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Report of the International Law Commission on the work of its seventy-fourth session (2023)

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

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I. Introduction

1. At its seventy-eighth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, held on 8 September 2023, to include in its agenda the item entitled "Report of the International Law Commission on the work of its seventy-third and seventy-fourth sessions" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 23rd to 33rd meetings, and at its 37th meeting, held from 23 October to 2 November, and 17 November 2023. The current Chair of the seventy-fourth session of the International Law Commission, Ms. Patrícia Galvão Teles, and the Chair during the first part of the seventy-fourth session, Ms. Nilüfer Oral, introduced the report of the Commission on the work of that session (A/78/10) at the 23rd meeting, on 23 October. The Committee considered the report in three clusters, namely: cluster I (chapters I to IV, VIII and X) at its 23rd to 28th meetings, from 23 to 27 October; cluster II (chapters V and VI) at its 28th to 30th meetings, from 27 to 31 October; and cluster III (chapters VII and IX) at its 30th to 33rd meetings, from 31 October to 2 November.

3. At its 37th meeting, on 17 November, the Sixth Committee adopted draft resolution A/C.6/78/L.12 entitled "Report of the International Law Commission on the work of its seventy-fourth session", as orally revised, without a vote. On the same day, the Committee also adopted without a vote a draft resolution entitled "Peremptory norms of general international law (*jus cogens*)" (A/C.6/78/L.21). After the General Assembly had considered the relevant report of the Sixth Committee (A/78/435), it adopted the draft resolutions, respectively, as resolutions 78/108 and 78/109 at its 45th plenary meeting, on 7 December 2023.

4. The present topical summary has been prepared pursuant to paragraph 40 of resolution 78/108, in which the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the seventy-eighth session of the General Assembly.

5. The present topical summary consists of two parts. The first part contains seven sections, reflecting the current programme of work of the Commission: general principles of law (A/78/10, chap. IV); settlement of disputes to which international organizations are parties (*ibid*., chap. V); prevention and repression of piracy and armed robbery at sea (*ibid*., chap. VI); subsidiary means for the determination of rules of international law (*ibid*., chap. VII); sea-level rise in relation to international law (*ibid*., chap. VIII); succession of States in respect of State responsibility (*ibid*., chap. IX); and other decisions and conclusions of the Commission (*ibid*., chap. X). The second part contains a summary on the topic of immunity of State officials from foreign criminal jurisdiction (A/77/10, chap. VI), on which the Commission completed its first reading at the seventy-third session and to which it will revert at the seventy-fifth session.

II. Topics and items on the current programme of work of the Commission

A. General principles of law

1. General comments

6. Delegations welcomed the work of the Commission on the topic, noting the adoption of the draft conclusions and the commentaries thereto on first reading by the Commission. The importance of the topic was emphasized by several delegations; it

was noted that the draft conclusions on general principles of law complemented the Commission's work on sources of international law. It was stressed that the topic might not be fully suitable for progressive development and codification, as well as that its practical benefits were limited. The Commission was urged to approach the topic with caution. The importance of State consent and of not overriding it in the creation of rules of international law was once again underlined. At the same time, the view was expressed that the draft conclusions could draw more on the practice of international organizations.

7. It was recalled that the work on the topic should be based on Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Several delegations stressed that the work on the topic had to rely on primary sources of international law and that the Commission should not excessively resort to subsidiary means for the determination of rules of international law. A concern was raised that some of the comments made by States had been overlooked. The Commission was requested to ensure consistency throughout its work, in particular with the topic "Subsidiary means for the determination of rules of international law". Some delegations expressed concerns about the discrepancies existing between the two topics.

8. It was stated that the Commission should elaborate a definition of general principles of law, in particular to distinguish between general principles of law that gave rise to the rights and obligations of States, fundamental political and legal ideas that were principles of a higher order than rules of international law, and interpretative techniques used to fill lacunae and to ensure the optimal application of substantive legal rules. Relatedly, requests were made for the Commission to clarify the distinction between general principles of law as a source of law and legal principles more generally, between rules and principles, and between general principles of law and fundamental principles of international law. Furthermore, a regret was expressed on the absence of a clear distinction between "les principes généraux *du* droit" and "les principes généraux *de* droit" in French.

2. Specific comments

9. Some delegations expressed support for the scope of the topic, as defined in **draft conclusion 1** (scope).

10. Regarding **draft conclusion 2** (recognition), some delegations emphasized that recognition was essential for the identification of a general principle of law. Several delegations welcomed the replacement of the term "civilized nations", which was generally considered anachronistic. While support was expressed for the use of the term "community of nations", other terms were suggested, such as "community of States", "the international community" and "international community of States".

11. On **draft conclusion 3** (categories of general principles of law), differing views were expressed regarding the existence of a category of general principles of law formed within the international legal system. A number of delegations questioned the existence of such a category, stating that it was neither supported by State practice nor by the *travaux préparatoires* of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice. Other delegations either supported, or were open to, the existence of general principles of law formed within the international legal system in addition to general principles of law that are derived from national legal systems. A suggestion was made to add a "without prejudice" clause on the existence of general principles of law formed within the international legal system so that the issue could be addressed in the future if State practice were ever to support it more conclusively. Further examples of State practice on the existence of general principles of law formed within the international legal system were requested by several delegations,

and the elaboration of a clear distinction between said category and customary international law was called for. The need to reflect in the commentaries the ongoing debate in international law on whether general principles of law formed within the international legal system did indeed exist was emphasized.

12. Several delegations expressed support for **draft conclusion 4** (identification of general principles of law derived from national legal systems) and the two-step analysis for identification of general principles of law derived from national legal systems. With respect to the first requirement, that is that a general principle of law should be "common to the various legal systems of the world", a further clarification in the commentary of the term "various" was deemed necessary with a view to ensuring a high degree of representativeness. A proposal was made to specify in subparagraph (a) that the principle should be common to various "national" legal systems of the world, to align the text of the draft conclusion with its title. The importance of the second step, namely the requirement of "transposition", was emphasized by some delegations.

13. Regarding **draft conclusion 5** (determination of the existence of a principle common to the various legal systems of the world), some delegations welcomed its proposed formulation and the commentary thereto. At the same time, concerns were raised that the requirements contained in the provision were too strict. Some delegations emphasized that the comparative analysis envisaged in the draft conclusion should be wide and representative, not be limited to recognition by a few States, and be geographically and linguistically diverse. Clarification was requested on whether the comparative analysis could include examination of all national practice, including on matters of internal law, or whether it should only cover national practice addressing international law questions.

14. Concerning **draft conclusion 6** (determination of transposition to the international legal system), support was voiced for its formulation and the notion of compatibility in the determination of transposition of general principles of law to the international legal system. Some delegations requested further elaboration of the notion of compatibility in practical terms, and in particular identification of some general essential features of the process. It was emphasized that a determination of compatibility was necessary for transposition. Some delegations stressed that recognition should not require a formal act and that the Commission should aim to produce a text that avoided creating such an impression. Other delegations stated that the Commission should introduce a higher threshold for transposition of a principle to the international legal system, in particular through the explicit consent of the community of nations. It was noted that transposition of a principle to the international legal system should not occur automatically. A question was raised as to whether the term "transposition" was appropriate, and other terms were proposed, such as "transposability", "reception" and "absorption".

