A/CN.4/SER.A/2016

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2016

Volume I

Summary records of the meetings of the sixty-eighth session 2 May–10 June and 4 July–12 August 2016

UNITED NATIONS

A/CN.4/SER.A/2016

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

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UNITED NATIONS
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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2016*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the sixty-eighth session of the Commission (A/CN.4/SR.3291–A/CN.4/SR.3347), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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Second Vice-Chairperson: Mr. Gilberto Vergne SABOIA

Chairperson of the Drafting Committee: Mr. Pavel ŠTURMA

Rapporteur: Mr. Ki Gab PARK

Mr. Miguel de Serpa Soares, Under-Secretary-General of Legal Affairs, United Nations Legal Counsel, represented the Secretary-General. Mr. Huw Llewellyn, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General.

AGENDA

The Commission adopted the following agenda at its 3291st meeting, held on 2 May 2016:

1. Organization of the work of the session.
2. Protection of persons in the event of disasters
3. Immunity of State officials from foreign criminal jurisdiction.
4. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
5. Provisional application of treaties.
6. Identification of customary international law.
7. Protection of the environment in relation to armed conflicts.
8. Protection of the atmosphere.
9. Crimes against humanity.
10. *Jus cogens*.
11. Programme, procedures and working methods of the Commission and its documentation.
12. Date and place of the sixty-ninth session.
13. Cooperation with other bodies.
14. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
CAHDI	Committee of Legal Advisers on Public International Law
IAJC	Inter-American Juridical Committee
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
IFRC	International Federation of Red Cross and Red Crescent Societies
ILO	International Labour Organization
ISIL	Islamic State in Iraq and the Levant
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OCHA	Office for the Coordination of Humanitarian Affairs
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WTO	World Trade Organization

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ECHR	European Court of Human Rights, *Reports of Judgments and Decisions.* All judgments and decisions of the Court, including those not published in the official series, can be consulted in the database of the Court (HUDOC), available from the Court's website (www.echr.coe.int).
I.C.J. Reports	International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders.* All judgments, advisory opinions and orders of the Court are available from the Court's website (www.icj-cij.org).
ILM	*International Legal Materials*
ILR	*International Law Reports*
ITLOS Reports	International Tribunal for the Law of the Sea, *Reports of Judgments, Advisory Opinions and Orders.* Case law is available from the ITLOS website (www.itlos.org).
P.C.I.J., Series A/B	Permanent Court of International Justice, *Collection of Judgments, Orders and Advisory Opinions* (from 1931)
UNRIAA	United Nations, *Reports of International Arbitral Awards*

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In the present volume, "International Tribunal for the Former Yugoslavia" refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and "International Tribunal for Rwanda" refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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Information on uniform resource locators and links to websites contained in the present publication are provided for the convenience of the reader and are correct at the time of issuance. The United Nations takes no responsibility for the continued accuracy of that information or for the content of any external website.

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The Internet address of the International Law Commission is **https://legal.un.org/ilc**.

CASES CITED IN THE PRESENT VOLUME

Case	*Nature and source of the decision*
2 BvR 1506/03	Order of the Second Senate of 5 November 2003, German Federal Constitutional Court.
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	Order of 11 April 2016, *I.C.J. Reports 2016*, p. 222.
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Barbie	Case No. 85-95166, Decision of 20 December 1985, Criminal Chamber, Court of Cassation of France, ILR, vol. 78 (1988), p. 125.
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Barrios Altos v. *Peru*	Merits, Judgment of 14 March 2001, Inter-American Court of Human Rights, Series C, No. 75.
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American Treaty on Pacific Settlement (Pact of Bogotá) (Bogotá, 30 April 1948)	United Nations, *Treaty Series*, vol. 30, No. 449, p. 83.
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Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	United Nations, *Treaty Series*, vol. 2515, No. 44910, p. 3.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	*Ibid*., vol. 2716, No. 48088, p. 3.
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007)	*Ibid*., vol. 2680, No. 47612, p. 249.
Protocol on the Statute of the African Court of Justice and Human Rights (Sharm El-Sheikh, 1 July 2008)	Available from the website of the African Union: https://au.int, *Treaties*.
Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014)	*Ibid*.
Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 11 May 2011)	Council of Europe, *Treaty Series*, No. 210.

International trade and development

General Agreement on Tariffs and Trade (GATT) (Geneva, 30 October 1947)	United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.
Inter-American Convention on the Law Applicable to International Contracts (Mexico, 17 March 1994)	Organization of American States, *Treaty Series*, No. 78.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	United Nations, *Treaty Series*, vols. 1867–1869, No. 31874.

Transport and communications

Intergovernmental Agreement on Dry Ports (Bangkok, 1 May 2013)	Available from the United Nations Treaty Collection website: https://treaties.un.org, *Status of Treaties*, chap. XI.E.3.

Civil aviation

Convention for the suppression of unlawful seizure of aircraft (The Hague, 16 December 1970)	United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105.

	Source
Penal matters	
Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (New York, 26 November 1968)	United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	*Ibid.*, vol. 1035, No. 15410, p. 167.
European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 25 January 1974)	*Ibid.*, vol. 2245, No. 39987, p. 307.
International Convention against the taking of hostages (New York, 17 December 1979)	*Ibid.*, vol. 1316, No. 21931, p. 205.
Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994)	*Ibid.*, vol. 2051, No. 35457, p. 363.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid.*, vol. 2187, No. 38544, p. 3.
Amendment to article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010)	*Ibid.*, vol. 2868, p. 197.
Amendments on the crime of aggression to the Rome Statute of the International Criminal Court (Kampala, 11 June 2010)	*Ibid.*, vol. 2922, p. 199.
United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	*Ibid.*, vol. 2225, No. 39574, p. 209.
Convention on cybercrime (Budapest, 23 November 2001)	*Ibid.*, vol. 2296, No. 40916, p. 167.
United Nations Convention against Corruption (New York, 31 October 2003)	*Ibid.*, vol. 2349, No. 42146, p. 41.
Commodities	
International Coffee Agreement, 1962 (New York, 28 September 1962)	United Nations, *Treaty Series*, vol. 469, No. 6791, p. 169.
International Rubber Agreement, 1979 (Geneva, 6 October 1979)	*Ibid.*, vol. 1201, No. 19184, p. 191.
International Cocoa Agreement, 1980 (Geneva, 19 November 1980)	*Ibid.*, vol. 1245, No. 20313, p. 221.
Wheat Trade Convention, 1986 (London, 14 March 1986)	*Ibid.*, vol. 1429, No. 24237, p. 71.
International Tropical Timber Agreement, 1994 (Geneva, 26 January 1994)	*Ibid.*, vol. 1955, No. 33484, p. 81.
International Natural Rubber Agreement, 1994 (Geneva, 17 February 1995)	*Ibid.*, vol. 1964, No. 33546, p. 3.
International Agreement on Olive Oil and Table Olives, 2015 (Geneva, 9 October 2015)	Available from the United Nations Treaty Collection website: https://treaties .un.org, *Status of Treaties*, chap. XIX.
Fight against international terrorism	
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	*Ibid.*, vol. 2178, No. 38349, p. 197.
Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005)	*Ibid.*, vol. 2488, No. 44655, p. 129.
Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Riga, 22 October 2015)	Council of Europe, *European Treaty Series*, No. 217. See also United Nations, *Treaty Series*, No. 44655 (volume number to be determined). Available from: https://treaties.un.org.
Law of the sea	
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995)	*Ibid.*, vol. 2167, No. 37924, p. 3.

	Source
Law of treaties	
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
Vienna Convention on succession of States in respect of treaties (Vienna, 23 August 1978)	*Ibid*., vol. 1946, No. 33356, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15, published *in Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organization, Vienna, 18 February–21 March 1986*, vol. II (United Nations publication, Sales No. E.94.V.5), p. 93.
Assistance	
Agreement establishing the Caribbean Disaster Emergency Management Agency (Port of Spain, 26 February 1991)	United Nations, *Treaty Series*, vol. 2256, No. 40212, p. 53.
Telecommunications	
Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998)	United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 5.
Law applicable in armed conflict	
Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land: Convention VIII relative to the Laying of Automatic Submarine Contact Mines (The Hague, 18 October 1907)	J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915.
Agreement for the prosecution and punishment of the major war criminals of the European Axis, Charter of the International Military Tribunal (London, 8 August 1945) and Protocol rectifying discrepancy in text of Charter (Berlin, 6 October 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279. For the text of the Berlin Protocol, see *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945–1 October 1946*, vol. 1, Nuremberg, 1947, p. 17.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	United Nations, *Treaty Series*, vol. 75, Nos. 970–973, p. 31.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I) (Geneva, 12 August 1949)	*Ibid*., No. 970, p. 31.
Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949)	*Ibid*., No. 973, p. 287.
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	*Ibid*., vol. 1125, No. 17512, p. 3.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid*., No. 17513, p. 609.
Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954)	*Ibid*., vol. 249, No. 3511, p. 215.
Disarmament	
Treaty on the Non-Proliferation of Nuclear Weapons (London, Moscow and Washington, 1 July 1968)	United Nations, *Treaty Series*, vol. 729, No. 10485, p. 161.
Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or have indiscriminate effects (Geneva, 10 October 1980)	*Ibid.*, vol. 1342, No. 22495, p. 137.
Additional Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, annexed to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or have indiscriminate effects (Geneva, 3 May 1996)	*Ibid.*, vol. 2048, No. 22495, p. 93.

	Source
Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Geneva, 28 November 2003)	*Ibid.*, vol. 2399, No. 22495, p. 100.
Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (opened for signature in Paris on 13 January 1993)	*Ibid.*, vol. 1974, No. 33757, p. 45.
Arms Trade Treaty (New York, 2 April 2013)	Adopted by the General Assembly in its resolution 67/234 B of 2 April 2013. For the text of the Treaty, see A/CONF.17/2013/L.3, annex.

Environment

Convention on wetlands of international importance especially as waterfowl habitat (Ramsar, 2 February 1971)	United Nations, *Treaty Series*, vol. 996, No. 14583, p. 245.
Convention on the prevention of marine pollution by dumping of wastes and other matter (London, Mexico City, Moscow and Washington, D.C., 29 December 1972)	*Ibid.*, vol. 1046, No. 15749, p. 120.
1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, 7 November 1996)	ILM, vol. 36 (1997), p. 7.
Convention on the prohibition of military or any other hostile use of environmental modification techniques (New York, 10 December 1976)	United Nations, *Treaty Series*, vol. 1108, No. 17119, p. 151.
Convention on long-range transboundary air pollution (Geneva, 13 November 1979)	*Ibid.*, vol. 1302, No. 21623, p. 217.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985)	*Ibid.*, vol. 1513, No. 26164, p. 293.
Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	*Ibid.*, vol. 1522, No. 26369, p. 3.
Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 22 March 1989)	*Ibid.*, vol. 1673, No. 28911, p. 57.
Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako, 30 January 1991)	*Ibid.*, vol. 2101, No. 36508, p. 177.
Convention on environmental impact assessment in a transboundary context (Espoo (Finland), 25 February 1991)	*Ibid.*, vol. 1989, No. 34028, p. 309. For the amendment of 27 February 2001, see the United Nations Treaty Collection website: https://treaties.un.org, Status of Treaties, chap. XXVII.
Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kiev, 21 May 2003)	United Nations, *Treaty Series*, vol. 2685, No. 34028, p. 140.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	*Ibid.*, vol. 1771, No. 30822, p. 107.
Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997)	*Ibid.*, vol. 2303, p. 162.
Convention on biological diversity (Rio de Janeiro, 5 June 1992)	*Ibid.*, vol. 1760, No. 30619, p. 79.
Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa (Paris, 14 October 1994)	*Ibid.*, vol. 1954, No. 33480, p. 3.
Convention on the Law of the Non-Navigational Uses of International Watercourses (New York, 21 May 1997)	*Ibid.*, vol. 2999, No. 52106, p. 77.
Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus (Denmark)), 25 June 1998)	*Ibid.*, vol. 2161, No. 37770, p. 447.
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998)	*Ibid.*, vol. 2244, No. 39973, p. 337.
European Landscape Convention (Florence, 20 October 2000)	*Ibid.*, vol. 2296, No. 40915, p. 141.
African Convention on the Conservation of Nature and Natural Resources (Maputo, 11 July 2003)	W. E. Burhenne (ed.), *International Environmental Law—Multilateral Treaties*, vol. IX, The Hague, Kluwer Law International, p. 52.

	Source
Minamata Convention on Mercury (Kumamoto, 10 October 2013)	United Nations, *Treaty Series*, No. 54669, (volume number to be determined). Available from: https://treaties.un.org.
Paris Agreement under the United Nations Framework Convention on Climate Change (Paris, 12 December 2015)	Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, addendum: decisions adopted by the Conference of the Parties (FCCC/CP/2015/10/Add.1), decision 1/CP.21, annex. See also United Nations, *Treaty Series*, No. 54113 (volume number to be determined). Available from: https://treaties.un.org.

Tax matters

Convention on Mutual Administrative Assistance in Tax Matters (Strasbourg, 25 January 1988)	United Nations, *Treaty Series*, vol. 1966, No. 33610, p. 215.

General international law

Convention on Private International Law (Havana, 20 February 1928)	League of Nations, *Treaty Series*, vol. LXXXVI, No. 1950, p. 111.
Charter of the Organization of American States (Bogotá, 30 April 1948)	United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3.
Statute of the Council of Europe (London, 5 May 1949)	*Ibid.*, vol. 87, No. 1168, p. 103.
Convention for the protection of the world cultural and natural heritage (Paris, 16 November 1972)	*Ibid*., vol. 1037, No. 15511, p. 151.
The Energy Charter Treaty (Lisbon, 17 December 1994)	*Ibid.*, vol. 2080, No. 36116, p. 95.
Constitutive Act of the African Union (Lomé, 11 July 2000)	*Ibid.*, vol. 2158, No. 37733, p. 3.
Inter-American Democratic Charter (Lima, 11 September 2001)	OAS, *Official Documents*, OEA/Ser.G/CP-1. See also ILM, vol. 40, No. 5 (September 2001), p. 1289.
Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events (Saint-Denis (France), 3 July 2016)	Council of Europe, *Treaty Series*, No. 218. See also United Nations, *Treaty Series*, No. 54826 (volume number to be determined). Available from: https://treaties.un.org.

CHECKLIST OF DOCUMENTS OF THE SIXTY-EIGHTH SESSION

Symbol	*Title*	*Observations and references*
A/CN.4/679 and Add.1	Long-term programme of work: Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments—Working paper prepared by the Secretariat	Reproduced in *Yearbook ... 2016*, vol. II (Part One).
A/CN.4/688	Provisional agenda for the sixty-eighth session	Available from the Commission's website, documents of the sixty-eighth session. The final agenda appears at p. ix above.
A/CN.4/689	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session, prepared by the Secretariat	Available from the Commission's website, documents of the sixty-eighth session.
A/CN.4/690	Second report on crimes against humanity, by Mr. Sean D. Murphy, Special Rapporteur	Reproduced in *Yearbook ... 2016*, vol. II (Part One).
A/CN.4/691	Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law—Memorandum by the Secretariat	*Idem*.
A/CN.4/692	Third report on the protection of the atmosphere, by Mr. Shinya Murase, Special Rapporteur	*Idem*.
A/CN.4/693	First report on *jus cogens*, by Mr. Dire D. Tladi, Special Rapporteur	*Idem*.
A/CN.4/694	Fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, by Mr. Georg Nolte, Special Rapporteur	*Idem*.
A/CN.4/695 and Add.1	Fourth report on identification of customary international law, by Sir Michael Wood, Special Rapporteur	*Idem*.
A/CN.4/696 and Add.1	Protection of persons in the event of disasters: Comments and observations received from Governments and international organizations	*Idem*.
A/CN.4/697	Eighth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	*Idem*.
A/CN.4/698	Crimes against humanity: Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission—Memorandum by the Secretariat	*Idem*.
A/CN.4/699 and Add.1	Fourth report on the provisional application of treaties, by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur	*Idem*.
A/CN.4/700	Third report on the protection of the environment in relation to armed conflicts, by Ms. Marie G. Jacobsson, Special Rapporteur	*Idem*.
A/CN.4/701	Fifth report on the immunity of State officials from foreign criminal jurisdiction, by Ms. Concepción Escobar Hernández, Special Rapporteur	*Idem*.
A/CN.4/L.870/Rev.1	Protection of the environment in relation to armed conflict: Text of the draft principles provisionally adopted in 2015 and technically revised and renumbered during the present session by the Drafting Committee	Available from the Commission's website, documents of the sixty-eighth session.
A/CN.4/L.871	Protection of persons in the event of disasters: Titles and texts of the preamble and draft articles 1 to 18 of the draft articles on the Protection of persons in the event of disasters adopted, on second reading, by the Drafting Committee	*Idem*.
A/CN.4/L.872	Identification of customary international law: Text of the draft conclusions provisionally adopted by the Drafting Committee	*Idem*.
A/CN.4/L.873 and Add.1	Crimes against humanity: Text of draft articles 5, 6, 7, 8, 9 and 10 provisionally adopted by the Drafting Committee on 25, 26, 30 and 31 May and 1 and 2 June 2016, and of draft article 5, paragraph (*f*), provisionally adopted on 7 July 2016	*Idem*.

Symbol	Title	Observations and references
A/CN.4/L.874	Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading	*Idem*.
A/CN.4/L.875	Protection of the atmosphere: Texts and titles of draft guidelines 3, 4, 5, 6 and 7, together with a preambular paragraph, provisionally adopted by the Drafting Committee on 7, 8 and 9 June 2016	*Idem*.
A/CN.4/L.876	Protection of the environment in relation to armed conflict: Text of the draft principles provisionally adopted during the present session by the Drafting Committee	*Idem*.
A/CN.4/L.877	Provisional application of treaties: Text of the draft guidelines provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions	*Idem*.
A/CN.4/L.878	Report of the Planning Group	*Idem*.
A/CN.4/L.879	Draft report of the International Law Commission on the work of its sixty-eighth session: chapter I (Introduction)	*Idem.* See adopted text in *Official Records of the General Assembly, seventy-first session, Supplement No. 10* (A/71/10). The final text appears in *Yearbook ... 2016*, vol. II (Part Two).
A/CN.4/L.880	*Idem*: chapter II (Summary of the work of the Commission at its sixty-eighth session)	*Idem*.
A/CN.4/L.881	*Idem*: chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem*.
A/CN.4/L.882 and Add.1	*Idem*: chapter IV (Protection of persons in the event of disasters)	*Idem*.
A/CN.4/L.883 and Add.1	*Idem*: chapter V (Identification of customary international law)	*Idem*.
A/CN.4/L.884 and Add.1–2	*Idem*: chapter VI (Subsequent agreements and subsequent practice in relation to the interpretation of treaties)	*Idem*.
A/CN.4/L.885 and Add.1–2	*Idem*: chapter VII (Crimes against humanity)	*Idem*.
A/CN.4/L.886 and Add.1	*Idem*: chapter VIII (Protection of the atmosphere)	*Idem*.
A/CN.4/L.887	*Idem*: chapter IX (*Jus cogens*)	*Idem*.
A/CN.4/L.888 and Add.1	*Idem*: chapter X (Protection of the environment in relation to armed conflicts)	*Idem*.
A/CN.4/L.889 and Add.1–3	*Idem*: chapter XI (Immunity of State officials from foreign criminal jurisdiction)	*Idem*.
A/CN.4/L.890	*Idem*: chapter XII (Provisional application of treaties)	*Idem*.
A/CN.4/L.891	*Idem*: chapter XIII (Other decisions and conclusions of the Commission)	*Idem*.
A/CN.4/SR.3291–A/CN.4/SR.3347	Provisional summary records of the 3291th to 3347th meetings	*Idem.* The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-EIGHTH SESSION

Held at Geneva from 2 May to 10 June 2016

3291st MEETING

Monday, 2 May 2016, at 3.10 p.m.

Outgoing Chairperson: Mr. Narinder SINGH

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-eighth session of the International Law Commission.

Tribute to the memory of Boutros Boutros-Ghali, former Secretary-General of the United Nations

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note, owing to the recent death of Boutros Boutros-Ghali, who, before being elected Secretary-General of the United Nations, had served as a member of the Commission from 1979 to 1991. The Commission owed him a debt of gratitude for his commitment to the progressive development and codification of international law and for his service to the Organization.

At the invitation of the outgoing Chairperson, the members of the Commission observed a minute of silence.

Statement by the outgoing Chairperson

3. The OUTGOING CHAIRPERSON said that the consideration of the Commission's report on the work of its sixty-seventh session[1] had constituted the highlight of the Sixth Committee's work at the seventieth session of the General Assembly. A topical summary of the debate was contained in document A/CN.4/689.[2] The Sixth Committee had continued its practice of complementing formal discussions with an interactive dialogue with those Commission members and Special Rapporteurs who were present in New York. The dialogue, which had also been pursued at meetings with legal advisers, had focused on the topics "Immunity of State officials from foreign criminal jurisdiction", "Protection of the environment in relation to armed conflicts", "Provisional application of treaties" and "*Jus cogens*".

4. Following the Sixth Committee's consideration of the Commission's report, the General Assembly had adopted resolution 70/236 on 23 December 2015, in which it had expressed its appreciation to the Commission for the work accomplished at its sixty-seventh session and had taken note of the final report on the topic "The most-favoured nation clause". The General Assembly had recommended that the Commission continue its work on the topics in the current programme, taking into account the comments and observations of Governments, whether submitted in writing or expressed orally in debates in the Sixth Committee. It had also noted the inclusion of the topic "*Jus cogens*" in the programme of work of the Commission and had encouraged the Commission to continue the examination of the topics in its long-term programme of work. Delegations were interested in further improving the ongoing dialogue between the Sixth Committee and the Commission. In that regard, paragraphs 9 to 12 of the resolution might be of particular interest to the Planning Group.

5. He had represented the Commission at the 50th meeting of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, at which he had provided an overview of the work of the Commission at its sixty-seventh session.

Election of officers

Mr. Comissário Afonso was elected Chairperson by acclamation.

Mr. Comissário Afonso took the Chair.

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[1] *Yearbook ... 2015*, vol. II (Part Two).

[2] Available from the Commission's website, documents of the sixty-eighth session.

6. The CHAIRPERSON thanked the members of the Commission for the honour they had conferred on him in electing him to chair the current session. He paid tribute to Mr. Singh, Chairperson of the sixty-seventh session, and to the other officers of that session for their outstanding contribution and service.

Mr. Nolte was elected First Vice-Chairperson by acclamation.

Mr. Saboia was elected Second Vice-Chairperson by acclamation.

Mr. Šturma was elected Chairperson of the Drafting Committee by acclamation.

Mr. Park was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/688)

The agenda was adopted.

7. Following a brief exchange of views, the CHAIRPERSON suggested that the Enlarged Bureau be convened for consultations concerning the allocation of time to the various items on the Commission's agenda for the session.

It was so decided.

The meeting was suspended at 4 p.m. and resumed at 5.05 p.m.

Organization of the work of the session

[Agenda item 1]

8. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the Commission's session, which had been drawn up during the consultations.

9. He invited Commission members to consider the recommendation of the Bureau to establish a Working Group on the identification of customary international law, the mandate of which would be to advise the Special Rapporteur in preparing commentaries to the draft conclusions on that topic in preparation for the formal consideration and adoption of the texts by the Commission as a whole later in the current session. Mr. Vázquez-Bermúdez had indicated his willingness to serve as Chairperson of the Working Group. If he heard no objection, he would take it that the Commission wished to establish the Working Group on the identification of customary international law under the chairpersonship of Mr. Vázquez-Bermúdez.

It was so decided.

10. Sir Michael WOOD said that the preliminary comments and suggestions of the Working Group would be of great assistance to him in preparing a revised set of draft conclusions and the commentaries thereto. He encouraged Commission members to join the Working Group, while noting that its meetings were also open to those Commission members who did not wish formally to join it.

11. Mr. KITTICHAISAREE said that it would be helpful if the Commission could follow established procedures in determining the composition and mandate of its working groups.

12. The CHAIRPERSON said that the Commission could give consideration to that proposal in the future.

13. Ms. ESCOBAR HERNÁNDEZ said that she was not opposed to the establishment of the Working Group. She considered that the Working Group did not have a mandate to adopt the draft conclusions. However, given that the draft text on which the Working Group would base its comments had been prepared in English only, she wished to reserve the right to make corrections to the Spanish version of the texts of the draft conclusions and commentaries once they had been finalized and submitted for consideration when the Commission adopted its annual report.

14. Mr. HASSOUNA requested further clarification of the Working Group's mandate.

15. Mr. LLEWELLYN (Secretary to the Commission) said that the Working Group on the identification of customary international law would meet to consider an English-language text with a view to helping the Special Rapporteur to formulate, or in some cases, to reformulate draft commentaries and draft conclusions on the topic. The Special Rapporteur would submit the final English-language version of those texts to the Secretariat for translation into all six official United Nations languages. The Commission would then proceed to the consideration and adoption of the texts as part of the relevant chapters of the Commission's annual report to the General Assembly, in accordance with its usual practice.

16. The CHAIRPERSON said he took it that the Commission wished to adopt the proposed programme of work for the first two weeks of the session.

It was so decided.

Protection of persons in the event of disasters[3] (A/CN.4/696 and Add.1,[4] A/CN.4/697,[5] A/CN.4/L.871[6])

[Agenda item 2]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

17. Mr. VALENCIA-OSPINA (Special Rapporteur), introducing his eighth report on the protection of persons in the event of disasters (A/CN.4/697), said that the report represented the culmination of seven years of sustained efforts in progressive development and codification by the Commission. In order to facilitate the Commission's second reading of the draft articles, the report summarized

[3] At its sixty-sixth session (2014), the Commission adopted on first reading a set of 21 draft articles and the commentaries thereto (*Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56).

[4] Reproduced in *Yearbook ... 2016*, vol. II (Part One).

[5] *Idem.*

[6] Available from the Commission's website, documents of the sixty-eighth session.

the written and oral comments and observations of more than 100 States, organizations and other international entities on the draft articles, as adopted on first reading.[7] The report also mentioned a number of intergovernmental and non-governmental conferences and meetings, held after the adoption of the draft articles on first reading, that had given considerable attention to the topic of disasters and had referred directly or indirectly to the Commission's draft articles. Relevant events held after the submission of his report included a meeting, in April 2016, of the States parties to the Agreement establishing the Caribbean Disaster Emergency Management Agency, which had specifically included consideration of the Commission's draft articles in its agenda, and the launch of an essay contest on international disaster law, co-sponsored by the International Federation of Red Cross and Red Crescent Societies (IFRC).

18. All the aforementioned activities showed that, within seven short years, the Commission had managed to achieve general recognition of a new branch of international law, namely international disaster response law. The principles and rules underpinning the Commission's draft articles were in fact reflected in a number of texts recently drafted by other bodies. For example, the Inter-Agency Secretariat of the International Strategy for Disaster Reduction, in its written comments and observations to the Commission, had referred to the strong alignment and complementarity between the draft articles and the Sendai Framework for Disaster Risk Reduction 2015–2030,[8] noting that the former articulated the duty to reduce the risk of disasters and to cooperate, and the latter articulated modalities and measures that States needed to adopt to discharge such duty. The draft guide to the law regulating humanitarian relief operations in armed conflict, being prepared by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) in cooperation with Oxford University, confirmed that draft article 14, paragraph 2, according to which consent to external assistance should not be withheld arbitrarily, applied to such operations. Furthermore, in the "Agenda for Humanity" annexed to the report of the Secretary-General for the World Humanitarian Summit, all stakeholders of the Summit were urged, under core responsibility two: uphold the norms that safeguard humanity, to "[c]ondemn any instances of arbitrary withholding of consent or impediment to impartial humanitarian relief operations".[9] The clear legal repercussions deriving from the mere process of preparing the draft articles on the protection of persons in the event of disasters should constitute a major incentive for the Commission to provide the General Assembly and the whole international community, by the end of the current quinquennium, with a final set of draft articles that followed the course of action mapped out by the Commission at the outset of its work on the topic.

19. With regard to the general comments and observations received by the Commission, he saw no need, at the current advanced stage in the preparation of the draft articles, to make a recommendation on his approach to the topic, since that had already been essentially adopted by the Commission and widely endorsed by States, organizations and other international bodies. Accordingly, in his eighth report, the Special Rapporteur had not entertained isolated suggestions for changes to the text of draft articles, whether made in a general context or in relation to specific draft articles, where they were intended to revive a largely superseded debate for the purpose of fundamentally altering the Commission's basic approach; or specific suggestions that aimed to disproportionately tilt the delicate balance achieved throughout the text between the paramount principles of sovereignty and non-intervention, on the one hand, and the equally important protection of individuals affected by a disaster, on the other. Instead he had concentrated on concrete suggestions intended to modify the text of specific draft articles as adopted on first reading. A compendium of the preamble and draft articles, as proposed by him on the basis of those suggestions, was contained in the annex to his eighth report.

20. The purpose of many of the comments and observations set out in the eighth report had been to suggest that various textual aspects of the draft articles, as adopted on first reading, should be further clarified in the respective commentaries. He saw merit in many of those suggestions; however, in accordance with the Commission's constant practice, the commentaries could not be drafted until the provisional, and *a fortiori*, final text of the draft articles had been adopted. He would therefore wait for the Commission to adopt the draft articles on second reading in the first part of the current session, before incorporating, as appropriate, into the draft of the accompanying commentaries those suggestions that might still be made within the Commission and those already advanced by States, international organizations and other entities. He would then submit the commentaries to the Commission, which would examine them paragraph by paragraph when it adopted its report. Members could make any linguistic corrections or suggest amendments at that point.

The meeting rose at 6 p.m.

3292nd MEETING

Tuesday, 3 May 2016, at 10.05 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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[7] *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

[8] General Assembly resolution 69/283 of 3 June 2015, annex II.

[9] "One humanity: shared responsibility", report of the Secretary-General for the World Humanitarian Summit (A/70/709), annex, p. 52.

Organization of the work of the session (*continued*)

[Agenda item 1]

1. The CHAIRPERSON invited Mr. Vázquez-Bermúdez to read out the composition of the Working Group on identification of customary international law.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on identification of customary international law) said that the Working Group would be composed of the following members: Mr. Commissário Afonso, Mr. Forteau, Mr. Hmoud, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Murase, Mr. Murphy, Sir Michael Wood and Mr. Park, *ex officio*.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Eighth report of the Special Rapporteur (*continued*)

3. The CHAIRPERSON invited the Commission to resume its consideration of the eighth report on the protection of persons in the event of disasters (A/CN.4/697).

