United Nations A/C.6/78/SR.23

General Assembly
Seventy-eighth session

Official Records

Distr.: General
11 December 2023

Original: English

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Monday, 23 October 2023, at 10 a.m.

Chair: Mr. Chindawongse . . . . . (Thailand)

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23-20397 (E)

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

Agenda item 79: Report of the International Law Commission on the work of its seventy-third and seventy-fourth sessions (A/78/10)

1. **The Chair** invited the Committee to begin its consideration of the report of the International Law Commission on the work of its seventy-fourth session (A/78/10). The Committee would consider the report in three parts, beginning with the first part, which would cover chapters I to III (the introductory chapters), chapter X (Other decisions and conclusions of the Commission), chapter IV (General principles of law) and chapter VIII (Sea-level rise in relation to international law).

2. **Ms. Galvão Teles** (Co-Chair of the International Law Commission) said that, in an exceptional arrangement, she and Ms. Nilüfer Oral had acted as Co-Chairs of the seventy-fourth session of the Commission. Ms. Oral had chaired the first part of the session and she herself had chaired the second part of the session and continued to serve as Chair. She and Ms. Oral were also the first women Chairs to address the Committee in that capacity and hoped that the symbolism that their presence carried would advance the goal of making international law a bastion not only for peace, but also one whose structures and methods were informed by the diversity of the people it represented.

3. Introducing the first part of the report, she said that, as shown in chapter II, the Commission had adopted, on first reading, 11 draft conclusions on the topic "General principles of law", together with commentaries thereto. On the topic "Sea-level rise in relation to international law", the Commission had reconstituted the Study Group on sea-level rise in relation to international law. The Commission had also commenced its consideration and made good progress on three new topics included in its programme of work in 2022: "Settlement of disputes to which international organizations are parties", "Prevention and repression of piracy and armed robbery at sea" and "Subsidiary means for the determination of rules of international law". In addition, the Commission had established a Working Group on the topic "Succession of States in respect of State responsibility" and had taken note of the Working Group's recommendation that it should be re-established at the seventy-fifth session of the Commission with a view to undertaking further reflection and making a recommendation on the way forward.

4. The Commission had appointed Mr. Claudio Grossman Guiloff as Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" to replace the previous Special Rapporteur, Ms. Concepción Escobar Hernández, who was no longer with the Commission. Mr. Grossman Guiloff had held informal consultations with members of the Commission, which would resume its consideration of the topic at its next session. Given the importance of the topic for States in international relations, the Commission urged all Governments to submit their comments and observations thereon by 1 December 2023. The Commission had decided to include the topic "Non-legally binding international agreements" in its programme of work and had appointed Mr. Mathias Forteau as Special Rapporteur, who was expected to submit his first report in 2024.

5. The Working Group on the long-term programme of work had been re-established and had continued its consideration of proposals for new topics, including six new proposals introduced during the session. The Working Group would continue considering the proposals until it was in a position to make a recommendation to the Commission. In that context, it was worth noting that nine topics from the Commission's previous quinquennims remained inscribed in its long-term programme of work. The Commission prioritized the improvement of its working methods and had re-established the Working Group on methods of work. It had endorsed the recommendation of the Working Group that a new reporting practice should be adopted whereby a brief summary of the Working Group's deliberations would be included in the Commission's annual report to the General Assembly. The Commission had also requested the Secretariat to prepare a draft of an internal practice guide, handbook or manual on the working methods and procedures of the Commission.

6. Pursuant to General Assembly resolution 77/110, the Commission had commented in the report on its current role in promoting the rule of law, reiterating its commitment to the rule of law in all of its activities. The Commission had noted with appreciation that, pursuant to paragraph 37 of General Assembly resolution 77/103, the Secretary-General had established a trust fund to receive voluntary contributions for assistance to Special Rapporteurs of the Commission or Chairs of its Study Groups and matters ancillary thereto and appealed to Member States, non-governmental organizations, private entities and individuals to contribute to the trust fund.

7. The President of the International Court of Justice, Judge Joan E. Donoghue, had addressed the

Commission in person on 18 July 2023 and the Commission had resumed its full schedule of interactions with other bodies, following the disruptions to its traditional exchanges of information with those bodies during previous sessions owing to the coronavirus disease (COVID-19) pandemic. In July 2023, the Commission had held meetings with representatives of the African Union Commission on International Law, the Asian-African Legal Consultative Organization, the Committee of Legal Advisers on Public International Law of the Council of Europe, and the Inter-American Juridical Committee. An informal exchange of views had also been held between members of the Commission and the International Committee of the Red Cross on matters of mutual interest. During the session, the Commission had convened meetings in honour of the memory of former members, Mr. Gaetano Arangio-Ruiz, Mr. Guillaume Pambou-Tchivounda, Mr. Sompong Sucharitkul, Mr. Nugroho Wisnumurti and Mr. João Clemente Baena Soares.

8. The Commission had decided that its seventy-fifth session would be held in Geneva from 15 April to 31 May and from 1 June to 2 August 2024. As 2024 would be the year of the Commission's seventy-fifth anniversary, it planned to convene during the first part of the session a solemn meeting to which dignitaries, including the Secretary-General, the President of the General Assembly, the President of the International Court of Justice, the United Nations High Commissioner for Human Rights and representatives of the host Government would be invited. That would be followed by one and a half days of meetings with legal advisers of ministries of foreign affairs dedicated to the work of the Commission. The Commission also encouraged Member States, in association with regional organizations, professional associations, academic institutions and members of the Commission concerned, to convene national or regional meetings dedicated to the work of the Commission. To facilitate direct contact between the Commission and the Committee, the Commission had recommended that the first part of its seventy-seventh session in 2026 should be held in New York and had requested the Secretariat to proceed with the necessary administrative and organizational arrangements. The Commission hoped that the Committee would endorse that recommendation.

9. The Commission acknowledged the invaluable assistance of the Codification Division of the Office of Legal Affairs in the technical and substantive servicing of the Commission. It also recognized the role of the Secretariat in its work, in particular its continued preparation of studies and memorandums on matters in the Commission's programme of work. The Commission had been particularly pleased to receive the Legal Counsel of the United Nations for the traditional annual briefings on activities and developments concerning the Office of Legal Affairs. The Commission was also grateful for the continued support of the United Nations Library at Geneva and emphasized the need to limit as much as possible the impact of the ongoing renovation at the Palais des Nations on the research spaces and the legal collection of the Library, especially during the Commission's seventy-fifth session.

10. Introducing the topic "General principles of law", which was addressed in chapter IV of the report, she said that the Commission had adopted, on first reading, the draft conclusions on general principles of law and, in accordance with its statute, had decided to transmit them, through the Secretary-General, to Governments, with the request that they should submit their comments and observations thereon to the Secretary-General by 1 December 2024.

11. Draft conclusion 1 set out the general parameters of the draft conclusions, stating succinctly that the draft conclusions concerned general principles of law as a source of international law. The term "general principles of law" was used throughout the draft conclusions to refer to the general principles of law listed in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, and had been analysed in the light of the practice of States, the jurisprudence of courts and tribunals, and teachings. Draft conclusion 2 reaffirmed, as provided in Article 38, paragraph 1 (*c*), that for a general principle of law to exist, it must be recognized by the community of nations. The term "community of nations" was employed in draft conclusion 2 as a substitute for the term "civilized nations" found in Article 38, paragraph 1 (*c*), as the Commission had considered that the latter term was anachronistic. By employing that formulation, the Commission aimed to stress that all nations participated equally, without any kind of distinction, in the formation of general principles of law, in accordance with the principle of sovereign equality set out in Article 2, paragraph 1, of the Charter of the United Nations.

12. Draft conclusion 3 dealt with the two categories of general principles of law in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, namely, those that were derived from national legal systems and those that might be formed within the international legal system. The term "categories" was employed to indicate two groups of general principles of law in light of their origins and thus the process through which they might emerge. The phrase "may be formed", which was used in reference to general principles of law within the second category, was

considered appropriate to introduce a degree of flexibility to the provision, as it constituted recognition that there was a debate as to whether such a category existed.

13. Draft conclusion 4 addressed the requirements for the identification of such general principles, providing that, to determine the existence and content of a general principle of law, it was necessary to ascertain the existence of a principle common to the various legal systems of the world and the transposition of that principle to the international legal system. That two-step analysis was aimed at demonstrating that a general principle of law had been "recognized" in the sense of Article 38, paragraph 1 (*c*). It was an objective method to be applied by all those called upon to determine the existence of a given general principle of law at a specific point in time and the content of that general principle of law. Draft conclusion 5 addressed the first step of the two-step methodology for the identification of general principles of law derived from national legal systems set out in draft conclusion 4, while draft conclusion 6 concerned the second step.

14. Draft conclusion 7 dealt with general principles of law formed within the international legal system. Paragraph 1 provided 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 that system. Paragraph 2 indicated that paragraph 1 was without prejudice to the question of the possible existence of other general principles of law formed within the international legal system. That paragraph had been included to reflect the view of some members of the Commission who supported the existence of general principles of law formed within the international legal system, but considered that paragraph 1 would be too narrow and would not encompass other possible principles which, while not intrinsic in the international legal system, might nonetheless emerge from within it and not from national legal systems.