15. On **draft conclusion 7** (identification of general principles of law formed within the international legal system), some delegations welcomed its formulation and concurred with the proposed methodology for identification of such general principles of law, while others continued to question the existence of such principles and the efficacy of the test proposed in the draft conclusion. It was pointed out that the title of the draft conclusion used the word "identification", while the text of the provision employed the word "determine". A view was expressed that the word "may" in paragraph 1 of the draft conclusion lacked sufficient legal precision. Several delegations considered insufficient the clarification provided in the commentary to the term "intrinsic". A concern was raised that the current wording of draft conclusion 7 was at odds with draft conclusion 2, which imposed "recognition by the community of nations" as compulsory precondition for the existence of a general principle of law, while the "intrinsic" test had an element of automaticity.

16. Some delegations expressed concerns regarding the inclusion of a "without prejudice" clause in paragraph 2 of draft conclusion 7. Several delegations considered that paragraph 2 was overly broad and undermined the high identification threshold for general principles of law formed within the international legal system by allowing for a possibility of existence of general principles of law formed within the international legal system on conditions other than those referred to in paragraph 1. Further clarification as to the nature of a third category of general principles of law was requested.

17. Regarding **draft conclusion 8** (decisions of courts and tribunals) and **draft conclusion 9** (teachings), while views were expressed in support of their formulation, a number of delegations questioned their relevance, as they were considered to be within the scope of another topic already in the programme of work of the Commission. Delegations expressed divergent views as to whether decisions by national courts could in certain cases be considered as subsidiary means for the determination of general principles of law, and additional clarification on their role was requested. A question was raised as to whether decisions should have more weight when compared to teachings. A proposal was made to replace the term "decisions" with "jurisprudence" in draft conclusion 8. It was observed that there appeared to be a discrepancy between draft conclusion 8 of the present topic and draft conclusion 4 of the topic "Subsidiary means for the determination of rules of international law". Regarding the terminology used in draft conclusion 9, it was suggested that the term "most highly qualified publicists" be modified in order to avoid value judgments. A proposal was made to add a draft conclusion on the usefulness or significance of other subsidiary means for the determination of general principles of law, in particular resolutions of United Nations organs and works of international expert bodies.

18. Several delegations welcomed **draft conclusion 10** (functions of general principles of law), highlighting its accurate reflection of the functions of general principles of law in international legal practice, and its usefulness for practitioners. At the same time, some delegations noted that the use of "mainly" in paragraph 1 implied the existence of a hierarchical relationship between sources of international law and they considered it preferable to align this draft conclusion with the letter and spirit of Article 38 of the Statute of the International Court of Justice by deleting "mainly". Additional explanation in the commentary in that regard was called for. The view was expressed that the Commission should specify that the general principles of law were "only" used when a particular issue cannot be resolved as a whole or in part by other rules of international law. It was proposed that the particular functions of general principles of law highlighted in paragraph 2, subparagraphs (a) and (b), of draft conclusion 10 be moved to the commentary.

19. Some delegations considered that **draft conclusion 11** (relationship between general principles of law and treaties and customary international law) offered an accurate reflection of the basic interplay between general principles of law and the other primary sources of international law. While several delegations expressed support for the lack of hierarchy between sources of international law, others stated that there existed at least an informal hierarchy between those sources. In that regard, the suggestion was made to add "formal hierarchy" to the text of the draft conclusion. It was proposed that general principles could be considered transitional sources of law. According to another view, it was suggested that general principles of law constituted a supplementary source of international law, as opposed to a subsidiary or secondary source. Relatedly, a view was expressed that general principles of law were applied rarely due to speciality of treaties and rules of customary international law. Some delegations stated that paragraph 1 of draft conclusion 11 and paragraph 1 of draft conclusion 10 were contradictory, since while the former affirmed lack of hierarchical relationship between sources of international law, the latter provided that

general principles of law constituted a supplementary source of international law that were mainly resorted to when other rules of international law did not resolve a particular issue. While some support was expressed for the notion of parallel existence between sources under paragraph 2, a view was expressed that such existence should not be possible. A proposal was made to address in the draft conclusion the relations between general principles of law and peremptory norms of general international law (*jus cogens*). A suggestion was also made to split the draft conclusion into two new conclusions with a view to addressing relations between general principles of law with treaties and customary international law separately.

3. Future work

20. Delegations were looking forward to the Commission's future work and to the completion of the second reading in 2025. At the same time, it was emphasized that work on the topic should not be rushed, in order allow for due consideration of all pertinent aspects. The Commission was requested to continue its study of the topic in order to provide more exhaustive practical guidance. The Commission's decision to seek States' comments and observations on the draft conclusions was welcomed, with several delegations signalling their intent to provide comments by the requested deadline. The Commission was urged to take into account all the information submitted by States. In that regard, a request was made to the Secretary-General to compile and circulate the States' comments and observation in a timely manner.

4. Final form

21. Several delegations supported the proposed outcome of the topic to be draft conclusions accompanied by commentaries; however, a view was expressed that, owing to the large number of unresolved questions, the output on the topic could take a different form. It was also suggested that the output of the Commission's work on the topic could be in the form of draft articles accompanied by commentaries.

B. Settlement of disputes to which international organizations are parties

1. General comments

22. Delegations generally welcomed the work of the Commission and in particular the first report of the Special Rapporteur (A/CN.4/756). Several delegations stated that aspects of the provisionally adopted draft guidelines required clarification.

23. A number of delegations emphasized the need to strike a balance between the privileges and immunities of international organizations and the need for justice and the right to remedy. Some delegations remarked that immunities of international organizations should not lead to denial of justice. A number of delegations emphasized the close connection of the topic with issues involving the articles on the responsibility of international organizations, jurisdictional immunities, obligations to provide for appropriate means of dispute settlement, human rights obligations, the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, and the agenda item "Administration of justice at the United Nations", included in the work of the Sixth Committee. The potential existence of conflictual obligations with regard to immunities and human rights law was highlighted.

24. The Commission was encouraged, *inter alia*: to focus on problems of practical concerns and on the adequacy of existing means of dispute settlement, rather than on the rules or principles that applied to international disputes more generally; to analyse

what internal mechanisms of disputes might be considered appropriate; to identify and examine relevant State practice; to address questions of privileges and immunities, including within the realm of private law proceedings; to clarify to what extent an international organization could continue to rely on its jurisdictional immunity when it had neither established appropriate means of dispute settlement nor waived its immunity; to consult States and regional legal commissions, such as the Commission of the African Union.

2. Specific comments

25. Regarding **draft guideline 1** (scope), several delegations welcomed the removal of the qualifier "international" before the word "disputes" both in the title of the topic and in draft guideline 1, while the view was expressed that the word "international" should have been retained. Several delegations requested further clarification on the scope of the topic. It was stated that the removal of the word "international" emphasized that all types of disputes to which international organizations were parties would fall within the scope of the topic. While several delegations expressed support for including disputes of private law character, the need for the Commission to focus its work on questions of international law was emphasized by a number of delegations. The difficulty in distinguishing between international and non-international disputes was highlighted by a number of delegations. It was noted that not all disputes of private law character stemmed from a relationship governed by international law. At the same time, while encouraging the Commission to exercise caution against overstepping its mandate, it was stressed that practice should only be considered relevant when grounded in international law, not national law. Reference was made to the syllabus of the topic, recalling that the Commission should restrict the scope of the topic to disputes that "ar[o]se from a relationship governed by international law". It was also suggested that the scope should be limited to disputes to which intergovernmental organizations were parties and exclude disputes involving non-governmental international organizations and entities, and disputes of private law character regulated by domestic law. A suggestion was made to rephrase the provision and replace it with the phrase "[t]he present draft guidelines concern the settlement of international law aspects of disputes to which international organizations are parties".