4. Mr. FORTEAU thanked the Special Rapporteur for the meticulous care he had taken in preparing his report. He said that, in line with the structure of the eighth report, he would make some general remarks before commenting on some of the draft articles, restricting himself to matters of principle, while leaving it to the Drafting Committee to consider the more technical issue of the formulation of the draft texts, including the draft preamble, which at the current stage required no particular comment except that it would be useful to refer therein to the needs of persons affected by disasters. The Committee could perhaps also suggest how to renumber the draft articles. In that regard, he expressed support for the proposal to place draft article 16 before draft articles 14 and 15, as set out in paragraph 273 of the Special Rapporteur's eighth report.

5. In general, he noted with satisfaction that States had supported the text adopted on first reading,[10] which should allow the Commission to adopt the draft articles on second reading without too many difficulties during its current session. Although some adjustments were needed, the delicate balance between the rights of persons and the interests of States that the Commission had achieved in 2014 could nevertheless be maintained.

6. He expressed support for explicitly including the concept of the responsibility to protect in the draft articles but noted that, overall, States did not share that view. The concept was, however, implicit in the draft, particularly if articles 2, 6, 7, and 12 to 16 were read together.

7. As some members of the Commission would doubtless recall, the hypothesis that a State would arbitrarily refuse to accept external assistance was unlikely, and it was therefore important to focus on measures to encourage, incentivize or promote prevention rather than on the rights and obligations of States. One could not, however, completely ignore the obligations of States in the event of disasters, which were also mentioned in the Sendai Framework for Disaster Risk Reduction 2015–2030,[11] particularly paragraph 6 thereof.

8. The main general issue to consider was the purpose of the draft articles, as that would determine the final form that they would take. Some international institutions had questioned whether the draft articles were sufficiently operational – and therefore sufficiently detailed – and whether it would not be better to supplement them with more detailed annexes. The Commission could take up that matter in the years to come but, for the moment, it had achieved its objective, namely adopting a set of framework rules that States would subsequently be able to apply in practice, including by adopting domestic legislation or operational agreements. There was therefore no need at the current stage to reorient the Commission's work as set out in the draft articles adopted on first reading.

9. With regard to the adjustments to be made to some of the draft articles, various States and international organizations had pointed out, first, that reference should be made to the concept of resilience. In fact, that concept occurred frequently within the Sendai Framework and, albeit to a lesser extent, in General Assembly resolution 70/107 of 10 December 2015. In those texts, building resilience was almost systematically associated with disaster risk prevention, with the Sendai Framework itself making it one of its four priorities. It would be useful for the Special Rapporteur to give his view as to whether the concept should be included in the draft articles and to indicate which of the provisions it should be linked to, if appropriate.

10. On draft article 2, while some States had wanted, for the sake of balance, to see the rights of States mentioned alongside the rights of persons, he considered that this would not be appropriate. In its relationship with persons, the State did not, strictly speaking, have "rights"; as a legal person, it had a function to fulfil, namely serving the general interest. In the present case, the function of the State was to protect persons affected by a disaster. It was therefore entirely justified for draft article 2 to focus on the rights of persons and their essential needs, without mentioning the "rights" of States.

11. Draft article 3, which had been the subject of many comments, should be merged with draft article 4. It would also be necessary to specify that the definition of disasters, as well as all the definitions set out in draft article 4, were valid only for the purposes of the draft articles under consideration. He was not convinced by the Special Rapporteur's argument that the definition of disasters merited a separate, autonomous provision, as that would give too much importance to that definition while, in practice, it might be necessary or appropriate to refer to the draft articles in borderline situations where, even if no real disaster within the meaning of the draft articles had occurred, they could nevertheless serve as a useful guide. The core of the draft articles was not to define disasters, but rather to lay

[10] *Yearbook … 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

[11] General Assembly resolution 69/283 of 3 June 2015, annex II.

down principles and framework rules guiding the action to be taken in the event of a disaster. That was an argument for moving the content of draft article 3 into draft article 4.

12. With regard to draft article 4, he agreed with the European Union and Switzerland in saying that the reference to military personnel in subparagraph 4 (*e*) should be accompanied by the clarification given in the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")[12] and the Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies,[13] under which international military assets should be used only as a last resort, when civilian alternatives had been exhausted, as recalled in the preamble to General Assembly resolution 70/107. Unlike the Special Rapporteur, however, he considered that, as it concerned a substantive clarification and not an element of a definition, it should not be inserted into draft article 4, but rather into draft articles 15 or 16, or else should form the subject of a new provision.

13. Nor did he share the Special Rapporteur's view that the reference to risk reduction should be deleted from draft article 4, subparagraphs (*d*) to (*f*). Insofar as reduction was the subject of at least two draft articles (10 and 11), the reference should be kept.

14. As several States had observed, draft article 6 was probably too general and too vague, particularly with regard to the possibility of derogating from certain human rights under treaty provisions. Adding the terms "protection" and "fulfillment", as proposed by the Special Rapporteur in his eighth report, was an improvement. It could also be specified that persons were entitled to the respect, protection and fulfillment not of "their human rights", which was a rather vague formulation, but of "their rights under international human rights law", which would more clearly express the fact that, in certain cases, treaty provisions permitting certain derogations might apply, under the conditions and within the limits set out in the treaties concerned.

15. As various States and international organizations had remarked, the wording of draft articles 8, 9 and 10 on cooperation should be reviewed. The aim of those provisions should also be clarified. While he was convinced that they followed a logical order, as the Special Rapporteur had underlined in his eighth report, he considered that in practice their wording did not really make that order clear. In the interests of clarity, one might for instance alter the title of draft article 9 to read "Cooperation in the area of relief and assistance in the event of disasters" and incorporate that clarification into the text of the draft article by inserting, after "cooperation", the phrase "in the area of relief and assistance". That would make it easier to highlight the fact that draft article 8 carried a general obligation to cooperate in two respects: with regard to relief and assistance (the subject of draft article 9) and with regard to disaster risk reduction (the subject of draft article 10).

16. Draft article 11 was one of the fundamental provisions of the draft articles. Indeed, only risk reduction could effectively protect persons from disasters. It would therefore be useful to maintain the reference in the title to a duty to reduce risk, which was perhaps more a matter of progressive development of law than codification, but which seemed welcome, and even necessary. The same did not hold true of the clarification that risk reduction was intended to "prevent the creation of new risk and reduce existing risk", which the Special Rapporteur had added to paragraph 1. That wording actually made it harder to understand the duty to reduce the risk of disasters. After all, one might think that there was a duty not only to reduce existing risk, but also to prevent it. Draft article 11, including its title, should therefore not be amended.

17. With regard to draft article 12, some States had considered it preferable to talk about the "responsibility" rather than the "role" or "duty" of the State. Given that the term "role" was not terribly meaningful, legally speaking, it would be better to replace it throughout draft article 12 with the term "responsibility" and to replace the term "duty" with the term "responsibility" in paragraph 1. That would allow the double principle underpinning the draft article to be brought out more clearly: the State, by virtue of its sovereignty, had the role of protecting persons, and thus it must also be in charge of providing such protection. That double principle was perfectly embodied in the word "responsibility", which encompassed both a duty and a privilege. It was also the term used in the Sendai Framework, as well as in resolution 6 adopted at the thirty-second International Conference of the Red Cross and Red Crescent in December 2015.[14]

18. Taking into account the comments made by States, the Special Rapporteur was proposing to turn draft article 13 into a "self-judging" provision by specifying that it was up to the affected State to determine, subjectively, whether a disaster exceeded its response capacity. That proposal was excessive. Between the purely objective formulation of draft article 13 adopted on first reading and the entirely subjective one proposed by the Special Rapporteur, it was doubtless possible to find a happy medium by allowing a "certain discretional flexibility", to use the European Union's phrase. It could, for instance, read, "To the extent that a disaster manifestly exceeds its national response capacity", which would mean that the State affected would not be the only judge but that the obligation provided for in draft article 13 would be triggered only if the State manifestly could not, whatever it might say, tackle the disaster alone.

19. With regard to draft article 14, there was no need to specify in paragraph 2 that consent could not be withdrawn arbitrarily, as the regime for withdrawing consent was based on draft article 19, not draft article 14. A sentence to that effect could be added at the end of draft article 19. In order to reassure those States that considered

[12] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

[13] OCHA, Inter-Agency Standing Committee, Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies, 2003—Revision 1, 2006.

[14] IFRC, Strengthening legal frameworks for disaster response, risk reduction and first aid: Resolution (document 32IC/15/R6).

paragraph 2 of draft article 14 too vague, it could stipulate that only consent to external assistance "offered in accordance with the present draft articles" could not be refused arbitrarily. In particular, that would meet the legitimate concerns expressed by Thailand and other States that were worried about the risk of unsolicited or inappropriate offers of assistance.

20. Draft article 16 had prompted contrasting reactions. He recalled that he found it surprising to impose a duty to seek external assistance on an affected State, as draft article 13 did, without at the same time imposing the slightest duty on other States to provide such assistance. Aside from the fact that in some respects that approach represented a retrograde step in terms of current international law, it created an inconsistency insofar as draft article 13 required the affected State to seek external assistance, while draft article 16 did not impose a duty on anyone to offer it. That inconsistency was even more striking given that, under the draft articles, offers of assistance were intended to occur in very specific and particularly exceptional circumstances, namely when the affected State could not itself respond to a disaster, defined in draft article 3 as an event "resulting in widespread loss of life, great human suffering and distress, displacement, or large-scale material, economic or environmental damage". In such a situation, international solidarity was required, obviously within the bounds of each State's respective capacities.

21. Some years previously, when the Commission had asked them the question, some States had affirmed that there was no obligation to provide external assistance. The compromise reached on first reading was to admit that there existed, at the very least, a right to provide such assistance. The Special Rapporteur was currently proposing in draft article 16 to take a further step backwards, under the guise of pragmatism, and to say that States and other actors "may address an offer of assistance". That wording left the draft articles as a whole slightly more unbalanced.

22. Another possible, and perhaps more satisfying, compromise would be to retain the wording of draft article 16 proposed by the Special Rapporteur as paragraph 1 and to add a paragraph 2 stipulating that "to the extent that a disaster exceeds the response capacity of the affected State within the meaning of draft article 13, other States should offer (or: are encouraged to offer) all necessary assistance to that State, within the limits of their respective capacities".

23. He had taken good note of the Special Rapporteur's proposal to indicate, in draft article 19, that there existed a right to terminate external assistance, but considered that this right must be qualified. Under the terms of draft article 14, paragraph 2, State consent to assistance could not be withheld arbitrarily, and a similar restriction should apply to the right to terminate assistance.

24. With regard to draft articles 20 and 21, while it was indeed necessary to clarify draft article 20 as indicated by the Special Rapporteur, the proposed formulation seemed somewhat complex, particularly because it seemed to limit special and regional law to treaty rules alone. It would probably be sufficient to state that the draft articles were "without prejudice to other rules of international law applicable in the event of disasters, at the universal, regional or bilateral level". As to the question of how to deal with situations of armed conflict under draft article 21, it was clear that there were two diametrically opposed views. The amendment proposed by the Special Rapporteur was welcome in that it would enable States' points of view to be reconciled.

25. The final form that the draft articles and recommendations that the Commission would submit to the General Assembly should take would of course depend on the eventual content of the draft articles as decided following the debate in plenary, the work of the Drafting Commission and discussions on the commentaries. That said, he considered that the draft articles did not really lend themselves to the development of a treaty instrument. He was particularly conscious of the observation made by the IFRC, which was concerned that an effort aimed at the development of a treaty might distract from developments at the national level. He would be more inclined to recommend that the General Assembly should adopt a "framework declaration" incorporating the Commission's draft articles, with possible amendments, since such an instrument would be a better fit with the content and objectives of the draft articles. That would also enable close cooperation to be established between the Commission and the Sixth Committee on a given subject and to show that, between simply taking note of the Commission's drafts and adopting a treaty, there were intermediate options that should be explored.

26. Mr. KITTICHAISAREE asked Mr. Forteau to clarify what he meant by saying that the responsibility to protect was implicit in some of the draft articles, as it was a contentious issue in the Sixth Committee and several States were opposed to the inclusion of that concept in the draft articles. As could be seen from the 2005 World Summit Outcome document[15] and the report produced by the Secretary-General in 2009,[16] the responsibility to protect rested on three pillars: the State carried the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; the international community had a responsibility to encourage and assist States in fulfilling that responsibility; and the international community had a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from those crimes. If a State was manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations. The Sixth Committee had underlined time and again that the absence of protection in a situation of national disaster could not be equated to the absence of protection against war crimes, crimes against humanity, genocide or ethnic cleansing. In the past, the Legal Counsel of the United Nations had also told the Commission that the concept of the responsibility to protect had been used for the first time in the context of Libya. He feared that the Sixth Committee might be led to believe that the concept fell within the scope of some of the draft articles, even if the Special Rapporteur had said that this was not the case.

[15] General Assembly resolution 60/1 of 16 September 2005.

[16] "Implementing the responsibility to protect", report of the Secretary-General (A/63/677).

27. Mr. FORTEAU explained that he was not proposing that the concept of the responsibility to protect be explicitly included in the draft articles, but that nothing prevented the Commission from extending the principle underpinning that concept to the area of disasters. It also seemed to him that the principle that lay at the heart of the responsibility to protect was also found in the draft articles, as various members of the Commission had observed since the start of debates on the subject.

28. Sir Michael WOOD thanked the Special Rapporteur for his eighth report and his introduction to it. In his report, the Special Rapporteur showed that the Commission was well on the way to adopting the draft articles on second reading during the present session, and the many comments and suggestions received showed how much interest there was in the topic. Overall, the Special Rapporteur's recommendations seemed balanced and sensible. In particular, he agreed with the Special Rapporteur's approach to the comments and observations received from States and international organizations. For the most part, if the changes suggested by the Special Rapporteur were adopted, the draft articles would be significantly improved. Although some comments had unfortunately been received very late, they should be taken into account as far as possible in either the draft articles or the commentaries, as some were very detailed and raised interesting points.

29. He would mention only those points where he had questions about the Special Rapporteur's recommendations. He looked forward to working within the Drafting Committee to produce a final text for adoption by the Commission and to working on the commentaries, which he hoped the Commission would have adequate time for, given that it would be the final reading.

30. Beginning with a general observation that perhaps concerned the commentaries more than the draft articles, he observed that, given that the Commission had drawn mainly from non-binding legal instruments, it should perhaps be stated, at the outset of the commentaries, that the draft articles represented in large part progressive development of the law rather than codification.

31. He would be in favour of merging draft articles 3 and 4, which had been suggested by a number of States, as it seemed odd to separate the definition of "disaster" from the other definitions. In any event, as France had suggested, it needed to be made clear that the term "disaster" was being defined for the purposes of the draft articles, which would avoid any *a contrario* argument drawn from the inclusion of those words in draft article 4.

32. The addition, in draft article 4 (*e*), of the words "military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need" was hardly convincing. First, it seemed out of place to include a substantive rule in an article given over to definitions, and, if it were to be retained, it should be moved, for example into the commentary. Second, the wording "shall be used only where" seemed too strong for a text that might become a legally binding convention. The Oslo Guidelines did not go that far, and they considered the matter in a specific context. They were non-binding statements of policy, primarily intended for use by United Nations humanitarian agencies and their partners. Could it really be right to suggest that States would breach a rule of international law if they used military assets with the consent of the affected State, simply because civilian assets were also available? Would such a rule assist disaster relief? Third, even if it were a matter of a simple statement of policy, States might well have military assets trained for and intended to provide disaster relief, in which case why not use them? As with domestic disaster relief action, many factors would need to be taken into account in deciding whether to use military or civilian assets, such as speed, availability, skills, efficiency and cost. If the Commission nevertheless decided to retain such a rule, whether in the draft article or in the commentary, the wording should be softened, for instance to something like "should only be used" or "may in particular be used", and the commentary would need to explain the reasons for the rule and what was meant by the expression "there is no comparable civilian alternative".

33. With regard to draft article 5, on human dignity, he shared the view that the concept was overarching and that it would be better placed in the preamble.

34. Turning to draft article 6, he said that the expression "entitled to the respect, protection and fulfillment" did not really seem appropriate and that it would be preferable to keep the original text. Even if, according to the Special Rapporteur, it was the "standard formula", the expression was not often used by States and, in English, the notion of "fulfillment of their human rights" was an odd one.

35. With regard to draft article 7, the changes suggested were not improvements. The suggested title lacked the clarity and simplicity of the original; the latter was unlikely to lead to confusion with international humanitarian law, as one State feared, since it was perfectly clear that the draft articles were addressing disasters, not international humanitarian law. Indeed, introducing a new term ("humanitarian response") into the text might itself lead to confusion. Moreover, he was not entirely clear what the "no harm" principle would mean in practice, and he doubted that it could really be seen as a humanitarian principle alongside the principles of humanity, neutrality and impartiality. As the Nordic States had explained, the term seemed to cover a range of disparate matters, and he was not sure what it added in practice. If it were to be retained, it would need very careful explanation in the commentary. Nor did he understand what the word "independence" meant in paragraph 140 of the eighth report. Nothing, at least within the eighth report, explained why the Special Rapporteur proposed to add the term. Finally, adding "in particular" after the word "impartiality" did not improve the original wording, which treated non-discrimination as something distinct from impartiality, while the new formula seemed to reduce impartiality essentially to non-discrimination. If a logical link was needed, then perhaps "including" would be better than "in particular".

36. Concerning draft article 8, he considered it unwise to refer expressly to the United Nations Special Coordinator for Emergency Relief. What would happen if there was a reorganization or if the position was renamed? It would be sufficient, and more prudent, either to have a more generic reference or to include the specific reference in the commentary.

37. In draft article 13, the change suggested by the Special Rapporteur raised two quite important points. First, to refer to a determination by the affected State rather than to an objective standard might render any obligation set forth in the draft article illusory, and the draft article would become a discretionary provision, as Mr. Forteau had pointed out. Second, in the amended version, the words "to the extent that" had been lost, despite the fact that, based on paragraph (3) of the commentary, the Commission had evidently attached some importance to them on first reading. The Drafting Committee would do well to consider the wording suggested by Mr. Forteau, which retained that phrase.

38. He did not think it was a good idea to add the expression "good faith" to draft article 14, paragraph 3. It went without saying that any offer of assistance must be made in good faith and not for some improper motive. That reflected a basic principle of international law and there was no particular reason to include the word in that specific provision.

39. Draft article 21 raised a most important issue on which clarity was needed: the relationship between the draft articles and international humanitarian law. There was a disconnect between the draft article and the commentary that should be remedied. He was not convinced that the changes suggested by the Special Rapporteur were an improvement and considered that it would be useful to refer them to the Drafting Committee.

40. With regard to the draft preamble proposed by the Special Rapporteur, the fifth paragraph, or at least its first part, did not seem appropriate. It might be right to reaffirm the primary responsibility of the affected State in the preamble, but it seemed out of place to give such prominence to the principle of non-intervention in what was only a brief preamble dealing with disaster relief. Those matters had been dealt with in a careful and balanced manner throughout the draft articles, in particular in draft article 14, and the paragraph in question might upset that balance. At the end of the preamble, a provision, inspired by the 1969 Vienna Convention on the Law of Treaties ("1969 Vienna Convention"), might be added to the effect that: "The rules of customary international law will continue to govern questions not regulated by the present [draft articles]."

41. Turning to the final form of the draft articles, he noted the Special Rapporteur's recommendation that an international convention be concluded and his explanation that this would be in line with the Commission's practice since 2001 with regard to various texts on different topics. In most, if not all, of those cases, the Commission had recommended a two-stage approach by the General Assembly: first, the endorsement of the draft articles by annexing them to a resolution, then consideration of the question of the adoption of a convention. In that respect, it would all depend, as Mr. Forteau had said, on what text resulted from the consideration of the draft articles by the Drafting Committee. He proposed that the Special Rapporteur reflect on the matter informally before making a specific recommendation to the Commission for adoption, probably towards the end of the session.

42. In conclusion, he expressed support for referring the draft articles and the draft preamble to the Drafting Committee, as recommended by the Special Rapporteur.

43. Mr. PARK thanked the Special Rapporteur for his eighth report, which properly summarized and reflected the comments and observations made by States, international organizations and non-governmental organizations (NGOs). He would air some general views on certain points that he considered important and would raise his specific suggestions within the Drafting Committee.

44. Recalling that the draft articles were intended to cover the entire disaster cycle, he said that draft articles 1 and 2 did not clearly reflect that idea, particularly the fact that the draft articles also covered the prevention phase. Even though the Special Rapporteur had explained that the definition of "disaster" was couched in very general terms and that there was no need to make a specific reference in the text to "disaster risk reduction", he considered it preferable to clarify the scope and purpose of the draft articles.

45. Although he knew that some States were not in favour of draft article 11, his only question was whether, under paragraph 1 thereof, a third State might invoke a State's failure to fulfil its "duty to reduce the risk of disaster" as a breach of an international obligation. If so, the structure of the draft article should be re-examined, as there were no identical and uniform measures or international obligations for all States in that area.

46. He agreed with the Special Rapporteur that certain provisions should not be discussed any further. In his view, no substantive amendments should be made to draft articles 13 and 14, which were the result of intensive debates and were not intended to change the basic nature of contemporary international relations. Those draft articles reflected the delicate balance achieved between the principles of sovereignty and non-intervention, on the one hand, and the protection of human rights, on the other. If the debate were reopened, it would doubtless complicate the adoption of the draft articles on second reading.

47. He nevertheless wished to seize the opportunity to clarify his position on those important provisions. First, he considered that draft article 13 was *lex ferenda* and that it did not reflect customary international law. Unfortunately, seeking external assistance to the extent that a disaster exceeded a State's response capacity was still, at the beginning of the twenty-first century, not an obligation, but rather a recommendation addressed to the affected State. In that context, it could not be accepted that a refusal to seek assistance would incur State responsibility. Second, even though the Special Rapporteur had amended the wording of paragraphs 2 and 3 of draft article 14, it still did not provide clear answers in all cases: what would happen, for instance, if there was no functioning Government to provide consent or if consent was withheld arbitrarily? Moreover, given that the expression "good faith", which had been inserted into paragraph 3, could, because of its subjectivity, give rise to conflict between the affected State and the State offering assistance, it would be better to delete it.

48. Draft article 21 was one of the most controversial points. Some States could not see clearly the relationship or demarcation of the scope of application between the draft articles and international humanitarian law. By amending the draft article, the Special Rapporteur had no doubt intended to resolve the inconsistencies between the original wording of the article ("The present draft articles do not apply to situations to which the rules of international humanitarian law are applicable.") and the relevant commentary ("[The present draft articles] can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not apply.").[17] He understood that, in the amended text proposed by the Special Rapporteur, the preferential application of the rules of international humanitarian law in cases of armed conflict was maintained and that draft article 21 was applicable in complex situations of armed conflict and natural or environmental disasters where the rules of international humanitarian law did not explicitly address disaster-related issues. Consequently, if a conflict arose between various rules, the rules of international humanitarian law would always prevail over the draft articles. He was not certain whether that legal hierarchy would always be acceptable or helpful for the effective protection of victims of a humanitarian crisis.

49. In draft articles 5, 8, 13 and 16, the Special Rapporteur had replaced "competent international organizations and relevant non-governmental organizations" with "other assisting actors", which appeared in draft article 4 (*c*). That change had the merit of concision, but the original wording was the result of intensive debate within the Drafting Committee, and the expression "other assisting actors" included not only international organizations and NGOs, but also any other entity or individual external to the affected State. Given that the latter category of actor was not mentioned in draft articles 8 or 16, the matter required further examination before a global change was made.

50. With regard to the final form of the draft articles, he favoured a legally binding instrument. Guidelines could obviously provide States with useful information, but it should be remembered that there was currently no universal and legally binding convention on the topic. In his view, the draft articles set out clear rights and obligations for all and struck an appropriate balance for affected States, assisting States and relevant international organizations. International law would be enriched by a new field, that of the "law of disasters".

51. Mr. MURPHY said that it appeared from the comments and observations that there was considerable interest in the Commission's work on the topic, but also considerable concern with regard to the formulation of many of the draft articles. As a general matter, there continued to be concern about the characterization of "rights" and "duties" of States in the area in question, even though there was rather thin treaty law, State practice and jurisprudence in support of settled law on most issues. It might indicate that the Commission had not yet achieved the required balance, even if it was very close. The resistance of some States was no doubt attributable to the Commission's unwillingness so far to be candid in its commentary that most of the draft articles fell within the realm of progressive development of the law, and that there was really not sufficient State practice, let alone treaty law, to support several of the rules it was advancing. He therefore agreed with the Special Rapporteur's recommendation that the Commission approach the project as a draft treaty, containing a preamble and perhaps even closing draft articles, as it had already done for some of its projects. He nevertheless took note of Mr. Forteau's proposal to submit a framework declaration to the General Assembly and added that, if the members of the Commission decided to take that approach, they should perhaps partly review the wording of the draft articles and the introduction to the topic.

52. The Commission should also include an introductory commentary to the draft articles, similar in nature to the commentary it had used in 2014 with respect to the draft articles on the expulsion of aliens – "the present draft articles involve both the codification and the progressive development of fundamental rules"[18] – which therefore justified the pursuit of a global treaty in that area.

53. He supported the recommendation that the Commission send the draft articles and the draft preamble to the Drafting Committee for revisions based on the comments that the Commission had received, although he believed that changes going beyond those envisaged by the Special Rapporteur should be contemplated. Many Governments and international organizations had also called for changes to the Commission's commentary, as the Special Rapporteur had indicated in his opening statement.

54. With respect to draft article 3, a few States had expressed concerns about the definition of "disaster" in the draft articles, but the wording was already broad enough to address those concerns. However, the Special Rapporteur had recommended including in the definition of a disaster any calamitous event that resulted in large-scale "economic" damage that seriously disrupted the functioning of society. In his view, the adjective "economic" excessively widened the scope of the draft articles, which might end up covering events such as a steep rise in interest rates, an economic recession or a collapse in the price of a particular commodity, such as oil or precious metals. What, then, would it mean to have a duty to reduce the risk of an economic recession? It would also be useful to combine draft articles 3 and 4, as Mr. Forteau and Sir Michael had suggested.

55. With respect to draft article 4, OCHA had said that the definition of "affected State" in subparagraph (*a*) was too broad. As drafted, any State that had a national located in a disaster zone was an "affected State", because that State had jurisdiction over its nationals. The Commission had certainly not intended the term to be understood that broadly, and it could change the definition to read: "'affected State' means the State in whose territory, or in any territory under its jurisdiction or control, there are persons, property, or the environment affected by a disaster".

[17] *Yearbook ... 2014*, vol. II (Part Two), p. 90, para. (3) of the commentary to draft article 21.

[18] *Ibid*., p. 25, para. (1) of the general commentary to the draft articles on the expulsion of aliens.

56. With regard to the Special Rapporteur's proposal that a new clause be inserted at the end of draft article 4 (*e*), indicating a preference for the use of civilian assets over military assets, it would be better to include such a provision in draft article 9 or draft article 13, rather than in an article on use of terms. Further, if the reason for expressing such a preference was to capture the spirit of the Oslo Guidelines, it should be completely redrafted, as the Oslo Guidelines recognized the value of military assets in complementing civilian assets, referred to "military and civil defence assets", operationalized that preference only with respect to United Nations operations, and stipulated that such resources should be "requested", not that they "shall be used" – the wording used by the Special Rapporteur, which failed to capture all those nuances, so important to the participants in the International Conference on the Use of Military and Civil Defence Assets in Disaster Relief held in Oslo in January 1994, and which also did not replicate the spirit of other instruments, particularly certain General Assembly resolutions. Perhaps a second paragraph might be added to draft article 13, to read: "Foreign military and civil defence assets should be requested only where there is no comparable civilian alternative and only when the use of military or civil defence assets can meet a critical humanitarian need." In any case, the most important thing was to ensure that disaster relief was not impeded by bureaucratic rules. It was not easy to see, for example, how it would be helpful to force the United States of America not to use its military aircraft for humanitarian assistance – even if the recipient State had asked it to – unless it was certain that no civilian transport aircraft were available.

57. With regard to draft article 5, although the Special Rapporteur viewed it as a "signal achievement of the Commission", he agreed with the representatives of Ireland that human dignity was an overarching principle that would be better dealt with in a preamble, as had been decided during the drafting of the International Covenant on Civil and Political Rights. The preamble to the Covenant recognized "the inherent dignity … of all members of the human family", and that broad principle then animated the operational rules of the Covenant, but there was no general obligation to protect "the inherent dignity of the human person" because the concept was too vague and uncertain to operationalize. Draft article 5 should therefore be moved into the preamble, where reference could also be made to persons affected by disasters, as suggested by Mr. Forteau, while retaining draft article 6, which acknowledged the need to respect the human rights of persons affected by disasters.

58. With respect to draft article 6, he did not support the insertion of the terms "protection and fulfillment" into the text. The Special Rapporteur asserted that such language would place the draft article in conformance with international human rights law, but such terms did not appear in the major human rights treaties, such as the aforementioned Covenant, not to mention the fact that recent projects of the Commission itself, such as the draft articles on the expulsion of aliens,[19] referred only to "respect for their human rights". It could be useful, though, to replace the expression "their human rights" with "their rights held by virtue of international human rights law", as proposed by Mr. Forteau.

59. With regard to draft article 7, numerous States and the IFRC had expressed concerns with some of the principles included therein, such as "neutrality" and "non-discrimination". Although the Special Rapporteur had noted those concerns in his eighth report, he was not proposing to remove any principles, but rather to add more of them, specifically a "no harm" principle and an "independence" principle, the inclusion of which had been advocated by the Nordic States and the European Union, respectively. He had no idea what those "principles" meant in that context, as the Special Rapporteur had not explained them further, such as by reference to treaties, State practice, or jurisprudence. What did "no harm" mean? To whom or to what did it apply? Presumably relief operations required tearing down unstable structures in the aftermath of an earthquake or killing livestock infected with viruses in the aftermath of a cyclone, so in some sense "harm" was done to property and even to life. As for the principle of independence, to what did it refer? Again, whom did it apply to? And how could such a principle be defended when various draft articles referred to the concept of "cooperation"? Adding such principles, without at least explaining them, would only sow confusion, and he did not therefore favour doing so at that stage.

60. With regard to draft article 8, he supported the Special Rapporteur's proposal to change how the text referred to certain actors. He noted that many States had expressed concern about the title of the draft article, arguing that the "duty" to cooperate did not exist under international law. For example, Greece had noted that the use of mandatory language in the form of "shall" indicated the existence of a duty that was not supported by State practice, in which respect the Nordic States and Austria had also expressed concern. The Russian Federation had stated that the duty in the draft article was not a well-established principle of international law. The United Kingdom of Great Britain and Northern Ireland had expressed the view that using the term "duty" was at odds with the essentially voluntary nature of the principle of cooperation. The Special Rapporteur discussed those concerns in his eighth report, but viewed the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[20] as a sufficient legal basis upon which to introduce such a duty, and he therefore recommended no changes. While that Declaration could be understood as referring to a legal duty of inter-State cooperation, it could not be viewed as establishing a legal duty for States to cooperate with international organizations or non-State actors, as envisaged in draft article 8. The problem might be minimized by replacing "shall" with "should" or, if "shall" were to be retained, by indicating in the commentary that this was progressive development of the law. Further, the title of the draft article should be changed to read "Cooperation in the event of a disaster", and consideration should be given to incorporating draft article 10 into draft article 8.