15. Draft conclusion 8 concerned the role of decisions of courts and tribunals as an aid in the identification of general principles of law. It followed closely the wording of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, in specifying that judicial decisions were a subsidiary means for the determination of rules of international law, including general principles of law. The draft conclusion also indicated that, where appropriate, decisions of national courts might serve as a subsidiary means for the determination of general principles of law. Draft conclusion 9 addressed the role of teachings in the identification of general principles of law. Following closely the wording of Article 38, paragraph 1 (*d*), it provided that such works might be resorted to as a subsidiary means for ascertaining whether there was a principle common to the various legal systems of the world that might be transposed to the international legal system, or whether there was a principle formed within the international legal system.

16. Draft conclusion 10, on the functions of general principles of law, stated that general principles were mainly resorted to when other rules of international law did not resolve a particular issue in whole or in part. It also indicated that general principles of law contributed to the coherence of the international legal system, that they might serve, inter alia, to interpret and complement other rules of international law, and might constitute a basis for primary rights and obligations, secondary rules and procedural rules. Draft conclusion 10 applied to all general principles of law, regardless of whether they were derived from national legal systems or formed within the international legal system, depending on the general principle in question. Draft conclusion 11 clarified certain aspects concerning the relationship between general principles of law, on the one hand, and treaties and customary international law, on the other.

17. Turning to the topic "Sea-level rise in relation to international law", which was addressed in chapter VIII of the report, she said that the Commission had reconstituted the Study Group on sea-level rise in relation to international law, which had had before it the additional paper (A/CN.4/761 and A/CN.4/761/Add.1) to the first issues paper on the subtopic of the law of the sea, prepared by two of the Co-Chairs of the Study Group, which addressed a number of principles and issues for which the Study Group had specifically called for further study in 2021. The content of the paper reflected the outcome of the meetings the Study Group had held during the seventy-second session of the Commission and the specific issues flagged by Member States in comments conveyed either in the Committee or in response to questions raised by the Commission. The Commission expressed its appreciation for the contributions of the International Maritime Organization, the International Hydrographic Organization and the Division for Ocean Affairs and the Law of the Sea.

18. The Study Group had had an extensive exchange of views on the additional paper, focused on the preliminary observations prepared by the Co-Chairs. The discussion had centred in particular on the meaning of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones; the immutability and intangibility of boundaries, including the principle

of *uti possidetis juris*; fundamental change of circumstances (*rebus sic stantibus*); effects of the potential situation whereby overlapping areas of the exclusive economic zones of opposite coastal States, delimited by bilateral agreement, no longer overlapped; effects of the situation whereby an agreed land boundary terminus ended up being located out at sea; the principle that "the land dominates the sea"; historic waters, title and rights; equity; permanent sovereignty over natural resources; possible loss or gain of benefits by third States; nautical charts and their relationship to baselines, maritime boundaries and the safety of navigation; and the relevance of other sources of law. The Study Group had also discussed future work on the topic. In 2024 it would revert to the subtopics of statehood and the protection of persons affected by sea-level rise, which had last been discussed in 2022. In 2025, the Study Group would then consolidate the results of the work undertaken and prepare a substantive report on the topic as a whole.

19. The Commission encouraged Governments to provide information or updates to information submitted on the issues related to the subject of sea-level rise in relation to statehood and protection of persons affected by sea-level rise raised in chapter III of its report. The Commission would also welcome any information that States, international organizations and other relevant entities could provide on their practice and other pertinent information concerning sea-level rise in relation to international law, and reiterated its requests made in its reports on the work of its three previous sessions.

20. **Ms. Oral** (Co-Chair of the International Law Commission), introducing the second part of the report and referring to the topic "Settlement of disputes to which international organizations are parties", which was addressed in chapter V of the report, said that the topic had been included in the Commission's programme of work in 2022. The Commission had requested the Secretariat to prepare a memorandum providing information on the practice of States and international organizations that might be of relevance to its future work on the topic, including both international disputes and disputes of a private law character. A questionnaire had been prepared by the Special Rapporteur for the topic for that purpose and communicated to States and international organizations in December 2022. The memorandum by the Secretariat would be before the Commission in 2024.

21. The Commission had had before it the first report of the Special Rapporteur for the topic (A/CN.4/756). The report addressed the scope of the topic and provided an analysis of the subject matter in light of previous work of the Commission and of other international bodies. Two draft guidelines were proposed in the report. Following the debate in plenary, the Commission had decided to refer the two draft guidelines to the Drafting Committee, taking into account the comments and observations made in plenary. Upon consideration of the report of the Drafting Committee (A/CN.4/L.983), the Commission had provisionally adopted the two draft guidelines and had decided to change the title of the topic from "Settlement of international disputes to which international organizations are parties" to "Settlement of disputes to which international organizations are parties".

22. Draft guideline 1 dealt with the scope of application of the draft guidelines, which concerned the settlement of disputes to which international organizations were parties. Draft guideline 1 should be read together with draft guideline 2, which set out the use of the three core terms "international organization", "dispute" and "means of dispute settlement". Those terms also contributed to delimiting the scope of the topic. The definition of "international organization" given in subparagraph (a) built on the definition contained in article 2, subparagraph (a), of the articles on the responsibility of international organizations, which had been adopted by the Commission and taken note of by the General Assembly in 2011. The definition outlined the commonly accepted characteristic features of an international organization, identifying the possession of "its own international legal personality" as the most relevant characteristic for purposes of dispute settlement, and specifically mentioning "at least one organ capable of expressing a will distinct from that of its members" as the characteristic feature of an international organization.

23. Turning to the topic "Prevention and repression of piracy and armed robbery at sea", which was addressed in chapter VI of the report, she said that the topic had been placed on the Commission's programme of work in 2022. The Commission had had before it the first report of the Special Rapporteur for the topic (A/CN.4/758) and the memorandum on the topic prepared by the Secretariat at the request of the Commission (A/CN.4/757). The Special Rapporteur's report covered the historical, socioeconomic and legal aspects of the topic, including an analysis of the international law applicable to piracy and armed robbery at sea, and the shortcomings thereof, and outlined the national legislation and judicial practice of States in respect of the definition of piracy and the implementation of conventional and customary international law. The Special Rapporteur had proposed three draft articles, which, following the plenary debate,

had been referred to the Drafting Committee for consideration, taking into account the views expressed in plenary. The Commission had subsequently received the report of the Drafting Committee and had provisionally adopted the three draft articles, with the commentaries thereto.

24. Draft article 1 defined the scope of the draft articles, indicating that they applied to piracy and armed robbery at sea. It should be read together with draft articles 2 and 3, which defined those two crimes and further served to delimit the scope of the topic. The Commission noted in its commentary that the draft articles applied to the "prevention" and "repression" of piracy and armed robbery at sea. "Prevention" was the act of stopping something from happening or arising, while "repression" was the act of subduing or suppressing something that had arisen.

25. Draft article 2 defined piracy. Paragraph 1 of the draft article set out a definition of acts of piracy for the purpose of the draft articles. The definition was based on article 101 of the United Nations Convention on the Law of the Sea, article 15 of the 1958 Convention on the High Seas and article 39 of the draft articles concerning the law of the sea, adopted by the Commission in 1956. The definition was regarded as reflecting customary international law and had been reproduced in several regional legal instruments. The Commission felt that the integrity of the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea should be preserved. That was in line with the objective of the topic, which was not to seek to alter any of the rules set forth in existing treaties, including the Convention.

26. The Commission, however, acknowledged that there were certain elements of the definition of piracy contained in article 101 of the Convention that posed questions of interpretation and application, especially in view of the evolving nature of modern piracy. It clarified those elements further in its commentary to draft article 2, indicating that it had considered whether an explicit reference should be made to the exclusive economic zone, but had decided instead to include a reference to the provisions of article 58, paragraph 2, of the Convention to indicate that piracy could also be committed in the exclusive economic zone. That paragraph had been drafted in a neutral manner so as not to prejudice the position of non-parties to the Convention. Keeping those two paragraphs apart was meant to recognize that the exclusive economic zone and the high seas were two distinct maritime spaces.

27. Draft article 3 provided a definition of armed robbery at sea, which was drawn from the definition adopted by the Assembly of the International Maritime Organization in its Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships. Subparagraphs (a) and (b) of draft article 3 corresponded to subparagraphs 1 and 2, respectively, of paragraph 2.2 of the Code. The Commission considered that there was not necessarily any substantive difference between piracy and armed robbery at sea in terms of the conduct itself. Rather, the main difference concerned the location of the act: piracy took place on the high seas and the exclusive economic zone, and armed robbery at sea took place in the internal and territorial waters of the coastal State. That difference had consequences for the applicable jurisdiction in respect of the two crimes. In the case of piracy, it was acknowledged that universal jurisdiction applied, such that any State had the right to prosecute the crime. With respect to armed robbery at sea, the coastal State had the exclusive competence to exercise prescriptive and enforcement jurisdiction.