26. Clarification of the scope of the topic, notably regarding disputes of private law character, was sought by several delegations. The Commission was invited to examine various aspects, including whether the topic should cover disputes between Member States and international organizations concerning their constituent instruments, the differences between disputes involving international staff and international organizations as parties, and the different frameworks applicable to international staff and to non-staff personnel. The importance of developing recommendations aiming at improving the quality of internal procedures was emphasized. It was stated that internal disputes within an international organization were governed by a legal framework specific to that organization and remained subject to the specificities of that regime. In that regard, textual proposals were made to the provision to add specific reference to the legal framework established by the constituent instrument of the international organization. Differing views were expressed on whether the Commission should examine disputes between international organizations and their Member States concerning non-payment of contributions. The view was expressed that the present topic should cover disputes with international organizations either as a respondent or a claimant.

27. With respect to **draft guideline 2** (use of terms), a number of delegations appreciated the definition contained in **subparagraph (a)** (international organizations), while several delegations were of the view that reproducing the

definition of "international organization" contained in article 2 of the articles on the responsibility of international organizations was more appropriate. The importance of consistency between the work on the topic and the articles on the responsibility of international organizations was highlighted. If the Commission deemed it necessary to depart from the definition in the articles on the responsibility of international organizations, it was stated that further clarification was required, including regarding the consequences of such a departure. It was emphasized that the definition in subparagraph (a) should capture the practice of international organizations.

28. The phrase "possessing its own international legal personality" in subparagraph (a) was welcomed by a number of delegations. To some delegations, the term constituted an important element in distinguishing international organizations from mere cooperation treaties and clarified that it concerned an international organization with the capacity to make legal decisions and hold responsibilities. To other delegations, further clarification was needed, notably regarding the differences between international organizations and multilateral initiatives. The view was expressed that legal personality could be conferred domestically. Another view was expressed that international organizations might be established at the national level, but they might acquire international legal personality by virtue of a treaty or subsequent accession by States.

29. Some delegations expressed their support for the phrase "established by a treaty or other instrument governed by international law" in subparagraph (a), while noting that it aligned with the articles on the responsibility of international organizations. It was stated that an "instrument governed by international law" did not necessarily have to be a legally binding one. The view was expressed that, while some organizations, such as the Association of Southeast Asian Nations and the Organization for Security and Cooperation in Europe, might not initially have been established through an international legally binding instrument or another instrument governed by international law, they functioned on the basis of a collective will of their member States. According to another view, the Organization for Security and Cooperation in Europe did not constitute an international organization. It was stated that the provision should provide for solutions that addressed the realities of international practice. The Commission was encouraged to consider whether the establishment of an international organization typically required a form of formal adherence, acceptance or ratification of its members to the constituent instrument. It was observed that while the United Nations Industrial Development Organization was not initially established through a treaty, a constitutive instrument was subsequently adopted to transform the organization into a specialized agency that represented a formal instrument to which others could accede. Additionally, the Commission was requested to issue a correction to the commentaries to the draft article to reflect that the Holy See was recognized as a State at the international level, and not as a *sui generis* subject of international law.

30. With respect to the phrase "that may include as members, in addition to States, other entities", a number of delegations raised concerns regarding the term "other entities" and underscored the need for further clarification regarding whether the term excluded private entities and encompassed organizations that operated without standard membership arrangements, such as the International Criminal Court and other international tribunals. A suggestion was made to delete the term "other entities". A concern was raised that the term "other entities" might imply that entities were standard members of international organizations. Some delegations stated that the term referred exclusively to international public law entities and encompassed international organizations and States. It was noted that, while private entities might participate in the activities of international organizations, they were not typically admitted as full members of such international organizations. The view was expressed that one of the legal characteristics that best defined the nature of an international

organization was the exercise of sovereign powers that were attributed to them by their constituent States, as defined in their constitutive treaties or instrument governed by international law. A suggestion was made to insert the word "sovereign" between the words "other" and "entities", resulting in "other sovereign entities", to differentiate international organizations from other international bodies and entities, and other subjects of international law. Another perspective emphasized that, while it was crucial to clarify that other entities, in addition to States, could be members of international organizations, such possibility should not constitute a defining feature in itself.

31. The phrase "and has at least one organ capable of expressing a will distinct from that of its members" was appreciated by a number of delegations. Some delegations emphasized that the phrase served as an indicator of whether an international organization possessed a legal personality. Some delegations suggested that such a criterion was a consequence of the legal personality of the organization and not a distinct feature. Other delegations expressed concerns regarding that requirement, with some delegations suggesting its deletion. The view was expressed that the development of such requirement by the Commission would need to be founded in practice. Another view expressed was that the level of subordination of an organization to the will of its members that must exist in order for the organization to express its own will in accordance with its statute and constitutive instrument should be taken into account.

32. A number of delegations expressed support for the definition of disputes contained in **subparagraph (b)** (dispute), while others questioned the added value of the new definition. At the same time, some delegations noted that the definition drew inspiration from the definition contained in the *Mavrommatis Palestine Concessions* judgment issued by the Permanent Court of International Justice, emphasizing that political aspects in international disputes did not change their character as legal disputes. It was stated that a disagreement on a point of fact would be considered a dispute only if it pertained to a point of law and the fact in question amounted to a breach of an international obligation. If the Commission decided to retain the reference to a disagreement of fact, the wording of Article 36, paragraph 2 (c), of the Statute of the International Court of Justice was suggested as a possible model for the text. It was stated that the definition was formulated in very general terms, suggesting that it included specific types of disputes, such as international disputes and disputes of private law character. Some delegations stated that the definition might not be sufficiently broad to capture circumstances in which one of the parties to a dispute simply failed to respond to the assertions of the other, such as in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. Some delegations emphasized that, in disputes between personnel and an international organization, the failure to respond to an application within a specified time period could be deemed as a rejection. In that connection, a suggestion was made to include text clarifying that a "tacit/implicit" refusal fell within the scope of the definition. The Commission was invited to clarify what role political considerations could play in determining the existence of a dispute.

33. A number of delegations expressed support for the definition contained in **subparagraph (c)** (means of dispute settlement). The Commission was encouraged, *inter alia*: to address the potential role of the International Court of Justice with regard to the settlement of disputes between international organizations and States through advisory opinions; to examine the existence of additional means for dispute resolution that take into account the nature of the dispute and the obstacles associated with resorting to alternative means of settling disputes; to consider adding text related to disputes of private law character, as the current text referred mainly to international disputes; to include "good offices" at the end of the definition, as per the United

Nations Handbook on the Peaceful Settlement of Disputes; and to consider defining the term "settlement of disputes" instead of reproducing Article 33 of the Charter of the United Nations. Moreover, it was stated, *inter alia*, that: there was no need to reproduce Article 33 of the Charter; the term "resort to regional agencies or arrangements" was already captured by the other means mentioned in that subparagraph; it should be clear that the subparagraph did not impose any obligations related to the resolution of disputes; and the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization was relevant for the definition of disputes.

3. Future work

34. Delegations indicated that they were looking forward to the Special Rapporteur's second report and future work on the topic. The decision to include in future reports disputes that were not of an international character and recommendations of best practices was welcomed. It was suggested that the role of the International Court of Justice should be further examined, including through, in particular, advisory opinions and the possibility of extending its contentious jurisdiction to cases related to the topic. Moreover, it was emphasized that future discussions on the topic should be continued in close connection with the agenda item "Responsibility of international organizations".