[19] The draft articles on the expulsion of aliens adopted by the Commission and the commentaries thereto are reproduced in *ibid*., pp. 22 *et seq.*, paras. 44–45.

[20] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

61. With respect to draft article 11, again the term "duty" had elicited negative reactions from many States, which disputed that international law obliged States to reduce the risk of disasters. France, the Islamic Republic of Iran, the Republic of Korea and the United States had expressed the view that there was no general obligation under international law to take measures to prevent, mitigate and prepare for disasters, while Austria had asserted that the issue exceeded the original mandate of the protection of persons in the event of disasters. Other States, such as Australia and South Africa, had questioned whether States had the capacity or resources to take such measures, leading the Russian Federation to propose that a qualifier of "within their capabilities" be added and that the entire provision be framed as a "recommendation",[21] a proposal that he considered to have some merit. That might be done by replacing the term "shall" with "should" or by redrafting paragraph 1 simply to read: "As necessary and appropriate, each State shall pursue disaster risk reduction measures." Like Mr. Forteau, he did not favour the Special Rapporteur's proposal to insert the phrase "the creation of new risk and reduce existing risk" in paragraph 1, as that was unnecessary and confusing.

62. With respect to draft article 12, some States had disputed that there was a "duty" to accept assistance. The Islamic Republic of Iran had expressed the view that it was not an "internationally wrongful act" for a State to refuse international aid.[22] The Russian Federation had maintained that, while a State had a responsibility to take measures to ensure the protection of persons on its territory, it did not have a legal obligation to do so. There, too, the term "should" might be used, or perhaps "shall" but with an indication in the commentary that this was progressive development of the law. But it did not really seem sensible to replace "role" with "responsibility", as suggested by Mr. Forteau, as the term "role" had been carefully chosen and reflected exactly what the draft article was intended to mean.

63. With respect to draft article 13, numerous States, including Austria, France, Indonesia, Malaysia, the Russian Federation and the United Kingdom, had all expressed the view that there was no duty under international law to accept assistance. Some, such as Austria, Poland and the Russian Federation, had enquired what the consequences of a breach of that duty would be. China had suggested that the Commission should avoid the term "duty", and the Islamic Republic of Iran had suggested rephrasing the draft article using the word "should". To get around that difficulty, the Special Rapporteur proposed specifying at the beginning of the draft article that the duty was only triggered if the affected State "determines that a disaster exceeds its national response capacity". He himself considered that adding that phrase did nothing to change the fact that there was probably no such duty under international law, not to mention the fact that the Special Rapporteur's proposal might have the perverse effect of discouraging affected States from asking for help, so as to avoid triggering any such "duty". Perhaps the Commission should simply replace the words "has the duty to" with "should" or "shall" but identify in the commentary that this was progressive development of the law. He took note, in that regard, of the comment made by Mr. Park, who considered the provision *lex ferenda*. He also proposed changing the title of the draft article to read: "Pursuit of external assistance by the affected State".

64. With respect to draft article 14, many States had questioned both what "consent" required in paragraph 1 and what "arbitrarily" meant in paragraph 2.

65. With regard to paragraph 1, it was understood that the notion of consent did not mean that some type of express, written consent was needed from a Government every time others (including NGOs) engaged in disaster relief activities. Simply issuing visas to medical personnel from Doctors Without Borders, for example, presumably constituted the necessary "consent" within the meaning of paragraph 1. It might be useful to make that clear in the commentary.

66. As for paragraph 2, several States had rejected the idea that there was a legal obligation under customary international law not to deny aid arbitrarily. Other States had sought additional clarification on the meaning of "arbitrariness" and who would determine whether a State's decision to withhold aid was arbitrary. Still others had worried that if consent was withheld arbitrarily, then the draft article might be read as allowing other States to act without consent, or at least to pass judgment on the affected State. One might add that there was a tension with the new wording for draft article 19 proposed by the Special Rapporteur, which would refer to a right of the affected State "to terminate external assistance at any time", without reference to a standard of arbitrariness. For reasons such as that, some States had proposed changing the language in draft article 14 from "shall not" to "should not", while others had suggested that the draft article should in some fashion be expressed as a political or moral recommendation. It would be a good idea for the Drafting Committee to consider the various proposals, or at least to address the issue in the commentary.

67. With respect to draft article 16, he expressed support for the amendments proposed by the Special Rapporteur, precisely because moving away from the language of "rights" and "duties" was more likely to encourage desirable behaviour. It would be for the Drafting Committee to decide whether it would be better to say "may offer assistance" rather than "may address an offer of assistance".

68. With respect to draft article 21, numerous States and organizations, such as Austria, Mongolia, Switzerland, the European Union and the International Committee of the Red Cross (ICRC), had noted an apparent conflict between the text of the draft article and its commentary. In its current wording, the draft article excluded armed conflict entirely from the scope of the draft articles, while the commentary stated that there were some "complex emergencies" where both the draft articles and international humanitarian law could apply. The Special Rapporteur recommended modifying draft article 21 to be a "without prejudice" clause, but then it would not be needed at all, as it would duplicate draft article 20. Moreover, it could be incorrect to say simply that the draft articles were "without prejudice" to international humanitarian law. Although sometimes the rights and duties of

[21] A/C.6/69/SR.19, para. 105.

[22] A/C.6/65/SR.24, para. 36.

a belligerent under international humanitarian law were less than what appeared in the draft articles, and sometimes they were greater, there was an undeniable overlap and sometimes conflict between the two sets of rules. When conflicts arose, a simple "without prejudice" provision left it unclear which set of rules applied, as it created no hierarchy. If the intention was for the draft articles not to apply when there was overlap or a conflict between the two sets of rules, then perhaps draft article 21 should be left in its current form. Many States (Austria, Colombia, Cuba, Greece, India, Israel, Mongolia, the Netherlands, the Nordic States, Poland, the Russian Federation, Spain, Sri Lanka, Thailand and the United States) had spoken in favour of this. The ICRC had also considered the current wording satisfactory and felt that overlaps should not be created between the draft articles and international humanitarian law. Similarly, the IFRC had asserted that the draft articles should not apply in situations of armed conflict, as doing so could inadvertently undermine the protection offered by international humanitarian law.

69. If, despite those concerns, the intention was that the draft articles might displace international humanitarian law when there was overlap or a conflict between the two sets of rules, the implications of doing so should be considered. Treaties on the law of armed conflict contained many provisions that set out in detail the rights and duties of belligerents, particularly with respect to relief activities, including consignments of medical supplies, food and clothing, cooperation with national Red Cross and other societies, and treatment of relief personnel. Those rules of international humanitarian law were much more detailed and specific than the draft articles. Was it sensible, for instance, to give precedence to the application of draft article 7, when article 70 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) was much more comprehensive and detailed? One referred only to the principle of "non-discrimination" in disaster relief, while the other specified that, when distributing "relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers" (art. 70, para. 1). And over what aspects of articles 23, 55, 59 to 63 and 109 to 111 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), of articles 69 to 71 to Protocol I, or of article 18 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), would the draft articles take precedence?

70. Many Governments would not be happy to see the Commission rewriting the rules of international humanitarian law that applied to armed conflicts. Austria had said it should not do so. Switzerland had warned that adding another set of rules would allow a belligerent to choose whichever set it preferred. OCHA had also expressed concern, suggesting that the Commission should make clear that the draft articles only applied where international humanitarian law did not address the specific disaster-related issue. The European Union had expressed a similar view, although it had said that the matter could be addressed in the commentary. In his view, however, the issue was too important to be relegated to the commentary.

71. On the assumption that the Commission was not trying to alter international humanitarian law, it would perhaps be sufficient to leave draft article 21 unaltered or to amend it to read: "The present draft articles do not affect the rights and obligations of States in situations of armed conflict." Such an approach was in accord with the views expressed by most States and organizations and with other existing treaties, such as in the area of aviation and the law of the sea. Further, if it was agreed that international humanitarian law served as the *lex specialis* in that context, then it was important to say so clearly in the commentary, otherwise it would simply sow confusion, to the detriment of those the Commission sought to assist.

72. Mr. KITTICHAISAREE recalled that, during the Drafting Committee's debates on the protection of the environment in relation to armed conflict, it had been decided to replace "international humanitarian law" with "law of armed conflicts" to reflect the Commission's practice on the topic of the effects of armed conflicts on treaties.[23] In that case, the Commission had established that there was a distinction between the law of armed conflicts and international humanitarian law, and had considered that international humanitarian law was an area of the law of armed conflicts; hence it was preferable to use the term "law of armed conflicts" in its work. However, the term "international humanitarian law" was the one used in the eighth report of the Special Rapporteur, without objection. Clarification was therefore needed on that point, and, as far as possible, a degree of consistency should be ensured in the work of the Commission.

The meeting rose at 11.50 a.m.

3293rd MEETING

Wednesday, 4 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Boutros Boutros-Ghali, former Secretary-General of the United Nations (*concluded*)[*]

1. The CHAIRPERSON said that the 3293rd meeting of the Commission was dedicated to the memory of

[*] Resumed from the 3291st meeting.

[23] See *Yearbook ... 2015*, vol. I, 3281st meeting, pp. 286–287, para. 8.

Boutros Boutros-Ghali, former Secretary-General of the United Nations and former member of the International Law Commission.

2. Mr. HASSOUNA said that he was grateful to the Commission members for having organized the tribute to the memory of a prominent Egyptian, scholar, professor of international law, well-known journalist, outstanding diplomat and active international civil servant – one who had been a long-standing member of the International Law Commission and the first African and Arab United Nations Secretary-General. Boutros Boutros-Ghali had also been a personal friend of his, and a mentor who had advised and inspired him in his own academic research and diplomatic career.

3. In the field of Egyptian diplomacy, Mr. Boutros-Ghali's contribution had been impressive. As Minister for Foreign Affairs, he had brought an academic dimension to diplomacy by encouraging analysis, research and the training of young diplomats. Actively strengthening and developing his country's relations with other African countries and supporting their struggle for independence and development, he had been a strong advocate of the policy of non-alignment, which had played an important role in world politics during the cold war period. Owing to his strong belief in the necessity of achieving a just and lasting Arab–Israeli peace, he had accompanied President Anwar Sadat on his historic journey to Jerusalem in November 1977 – a development that had led to the revival of the Middle East peace process and to the eventual signing of the Treaty of Peace between Egypt and Israel.[24]

4. Shortly after his appointment as Secretary-General of the United Nations, Mr. Boutros-Ghali had stressed the importance of an independent Secretary-General, as envisioned in the Charter of the United Nations. At the request of the Security Council, he had presented his report entitled "An Agenda for Peace",[25] which had proposed a new approach by the United Nations to international security and stability in the post-cold war era with a view to enhancing the Organization's capacity for preventive diplomacy, peacekeeping and peacemaking. Through "An Agenda for Peace" and his subsequent agendas for development[26] and democratization,[27] Mr. Boutros-Ghali set out ground rules for enabling a proactive United Nations to address the most pressing challenges of the contemporary world.

5. Also during his tenure as Secretary-General, a series of major United Nations world conferences – on environment and development, human rights, population and development, social development, women, and human settlements – had been organized to address critical transnational problems. At the request of the Security Council, Mr. Boutros-Ghali had proposed the establishment of an international tribunal to try the war criminals of the former Yugoslavia, thus laying the groundwork for the first United Nations war crimes tribunal and reaffirming the individual responsibility of persons who committed or ordered grave breaches of the 1949 Geneva Conventions for the protection of war victims or violations of international humanitarian law.

6. Although he had regrettably been denied a second term of office as Secretary-General of the United Nations, when one member of the Security Council had vetoed his re-election, Mr. Boutros-Ghali, in recognition of his competence and experience, had subsequently been appointed Secretary-General of the International Organization of la Francophonie, and had succeeded in enlarging that body's membership and increasing its activities. Following his retirement, he had been asked to chair the newly founded Egyptian National Council for Human Rights, a position in which he drew on his long experience in the field of human rights, including his strong support for the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights.[28] A true intellectual, Mr. Boutros-Ghali had actively continued to write, lecture and give interviews, despite his advanced age. Gradually, however, he had begun withdrawing from all the boards of academic and cultural institutions to which he had belonged, except that of The Hague Academy of International Law – a clear demonstration of the value he attached to the Academy and its role in the teaching and wider dissemination of international law.

7. On his death, Mr. Boutros-Ghali's legacy had been praised extensively throughout the world. Secretary-General Ban Ki-moon had referred to him in his statement of 16 February 2016 as "a memorable leader who rendered invaluable services to world peace and international order".[29] By his friends, he would always be remembered as a warm and modest human being with a sharp intellect and a great sense of humour. He would be missed by all.

8. Mr. MURASE said that Boutros Boutros-Ghali would be remembered as a man of courage and conviction, an excellent national leader, brilliant negotiator, accomplished diplomat and outstanding Secretary-General. In the International Law Commission, he had impressed everyone with his keen intellect, warm heart and great sense of humour. He should also be recognized for his contribution to international law research, education and dissemination. As President of the Curatorium of The Hague Academy of International Law from 2002 until his death, Mr. Boutros-Ghali had been energetic and passionate about international law and its transmission to the many students from around the world who attended the Academy's summer courses each year. His mind had remained very sharp until the end, and when the members of the Curatorium had wished to pay tribute to his past accomplishments on the occasion of his ninetieth birthday, his

[24] Treaty of Peace signed at Washington, D.C., on 26 March 1979, United Nations, *Treaty Series*, vol. 1136, No. 17813, p. 100.

[25] "An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping", Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 21 January 1992 (A/47/277-S/24111).

[26] "Development and international economic cooperation: an agenda for development", Report of the Secretary-General (A/48/935).

[27] A/51/761, annex.

[28] Arab Charter on Human Rights, adopted by the Summit Conference of the Arab League Council in its 16th ordinary session, held in Tunis, in May 2004, and entered into force 15 March 2008 (see CHR/NONE/2004/40/Rev.1, or *Boston University Law Journal*, vol. 24, No. 2 (Fall 2006), pp. 147–164).

[29] Available from the United Nations website: www.un.org/sg/en/content/sg/statement/2016-02-16/statement-secretary-general-death-boutros-boutros-ghali.

remarks had revealed less of an interest in the past than in the future of international law and The Hague Academy.

9. Mr. KAMTO said that the former Secretary-General had had the rare privilege of enjoying a long life and an exceptional professional career that had been replete with success and achievement. While it was difficult to rival the brilliant tribute paid to the former Secretary-General at his funeral in Cairo by Yves Daudet, Secretary-General of The Hague Academy of International Law, which had been published in the *Revue générale de droit international public*,[30] he wished to express his profound appreciation for the kindness and attention Mr. Boutros-Ghali had unfailingly shown him personally over the years, particularly in 2015 at the time of his election to the Curatorium of The Hague Academy of International Law, as well as when he had stood as a candidate for election to the International Court of Justice.

10. Mr. WAKO said that over the years, he had had the privilege of taking part in many discussions with Boutros Boutros-Ghali, a Coptic Christian Arab at home in Africa as well as in the broader English-speaking and French-speaking worlds and a true global citizen, on the relationship between Christians and Muslims, on human rights and Islam and on the universal nature of human rights irrespective of religion. He would mourn the loss of a man for whom he had felt great affection and who had contributed to his own development in the field of international law. Most notably, Mr. Boutros-Ghali, during his tenure as Secretary-General of the United Nations, had appointed him as his Personal Envoy to East Timor, a role in which he had ultimately contributed to the self-determination of Timor-Leste.

11. Mr. VALENCIA-OSPINA said that he was honoured, on behalf of all Latin American members of the Commission, to pay tribute to the memory of Boutros Boutros-Ghali, who had been a great source of inspiration to him in his work. While the list of Mr. Boutros-Ghali's achievements was long, it must not fail to include his sharp wit and well-rounded background, not only in law but also in humanities, especially art. The world had lost a great man, one who had, with dignity and foresight, represented the perspective of the developing and non-aligned countries within the United Nations.

12. Mr. FORTEAU said that he saluted the memory of Boutros Boutros-Ghali, a great internationalist who, as Secretary-General of the United Nations, had contributed substantially to peacekeeping and peacemaking in the world through his report entitled "An Agenda for Peace", in which he had recognized that development, democratization and preventive diplomacy were essential for international peace. As a young student writing his doctoral thesis on the law of collective security, he personally had admired, and indeed was still impressed by, the innovative quality, conceptual richness and usefulness of the above-mentioned work and its companion report entitled "An Agenda for Development". Mr. Boutros-Ghali had been an eminent scholar of international law with a distinguished teaching career spanning five decades. He had published three courses, all in French, for The Hague Academy of International Law, the last of which was entitled *Le droit international à la recherche de ses valeurs: paix, développement, démocratisation*.[31]

13. Mr. Boutros-Ghali had been an ardent champion of the French language, the culture of the French-speaking world and its role on the international diplomatic stage and he had served as the first Secretary-General of the International Organization of la Francophonie from 1997 to 2002. The attachment that he had shown throughout his life to the world's linguistic and cultural richness and diversity and to the aims, principles and aspirations of the United Nations constituted a valuable legacy which should always remain a source of inspiration for the Commission's members.

14. Mr. WISNUMURTI said that Boutros Boutros-Ghali had had a distinguished career as a statesman, diplomat and legal scholar. He personally remembered Mr. Boutros-Ghali as a Secretary-General who had shown determination, leadership, independence and courage during the difficult period faced by the Security Council in the 1990s. His landmark report on conflict resolution, entitled "An Agenda for Peace", was still relevant. It was deeply regrettable that he had failed to secure the unanimous endorsement of the members of the Security Council for a second term of office.

15. Mr. HUANG said that he had been greatly saddened to learn of the death of Boutros Boutros-Ghali who, in the course of more than 20 visits to China, had helped to forge friendly relations between that country and Egypt. In fact, in January 2016, President Xi Jinping, acting on behalf of the Government of China, had conferred on Mr. Boutros-Ghali an award for his outstanding contribution to Sino–Arab friendship.

16. He personally respected Mr. Boutros-Ghali highly as a world-class statesman and diplomat and in 1991, at the thirtieth annual session of the Asian–African Legal Consultative Organization (AALCO), held in Cairo, he had been privileged to hear an address by Mr. Boutros-Ghali, in his capacity as Minister for Foreign Affairs of Egypt, the host State. The wisdom and erudition of Mr. Boutros-Ghali had been impressive, as had been his dedication to fostering world peace and development during his term of office as Secretary-General of the United Nations. In that capacity, he had safeguarded the legitimate rights and interests of developing countries and had dealt constructively with a plethora of international and regional crises.

17. Mr. Boutros-Ghali had also been a distinguished international jurist and had taught international law and international relations in universities around the world. The International Law Commission had benefited from his vast knowledge and wisdom during his membership of that body from 1979 to 1991. He had been firmly committed to defending the Charter of the United Nations as a cornerstone of modern international relations and international law, and to maintaining peace, promoting development and advocating democracy, dialogue and

[30] "*In memoriam*: Boutros Boutros-Ghali (1922–2016)", *Revue générale de droit international public*, vol. 120, No. 1 (2016), pp. 5–8.

[31] *Collected Courses of The Hague Academy of International Law*, 2000, vol. 286, pp. 9–38.

cooperation. He had dedicated his whole life to furthering the establishment of a more just and equitable world.

18. Mr. PETER said that Boutros Boutros-Ghali had been one of the five great African masters of international law who had greatly inspired him when he had been a young undergraduate student. Mr. Boutros-Ghali's time as Secretary-General of the United Nations, although short, had been momentous, since it had been marked by the establishment of the International Tribunals for the Former Yugoslavia and the International Tribunal for Rwanda, which had furthered the development of jurisprudence on genocide, crimes against humanity, aggression and related offences.

19. After leaving the United Nations, Mr. Boutros-Ghali had been very active in public life. Among his appointments, from 2003 to 2006 he had served as the Chairperson of the Board of the South Centre in Geneva, an intergovernmental research organization for developing countries. His death was a great loss to Africa and the international community as a whole.

20. Mr. PETRIČ, speaking on behalf of all Commission members from Eastern European States, said that the Commission would remember Boutros Boutros-Ghali as an excellent international lawyer, academician, politician, humanist and man of integrity. He personally believed that Mr. Boutros-Ghali's most historic achievement had been his contribution to the signing of a peace treaty between Egypt and Israel. He had also played an important role in securing the peaceful settlement of disputes among non-aligned States, and had achieved the establishment of the International Tribunal for the Former Yugoslavia, a forerunner of the International Criminal Court. During the break-up of the former Yugoslavia during his term of office as Secretary-General, Mr. Boutros-Ghali had quickly understood that the Socialist Federal Republic of Yugoslavia, at that time a respected member of the international community, really comprised several nations that were striving for independence.

21. The CHAIRPERSON said that he wished to join his colleagues in paying tribute and expressing his profound respect for Boutros Boutros-Ghali, a distinguished member of the International Law Commission and a great son of Africa. Recalling his own involvement in the campaign to promote an African candidate for the post of Secretary-General, he said that, following Mr. Boutros-Ghali's appointment, the African States and the entire membership of the United Nations had quickly recognized that they had elected a noble man of integrity to the post. Mr. Boutros-Ghali had taken office at a time of great turbulence and a change of paradigm in international relations. Under his leadership, the number of United Nations peacekeeping missions worldwide had multiplied, and the important report entitled "An Agenda for Peace" had been issued. That document and its companion report "An Agenda for Development" were part of the intellectual legacy that Mr. Boutros-Ghali had left to the United Nations system. Mr. Boutros-Ghali had also been a great friend of Mozambique and had played an active personal role in the peace process there.

22. Mr. HASSOUNA thanked the members of the Commission for their tributes, which he would convey to the Government of Egypt and the family of Mr. Boutros-Ghali.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Eighth report of the Special Rapporteur (*continued*)

23. The CHAIRPERSON invited the Commission to resume its consideration of the eighth report of the Special Rapporteur on the topic of the protection of persons in the event of disasters (A/CN.4/697).

24. Mr. CAFLISCH thanked the Special Rapporteur for his clear and balanced report. He agreed with Mr. Forteau that the proposed draft articles as a whole might form some kind of framework declaration, although he would reserve his final position on that point. He was in favour of referring the preamble and text of all of the draft articles, as proposed by the Special Rapporteur, to the Drafting Committee.

25. It would be appropriate to mention in the preamble that the draft articles involved a considerable amount of progressive development. As both articles 3 and 4 contained definitions, they should be merged; however, the second clause of article 4 (*e*), which was not a definition, should be moved elsewhere. Moreover, the substantive rule contained in that clause was formulated in excessively rigid terms, since the main point was that assistance should be forthcoming, provided that the use of military assets, whether personnel or equipment, should not lead to abuses.

26. The content of draft article 5 on respecting and protecting the inherent dignity of the human person should be moved to the preamble. As the Commission had previously established, such protection was not a human right as such, but rather the source of most or all of the specific rules protecting human rights. Moreover, the protection of specific human rights was taken care of in draft article 6.

27. Regarding draft article 7, the response to disasters was without doubt based on the principle of humanity and should take place without distinction, which explained the references to neutrality, impartiality and non-discrimination; however, the reference, in the French text, to the principle of *non-malfaisance* was incomprehensible. If it was not deleted, it would have to be explained in the commentary.

28. With regard to draft article 11, some had said that a duty to reduce the risk of disasters did not exist. While that was partially true in general terms, draft article 11 involved the progressive development of international law, which he hoped would be mentioned in the preamble. Furthermore, such a duty did seem to exist in the narrower context of obligations of good neighbourliness. As for draft article 12, paragraph 1, he understood why a proposal had been made to replace the word "duty" (*devoir*) with "responsibility" (*responsabilité*); however, since, in

French, *responsabilité* referred to the legal consequence of violating a duty, it would be preferable to retain the existing text. He wondered whether it might be possible to merge draft articles 20 and 21 into a single provision stating that the rules in the draft articles were without prejudice to other rules of international law.

29. Mr. CANDIOTI said he was concerned that some Commission members saw a need to warn readers that certain of the draft articles were a result of progressive development. That was a departure from the standard practice of the Commission, since it had not previously made a clear distinction between codification and progressive development, both of which were part of its mandate. He did not understand why it was now thought necessary to do so, especially as the implication seemed to be that progressive development was somehow dangerous or negative.

30. Mr. CAFLISCH said that the progressive development of international law was far from being a bad thing; however, it was necessary to state clearly that positive law and the development of positive law were two different concepts.

31. Mr. PETRIČ said that he too was concerned at the proposal to indicate which elements of the draft articles derived from progressive development. It was understood that the draft texts produced by the Commission were a combination of progressive development and codification and, in any case, it would be difficult to identify which specific elements were an exercise in progressive development and which represented codification. In cases where a provision did not clearly represent the codification of an existing rule, the Commission could perhaps use the word "should" rather than "shall". If the commentaries were to indicate that a particular element involved progressive development, it would give the impression that progressive development was somehow secondary to codification.

32. Mr. KAMTO, recalling that the Commission had engaged in similar debates at previous sessions, said that, as he understood it, the question now was where, rather than whether, progressive development should be mentioned. While some members wished to indicate which specific provisions were an exercise in codification or progressive development, he suggested that, by way of compromise, the Commission should, as a general policy, merely indicate in the general introductory commentary that the proposed texts were a combination of the two elements. That should not be problematic, given that virtually all of the Commission's work, including on such topics such as "Responsibility of international organizations", "Expulsion of aliens" and even "Law of treaties", represented a combination of codification and progressive development.

33. Mr. CANDIOTI said that, in its past practice, the Commission had never distinguished between codification and progressive development. In any case, all codification of an unwritten rule of customary law involved an element of progressive development, since, through codification, the rule was clarified and defined in greater detail. He was concerned that singling out progressive development in the Commission's projects would give progressive development a negative connotation, as it suggested a lack of legal certainty. The Commission had a clear mandate to engage in progressive development and to consider new topics in response to the international community's urgent needs; there was therefore no need to add caveats in that regard.

34. Mr. CAFLISCH said that he had never suggested that everything in the current topic was a result of progressive development nor that each individual principle needed to be qualified as an exercise in progressive development or codification. However, it was necessary to mention – perhaps in the general commentary, as well as in the preamble – that the draft articles involved a combination of the two elements.

35. Mr. MURPHY said that the Commission had in fact often indicated in the introductory commentary to the final version of draft texts that it had been engaged in a combination of progressive development and codification, as a reminder that the project, as a whole, involved both elements. Such an approach had been followed for the draft articles on the expulsion of aliens[32] and the draft articles on the responsibility of international organizations,[33] among others, and he hoped that the Special Rapporteur would consider doing the same for the current draft articles. Furthermore, it could not be asserted that the Commission had never made a distinction between codification and progressive development in relation to individual provisions: in the commentary to the draft articles on the expulsion of aliens, for example, the Commission had candidly acknowledged that some rules contained therein constituted progressive development of international law and explained how it had formulated them. Such candour was positive in terms of maintaining the legitimacy of the Commission's work. In some cases where certain members had expressed doubts as to whether a particular rule should be advanced, owing to a paucity of evidence in State and treaty practice, the compromise approach had been to indicate that the rule was an exercise in progressive development. If that wording was problematic, a different formulation could perhaps be found.

36. Mr. CANDIOTI said that, while he would search for precedents in the Commission's earlier work, he still questioned the need to indicate that a particular rule constituted progressive development in cases where there was no general agreement as to its existence, given that the Commission had a mandate to develop new rules if so required by the international community. It was not clear to him why each provision that reflected progressive development should be identified. Furthermore, if the Commission were to do so for each provision arrived at through progressive development, it would also have to identify every provision resulting from the codification of customary law.

[32] The draft articles on the expulsion of aliens adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2014*, vol. II (Part Two), pp. 22 *et seq.*, paras. 44–45.

[33] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

37. Sir Michael WOOD said that it was important not to generalize, as the usefulness of indicating, either in the general commentary or in relation to specific provisions, that the work contained elements of progressive development or of codification varied from topic to topic. There was obviously nothing wrong with progressive development, and it could be very useful to highlight it, especially for practitioners seeking guidance as to whether the Commission's draft texts reflected existing law or constituted proposals for new law. In the current context, the matter could be left in the hands of the Special Rapporteur.

38. Mr. ŠTURMA said that the proper place to indicate that the Commission's work involved a combination of progressive development and codification was in the general commentary. The commentaries to specific draft articles should make reference to progressive development only in exceptional cases, since sometimes the Commission was divided on such issues. Furthermore, rules that were currently elements of progressive development could become customary rules over time, and the Commission should not prevent such development. States might also have a role to play in indicating, in their discussions in the Sixth Committee and elsewhere, whether they considered a particular rule to be an exercise in progressive development or codification.

39. The CHAIRPERSON said that it had been a valuable discussion. He welcomed the proposal to indicate in the general introductory commentary that the draft articles were a combination of codification and progressive development, although a decision on the issue did not have to be taken at that time.

40. Mr. NOLTE said that he wished to thank the Special Rapporteur for his excellent eighth report, in which he had diligently considered the wealth of comments received from States and organizations. The importance of the topic under discussion lay not only in the number of disasters that the world had experienced in recent years and the likelihood of yet more to come, but also in the recognition by States, international organizations and civil society of a responsibility and a need for global solidarity to reduce the risks associated with disasters and to mitigate their consequences. The Commission's work on the topic had a crucial role to play in recognizing and crystallizing that responsibility and need in an appropriate legal form.

41. There was, however, no easy answer to the question of the form that the Commission's work on the topic should take. The current draft text contained elements of both codification and progressive development, with many draft articles reflecting existing law, even though the proposed wording of those articles might not correspond exactly to that used by States to accompany their practice. Where a particular draft article constituted progressive development, the Commission should be candid and say so. It would be going too far, however, to make a general statement in the commentaries that would result in a presumption that the draft articles represented progressive development of the law rather than its codification. It should be borne in mind that the Commission's mandate to promote the progressive development of international law did not mean that it had a mandate to make customary international law. Rather, its mandate was to submit proposals to the General Assembly on how international law should be progressively developed; it did not itself have the political competence to make the decisions that progressive development entailed.