28. In terms of future work on the topic, it was the intention of the Special Rapporteur to analyse, in his second report, regional and subregional practices and initiatives for combating piracy and armed robbery at sea as well as the relevant resolutions of the General Assembly, the Security Council and international organizations, in particular the International Maritime Organization. To that end, the Commission still considered as relevant its request for information on the topic contained in its report on the seventy-third session of its work, which was reiterated in chapter III of the report on the seventy-fourth session, and would welcome any additional information by 1 December 2023.

29. Turning to the topic, "Subsidiary means for the determination of rules of international law", which concerned the study of the materials mentioned in Article 38, paragraph (1) (*d*), of the Statute of the International Court of Justice and was addressed in chapter VII of the report, she said that the Commission had had before it the first report of the Special Rapporteur (A/CN.4/760) and a memorandum prepared by the Secretariat (A/CN.4/759) identifying elements in the previous work of the Commission that could be particularly relevant to the topic. In his report, the Special Rapporteur had addressed the scope of the topic and the main issues to be studied in the course of the work of the Commission and provided an overview of the views of States, questions of methodology, the previous work of the Commission, the nature and function of sources of international law and their relationship to the subsidiary means, and the drafting history of Article 38, paragraph 1 (*d*) and its status under customary international law. He had addressed the

outcome of the work and, consistent with the related prior work of the Commission, had proposed draft conclusions as the final form of output for work. To that end, he had proposed five draft conclusions. The Commission had provisionally adopted draft conclusions 1 to 3, with commentaries thereto, and had taken note of draft conclusions 4 and 5, as provisionally adopted by the Drafting Committee.

30. Draft conclusion 1 concerned the scope of the draft conclusions, in line with the Commission's established practice, and reflected the Commission's intention to focus on the question of the use of subsidiary means for the determination of rules of international law. The Commission considered that subsidiary means interacted with the sources of international law but were not themselves sources, and that subsidiary means assisted in the determination of rules of law. The phrase "rules of international law" was used in the draft conclusion to ensure consistency with the title of the topic, the choice of which was intended to emphasize that the principal thrust of the project.

31. Draft conclusion 2 set out the categories of subsidiary means for the determination of rules of international law, and the word "include" was used in the chapeau to confirm the non-exhaustive nature of those categories. Subparagraphs (a) and (b), which indicated "decisions of courts and tribunals" and "teachings" as such categories, followed the structure of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, and were consistent with the recent practice of the Commission on the topics "Identification of customary international law and "General principles of law". Subparagraph (c) referred to a third category, any other means derived from practice, to assist in the determination of the rules of international law. Draft conclusion 3, on the general criteria for the assessment of subsidiary means for the determination of rules of international law, was based on the premise that various forms of subsidiary means would have different weights or values depending on the context. The list of criteria was intended to provide guidance in the assessment of the weight to be given to such means and included the degree of representativeness, the quality of the reasoning, the expertise of those involved and their level of agreement, the reception by States and other entities, and the mandate conferred on the relevant body.

32. At the Commission's next session, the Special Rapporteur would present a second report focusing on decisions of international courts and tribunals and elaborating on the use of subsidiary means for the determination of rules of international law. The Commission would also have before it a memorandum prepared by the Secretariat surveying the case law of international courts, tribunals and other bodies, which had been requested by the Commission in 2022. In the report, the Commission had reiterated its request to States and international organizations for information that could be relevant for the study of the topic, including practice at the domestic level that drew upon judicial decisions and the teachings of the most highly qualified publicists in the process of determination of rules of international law, and statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, concerning subsidiary means for the determination of rules of international law.

33. Turning to the topic "Succession of States in respect of State responsibility", which was addressed in chapter IX of the report, she said that, as the Special Rapporteur for the topic, Mr. Pavel Sturma, was no longer with the Commission, the Commission had decided to establish a Working Group on the topic. The Working Group had held four meeting to discuss the way forward. It had considered whether the Commission should continue developing a text in the Drafting Committee and proceed to conclude the first reading of the draft guidelines on succession of States in respect of State responsibility which were pending before it, or whether it should pursue a different course, as suggested in the plenary in 2022, and convene a dedicated Working Group with a view to eventually producing a report on the topic to be adopted by the Commission. Most members of the Working Group had favoured an approach that would be guided by a Working Group rather than a process driven by a Special Rapporteur, with the goal of producing a final report as opposed to the adoption of draft guidelines.

34. There was also a preference for a more incremental approach, whereby a decision on the way forward would not be taken until 2024. Accordingly, the Working Group had decided to recommend that the Commission should continue its consideration of the topic at its seventy-fifth session in the format of an open-ended Working Group with a view to undertaking further reflection on the way forward for the topic on the basis of a working paper examining the work of the Commission thus far and outlining the options open to the Commission, to be prepared by the Chair of the Working Group in advance of the session. It had been recommended that the re-established Working Group should seek to make a recommendation with a view to the Commission taking a decision on the way forward at its next session.

35. Lastly, the Commission looked to the Committee for valuable comments on its work, so as to make it more

useful and relevant to the needs of Member States. The interaction that the Commission had with the Committee during the debate on the Commission's report and during the interactive dialogue, as well as through the written comments received, provided a useful framework for enriching the work product of the Commission. The Commission also looked to the Committee to effect the necessary changes desired by all, in particular ensuring equal gender representation on the Commission.

36. **The Chair** invited the Committee to begin its consideration of chapters I, II, III, IV, VIII and X of the report of the International Law Commission on the work of its seventy-fourth session (A/78/10).

37. **Mr. Kanu** (Sierra Leone), speaking on behalf of the Group of African States, said that the Group hoped that the fact that the Commission currently had more first-time members than returning members would bring new dynamism to its work. It welcomed the appointment of the first African woman member of the Commission and the election of the first women Co-Chairs of the Commission.

38. The process of progressive development and codification of international law must be all-embracing by including the consideration of legal texts, State practice, precedents and doctrine, as required by the Commission's statute. The Commission should also develop cooperative relationships with regional international law commissions. In that regard, his delegation welcomed the Commission's recent exchange of views with the African Union Commission on International Law. The International Law Commission should redouble its efforts to draw inspiration from the principal legal systems of the world, including African sources and principles, in particular in its work on the topic of subsidiary means for the determination of rules of international law. The Group was committed to multilateralism and the rules-based international legal system and valued the Commission's contribution in that regard, taking into account the views of all Member States. Topics considered by the Commission should bring added value and be of interest and relevance to the international community as a whole.

39. On the issue of equitable geographical representation in the work of the Commission, the Group had previously noted that only one African member was serving as a Special Rapporteur and one other as Co-Chair of a Study Group. It had called upon the Commission, when making decisions about the addition of new topics, to consider a balanced approach in terms of the practical interest of Member States, as well as in the selection of Special Rapporteurs, so as to enhance the legitimacy of its work. The Group was therefore pleased that the Commission had made progress in that regard. The next step was to ensure that the appointed Special Rapporteurs had the necessary resources available to them.

40. Lastly, the Group welcomed the fact that the webcasting of the Commission's plenary meetings had increased the accessibility of its work.

41. **Mr. Marquardt** (Representative of the European Union, in its capacity as observer), referring to the topic "General principles of law", said that his delegation welcomed the adoption by the International Law Commission, on first reading, of the draft conclusions on general principles of law and the commentaries thereto. The text currently built primarily on the practice of States and international courts. Although the Special Rapporteur had, in his first report (A/CN.4/732), raised the possibility of analysing the practice of international organizations if considered relevant for the purposes of the topic, the only mention of the practice of the European Union in his reports thus far was a reference, in the same report, to article 340 of the Treaty on the Functioning of the European Union, which stipulated that principles recognized by States members of the European Union served as a source of Union law. He had indicated that that provision might serve as an example of a general principle with limited scope of application, and that such principles might be addressed in a future report. Similarly, the commentaries to the draft conclusions contained only one reference to the practice of the Court of Justice of the European Union. Yet, the European Union considered that its practice was indeed relevant to that exercise.

42. The European Union agreed with the Special Rapporteur that its practice, which built upon and reflected the legal traditions of its member States, could serve as an important point of reference in the identification of principles recognized by the community of nations. An analysis of the comparative methodology used by the Court of Justice of the European Union to identify principles of European Union law derived from the legal systems of its member States, in relation to article 340 of the Treaty on the Functioning of the European Union and in other contexts, could help the Commission determine how methods of comparative law should be used by international judicial bodies in the identification of general principles of international law.

43. The Treaty on the Functioning of the European Union provided that fundamental rights, as they resulted from the constitutional traditions common to the

member States, constituted general principles of European Union law. Thus, general principles emanating from the legal systems of member States also constituted principles of European Union law and an autonomous source of law. That fact might be relevant to the Commission's debate regarding the existence of general principles of law originating in the international legal system.