4. Final form

35. A number of delegations expressed support for the final form of draft guidelines. Some delegations emphasized that draft guidelines were appropriate given the diverse nature of international organizations and their existing legal commitments. Several delegations suggested that the final form could be decided at a later stage. A concern was raised regarding the limited scope of draft guidelines and their lack of applicability to private persons. It was suggested that the Commission should first conclude discussions on best practices related to the topic before commencing the development of draft guidelines. It was also suggested that the Commission should assess the possibility of formulating a set of draft articles that could serve as the basis for an international treaty.

36. Several delegations voiced support for the elaboration on model clauses that could be included in treaties or other instruments. It was suggested that such model clauses could include provisions on alternative dispute resolution mechanisms, such as enquiry, mediation, and conciliation, while identifying best practices and international minimum standards. The view was expressed that such clauses had the potential to harmonize the practice in the field of dispute resolution, actively reducing the phenomenon of fragmentation in international law. To some delegations, caution was deemed necessary regarding the development of model clauses for disputes of a contractual nature or those arising from the application of national laws due to the variety of contract types and differences in national legislation.

C. Prevention and repression of piracy and armed robbery at sea

1. General comments

37. Delegations generally welcomed the work of the Commission on the topic. Noting that piracy and armed robbery at sea continued to pose serious threats to international maritime security, delegations stressed the importance of the topic. The potential for the work of the Commission to contribute to enhanced international cooperation with respect to the prevention and repression of piracy and armed robbery at sea was highlighted.

38. Several delegations commended the Special Rapporteur for his first report, expressing appreciation for its consideration of the historical, sociological and legal aspects of the topic. A number of delegations welcomed the broad review of State legislative and judicial practice in the report, and several of them provided further information concerning their own practice. Appreciation was also expressed to the Secretariat for its memorandum.

39. Several delegations expressed support for the approach the Commission had taken toward the topic. A number of delegations agreed with the Commission that its work should not duplicate existing frameworks and academic studies but should rather aim at identifying new issues of common concern. Delegations welcomed in particular the commitment of the Commission not to alter the relevant provisions of existing definitions, particularly those of the United Nations Convention on the Law of the Sea.

40. Appreciation was expressed for the commentaries; the Commission was encouraged to further substantiate the commentaries using information gathered by the Special Rapporteur and the Secretariat. Differing view were expressed in relation to certain provisions of the commentaries.

41. Interest was expressed in the relationship of universal jurisdiction to the topic. The view was expressed that piracy was the only crime for which the existence of universal jurisdiction without an *erga omnes partes* basis was undisputed.

2. Specific comments

42. Several delegations welcomed the provisional adoption of draft articles 1, 2 and 3.

43. With respect to **draft article 1** (Scope), a number of delegations welcomed the inclusion of the distinct crimes of piracy and armed robbery at sea. The Commission was encouraged to exercise caution in expanding the scope of the draft articles beyond that of the rules in the United Nations Convention on the Law of the Sea. The view was also expressed that any draft articles should be limited in scope to armed robbery at sea, as piracy was already adequately treated by the Convention. A number of delegations welcomed the inclusion of prevention within the scope, while some requested further clarification as to what prevention entailed. The recognition in the commentary that "repression" did not necessarily mean criminal investigation or prosecution was welcomed.

44. Regarding **draft article 2** (Definition of piracy), delegations welcomed the decision of the Commission to incorporate, in paragraph 1 of draft article 2, the definition of "piracy" contained in article 101 of the United Nations Convention on the Law of the Sea. Several such delegations stated that the aforementioned definition reflected customary international law. While the importance of consistency with the definition in the Convention – in all the official languages – was highlighted, the desirability of presenting a definition of piracy at this time for negotiation was questioned. It was proposed to incorporate the concept of "threat", included in draft article 3 relating to armed robbery at sea, in the definition of piracy.

45. A number of delegations welcomed the commentary to the provision, considering that it elucidated the terms of the definition. The Commission's broad understanding of "violence" as including psychological violence was welcomed, and further indications of relevant practice were requested. Some delegations agreed that only acts lacking public authority could qualify as "for private ends", but the view was expressed that a private act committed solely for political ends would amount to maritime terrorism rather than piracy. It was stated that a private act on board of a State vessel could not amount to piracy. Further analysis of the phrase "for private ends" was recommended. Regarding the final sentence of paragraph (8) of the

commentary, it was suggested that the reference to "against 'private aircraft'" should rather be "by private aircraft". The Commission was urged to address acts of violence against maritime commerce committed by States.

46. The decision of the Commission not to define the term "ship" was noted. Delegations also noted the need to consider the possibility of piracy committed by the crews of government ships in case of mutiny, as foreseen in article 102 of the United Nations Convention on the Law of the Sea. Deeper analysis of the status of offshore platforms was suggested. The Commission's analysis of "incitement and facilitation", including its broad geographical and material scopes, was welcomed. Nevertheless, the decision not to refer specifically to land as a starting point for acts of piracy was noted.

47. Several delegations welcomed the inclusion of draft article 2, paragraph 2, and the reference to article 58 of the Convention therein, to indicate that the rules governing piracy also applied in a State's exclusive economic zone (EEZ). Further clarification was requested as to the extent to which piracy rules would apply in the EEZ, in view of the phrase "insofar as they are not incompatible with this Part" contained in article 58 of the Convention. The view was expressed that the EEZ and high seas were two distinct maritime spaces in which different rights and obligations applied and that cooperation in the EEZ should be without prejudice to the sovereign rights of the coastal State. It was suggested that the applicability of the rules concerning piracy to the EEZ was an important point that could be made more explicitly.

48. The Commission was requested to provide deeper analysis of the scope of permissible exercise of jurisdiction over piracy. The need to take into account the principle of common heritage of humankind, as reflected in the 2023 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, was also highlighted.

49. Regarding **draft article 3**, several delegations welcomed the inclusion of a definition of "armed robbery at sea". A number of delegations supported the use of the definition contained in the annex to resolution A.1025(26) of the Assembly of the International Maritime Organization, and some stated that the definition reflected existing international law. Several delegations welcomed the alignment of the definition with the practice of the Security Council by the use of the phrase "armed robbery at sea" in place of "armed robbery against ships". With respect to the French text, a preference was indicated for the term "*brigandage*" in place of "*vol à main armée*".

50. Several delegations noted that the main distinction between piracy and armed robbery at sea was the geographical location of the crime, with the latter occurring within a State's internal waters, archipelagic waters or territorial sea. It was suggested that the expression "other than an act of piracy" be deleted from the definition, as the respective geographical scopes of the crimes were sufficient to distinguish the two. As the geographical location was the main distinction between the crimes, it was proposed to align draft article 3 with the definition of piracy contained in draft article 2. The exclusion of the contiguous zone and EEZ from the definition was questioned, in view of the explanation in paragraph (2) of the commentary that armed robbery at sea concerned waters subject to the jurisdiction of the coastal State.

51. It was noted that, consistent with Part II of the United Nations Convention on the Law of the Sea, the coastal State had the responsibility to exercise jurisdiction over acts of armed robbery at sea. The observation of the Commission that universal jurisdiction did not apply to armed robbery at sea was welcomed. The Commission was urged to reflect in the commentary that, unlike the definition of piracy, the

definition of armed robbery at sea did not serve the purpose of enlarging or limiting the jurisdiction of States.