42. International law had long recognized that the main purpose and responsibility of the State was to protect its people. Although that obligation had sometimes been overshadowed by a misleading debate about the "responsibility to protect", the Commission did not need to involve itself in that debate in the context of the current topic. The idea that States had a general obligation to protect, by virtue of their sovereignty, had already been authoritatively articulated almost one hundred years earlier, in the *Island of Palmas* case, in which it had been stated that "[t]erritorial sovereignty … has as corollary a duty: the obligation to protect within the territory the rights of other States" (p. 839 of the award). Following the post-1945 universal recognition of human rights, on both a customary law and treaty law basis, the general obligation to protect was no longer limited to inter-State relations. However, it was not focused on the prevention of international crimes, nor must it carry any implications regarding a possible right of States to intervene in the domestic affairs of other States. It entailed certain more specific obligations that were spelled out in the draft articles as a matter of *lex lata*, such as the duty of the affected State to seek external assistance if a disaster exceeded its capabilities. On the other hand, the draft articles contained certain other rules that were in the area of progressive development, for example regarding prevention.

43. The need to indicate whether a particular draft article purported to reflect existing law or not would depend on the intended outcome of the project. In that regard, it might be wise for the Commission to refrain from expressing a clear preference for either a draft treaty or for a draft declaration by the General Assembly and to leave it to States to choose the path they wished to pursue. In any event, it was clear that the draft articles would have the character of a framework for action or of principles; they would not constitute a set of specific rules.

44. Concerning draft article 3, he agreed with other speakers that it would be going too far to include the adjective "economic" in the definition of a "disaster". Its inclusion might wrongly suggest that the Commission had given careful consideration to the difficult questions raised by the dire consequences of international economic shocks and the ensuing need for international cooperation.

45. Regarding draft article 4 (*a*), there was no need to restrict the definition of "affected State", as proposed by Mr. Murphy. The latter's concern that, under the current broad definition, every State that had a national located in a disaster zone would constitute an affected State was perhaps based on a misunderstanding regarding the concept of jurisdiction, as used in the current draft. That concept was not identical to the general jurisdiction of States to prescribe, but referred rather to the specific concept of jurisdiction as it had been developed by various human rights courts and bodies, as well as by the International Court of Justice, in the context of the responsibility of States for human rights violations. It would be sufficient to make that clear in the commentaries.

46. He agreed that the new reference to "military assets" in draft article 4 (*e*) should be reconsidered, both because it was formulated as a substantive rule in an article on definitions and because it might unnecessarily restrict recourse to important forms of assistance. If a cautioning reference to the military was considered necessary, it should perhaps refer not to "assets" but to "arms".

47. Draft article 5 should remain where it was. Human dignity was not merely an overarching principle or source of inspiration: it also represented the very core of human rights and was central to the current topic. International and national courts had demonstrated on various occasions that human dignity, while admittedly a rather general and indeterminate concept, was not inherently too vague and uncertain to operationalize. The article was therefore appropriately placed at the beginning of the substantive provisions and just before the draft article on human rights. A reference to its function could, however, perhaps be included.

48. He would prefer to keep the original text of draft article 6, as adopted on first reading,[34] since the expression "fulfillment of their human rights", in the amended text recommended by the Special Rapporteur, seemed somewhat inappropriate in the current context.

49. Concerning draft article 7, he shared the doubts of those members who had questioned whether the inclusion of a "no harm" principle or the word "independence" would be helpful. It was not clear what those concepts meant in the context of the topic in question.

50. Draft article 8 should not lose the element of "duty", which was clearly recognized as a legal duty in its inter-State dimension and was not purely voluntary in that dimension. A distinction should perhaps be made between States and international organizations, for whom such a duty existed, and "other assisting actors", for whom its existence was less clear. He was not convinced of the advisability of replacing the expressions "other competent intergovernmental organizations" and "relevant non-governmental organizations" with "other assisting actors", in various draft articles. The Commission made a distinction between intergovernmental organizations and other actors in other contexts, and with good reason: that distinction might, for example, be legally relevant in the context of the duty to cooperate.

51. With regard to draft article 12, he was not in favour of replacing the word "role" as proposed by Mr. Forteau, since, although the term did not have a specific legal content, it served the important purpose in the current context of describing the main functions of the State.

52. The Special Rapporteur's proposal to turn draft article 13 into a self-judging provision went too far in taking certain concerns of States into account. The proposal to insert the word "manifestly" went in the right direction and should accommodate the concerns of those States that had expressed scepticism about whether a duty of the affected State existed. The questions raised by some States regarding the potential consequences of a breach of such a duty had also drawn attention to the important practical issue of whether the application of the rules of State responsibility would be helpful in that context. On a more general level, the intense debates that had resulted in draft articles 13 and 14 should not be reopened unless there were convincing reasons to do so. Like previous speakers, he saw no need to emphasize that offers of assistance must be made in good faith, since that would introduce an inappropriate element of distrust into the set of draft articles.

53. In conclusion, he was in favour of referring the draft articles to the Drafting Committee.

54. Mr. McRAE said that he wished to congratulate the Special Rapporteur on his eighth report, in which he had sought to take into account the responses from Governments and other stakeholders following the first reading of the draft articles.[35] Although he himself had not been involved in the Commission's finalization of the first reading, he had taken part in the earlier stages and fully remembered the delicacy of achieving a balance between State sovereignty and claims to a right to intervene in the event of a disaster. Like others, he would be reluctant for the Commission to go back and upset those balances, which were reflected in, for example, draft articles 13, 14 and 16.

55. Although he had doubts about some of the amendments proposed by the Special Rapporteur, such as the inclusion of the adjective "economic" in the definition of "disaster" in draft article 3, the addition of the words "no harm" and "independence" in draft article 7 and the inclusion of a "without prejudice" clause in draft article 21, those were matters that could be dealt with in the Drafting Committee.

56. With regard to the question of whether to make any reference to progressive development in the final report on the topic, the Commission had never had a consistent practice in the way in which it treated or distinguished between codification and progressive development. Having quickly abandoned the separate procedures set out in its statute for dealing with the two elements, it had, for a time, simply noted that the draft articles it was proposing dealt with both codification and progressive development, taking the view that it was not possible to draw a distinction between them. More recently, there had been an occasional tendency to identify individual provisions as progressive development. However, both approaches were inadequate in terms of dealing with the question of the status of draft provisions and, ultimately, quite misleading.

57. The mandate of the Commission was the "progressive development of international law and its codification". Consequently, the statement that a particular set of draft articles was a combination of codification and progressive development was saying nothing more than that the Commission had carried out its mandate. However, a statement that some provisions represented existing law while others represented progressive development suggested that there was a hierarchy among the articles proposed and that some draft articles could be relied upon, but others could not. That was made more explicit if the

[34] See *Yearbook ... 2014*, vol. II (Part Two), p. 70.

[35] *Ibid*., pp. 61 *et seq.*, paras. 55–56.

reference to progressive development was a label attached to a particular draft article like a warning sign. Moreover, the Commission often did not reach a unanimous decision on what was customary international law and what was not, and thus when it identified a provision as coming within the category of progressive development it was not stating that the Commission had reached a conclusion on that matter; rather, the label was a compromise between different views. While it was acceptable at first reading to include in the commentaries an indication of such divided opinion in the Commission on certain points, the practice had been to remove such notations at the second reading, so that the outcome reflected the views of the Commission as a whole. Attaching a "progressive development" label to one set of draft articles also raised a question about other draft articles where there was no such label. In addition to the fact that other draft articles not labelled as such also clearly involved progressive development in some cases, such a label carried the implication that the draft articles were of less value than they would otherwise have been if no such qualifier had been attached. It was not for the Commission to diminish the value of its work in advance by providing a warning that it did not regard what it had proposed as being in accordance with the existing law. Instead, the Commission's role was to produce an outcome that States could then decide how to use.

58. Regarding the final form of the work on the topic, while the Special Rapporteur had proposed that the Commission continue with the objective of providing draft articles and recommending that they should be incorporated into a convention, some States had taken the view that the Commission should instead be producing guidelines, principles or conclusions. The discussion highlighted the fact that the Commission had never adopted a uniform view on what the differing ways of describing the outcome of its work actually meant. The preparation of draft articles with a recommendation that the General Assembly convene a conference with a view to drafting a convention was perhaps the clearest outcome that it could propose. But what if the Commission prepared draft articles but did not recommend that they be incorporated into a convention? Did it matter whether they were called draft articles, draft principles, draft guidelines or draft conclusions? Those were questions that required further reflection, and, in the next quinquennium, the Commission might like to give thought to setting up a working group to consider such questions with a view to introducing some uniformity into the Commission's practice. As to the current draft articles, it seemed appropriate to continue with the project in the form of draft articles that could be turned into a framework convention, as proposed by the Special Rapporteur. The Commission could subsequently decide, after it had adopted the draft articles on second reading, whether actually to recommend that the General Assembly convene a conference with a view to drafting a convention.

59. In conclusion, he recommended that all of the draft articles, as proposed by the Special Rapporteur, be sent to the Drafting Committee.

The meeting rose at 1.10 p.m.

3294th MEETING

Friday, 6 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Eighth report of the Special Rapporteur (*continued*)

1. Mr. KITTICHAISAREE said that he would begin with some general comments. Noting that the purpose of the draft articles was to find the most appropriate balance between the rights and interests of States, individuals and the international community, he recalled that the movement of persons to unaffected States was one of the main consequences of disasters and that it was for that reason, among others, that States had a vested interest in the prevention of disasters and the protection of victims. Regarding the concept of the responsibility to protect, the reactions of States in the Sixth Committee had been unequivocal: it was not applicable to the situations covered by the draft articles. Lastly, he agreed with Commission members who had noted that several provisions of the draft articles reflected progressive development rather than the codification of international law, a point that should be made clear in the commentary.

2. Turning to draft article 3, he agreed with the comments made by some members about the inclusion of the adjective "economic" in the definition of the term "disaster". As the adjective was vague and ambiguous in the context of the draft articles, an explanation for its use was needed.

3. Like many other members, he considered that draft articles 3 and 4 should be combined. In relation to draft article 4 (*a*), he agreed with Mr. Nolte that the definition of "affected State" was appropriate. As the International Court of Justice stated in paragraph 109 of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions." The International Covenant on Civil and Political Rights contained provisions that were of direct relevance to, *inter alia*, the

protection of the human rights of victims of disasters. In addition, in an internal memorandum issued by the Office of the Legal Adviser of the United States Department of State on 19 October 2010, the Legal Adviser affirmed that a State incurred obligations to respect Covenant rights – in other words, was itself obligated not to violate those rights through its own actions or the actions of its agents – in those circumstances where it exercised authority or effective control over the person or context at issue.[36] The European Court of Human Rights, meanwhile, interpreting the territorial scope of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), had consistently held, as in *Loizidou* v. *Turkey*, that a State party to the Convention had a positive obligation to ensure human rights thereunder whenever it had *de facto* control over a territory, even if it did not have sovereignty over that territory. It therefore made sense to affirm in draft article 4 (*a*) that "affected State" meant "the State in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster".

4. With regard to draft article 5, he agreed with the proposal by Mr. Caflisch and Mr. Murphy to refer to human dignity in the preamble, since that principle was a yardstick for the protection of human rights and not a legal obligation in and of itself.

5. Like Mr. Murphy, he considered the term "no harm" in draft article 7 to be ambiguous. The term "independence" should be understood as the need to respect the territorial sovereignty, integrity and independence of affected States. However, in the light of draft articles 13 and 14, one might wonder how to respect the "independence" of an affected State that was unable or unwilling to protect its citizens.

6. He agreed with Mr. Park that draft articles 13 and 14 were not sufficiently clear and failed to provide definitive answers regarding affected States that did not have a functioning Government. In the past, certain affected States had deliberately avoided or even prevented disaster relief in regions inhabited by enemies of the central Government or by persecuted populations. The Commission should therefore consider how best to balance, on the one hand, the rights of affected States that were unable or unwilling to protect their citizens and, on the other, the strong desire of States not to include the concept of responsibility to protect in the draft articles.

7. Lastly, he highlighted the importance of draft articles 10 and 11, since the reduction of risk and prevention had more merit than disaster relief, and said that, like other Commission members, he supported the deletion of draft article 21, which was superfluous given the all-encompassing nature of draft article 20.

8. Mr. HMOUD noted that the issue of whether to specify which rules were progressive development and which were codification of customary law had sparked a debate within the Commission that concerned not only the topic in question but also the overall approach to the various topics on the agenda, and said that no uniform rule could be applied in that regard. If the Commission believed that there was a need to highlight that a certain rule or principle was progressive development rather than codification, it would do so. Given that the draft articles were meant to strengthen the protection of persons during disasters and to create appropriate legal tools for responding and providing relief, and taking into account the balance between a State's prerogatives and individuals' rights that the articles strived to achieve, references to the nature of the rules proposed could prove counterproductive. If the draft articles took the form of a convention, the rules that they contained would become binding as treaty obligations. If they took the form of guidelines or of a declaration, however, those rules which were *lex ferenda* could become binding if they induced a general practice in the context of disaster prevention, response and relief. Several provisions of the draft articles were clearly innovative or based on practice, which was mixed in that field. It should be stressed that the Special Rapporteur and the Commission had ensured that the necessary balance was struck between the sovereign rights of States and individual rights without undermining the effectiveness of the draft articles in strengthening the protection of persons.

9. Turning to the rights of the affected State, he noted that, in many disaster situations, the lack of a proper response had resulted in the deaths of hundreds of thousands of people and in the suffering of many more. Those losses could have been mitigated if measures of relief, cooperation and coordination with assisting actors had been taken in a timely and appropriate manner. In many cases, assistance had not been provided or had been delayed because the authorities in the affected State had not been in a position to act or had failed to respond to offers of assistance from external actors, and had thus been unable to protect the persons in their territory effectively from the effects of the disaster. It was that imbalance between what were perceived as the rights of the affected State, on the one hand, and the rights of the people in its territory, on the other, that contributed to aggravating the situation and the effects of the disaster. The draft articles aimed to address that situation by introducing or reaffirming certain core principles, including the duties of the State, by virtue of its sovereignty, to ensure the protection of persons and the provision of relief and assistance on its territory, to cooperate, to respect human dignity, to protect the human rights of the individuals affected and not to abuse its right to withhold consent for assistance. Those principles had to work in tandem in order to achieve the goals of the draft articles, which were to strengthen and maximize protection in the event of a disaster. They provided the necessary guarantees for the proper application of the protection regime under the draft articles.

10. While Commission members, States in the Sixth Committee and other actors had debated the appropriateness of a rights-based approach, he did not see how a legal instrument intended to provide the necessary protection during disasters could achieve that objective without being based on the concepts of the rights and obligations of States and the fundamental rights of the persons affected. It should be noted that the draft articles were the *lex generalis* and so did not limit the application, in

[36] Office of the Legal Adviser, United States Department of State, "Memorandum opinion on the geographic scope of the International Covenant on Civil and Political Rights", p. 4.

a given situation, of the special rules contained in other instruments, including the rules governing the specific needs and the *modus operandi* to be adopted in a disaster area. Another aspect of the issue concerned the role of actors who were not the subjects – at least not the traditional subjects – of international law, such as individuals and NGOs involved in providing relief who fell within the definition of "other assisting actors". The draft articles provided, in some cases, for certain rights and duties for those actors that went beyond the rules applicable to them in international law, but did not set out the specific consequences that flowed from those rights and duties, the implementation of which would thus be governed by national laws. Under international law, however, the non-performance of those duties or a violation of the rights of assisting non-State actors by one or more States could trigger the application of the regime concerning the responsibility of the States involved.

11. As a last general point, he recalled that the Commission had decided not to include the concept of responsibility to protect in the draft articles, which had proved to be the right approach in the light of the comments and observations made by States over the years. There was no denying, nonetheless, that the goals of the responsibility to protect, which was not yet a doctrine of international law, underpinned some of the provisions of the draft articles without giving rise to rights or obligations, as Mr. Forteau had said. That approach was appropriate as the concept of responsibility to protect had emerged in a different context and aimed to put a stop to the most serious crimes of concern to the international community as a whole. It should be stressed that the draft articles did not trigger obligations *erga omnes*: the non-performance by an affected State of the obligations set forth in the draft articles would lead to the normal consequences of a breach of an obligation under international law. If the draft articles became a convention, the negotiating parties could include provisions regarding the specific consequences of a violation of certain obligations.

12. Turning to draft article 1, he said that it was apparent from the discussions in the Sixth Committee and from the comments received that the Commission had been right to include the three phases of disaster in the scope of the draft articles. Leaving out the pre-disaster phase would have undermined the goal of the protection regime contained in the draft articles, especially since, in many cases, disasters were simply the final manifestation of a chain of events, and preparedness and prevention were integral to any effective response to a disaster and its effects.

13. Regarding the definition of the term "disaster" in draft article 3, he understood why it should be addressed in a separate draft article, but considered that it should be specified that the definition was for the purposes of the draft articles, as it was technical in nature and its application to other instruments might not necessarily be appropriate. From reading the draft article and the new formulation of draft article 21 on the relationship with international humanitarian law, armed conflicts and other internal disturbances and violent acts did not appear to be excluded from the definitions. The Commission would have to consider that point carefully in order to avoid any unintended consequences, even though it was stated in draft article 20 that the draft articles were without prejudice to other applicable rules of international law. He agreed with Mr. Murphy that the reference to large-scale economic damage would extend the scope of the draft articles beyond what had initially been intended. If the Commission decided to keep the reference, it should make clear in the commentary that the damage in question was not the sort caused by a recession or by similar events.

14. The definition of affected State in draft article 4 (*a*) suggested that more than one State could be considered as affected. In fact, any State in whose territory an affected person was present would be considered an affected State, so tens of States could be affected by a disaster that had occurred in the territory of just one. The issue would have to be dealt with in the draft articles, and not in the commentaries, in order to ensure that the definition applied only to those States in whose territory the disaster and its effects occurred. He did not see the need to include the phrase "at its request or with its consent" in the definitions of "assisting State" or of "other assisting actor". The protection regime under the draft articles set out the conditions for its application and for requesting, accepting and providing assistance. Leaving the phrase as it was might create legal problems, for example if a State withdrew its consent arbitrarily: what would be the legal position of the assisting State or of other assisting actors considering that they would no longer fall within the definition given in draft article 4?

15. On the issue of military assets and the assertion that they should be used only where there was no comparable civilian alternative to meet a critical humanitarian need, he wished to point out that, in many States, civil defence personnel were part of the armed forces. Allowing the use of military assets only as a last resort would, in many cases, limit the ability of assisting States to provide assistance. The fact that such assets fell under the command of assisting States and therefore that there was a conflict with the prerogatives of the affected State in directing and controlling relief and assistance under draft article 12, was not a genuine problem. After all, the draft articles were *lex generalis*, and often States entered into agreements regulating the relationship between the military assets of the assisting State and those of the affected State prior to the deployment of assets. As a result, the Commission should perhaps refrain from adding a provision concerning the use of military assets to draft article 4 (*e*).

16. With regard to the issue of whether to devote a provision of the draft articles to the principle of human dignity, on which there had been an extensive debate during the first reading, it should be stated in the body of the text that respect for, and the protection of, the inherent dignity of the human person by States and by other assisting actors was a guiding principle that should serve as the basis for the implementation of protection regimes during disasters. The principle created obligations for States and for intergovernmental organizations, but not for assisting non-State actors.

17. The entitlement of persons affected by a disaster to respect for, and the protection of, their human rights was an important point that should be made in the draft

articles to encourage the adoption of positive measures in that regard. That did not prevent the application as *lex specialis* of the human rights regime under human rights treaties, including the implementation of rules relating to derogable and non-derogable rights.

18. As to the principles of humanitarian response under draft article 7, he agreed that the principle of non-discrimination was an element of impartiality and welcomed the clarification provided in the draft article. The addition of the principle of independence might lead to certain legal problems in relation to assisting actors, whether they were States, international organizations or other actors. At the same time, he did not see how the principle of no harm would add to the protection regime under the draft articles.

19. The duty to cooperate, which was key to achieving the goal of protection during disasters, was a fundamental obligation under the draft articles. The content of the duty was interpreted in the light of the other provisions of the draft articles, including draft article 9 on forms of cooperation, and other rules of international law. He noted that the duty to cooperate was more limited under the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[37] than under the draft articles, which also imposed such a duty on assisting non-State actors. Nevertheless, he was not in favour of referring to the United Nations Special Coordinator for Emergency Relief, since his or her role could change, as previously noted.

20. Draft article 11 should take into account, or be read in the light of, the fact that many States did not have the capacity to reduce the risk of disasters. It should thus be clear that the duty was a differentiated duty based on every State's capacity to undertake the necessary and appropriate measures to prevent, mitigate and prepare for disasters.

21. Draft article 12 on the role of the affected State was one of the pillars of the draft articles, as it established that the State, by virtue of its sovereignty, had the duty to ensure protection and to provide relief, and that it had the primary role in the direction, control, coordination and supervision of that relief and assistance. It guaranteed the rights of the affected State, stemming from its sovereignty, *vis-à-vis* other actors. At the same time, it should be noted that any violation of a duty of the affected State triggered the same consequences as an internationally wrongful act. The draft articles did not specify the consequences of such a violation, which would thus need to be defined in the future if the draft articles took the form of a convention.

22. On the duty of the affected State to seek external assistance, he did not consider it appropriate to leave it to the affected State to determine whether a disaster exceeded its response capacity. That might have the effect of suspending the application of a key aspect of the draft articles, which aimed to provide effective and adequate protection during disasters. That was especially true when the State was unable or unwilling to seek external assistance or when it did not have an effective Government.

23. On the consent of the affected State to external assistance under draft article 14, he welcomed the proposed amendment to prohibit the arbitrary withdrawal of consent, which did not mean that the affected State lost the right to control its territory and the relief operations carried out there. The prohibition on withholding consent during an emergency was, at the very least, an emerging norm, which could be found in, for example, Security Council resolution 2165 (2014) of 14 July 2014 on the humanitarian situation in the Syrian Arab Republic.

24. In the same vein, draft article 15, on the conditions for the provision of external assistance, did not provide the affected State with a blanket right to decide those conditions, as the draft articles established that assisting actors had certain rights *vis-à-vis* the affected State.

25. With regard to offers of external assistance, he was in favour of deleting the word "right", which would have created practical and legal problems, including in relation to subjects of international law.

26. Regarding the duty of the affected State to take appropriate measures to ensure the protection of relief personnel under draft article 18, it should be stressed that no undue burden should be placed on the affected State and that such protection should depend on the capacity of that State, especially when relief was provided in areas where no State authority existed. The words "within the capacity of the affected State" or a similar expression should therefore be added to convey the idea clearly.

27. The relationship between the draft articles and international humanitarian law should be studied carefully by the Commission and by the Drafting Committee. The change proposed by the Special Rapporteur had the effect of applying the provisions of international humanitarian law and those of the draft articles concurrently when they were not in conflict. If they were in conflict, international humanitarian law would prevail. Mr. Murphy had explained in detail why the proposed language (a "without prejudice" clause) might create problems in relation to the rights and obligations of parties to an armed conflict. At the same time, it was important for the draft articles to fill any gaps in international humanitarian law with regard to disasters during conflict situations (assuming that the conflict itself would not be included in the definition of the term "disaster") and not to infringe the rules of international humanitarian law or the rights and obligations thereunder.

28. Regarding the form that the draft articles should take, there were strong reasons to support the Special Rapporteur's proposal for them to take the form of a convention, as the draft articles not only set out rights and obligations but also facilitated the operationalization of disaster relief. The Commission should at least look into Mr. Nolte's proposal for the draft articles to become a framework convention, which would offer the necessary flexibility and enable other actors to negotiate separate agreements while respecting the principles of the convention.

[37] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

29. Mr. FORTEAU said that, in the French version, the principle of independence was not mentioned in draft article 7 as it appeared in paragraph 141 of the eighth report of the Special Rapporteur nor in the annex.

30. Mr. WISNUMURTI said that, in general, many of the changes proposed by the Special Rapporteur improved the text of the draft articles. Regarding draft article 3, it was important to retain the adjective "economic" as it covered disasters that caused economic damage, like the huge tsunami in Aceh, Indonesia in 2004, which had had severe consequences for the economy of the region and its surroundings. He agreed with Mr. Forteau and Sir Michael, among others, that draft articles 3 and 4 should be combined, as it did not seem logical to separate the definition of the term "disaster" from the other definitions.

31. As to draft article 6, it was important to keep the text adopted on first reading. The proposed wording – "fulfillment of their human rights" – would not reflect the reality on the ground, since certain rights might be impeded, limited or suspended in disaster situations. He also agreed with Sir Michael that the expression "fulfillment of their human rights" was rather odd.

32. Concerning draft article 7, he had doubts about the need to add the words "no harm" and "independence", which would overburden the text unnecessarily. He was not sure that he understood what the no harm principle covered or that the addition of the principle of independence was useful, given that the principle of impartiality was already mentioned. He was not even convinced of the need to refer to the principle of neutrality, which had been adopted on first reading. As indicated in paragraph 128 of the eighth report, a number of Governments had expressed doubts over whether the principle was relevant, as it was closely connected to situations of armed conflict, which fell outside the scope of the draft articles. The Drafting Committee should thus reconsider the issue.

33. Turning to draft article 11, he agreed with the Special Rapporteur's recommendation, but believed that the phrase "the creation of new risk and reduce existing risk" in paragraph 1 should be clarified in the commentary.

34. It was clear from the comments received that a significant number of States had expressed reservations about the wording of draft article 13. The imposition of a duty to seek external assistance had no basis in international law and would undermine the legitimate and sovereign right of the affected State to judge for itself whether it needed external assistance. According to the current wording, any actor (a State or an international organization) could judge for itself whether a disaster exceeded the response capacity of the affected State, which would trigger the obligation of that State to seek external assistance. Another undesirable consequence was that State responsibility could be invoked against an affected State accused of non-compliance with its obligation to seek external assistance, a situation that would be unacceptable. One of the solutions proposed by some Commission members, including Mr. Murphy, was to use an exhortatory formulation such as "should seek". He recalled that he had, on several occasions, expressed his own strong reservations about the current wording of draft article 13. The new wording proposed by the Special Rapporteur was not ideal because the word "duty" was retained, but it was satisfactory since it took into account the observations of the Governments concerned and reflected the efforts made to find a compromise. It therefore deserved to be considered favourably by the Drafting Committee.

35. With regard to draft article 14, it would be helpful to include the concept of "good faith" in paragraph 3, as proposed by the Special Rapporteur. The affected State had to deal with various offers of assistance, which, in accordance with draft article 13, could be made by "other potential assisting actors", which could be any actor or NGO. It was thus important to give the affected State the necessary discretion and to provide it with criteria for making a decision about an offer of assistance.

36. Turning to draft article 16, he said that he was in favour of the Special Rapporteur's proposal to simplify the text and to replace "have the right" with "may". He would also prefer to replace "may address an offer of assistance" with "may offer assistance", as proposed by Mr. Murphy.

37. Subject to the adoption of the draft articles on second reading, he agreed with the Special Rapporteur that the final draft articles should be submitted to the General Assembly with a recommendation in favour of the conclusion of an international convention. For the time being, he supported the referral of all the draft articles to the Drafting Committee.

38. Mr. KOLODKIN said that he wished to congratulate the Chairperson and all the members of the Bureau on their election and to thank the Special Rapporteur for the considerable amount of work that he had put into drafting his eighth report on the protection of persons in the event of disasters.

39. Although the time for substantive discussions had passed, he wished to make some observations that might influence the wording of the draft articles. First of all, it was essential, for the purposes of preparing the draft articles, to decide how to reflect the balance between, on the one hand, the principles of sovereignty, of the defence of human rights and of cooperation and, on the other, the rights and obligations of States in terms of the protection of persons in the event of disasters.

40. At the heart of the draft articles lay the duty of the affected State to ensure the protection of persons in its territory. To perform that duty, which itself flowed from the three aforementioned principles, the State in question had to be in a position to seek assistance when it did not have the capacity to cope with a disaster. The relevant provision of the draft articles, along with some other related provisions, clearly echoed the notion of the "responsibility to protect". Nevertheless, that obligation went hand in hand with the assurance that, in accordance with the principle of sovereignty, assistance could be provided only with the consent of the State concerned, which was not required to accept if it did not see fit to do so.

41. In that connection, it was strange that, with regard to the principle of cooperation, only the obligations of the

affected State were laid down. The obligations of other States *vis-à-vis* that State were hardly mentioned in the draft articles or appeared in any case to have been given no importance. In draft article 16, "States, the United Nations and other potential assisting actors" were not subject to anything like the same requirements as affected States in draft articles 12 and 13, to the extent that it was questionable whether there was a need to retain draft article 16.

42. None of the nine multilateral agreements or 30 or so bilateral agreements to which the Russian Federation was a party and that dealt to a greater or lesser extent with the protection of persons in the event of disasters required States parties to seek assistance. They did, however, oblige States parties to offer assistance as appropriate, provided that the affected State had requested them to do so and that it was unable to cope with the disaster by using its own resources. States parties were, at the very least, required to consider requests for assistance and to communicate their decisions to the affected States. The scope of the affected State's duties under those agreements widened once other States began to provide it with assistance. The affected State then had more obligations than other States. The balance between the rights and obligations of the affected State and those of other States was thus not the same in those agreements as in the draft articles.

43. While, in his fourth report,[38] the Special Rapporteur had spoken in favour of the duty to seek assistance, he had not cited any international agreements establishing such an obligation to substantiate his argument and had referred only to non-binding instruments. The Commission could of course decide to impose such an obligation, on condition that it specified that it was promoting the progressive development of international law rather than its codification. Similarly, by way of progressive development, it could impose obligations on the States from which assistance was requested by the affected State, including the duty to consider and respond to requests for assistance, because, ultimately, why not create new obligations for all the States concerned? To that end, it could base itself on the principles of cooperation and good faith. In any event, it had to explain clearly to States that such a duty did not exist in international law but that, for various reasons, it considered it important to incorporate it in the draft articles. It would also be necessary to define more precisely what constituted a source of obligations. Some issues lent themselves to the progressive development of international law, but others did not, and a case-by-case analysis of the different issues addressed by the Commission was therefore needed. In the field of the protection of persons in the event of disasters, nothing prevented the Commission from contributing to the progressive development of international law, but it had to be realistic. The provisions that would be proposed to States had to take into account the real needs of the international community or they would remain a dead letter.

44. With regard to the scope of the draft articles *ratione temporis*, the Commission indicated in the commentary to draft article 4 adopted on first reading that it was taking the approach of considering "the consequence of the event as a key element for purposes of establishing the threshold for the application of the draft articles".[39] If that was the case, how could the scope of the draft articles be extended to the pre-disaster risk-reduction phase? And, in any event, was it really useful to include that phase within the scope of the draft articles?

45. Draft articles 10 and 11 did not fit into the general structure of the draft articles. Under draft article 10, for example, the duty to cooperate enshrined in draft article 8 extended to the taking of measures intended to reduce the risk of disasters. However, the forms of cooperation contemplated in draft articles 8 and 9 did not lend themselves to the cooperation provided for in draft article 10. The general obligation of each State to take the measures referred to in draft article 11, paragraph 2, seemed unrealistic, even if it was an obligation of conduct, given the highly diverse nature of the disasters for which risk reduction would be appropriate. It was thus for States to assume such a duty if they had the resources to do so.

