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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3548th meeting

Held at the Palais des Nations, Geneva, on Thursday, 22 July 2021, at 3 p.m.

Contents

Present:

Chair:	Mr. Hmoud
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Cooperation with other bodies (agenda item 11)

Statement by the President of the International Court of Justice

Judge Donoghue (President of the International Court of Justice), speaking via video link, said that she was honoured to address the International Law Commission at its seventy-second session. She would like to begin by commemorating Judge James Crawford, a mutual friend of the Court and the Commission who had passed away in May 2021. In line with tradition, the Government of the Netherlands, working with the Court, had organized a State funeral in his honour at the Peace Palace in The Hague, during which uniformed officers had carried the casket, draped with the flag of the United Nations, into the Great Hall of Justice. It had been a sombre and formal affair but also a very moving one. Judge Crawford had been fascinated by what he had described as the "symbiotic" yet "dialectical" relationship that had developed between the Commission and the Court since their establishment, irrespective of the completely different tasks of the two bodies. She was grateful to have the opportunity to contribute to the ongoing dialogue between the two institutions by continuing the long-standing tradition of annual exchanges of views between the President of the Court and the Commission.

Since her predecessor, Judge Abdulqawi Yusuf, had last addressed the Commission in July 2019, the coronavirus disease (COVID-19) pandemic had caused unimaginable suffering, dramatically changing the daily lives of millions of people around the world. The International Court of Justice, like the Commission and virtually all other national and international institutions, had faced unprecedented challenges in pursuing its mandate in the context of the public health crisis. When the pandemic had first hit the Netherlands, in the spring of 2020, the Court had decided to postpone all hearings and meetings, to suspend all official travel, to cancel all visits and to reduce to a minimum the physical presence of staff at the Peace Palace. In the weeks that had followed, it had become increasingly clear that the pandemic was not waning and that the Court needed to adapt its methods of work to the new circumstances. Thus, the Court had started to hold internal meetings via videoconference, with judges joining either from their respective offices at the Peace Palace or from another location, in order to ensure a continued focus on judicial matters. Throughout the crisis, judges had continued to work in both of the official languages of the Court.

Thanks to the initiative and hard work of the former President, the Registrar and their staffs, the Court had also been able to make the transition to hybrid hearings. At those hearings, some judges were physically present in the Great Hall of Justice, while others participated remotely by video link. A small number of representatives of the parties to the proceedings and their counsel were also permitted to attend the hearings in person, while others addressed the Court remotely using dedicated videoconferencing technology. Arrangements had been made for counsel to display demonstrative exhibits on screen, as they would normally do at an in-person hearing. The exhibits were visible to all judges, irrespective of their location, and the Court was rigorous about technical testing by all participants in advance of each hearing.

In 2020, the Court had amended articles 59 and 94 of its rules to clarify that, for health, security or other compelling reasons, the Court could decide that hearings should be held entirely or in part by video link or that the reading of judgments should take place by video link. The Court had also issued guidelines for the parties on the organization of hearings by video link. With those measures in place, over the last year, the Court had delivered six judgments by video link and had held hybrid hearings in five cases.

Since July 2019, the Court had delivered eight judgments in total. On 17 July 2019, it had issued its judgment on the merits in *Jadhav (India v. Pakistan)*. That case had been instituted by India following the arrest and detention of an Indian national, Mr. Jadhav, whom Pakistan had accused of acts of espionage. In April 2017, Mr. Jadhav had been sentenced to death by a military court in Pakistan. India had argued that consular officers had been denied access to Mr. Jadhav, in violation of the 1963 Vienna Convention on Consular Relations. The Court had rejected the counterargument by Pakistan that the right to consular access set out in article 36 of that Convention did not apply in situations where the individual concerned

was suspected of carrying out acts of espionage. The Court had also found that the fact that Pakistan had provided the relevant consular notification some three weeks after Mr. Jadhav's arrest constituted a breach of its obligation to inform the consular post of India "without delay", as required under article 36.

The Court had decided that the appropriate remedy was for Pakistan to provide, by means of its own choosing, effective review and reconsideration of Mr. Jadhav's conviction and sentence. The judgment set out certain essential elements of what would constitute effective review and reconsideration: Pakistan was required to ensure, firstly, that full weight was given to the effect of the violation of the rights set forth in article 36; and, secondly, that the violation and the possible prejudice caused by it were fully examined. The Court had also stated that a continued stay of Mr. Jadhav's execution was an indispensable condition for the effective review and reconsideration of the conviction and sentence.