52. It was noted that the jurisdiction of the coastal State extended to conduct beyond that captured by the definition. Some delegations encouraged the Commission to consider the alignment of the definition with the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. The Commission was also invited to consider the definition contained in article 8, paragraph 1 (b), of the resolution on piracy adopted by the International Law Institute on 30 August 2023, as well as those in relevant regional instruments.[1]

53. Delegations discussed the need to take into account technological developments, including the use of drones, uncrewed aerial vehicles (UAVs) and maritime autonomous vehicles (MAVs) as well as cyberattacks, in considering the definitions contained in draft articles 2 and 3. The clarification that the use of such means could amount to piracy was welcomed. The Commission was requested to reflect examples of relevant practice in the commentaries. Some delegations emphasized the need to proceed with caution in interpreting and applying established definitions with respect to new developments. The view was expressed that it was premature to discuss such developments.

54. Some delegations emphasized the connection between the definitions contained in draft articles 2 and 3 and the way these would be used in future provisions.

3. Future work

55. Delegations looked forward to the continuation of work on the topic. A number of delegations requested clarification of the future direction of the Commission's work. The Commission was encouraged to identify new and emerging issues of common concern and to focus on domestic frameworks and international cooperation. Several delegations emphasized the importance of consistency with existing legal frameworks, including the United Nations Convention on the Law of the Sea, and the Commission was invited to focus on clarifying existing terms and concepts.

56. Delegations invited the Commission to examine various aspects of the topic. Several delegations encouraged the Commission to consider the root causes of piracy and armed robbery at sea. The need to address humanitarian assistance to victims of piracy and armed robbery at sea, especially hostages held for ransom, was underscored. The importance of the subject of transfer of persons suspected of committing piracy was highlighted. Questions relating to the placement of military or privately contracted armed security personnel aboard merchant vessels were also raised.

57. Appreciation was expressed for the intention of the Commission to take the opinions and practices of States into account as it continued its work on the topic, and several delegations encouraged the Commission to continue to do so. The invitation to States to provide information to the Commission was noted. The Commission was also encouraged to consider relevant work of international organizations, including the United Nations and the International Maritime Organization.

4. Final form

58. With respect to the final form of the work of the Commission on the topic, support was voiced for the elaboration of draft articles, and the view was expressed that a new, comprehensive instrument on the topic would be a useful addition to the

[1] International Law Institute, "Piracy, present problems", resolution of 30 August 2023, Session of Angers.

international legal framework. At the same time, it was suggested that draft articles might not be the most appropriate final form and that draft guidelines would be a more appropriate outcome for the topic. While support was expressed for the flexible approach the Commission had taken as to form, several delegations emphasized the need for clarity on the question.

D. Subsidiary means for the determination of rules of international law

1. General comments

59. Delegations generally supported the Commission's work on the topic, and some delegations expressed the view that the consideration of the topic would complete the work of the Commission on the sources of international law.

60. Some delegations advised caution as to the time needed to complete the consideration of the topic and allow States to participate. It was noted that the work of the Commission on the topic might require additional time due to its complexity.

61. A view was expressed that the work on the topic should include practical aspects that could provide guidance to practitioners. Some delegations stated that the Commission should consider in its work the fact that, historically, there had been more study of decisions and teachings coming from certain regions of the world. Several delegations emphasized the importance of consistency with the previous work of the Commission. Various delegations also welcomed the preparation of a multilingual bibliography on the topic. The view was expressed that a shorter commentary to the text would be preferred.

2. Specific comments

62. **Draft conclusion 1** (Scope) was welcomed by delegations as being consistent with Article 38 of the Statute of the International Court of Justice. Several delegations emphasized that subsidiary means played a supplementary role in the determination of rules and were not sources of international law. It was noted that the sources were based on the consent of subjects of international law and that the role of subsidiary means would be to assist with the interpretation and application of such sources. Some delegations called for further elaboration of the meaning of the determination of rules of international law. A suggestion was made to expand on the distinction between interpretation and determination of rules. Some delegations welcomed the multilingual efforts of the Commission in the interpretation of the Statute of the International Court of Justice.

63. In relation to **draft conclusion 2** (Categories of subsidiary means for the determination of rules of international law), a view was expressed that the draft conclusion should indicate explicitly that the determination of rules of international law included the existence and content of such rules, as mentioned in the commentary. With regard to **subparagraph (a)**, while some delegations welcomed the use of the term "decisions", others called for a more detailed explanation in the commentary to indicate what a court or tribunal was and possible differences between both terms. Other delegations considered the term "decisions" broader than the term "judicial decisions" contained in the Statute of the International Court of Justice and that the Commission should be cautious in broadening the scope of the Statute.

64. Some delegations expressed support for the inclusion of advisory opinions, and procedural or interlocutory decisions. The view was expressed that the decisions of *ad hoc* arbitration bodies were not exactly judicial, and that those of treaty monitoring bodies should not be treated as equivalent to decisions of international courts. It was noted that decisions of arbitral tribunals were not mentioned in the commentary, while

they had been referred to by the International Court of Justice. Some delegations considered that the phrase “courts and tribunals” should be read broadly to include entities with functions similar to those of a court adjudicating a dispute, such as those indicated in the commentary and including the Council of the International Civil Aviation Organization. A view was expressed that the category should also include the decisions of quasi-judicial bodies, such as human rights treaty organs and committees created by environmental agreements. Some delegations disagreed with the inclusion of the decisions of human rights treaty bodies, and emphasized the importance of the exercise of a judicial function by the institution and expressed the view that statements and assessments of treaty bodies commenting on legal issues and not exercising judicial powers were not to be considered as decisions. Several delegations emphasized that there was no system of precedent among decisions in international law.

65. Some delegations indicated that caution would be needed regarding the consideration of decisions of national courts. A suggestion was made to take the work of the Commission on the identification of customary international law as a starting point for such distinction and various delegations referred to the need for consistency with the previous work of the Commission in other topics.

66. With regard to **subparagraph (b)**, some delegations expressed the view that what was being referred to was the most highly qualified persons specifically in international law. Some delegations considered that it was important to distinguish the various roles that teachings could play. For example, inspiring legal reasoning or political action that could lead to the creation of rules of international law, which should not be equated with the auxiliary function of teachings under Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

67. The view was expressed that the collective work of bodies of experts would be the only materials to be considered in this category. Others were of the view that the work of authorized bodies or entities created by States could be considered as additional subsidiary means besides teachings. Other delegations opined that the collective work of expert bodies should carry additional weight compared to the views of individual publicists. Some delegations recalled that Article 38, paragraph 1 (d), envisaged the use of teachings as evidence to support the identification or determination of the existence and content of rules of international law, which were independent of the teachings themselves. The view was expressed that references to doctrine should take into account audiovisual materials. It was further suggested that materials beyond written or audiovisual form and created with the assistance of artificial intelligence be taken into account. A view was expressed that further analysis was needed in relation to the possible value of the opinions of judges and the work of Special Rapporteurs on thematic issues and situations.

68. In relation to **subparagraph (c)**, some delegations welcomed the study of possible additional subsidiary means beyond those mentioned in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. Several delegations considered that such provision did not contain an exhaustive list of subsidiary means and expressed openness to the consideration of other subsidiary means. Meanwhile, some delegations stressed that the work of the Commission should be based on the practice of States.

69. Other delegations expressed skepticism concerning the possible existence of additional subsidiary means and considered that the materials referred to in Article 38, paragraph 1 (d), were sufficiently broad. Some delegations expressed the view that the consideration of additional subsidiary means may expand unduly the scope of the topic as delineated in Article 38, paragraph 1 (d). Some delegations were of the view that, if the Commission concluded that there were additional subsidiary means,

it should explain how it arrived at such conclusion and suggested caution to avoid undue expansion of the categories of subsidiary means beyond those currently widely accepted.