44. With regard to draft conclusion 2 (Recognition), the European Union agreed that the term "civilized nations", used in the corresponding article in the Statute of the International Court of Justice, might appear anachronistic. However, the term "community of nations" did not fully reflect the role played by international organizations as subjects of international law. While it was noted in the commentary to the draft conclusion that the use of the term "community of nations" did not preclude that, in certain circumstances, international organizations might also contribute to the formation of general principles of law, no guidance was provided as to the circumstances in which such organizations could contribute to the formation of such principles. The recognition by the European Union of general principles of law as an autonomous part of its legal order might serve as an example of an international organization contributing to the formation of general principles of law. The European Union would welcome further reflection on the role of international organizations and suggested that the term "international community" be used instead of "community of nations".

45. The European Union understood the reasoning provided in the commentary for using the word "transposition", rather than "transposability", in draft conclusion 4 (Identification of general principles of law derived from national legal systems). However, it should be made clear in the commentary that the meaning was not that ex ante transposition of the principle in question to the international legal system was required, but rather that such transposition was possible. Furthermore, the precise meaning of the phrase "principle common to the various legal systems of the world", in draft conclusions 4 and 5 should also be clarified. In the view of the European Union, the legal systems used in the identification of a general principle of law should be as numerous and representative as possible.

46. The European Union welcomed the clarification in paragraph (7) of the commentary to draft conclusion 8 that the term "international courts and tribunals" was intended to cover any international body exercising judicial powers that was called upon to consider general principles of law. In that context, the decisions of the Court of Justice of the European Union should undoubtedly be considered as subsidiary means for the determination of general principles of law. Accordingly, the European Union invited the Commission to mention the jurisprudence of that Court in the commentary to draft conclusion 8, as appropriate.

47. The European Union understood that draft conclusion 10, which provided that general principles were "mainly" resorted to when other rules of international law did not resolve a particular issue in whole or in part, was intended to reflect the tendency in practice and doctrine. Nevertheless, it would prefer the wording to be aligned fully with the wording and spirit of Article 38 of the Statute of the International Court of Justice, which did not indicate any hierarchical relationship between the three sources of international law. Alternatively, the word "mainly" could be deleted from the draft conclusion, or the details contained in that paragraph could be moved to the commentary.

48. The European Union would consider sharing with the Commission additional observations in writing and other information and material that could be used during the further consideration of the topic.

49. **Mr. Ramopoulos** (Representative of the European Union, in its capacity as observer), speaking on the topic "Sea-level rise in relation to international law", said that the European Union welcomed the work of the Study Group on sea-level rise in relation to international law, in particular the additional paper (A/CN.4/761 and A/CN.4/761/Add.1) to the first issues paper prepared by the Co-Chairs of the Study Group. The results of the work on all the legal aspects of sea-level rise to be undertaken by the Commission needed to be carefully consolidated.

50. The European Union and its member States reiterated their commitment to preserving the integrity of the United Nations Convention on the Law of the Sea, which was recognized as the constitution for the oceans and had central importance in the debate, in particular as it reflected customary international law, such as the general obligation to protect and preserve the marine environment, including against pollution. In that regard, it should be noted that the definition of "pollution of the marine environment" in the Convention was interpreted as including greenhouse gas emissions. The Convention set out the legal framework within which all activities in the oceans and seas must be carried out. Consequently, any possible responses to the challenges posed by sea-level rise that the Commission might consider needed to be in line with and respect the legal framework established by the Convention.

51. With regard to paragraphs 158, 227 and 228 of the Commission's report (A/78/10), the European Union

was of the view that the Study Group should distinguish matters of policy from matters of international law. Moreover, it should not propose any amendments to the United Nations Convention on the Law of the Sea; its work should be rooted within the existing international rules and focused on their interpretation.

52. The Commission should exercise caution in its consideration of regional State practice and the respective *opinio juris* in the context of sea-level rise. That was because universally applicable provisions and principles, such as those contained in the United Nations Convention on the Law of the Sea, needed to be applied in a uniform way in all regions of the world. Thus, possible emerging regional State practice regarding sea-level rise should not lead to the recognition of a regional customary rule concerning the law of the sea. The Study Group should consider *opinio juris* accepted by all the regions of the world before inferring the existence or absence of an established State practice or *opinio juris*.

53. With regard to the issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones, and to the immutability and intangibility of boundaries, the European Union and its member States acknowledged that sea-level rise threatened many low-lying States and islands. While the principle that the land dominated the sea was an underlying premise for the attribution of maritime zones, it did not necessarily imply that coastal States would be legally obliged to periodically review or update the relevant charts and coordinates that they had drawn and duly published in accordance with the United Nations Convention on the Law of the Sea. In that regard, the European Union was pleased that no State had contested the notions of legal stability or the preservation of maritime zones and that States had underlined the need to interpret the Convention in such a way as to effectively address sea-level rise in order to provide practical guidance to affected States.

54. The European Union also noted with great satisfaction that an ever-increasing number of States had expressed the view that the Convention did not forbid or exclude the option of fixing or freezing baselines and had stressed the importance of interpreting the Convention with a view to preserving maritime zones. In the view of the European Union, the Convention did not forbid or exclude the preservation of baselines and the outer limits of maritime zones in the context of climate change-induced sea-level rise. States were not under an express obligation to periodically review and update the charts on which straight baselines were shown, or the list of geographical coordinates of the points from which straight baselines were drawn, and there were significant legal and policy reasons to recognize the stability provided by the maritime delimitations established either by treaty or by adjudication. However, the precise way in which the Convention ought to be interpreted might require further consideration by the Commission and States.

55. **Ms. Harm** (Fiji), speaking on behalf of the Pacific Islands Forum, said that Pacific Island countries had served as guardians and stewards of the ocean. Their past, present and future development was based on the rights and entitlements guaranteed under the United Nations Convention on the Law of the Sea. The greatest threat facing them was climate change; sea-level rise, in particular, was a real and pressing issue that raised interrelated development and security concerns.

56. In August 2021, the leaders of the Forum had adopted the Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, which was rooted in the legal principles of stability, security, certainty and predictability. In March 2023, the Forum had convened a regional conference on statehood and the protection of persons affected by sea-level rise, at which participants had identified various possible responses to climate change-related sea-level rise, in the context of international law. The 2050 Strategy for the Blue Pacific Continent reflected the commitment of the Pacific Island States to promoting regionalism and solidarity; treasuring the diversity and heritage of the Pacific and seeking an inclusive future; protecting their collective interests and securing the well-being of their peoples; deepening their collective responsibility for the stewardship of the Blue Pacific continent; and protecting their sovereignty and their jurisdiction over their maritime zones.

57. Protection of persons cuts across many human rights and security issues. The existing international frameworks governing the protection of persons affected by sea-level rise were fragmented and comprised a mixture of hard- and soft-law instruments. Rights-based and needs-based approaches were both important and complemented one another. Addressing the human rights implications of climate change-related sea-level rise was crucial to ensuring that affected communities were able to maintain their dignity, identities, cultures and ways of life. The Forum welcomed the adoption by consensus of General Assembly resolution 77/276, by which the Assembly had decided to request the International Court of Justice to render an advisory opinion on the obligations of States in respect of climate change. It also welcomed the adoption of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, in which it was

recognized that Indigenous Peoples and local communities had an important role to play in the conservation and sustainable use of biodiversity beyond national jurisdictions and that their rights as holders of traditional knowledge must be upheld. Those achievements reflected a growing regional practice aimed at preserving statehood and sovereignty in the face of climate change-related sea-level rise. In that connection, the Forum highlighted that both land territory and maritime zones should be preserved.

58. **Ms. Pasternak Jørgensen** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the Nordic countries welcomed the inclusion of the topic "Non-legally binding international agreements" in the Commission's programme of work and the appointment of a Special Rapporteur for the topic. With regard to the requests in chapter III of the Commission's report (A/78/10) for information in connection with various topics, the Nordic countries would make every effort to provide the Commission with relevant information, where available, and encouraged Member States to do the same. For the current year, it was important for States to make a particular effort to submit comments on the draft articles on immunity of State officials from foreign criminal jurisdiction by the deadline of 1 December 2023. The Nordic countries looked forward to the successful completion of the work of the Commission on that topic under the leadership of the new Special Rapporteur.

59. Regarding the topic "General principles of law", she said that the Nordic countries agreed with the Special Rapporteur's general approach and reiterated that caution was warranted, given the many sensitivities at play and the significance of the topic. The thoroughness of the Special Rapporteur's work and the broad survey of relevant State practice, jurisprudence and teachings were to be commended. The Commission's work on the topic must remain sufficiently anchored in the primary sources of international law. It was also important that the conclusions drawn were adequately related to the practice and opinion of States, and that work on the topic was not based excessively on subsidiary means for the determination of law, namely judicial decisions and the opinions of individual publicists.