On 8 November 2019, the Court had delivered a judgment on the preliminary objections raised by the Russian Federation in the case concerning the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*. That case related to alleged breaches of the two conventions by the Russian Federation arising out of events that had occurred in eastern Ukraine and in Crimea. In its judgment, the Court had found that it had jurisdiction, under both conventions, to entertain the claims made by Ukraine and that the application was admissible in relation to the claims made under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The case had proceeded to the merits stage.

On 14 July 2020, the Court had rendered judgments in two closely related cases, the *Appeal Relating to the Jurisdiction of the Council of the International Civil Aviation Organization (ICAO) under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)* and the *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*. The two cases pertained to aviation-related restrictions adopted by several States against Qatar in June 2017. Pursuant to the Convention on International Civil Aviation (Chicago Convention) and the International Air Services Transit Agreement, Qatar had filed two applications with the ICAO Council, claiming that, by adopting those restrictive measures, Bahrain, Egypt, Saudi Arabia and the United Arab Emirates had violated their obligations under the Chicago Convention and that Bahrain, Egypt and the United Arab Emirates had also violated their obligations under the International Air Services Transit Agreement. In both cases, the States that were respondents before the ICAO Council had raised preliminary objections to the jurisdiction of the Council, which the Council had rejected. The respondent States had appealed those decisions in two separate cases submitted to the Court on the basis of article 84 of the Chicago Convention and article II of the International Air Services Transit Agreement. In both cases, the Court had rejected the appeal, confirming that the ICAO Council had jurisdiction to hear the cases and that the applications filed by Qatar before the Council were admissible.

On 11 December 2020, the Court had delivered its judgment on the merits in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*. In that case, the applicant had alleged that a building located on Avenue Foch in Paris was the premises of the Embassy of Equatorial Guinea and was thus entitled to inviolability and other protections set out in article 22 of the 1961 Vienna Convention on Diplomatic Relations. The French authorities had taken certain measures with respect to the property in question in the context of a criminal investigation, including searches of the building and the seizure of certain items. According to Equatorial Guinea, those measures violated the receiving State's obligations under the 1961 Vienna Convention. In its judgment, the Court had concluded that the Convention could not be interpreted so as to allow a sending State unilaterally to impose its choice of mission premises upon the receiving State where the latter had objected to that choice, provided that the objection was communicated in a timely manner and was neither arbitrary nor discriminatory in character. The Court had found that the building on Avenue Foch had never acquired the status of premises of the mission and thus that France had not violated its obligations under article 22 of the Convention.

On 18 December 2020, the Court had delivered its judgment on jurisdiction in the case concerning the *Arbitral Award of 3 October 1899 (Guyana v. Bolivarian Republic of Venezuela)*. Those proceedings had been instituted by Guyana, which had requested the Court, *inter alia*, to confirm the validity of an arbitral award issued on 3 October 1899 and of the land boundary established pursuant to that award. The Venezuelan Government had stated that the Court manifestly lacked jurisdiction and had announced that it would not participate in the proceedings. On 30 June 2020, the Court had held a hearing at which only Guyana had participated. In its judgment, the Court had found that it had jurisdiction to entertain the application filed by Guyana insofar as it concerned the validity of the arbitral award and the related question of the definitive settlement of the land boundary dispute between the two States. The Court had also found that it did not have jurisdiction in respect of certain other claims made by Guyana. The case had proceeded to the merits stage.

On 3 February 2021, the Court had rendered its judgment on the preliminary objections raised by the United States of America in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*. That case had been instituted by the Islamic Republic of Iran against the United States on the basis of the compromissory clause contained in the Treaty of Amity, Economic Relations, and Consular Rights signed between the two States in 1955. The Iranian claims were centred on the decision of the United States, in May 2018, to reimpose a number of restrictive measures on the Islamic Republic of Iran and on Iranian nationals and companies. In its judgment, the Court had found that it had jurisdiction, on the basis of the treaty, to entertain the application filed by the Islamic Republic of Iran and that the application was admissible. The case was thus proceeding to the merits phase.

Lastly, on 4 February 2021, the Court had rendered its judgment on the preliminary objections raised in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*. That case had been initiated by Qatar on the basis of the compromissory clause contained in that Convention. The application concerned a series of measures taken by the United Arab Emirates on or after 5 June 2017, including the severance of diplomatic relations with Qatar, the closure to Qataris of the airspace and seaports of the United Arab Emirates, measures relating to Qatari media and speech in support of Qatar, measures that Qatar characterized as "travel bans" for Qatari nationals and the "expulsion" from the United Arab Emirates of Qatari residents and visitors. Qatar had contended that those measures violated the obligations assumed by the United Arab Emirates under the International Convention on the Elimination of All Forms of Racial Discrimination.