70. Some delegations were open to considering resolutions of international organizations as possible subsidiary means. The view was expressed that the Commission should consider carefully whether unilateral acts and resolutions of international organizations could be considered as subsidiary means. Some delegations considered that unilateral acts could not be considered subsidiary means and that they instead constituted a source of international law. The view was expressed that resolutions of international organizations or conferences could be evidence of the elements of the sources of international law but not subsidiary means. Reference was also made to the special nature of resolutions of the Security Council, which could have binding force.

71. Another view was that the Commission should consider the distinction between subsidiary means and evidence of the existence of rules of international law before exploring potential additional subsidiary means. Some delegations noted that the qualifier "generally used" should be evidenced in practice and the emphasis on the role of subsisidary means to assist in the determination of rules of international law was an important reminder of their auxiliary function.

72. With regard to **draft conclusion 3** (General criteria for the assessment of subsidiary means for the determination of rules of international law), several delegations welcomed the proposed criteria and supported the importance of representativeness. It was indicated that the assessment of the degree of representativeness of the materials should take into account geographic, linguistic and gender diversity. Other delegations were of the view that representativeness should include diversity of legal systems and regions.

73. For some delegations, the quality of the reasoning should be given special weight to assess the materials. Other delegations emphasized the importance of the reception of the materials by States and the scope of the mandate of the respective body. A suggestion was made to include an assessment of the objectivity and impartiality of the materials in order to determine their credibility and the weight to be attributed to them.

74. A number of delegations noted that the criteria would be helpful in determining the weight to be given to the various materials and indicated that practical examples of the different criteria would also be of assistance. A view was expressed that some of the criteria mentioned in draft conclusion 3 could be difficult to implement in practice. A suggestion was made to clarify in the commentary to what extent each criterion applied to each category of subsidiary means. The view was expressed that draft conclusion 3 could be better characterized as a guideline rather than codification of existing law.

3. Future work

75. Some delegations suggested that the Commission address the relationship between subsidiary means referred to in Article 38 of the Statute of the International Court of Justice and the supplementary means of interpretation in article 32 of the Vienna Convention on the Law of Treaties.

76. Some delegations expressed appreciation for the cautious approach of the Commission regarding the study of possible additional subsidiary means. The view was expressed that some of the proposed additional subsidiary means could be considered within the existing categories. For example, the work of expert bodies could be considered as publicists. Caution was urged in relation to the use of

resolutions or decisions of international organizations as subsidiary means, due to the number of such materials and their non-binding nature; it was mentioned that they were often adopted with minimal debate and through procedures based on consensus.

77. A view was expressed that the study of the functions of subsidiary means would be valuable and inform the direction of the work of the Commission. It was suggested that a draft conclusion concerning the relationship between subsidiary means and sources of international law could provide further clarity. Some delegations considered that the study of the topic could contribute to preventing fragmentation of international law, and provide guidance in addressing contradictory decisions. Other delegations expressed the view that they did not consider it appropriate to include the study of fragmentation of international law in the topic.

4. Final form

78. Delegations generally expressed support for the Commission's approach of draft conclusions as the output of the topic. A view was expressed that since the nature of draft conclusions was to codify existing rules, the Commission should focus its work on codification based on established practice. Another view was that the Commission should keep an open mind as to the final form of its work, and clarify in the commentaries the status of each specific provision.

E. Sea-level rise in relation to international law

1. General comments

79. Delegations generally commended the Study Group for its dedicated work on the topic. They expressed their appreciation to the Co-Chairs for their work and, in particular, for the additional paper to the first issues paper and for the selected bibliography related to the law of the sea aspects of sea-level rise.

80. Delegations emphasized once more that sea-level rise was an issue of real and global concern, and one of critical importance, affecting even landlocked States. Some delegations stressed that sea-level rise created serious or even existential risks, in particular for small island and low-lying States. It was recalled that the issue of sea-level rise was inherently linked to global climate change. A reference was made to the principle of common but differentiated responsibilities, which was seen as ever more relevant for defining obligations of States related to climate change and sea-level rise. Some delegations expressed the view that sea-level rise was of direct relevance to the question of international peace and security.

81. Some delegations recalled that the requests for advisory opinions addressed to the International Tribunal for the Law of the Sea and to the International Court of Justice were relevant to work of the Commission on the topic. 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 was noted.

82. Several delegations once again referred to the Pacific Islands Forum's 2021 Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise. The 2023 Pacific Islands Forum Regional Conference on Statehood and Protection of Persons Affected by Sea-Level Rise was recalled.

2. Specific comments

83. Delegations generally emphasized the fundamental importance of the United Nations Convention on the Law of the Sea, and the concomitant need to preserve its integrity. It was reiterated that the Study Group should not propose any amendments

to the Convention, and that any solutions or observations that might be put forward by the Study Group should be in line with the existing legal framework of the law of the sea.

84. Several delegations reiterated the importance of predictability and stability of maritime entitlements. Some delegations observed that the contemporary interpretation of the United Nations Convention on the Law of the Sea allowed for the fixing of baselines and outer limits of maritime zones, once these had been duly established. It was recalled that States had not contested the proposed interpretation of the Convention in favour of fixed baselines. Several delegations also reiterated that there was no legal obligation on States to periodically review baselines and outer limits of maritime zones and to update nautical charts and coordinates.

85. It was noted that legal ideas encapsulated in article 7, paragraph 2, of the Convention could serve as an additional basis for the contemporary interpretation of the Convention that allowed for the stabilization of baselines in coastal areas affected by climate-change-induced sea-level rise. It was also recalled that article 76, paragraph 9, of the Convention offered clear signals on permanence and stability of title and rights by requiring States to deposit with the Secretary-General of the United Nations charts and other relevant information "permanently describing the outer limits of its continental shelf".

86. It was noted that, while the fixing of baselines and maritime zones secured legal stability, that solution required increased caution, in particular to ensure full respect for the Convention and to consider all possible legal implications under international law. It was emphasized that any solution aimed at preservation of baselines and maritime zones should be strictly conditional on them being established in accordance with the Convention. A call was made to States, who had not yet done so, to determine and publish their coastal baselines in accordance with international law.

87. At the same time, a view was expressed that current State practice was insufficient to support the existence of a clear rule for either ambulatory or fixed baselines. It was also observed that there was an important difference between legally freezing baselines and not updating them. Some delegations noted that the Commission should not seek to select between permanent and ambulatory approaches with regard to baselines, as they were not mutually exclusive.

88. A view was expressed that the principle of "legal stability" should equally apply to baselines and maritime zones derived from islands and rocks pursuant to article 121 of the Convention, when such natural land features were submerged due to sea-level rise.

89. Some delegations noted that the issue of intangibility of boundaries was of fundamental importance. Several delegations noted that the *uti possidetis* principle was only applicable in cases of State succession and that it was questionable whether it could contribute to a solution to the issue of sea-level rise. At the same time, it was observed that the principle, while not directly or fully applicable, could be used as a source of inspiration.

90. The cautious approach adopted in the additional paper towards the possible applicability of the principle of *rebus sic stantibus* in the sea-level rise context was welcomed. Several delegations considered that sea-level rise did not constitute a fundamental change of circumstances under article 62 of the Vienna Convention on the Law of the Treaties, and noted that article 62, by virtue of its paragraph 2 (a), was not applicable to treaties establishing maritime boundaries. It was noted that the principles of legal stability and certainty of treaties supported an argument against the use of the principle of *rebus sic stantibus* to disturb the maritime boundary treaties resulting from sea-level rise. Several delegations also observed that there existed

major legal and policy reasons to recognize the stability provided by maritime boundaries fixed either by a treaty or by an international adjudication procedure.