60. While the Nordic countries agreed that there was no formal hierarchy between the primary sources of international law, they also stressed that general principles of law in practice played a subsidiary role, mainly as a means of interpretation, filling gaps, or avoiding situations of *non liquet*. The International Court of Justice had only rarely referred explicitly to principles of international law, and when it did, it was primarily in the context of procedural obligations rather than substantive law obligations. In light of the cases cited in the third report of the Special Rapporteur (A/CN.4/753), the Nordic countries stressed that the fact that the term "principle" was used in the course of a legal argument did not necessarily mean that it was being used, in a legal sense, as a reference to a legal source per se or that it supported the existence of a certain principle as a legal source per se. It was important to distinguish clearly and systematically between practice supporting the existence of a general principle or general principles as a source of law and cases where use of the term "principle" might not be intended to refer to, or could not be justified as referring to, a general principle in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice.

61. With regard to the draft conclusions on general principles of law adopted by the Commission on first reading, the Nordic countries reiterated that the term "international community of States" would be preferable to the current "community of nations" used in draft conclusion 2 and in paragraph 1 of draft conclusion 7, as it was clearer and more up to date.

62. The Nordic countries agreed with the indication in draft conclusion 3 that general principles could either be derived from national legal systems or formed within the international legal system. However, it would be preferable to have more instances of State practice and *opinio juris* to support the conclusions drawn in the commentary thereto, in particular with regard to paragraph 3 (b). The Nordic countries also agreed with the two-step approach to the identification of general principles derived from national legal systems, set out in draft conclusions 4, 5 and 6. The second criterion in draft conclusion 4, namely, that a principle derived from national legal systems must be transposable to the international legal system, was particularly important.

63. While the Nordic countries agreed that general principles of law could also emanate from the international legal system, as highlighted in draft conclusion 7, they noted that there were some inconsistencies in the formulations of paragraphs 1 and 2 of the draft conclusion. Paragraph 1 stipulated as a condition for the determination of a general principle of law that the community of nations should have recognized the principle as intrinsic to the international legal system. Paragraph 2, on the other hand, envisioned a possible existence of general principles of law formed within the international legal system on conditions other than those referred to in paragraph 1, which appeared to water down paragraph 1. The Nordic countries

supported the approach taken in paragraph 1, which rightly established a high threshold for the determination of a general principle of law.

64. While the Nordic countries agreed with the basic assertions in draft conclusions 8 and 9 that decisions of courts and tribunals and teachings of the most highly qualified publicists might serve as subsidiary means for the determination of general principles of international law, they considered their inclusion to be unnecessary and inappropriate. The relevance of judicial decisions and teachings in the determination of international law was a matter best considered in the context of work specifically concerning subsidiary means for the determination of rules of international law, a topic which was currently in the Commission's programme of work.

65. The Nordic countries welcomed the proposed formulation of draft conclusion 10 (Functions of general principles of law) as an accurate reflection of the actual function of general principles of law in international legal practice, namely the residual character of that particular source of international law and its relevance in terms of contributing to the coherence of the international legal system. The Nordic countries encouraged the Special Rapporteur and the Commission to consider whether it would be better to have the particular traits identified in the points lettered (a) and (b) in paragraph 2, highlighted in the commentaries to the draft conclusions, rather than identifying them in the draft conclusion itself, as they were traits common to all primary sources.

66. The Nordic countries also welcomed the proposed structure and formulation of draft conclusion 11 (Relationship between general principles of law and treaties and customary international law), as it offered an accurate reflection of the basic interplay between general principles of law and the other primary sources of law, namely treaties and customary international law. Preferably, paragraph 1 could account for the residual role of general principles and the fact that the primary sources were commonly operationalized in successive order. For example, the word "formal" could be added before "hierarchical", so that the paragraph would read: "General principles of law, as a source of international law, are not in a formal hierarchical relationship with treaties and customary international law."

67. Lastly, the Nordic countries supported the proposed outcome of the topic to be draft conclusions accompanied by commentaries.

68. Turning to the topic "Sea-level rise in relation to international law", she said that the Nordic countries remained supportive of the Commission's work in that regard. They particularly appreciated the work of the Co-Chairs of the Study Group on sea-level rise in relation to international law as captured in the additional paper (A/CN.4/761 and A/CN.4/761/Add.1) to their first issues paper, concerning issues related to the law of the sea.

69. There was no denying the scientific fact that sea-level rise was occurring. Humanity must mitigate its impact and adapt to new realities, including by finding appropriate solutions in the realm of international law. All States had a joint responsibility to find workable solutions; the burden should not fall only on those facing the most serious consequences. While the Intergovernmental Panel on Climate Change had warned that sea levels were certain to keep rising well beyond the year 2100, the magnitude and rate would depend on how fast emissions were reduced. The Nordic countries therefore supported ambitious climate action to keep global warming below 1 degree Celsius, while also standing ready to engage in structured discussions on the legal challenges related to sea-level rise. The Commission's work was of value in that regard.

70. The Nordic countries agreed with the members of the Study Group who had stated that sea-level rise was of direct relevance to the question of peace and security. While new realities might warrant the introduction of new terminology and concepts, caution must be exercised in the use of any that were as yet undefined in international law, such as "specially affected State".

71. The issue of "legal stability" in relation to sea-level rise, with a focus on baselines and maritime zones, was significant. In the additional paper to the first issues paper, the Co-Chairs acknowledged that the Nordic countries had referred to predictability and stability in a statement before the Committee at the seventy-sixth session of the General Assembly. However, they also noted that those comments had concerned the United Nations Convention on the Law of the Sea in general. To clarify, the Nordic countries agreed that the fixing of baselines or outer limits could provide legal stability, especially for States affected by sea-level rise. However, that concept must be approached with caution, with full respect for the United Nations Convention on the Law of the Sea and taking into consideration all possible implications, including those concerning existing rights and obligations under international law.

72. As noted in the Commission's report (A/78/10), members of the Study Group had stressed that there was no explicit provision in the Convention requiring States parties to update their published baselines and outer limits of maritime zones. However, they had also observed that there was a difference between legally

freezing baselines and not updating published baselines. The suggestion by members of the Study Group that the Commission should not seek to decide between a permanent and an ambulatory approach, since they were not necessarily mutually exclusive and either might be in conformity with the Convention, was interesting. The Nordic countries looked forward to further discussion on that subject.

73. It was worth noting that the Convention did include some explicit references to the permanence and stability of titles and rights. For instance, article 76, paragraph 9, provided that a coastal State must deposit with the Secretary-General charts and other relevant information "permanently describing the outer limits of its continental shelf". All coastal States that had a continental shelf would be well advised to deposit such charts and information, if they had not yet done so.

74. In its work, the Commission should be mindful of the legal implications of potential changes to the natural environment caused by phenomena other than sea-level rise. For example, the formation of new islands due to underwater volcanic eruptions could also change baselines and the outer limits of maritime zones. However, it was possible that such examples might not apply, being considered human-caused changes to the natural environment and thus inconsistent with the Convention.

75. With regard to practical solutions, the Nordic countries strongly agreed with the Study Group that amending the Convention would be difficult and would not even address the challenges at hand and in time. It could also affect the internal balance and the universal and unified character of the Convention, which set out the legal framework within which all activities in the oceans and seas must be carried out. The Commission should not pursue that option in its work on the topic. Nevertheless, at the current stage, the Nordic countries would not exclude the possibility of the issue of sea-level rise being addressed through joint interpretative declarations or other common international legal instruments.

76. With regard to the future work of the Study Group, the Nordic countries supported the view of the Co-Chairs that the issue of submerged territories, which was related to both the law of the sea and statehood, was an important topic for further exploration. They also supported the plan of the Study Group to address the principle of self-determination at the session of the Commission to be held in 2024. It would be advisable for the Study Group to identify the priority issues that it would address in its final report, expected to be issued in 2025.

77. **Ms. Hong** (Singapore), referring to the topic "General principles of law", said that her delegation welcomed the adoption on first reading of the International Law Commission's draft conclusions on general principles of law. Her delegation noted that there had been a robust discussion concerning the category of general principles of law that might be formed within the international legal system, identified in the point lettered (b) in draft conclusion 3 (Categories of general principles of law). It was helpful that the Commission had made reference to both sides of the debate in its commentary to the draft conclusion.

78. Her delegation appreciated that the Commission had clarified the methodology for determining the existence and content of a general principle of law that might be formed within the international legal system in its commentary to draft conclusion 7. It also recognized the efforts that had been made to address the concerns raised by Member States in the discussions on the topic at the seventy-seventh session of the General Assembly, in particular regarding the application of the above-mentioned methodology and the meaning of the term "intrinsic".

79. However, while the Commission had stated in the commentary to draft conclusion 7 that the term "intrinsic" meant that the principle in question was specific to the international legal system and reflected and regulated its basic features, it had not explained what it meant for a principle to reflect and regulate those features. While certain examples given in the commentary, such as the principle of consent to jurisdiction, provided some insight into the Commission's intention, other examples did not appear to show instances of principles reflecting or regulating the basic features of the international legal system. In addition, the caveat under paragraph 2 that the criterion set out in paragraph 1 was "without prejudice to the question of the possible existence of other general principles of law formed within the international legal system" was overly broad and threatened to undermine the criterion completely.