The United Arab Emirates had raised two preliminary objections to the jurisdiction of the Court and the admissibility of the application. A central question for the Court had been whether the term "national origin" in the definition of racial discrimination contained in article 1 (1) of the Convention encompassed current nationality. The Court had concluded that that was not the case and, consequently, that the measures about which Qatar had complained, being based on the current nationality of its citizens, did not fall within the scope of the Convention. The Court had also found that the Convention concerned only racial discrimination against individuals or groups of individuals and thus that the claim by Qatar relating to Qatari media corporations did not fall within the scope of the Convention. With respect to the claim of indirect discrimination made by Qatar, the Court had found that the relevant measures did not entail, either by their purpose or by their effect, racial discrimination within the meaning of article 1 (1) of the Convention. The case had been removed from the Court's docket.

Before concluding her overview of the Court's recent judicial activities, she wished to mention the Court's order of 23 January 2020 on the indication of provisional measures in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*). The case involved alleged violations of the Convention by Myanmar in relation to the members of the Rohingya group in its territory. The application made by the Gambia had also requested a series of provisional measures. In the order, the Court had found, *inter alia*, that it had *prima facie* jurisdiction and that the Gambia had *prima facie* standing to submit to the Court the dispute with Myanmar with a view to ascertaining the latter's alleged failure to comply with its obligations *erga omnes*

partes under the Convention. The Court had unanimously indicated provisional measures, ordering Myanmar, in pursuance of its undertaking in the Convention, to take all measures within its power to prevent the commission of all acts that fell within the scope of article II of the Convention in relation to the members of the Rohingya group in its territory.

Another point of note was that, in the course of 2020, no new cases had been brought before the Court, marking a break from the pattern seen in recent years. She hoped that the break was a temporary phenomenon, triggered by the COVID-19 pandemic. Thus far in 2021, one new case had been submitted to the Court: on 5 March 2021, proceedings had been instituted by way of a special agreement between Gabon and Equatorial Guinea in the case concerning *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*. Also worth mentioning was that, on 24 September 2019, Latvia had deposited a declaration recognizing the jurisdiction of the Court as compulsory, pursuant to Article 36 (2) of the Court's Statute, bringing the total number of such declarations to 74.

She had described recent developments at the Court in a manner that sounded quite positive. The Court had been able to fulfil its mission despite the pandemic, dealing with cases on diverse topics involving parties from various regions of the world. In Geneva, the Commission was also hard at work on its own rich and diverse programme. Did that mean that all was well for those two important institutions of international law? To answer that question, the members of both the Court and the Commission needed to take a step back from their day-to-day work of analysing and drafting legal texts, bearing in mind that calm surface waters could obscure the churning and currents that lay deep below.

The Court and the Commission were part of the post-Second World War architecture of international law and international institutions. Taken together, they embodied two closely linked ideals: that States should settle disputes peacefully in court and that the content of international law should be codified and progressively developed. Of course, international law had not stood still since the 1940s. Both the substantive content of international law and the associated international institutions had evolved, largely in positive ways. Although the peoples of the world who had been living in colonial arrangements in the 1940s had had no meaningful input into the post-Second World War framework, the States in which they lived were now playing an important role in international institutions. Treaties on human rights, the environment and other topics established rules and promoted values that should be cherished and nurtured.

However, as was well known, voices in the international community had recently been raising questions about the values embodied in international law and about the institutions that promoted and applied international law. Some were emphasizing the sovereignty of States and impugning international bureaucrats, while others were seeking to suppress diversity of opinion at home and abroad. A related phenomenon, which affected both the Court and the Commission, was the increasing difficulty of finding broad support for the negotiation and adoption of multilateral treaties. The Commission's draft articles on prevention and punishment of crimes against humanity had come up against that very problem.