46. With regard to the general structure and wording of the draft articles, he was in favour of combining draft articles 3 and 4. In any event, the phrase "for the purposes of the present draft articles" should be added to the definition of the term "disaster". As to draft article 4 (*a*), the definition of "affected State" gave the impression that a State could be affected even if a disaster had not had a major impact on its population, as it was enough for persons, property or the environment in its territory or under its jurisdiction or control to be affected in one way or another, but was that criterion sufficient to justify the application of the draft articles to the State concerned?

47. Regarding the proposal to draw a distinction between civilian and military personnel and resources, he wished to stress that the relevant bilateral agreements reached by the Russian Federation provided for both civilian and military assistance, and for the use, in the latter case, of military equipment. In no case was priority given to civilian assistance. The States parties to those agreements assumed that, in the event of a disaster, one should use the military or civilian means that would produce the best results in a given situation, subject, of course, to the consent of the receiving State. There was therefore no need to favour civilian personnel or equipment in the draft articles.

48. With regard to draft article 5, the Special Rapporteur had rightly proposed specifying that all assisting actors should respect the dignity of the human person. There remained, however, a point that needed clarifying: did the duty to protect the dignity of the human person entail the adoption of specific measures? And was it an obligation under international law, particularly for NGOs and individuals providing assistance? The proposal to move draft article 5 to the preamble should also be considered.

49. In the commentary to draft article 6 adopted on first reading, it was stated that "the provision contemplates an affected State's right of derogation where recognized under existing international human rights law".[40] He was

[38] *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

[39] *Yearbook ... 2014*, vol. II (Part Two), p. 66 (para. (6) of the commentary to draft article 4, subpara. (*a*)).

[40] *Ibid*., p. 70 (para. (3) of the commentary to draft article 6).

not sure, however, that such a principle could be identified in draft article 6, as it was currently worded. It would therefore be useful to add the words "in accordance with international law" at the end of the text. While he did not support the Special Rapporteur's proposed rewording for the reasons already set out, he considered that it would be advisable to explore the possibility of moving draft article 6 to the preamble.

50. As to the proposed rewording of draft article 7, it would be useful, as other Commission members had pointed out, to know what the principles of independence and no harm meant in that context. Moreover, neither the title of the draft article adopted on first reading ("Humanitarian principles"[41]) nor the title proposed by the Special Rapporteur ("Principles of humanitarian response") was related to humanitarian law. If the draft article concerned external assistance, it would make sense to include the principle of neutrality. The draft article as adopted on first reading, however, did not appear to concern only the assistance given to the affected State, because it also dealt with the conduct of that State. It was difficult to see how the principle of neutrality was applicable to the affected State's response. If draft article 7 was applied to a disaster caused by a terrorist attack, would the State be required to remain neutral with regard to the terrorists? It was important to recall, in that respect, that humanity and neutrality were not synonyms.

51. Draft article 8 provided that States had a duty to cooperate among themselves, but to what extent was that duty applicable to other assisting actors? Conversely, to what extent were international organizations obliged to cooperate with States? International organizations had their own rules governing their conduct. Consequently, could an organization that was in a position to provide disaster relief assistance and that was required to cooperate with its member States be considered to have a duty to cooperate with other States, too? It might be appropriate to supplement the draft article by indicating that the duty to cooperate also stemmed from applicable national and international law.

52. Turning to draft article 16, it should be noted that, in accordance with its rules of procedure, an international organization might also have a duty to offer assistance that was owed, above all, to its member States. Draft article 20 perhaps helped remedy the shortcomings of draft article 16 in that regard. In any event, it would be wrong to place States and international organizations on the same footing in draft article 16. In addition, one might wonder whether it was appropriate to establish a general rule applicable to international organizations.

53. The first sentence of draft article 19 imposed a very strict and unrealistic obligation to consult with respect to the termination of external assistance. The Special Rapporteur's proposal would improve the draft article but would not address that fundamental flaw.

54. The Special Rapporteur's proposed rewording of draft article 21 added nothing to what was contained in draft article 20 and might even render the former superfluous. Moreover, it should be noted that, in paragraph 366 of his eighth report, the Special Rapporteur listed a very large number of States that supported the exclusion of situations of armed conflict from the scope of application of the draft articles. It was rare for so many States to hold the same opinion on a humanitarian law issue, an opinion that was shared by the ICRC, as noted in paragraph 377 of the eighth report. Other States were of a different view, but it was clear from the report that there were not as many of them. The proposed rewording of draft article 21 did not reflect the view of most States. It was therefore reasonable to question the usefulness of seeking their opinion if that was not then taken into account.

55. He recommended the referral of the draft articles to the Drafting Committee. It was essential, however, that the Committee knew what was expected of it: was it being asked to formulate draft articles that were intended to become a convention, or to produce a draft declaration or a draft of a different nature? If it was deemed appropriate to establish draft articles, "shall" should not be used systematically in place of "should", as both words coexisted harmoniously in many international instruments. Above all, the Commission should make clear to States that the aim of the draft articles was to contribute to the progressive development of law.

56. Mr. CANDIOTI said that he wished to draw attention to two points. First, with regard to the wording of draft article 16, he noted that, in the Spanish version, it was difficult to grasp the meaning because an important element was missing, namely the adjective *potenciales*. The mistake would no doubt be corrected. In any event, he agreed with Mr. Kolodkin that draft article 16 was flawed as it gave the impression that States and international organizations were free to choose whether or not to offer assistance to affected States. Second, as noted by the Special Rapporteur, the duty to cooperate provided for in draft article 8 was insufficient. It was important that States and organizations at the very least be required to consider any requests for assistance made to them.

57. Mr. SABOIA said that the Special Rapporteur's eighth report on the protection of persons in the event of disasters contained all the elements necessary for the successful completion of the second reading of the draft articles. He wished, in particular, to congratulate the Special Rapporteur on having presented in his eighth report a careful analysis of the comments and suggestions made by States and by international organizations during the course of the elaboration of the draft articles.

58. Regarding the form of the outcome of the Commission's work, it should be recalled that it would be for States to decide whether they wished to adopt a legally binding instrument on the basis of the text submitted by the Commission or to choose an instrument of a different nature. He was in favour of drafting a binding instrument. As stated by the Special Rapporteur in paragraph 413 of his eighth report, a recommendation in favour of the conclusion of an international convention would be fully in line with the practice of the Commission. Moreover, important organizations with extensive experience of disaster situations, such as the IFRC and the World Food Programme, had expressed support in that regard.

[41] *Ibid.* (draft article 7).

59. As to the debate on whether it should be mentioned expressly that certain provisions represented either progressive development or codification of international law, he shared the view expressed by Mr. Candioti, Mr. McRae and Mr. Nolte, among others. The Commission's mandate was to promote the progressive development of international law and its codification. In most of its work, the Commission had avoided drawing a sharp distinction between the two aspects and, as Mr. McRae had pointed out, it was often difficult to differentiate them in practice.

60. Most of the changes proposed by the Special Rapporteur as a result of his analysis of the comments made by States and by international organizations preserved or enhanced the balance between respect for the sovereign rights of the affected State, on the one hand, and respect for individual rights and for international law, on the other. While, for some, the draft articles were not sufficiently operational, it should be recalled that their purpose was not to duplicate the large number of instruments governing operational aspects of the protection of persons in the event of disasters, but to establish a broad legal framework and thereby fill a gap.

61. With regard to draft article 3, some Commission members had argued that the addition of the adjective "economic" could lead to an excessively broad interpretation of the definition of "disaster", which might then be applied to, for example, the effects of falling prices of exports. However, the adjective "economic" was linked to the word "damage" and to the expression "large-scale" and referred to the large-scale destruction of economic infrastructure resulting from a disaster, as had happened in Haiti. The Drafting Committee should take care to reword the draft article in a manner that responded to the concerns expressed in that regard.

62. As to draft article 4 on the use of terms, the Special Rapporteur proposed, taking into account the Oslo Guidelines,[42] to rephrase the provision related to military assets. The reasons cited to justify that approach should not lead to undue restrictions being placed on the employment of military assets, which were often vital in bringing prompt and adequate assistance to victims of disasters, as Mr. Kolodkin had rightly noted. Moreover, it was stated in paragraph 76 of the eighth report that military personnel remained under the full command of the assisting State, which might conflict with the rights of the affected State. The matter should be further clarified.

63. Turning to draft article 5, Mr. Saboia said that the inherent dignity of the human person, which served as the basis for the evolution of human rights, should not be incorporated in the preamble, as it was a concept that deserved to be addressed in a separate draft article.

64. Concerning draft article 6 on human rights, he supported the insertion of the word "protection". The word "fulfillment" had been criticized by some; perhaps the word "enjoyment" was more in line with standard human rights terminology. As to draft article 7, he agreed with some of the earlier speakers that there was little reason to insert the words "no harm" and "independence".

65. As emphasized by the Special Rapporteur in paragraph 158 of his eighth report, the duty to cooperate was an important principle of international law embodied in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Draft article 8 on the duty to cooperate was central to the topic, and the expression "as appropriate" added an element of flexibility to the fulfillment of the obligation.

66. Lastly, regarding the relationship of the draft articles with international humanitarian law and the reformulation of draft article 21 by the Special Rapporteur as a "without prejudice" clause, that solution adequately incorporated the majority opinion expressed during the debate held in the Sixth Committee, namely that, while it should be recognized that international humanitarian law took precedence as *lex specialis* during armed conflicts, the draft articles could prove useful in disaster situations occurring in time of armed conflict.

67. The draft preamble proposed by the Special Rapporteur should be submitted to the Drafting Committee together with the draft articles.

68. Mr. HASSOUNA said that the timeliness of the topic under consideration was demonstrated by the suffering caused all over the world by natural disasters such as floods, earthquakes and tsunamis, and that there was therefore an urgent need to regulate the international community's response to those dramatic situations. The Commission's work, guided and inspired by the Special Rapporteur, was important in that regard, and the draft articles filled a legal lacuna by elucidating the basic principles that underpinned the rights and duties of States and other actors in the event of disasters. They would provide a legal framework for the conclusion of regional and bilateral agreements and for drafting the operational guidelines governing the work of non-State actors, in particular the IFRC.

69. The draft articles under consideration had been developed by the Commission between 2008 and 2014, when they had been adopted on first reading. The Commission was currently carrying out the second reading of the draft articles, at a time when it had entered the final year of the current quinquennium. In that context, he wished to thank the Special Rapporteur for his excellent eighth report, in which he summarized all the work on the topic by going over the comments and observations of all relevant actors in relation to each issue and draft article, and studied each proposal and agreement before presenting his own recommendations, in which he showed understanding, objectivity and flexibility. His only aim was to end up with wording that was accurate, legally sound and likely to attract wide support. It would be appropriate, however, to explain briefly in the commentaries the reasons why he had not accepted the main proposals of relevant actors.

70. The report under consideration reflected the Commission's overall approach to dealing with the topic,

[42] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

which consisted in striking the right balance between the need to protect the persons affected by disasters and the need to respect the principles of State sovereignty and non-interference. In order to achieve that goal, humanitarian assistance had, at all times, to remain neutral and impartial, and be based on solidarity and cooperation among all relevant actors. In spite of the constructive approach adopted by the Commission, many member States of AALCO had expressed concern, at their recent annual assembly, that the draft articles did not sufficiently preserve the sovereignty of the affected States and its consent to external assistance. He had reassured them that the sovereignty and consent of the affected State were explicitly referred to in draft article 4 on the use of terms, draft article 12 on the role of the affected State, draft article 14 on the consent of the affected State to external assistance and draft article 15 on the conditions on the provision of external assistance. He had expressed his hope that those clarifications would dispel their concerns, and had stressed that the support of member States of the Organization for the draft articles adopted by the Commission was essential to their approval by the General Assembly of the United Nations.

71. Regarding the Special Rapporteur's eighth report and his recommendations concerning the draft articles, he supported the proposal to indicate in the introduction or in the commentaries that the draft articles represented both progressive development and codification of international law, as that would be in accordance with the Commission's mandate and recent practice. The appropriateness of mentioning that a given rule represented progressive development should be left to the discretion of the Special Rapporteur, who was the best placed to determine whether it was useful and necessary.

72. He welcomed the fact that the draft articles did not include the concept of "responsibility to protect", in line with the position taken by the Secretary-General of the United Nations, who, in his 2009 report on implementing the responsibility to protect, indicated that "[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility".[43] The Commission had subsequently endorsed that position.

73. It should be made clear in the commentary that draft articles 1 and 2 were applicable to all phases of disasters.

74. Draft articles 3 and 4 could be combined as they both related to the terms used, although keeping the definition of "disaster" in a separate draft article could be justified, as it was the subject of the draft articles as a whole. He welcomed the inclusion of the word "displacement" in the definition contained in draft article 3, since it addressed the sad plight of displaced persons in disaster situations. As to the adjective "economic", it would be unreasonable if it referred only to a recession or to a temporary economic crisis, but since the damage was qualified as "large-scale", it referred to the total economic collapse of the affected State, which was often combined with another calamity and could thus well be described as a disaster.

75. Concerning draft article 4 (*e*) on "relief personnel", the proposition that "military assets shall be used only where there is no comparable civilian alternative" warranted further explanation in the commentary, bearing in mind that military assistance (as opposed to intervention) had often proved in practice to be more expeditious and effective in disaster situations. The word "shall" should thus be replaced with "should".

76. Draft article 5 related to human dignity, which was an important principle that provided the ultimate foundation for human rights law. It was referred to in the Charter of the United Nations, in all universal human rights instruments, in most regional human rights instruments and in the constitutions of various countries. The draft article should therefore be retained prior to draft article 6 on human rights. With regard to draft article 6, he would prefer to return to the original wording, in which reference was made only to respect for human rights, rather than to respect, protection and fulfillment.

77. Concerning draft article 7 on the principles of humanitarian response, the reference to the principles of no harm and independence was ambiguous and should be clarified. While he welcomed the reference to the needs of the most vulnerable people, clarifications in the commentary as to their legal identity would facilitate the provision of assistance.

78. Draft article 8 related to the duty of States to cooperate among themselves, with the United Nations and with other assisting actors. Since cooperation was by definition of a voluntary nature, the verb "shall" should be replaced with "should", and the title of the draft article should simply read "Cooperation in the event of disaster". Moreover, special mention should be made in the draft article or in its commentary to the role of regional organizations, whether intergovernmental or non-governmental, in providing assistance in disaster situations. Practical experience demonstrated that regional assisting actors could often provide the most rapid and effective assistance in such situations.

79. Concerning the reduction of the risk of disasters provided for in draft article 11, he would prefer to replace the words "shall reduce" in paragraph 1 with "should reduce" or "shall aim at reducing".

80. On the duty of the affected State to seek external assistance, which was the subject of draft article 13, a determination as to whether a disaster exceeded an affected State's response capacity should not be made by the State itself; he therefore supported adding the word "manifestly" before "exceeds" to define the threshold for triggering the duty.

81. In draft article 14 on the consent of the affected State to external assistance, the notion of "good faith" seemed unnecessary. Besides, the idea that consent

[43] "Implementing the responsibility to protect", report of the Secretary-General (A/63/677), para. 10 (*b*).

should not be withheld or withdrawn "arbitrarily" required elaboration and clarification in the commentary to the draft article, since it was a key element in the provision of external assistance.

82. As to the termination of external assistance, which was dealt with in draft article 19, the requirements for such termination should be more clearly defined in the commentary to ensure the transparency and legal clarity of the process.

83. Draft article 20, on the relationship to special or other rules of international law, and draft article 21, on the relationship to international humanitarian law, should be simplified and combined in a single draft article that provided: "The present draft articles are without prejudice to other rules of international law." The nature and specificity of those rules could be mentioned in the commentary.

84. He agreed with the Special Rapporteur that the draft articles needed to be supplemented by a preamble that provided the conceptual framework. The Special Rapporteur's proposed text was generally acceptable, with two observations. In the fourth paragraph, on the importance of strengthening international cooperation, reference could be made to the parties to that cooperation, for example assisting actors or the affected State. In the fifth paragraph, when reaffirming the primary role of the affected State, reference could also be made to the State's duty to cooperate with assisting States and other actors, so as to preserve the balance of the draft articles.

85. The issue of the final form of the draft articles seemed to be controversial, since different opinions had been expressed on the matter by States and by the Commission members. Some had stated that they would prefer non-binding guidelines, a guide to practice or a set of recommendations, but he considered that an international convention would provide the momentum needed to develop new disaster relief assistance instruments at the regional level and relief legislation at the national level. Consequently, he agreed with the Special Rapporteur's proposal that the Commission recommend to the General Assembly the conclusion of an international convention on the basis of the draft articles. All the recommendations in the Special Rapporteur's eighth report should thus be referred to the Drafting Committee in order for the draft articles to be finalized as soon as possible and for the Special Rapporteur to complete the commentaries. Once the draft articles had been adopted on second reading, they would represent a major achievement of the current quinquennium.

86. Ms. JACOBSSON said that she wished to state from the outset that, with respect to the final form of the Commission's work on the topic of the protection of persons in the event of disasters, she was in favour of a draft convention. The need for a universal framework convention on the topic had become more and more apparent in view of the natural disasters that the world had faced in recent years and of the administrative and structural difficulties that had sometimes slowed response times. In fact, it would be regrettable if the Commission did not make use of its mandate to codify and progressively develop international law in an area where the need was so obvious.

87. Having said that, the Special Rapporteur's excellent eighth report and the draft articles that he proposed warranted some comments. It was worth underlining the excellent manner in which the Special Rapporteur had managed, as in his previous reports, to focus on the protection of the individual while maintaining the basic presumption that the affected State had the primary role in the direction, control, coordination and supervision of disaster relief and assistance in its territory. In that context, it was worth reiterating that no balance could ever be struck between sovereignty and human rights, which existed irrespective of whether the sovereignty of a State was infringed. Reciprocity was not required. The fact that a State could derogate from its human rights obligations did not mean that those rights ceased to exist. In addition, as pointed out by other Commission members, State sovereignty entailed a duty to honour human rights obligations.

88. There was no reason to revisit matters on which the Commission had reached agreement after lengthy discussions, for example the sensitive and controversial issue of the "responsibility to protect". The protection of persons in the event of disasters did not depend on a label; it should rest on concrete and functional articles on how States and international organizations had to and could act so as to ensure that victims of disasters were protected and assisted with full respect for their dignity and rights.

89. She welcomed any formulation that aimed to strengthen preventive measures and to underscore the importance of regional and bilateral agreements on assistance in the event of disasters. Such agreements were most often concluded before a disaster had taken place and often addressed all phases of disasters, including prevention. In addition, they often provided for cooperative measures, such as common training and exercises, which did not serve only a practical purpose: they also contributed significantly to diminishing tension among countries. In the region from which she hailed, several bilateral and regional agreements had been reached containing a general article on border crossing and an article on cases when assistance was provided by military personnel, State ships and aircraft or military vehicles. In such situations, special permission was required to enter the territory. In that connection, regarding the treatment of military assets in the report under consideration, although humanitarian assistance was primarily a civilian matter, it was important not to set up obstacles that might unnecessarily delay disaster assistance. In the end, it was the receiving State that decided whether to accept assistance. In addition, it was sometimes difficult to distinguish between military and civilian assets. Coastguards, for example, could be characterized as civilian or military depending on the internal organization of the assisting State.

90. The issue of gender seemed to have been forgotten in the report under consideration. In his seventh report,[44] the Special Rapporteur had mentioned the Hyogo Framework for Action 2005–2015[45] and the need to take that issue into

[44] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/668 and Add.1.

[45] Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. 1, resolution 2: "Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters".

account. She remained convinced that the issue of gender should be elucidated in the draft articles and in the commentaries, for the simple reason that it would make assistance much more effective. A gender-sensitive approach, like other elements, such as the need to take into account cultural diversity, was essential to ensuring that responses were effective, in terms of speed, adequacy and cost.

91. The issue of gender was increasingly mainstreamed when humanitarian assistance was discussed, and the OCHA had made an important contribution at the global level. The issue was, however, somewhat ignored in disaster situations, as had been noted during the thirty-first International Conference of the Red Cross and Red Crescent in 2011. For example, after having experienced how emergency operations in Haiti and Pakistan affected women, girls, men and boys differently, the Norwegian Red Cross had decided to take account of the issue more systematically. The importance of the issue was also underlined in the Sendai Framework for Disaster Risk Reduction (2015–2030)[46] and in resolution 6 on strengthening legal frameworks for disaster response, risk reduction and first aid, adopted in December 2015 at the thirty-second International Conference of the Red Cross and Red Crescent.[47]

92. Regarding draft articles 1 and 2, she supported the Special Rapporteur's recommendation to retain the wording adopted by the Commission on first reading. She was of the view that draft articles 3 and 4 should be merged. She could not see the merit in adopting a definition of "disaster" for purposes other than those of the draft articles. By introducing two categories of definitions – one that was clearly restricted to the purposes of the draft articles and one that attempted to go further – there was a risk of causing some confusion. In addition, such a general definition might run counter to the definitions of "disaster" in other instruments, including bilateral and regional agreements.

93. The Special Rapporteur had proposed two modifications to draft article 3. She supported the insertion of the word "displacement", primarily for the reason put forward by the International Organization for Migration, namely that it would give greater visibility to the issue of human mobility, but not the proposal to insert the adjective "economic", since she could not find convincing arguments in favour of such an addition, which might cause uncertainty.

94. The definition of "affected State" in draft article 4 (*a*) merited further consideration if it was to be interpreted as it had been by some Commission members, such as Mr. Hmoud and Mr. Murphy, namely as meaning that a State was affected if one of its citizens was present in the territory where the disaster had taken place. It would be worrying if the Commission were to expand the concept of "affected State" beyond what could be considered reasonable. In addition, the concept had to be kept separate from that of "national interest". There was a dangerous tendency to expand the concept of "national interest" that the Commission should not fuel. It was therefore important that the meaning of "affected State" be explained properly in the commentaries. The current definition drew on the IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,[48] as explained in the commentaries adopted on first reading in 2014. It was an appropriate starting point, although more detailed commentaries might be warranted.

95. For reasons that she had already explained, she believed that the proposed addition to draft article 4 (*e*), namely that "military assets shall be used only where there is no comparable civilian alternative", should be deleted. However, she supported the inclusion of an explicit reference to "telecommunications equipment" in draft article 4 (*f*).

96. She was of the firm opinion that human dignity, which was the subject of draft article 5, should be dealt with in a separate draft article. As explained in the commentaries adopted on first reading, "[t]he principle of human dignity undergirds international human rights instruments and has been interpreted as providing the ultimate foundation of human rights law".[49] It would be wrong to place the obligation of States and other assisting actors to respect and protect the inherent dignity of the human person in the preamble when that obligation was set out in the articles of human rights instruments, for example article 10 of the International Covenant on Civil and Political Rights. She also supported the Special Rapporteur's proposal to use the expression "other assisting actors".

97. She supported the revised version of draft article 6. As to draft article 7, on humanitarian response principles, and draft article 21, on the relationship with international humanitarian law, the Special Rapporteur proposed mentioning two additional principles in draft article 7, namely those of no harm and independence. However, in a draft convention, only principles with clear implications should be mentioned, and she was not convinced that referring to the principles of no harm and independence would help in assessing their legal implications. It would be better to emphasize the importance of the two principles in the commentaries. For a similar reason, she remained sceptical about referring to the principle of neutrality. Admittedly, the principle was laid down in many "soft law" instruments on disaster response. As one of the core principles of the ICRC, it was of course crucially important to its work, but she could not understand why it was mentioned in the draft articles under consideration. She would not, however, be opposed to retaining the reference if the distinction between neutrality and impartiality was properly explained in the commentary.

98. While it was correct to say, as Ecuador had done, that humanitarian action should avoid worsening disparities and discrimination among the affected population, it was also correct to note that international humanitarian law occasionally supported "discrimination", in the

[46] General Assembly resolution 69/283 of 3 June 2015, annex II.

[47] IFRC, document 32IC/15/R6.

[48] IFRC, Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, Geneva, 2008.

[49] *Yearbook ... 2014*, vol. II (Part Two), p. 68 (para. (2) of the commentary to draft article 5).

sense that it prioritized certain groups, such as women and children. That had led some Commission members to conclude that the principles laid down in the draft convention might conflict with the principles of international humanitarian law, despite the fact that the draft convention was not, generally speaking, applicable in times of armed conflict. That showed the inextricable link between draft articles 7 and 21. If the Commission were to retain the wording of draft article 21 adopted on first reading, which provided that the draft articles "do not apply to situations to which the rules of international humanitarian law are applicable",[50] there would be less of a problem. The wording made it clear that there was a hierarchy of norms that helped protect vulnerable persons in the event of disasters and during armed conflicts. If, however, the Commission were to reformulate draft article 21 as proposed by the Special Rapporteur, a problem might arise unless it explained in detail in the commentaries what was meant by "without prejudice to".

99. With regard to draft article 8, on the duty to cooperate, she was not convinced that it was necessary to refer specifically to the United Nations Special Coordinator for Emergency Relief, whose post was far too closely connected to the present administrative structure of the United Nations. The specific role of the Coordinator could be explained in the commentaries.

100. Lastly, concerning draft article 12, on the role of the affected State, she supported the Special Rapporteur's recommendation not to modify the text as adopted on first reading. The wording was the result of long and thorough discussions, and any modification might prompt requests for other consequential modifications. The draft article on the role of the affected State was one of the most important, if not the most important, in that it set out the premises for the draft articles as a whole.

101. In conclusion, she supported the referral of all the draft articles to the Drafting Committee.

102. Mr. ŠTURMA said that the proposed draft articles as a whole set out suitable and balanced principles that could guide the provision of assistance to affected States by relevant actors. They struck an appropriate balance between the principles of sovereignty and non-intervention, on the one hand, and humanitarian principles and human rights, on the other. As to their legal nature, they represented both codification and progressive development of international law, which could be mentioned in a general commentary to the draft articles, as had been proposed by some members at a previous meeting, but he would not press the matter.

103. As to the final form of the draft articles, he supported the Special Rapporteur's proposal for the Commission to recommend to the General Assembly the adoption of an international convention. Since the convention would, by the nature of its provisions, necessarily be a framework convention, there was no cause for concern if the General Assembly opted instead for a declaration, because, in either case, framework rules and principles would be adopted. While the adoption of the draft articles in the form of a binding treaty would be preferable, a declaration might bring certain advantages, as it would be adopted more quickly and would apply to all Member States.

104. He agreed with most of the draft articles and would therefore make just a few comments on the changes proposed by the Special Rapporteur and on related problems. Several members had proposed merging draft articles 3 and 4 into a single draft article on the use of terms. There was nothing to prevent such a step, since it was the content of the draft articles that was most important. The definition of "disaster" in draft article 3 was key to understanding the distinction between the protection of persons in the event of disasters and the concept of responsibility to protect, a point that had been raised by Mr. Forteau and Mr. Nolte. The two sets of rules were clearly based on the basic obligation of States to protect, by virtue of their sovereignty, persons in their territory or under their jurisdiction or control. They differed, however, in terms of the nature of the risks associated with them and, to a large extent, in terms of the nature and means of the responses provided in each case.

105. Several elements had been added to the definition of "disaster" and, while there had been no particular objection to the inclusion of the word "displacement" among Commission members, Mr. Murphy and Mr. Nolte had questioned the addition of the adjective "economic". The decision could be reversed, but, coming from a country that had experienced two large-scale floods over the past 15 years, he wished to recall that disasters also often resulted in direct and indirect damage, which was precisely what the words "material" and "economic" aimed to encapsulate. He therefore proposed to keep the adjective "economic" and to add, after the words "events resulting", the phrase "through their physical consequences", which were taken from the 2001 draft articles on the prevention of transboundary harm from hazardous activities.[51] That solution had the double benefit of recalling the distinction between the topic of the protection of persons in the event of disasters and the concept of responsibility to protect, and of excluding from the definition of disaster and economic damage human-caused economic troubles and disruptions, such as debt or financial crises.

106. As to the wording of draft article 4, the term "other assisting actor" was a good shorthand for actors other than assisting States. Nevertheless, it might be useful, in some operative draft articles, to distinguish among States, the United Nations (and possibly some other intergovernmental organizations) and other actors. That was particularly the case in draft article 8 on the duty to cooperate, where the distinction was desirable, as had been emphasized by Mr. Murphy and Mr. Nolte.

107. Concerning draft article 4 (*e*), he agreed that the phrase "military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need" should be removed for both formal

[50] *Ibid.*, vol. II (Part Two), p. 62.

[51] The draft articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and the commentaries thereto adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

and substantive reasons: for formal reasons, because such a rule should be placed not in a draft article on the use of terms, but in draft article 16 or 17; for substantive reasons, because the language was too restrictive, particularly when compared to the Oslo Guidelines. The organization of relief personnel and equipment differed among States, and it was not uncommon for it to fall under the responsibility of the military, including when relief was provided for civilian or humanitarian purposes. If the above-mentioned phrase were to be retained, the word "shall" should be replaced with "should".

108. Turning to the key draft articles, while he supported the inclusion of draft article 6, the word "fulfillment" gave rise to significant difficulties. Without downplaying the role of the positive obligations of States or that of economic and social rights (the right to food, for example), he wished to recall that disasters were a typical example of *force majeure* or of exceptional circumstances, in other words, of situations when the capacity of States to fulfil all human rights was limited. As acknowledged by the Special Rapporteur in the commentary to the draft article, the reference to human rights in the draft article was to the whole of international human rights law, including its treatment of derogable and non-derogable rights. However, that distinction, which was crucial for civil and political rights, was not included in all treaties, in particular those on economic and social rights. Moreover, in the event of disasters, the implementation of those rights was affected, even without a formal derogation.

109. With regard to draft article 7, which was of the utmost importance, he supported the words "the most vulnerable", which were an improvement on the original version, but was unsure why the Special Rapporteur had added the principle of "no harm", which seemed rather problematic, to the principles of humanitarian response. Clearly, the response to a disaster should never cause any additional harm to the victims. However, in the very exceptional circumstances (*force majeure*) created by disasters, it was not always possible to provide an effective response and assistance without causing harm. Thus, the measures adopted by assisting States or by other assisting actors in order to save human lives might cause damage to private or public property. Did it follow that States could be held internationally responsible for such damage?

110. The same problem arose in relation to draft article 11, which provided for the adoption by States of preventive measures to reduce the risk of disasters. Should the lack of prevention, or its inadequacy, be considered a breach by the affected State of its obligations, which might render it internationally responsible? If so, a new rule would be created. In order to avoid further debate on the progressive development of international law, "shall reduce" could be replaced with "should reduce" in the first paragraph of the draft article.