80. Her delegation would continue to examine the examples and methodology provided in the commentary to the draft conclusion in connection with the category of general principles of law that might be formed within the international legal system. Given the diverging views within the Commission as to whether certain examples in the commentary were indeed general principles of law, it would be premature, at the current stage, to conclude that all the examples in the commentary had met the criterion for the identification of general principles of law formed within the international legal system. Furthermore, it was unclear

whether the methodology set out in draft conclusions 4, 5, 6 and 7 had been applied in respect of the principles cited in the commentary to draft conclusion 10 as examples of general principles of law serving as a basis for primary rights and obligations, secondary rules and procedural rules.

81. Regarding the topic "Sea-level rise in relation to international law", she said that Singapore, a small island developing State, underlined the very real and existential threat posed by that phenomenon. Her delegation welcomed the extensive efforts of the Co-Chairs of the Study Group on sea-level rise in relation to international law to identify and discuss the relevant legal issues concerning the subtopic of the law of the sea in the additional paper (A/CN.4/761 and A/CN.4/761/Add.1) to the first issues paper prepared by two of the Co-Chairs. On the issue of the legal stability of baselines and maritime zones, her delegation agreed with the preliminary observation of the Co-Chairs that there was no obligation under the United Nations Convention on the Law of the Sea to keep baselines and outer limits of maritime zones under review nor to update charts or lists of geographical coordinates once deposited with the Secretary-General of the United Nations. For her delegation, the one caveat was that such baselines and outer limits must have been defined in strict accordance with the United Nations Convention on the Law of the Sea. Since baselines and outer limits did not have to be updated, small and low-lying States facing existential threats due to climate change-induced sea-level rise would not face a reduction in their maritime zones or the rights and entitlements flowing from them.

82. With respect to agreed and adjudicated maritime boundaries, Singapore agreed with the preliminary observation of the Co-Chairs that, in the interest of promoting the stability of and respect for existing maritime boundaries, the applicability of treaties and the decisions of international courts or tribunals delimiting such boundaries should not be easily called into question. Her delegation also supported the emphasis given by the Co-Chairs to the importance of equity in the interpretation and application of the United Nations Convention on the Law of the Sea, in particular when it came to taking into consideration the impact of climate change-induced sea-level rise on small island developing States. For vulnerable small, low-lying States facing existential threats, the balance of equities under the Convention clearly and indisputably weighed in favour of the preservation of existing maritime zones and entitlements. The Commission should further study how the principle of equity should apply in the context of climate change-induced sea-level rise, so as to ensure the appropriate balance of rights and obligations under the Convention, including the extent to which the interests of third States and the freedom of navigation would be affected.

83. Concerning the question of whether the historic waters, title and rights regime was relevant to the issue of sea-level rise, her delegation noted that State practice was limited and looked forward to the Study Group's further work on the matter.

84. With regard to "Other decisions and conclusions of the Commission", her delegation welcomed the appointment of the Special Rapporteur for the topic of non-legally binding international agreements. It would be interested in participating in the meetings with legal advisers of ministries of foreign affairs that the Commission intended to organize in the context of the commemoration of its seventy-fifth anniversary. It welcomed the successful convening of the fifty-seventh session of the International Law Seminar, in particular the timely workshop on the impact of climate change on the law of the sea and international water law. Lastly, given the importance of enhancing dialogue between the Commission and the General Assembly, her delegation was disappointed that the Commission would not be able to hold the first part of its seventy-fifth or seventy-sixth session in New York and urged the Secretariat to make the necessary arrangements for the first part of the seventy-seventh session, which would be held in New York.

85. **Mr. McCarthy** (Australia) said that his delegation acknowledged the International Law Commission's valuable contribution to the codification and progressive development of international law and welcomed both the new and re-elected members of the Commission. Although gender balance continued to evade the Commission, his delegation was pleased with the Commission's decision to appoint two of its eminent women members as Co-Chairs for its current session. His delegation encouraged the Commission to ensure gender and geographic balance and representation of the principal legal systems of the world in the composition of its Bureau and the appointment of its Special Rapporteurs and the Chairs of its Drafting Committee, Working Groups and Study Groups.

86. Referring to the topic "General principles of law", he said that the draft conclusions on general principles of law adopted by the Commission on first reading were a valuable first step in helping States clarify the interpretation of the expression "general principles of law" in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice. His delegation welcomed the Commission's work to

determine whether a general principle of law derived from national legal systems was transposable to the international legal system. His delegation also welcomed the Commission's commentary to draft conclusion 7, on the identification of general principles of law formed within the international legal system, and took note of the inclusion of examples of State practice and decisions of international courts and tribunals in the commentary.

87. His delegation still had misgivings about the inclusion of a "without prejudice" clause in the draft conclusion, particularly as it did not contain specific criteria for the identification of a general principle of law that fell in that category. It welcomed the clarification provided by the Commission in draft conclusion 10 that the functions of general principles of law supported and complemented existing treaties and customary international law. Australia welcomed the Commission's decision to transmit the draft conclusions to Governments for comments and observations.

88. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation was grateful to the Co-Chairs of the Study Group on sea-level rise in relation to international law for preparing the additional paper (A/CN.4/761 and A/CN.4/761/Add.1) to the first issues paper, which provided a strong basis for continued discussion. His delegation recognized that climate change remained the single greatest threat to the livelihoods, security and wellbeing of peoples of the Pacific, and that climate change-related sea-level rise posed an existential threat to low-lying States, in the Pacific and beyond. The Commission's work helped to advance national, regional and international action and responses on the topic.

89. Australia was pleased to have participated in the regional conference on preserving statehood and protecting persons in the context of sea-level rise, organized by the Pacific Islands Forum and held in Nadi, Fiji, from 27 to 30 March 2023. The Conference had helped to advance thinking on international law issues in the context of sea-level rise, including the broader implications of rising sea levels on statehood, sovereignty and human rights. It had also helped to show that both international law and policy responses were instrumental in addressing sea-level rise. Another key outcome of the Conference had been the joint submission by the Pacific Islands Forum to the Commission in August 2023, in which the Forum had identified a number of elements that deserved to be considered by the Commission in relation to statehood and the protection of persons affected by sea-level rise. The Forum would like to bring those elements to the attention of all States as they too advanced in their consideration of those important issues.

90. Australia reiterated its support for its Pacific neighbours and others in taking steps to preserve their statehood and protect the human rights of persons affected by sea-level rise. It wished to recall that in their Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-level Rise, adopted in 2021, the leaders of the Pacific Islands Forum had reaffirmed the integrity of the United Nations Convention on the Law of the Sea and their concern to preserve maritime zones guaranteed in the Convention. It was encouraging to see that the Declaration had garnered support beyond the Pacific region, thus contributing to the progressive development of international law and State practice on the interpretation of the Convention. Australia called for continued support for the Declaration, bearing in mind that maritime boundaries were among the issues raised in the additional paper (A/CN.4/761 and A/CN.4/761/Add.1) to the first issues paper, prepared by two of the Co-Chairs of the Study Group on sea-level rise in relation to international law.

91. In considering the requests for advisory opinions on climate change that were currently before them, the International Court of Justice and the International Tribunal for the Law of the Sea might examine the issues addressed by the Study Group, thus reinforcing the importance of the Commission's work. The Commission's discussions to date, including the sharing of recent State practice, were valuable and could play a key role in the progressive development of international law in the context of sea-level rise.

92. Concerning "Other decisions and conclusions of the Commission", he said that his delegation welcomed the Commission's decision to reconstitute the Working Group on methods of work. It supported efforts across the United Nations system, including within the Commission, to improve inclusivity, efficiency and effectiveness, thereby leading to more fit-for-purpose institutions and outcomes. In that context, his delegation would particularly welcome the consideration of ways of strengthening the symbiotic relationship between the Commission and the Sixth Committee in their common efforts to codify and progressively develop international law. Australia welcomed the Commission's recommendation to hold the first part of its seventy-seventh session in New York in 2026. However, there was no reason to wait until then to consider others means of strengthening the substantive exchanges between the two bodies. His delegation encouraged the members of the Commission, especially the Special Rapporteurs, to take advantage of virtual working

methods to strengthen the informal, intersessional dialogue with the Committee and its members, both in New York and in capitals.

93. Lastly, Australia looked forward to the seventy-fifth anniversary of the first session of the Commission in 2024, which would provide an opportunity to reflect on the invaluable contribution the Commission continued to make to international cooperation, the strengthening of national legal capabilities and the pursuit of a world where differences and disputes were settled through institutions and agreed rules and norms, and not by power and size.

94. **Mr. Muniz Pinto Sloboda** (Brazil), referring to the topic "General principles of law" and the draft conclusions on general principles of law adopted by the International Law Commission on first reading, said that his delegation welcomed the Commission's decision to abandon the expression "civilized nations", which despite being used in the Statute of the International Court of Justice, was outdated. However, the term "community of nations" might not be the most appropriate one to use either, since it might be interpreted as meaning that international organizations might also contribute to the formation of general principles of law, as the Commission acknowledged in paragraph (5) of its commentary to draft conclusion 2. As general principles of law were derived from national legal systems, his delegation suggested that the Commission should adopt the formulation of general principles of law recognized by "the community of States".