As treaty-making became more difficult, the increasing interest shown in other means of developing, enshrining and creating rules of international law was not surprising. There was, of course, scope for both the Court and the Commission to participate in the development of international law. There might also be a view, in some quarters, that the two institutions should be more proactive in what might be considered law-making. Her perspective was that the wider political dynamics suggested quite the opposite. More than ever before, the Court and the Commission could not presume to derive their legitimacy and authority from their pedigree as organs of the United Nations or from the biographies of their distinguished members. They must be prepared to earn the respect of States and other observers on a daily basis, in all the work they performed. One way they could achieve that end was by stating and justifying their conclusions on legal issues clearly and comprehensively, while remaining mindful of the divergent views held by those who read the Court's decisions and the Commission's reports.

The way in which the legal texts issued by the Court and the Commission were received by their various audiences could be compared to a situation where a student received

only partial credit for a correct answer on a mathematics test because of a failure to indicate the steps taken to reach that answer. Points were deducted if students did not "show their work". The members of the Court and the Commission should keep that admonition in mind. In that context, she wished to mention some examples of specific situations in which they could do better. The first related to pronouncements regarding the existence and content of customary international law.

The Commission had addressed that issue in its conclusions on identification of customary international law, adopted in 2018. In those conclusions, the Commission recalled the two-element test to be used to determine the existence and content of a rule of customary international law. First, pursuant to conclusion 2, it was "necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)". Conclusion 3 then set forth the different categories of evidence relevant for the purpose of ascertaining the existence and content of a rule of customary international law and the means of assessing that evidence. The conclusions gave the impression that the Commission expected either a court, a State or a scholar to set forth reasons grounded in both elements before making a pronouncement regarding the existence or content of customary international law, and sometimes the reasoning of the Court or the commentaries of the Commission did exactly that. However, at other times, a judgment of the Court or a report of the Commission claimed that a particular rule was part of customary international law on the basis of little or no supporting reasoning. That practice was ill-advised. While an assertion by the Commission or the Court as to the existence and content of customary international law might be seen as being authoritative *per se* by some, especially those who welcomed the content of the assertion, an unsubstantiated conclusion on the existence or content of a rule could easily be criticized and might detract from the overall credibility of the Court or the Commission.

The two institutions should also be cautious about placing too much weight on cross-citation, by which she meant the Court's citation of the Commission's outputs as authoritative and the Commission's frequent citation of the Court as an authority. Cross-citation as a means of supporting a particular proposition was convenient and efficient, and could also be considered to reflect the respect that each institution had for the other, but the two institutions should not be overly reliant on that method of reasoning. They had a duty to the States Members of the United Nations and other readers to set out convincing substantive reasons for their conclusions that went beyond simply observing that the other institution had stated a concordant view. If the two institutions offered only meagre reasons for their conclusions on the existence and content of customary international law and relied excessively on cross-citation, they ran the risk of being criticized for establishing what Judge James Crawford had once described as "customary international law by stealth". The substance of the institutions' specific conclusions and the overall authority of their pronouncements could be diminished as a result.

In her former role as a foreign ministry lawyer and in her current position as a judge, she had benefited enormously from the Commission's work on many topics. Accordingly, she did not wish to leave the impression that she had intended to criticize the Commission. Her musings had touched on the work of both the Court and the Commission, and her aim was simply to put forward some ideas in the hope of stimulating further reflection. At the same time, she was open to learning from the perspectives of others.

Ms. Galvão Teles, noting that, in the context of the pandemic, the Commission had been grappling with the same problems as the Court and had also been reflecting on how best to continue to pursue its mandate in the current circumstances, said that she would be interested to hear what impact, whether positive or negative, the measures adopted were perceived to have had on the fulfilment of the Court's judicial functions and the representation of parties to proceedings. As circumstances returned to normal, she wondered whether any of the changes introduced were likely to become permanent and whether any other changes to the Court's long-standing methods of work were being considered.

Mr. Vázquez-Bermúdez, thanking Judge Donoghue for her very thoughtful presentation, said that, in her long experience in international law, and especially during her time as a judge of the International Court of Justice, she had probably come across areas of international law that were either unclear or insufficiently developed. He wondered, therefore, whether she could identify any specific topics or areas in respect of which

clarification or development would, in her view, be particularly beneficial for the international community and which the Commission might therefore consider for its future programme of work.

Judge Donoghue (President of the International Court of Justice) said that, as a judge, she had been surprised by how well the measures taken to allow the Court to continue its activities during the COVID-19 pandemic had worked. Since the beginning of the pandemic, she had participated in the Court's hearings both remotely, prior to her election as President, and from the Great Hall of Justice, following her election, and had found the two experiences to be comparable. During the Court's deliberations, she had found that she could "read the room" fairly well, as she could see the faces of all her colleagues on screen at the same time. In that regard, the Court's experience had been made easier by the fact that it had only 15 members. Of course, there were fewer opportunities for informal interactions, which had previously been a useful way of resolving differences.