91. The importance of the principle that "the land dominates the sea" was emphasized. It was recalled that the United Nations Convention on the Law of the Sea allocated sovereign rights and maritime zones based on the size and form of their adjacent coastal territorial land. At the same time, some delegations considered that the application of the principle that "the land dominates the sea" in the context of sea-level rise was not absolute and freezing of baselines and the outer limits of the other maritime zones would not be inconsistent with the principle.

92. The Co-Chairs' efforts to explore potential applicability of historic waters, title and rights in the sea-level rise context were welcomed. At the same time, the view was expressed that State practice was limited and that the Study Group should exercise caution when exploring the issue. It was observed that historical considerations did not create legal rights, but had primarily evidentiary value, as had been confirmed by the jurisprudence of the International Court of Justice.

93. The importance of equity as a guiding principle for the interpretation and application of the United Nations Convention on the Law of the Sea was emphasized. Some delegations recalled that the principle of equity was enshrined in many international instruments, including in the Convention. It was considered that the application of the principle of equity to sea-level rise to support the preservation of existing maritime entitlements merited further consideration. A request was made to further study how the principle of equity should apply vis-à-vis the implications of climate change induced sea-level rise, so as to ensure the appropriate balance of rights and obligations under the Convention. At the same time, it was noted that there was no self-standing, overarching principle of equity in the Convention, but rather that equity was an integral element of specific rules enshrined therein. It was also observed that there was a link between the principle of equity and the principle of common but differentiated responsibilities.

94. The importance of the principle of permanent sovereignty over natural resources was emphasized and its consideration by the Study Group was welcomed. It was noted that States' sovereign rights over the natural resources in their maritime zones were central to the delicate balance of rights and obligations contained in the United Nations Convention on the Law of the Sea. It was recalled that the question of permanent sovereignty over natural resources was closely intertwined with the question of whether baselines were fixed or ambulatory under the Convention.

95. It was noted that the right of peoples to self-determination was closely linked with sovereignty over natural resources. According to one view, the principle of the right of peoples to self-determination implied that the States formed by those peoples should not lose their right to territorial integrity or permanent sovereignty over their natural resources, including maritime natural resources, as a result of climate change-related sea-level rise.

96. The importance of further exploring the issue of territories submerged owing to sea-level rise, and in particular their *sui generis* legal status, was emphasized. A view was expressed that in situations where a State's territory was completely covered by the sea or rendered uninhabitable, there would be a need to read the United Nations Convention on the Law of the Sea and relevant international instruments in light of such new developments.

97. The additional study by the Co-Chairs and the Study Group on the issue of the safety of navigation in relation to nautical charts was welcomed. Support was voiced for the preliminary conclusion contained in the additional paper that nautical charts were used primarily for navigation and did not reflect baselines.

3. Future work and working methods

98. Delegations indicated that they were looking forward to the Study Group's work on the subtopics of statehood and protection of persons affected by sea-level rise, as well as to the consolidated results of work on the topic in a final substantive report. A view was expressed that the scope of the future work, as described in the Commission's report, was overly broad.

99. Regarding the subtopic of protection of persons affected by sea-level rise, it was recalled that the existing applicable legal frameworks were fragmented and comprised of both soft and hard law elements. A call was made to further examine the concepts of "climate displacement", "climate refugees" and "climate statelessness". The Commission was requested to exercise an increased level of caution when examining these new legal concepts.

100. Regarding the subtopic of statehood, some delegations emphasized the need for caution, in particular when considering the presumption of continuing statehood for States directly affected by sea-level rise. Several delegations reiterated that a State, once established, should remain no matter the physical changes to its territory brought by sea-level rise. It was considered helpful for the Study Group to address the application of the principle "land dominates the sea", and also that of the principle of permanent sovereignty over natural resources.

101. With regard to the working methods, it was noted that, since the United Nations Convention on the Law of the Sea did not have answers to all the questions related to sea-level rise before the Study Group, the Commission should take into consideration all relevant sources of international law. According to another view, sources of law other than the Convention were of no relevance to the topic. The Commission was requested to take a balanced approach to progressive development, as may be necessary in certain aspects, and to work within the confines of existing international legal rules. It was noted that, in line with its mandate, the Commission should distinguish matters of policy from those of international law.

102. It was noted that the Study Group should exercise caution when interpreting the silence of some States, as not necessarily reflecting a specific legal position. It was emphasized that the absence of contention to legal positions expressed by the Study Group or to the preliminary observations of the Co-Chairs in the first and additional issues papers should not be interpreted as tacit agreement with them. Several delegations called for caution when considering regional State practice emerging in the context of sea-level rise, emphasizing that such practice should not lead to the recognition of regional customary law.

103. It was noted that the Commission should be mindful of the legal implications of potential changes to coastlines and maritime zones caused by natural phenomena other than sea-level rise. It was also recalled that, since sea-level rise was a gradual process, the Study Group could structure its discussion more systematically based on different phases of the rise.

4. Final form

104. Several delegations recalled that the Study Group was tasked with a mapping exercise of the questions raised by sea-level rise and that proposing amendments to the United Nations Convention on the Law of the Sea was not advisable. According to one view, the Commission should refrain from proposing any amendments to existing international law, and the adoption of any interpretative declarations on the Convention, or the development of a draft framework convention, would exceed its mandate. Other delegations were open to considering joint interpretive declarations

on the Convention or on other common international legal instruments as a way of addressing the issue of sea-level rise.

105. The view was also expressed that, on the basis of the research already conducted, the Commission could prepare practical guidelines and elaborate a set of legal solutions to practical problems. It was observed that for the subtopics of statehood and of protection of persons affected by sea-level rise, the final report of the Study Group could be the most appropriate outcome, while on questions related to the law of the sea more tangible proposals for legal reform would be preferable. The view was expressed that the proposal to develop a draft framework convention on issues related to sea-level rise, following the example of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, was worth considering.

F. Succession of States in respect of State responsibility

1. General comments

106. A number of delegations underlined the importance of the topic, while other delegations observed that its complexity and the scarcity of State practice in the area posed challenges. Delegations expressed appreciation for the work accomplished by the Commission, expressed their gratitude to the former Special Rapporteur for his contribution, and recalled with appreciation the Secretariat's memorandum concerning information on treaties which may be of relevance to the Commission's future work on the topic.

107. Several delegations took note of the decision of the Commission to establish an open-ended Working Group and congratulated the Chair of the Working Group for his appointment. While several delegations concurred with the Commission's decision not to appoint a new Special Rapporteur at the present stage, the view was expressed that the decision to continue the consideration of the topic in that manner did not reflect the prevailing view of States and that the appointment of a new Special Rapporteur was imperative. Delegations welcomed the intention to re-establish the Working Group at the seventy-fifth session of the Commission with a view to undertaking further reflection and making a recommendation on the way forward for the topic.

2. Future work

108. Several delegations encouraged the Commission to maintain a prudent approach to the topic and reiterated the importance of maintaining consistency with its previous work. The view was expressed that, in matters related to succession of States in respect of State responsibility, priority should be given to agreements between the States concerned, emphasizing the need to maintain the subsidiary nature of the draft guidelines. Some delegations expressed concern that the Commission did not take into consideration certain comments from States on the topic.