95. Brazil welcomed draft conclusions 3 (a), 4, 5 and 6, which acknowledged general principles of law derived from national legal systems. It reiterated its understanding that those principles must be common to the various legal systems of the world and reflect linguistic diversity. As a country that attached great importance to multilingualism, Brazil regretted that materials from Portuguese-speaking countries were often absent from United Nations documents, with only sparse references that did not properly reflect the importance of the legal traditions of those countries. A comparative analysis of the determination of the existence of a principle common to the various legal systems of the world could only be truly broad and representative if it reflected the linguistic diversity of the world. Brazil therefore encouraged the Commission to add an explicit reference to the different languages of the world in draft conclusion 5, paragraph 2.

96. Although in general the aim of draft conclusions was to systematize existing rules of customary international law, draft conclusions 3 (b), which referred to general principles of law that might be formed within the international legal system, and draft conclusion 7, on the identification of general principles of law formed within the international legal system, respectively, reflected an exercise in progressive development on a topic relating to the sources of international law. The negotiating history of the Statute of the International Court of Justice did not support the conclusion that principles formed within the international legal system were referenced in Article 38, paragraph (1) (*c*), of the Statute. Indeed, many States had indicated at the previous session of the Committee that they were not convinced as to the existence of that second category of general principles of law. Furthermore, State practice, case law or teachings in that regard were scarce.

97. In its commentary to draft conclusion 3, the Commission had cited a number of decisions of international courts which it believed supported the existence of general principles of law formed within the international legal system. However, those decisions only confirmed the normative value of some principles and not the existence of such principles as an independent source of international law. His delegation therefore suggested that the Commission not include principles of law formed within the international legal system when adopting the draft conclusions on second reading. Rather, it should consider including a "without prejudice" clause, in case future State practice supported principles formed in the international legal system as general principles of law.

98. Turning to the topic "Sea-level rise in relation to international law", he said that his delegation commended the Co-Chairs of the Working Group on sea-level rise in relation to international law for their additional paper to the first issues paper on the topic, but reiterated its position that any solutions to the complex problems arising from the topic should be in accordance with the United Nations Convention on the Law of the Sea. Despite the importance of legal stability, current State practice regarding baselines and maritime zones was not sufficient to identify a clear rule on ambulatory or fixed baselines. At the same time, his delegation acknowledged that the Convention did not set out explicitly any obligation to update published baselines. In that respect, it was crucial that any future rule on the topic be established on the basis of State consent.

99. The principle of common but differentiated responsibilities, which was well-established in treaty law and in customary international law, was ever more relevant in guiding the obligations of States in respect of individual and collective action against climate change and its consequences, including sea-level rise. Aligned with both science and equity, the principle

stemmed from the universal recognition that the largest share of historical global emissions of greenhouse gases had originated in developed countries. Indeed, the Intergovernmental Panel on Climate Change had acknowledged that, because of the long atmospheric residence time of some greenhouse gases and their accumulation over time, past emissions contributed exponentially more to the global temperature increase than current emissions.

100. With regard to "Other decisions and conclusions of the Commission", his delegation welcomed the appointment of a new Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction" and looked forward to the future adoption of the draft articles on immunity of State officials from foreign criminal jurisdiction following due consideration of the comments and observations submitted by States. His delegation also welcomed the inclusion of the topic "Non-legally binding international agreements" in the Commission's programme of work and the appointment of a Special Rapporteur for the topic. Considering the topic's non-binding nature and in order to avoid any ambiguity that might arise from the use of the term "agreements", his delegation suggested that the Commission should change the title of the topic to "Non-legally binding instruments". It also encouraged the Special Rapporteur to use as an important basis for his work the guidelines on the same topic adopted in 2020 by the Inter-American Juridical Committee.

101. Lastly, his delegation would be in favour of moving the topic "Extraterritorial jurisdiction" from the Commission's long-term programme of work to its current programme of work. It also welcomed the Commission's recommendation that the first part of its seventy-seventh session be held in New York in 2026.

102. **Mr. Colas** (France) said that his delegation commended the International Law Commission for its work and for its decisive contribution to the codification and progressive development of international law. The Commission's role was even more vital at the current time of endless challenges to the authority of international law. At a time when certain States were violating the most fundamental principles of the Charter of the United Nations on a daily basis, it was important to recall that international law was the foundation and guiding framework of the common multilateral system. His delegation therefore took note of the Commission's decision to hold a seventy-fifth anniversary commemorative event in Geneva in 2024, which would provide an opportunity to reflect on the Commission's future. His delegation believed that that future was bright, provided the Commission remained true to its original mission of being an organ that was both open to the diversity of the world and at the service of Member States.

103. Regarding the Commission's openness to the diversity of the world, France believed that strengthening multilingualism within the Commission was a step in the right direction and made it possible to take into consideration the specificities of the various national legal systems and legal cultures in all their diversity. Beyond the composition of the Commission and the promotion of its work, efforts aimed at achieving linguistic diversity must also be reflected in the diversity of the documentary sources used. In that connection, France had made a voluntary contribution of 100,000 euros in 2023 to support the International Law Seminar, in which 23 people of different nationalities and from all regional groups had participated.

104. With regard to the Commission's primary mission of working in close cooperation with States, it was important to continue the efforts to improve the Commission's working methods and, in particular, the fluidity of dialogue with States within the Sixth Committee. France took note of the reconstitution of the Working Group on methods of work and the discussions held there. It also noted with interest that the Working Group had stressed, as indicated in the Commission's report (A/78/10), that "the relationship between the Commission and the Sixth Committee should be given priority, through formal and informal contact". France stood ready to support initiatives to that end. It also took note of the proposal that there should be one and a half days of meetings with legal advisers of ministries of foreign affairs dedicated to the work of the Commission, an initiative that would help to strengthen dialogue between the Commission and States.

105. With regard to working methods, the Commission should set aside the necessary time for the smooth conduct of its work. It should not hesitate to devote several readings to deserving subjects and to request comments and observations on its projects where necessary. The draft conclusions on peremptory norms of general international law (*jus cogens*) had demonstrated, unfortunately, that work that was completed prematurely, without sufficient consultation with States, might not garner a consensus in the Committee. In that connection, when the Commission transmitted to the General Assembly draft articles that deserved to be adopted in the form of a convention, the international community had a collective responsibility to work to achieve that. Following the debate on the draft articles on prevention and punishment of crimes against humanity held in April 2023, it was important to

continue moving the draft articles forward toward the goal of adopting a convention.

106. Addressing the topic “General principles of law”, he said that his delegation had taken note of the draft conclusions on general principles of law adopted by the Commission on first reading, together with the commentaries thereto. As requested by the Commission, his delegation would be submitting its comments and observations on the text by 1 December 2024. In the meantime, it was disappointed that the Commission had decided to ignore the distinction that existed, in the French language, between “les principes généraux *du* droit”, which referred to custom, and “les principes généraux *de* droit”, mentioned in Article 38 of the Statute of the International Court of Justice as an independent source. That distinction was important and the Commission could usefully rely on it in its upcoming work on the topic.

107. His delegation was puzzled by the category of “general principles of law formed within the international legal system”, cited in draft conclusion 7. By definition, general principles of law originated in national legal systems, before they might be transposed to the international system. That observation therefore seemed, at first glance, to exclude the possibility of recognizing the existence of general principles of law formed directly within the international legal system. Rather, such principles seemed to stem from customary law, which was an autonomous source of law. The direction in which the Commission was heading with the approach adopted in draft conclusion 7 risked creating confusion between general principles of law and custom, as autonomous sources of international law. In that connection, his delegation noted that the Commission itself had pointed out in its commentary to draft conclusion 7 that “the doctrine is divided on this issue”. In the commentary, the Commission seemed to downplay the controversial nature of that new category of general principles. If that conclusion were maintained, it would be useful to specify, at the very least, that that category of general principles, which had not been substantiated by practice, was also controversial among States.

108. His delegation believed that draft conclusion 11 (Relationship between general principles of law and treaties and customary international law) could be streamlined, or even divided into two separate draft conclusions, since the legal issues raised by general principles of law relating to treaties, especially when they had a codification function, were not exactly the same as those raised by general principles of law relating to custom. The above comments were preliminary in nature; his delegation would be submitting written and more detailed observations in due course.

109. Turning to the topic “Sea-level rise in relation to international law”, he said that his delegation welcomed the Commission’s decision to reconstitute the Study Group on sea-level rise in relation to international law and the fact that the Commission had confirmed the relevance of the United Nations Convention on the Law of the Sea in the quest for solutions to the effects of rising sea levels. His delegation noted that the members of the Study Group broadly supported the preliminary observations of the Co-Chairs in favour of fixed baselines. It also approved the cautious approach taken by the Study Group in addressing the principle of fundamental change of circumstances. That principle had a very narrow application and his delegation agreed with the assertion in the Commission’s report (A/78/10) that “the principles of legal stability and certainty of treaties would accordingly support an argument against the use of the principle *rebus sic stantibus* to upset the maritime boundary treaties resulting from the rise in sea levels”.