In her view, the Court was less likely than certain other institutions to continue to use virtual participation technologies after the pandemic had subsided. In arbitration, the use of those technologies had been deemed a success and, going forward, there would be some interest in using them more frequently, for cost-saving reasons. However, she would be surprised if the Court ultimately retained the current practices. She believed that, for various reasons, the parties would prefer to be present, as agents and counsel, in the Great Hall of Justice. For the Court's internal work, the intention was to return to in-person hearings, without the possibility of virtual participation, as soon as conditions allowed.

With regard to matters that would benefit from clarification, when she read the Commission's outputs, she liked to see a clear distinction between propositions that were viewed as stating existing law and those that were viewed as being more aspirational in nature. She was aware that the question of where to draw that distinction was a source of constant debate. Nevertheless, as the Court was an increasingly important audience for the Commission, it would be useful if the Commission could indicate how it viewed its propositions in relation to that distinction. If there were divergent views among the members of the Commission in that regard, it would also be useful if that fact could be noted in the commentary. The Court often sought to avoid reflecting the differences among its judges by focusing on a common line of reasoning, but the Commission had greater freedom, as it was not trying to answer a specific question posed by a party.

The various topics that the Commission was currently considering seemed to her to be worthwhile, and she looked forward to seeing how they developed.

Mr. Murphy said that, earlier that week, the Commission had concluded a robust debate on the topic of general principles of law. Although general principles of law had been recognized as a source of international law since at least 1920, when the Statute of the Permanent Court of International Justice had been adopted, there was still considerable uncertainty as to their exact nature and scope some 100 years later. The members of the Commission would be interested to hear Judge Donoghue's thoughts on that source of international law in the light of her years of experience at the Court.

Mr. Valencia-Ospina, speaking via video link, said that, among United Nations bodies, the Court had shown itself to be a leader in the use of videoconferencing technologies. Such technologies had proved to be an effective mechanism for enabling the Court and the Commission to continue to fulfil their respective mandates during the pandemic.

The Court and the Commission were two kindred institutions, each representing one of the two sides of international law: the Commission's task was to draft texts aimed at its progressive development and codification, and the Court's was to interpret and apply it through judicial pronouncements. The mutually enriching nature of the interactions between the two institutions had been widely recognized. Such interactions played a valuable role in strengthening international law, as Judge Donoghue had recognized by making specific reference to articles 8 and 9 of the Commission's articles on prevention of transboundary harm from hazardous activities in her separate opinion on the Court's judgment of 16 December 2015 in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*.

Judge Donoghue also personified a significant feature that favourably distinguished the Court from the Commission. The Court's 15 current members included 3 women, and, since its establishment, 2 women had been elected President of the Court. In addition, 5 women had acted as judges *ad hoc* in five different cases since 1985. By contrast, the 229 current and former members of the Commission included only 7 women. Judge Xue, who was currently serving as a member of the Court, was the only woman ever to have been elected Chair of the Commission. As the Commission's parent organ, the General Assembly would do well to follow the example set by the Court in making progress towards the achievement of the imperative United Nations goal of the equal representation of women. The four women jurists who were currently serving as members of the Commission were leaving a signal imprint on the work of the current quinquennium through the guiding role that they were playing either as Special Rapporteurs or as Co-Chairs of the Study Group on sea-level rise in relation to international law.

Mr. Tladi said that Judge Donoghue's comments on the importance of rigour in the context of the identification of customary international law seemed to point to a certain tension. The two-element approach to the identification of customary international law was based on one of the Commission's conclusions on identification of customary international law, which, in turn, had been based wholly on the Court's judgments rather than on State practice. However, in its judgments, the Court did not always clearly set out its reasoning, as Judge Donoghue had noted. Consequently, it could be argued that the two-element approach should not be accepted. The approach to the identification of customary international law that prevailed in practice was in fact much less clearly defined.

Judge Donoghue (President of the International Court of Justice) said her impression was that, whenever parties raised general principles of law in cases before the Court, they did so hesitantly, and it became immediately apparent that it was not clear what they understood by that term. During debates about its meaning, she usually wondered why it had not been developed more fully. The fact that the topic of general principles of law had sparked a robust debate in the Commission would seem to suggest that it was ripe for consideration, provided that it was considered with an awareness of the uncertainty surrounding it. Even after reading about general principles of law in various scholarly sources, she had not felt fully enlightened.