111. He supported the new wording of draft articles 12, 13 and 14, the content of which was the result of a delicate balance between the sovereignty of the affected State and its obligations. Lastly, the wording of draft article 21 as modified by the Special Rapporteur posed an interesting legal problem. Mr. Caflisch was right to say that, if the Commission just wanted to have two "without prejudice" clauses, the best solution would be to combine draft articles 20 and 21. However, if it wished to draw attention to the fact that some complex emergency situations could result from both a disaster and an international or non-international armed conflict, it should include in the draft articles another provision on the relevant *lex specialis*, namely international humanitarian law. Thus, the draft articles would apply only when the existing rules of international humanitarian law did not. In conclusion, he supported the referral of all the proposed draft articles to the Drafting Committee.

112. Mr. HUANG said that the draft articles adopted by the Commission on first reading at its sixty-sixth session had generally been welcomed by States in the Sixth Committee, which demonstrated the quality of the work carried out up to that point. Criticisms had also been voiced, however, which showed that significant improvements would need to be made to the draft articles on second reading. As work on the topic proceeded, the Commission should thus ensure that it took due note of not only the views expressed orally during the debates in the Sixth Committee but also the comments and observations submitted in writing by Governments and by international organizations and entities.

113. While he supported the referral to the Drafting Committee of the preamble and of the text of the draft articles on the protection of persons in the event of disasters as proposed in the eighth report, he wished to focus on certain issues that might arise during the second reading. Regarding the distinction between the progressive development of international law and its codification, which had been the subject of some very interesting exchanges, he noted that a considerable number of members had stated that many provisions of the draft articles were not substantiated by either treaty law or practice and they had therefore proposed to specify, in the commentaries to each of the draft articles, whether the rules that they contained constituted codification of international law or its progressive development. Other members had dismissed that proposal on the grounds that it made little sense and might even imply that a hierarchy had been established among the various proposed rules. In their view, it would be preferable to indicate in the preamble, and not in the commentaries, that the draft articles constituted both progressive development of international law and its codification. Lastly, other members had rejected both proposals and had stated that the issue simply should not be discussed. In his opinion, the issue at hand was not so much whether a particular provision was progressive development of international law or its codification as it was ensuring that there was no imbalance between the two. In general, however, it was clear that the proposed draft articles constituted progressive development of international law rather than its codification and that, moreover, their content was not at all substantiated by any settled State practice. That was true of draft article 13, which provided that, when a disaster exceeded an affected State's national response capacity, it had the duty to seek assistance from among other States. The same was also true of draft article 14, paragraph 2, in which it was stated that consent to external assistance could not be withheld arbitrarily. It should also be noted that, in the commentaries to those draft articles, reference was made above all to "soft law", but almost no mention was made of binding international

instruments or of rules of customary international law. The Commission should take care not to go too far or too fast with regard to the development of international law, which, it was worth recalling, should be progressive and in line with existing law.

114. It should also be borne in mind that, during its consideration of the draft articles on first reading, the Commission had decided not to refer to the concept of responsibility to protect. Given that its choice had been approved by States in the Sixth Committee, it would be inappropriate to reopen the debate on the matter. It was clear that the concept of responsibility to protect had been specified as part of work related to serious criminal activities that had nothing to do with the topic under consideration. Lastly, concerning the definition of the rights and obligations of States with regard to the protection of persons in the event of disasters, great care should be taken during the second reading to ensure that the draft articles struck a satisfactory balance between the sovereignty of States and the principle of non-interference in their internal affairs, particularly as, during the debate in the Sixth Committee, several States had indicated that such a balance had not been achieved. Indeed, while the draft articles adopted on first reading contained a number of provisions related to the duties of affected States or of assisting States and other assisting actors, very little was said about their rights. In draft article 12, paragraph 1, for example, it was established that the affected State, by virtue of its sovereignty, had the duty to ensure the protection of persons and the provision of disaster relief and assistance on its territory. However, that kind of duty did not imply an obligation to accept an offer of external assistance. The affected State should not be required to seek assistance, nor should it be obliged not to reject an offer of assistance from a third State. The links between the affected State and the assisting State should be viewed in the context of cooperation. The Commission should therefore specify that, while the affected State could seek assistance when a disaster clearly exceeded its national response capacity, it was under no binding obligation to do so.

115. He considered the new definition of the term “disaster” to be overly broad in that it encompassed both natural and industrial disasters and might even cover armed conflicts. It would be advisable to avoid such an approach, which might lead to a number of overlaps with the rules of international humanitarian law and to conflicts of norms. Lastly, with respect to the final form of the draft articles, the Special Rapporteur’s proposal to adopt them in the form of an international convention was not suitable, especially bearing in mind that most of their provisions were not substantiated either by international treaties or by customary international law or international practice. It would therefore be more worthwhile to present the draft articles in the form of a non-binding instrument.

116. The CHAIRPERSON, noting the late hour, suggested that the Commission pursue its consideration of the eighth report on the protection of persons in the event of disasters at the next meeting.

The meeting rose at 1.05 p.m.

3295th MEETING

Tuesday, 10 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Eighth report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the eighth report on the protection of persons in the event of disasters (A/CN.4/697).

2. Mr. PETRIČ said he agreed with the Special Rapporteur that it would be inadvisable to incorporate in the draft articles any proposed amendments which would alter the delicate balance between the paramount principles of the sovereign equality of States and non-interference, on the one hand, and the equally vital protection of individuals affected by a disaster, on the other. An international instrument protecting human beings in the event of disasters was needed but, in order to be accepted, it would have to respect the two above-mentioned principles of contemporary international law. Without that balance, which had been established after lengthy, in-depth discussions in the Commission, the whole project would fail. Although States’ comments were vital for the Commission’s work, they sometimes reflected the specific interests of a given State and should be treated with care. Thus, the original text of the draft articles should be changed only when there was good reason to do so. With regard to the relationship between codification and progressive development, he fully subscribed to the comments made by Mr. McRae at the end of the 3293rd meeting.

3. As there were already several non-binding instruments on the topic under consideration, he was in favour of the draft articles ultimately taking the form of a binding instrument. Even if they did not become a convention in the near future, as an instrument drafted by the International Law Commission they would have an impact on legal thinking and would provide an international legal framework for the protection of persons in the event of disasters. He was therefore in favour of referring all the draft articles to the Drafting Committee.

4. The fifth paragraph of the preamble was somewhat unbalanced in that it referred to the principles of

sovereignty and non-interference, but said nothing about the rights and needs of victims of disasters, which should be mentioned in either that paragraph or a separate preambular paragraph. With regard to draft articles 1, 2, 6, 9, 12, 15, 17, 18 and 19, he considered that either the versions adopted on first reading[52] or the new versions proposed by the Special Rapporteur in his eighth report were acceptable. Draft articles 3 and 4 should not be merged, because the definition of what constituted a disaster was so crucial that it deserved a separate article. He agreed that draft article 3 should include a reference to displacement, which was a consequence of many disasters. He was, however, uncertain whether a reference to economic damage should be included in the draft articles, even though it could have grave consequences for many people. The Drafting Committee might wish to give some thought to that matter.

5. In draft article 4 (*e*), he had some reservations with regard to the restriction placed on the use of military assets, because many countries had military units that were specially trained and equipped to respond speedily to disasters. In a large-scale disaster, the crucial role which they could play should not be hampered by lengthy discussions as to whether civilian disaster relief was available. He agreed with the introduction of a reference to "telecommunications equipment" in draft article 4 (*f*).

6. Although he could accept the use of the new formula "other assisting actors" in draft article 5, since it implied that everyone involved in assistance had to respect the inherent dignity of the human person, the differentiation of the various actors in the previous version had merit. It would therefore be wise to scrutinize the altered wording in the Drafting Committee. Bearing in mind that several modern constitutions and a number of international instruments deemed human dignity to be a separate basic human right underpinning all others, he agreed with the decision to devote a separate article to it, especially as human dignity was so often forgotten or ignored when disasters occurred.

7. In draft article 7, the addition of the principles of "no harm" and "independence" required clarification, because harm was often an unavoidable consequence of disaster response and it was unclear whose independence was meant in that context. If it were that of the affected State, he wondered whether it was not already covered by the reference to the principles of sovereignty and non-interference. Too many conflicting principles might undermine efficient disaster relief.

8. He questioned the advisability of including a specific reference to the United Nations Special Coordinator for Emergency Relief in draft article 8, since that position might no longer exist by the time the instrument entered into force. Moreover, that draft article was simply reconfirming a very basic principle, the duty to cooperate, which, in the opinion of some writers, belonged to the realm of *jus cogens*. As draft articles 10 and 11 both dealt with disaster risk reduction, they could be combined.

9. He preferred the version of draft article 13 as adopted on first reading, because a State might be slow to determine that a disaster exceeded its national response capacity, or it might be too proud to do so. As a result, the response might come too late for the victims. On the other hand, he agreed with the recasting of the final phrase of that draft article, as proposed by the Special Rapporteur. In draft article 14, he was not in favour of introducing the notion of "good faith", since it was unclear who would ascertain whether the offer of assistance had been made in good or bad faith. The draft articles already gave an affected State ample discretion to choose the most appropriate form of assistance and to refuse any offer it considered unhelpful or dangerous. In draft article 16, he failed to understand the logic behind weakening the language from "have the right to offer assistance" to "may address an offer of assistance". In that connection, he supported the view that the draft articles should refer to the obligation of a State or international organization to respond either negatively or affirmatively to a request for assistance. As far as draft articles 20 and 21 were concerned, deliberations in the Drafting Committee would offer an opportunity to establish a proper functional relationship between the draft articles and international humanitarian law.

10. Mr. VÁZQUEZ-BERMÚDEZ, referring to the discussion surrounding the advisability of making express reference in the commentary to the question of whether a specific draft article, or the draft articles as a whole, comprised the codification or progressive development of international law, said it should be recalled that, in accordance with its statute, the Commission had been tasked with assisting the General Assembly in both functions. In presenting draft articles that encompassed codification and progressive development, the Commission was therefore simply fulfilling its mandate. Elements of progressive development were inherent in any process of codification and vice versa. In practice, the Commission had proceeded on the basis of a composite idea of codification and progressive development, as stated in its report on the work of its forty-eighth session.[53] Its general practice had been not to draw a distinction between the two processes with respect to specific draft articles and it had only occasionally stated in the introductory commentary to draft articles adopted on second reading that they reflected both codification and progressive development. The fact that some Commission members might have identified elements of progressive development in a given proposal was not lost, however, since their comments were recorded in the summary records of debates in plenary meetings and, if necessary, in the reports of the Drafting Committee, or in the commentary to the draft articles adopted on first reading. He agreed with Mr. McRae that the Commission should not include such references in the final text adopted on second reading, since they would diminish the value of the final product. Moreover, it would be very difficult to determine which aspects of a given draft article were *lex lata*, *lex in statu nascendi* or *lex ferenda*. The most sensible solution might be to reflect the wording used in paragraph (1) of the general commentary to the draft articles on the responsibility of States for internationally wrongful acts.[54]

[52] *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

[53] *Yearbook ... 1996*, vol. II (Part Two).

[54] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

11. It should be remembered that the Commission had decided at the outset of its work on the topic under consideration not to employ the concept of responsibility to protect, since, among other reasons, the Heads of State and Government of the States Members of the United Nations had decided in the 2005 World Summit Outcome document[55] that this concept was applicable solely in respect of the most serious international crimes of genocide, war crimes, ethnic cleansing and crimes against humanity. Any subsequent developments in that field would have to be reflected in practice and *opinio juris*.

12. The Commission's rights/duty approach was appropriate, since the central purpose of the draft articles was to protect persons in the event of disasters by recognizing the rights of individuals, the rights and duties of the affected State and the duties of the international community, while maintaining a balance between those rights and duties. Since the draft articles and the commentaries thereto would therefore make a substantial contribution to the codification and progressive development of a sphere of international law which was of increasing importance and interest, the Commission should recommend to the General Assembly that the draft articles adopted on second reading form the basis for the negotiation of an international convention, whether in an *ad hoc* committee established on the recommendation of the Sixth Committee or a diplomatic conference. Such an outcome would be all the more welcome given that there was no general and legally binding instrument with universal scope on that important subject, and it might prompt the formulation of more detailed regional or bilateral agreements or relevant national laws.

13. As suggested by the International Organization for Migration, the commentary to draft article 1 should recall that States had the obligation to protect all persons present in their territory, irrespective not only of nationality but also of legal status. The commentary to draft article 2 should explain that the concept of effective disaster response included the timely provision of relief, since the prompt action of specialized relief teams in the first hours or days following a disaster could save many lives. In draft article 3, a reference to displacement should be included in the definition of disaster, as it was something that should be borne in mind by States when providing a response that took account of victims' essential needs. A disaster always caused enormous economic damage to individuals and States in terms of loss of homes and other assets, as well as loss of livelihood when tourism and trade were hit. For that reason, as proposed by the Special Rapporteur, it would be wise to include the economic effects of calamitous events in the definition of disaster. It had already been stated in the commentary to that article adopted on first reading that the scope of the definition did not cover serious events such as political and economic crises, which might also undermine the functioning of society.[56] That clarification should be retained and even possibly expanded so that it was clear that the draft articles would not apply, for example, in the event of a collapse of the stock market. The commentary should also state that not all the results of a calamitous event or series of events contained in the definition needed to be present in order for the definition to be applicable. Furthermore, there was no need to keep the definition of disaster separate from the terms defined in draft article 4.

14. In draft article 4 (*a*), the definition of "affected State" should be clarified so as not inadvertently to include States whose nationals were affected by a disaster in the territory of another State. He also agreed with the suggestion of the IFRC that subparagraph (*d*), which defined "external assistance", should include the words "financial support" after the reference to goods, in order to cover situations where external debt was cancelled or swapped, or non-reimbursable or reimbursable financial resources were provided, with a view to supporting the affected State's efforts to meet the essential needs of the stricken population. The last part of that subparagraph should read "for disaster relief and recovery or disaster risk reduction assistance" so as to cover the phase following the immediate response to a disaster. With regard to the Special Rapporteur's suggestion in paragraph 90 of his eighth report that the references to disaster risk reduction be deleted from subparagraphs (*d*), (*e*) and (*f*), "given the main focus of the draft as a whole, as explained under draft article 2", it should be noted that, in fact, draft article 2 implicitly covered disaster prevention, which was achieved through the provision of assistance in disaster risk reduction. Moreover, the United Nations Office for Disaster Risk Reduction had argued that the references to "disaster risk reduction" in draft article 4, subparagraphs (*d*), (*e*) and (*f*), should be deleted on the grounds that those subparagraphs were more relevant to the provision of relief than applicable for the purpose of disaster risk reduction, and not because the focus of the draft articles as a whole was limited to disaster relief. That Office had also stated that disaster risk management included measures to prevent or forestall conditions making for a disaster, which therefore came within the scope of the draft articles and had indeed formed the subject of draft articles 10 and 11. With regard to subparagraph (*e*), he was not in favour of restricting the definition of relief personnel in line with the Oslo Guidelines,[57] which called for military assets to be used only when there was no comparable civilian alternative, as that would unnecessarily constrain the provision of external assistance. The commentary could perhaps state that it was preferable to use civilian rather than military personnel.

15. Draft article 5 on human dignity was a key provision that should be kept as a separate article in its current location in the operative part of the document. Draft article 6, as proposed by the Special Rapporteur in his eighth report, was extremely important in that it covered the obligations not only to refrain from violating human rights in the event of disasters, but also to protect persons from such violations, as well as positive action to facilitate the fulfillment of their human rights. It should be made clear in the commentaries that international human rights law, including rules concerning the revocability or irrevocability of human rights, applied in full in that context.

[55] General Assembly resolution 60/1 of 16 September 2005.

[56] See *Yearbook ... 2014*, vol. II (Part Two), pp. 64–65 (para. (1) of the commentary to draft article 3).

[57] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

16. He supported the Special Rapporteur's proposal to add the words "in particular" after "impartiality" in draft article 7, in order to clarify that non-discrimination derived from the principle of impartiality. While he understood the logic behind the suggestion by some States to include the "no harm" and "independence" principles, their scope in the context of disasters was unclear. Only the references to the three principles on which there was broad consensus among States and other actors in the field of humanitarian assistance should be retained.

17. The duty to cooperate set out in draft article 8 was of utmost importance, but was considerably weakened by the inclusion of "as appropriate"; the words "according to their capacity" would be more suitable in the light of the purpose of the draft articles, namely to facilitate an adequate and effective response to disasters that met the essential needs of the persons concerned, with full respect for their rights. When a disaster on the scale described in draft article 3 occurred, if the affected State could not meet the essential needs of the persons concerned because the disaster exceeded its response capacity or for any other reason, the consequences for the victims would be catastrophic and were likely to have a major impact on their human rights. In that context, it seemed clear that the international community had a duty to contribute to the respect, protection and fulfillment of the victims' human rights through cooperation and solidarity.

18. In draft article 9 on forms of cooperation, a reference to "financial support" and "recovery assistance" should be added at the end of the sentence, in line with the suggestion by Romania and the IFRC. In draft article 11, for which many States, as well as the IFRC, had expressed support, it was important to retain the reference to disaster risk reduction as a duty so as to provide clear normative content in relation to disaster prevention, mitigation and preparedness. The first paragraph should be maintained as adopted on first reading. The reference to preventing the creation of new risk and reducing existing risk could be addressed in the commentary so as not to make the text unwieldy and to avoid problems of interpretation. Although the list in paragraph 2 was only indicative, two key measures should be added: planning and reduction of vulnerability, which would cover earthquake-resistant construction, for example.

19. As several members had noted, draft article 12 was a key pillar of the project. In order to ensure that the title more adequately reflected the content, the word "role" could be replaced with "duty", given that the first paragraph expressly mentioned the duty of the affected State to ensure the protection of persons and provision of disaster relief and assistance on its territory. With regard to draft article 13, the duty of the affected State to seek external assistance, to the extent that a disaster exceeded its national response capacity, was a consequence of the principle set out in draft article 12. The formulation adopted on first reading should be maintained, as it involved a more objective determination of whether national response capacity had been exceeded; if such a determination were left exclusively to the affected State, the provision would be unlikely to have any practical application. The duty of the affected State to seek external assistance must create a corresponding obligation for the international community to provide relief and assistance when a disaster exceeded the affected State's national response capacity. In that context, he agreed with the comments made by Mr. Forteau, Mr. Kolodkin and others.

20. In draft article 14, paragraph 3, it was not necessary to state that offers of assistance should be "good faith", since such a requirement would be difficult to apply in practice and implied that the affected State would need to verify that each offer of assistance had been made in good faith, which did not seem appropriate in disaster situations. In any event, the words "whenever possible" already provided sufficient flexibility in terms of the response to be given by the affected State regarding an offer. Draft article 15, as proposed by the Special Rapporteur in his eighth report, adequately provided for the right of the affected State to identify priorities in the type of disaster assistance it required. He supported the Special Rapporteur's recommendation that draft article 16 should not refer to a right to offer assistance to the affected State. The new formulation maintained the intended effect by ensuring that an offer of assistance would not be interpreted as an unfriendly act.

21. As for the relationship between the draft articles and international humanitarian law, he was of the view that, in complex emergency situations, international humanitarian law should be regarded as *lex specialis* and the draft articles should be used to fill any gaps that might exist in that field of law. It would be useful to include a preamble as a conceptual framework for the draft articles as a whole, based on the draft proposed by the Special Rapporteur. It might be worth including a reference to solidarity in the preamble, alongside the reference to cooperation.

22. Ms. ESCOBAR HERNÁNDEZ said that she agreed with the Special Rapporteur that the "rights-based approach" should be maintained; the final draft reflected an appropriate balance between the protection of individuals and recognition of their rights, on the one hand, and recognition and preservation of the sovereignty of the affected State, on the other, and she did not see any reason to change course at that late stage. Regarding the final outcome of the Commission's work, she now believed that the adoption of a convention would be the best way of regulating the complex questions raised by the topic. She therefore supported the Special Rapporteur's proposal that the Commission recommend to the General Assembly the adoption of a convention on the basis of its final draft articles on the topic.

23. With regard to the debate on codification and progressive development, she agreed with other members that it was not always easy to distinguish between the two activities. Obviously, qualifying a project as codification or progressive development should not have positive or negative connotations *per se*, at least in theory, but it was clear from the discussions in the Commission that making such a distinction could be interpreted as a warning that provisions described as an exercise in progressive development lacked certainty and reliability. The fact that the Commission was sometimes divided on whether a particular proposal was the result of codification or progressive development only added to the difficulties. She was therefore in full agreement with the balanced views

expressed by Mr. McRae on the matter. The newly constituted Commission beginning work in 2017 should perhaps discuss the issue in detail in the context of its debate on working methods.

24. With regard to the draft articles themselves, she agreed with other Commission members that draft articles 3 and 4 should be merged. Although the concept of "disaster" was obviously key to the project, its definition did not need to be kept separate from the other definitions. In order to highlight its importance, perhaps it could simply be placed in first position in draft article 4. She did not support the Special Rapporteur's proposal to include in draft article 4 (*e*) the phrase "military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need", as its prescriptive nature was not in keeping with a definition and it did not take account of the diversity of State practice in coordinating disaster response mechanisms. For example, the Emergency Military Unit established in 2006 to provide disaster relief throughout Spain, and the military mountain units involved in search and rescue operations, provided valuable services. However, assistance from military units that carried or used weapons was a different matter, and should be excluded or restricted to only the most exceptional cases. The Special Rapporteur's intention in proposing the amendment could be better addressed in the commentaries.

25. Concerning draft article 5, she believed that the prescriptive nature of the provision would be lost if it were moved to the preamble. In any case, the draft preamble already included respect for human dignity and human rights as objectives of the draft articles. Although it was true that some human rights instruments included human dignity only in their preambles as the source of human rights, without expressing a general obligation to protect the inherent dignity of the human person, they later defined how human dignity would be respected by listing the rights recognized and guaranteed thereunder. Since the Commission's draft articles were not a human rights instrument, the concept of dignity was the element underpinning the entire protection regime and should therefore be kept in the body of the draft articles. Mr. Forteau's proposal to refer to "rights under international human rights law" in draft article 6 should be considered, and a reference to refugee law might also be added, in line with the concerns expressed by the International Organization for Migration. Given the close relationship between draft articles 5 and 6, the two could perhaps be merged, following the precedent established in article 13 of the draft articles on the expulsion of aliens.[58] She proposed deleting the newly introduced reference to "no harm" in draft article 7, since it was unclear and did not appear to add value.

26. She had reservations about the newly formulated draft article 13, as proposed by the Special Rapporteur, since it seemed to promote unilateralism in determining whether a disaster exceeded the national response capacity of an affected State. Although it was clear that the role of the affected State was essential, the possibility of taking objective elements into consideration when making such determinations should be left open. If the Commission were to opt for the new formulation, a modifier, such as the word "manifestly", as suggested by Mr. Forteau, would have to be added.

27. The expressions "good faith offer" and "in a timely manner" in draft article 14, paragraph 3, as proposed by the Special Rapporteur, did not add any value and in fact introduced unnecessary elements of subjectivity and conditionality that could lead to unintended interpretations. For example, the suggestion that some offers of assistance might not be made in good faith seemed to send a general message of distrust. She would therefore support reverting to the original draft, as adopted on first reading. She did not understand the logic of the Special Rapporteur's proposal to split draft article 15 into two separate paragraphs and would prefer to retain the formulation adopted on first reading, although she would not oppose the amendment if the Special Rapporteur deemed it advisable. However, in that case, an explanation would have to be provided in the commentary.

28. Draft article 16, as adopted on first reading, had been the result of a hard-won compromise to reflect the different positions of Commission members, particularly with regard to the difference in the way in which offers of humanitarian assistance by States and international organizations, and such offers by other actors, should be treated. The general and ambiguous formulation of the new version upset that balance and it should therefore be reviewed, particularly as it now had no prescriptive meaning. In her opinion, the new version proposed by the Special Rapporteur could be deleted, unless the expression "without it being construed as an unfriendly act or a form of interference in internal affairs" (*sin que ello pueda entenderse como una actitud inamistosa ni como una forma de intervención en asuntos internos*) were to be added to give it some normative significance. Her preference was to retain draft article 16 as adopted on first reading. With regard to the concept of a duty to offer assistance, she agreed that it was the natural counterpart to the duty to seek external assistance and that it might therefore be appropriate to introduce a reference to it in the final draft, although that might be difficult to do at that late stage.

29. The phrase "in the exercise of their right to terminate external assistance at any time" in draft article 19 did not add value. It should therefore be deleted and addressed instead in the commentaries. The right to terminate assistance was implicit in other draft articles, particularly because it was stipulated that the provision of assistance required the consent of the affected State, which implied, *a contrario sensu*, the right to terminate said assistance, and also because States and other actors were not obliged to provide assistance but had the right to offer it, which implied that they could withdraw their offers. The reference to the "right to terminate external assistance at any time" could also lead to difficulties in interpreting the relationship between draft article 19 and draft article 14, paragraph 2, according to which "[c]onsent to external assistance shall not be withheld or withdrawn arbitrarily". The specific reference in draft article 20 to "regional and bilateral treaties" was unnecessary since such treaties were included in the reference to "special or other rules of international law otherwise applicable in the event of disasters". She supported the Special Rapporteur's use of a

[58] *Yearbook ... 2014*, vol. II (Part Two), p. 36 (draft article 13).

"without prejudice" clause in draft article 21 to acknowledge that a disaster could also occur in the context of an armed conflict, though she would prefer draft articles 20 and 21 to be merged. However, she would not object to an express reference to "international humanitarian law" in that merged article. In conclusion, she supported referring all of the draft articles to the Drafting Committee.

30. Mr. LARABA said that he fully endorsed the Special Rapporteur's recommendation in paragraph 28 of his eighth report that no changes be made to the text of the draft articles that might upset the delicate balance achieved between the principles of sovereignty and non-intervention on the one hand and the protection of individuals affected by a disaster on the other. That balance had been given a generally favourable reception by States, as demonstrated both by their reactions in the Sixth Committee and by the comments and observations that they had submitted to the Commission. However, the constant quest for compromise had at times led to the draft articles being formulated in a manner that was ambiguous or even contradictory. Certain provisions, for example draft article 16, which had already given rise to intense debates, would therefore need to be revisited. As some members had already mentioned, further thought should also be given to the importance currently accorded to certain documentary sources that were largely programmatic in nature, such as the Sendai Framework for Disaster Risk Reduction 2015–2030.[59] The idea, expressed in paragraph 26 of the eighth report, that there existed a strong alignment and complementarity between the draft articles and the Framework was open to dispute, since the function and the nature of the two texts were not the same.

31. As to the draft texts themselves, he was of the view that draft articles 3 and 4 could be merged. However, in the light of concerns that had been raised regarding draft article 3, some thought should be given to clarifying the meaning of the phrase "thereby seriously disrupting the functioning of society" and of the concept of economic damage.

32. The question had been raised as to whether draft articles 5 and 6 should be merged. He had no strong position on the matter and could go along with the Special Rapporteur's recommendation that draft article 5 be retained as a separate, autonomous provision. However, the commentary to that draft article gave rise to some doubt as to its autonomous nature and perhaps justified its merger with draft article 6, inasmuch as it indicated that the precise formulation of the principle of the inherent dignity of the human person adopted by the Commission was drawn from the preamble of the International Covenant on Economic, Social and Cultural Rights and article 10 of the International Covenant on Civil and Political Rights,[60] thereby emphasizing the close link between human dignity and human rights. It would be useful for the matter to be given further consideration in the Drafting Committee.

33. With regard to draft article 7, he had reservations about the change in the title recommended by the Special Rapporteur because of the historically loaded connotations of the proposed new wording, particularly in French.

34. Concerning draft article 12, he agreed that its title, "Role of the affected State", corresponded only to the second paragraph. Furthermore, the word "role" was not a legal term. He therefore proposed changing the title to read "General or guiding principles governing the conduct of the affected State" (*Principes généraux ou directeurs régissant la conduite de l'Etat touché*).

35. As to draft article 16, it was important that it be seen in the context of the draft articles that preceded it, in particular draft articles 8 and 10, which established the duty of States to cooperate; draft article 13, which addressed the duty of the affected State to seek external assistance; and draft article 14, on the consent of the affected State to external assistance. Against that background, the wording of draft article 16 appeared rather laconic and failed to convey fully the duty to cooperate, as set out in particular in draft article 8. An effort should therefore be made to review draft article 16 with the aim of achieving a better balance in that regard. He endorsed the proposal to delete draft article 21.

36. In conclusion, he was in favour of referring all the draft articles to the Drafting Committee.

37. Mr. KAMTO said that he was in favour of merging draft articles 3 and 4. From a legal perspective, defining the term "disaster" in a draft article on definitions in no way detracted from the scope and the force that the Commission wished to attribute to that definition. On the contrary, to define the word "disaster" separately from the other terms used in the draft articles would raise questions about the Commission's intentions in so doing. In any event, it should be borne in mind that any definition of the term "disaster" formulated in the text was made for the express purpose of the present draft articles. He agreed that the word "economic" should be included in the definition of disaster, since very few disasters, whatever their cause, did not result in economic damage of some kind.

38. Regarding draft article 4 (*e*), while he understood the viewpoint of colleagues who had rightly pointed out that military assets were commonly tasked with disaster relief operations, the risk of abuse could not be ruled out. He therefore proposed that the second part of subparagraph (*e*) be replaced with the following: "military assets may be used in agreement with the affected State" (*les ressources militaires peuvent être utilisées en accord avec l'Etat touché*).

39. Draft article 5 should remain where it was. Apart from the fact that human dignity was enshrined in various international legal instruments as a normative provision, it was not set forth in the draft article as a right but as an inherent value of human beings. Draft article 5 constituted the fundamental provision of the entire set of draft articles; moving it to the preamble or incorporating it into another draft article would have the effect of undermining the intended purpose of the project.

40. Given that some members had expressed reservations concerning the use of the expression "no harm" in

[59] General Assembly resolution 69/283 of 3 June 2015, annex II.

[60] See *Yearbook ... 2014*, vol. II (Part Two), p. 69 (para. (4) of the commentary to draft article 5).

draft article 7, the Special Rapporteur should perhaps do more to explain what was meant by that term in the current context, if he remained convinced of its usefulness.

41. He agreed with the Special Rapporteur and other members who were in favour of retaining draft article 8, since the duty to cooperate existed in international law. Furthermore, in the current context, it would be impossible to achieve the aim of the draft articles if cooperation constituted only an option that was available to States, rather than an obligation.

42. The formulation of draft article 13 posed a real legal problem. It was not possible to create a sort of objective obligation for the affected State the fulfillment of which was not subject to the fulfillment by another State of its own obligation under the draft articles. What would happen if the requested State or international organization failed to respond to the request or responded inadequately? In its current formulation, the obligation of the affected State to seek assistance would become, in the framework of a future convention, an obligation *erga omnes partes*, which, if not met, could lead to the responsibility of the affected State being invoked by any other State party to the convention, while the invoking State was bound by no obligation whatsoever. If the Commission wished to establish such an obligation, it should make it part of a system of collective obligations under which the affected State would be obligated to seek assistance from one or several States that, in turn, would be bound to respond to such a request. Alternatively, the seeking of assistance should be formulated either as an option available to the affected State – not an obligation – or in hortatory terms.