3. Final form

109. Regarding the final form of the work on the topic, several delegations voiced support for a final report, while others thought it was necessary to finalize the draft guidelines and submit them to States for comments and observations. The view was expressed that it was still premature to decide on the final form. The importance of ensuring continuity of topics within the Commission regardless of the renewal of its membership was underscored. Several delegations encouraged the Commission to conclude its work on the topic.

G. Other decisions and conclusions of the Commission

1. Future work of the Commission

110. A number of delegations welcomed the inclusion of the topic "Non-legally binding international agreements" in the Commission's programme of work. The view was expressed that the topic did not require the Commission's immediate consideration and, in that regard, a question was raised as to whether it met the criterion for the selection of new topics of "pressing concerns of the international community as a whole". A number of delegations highlighted that the topic dealt with an area of interest to, and had practical significance for, States. It was stated that work on the topic should be based on a thorough examination of the practice of States to produce convincing results. The proliferation of non-legally binding international instruments was noted; several delegations encouraged clarification on the legal nature, effects and consequences of such instruments. The importance of avoiding the fragmentation of international law was emphasized.

111. The Commission was asked to clearly define the scope of the topic and to exercise caution when doing so, given that the topic could touch upon the law of treaties. In that connection, the Commission was encouraged to establish reasonable limitations on the scope of the topic. It was suggested that agreements that brought together various unilateral acts, those covered by domestic law, and arrangements entered into with non-State entities should be excluded, whereas agreements developed informally, and non-legally binding acts entered into by international organizations could be included. It was suggested that the work of the Commission be limited to non-legally binding instruments entered into by States and international organizations. The view was expressed that the Commission should take time to reflect on the scope and utility of the topic in light of the apparent narrowness of the project; if the Commission pursued work on the topic, a report was proposed as a more suitable outcome than draft conclusions or model guidelines. A suggestion was made for the Commission to consider the guidelines on non-binding agreements adopted in 2020 by the Inter-American Juridical Committee of the Organization of American States in its work. Some delegations recalled that the Committee of Legal Advisers on Public International Law of the Council of Europe was discussing the topic. Suggestions were made to change the title of the topic by replacing the word "agreements" with "instruments" or "arrangements"; several delegations emphasized that the term "agreements" should be reserved for legally binding texts.

112. The topics "Extraterritorial jurisdiction" and "Universal criminal jurisdiction" were proposed by some delegations for inclusion in the Commission's programme of work. A suggestion was made for the Commission to focus on topics related to the interplay between international law and new technologies. It was stated that selection of topics for consideration by the Commission should be based on their added value and importance, as well as relevance to the international community as a whole.

2. Programme and working methods of the Commission

113. Delegations generally welcomed the work of the Commission and the new quinquennium, highlighting the important role of the Commission in the progressive development of international law and its codification. The webcasting of plenary meetings and the resulting increased accessibility of the Commission's work were emphasized. The website of the Commission was mentioned in that connection, stressing the importance of keeping it updated and user friendly. Several delegations expressed support for the work of the Planning Group; the work of the Working Group on methods of work was welcomed and the importance of having a guide or a manual on the Commission's methods of work was stressed. The Commission was

encouraged to improve gender parity among the Special Rapporteurs, while a number of delegations welcomed the fact that the current Chair of the seventy-fourth session of the Commission and the Chair during the first part of the seventy-fourth session were women.

114. A number of delegations recalled the upcoming seventy-fifth anniversary of the Commission. The Commission's decision to hold a meeting with legal advisers of Ministries of Foreign Affairs dedicated to the work of the Commission within the context of the commemoration of the seventy-fifth anniversary was welcomed. Several delegations expressed support for the Commission to hold the first part of its seventy-seventh session in New York, emphasizing the importance of enhancing the dialogue between the Commission and the Sixth Committee. Some delegations stressed the importance of cooperation between the Commission and regional international law bodies or commissions.

115. More clarity on the taxonomy of the outcomes of the Commission's work was called for. It was suggested that guidance on the nomenclature of the texts and instruments adopted by the Commission, including the meaning of the output on topics described as "articles", "conclusions", "guidelines" and "principles", would be useful. The Commission was once more encouraged to clearly distinguish in the outcomes of its work between provisions reflecting the codification of existing international law and those reflecting progressive development. It was emphasized that, whether engaging in codification or progressive development of international law, the Commission should take into account State practice and *opinio juris*. Clarification was sought on the different stages of the Commission's work on draft provisions within each topic.

116. A number of delegations reiterated their call for the Commission to continue to take the views and concerns of States into account; the view was expressed that the Commission should take a deliberative and measures approach to its work, including to allow sufficient time to receive and reflect the input of Member States. It was suggested that a mechanism to review the reception by Member States of past products of the Commission could be established. It was stated that the Sixth Committee and the Commission ought to reflect on their working methods and procedures for following up on the work of the Commission when it comes to codification.

117. A number of delegations encouraged the Commission to consider the diversity of legal traditions and to be inclusive in its work, including by taking into account the linguistic diversity of the sources used in the products of the Commission. The importance of multilingualism was stressed. It was suggested that resources available in the trust fund established for assistance to Special Rapporteurs could be used to enhance diversity. Support for the International Law Seminar was voiced, and its holding during the seventy-fourth session of the Commission was welcomed.

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

Immunity of State officials from foreign criminal jurisdiction

1. General comments

118. Delegations expressed their support for the work of the Commission and interest in the topic. Some delegations expressed interest in the consideration of the topic and the future adoption of the draft articles following the consideration of the observations by States.

119. A view was expressed that, taking into account the complexity of the subject, the Commission should not rush its examination, but rather take the time to continue its work in a consensual and paced manner. Another view was expressed that criminal jurisdiction over foreign officials should only be exercised after resorting to consultation and exchange with the concerned Government, through diplomatic or other official channels, with due regard for related rules of international law.

2. Specific comments

120. Some delegations expressed support for draft article 7 as a central provision of the work of the Commission and a contribution to the fight against impunity. For some delegations, the list of exceptions to functional immunity in draft article 7 was incomplete and should contain a reference to the crime of aggression. The view was expressed that the rationale of the Commission when draft article 7 was provisionally adopted in 2017 did not justify the distinction drawn between the crime of aggression and other international crimes when applying functional immunity.

121. The view was expressed that, unlike personal immunity, functional immunity did not have a temporal limit and would prevent the prosecution of the crime of aggression. The view was also expressed that there existed strong reasons for considering the non-applicability of functional immunity to crimes under international law, including the crime of aggression, as a rule of customary international law.

122. Another view expressed was that the inclusion of the crime of aggression in the list in draft article 7 would be consistent with the approach of the Commission. It was recalled that the Commission had rejected the application of immunity to crimes under international law in other topics such as in the Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, the Code of Offences against the Peace and Security of Mankind and the Code of Crimes against Peace and Security of Mankind.

123. The view was expressed that draft article 7 was not supported by consistent State practice and *opinio juris* and did not reflect customary international law.

3. Future work

124. Some delegations considered that the study of the topic by the Commission was important to ensure justice for crimes and the stability of international cooperation.

125. A proposal was made to establish a working group during the seventy-fifth session of the Commission for the consideration of the topic before the conclusion of the second reading. The view was expressed that the work of the Commission during second reading should include an indication in the commentary whether the draft articles reflected a proposal for the progressive development of international law or codification. The view was also expressed that the Commission should reconsider the substance of the draft articles, as adopted on first reading, since the likelihood of the text being adopted by States as an international convention could be affected if the draft articles did not reflect existing customary international law and the practice of States.