The question of gender representation at the Court was a complex one. On the one hand, her unvarnished opinion was that the national groups that put forward nominations in the Permanent Court of Arbitration and the States that voted in the General Assembly and the Security Council should be ashamed of themselves. It was astonishing that so few women were nominated by national groups to serve as members of the Court. Many women had distinguished themselves as legal scholars or as practising international lawyers in senior positions in ministries of foreign affairs. She would urge any members of the Commission who were members of a national group to nominate women. On the other hand, however, she knew from her experience of campaigning that some Member States were interested in supporting women candidates solely because they were women. Member States should look beyond the easily observable characteristics of candidates, such as their gender, age and nationality, to consider their substantive qualifications.

With regard to the two-element test for the identification of customary international law, at a certain point in any discussion of international law, one tended to cycle back to first principles. She had thought and read extensively about the formation and existence of customary international law, including the various alternatives to the two-element test that were sometimes put forward. It was her strong belief that the two-element test involved more than a mechanical exercise of seeking the views of States and trying to take stock of their practice. Whenever that approach to the two-element test was taken, the conclusion almost always drawn was that there was no customary international law rule, since evidence of State practice and *opinio juris* was so difficult to find. While there was no perfect solution, it was important to provide clear reasoning when determining the existence and content of a rule of customary international law.

Mr. Grossman Guiloff said that the Commission certainly needed to demonstrate the legitimacy of its pronouncements, particularly when it was working on the codification and progressive development not of abstract, primary rules but of secondary ones that established direct obligations in the context of topics that were the subject of ongoing debate and

negotiation at the international level. The topics of sea-level rise and the protection of the atmosphere were two examples. That need was especially acute when there was no consensus in the Commission as to which rules reflected customary international law and which constituted progressive development. In that context, he would be interested to hear whether, in Judge Donoghue's opinion, the Commission should take a more granular and transparent approach to the presentation of its pronouncements, for example by setting out the majority and minority views among its members, while clearly indicating which views enjoyed the greatest degree of consensus.

Mr. Rajput said that the Court's jurisprudence formed an important basis for the Commission's work. In that connection, he would be interested to hear how the Commission's output was perceived by the Court as a whole or by individual judges. Over the previous decade or two, the nature of the Commission's outputs had changed substantially: while the Commission had traditionally produced draft articles based on what might be described as classical State practice, it was now venturing into the area of clarification in the form of draft conclusions, draft guidelines and draft principles.

Judge Donoghue (President of the International Court of Justice) said that, with regard to the question of how the Commission should present its pronouncements when there were differing views among its members, she could understand the difficulties that the Commission was facing. When she had been involved in treaty negotiations, she had made great efforts to draft in a manner that achieved consensus. Since becoming a judge, she had learned that provisions drafted in such a manner had often been tolerated precisely because they had been understood in different ways by different participants. Those were the provisions that tended to end up before the Court. It was dangerous for an institution that was striving to provide clarity to draft with only consensus in mind, since that created an incentive to gloss over differences through clever wording. Nevertheless, the Court sometimes had to take that approach to drafting. It was trying to solve specific problems and, at times, wanted to reach a particular result even though the judges could not agree on the reasoning to be used to reach it. Imprecision could thus serve as a useful tool.

As a consumer of the Commission's outputs, she preferred the Commission to be more transparent about any such difficulties. In general, she was more interested in understanding the reasons behind particular views, so that she could draw her own conclusions, than in knowing which views had been supported by the majority and which by a minority. That said, in cases where a minority view was given undue weight in the output because of the insistence with which it had been advocated, it would be useful if the preponderant view among the members could be signalled to readers.

Both the Court and the parties who came before it paid close attention to the Commission's work. In trying to convince the Court that they were correct on propositions of law, parties looked at a wide range of sources, including the Commission's outputs, to find evidence to support their arguments. Members of the Court who had served on the Commission were often particularly attuned to its outputs but were not always well disposed towards every proposition that emerged from it. In general, all the judges of the Court with whom she had served viewed the Commission's work as very important and valuable. Although the Court did not cite scholarship in its judgments, it did cite the Commission's outputs, which, because of how the Commission was comprised, the role that it played in the United Nations system, the diversity of its membership and the deliberative and collaborative methodology that it followed, enjoyed a different status, despite their apparent similarities to other types of analyses.

The meeting rose at 4.15 p.m.