110. His delegation also wished to note the importance of the ongoing proceedings concerning the request for an advisory opinion from the International Court of Justice on the obligations of States in respect of climate change, the conclusions of which would likely feed into the Commission’s reflections on the issue, of which sea-level rise was a major component. His delegation was confident that the Commission would be able to use the outcomes of those proceedings to reinforce a coherent and systematic reading of international law on those matters.

111. Concerning “Other decisions and conclusions of the Commission”, his delegation had taken note of the Commission’s decision to include the topic “Non-legally binding international agreements” in its programme of work. That topic was important for State legal advisers who, in the daily practice of international law, were increasingly faced with instruments with uncertain legal ramifications. France stood ready to cooperate with the Commission to provide any useful information on the topic, in particular with regard to its national practice. His delegation had taken note of the appointment of a new Special Rapporteur for the topic “Immunity of State officials from foreign criminal jurisdiction”, which had been on the Commission’s agenda for many years. Given the time it had already spent on the topic, the Commission should not rush in its examination and should allot the time needed to continue deepening its work in a peaceful and consensual atmosphere. His delegation would submit its written observations on the topic by December 2023.

112. France had also taken note of and welcomed the establishment by the Secretary-General of a trust fund to receive voluntary contributions for assistance to Special Rapporteurs of the International Law Commission or Chairs of its Study Groups and matters ancillary thereto. It hoped that the diversity of linguistic and other profiles needed for the proper functioning of the Commission would be taken into consideration in the use of that fund.

113. **Mr. Alavi** (Liechtenstein), referring to the topic "Immunity of State officials from foreign criminal jurisdiction" and the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the International Law Commission, said that his delegation appreciated draft article 7, which dealt with crimes under international law in respect of which functional immunity should not apply. That was a key provision of the draft articles in the context of the fight against impunity for the crime of aggression, crime of genocide, war crimes and crimes against humanity. Given that those four crimes were considered core crimes under international law, his delegation would like the crimes listed in the draft article to include the crime of aggression, particularly since that was a crime that required immunities to be waived in order to ensure meaningful accountability and prevention of the crime in the future. His delegation would be submitting written comments to that effect to the Commission.

114. Turning to the topic of "Sea-level rise in relation to international law", he said that the right to self-determination of States and countries most immediately affected must be at the heart of the consideration of the impacts of sea-level rise in relation to international law. His delegation was therefore pleased to see the importance of self-determination in that context recalled in paragraph 170 of the Commission's report (A/78/10).

115. While not a State party to the United Nations Convention on the Law of the Sea, and aware of article 60 of the Convention, Liechtenstein continued to appreciate efforts to institutionalize the fixing of maritime zones, so that they could not be challenged or reduced as a result of sea-level rise, as had been proposed by the Pacific Islands Forum. The colonial status of relevant peoples should not be an impediment to joining those or other such efforts. His delegation supported the interpretation in paragraph 153 of the Commission's report that the Study Group on sea-level rise in relation to international law should consider sui generis status for territories submerged owing to sea-level rise, in particular because sea-level rise was not a natural phenomenon, but was human-caused. Accordingly, it approved of the Co-Chair's suggestion to further explore the issue, as noted in paragraphs 156 and 226.

116. His delegation looked forward to the Commission's continued work on the subtopics of statehood and the protection of persons affected by sea-level rise in 2024 and would contribute to those deliberations where possible in due course. In the interim, it would continue to work with like-minded States to consider legal avenues to fight climate change, including on the issue of sea-level rise as a whole.

117. **Ms. Langrish** (United Kingdom), referring to "Other decisions and conclusions of the Commission", said that her delegation welcomed the International Law Commission's decision to include the topic "Non-legally binding international agreements" in its programme of work. It continued to believe that terminology was key when distinguishing non-binding instruments from treaties. The practice of the United Kingdom was to use the terms "instrument" or "arrangement" for such understandings and to reserve the term "agreement" for treaties. Accordingly, it respectfully suggested that the Commission should amend the title of the topic to "Non-legally binding international instruments and arrangements".

118. On the topic "General principles of law", she said that her delegation welcomed the Commission's adoption on first reading of the draft conclusions on general principles of law, together with the commentaries thereto. The United Kingdom would submit detailed written comments by the Commission's deadline of December 2024.

119. Turning to the topic "Sea-level rise in relation to international law", which covered issues of fundamental and direct concern for many States – including the United Kingdom – and in particular for small island developing States, she said that the United Kingdom continued to consider carefully the implications of sea-level rise for maritime zones and was open to legitimate interpretations and applications of the United Nations Convention on the Law of the Sea, including in principle adaptive interpretations. However, it was important to be mindful of the potential risks and unplanned consequences of any change in interpretation.

120. It was noteworthy that the States that were supportive of an outcome that preserved existing maritime entitlements had mixed views about the legal underpinnings of such an approach. States should continue discussing the matter directly and in relevant forums, with a view to maintaining the integrity of the interpretation and application of the Convention. However, any emergent consensus on the preservation of existing maritime boundaries should not apply to claims that were inconsistent with the Convention for reasons unconnected with sea-level rise. Her delegation

agreed with the members of the Study Group on sea-level rise in relation to international law who had called for caution in examining the applicability of the principle of historic waters, title and rights in the context of sea-level rise.

121. As for the next steps, her delegation wished to recall that the mandate of the Study Group was a mapping exercise of the legal questions raised by sea-level rise, involving an analysis of existing law, and expressly excluded proposing modifications to existing international law, including the United Nations Convention on the Law of the Sea.

122. Lastly, the United Kingdom also agreed with the view that the Study Group should exercise caution when interpreting the silence of some affected States, which did not necessarily reflect a position on the interpretation of the United Nations Convention on the Law of the Sea. Similarly, the fact that the Study Group's preliminary observations in the first issues paper, or other points it had raised in various strands of its work had not been contested should not be interpreted as agreement with them. That was particularly the case in the light of the Study Group's mandate and the stage its work had reached.

123. **Mr. Zanini** (Italy), referring to the topic "General principles of law", said that since the aim of the draft conclusions on general principles of law adopted by the International Law Commission on first reading was to provide guidance on the interpretation and application of international law, his delegation trusted that the Commission would proceed with its study in order to be able to provide more exhaustive guidance. His delegation appreciated the adoption of the commentaries to the draft conclusions and the inclusion therein of examples of commonly recognized general principles of law.

124. With regard to general principles derived from national legal systems, Italy shared the view stated in draft conclusion 6 that a principle common to the various legal systems of the world might be transposed to the international legal system insofar as it was compatible with that system. Indeed, it would be interesting to pursue the analysis of the limits to such transposition. Although his delegation was aware that transposition was mostly assessed by judges on a case-by-case basis, it believed that the Commission's studies should lead to the identification of some general essential features of the process of assessing the transposition. The works of various scholars on the subject should be taken into account to that end.

125. With regard to general principles that might be formed within the international legal system, in its commentary, the Commission reflected some of the concepts which his delegation had presented the previous year, in particular with regard to the distinction between customary law and general principles of law. It should examine that distinction further, in order to find a shared and clear methodology for the detection of general principles as well as the differences between the criteria for establishing the emergence of either a rule of customary law or a principle. Since the expression "general principle" was used in practice in different circumstances, and State practice provided few elements to clarify the origin, structure and functions of general principles, it would be useful for the Commission to continue reflecting on the commonly recognized essential features of general principles.

126. The above observations pertained, in particular, to the risk of the will of States being overridden in the creation of rules of international law, especially considering that general principles might be an autonomous source of rights and obligations, as clarified in draft conclusion 10. Italy would consider submitting written comments and relevant information and looked forward to continuing its engagement with the Commission on the topic.

127. Addressing the topic "Sea-level rise in relation to international law", he said that his delegation emphasized the importance of ensuring stability, security and legal certainty with regard to maritime delimitation and therefore supported the view that the issue of legal stability was closely connected to the preservation of maritime zones as they had been before the effects of sea-level rise. In that regard, Italy considered that the United Nations Convention on the Law of the Sea did not seem to preclude baselines from being considered as fixed. It reiterated its position in favour of seeking solutions that did not involve modifications to applicable international law, with particular reference to the Convention. His delegation welcomed the suggestion by the Study Group on sea-level rise in relation to international law, as reflected in the Commission's report (A/78/10), that a meeting of States parties to the Convention might be considered with a view to interpreting the instrument and its relevant provisions.

128. Lastly, Italy shared the view that sea-level rise did not constitute a fundamental change of circumstances under article 62 of the Vienna Convention on the Law of Treaties. Indeed, it believed that sea-level rise should not affect the stability of existing maritime delimitation agreements and the maritime boundaries established therein.

The meeting rose at 1 p.m.