43. Lastly, he shared the view of other members who were in favour of merging draft articles 20 and 21. If the Commission wished to reassure those who were concerned about preserving the integrity of international humanitarian law, it could insert a comma after the word "disasters" at the end of draft article 20, add the phrase "including the rules of international humanitarian law" and delete draft article 21.

44. In conclusion, while he was in favour of referring all the draft articles and the draft preamble to the Drafting Committee, he hoped that the Special Rapporteur would take account of his concerns regarding draft article 13.

45. The Commission should, under no circumstances, go back on its wise decision to exclude the concept of the responsibility to protect, as formulated in the 2005 World Summit Outcome document, from the scope of the project. The topic under consideration was in no way linked to, for example, situations of internal conflict where there might be a risk of genocide, crimes against humanity, ethnic cleansing or war crimes; it was essentially related to unpredictable and overwhelming natural disasters. In the context of the present topic, "responsibility" basically meant the responsibility to provide assistance.

46. The thorny issue of whether or not to indicate that certain draft texts represented progressive development had not been resolved despite the many debates on the matter over the years. Until 2010, it had generally been the Commission's practice not to emphasize the distinction between the two dimensions, especially as far as individual provisions were concerned; more recently, however, some newer members had sought to reverse that trend. It was therefore important that the Commission in its future composition adopt a clear policy on the matter.

47. Since 2011, the Commission had appeared reluctant to envisage the drafting of a convention, preferring instead to draft guidelines, guiding principles or conclusions – in other words, non-binding instruments. While there was nothing wrong *per se* with producing a variety of outputs, the Commission, by giving the impression that it had abandoned the tradition of preparing draft articles, had opened itself to criticism and risked undermining its work at a time when it was under attack on a number of fronts. He therefore wished to reiterate his proposal that the Commission mark its seventieth anniversary by organizing a colloquium – open to, among others, representatives of States, members of international courts and academics – with a view to taking stock of its past work and exploring new opportunities.

48. Mr. KITTICHAISAREE said that his understanding was not that the Commission had excluded human-caused disasters from the definition of "disaster", but rather that it had decided that the concept of responsibility to protect was not applicable in its work on the present topic.

49. Mr. KAMTO said that he had intended simply to emphasize that the concept of responsibility to protect did not come under the scope of the draft articles.

50. Mr. NOLTE said that he welcomed the proposal for the Commission to hold a colloquium on the occasion of its seventieth anniversary. On the issue of the progressive development of international law and its codification, it was possible to find relevant examples of the Commission's practice of identifying certain draft articles as deriving from either progressive development or codification. One such example was the specific reference to "progressive development" in paragraph (12) of the commentary to article 48 of the draft articles on the responsibility of States for internationally wrongful acts.[61] That said, the fact that the Commission had sometimes found it useful to highlight certain draft articles in that way did not mean that doing so was beneficial in all its work. He proposed that the Commission continue discussing the issue either during the current quinquennium or at the beginning of the next one.

51. The CHAIRPERSON said that the proposal for a colloquium to be held on the occasion of the Commission's seventieth anniversary should be retained for future discussion.

52. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it would be interesting to verify whether the language of paragraph (12) of the commentary to article 48 of the aforementioned draft articles on the responsibility of States for internationally wrongful acts included the words "shall" or "should".

53. Mr. NOLTE said that article 48 of the draft articles on the responsibility of States for internationally wrongful

[61] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 127.

acts was formulated in terms of entitlement and therefore referred to rights and obligations. In that regard, there had been a lively debate on whether States had the right to invoke the responsibility of other States – a very controversial issue in terms of *lex lata*.

54. Mr. FORTEAU, referring to the Commission's 1966 draft articles on the law of treaties,[62] said that the commentary to draft article 50, relating to *jus cogens*, highlighted the Commission's contribution to the codification rather than the progressive development of international law.[63] However, in paragraph (6) of the commentary to draft article 62, on the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, the Commission had noted that the establishment of the procedural provisions of that draft article "would be a valuable step forward",[64] thereby placing it more in the context of the progressive development of international law. Draft article 62 had been formulated as an obligation and used the word "shall" rather than "should".[65]

55. Mr. NOLTE said that the example of the draft articles on the law of treaties supported the view that, during its elaboration of the draft articles on the responsibility of States for internationally wrongful acts, the Commission had weighed carefully its decision to indicate that certain draft articles, relating to sensitive subjects, were an exercise in the progressive development of international law or its codification.

56. Mr. VALENCIA-OSPINA (Special Rapporteur) said it was helpful to note that, in the examples provided by Mr. Nolte and Mr. Forteau, the draft articles had been elaborated in terms of rights and duties and the identification of a particular provision as an exercise in the codification of international law or its progressive development thus had no direct consequences for the formulation of the provision in question using "shall" or "should", especially if the intention was to recommend that the draft articles should become a convention.

57. Mr. HMOUD, noting that no action had been taken by the Sixth Committee on the draft articles on the responsibility of States for internationally wrongful acts since the General Assembly had taken note of them over a decade earlier, said that the Commission should endeavour to promote its work in a manner that was conducive to the adoption of draft texts by the Sixth Committee. Such considerations were especially relevant in the present case: given that many of the draft articles reflected both codification and progressive development, it was advisable not to attempt in the commentaries to distinguish between those two processes.

58. Mr. ŠTURMA said that, overall, there were relatively few cases in which the Commission had decided to highlight particular draft articles as being tied to either the progressive development of international law or its codification; therefore, such cases should not be considered to be the Commission's general practice. He would not oppose inserting a reference to the progressive development of international law on an exceptional basis; however, it should not become a general practice, lest it undermine the Commission's work.

59. Mr. SINGH said that he supported the Special Rapporteur's proposal for the Commission to adopt a recommendation to the General Assembly in favour of an international convention, to be concluded on the basis of its final draft articles on the protection of persons in the event of disasters. Such a position was in line with the Commission's practice and was also supported by a number of organizations with expertise in the matter. It must be borne in mind, however, that it was the prerogative of Member States to make a decision on the final form of the Commission's work.

60. On the question of whether to identify certain provisions as an exercise in progressive development, he shared the view expressed by some members that the Commission had generally preferred to avoid making a clear distinction between the two aspects of its mandate, and that, moreover, it was often difficult to make such a distinction in practice.

61. He supported the Special Rapporteur's general approach, as set out in paragraph 28 of his eighth report, to maintain the delicate balance achieved throughout the draft articles between the paramount principles of sovereignty and non-intervention, and the no-less-vital protection of the individuals affected by a disaster. In that regard, the concerns of some States members of AALCO should also be borne in mind. He continued to support the Commission's decision not to include the concept of the responsibility to protect in the draft articles – a decision that had also been borne out by States' comments on the draft articles in the years since the Commission had begun its consideration of the topic.

62. He was in favour of combining draft articles 3 and 4, as it seemed inappropriate to isolate the definition of one term, "disaster", from the others. If the definition were to remain separate, the text would need to make it clear that this definition, like the others, was for the purposes of the draft articles.

63. He had reservations about the addition, in draft article 4 (*e*), of the phrase "military assets shall be used only where there is no comparable civilian alternative to meet a critical humanitarian need". Such a phrase could unduly restrict the provision of prompt and adequate assistance to victims of disasters, since in many countries, including his own, it was the military that was best equipped and trained to respond in the early stages of a disaster, when action had the potential to save many lives.

64. There was little reason, in draft article 7, to insert the words "no harm" or the word "independence". He continued to have doubts about the principle of neutrality already included in the text as adopted on first reading. The relevance of that principle had also been questioned by a number of Governments on the basis that it was more

[62] The draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966) with commentaries thereto are reproduced in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

[63] *Ibid.*, pp. 247–249.

[64] *Ibid.*, p. 263.

[65] *Ibid.*, pp. 261–262.

closely connected to situations of armed conflict. Furthermore, States had clearly expressed reservations regarding draft article 13 on the grounds that imposing a duty on the affected State to seek external assistance would undermine the legitimate right of that State, by virtue of its sovereignty, to assess its own need for such assistance. The suggested alternative involving the use of hortatory terms, such as the words "should seek", would be preferable. In draft article 8, he supported deleting the reference to the United Nations Special Coordinator for Emergency Relief.

65. Regarding draft article 11, it was important to note that most States did not have the capacity to reduce the risk of disasters. Therefore, the duty set out in the draft article referred to each State's capacity to undertake the necessary and appropriate measures to prevent, and mitigate the risk of damage from, disasters.

66. Mr. CANDIOTI welcomed the Special Rapporteur's introduction of a draft preamble, which set out the general context in which the draft articles had been elaborated, and provided for a better understanding of the objectives of those draft articles. He supported the proposal that the outcome of the Commission's work on the topic form the basis of a binding text, such as a convention. In that connection, he was concerned that several members had proposed replacing the word "shall" with "should", since a standard-setting text necessarily referred to rights and obligations and therefore implied the use of the word "shall", rather than the word "should".

67. The debate about whether the Commission should indicate that certain draft articles related to the progressive development or codification of international law had been rich and interesting, and he had nothing to add to what had already been said by Mr. McRae and Mr. Kamto. He also supported the comments made by Mr. Kolodkin regarding the possible amendment of draft article 16, and its relationship to draft article 8, with a view to achieving an even better balance of interests and principles throughout the draft articles.

68. In draft article 12, which was focused on the competence, function and obligations of affected States, the Special Rapporteur might wish to replace the word "role" with a more technical expression, but any mention of the word "responsibility" should be avoided, not least to avoid confusion similar to that which had arisen in relation to references to the "responsibility to protect".

69. In draft article 4 (*e*), he proposed reformulating the phrase referring to "military assets" to make it less prescriptive and thus more appropriate in the context of "use of terms". It should be made clear that the military assets in question referred to "relief" assets only, as opposed to those that might be necessary to restore public order following a disaster.

70. Draft article 3 might be amended to clarify that the draft articles as a whole were applicable to both natural and human-caused disasters. He supported the reformulation of draft article 16. Draft articles 20 and 21 could be combined to form a general draft article. He supported the referral of the draft preamble together with the draft articles to the Drafting Committee.

71. The CHAIRPERSON said that he concurred with the proposal to refer the draft preamble and the draft articles, in their entirety, to the Drafting Committee. The Commission should make a recommendation to the General Assembly in favour of the conclusion of an international convention. With regard to draft article 3, although Mr. Murphy had raised a pertinent question regarding economic damage, it was important to recognize the undeniable connection between disasters and the economic losses deriving therefrom. Draft article 3 would therefore be much enhanced if it reflected that relationship; failing that, he would be comfortable retaining the wording adopted by the Commission on first reading. He would not be opposed to merging draft article 3 with draft article 4. In that connection, he was confident that the Drafting Committee would find language to streamline draft article 4 (*a*). Regarding the discussion on the concept of jurisdiction, it was crucial to convey clearly that the affected State was the State in the territory or otherwise under the jurisdiction or control of which a disaster had occurred, and that the disaster that had taken place in that territory had affected persons, property or the environment. Even though the use of precise legal terms was important, the Commission should bear in mind that, once adopted, the legal instrument based on the draft articles would be widely used by those more acquainted with disasters than with international law. Therefore, clarity should remain its primary goal.

72. He was strongly in favour of retaining draft article 5; as for draft article 6, he suggested reverting to the wording adopted on first reading.

73. Draft article 8 was one of the most important provisions resulting from the Commission's work. He disagreed with those who did not support the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[66] as a basis for the draft article. Where disasters occurred and the rights and dignity of the persons affected were at stake, there was a need and, in fact, a duty for States to cooperate. If the Commission recognized the universality of rights and defended the rights-based approach set out in draft article 6, it should not ignore a collective duty to cooperate on the part of the international community when disasters struck. He would therefore argue strongly in favour of retaining the draft article as currently drafted, with the exception of the reference to the United Nations Special Coordinator for Emergency Relief, the deletion of which he supported.

74. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of protection of persons in the event of disasters was composed of Mr. Forteau, Mr. Hmoud, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Valencia-Ospina (Special Rapporteur) and Mr. Park, *ex officio*.

The meeting rose at 1.15 p.m.

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[66] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

3296th MEETING

Wednesday, 11 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*continued*) (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Eighth report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur on the protection of persons in the event of disasters to summarize the debate on his eighth report (A/CN.4/697).

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the debate had shown that the Commission was ready to complete the second reading of the draft articles during the current session, since all the members had been in favour of referring the draft articles and the preamble to the Drafting Committee. Once the latter had finished its work, the Commission could adopt the complete set of draft articles together with the preamble as a framework instrument, which it could transmit to the General Assembly with the recommendation that this document serve as the basis for drafting a future convention. It went without saying that the General Assembly would not be bound by that recommendation and that it would take such action upon it as the States Members of the United Nations deemed appropriate.

3. During the plenary meetings, the Commission had once again engaged in the perennial debate stemming from its erroneous assumption that the first task entrusted to it by the General Assembly, namely the progressive development of international law, was distinct from its second task, in other words the codification of that branch of the law. In the constructive spirit of compromise that had characterized its debate, it had reached consensus on drawing up a final text that reconciled the opinions expressed by its members. For example, it had agreed to state in the commentary to the preamble that, in accordance with its practice, it had proceeded on the basis of a composite idea of the progressive development and codification of international law. That solution would avoid having to make it clear in the commentary into which category each article fell.

4. The members of the Commission had put forward many valuable suggestions on the contents of a number of draft articles. In some cases, they had wished to revert to the text adopted on first reading;[67] in others they had suggested amendments to the current text. He would therefore submit to the Drafting Committee a new version of the draft articles and preamble incorporating those proposals. In order to save time, he would not embark upon a detailed explanation of the changes made, but he did think that it would be worth explaining why he had recast some of the draft articles, which he would identify by using the number given to them in the annex to his eighth report.

5. Draft article 2 (Purpose) expressly referred to the reduction of the risks of disasters. In draft article 3, which had become subparagraph (*a*) of draft article 4 (Use of terms), the phrase "calamitous event or series of events" had been qualified by "physical" and the reference to economic damage had been retained, because the proposal to delete it seemed to rest on a misconception of what, for the Commission, constituted the core of the definition. By deliberately reversing the approach adopted in other contexts, the Commission considered that a disaster was primarily the event which caused it and not its consequences, as was plain from the use of the term "resulting in". The character of the event, either natural or human-caused, was made clearer by the addition of the adjective "physical". Hence "economic damage" was seen as a consequence of a calamitous physical event or series of physical events making up the disaster. Calamities such as an earthquake or the meltdown of a nuclear plant could therefore give rise to economic damage within the meaning of the draft article, whereas a financial crash, although calamitous, was not a physical event entailing that effect.

6. In draft article 4, the phrase "at its request" had been deleted from the definitions of "assisting State" (*b*) and "other assisting actor" (*c*), for it seemed obvious that a State which requested assistance had given its prior consent thereto. The new wording was also more consistent with that of the other draft articles, especially those concerning the duty to seek assistance and offers of assistance, which made no mention of a duty to request that assistance. The phrase "any other entity or individual external to the affected State" had also been deleted from the definition of "other assisting actor", for the rights and obligations of States and international organizations could not be extended to entities or individuals.

7. The phrase concerning the use of military assets was no longer contained in the definition of "relief personnel" (*e*) and the requisite explanation would be inserted in the commentary to draft article 17. In that connection, attention must be drawn to the fact that the Oslo Guidelines[68] applied only after natural, technological and environmental emergencies in peacetime and it was the Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies[69] that governed operations in humanitarian crises resulting from internal or external conflict. Both texts laid down that any humanitarian operation using

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[67] *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

[68] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

[69] OCHA, Inter-Agency Standing Committee, Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies, 2003—Revision 1, 2006.

military assets must retain its civilian nature and character and that humanitarian operations must be conducted by humanitarian organizations. The key idea in both sets of guidelines was that it was vital to avoid reliance on military resources. Although the scope of "last resort" had not been precisely defined, it was plain that this notion was specifically related to United Nations operations. Draft article 4 (*e*) no longer referred to it and again employed the initial wording adopted on first reading.

8. Draft article 5 had not become part of the preamble, but remained a separate provision. In that connection, it should be remembered that in the draft articles on the expulsion of aliens, which the Commission had adopted at its sixty-sixth session,[70] draft article 13 had been devoted to the obligation to respect the human dignity and human rights of aliens subject to expulsion. For the sake of consistency with that provision, the words "and protect" had been deleted from draft article 5. Moreover, draft article 6 no longer contained the words "and fulfillment".

9. As had been the Commission's general wish, draft article 7, the title of which again became "Humanitarian principles", no longer mentioned the principles of no harm and independence. In any event, both principles were closely connected with the Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies. According to the handbook on United Nations humanitarian civil–military coordination, the provisions of which applied in natural disasters and complex emergencies, the principle of "do no harm" presupposed recognition that any humanitarian assistance constituted an external intervention which could considerably affect the local economy, power balance and population movements and could also contribute adversely to crime and misuse of power.[71] The handbook clearly distinguished between those negative consequences and malpractice or collateral damage. In order to comply with the "no harm" principle, humanitarian actors must carefully examine the cultural, economic and social situation in a given area and adapt their response accordingly. When those actors were soldiers, the recipients of assistance must not be put at risk of becoming targets. The fundamental principle of operational independence, which was mentioned in the manual alongside impartiality, humanity and neutrality, meant that humanitarian action must be independent of the political, economic, military or other objectives pursued by anyone in the area where that action was necessary. However, that definition was specific to the humanitarian operations of the United Nations, and in international humanitarian law the principle of independence could have other connotations.

10. Given that the definitions of the above-mentioned principles were not yet clearly established and could vary depending on the context, the wording of draft article 7 had been modified so that it referred only to the three cardinal and universally recognized principles of humanity, neutrality and impartiality. That amendment was warranted by the Commission's decision to try to ensure the systemic harmonization of norms and by the fact that draft article 20 specified that the draft articles were without prejudice to the rules of international humanitarian law. It was clear that resting the draft articles and those rules on the same foundations would make for coherent interpretation which would be in the interests of victims of disasters.

11. As far as impartiality, non-discrimination and particularly vulnerable persons were concerned, the Netherlands and the IFRC had endorsed his argument that it was unnecessary to refer to the principle of non-discrimination, since it was already inherent in that of impartiality. That interpretation derived directly from the definition of impartiality given in the commentary to the Fundamental Principles of the Red Cross which stated that impartiality "makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress".[72] The notion of impartiality encompassed non-discrimination, proportionality and the personal qualities of the agent responsible for acting for the benefit of those who were suffering. According to the commentary, proportionality presupposed that the help available would be apportioned according to the relative importance of individual needs.[73]

12. As for vulnerable persons in the context of international armed conflicts, article 70, paragraph 1, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) provided that "[i]n the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection".

13. With regard to occupation, Part II of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), on the general protection of populations against certain consequences of war, laid down in article 16 that "[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect". That instruction was fleshed out in articles 89 and 132. The latter stated that "[t]he Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time".

14. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) did not contain any comparable provisions. It was however

[70] The draft articles on the expulsion of aliens adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2014*, vol. II (Part Two), pp. 22 *et seq.*, paras. 44–45.

[71] United Nations Humanitarian Civil–Military Coordination (UN-CMCoord), "UN-CMCCoord Field Handbook (v1.0)", p. 31. Available from: https://reliefweb.int/sites/reliefweb.int/files/resources/CMCoord%20Field%20Handbook%201.0.pdf.

[72] J. Pictet, *The Fundamental Principles of the Red Cross proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965: Commentary*, Geneva, Institut Henry-Dunant, 1979, p. 5.

[73] Resolution 33, Amendments to the Principles and Rules for Red Cross and Red Crescent Disaster Relief, adopted by the 25th International Conference of the Red Cross, held in Geneva from 23 to 31 October 1986, *International Review of the Red Cross*, No. 255 (1986), para. 1.

plain from reading article 132 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) and the commentary to the Fundamental Principles of the Red Cross that impartiality manifested itself through non-discrimination in providing the most vulnerable persons with the special protection to which they were entitled. There was therefore no reason to amend the wording of draft article 7.

15. Draft articles 8 and 10 had been merged in a single draft article entitled "Duty to cooperate" from which the reference to the United Nations Special Coordinator for Emergency Relief had been deleted. The title and wording of draft article 11 became those adopted on first reading. In the title of draft article 12, the word "role" was replaced with "function". The beginning of draft article 13 adopted on first reading had been restored with the addition of the adverb "manifestly", so that it read "To the extent that a disaster manifestly exceeds its national response capacity, the affected State has …".

16. In draft article 14, the words "good faith" had been deleted from the third paragraph. With respect to the second paragraph, it had been stressed in plenary meetings that the notion of the arbitrary withholding of consent did not appear in article 18 of Protocol II and that the Commission should refrain from establishing rules which were not consonant with the rules applicable in times of armed conflict. Article 18, paragraph 2, of that Protocol had, however, been construed as comprising a duty of consent. According to the commentary to Protocol I, the fact that consent was required did not give the authorities the discretion to refuse relief without good grounds and such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat. In addition, article 59 of Convention IV expressly provided that "the Occupying Power shall agree to relief schemes on behalf of the … population, and shall facilitate them by all the means at its disposal".

17. Article 70 of Protocol I stated that "[i]f the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with … supplies … , relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts".

18. It was well settled in international humanitarian law that the consent of the State was required. Associating the notion of an obligation with that of consent was tantamount to saying that consent was obligatory and could be refused only for valid reasons, in particular in the event of military necessity. In fact, article 71, paragraph 3, of Protocol I provided that "[o]nly in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted". Hence, draft article 14, paragraph 2, merely supplemented the existing rules of international humanitarian law by providing an additional legal basis for the prohibition on arbitrarily refusing external assistance.

19. In principle, there was no incompatibility between the draft articles under consideration and international humanitarian law, as the aim of both was to ensure the protection of human rights while at the same time achieving a delicate balance with the principle of State sovereignty. A problem might arise only when humanitarian assistance was provided in a complex emergency by military personnel. That scenario was envisaged in paragraph 19 of the Guidelines on The Use of Military and Civil Defence Assets To Support United Nations Humanitarian Activities in Complex Emergencies.

20. A second paragraph had been added to draft article 16 (Offers of external assistance). In the first paragraph, in order to underscore the idea of a right, the words "may address an offer" had been replaced with the phrase "have the right to offer" from the text adopted on first reading. The second paragraph was entirely new and had been drafting in light of a suggestion made during a plenary meeting. It introduced a new element, the limited duty of the actor who might possibly be required to give assistance. In addition, it was worded in such a way as to bring out the difference between the duty of the affected State to seek external assistance and the actual making of a request for assistance, which was not a duty. The proposed second paragraph would read: "When external assistance is sought by an affected State by means of a request, States, the United Nations and other potential assisting actors shall expeditiously consider and inform the affected State of the decision on such a request."

21. Draft article 19, entitled "Termination of external assistance" comprised two sentences, the second of which concerned solely the duty of appropriate notification, whereas the first dealt with the right to terminate external assistance and the duty of those concerned to consult with respect to that termination. For the sake of clarity, the text had been reworked to cover the ideas of notification and consultation in a single sentence and in that order, which was the most logical. In addition, the phrase "in the exercise of their right to terminate external assistance at any time" had been replaced with "may terminate". Draft article 19, as amended, therefore read: "The affected State and the assisting State and, as appropriate, other assisting actors, may terminate external assistance at any time. The affected State, the assisting State and other assisting actors wishing to terminate shall provide notification and shall consult among themselves, as appropriate, with respect to such termination and its modalities."

22. As they stood, draft articles 20 and 21 concerned the relationship of the draft articles on the protection of persons in the event of disasters to special or other rules of international law and to international humanitarian law. Both stated that the draft articles were without prejudice to other rules. The relationship between those two draft articles and more generally the relationship between the draft articles as a whole and international humanitarian law had given rise to a lively debate in plenary meetings. Opinions on how to express that relationship had been divided; some members had wanted to go back to the wording adopted on first reading, while others preferred a streamlined version merging the two draft articles to read: "The rules contained in the present draft articles are without prejudice to other rules of international law." He personally was in favour of the simplified formula, provided that it was supplemented by two important additions,

namely an express reference to international humanitarian law and the reintroduction of the term "regional and bilateral treaties" which was contained in the current wording, for those treaties constituted an indispensable guarantee for States parties, especially when they were adopted in the context of a regional political or economic integration scheme. He therefore proposed that draft articles 20 and 21 be combined in a single draft article to read:

> "Article … *Relationship to special or other rules of international law*
>
> "The present articles are without prejudice to regional and bilateral treaties and special or other rules of international law, in particular the rules of international humanitarian law otherwise applicable in the event of disasters."

23. The draft preamble had been supplemented with two new paragraphs, the first of which reproduced the language of article 1 of the statute of the International Law Commission, while the second set forth the principle of the continuous applicability of the rules of international customary law. He warmly thanked all the members of the Commission for their constructive and positive attitude during the second reading of the draft articles which should make it possible to complete the work on a highly relevant topic at the current session.

24. Mr. PARK said that it would be useful for the Drafting Committee to receive the exact wording of the proposed amendments read out by the Special Rapporteur and asked the secretariat to distribute the text of his statement to the members of the Commission.

25. The CHAIRPERSON thanked the Special Rapporteur for his summing up which had provided a clear synopsis of the Commission's debates on his eighth report and the proposals made therein. He took it that all the members wished to refer the draft articles to the Drafting Committee, as recommended by the Special Rapporteur.

It was so decided.

Crimes against humanity[74] (A/CN.4/689, Part II, sect. C,[75] A/CN.4/690,[76] A/CN.4/698,[77] A/CN.4/L.873 and Add.1[78])

[Agenda item 9]

Second report of the Special Rapporteur

26. The CHAIRPERSON invited the Special Rapporteur to present his second report on crimes against humanity (A/CN.4/690). He also drew the Commission members' attention to the memorandum by the Secretariat (A/CN.4/698) containing information on existing treaty-based monitoring mechanisms which might be of relevance to the Commission's future work on the issue of crimes against humanity.

27. Mr. MURPHY (Special Rapporteur) said that he had sent his second report to the Secretariat on 11 January 2016 and that, in view of the length of the document, an advance copy had been circulated to members on 26 January so that they might have sufficient time to read it. He greatly regretted that not all the language versions had been quickly available, a situation for which the Secretariat was plainly not responsible and he hoped that future reports would be translated faster. Moreover, in the course of producing the final version of the report, the language services of the United Nations had introduced numerous regrettable errors into the English version, for example in paragraphs 56 to 61, where the word "defence" had been changed to "defines". He had originally intended to write a shorter report, but the explanations and commentaries accompanying the six new draft articles had required an in-depth examination of various issues connected with treaty law, case law and national statutes. Early submission had meant that the second report did not unfortunately cover some new developments, such as the publication in 2016 by the ICRC of a new commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[79]

28. The second report was divided into an introduction, seven chapters and two annexes, one of which contained the first four draft articles provisionally adopted by the Commission at its sixty-seventh session and the other, six new draft articles which he was submitting to the Commission for adoption.

29. In the introduction, he had taken stock of work on the topic of crimes against humanity, described the debate he had held with the Sixth Committee in 2015 and outlined the purpose and structure of the report. During the debate in the Sixth Committee, most of which he had observed in person, 38 States had addressed the topic. He had been pleased to note that they had generally been in favour of and had supported the Commission's work. Several States had subscribed to the idea of turning the draft articles into a new convention on the prevention and punishment of crimes against humanity. Chapter I of the second report dealt with States' obligation to punish crimes against humanity in their domestic law. Some States had adopted the requisite legislation, but many others had not yet done so. In addition, the nature and scope of the crime as defined in municipal laws varied considerably. Some reproduced the definition to be found in article 7 of the Rome Statute of the International Criminal Court, but many had decades-old definitions that were incomplete. Consequently, draft article 5 had merit in that, like several international instruments concerning other crimes, it obliged States to take all the necessary steps to criminalize the acts referred to in draft article 3. It comprised three paragraphs, the first of which stipulated that each State

[74] At its sixty-seventh session (2015), the Commission provisionally adopted draft articles 1 to 4 and the commentaries thereto (*Yearbook … 2015*, vol. II (Part Two), pp. 33 *et seq.*, paras. 116–117).

[75] Available from the Commission's website, documents of the sixty-eighth session.

[76] Reproduced in *Yearbook … 2016*, vol. II (Part One).

[77] *Idem.*

[78] Available from the Commission's website, documents of the sixty-eighth session.

[79] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Cambridge, Cambridge University Press, 2016.

must take the necessary measure to establish criminal responsibility for the commission of the act – national law sometimes referred to the "direct" commission or "perpetration" of the act, or to someone being the "principal" in the commission of the act – or for an attempt to commit, participate in the commission of or attempt to commit the act, which was then termed "ordering", "soliciting", "inducing" or "aiding and abetting" someone else to commit the act, in which case that person was called the "accessory" or "accomplice" to the act. Other terms such as "planning" or "instigating" the offence, which were used in article 7 of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia[80] and article 6 of the Statute of the International Tribunal for Rwanda,[81] could have been employed in draft article 5, but he had decided to refrain from doing so, because they did not appear in the Rome Statute of the International Criminal Court, which was more recent.

30. Draft article 5, paragraph 2, set out that, in some circumstances, military commanders and other superiors were criminally responsible for acts committed by their subordinates. Initially, he had intended to base himself on shorter language, such as that of article 6, paragraph 1 (*a*), of the International Convention for the Protection of All Persons from Enforced Disappearance, or that of article 86, paragraph 2, of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). In the end, he had opted for longer wording reproducing article 28 of the Rome Statute of the International Criminal Court. The members of the Commission might wish to comment on that choice. On 21 March 2016, Trial Chamber III of the International Criminal Court had convicted Mr. Jean-Pierre Bemba Gombo, former Vice-President of the Democratic Republic of the Congo and leader of the Movement for the Liberation of the Congo, of crimes against humanity in the form of murder and rape. That had been the first conviction handed down by the International Criminal Court under the principle of command responsibility. Although Mr. Bemba had not physically committed the crimes of which he had been found guilty, the Court had held that he was personally liable for the acts committed by the troops under his command and had placed him on the same footing as a military commander within the meaning of article 28 of the Rome Statute of the International Criminal Court. It had taken the view that he knew that the forces of the Movement for the Liberation of the Congo under his effective command had committed or were about to commit the crimes charged and that he had failed to take the necessary and reasonable measures to prevent or repress the commission of those crimes by his subordinates.

31. Draft article 5, paragraph 3 (*a*), provided that the fact that a crime against humanity had been committed on the orders of a superior was not, in itself, a ground for excluding the criminal responsibility of a subordinate. The Commission might wish to supplement that provision by making it clear that those orders could come from a Government. Subparagraph (*b*) stipulated that the crimes referred to in draft article 5 could not be statute-barred and subparagraph (*c*) made it clear that those crimes must be punished by penalties appropriate to their grave nature.

32. In his second report, the Special Rapporteur also dealt with the possibility of introducing the obligation for States to provide for the criminal responsibility of corporations. The perpetrators of the acts referred to in the draft articles were commonly understood to be natural persons. If it was the Commission's wish that legal persons could also be held criminally responsible, it would therefore have to make it clear that this category of persons could also potentially commit crimes against humanity. The last footnote to paragraph 44 of the second report listed examples of provisions of international instruments on that subject. As State practice varied in that area, he had preferred not to mention legal persons explicitly in draft article 5. Members might wish to express their standpoint on that matter as well.

33. Chapter II of the second report concerned the establishment of national jurisdiction over crimes against humanity. In that chapter, he had examined the provisions of international instruments on other crimes which were designed to ensure that perpetrators could not evade justice, in particular article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Draft article 6 adopted the same approach. Draft article 6, paragraph 1, provided that each State must take the necessary measures to establish its jurisdiction over crimes against humanity that had been committed in its territory or when the alleged offender was one of its nationals and, if the State considered it appropriate, if the victim was one of its nationals. The word "and" should be deleted at the end of paragraph 1, because the requirements in subparagraphs (*a*), (*b*) and (*c*) were not cumulative. Paragraph 2 laid down that each State must take the necessary measures to establish its jurisdiction when the alleged offender was present in any territory under its jurisdiction or control, while paragraph 3 stated that, without prejudice to applicable rules of international law, the draft article did not exclude the establishment of other criminal jurisdiction in accordance with a State's national law.

34. Chapter III addressed a State's obligation to open an impartial investigation as soon as there was reason to believe that crimes against humanity had been or were being committed in any territory under its jurisdiction or control. That issue formed the subject of draft article 7, paragraph 1. Some international instruments, including the Convention against torture and other cruel, inhuman or degrading treatment or punishment in its article 12, expressly established the obligation for a State to hold an investigation "whenever there is a reasonable ground to believe" that the crime in question had been committed in its territory. Even if that was not true of all instruments addressing crimes, that matter should be covered in draft article 7. Paragraphs 2 and 3 of draft article 7 were not prompted by any existing treaty provisions, but they were useful innovations. Paragraph 2 provided that if a State determined that a crime against humanity had been or was

[80] The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993, is annexed to the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1).

[81] The Statute of the International Tribunal for Rwanda is annexed to Security Council resolution 955 (1994) of 8 November 1994.

being committed in any territory under its jurisdiction or control, it must notify, if appropriate, other States whenever there was reason to believe that nationals of those States had been or were implicated in the commission of the crime. That provision would enable the States concerned to investigate the acts ascribed to their nationals. Paragraph 3 required all States to cooperate, as appropriate, to establish suspects' identity and whereabouts.

35. Chapter IV of the second report discussed the exercise by a State of its national jurisdiction when the alleged offender was present in its territory, in other words when the measures provided for in draft article 7 had made it possible to identify and locate the person concerned. That obligation was generally set forth in international instruments addressing crimes and was often accompanied by three conditions, which formed the subject of draft article 8, paragraphs 1, 2 and 3. The State was expected to conduct a preliminary investigation. It must then take all the necessary steps to ensure the availability of the alleged offender for the opening of criminal proceedings against him or her, or his/her extradition or surrender to another State. That might necessitate taking the person into custody. Lastly, the State must inform any other State with jurisdiction over the matter of the action that it had taken and whether it intended to refer the case to its competent authorities for prosecution.

36. Chapter V of the second report addressed the obligation to submit the matter to the competent authorities for the prosecution or extradition of an alleged perpetrator of crimes against humanity, or for that person's surrender to another State or competent international tribunal. As the Commission had discovered during its own recent work, international instruments on crimes generally provided for an *aut dedere aut judicare* obligation. That was the reason why it had been incorporated in draft article 9, paragraph 1, which made it clear that a State could honour that obligation by surrendering the alleged offender to a competent international criminal tribunal.

37. In order to guarantee due process in those circumstances, existing international instruments often specified that, if a State referred the case to its competent national authorities for the purpose of prosecution, the latter must consider whether and how to prosecute in the same way as they would for any ordinary serious crime under its national law. That issue formed the subject of draft article 9, paragraph 2. In that connection, the Commission members might wish to examine the position with regard to hybrid tribunals, in other words courts that formed part of the national legal system of a State, but which comprised members of the judiciary of the State concerned as well as international judges and which could adjudicate in cases concerning breaches of municipal and international law. In the context of an *aut dedere aut judicare* obligation, the question arose of whether sending someone suspected of the commission of crimes against humanity for trial before a hybrid court could be regarded as extradition to another State or surrender to an international court. That issue might be of relevance when drawing up a new draft article providing that obligations under the draft articles under consideration were without prejudice to States' obligations in respect of a "competent international criminal court or tribunal".

38. Chapter VI of the second report concerned the obligation to give "fair treatment" to suspected perpetrators of crimes against humanity at all stages of proceedings against them, an obligation which was generally embodied in international instruments on crimes. Draft article 10, paragraph 1, expressly provided that the alleged offender must receive a fair trial and, more generally, the protection afforded by international human rights law. That chapter focused on the question of whether, under international law, military courts could try persons, including civilians, suspected of the commission of crimes against humanity. Practice in that area varied considerably from one State to another. While he had not wished to propose any language on that issue in draft article 10, in paragraph 192 of his second report, he had pointed to an emerging view that the requirement of a "fair trial" meant that someone accused of a crime against humanity should not be tried by a military court or commission unless that person was a member of the armed forces and had committed the offence in connection with an armed conflict. Draft article 10, paragraph 2, stipulated that when the alleged offender did not have the nationality of the State in which he or she was detained, the State in question must allow him or her to communicate with and receive visits from a representative of the State of his or her nationality.

39. Chapter VII of the second report, devoted to the future programme of work, explained that a third report might look at extradition procedures, mutual legal assistance and dispute settlement and monitoring mechanisms. In that connection, he noted that in March 2016 the Secretariat had published an excellent memorandum entitled "Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission" (A/CN.4/698). He was endeavouring, through the secretariat, to organize meetings with the staff of the Office of the United Nations High Commissioner for Human Rights and with members of various treaty monitoring bodies. The purpose of those meetings, which would take place during the current session, was to assess the advantages and disadvantages of a monitoring mechanism for a future convention on crimes against humanity. A fourth report, which would be submitted in 2018, might be devoted to other questions such as a draft preamble and draft concluding articles.

40. Before concluding, he stressed that the Commission's work on crimes against humanity was arousing considerable interest and that he was regularly contacted by representatives of Governments, international organizations, NGOs and universities who wished to learn more about the topic and share their views on it. He had been invited by Radio 4 of the British Broadcasting Company to take part in a programme called "Law in Action", which showed that the media were also interested in the Commission's work, which he strove to publicize all over the world. To that end, he had given lectures in several institutes and universities and had held meetings with the legal advisers of ministries for foreign affairs and other officials, including the Secretary-General of the League of Arab States. He had likewise taken part in a two-day workshop organized by the International Nuremberg Principles Academy. Lastly, with the assistance of two other members of the Commission, he had held an informal briefing with a number of Sixth Committee delegates prior to the session.

41. He and three other members of the Commission would be going to Bosnia and Herzegovina on Friday, 13 May 2016, at the invitation of the Association of Victims and Witnesses of Genocide, to participate in a workshop on atrocity prevention and punishment in order to discuss the difficulty of sending perpetrators of crimes against humanity to trial. That workshop would be an opportunity to provide information about the Commission's work. On Saturday, 14 May 2016, he would also be attending a workshop in Geneva on the prevention of torture, which would bring together several major human rights organizations, including Amnesty International, which had published an analysis of the report under consideration.[82] He was trying to organize a meeting on crimes against humanity as a side event at the Assembly of States Parties to the Rome Statute of the International Criminal Court, which would be convened in The Hague in November 2016. A workshop on the same subject, sponsored by the National University of Singapore and Washington University in Saint Louis (United States) would be held in Singapore in December.

42. Mr. MURASE thanked the Special Rapporteur for his excellent second report on crimes against humanity, which was comprehensive and well researched. As he had said previously, the topic had an intrinsic difficulty. The Commission could take up new subjects in two different ways. The first classical method consisted in codifying and progressively developing international law in pursuance of its mandate. The second consisted in responding to an express request of the General Assembly to draft new conventions on a given subject, as had been the case of the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents and the 1998 Rome Statute of the International Criminal Court. When responding to such a request, the Commission did not need to concern itself with the customary law status of the rules that it formulated. If necessary, it could set forth new rules, which it generally did by resorting to analogies. As no specific request had apparently been made by the General Assembly with regard to the topic under consideration, it must be considered under the Commission's usual mandate to codify international law on the basis of *a priori* "established" customary rules, or to develop that branch of law on the basis of "emerging" customary rules. The Special Rapporteur did not seem, however, to have bothered to determine the customary nature of the rules forming the basis of his work and merely drew analogies from conventions such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide or the 1949 Geneva Conventions for the protection of war victims. In other words, he was acting as if the Commission had been asked by the General Assembly to draw up new legal rules on crimes against humanity.

43. The second report made frequent reference to the Convention against torture and other cruel, inhuman or degrading treatment or punishment. However, merely mentioning international instruments on crimes other than crimes against humanity did not afford a sufficient legal basis for the proposed draft articles, even though torture might be regarded as a crime against humanity, provided that the acts in question had been committed as part of a "widespread and systematic attack", that being one of the elements of the definition of a crime against humanity.

44. In light of the foregoing, he wished to comment on draft article 5. None of the provisions of the Rome Statute of the International Criminal Court obliged the States that had ratified it to adopt criminal law punishing crimes against humanity. How they implemented the Statute was left to their discretion. The existing treaties mentioned in paragraphs 20 to 23 of the second report, which obliged States to criminalize certain acts in their domestic law, covered other crimes, namely genocide, war crimes and torture. While those instruments might serve as a basis for analogical reasoning, it must be noted that customary international law did not establish any obligation to punish crimes against humanity in municipal law. Consequently, as the Commission was not in a position to impose any new duties on States, the verb "shall" should be replaced with "should" in the aforementioned draft article. Moreover, as the Commission was supposed to abide by its mandate to codify and progressively develop law, most of the draft articles proposed by the Special Rapporteur should be worded as recommendations.

45. If, however, the Commission decided to go beyond its mandate by approving the Special Rapporteur's approach of creating new legal rules or drafting a new convention, he had some concerns about draft article 5. First, it must be emphasized that, unfortunately, the scope of the obligation set forth in that draft text was, to say the least, obscure. At its previous session, the Commission had provisionally adopted draft article 3 on the definition of crimes against humanity. That definition was borrowed from that which was to be found in article 7 of the Rome Statute of the International Criminal Court and reproduced its contextual elements, including the reference to "a widespread or systematic attack". Draft article 5 did not, however, indicate to what extent States were obliged to incorporate the definition in draft article 3 into their legislation. In paragraph 19 of the second report, the Special Rapporteur seemed to regret that some States parties to the Convention against torture and other cruel, inhuman or degrading treatment or punishment had not criminalized torture as defined in that instrument. If that was indeed the Special Rapporteur's position, it would be necessary to determine at least whether the States that ratified the proposed convention would be bound to incorporate the contextual elements of crimes against humanity in their domestic law. Unless the scope of States' obligation to adopt domestic law rules was clarified beforehand, they would probably find it difficult to ratify the new convention. The relationship between draft articles 5 and 3 must be spelled out, because States must know exactly what obligations they were going to bear.

46. In addition, in draft article 5, paragraph 1, the phrase "soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission" of a crime against humanity was insufficiently clear. If the scope of the crime remained ambiguous, that would certainly cause problems owing to the principle of *nullum crimen sine lege*. In Japan, the lack of a distinction in criminal

[82] Amnesty International, "International Law Commission: Second Report on Crimes against Humanity: Positive Aspects and Concerns", London, 2016. Available from: www.amnesty.org/en/documents/ior 40/3606/2016/en/.

law between "conspiracy" and "complicity" had prevented the country from ratifying the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

47. The Special Rapporteur made only a passing reference to the question of corporate responsibility for crimes against humanity, although that issue could be a salient feature of the future convention. As he had said earlier, the contextual elements of crimes against humanity, *inter alia* "a widespread or systematic attack", had been incorporated in draft article 3, paragraph 1. In paragraph 2 (*a*) of draft article 3, the phrase "pursuant to or in furtherance of a State or organizational policy" covered only "State-like" organizations, or at least organizations with the capacity to order crimes against humanity. Although judicial and scholarly views were divided on what type of policy had to be followed in order to give rise to the contextual elements of crimes against humanity, that policy encompassed the participation of legal persons in the commission and/or planning of a crime against humanity and their corporate liability therefor. In any event, it would be necessary to look closely at the relationship between the contextual elements of crimes against humanity and the conditions under which corporate criminal liability could be incurred alongside individual criminal responsibility.

48. Chapter II, on the establishment of national jurisdiction, which listed the three types of national jurisdiction resting on the principles of territoriality, active personality and passive personality, prompted similar concerns. Naturally, under customary international law States could establish their jurisdiction over crimes committed in their territory and they could likewise establish their extraterritorial jurisdiction to try cases involving crimes of which their nationals had been victims. He therefore failed to understand why no mention was made anywhere in the second report of the "objective territoriality principle" as a form of extraterritorial jurisdiction of the State in the territory of which a crime planned in another State had been committed. In any event, the question was not whether States could establish their jurisdiction, but whether they were bound under customary international law to establish their jurisdiction over crimes against humanity. The few examples given in that respect in the second report were of national laws and conventions that were of no direct relevance to crimes against humanity and it was difficult to rely on them in order to state categorically that the establishment of jurisdiction over crimes against humanity constituted a rule of customary international law.

49. The Special Rapporteur was right to mention briefly the principle of universal jurisdiction in paragraph 113 of his second report without describing it as a form of extraterritorial jurisdiction, for it was still too early to consider that principle to be a rule of customary international law which was applicable to crimes against humanity. The without prejudice clause in article 6, paragraph 3, might lead to the opposite conclusion.

50. Chapter III and the wording of draft article 7 on general investigation and cooperation for identifying alleged offenders posed fewer problems, although the term "general investigation" was too vague. It might be better not to use the word "investigation" in order to avoid any confusion with the specific investigation of a suspect.

51. He had reservations about chapter IV on the exercise by a State of national jurisdiction when an alleged offender was present in its territory. Draft article 8, paragraph 1, was too categorical and should be more nuanced. Opening an investigation, even of a preliminary nature, could give rise to substantial injury and violate the human rights of an alleged offender who might prove to be innocent. In Japan, for example, the police could not initiate an investigation unless there were reasonable grounds for believing that a person had committed a crime. Mere "rumours" would not warrant the immediate opening of an investigation.

52. Chapter V, concerning the *aut dedere aut judicare* principle, also raised the basic question of the latter's customary law status when it was applied to crimes against humanity. As indicated in paragraphs 151 to 153 of the second report, the International Court of Justice and the Commission had not recognized that status. In 2014, in the course of its work on that topic, the Commission had taken the view that there was some uncertainty on that point. It was hard to see how, only two years later, it could be said that States were bound, under customary international law, to extradite or prosecute perpetrators of crimes against humanity, as draft article 9 suggested. Perhaps the Special Rapporteur had based his thinking on a case where the alleged offender had committed some crimes constituting a crime against humanity which were covered by a treaty providing for prosecution or execution. Proceeding by analogy on that basis would not be justified in view of the general rule laid down in article 22, paragraph 2, of the Rome Statute of the International Criminal Court, according to which the definition of a crime must be strictly construed and must not be extended by analogy, a principle which was also held to apply to criminal proceedings.

53. Chapter V was also silent on two points. The first concerned competing requests for extradition. While article 90 of the Rome Statute of the International Criminal Court dealt with that matter in vertical relations between the International Criminal Court and States, in the draft articles under consideration it might be necessary to clarify the question of horizontal relations between States, especially as draft article 6 established several possibilities of extraterritorial jurisdiction. The second point concerned the question of whether the prosecution of crimes against humanity was obligatory or whether an amnesty was possible. Some writers denied that it was possible, but it was difficult to substantiate that answer on the basis of customary international law. Draft article 9, paragraph 2, described the procedure to be followed once a State had referred a case to its competent authorities, whereas amnesties were often granted at an earlier stage. Under the Rome Statute of the International Criminal Court, such amnesties did not prevent the International Criminal Court from exercising its jurisdiction, since they did not qualify as judgments for the purposes of article 20 of the Statute. Generally speaking, it was debatable whether perpetrators of crimes against humanity (other than acts of torture) could be amnestied, especially when those amnesties had been granted by a truth and reconciliation commission.

54. Chapter VI of the second report and draft article 10 did not pose any particular problems. It might be preferable

to provide for specific protective measures for persons who were alleged to have committed crimes against humanity, rather than broadly ensuring their "fair treatment". Lastly, he drew attention to a typographical error in the report: the last footnote to paragraph 133 should refer to "Security Council resolution 1894 (2009)". The best way for the Commission to proceed with the topic of crimes against humanity would be to obtain a General Assembly resolution requesting it to draft a new convention on the subject, otherwise the position under customary international law would continue to be an issue.

55. Mr. KITTICHAISAREE thanked the Special Rapporteur for his very detailed second report on crimes against humanity and said that he wished to comment on the proposed draft articles. He approved of draft article 5, paragraph 3 (*a*), although it could mention "an order of a Government", the wording employed in article 33, paragraph 1, of the Rome Statute of the International Criminal Court. There was no good reason to depart from the Statute, especially if a conflict of norms was to be avoided. The title of draft article 9, "*Aut dedere aut judicare*", should be amended. That title had been used by the Special Rapporteur on the topic "Obligation to extradite or prosecute (*aut dedere aut judicare*)" for the sake of convenience. It should be remembered that the report of the Working Group on that subject[83] had recorded the doubts of several members, including the Special Rapporteur on the topic himself, on the advisability of using the Latin formula *aut dedere aut judicare*, especially the word "*judicare*" which did not precisely reflect the scope of the verb "prosecute".

56. Draft article 10, paragraph 2, was much more restrictive than the corresponding provision of the 1963 Vienna Convention on Consular Relations which, in its article 36, paragraph 1 (*c*), provided that consular officers had the right to visit a national of the sending State who was in prison, custody or detention. Since there were no grounds for such a difference, article 10, paragraph 2, should be amended to bring it into line with article 36 of the 1963 Vienna Convention on Consular Relations. Moreover, as it stood, the draft article made no provision for the legal representation of the alleged offender, or for several other rights embodied in article 36 of the aforementioned Convention. The Commission should explain why those rights had been excluded. The time frame set out in the future programme of work was too long and was likely to lead to the international community losing its enthusiasm for a convention on crimes against humanity. It would therefore be preferable for the Commission to complete its work on the topic within two years. Lastly, he was in favour of referring the proposed draft articles to the Drafting Committee.

57. Mr. TLADI commended the Special Rapporteur on his excellent and comprehensive second report on crimes against humanity. He also thanked him for his oral presentation of the second report, which had provided welcome clarification on a number of points. While he was in favour of referring the proposed draft articles to the Drafting Committee, he wished to make a few comments on the report. As he had said at the previous session, he remained unconvinced by the arguments put forward by the Special Rapporteur and endorsed by the Commission for limiting the topic under consideration to crimes against humanity to the exclusion of other core crimes, such as war crimes and genocide. The general approach adopted by the Special Rapporteur and accepted by the Commission meant that the draft articles which had already been adopted and those which would be adopted later on did not necessarily constitute codification of international law. The Special Rapporteur certainly did not consider the draft articles which he had proposed in line with that approach to be rules of international customary law. It was essential to make that clear because domestic courts might be tempted to rely on the Commission's work even though it was not finished.

58. Members' comments on the second report and the proposed draft articles had mainly focused on the question of whether the practice recorded by the Special Rapporteur substantiated the draft text, no matter what form it might take (guidelines, conclusions, articles or principles). However, as the Commission's avowed purpose was not to codify the pertinent rules of international law, but to draw up draft articles, there was no need for the text to be supported by practice. The question was not even whether practice reflected written law and was accompanied by the requisite *opinio juris*. In fact, the existence of relevant practice was fairly unimportant; the Commission and therefore the Special Rapporteur was simply expected to make choices. For that reason, the Special Rapporteur could have refrained from engaging in such an exhaustive, in-depth survey of practice of such little importance.

59. In paragraph 15 of the second report, the Special Rapporteur stated that prosecution and punishment of persons for crimes against humanity might be possible before international criminal courts and tribunals, but must take place at the national level in order to be fully effective. Generally speaking, that statement encapsulated the principle of subsidiarity, but it was not always true in practice. A network of international and regional tribunals with jurisdiction to try crimes against humanity and other international crimes could conceivably be fully effective. Since there were much fewer of those kinds of crimes than ordinary crimes, there was no reason to think that such a network would not be of comparable effectiveness to that ascribed to national courts and tribunals. However, in the absence of such a set-up, the Special Rapporteur was quite right to focus on national investigation and prosecution.

60. In paragraph 19 of his second report, the Special Rapporteur correctly noted that States which had not adopted a national law on crimes against humanity as such could punish individual acts that constituted such crimes, namely rape, murder and torture, but that the sentences passed on the perpetrators might well not be commensurate with the gravity of the crimes against humanity which had been committed. In reality, that would depend on the applicable national laws. It was to be hoped that the constituent elements chosen by the Commission in order to define crimes against humanity, above all the fact that the act in question had to be committed as part of a widespread and systematic attack, would be incorporated as aggravating circumstances in States' legislation.

[83] Document A/CN.4/L.844, available from the Commission's website, documents of the sixty-sixth session.

61. The second report then usefully addressed various kinds of individual criminal responsibility for crimes against humanity. The Special Rapporteur considered several instruments that identified those forms of responsibility, and it seemed that almost all of them covered not only the actual commission of the crime against humanity but also various forms of participation, apart from "attempt" which was not mentioned in the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia,[84] the Statute of the International Tribunal for Rwanda[85] or the Statute of the Special Court for Sierra Leone.[86] The fact remained that the terms used to describe forms of participation were many and various, such as "ordering", "soliciting", "inducing", "aiding and abetting", "conspiracy" and "being an accomplice". Those myriad options naturally raised the question of what terms the Commission should use. The approach set out by the Special Rapporteur in paragraph 39 of the second report seemed to be the best option. Of course, he realized that some members would prefer greater standardization. The Special Rapporteur's choice of listing all or at least many of the possible terms seemed sufficient for that purpose and it also enabled States to choose the terms that were best suited to their legal system.

62. As Mr. Murase had noted, in paragraphs 41 to 44 of his second report, the Special Rapporteur examined the issue of corporate criminal liability. His analysis could be summed up in three points: the number of national laws recognizing corporate criminal liability had risen, but the texts varied; no international criminal court, not even the proposed criminal chamber of the African Court of Justice and Human Rights, had recognized corporate criminal liability, and that form of liability had not been incorporated into many treaties relating to crime.

63. The Special Rapporteur did not draw any conclusions from that analysis in his second report, but he had done so when he had presented it. In fact, although draft article 5 made no provision for corporate criminal liability, it could be presumed that a director (or anyone else behind the corporate veil) could be held criminally responsible as an individual for one of the forms of participation in the crime. That point could be made in the commentary. In addition, in view of the nature of the draft text and the approach discussed earlier, there was nothing to say that corporate criminal liability should be disregarded solely because of scant practice. After all, the latter was merely a source of inspiration in the draft articles and must not determine the content of the provisions that the Commission was putting together.

64. The question then arose of why corporate criminal liability should be included. The answer might be that it would serve the underlying purpose of the draft articles. If the Special Rapporteur found on balance that, despite the dearth of practice, it was desirable to include corporate criminal liability as that would further the objective of the draft text, the Commission should follow that recommendation. If, on the contrary, after analysis, that would prove too complicated, or would not serve the purpose of the draft articles – and perhaps that was what the Special Rapporteur was alluding to when he said that those crimes were inherently committed by individuals – that form of responsibility should not be dealt with in the draft articles. He had no opinion on the matter and he doubted that the Commission could take a decision on the basis of the second report. That might be an issue which the Special Rapporteur might like to consider in a subsequent report.

65. The Special Rapporteur had studied the practice of national courts and international law on the prescription of crimes against humanity and, after a very detailed analysis, he had concluded that the draft articles should rule out the application of the statute of limitations. In order to form an opinion on the subject, it was worth recalling the reason for the rule of prescription. The technical reason given in paragraph 63 of the second report was that prosecution should be initiated while physical and eyewitness evidence was still fresh and intact. That was, of course, a valid reason, but the more fundamental reason was that the statute of limitations was an essential element of the right to a fair trial. Defence witnesses might no longer be around or able to remember; the accused might have forgotten important details or have thrown away the hotel bill proving that he was not at a meeting where he had allegedly ordered crimes. That was not to say that prescription should be recognized. The case of Nazi Germany showed that it could occasionally take a long time for justice to be meted out. What was needed was an appropriate balance between the right to a fair trial and the need to ensure that justice was ultimately done. For example, it could be stipulated that the statute of limitations did not apply in cases where, for any reason, it was impossible to initiate prosecution (for example when the perpetrator was a member of a Government that was committing crimes against humanity). The text should also lay down that prescription no longer ran once an investigation had been opened and certainly not after an indictment, in order to prevent a fugitive evading justice through that rule.

66. Draft article 6 did not call for any particular comments. He approved of the content and thrust of draft article 7, despite the disjuncture between the paragraphs of the second report which related to that text and the text itself, especially paragraphs 2 and 3 thereof. In his second report, the Special Rapporteur gave several detailed examples of practice establishing a duty, whereas the draft article which, at first sight, did not call for any objections, essentially concerned cooperation.

67. In paragraph 139 on chapter IV and the scope of the topic, which was of particular interest to him personally, the Special Rapporteur drew attention to the gaps which he had also identified in the Convention on the Prevention and Punishment of the Crime of Genocide and the Geneva Conventions for the protection of war victims and noted that the international law framework relating to genocide and war crimes contained "no obligation to conduct a preliminary investigation".

68. The provisions relating to cooperation, especially the principle of *aut dedere aut judicare*, were the most

[84] See footnote 80 above.

[85] See footnote 81 above.

[86] The Statute of the Special Court for Sierra Leone is annexed to the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (signed at Freetown on 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

important elements of the topic under consideration. He therefore approved of the content of draft article 9, even if it bore an uncanny resemblance to draft article 6, paragraph 2. As the Commission's final report on the obligation to extradite or prosecute (*aut dedere aut judicare*) had indicated, that duty could take different forms, all of which had different legal consequences.[87] He supported the formula proposed in the draft articles and he hoped that, as the Special Rapporteur had said, the detailed terms and conditions of applying the principle of *aut dedere aut judicare* could be worked out, especially with regard to competing requests, including those from international courts and tribunals.

69. Mr. PARK said that he fully agreed with the Special Rapporteur that crimes against humanity must be punished under the domestic law of every State or of every State party to the future convention. He disagreed with Mr. Murase that a crime against humanity was a violation of a *jus cogens* rule in the same way as genocide or ethnic cleansing. While States could, of course, use different terminology and formulae in accordance with their legal systems and practice, it would be desirable and reasonable for them to adopt laws and regulations that were as close as possible to the standards of the Rome Statute of the International Criminal Court, the International Criminal Court and the future convention. Moreover, the question of corporate criminal liability, which was discussed in paragraphs 41 to 44 of the second report, was extremely interesting and should be examined in greater depth.

70. In draft article 5, the Commission should refrain from employing the term "offence" in relation to the various forms of responsibility listed in paragraph 1, for States recognized divers kinds of participation in a crime in their criminal law. It would be better to follow the wording of article 25, paragraph 3, of the Rome Statute of the International Criminal Court and to refer to a person "criminally responsible and liable for punishment". Since the Special Rapporteur had used the term "criminal responsibility" when presenting his second report, it would be wise to amend paragraphs 1 and 2 of draft article 5 to bring their language into line with that of the articles of the Statute. As Mr. Kittichaisaree and the Special Rapporteur had suggested, the phrase "order of a Government" could be inserted in draft article 5, paragraph 3 (*a*). In addition, when the person responsible for crimes against humanity was a Head of State or a Head of Government, the State concerned might not be willing or able to take the necessary steps to bring him or her to trial, because he or she enjoyed immunity from jurisdiction. For that reason, the future convention should include a provision on immunity along the lines of article 27 of the Rome Statute of the International Criminal Court, which could become draft article 5, paragraph 3 (*d*), and which would apply to everyone regardless of their official status. Although it was plain that the question of the constitutionality of such a provision would arise in many countries, it would nevertheless be a safeguard against impunity.

71. Draft article 6 established three forms of national jurisdiction based on the principles of territoriality, active personality and passive personality. If the draft articles were to establish an effective system for the prosecution and punishment of crimes against humanity, they would have to preclude any possibility that persons suspected of having committed crimes might escape justice. As questions of jurisdiction might, however, give rise to disputes between States, they must be regulated in accordance with the principles of international law, customary international law and the Rome Statute of the International Criminal Court.

72. The jurisdiction for which draft article 6 made provision seemed to rest largely on article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, especially paragraph 1, which showed that international agreement already existed on that matter. Even so, draft article 6, paragraph 3, might have the effect of authorizing wider jurisdiction than that recognized in the Rome Statute of the International Criminal Court. That was why the Special Rapporteur had used the expression "without prejudice to applicable rules of international law". Given that article 21, paragraph 1 (*c*), of the Statute, which covered the law applicable by the International Criminal Court, authorized the latter to apply national laws provided that the principles set forth therein were not inconsistent with "international law and internationally recognized norms and standards", it would be preferable to use a similar phrase such as "without prejudice to international law and internationally recognized norms and standards". Furthermore, in draft article 6, paragraph 1 (*b*) and (*c*), the Special Rapporteur used the phrase "one of its nationals" to cover cases where the alleged offender had two or more nationalities, whereas most international treaties employed the term "its nationals". If the Commission retained the phrase "one of its nationals", it would be more difficult to identify the link, hence it might perhaps be preferable to replace it with the phrase "when the alleged offender is a national of that State", which was taken from article 5, paragraph 1 (*b*), of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. As the draft articles proposed a minimum model for domestic laws, he suggested that draft article 6, paragraph 1 (*b*), be amended to read, "the alleged offender is a national or has his or her principal residence in its territory". That amendment would enable States to establish their jurisdiction over crimes committed by stateless persons or refugees.

73. Draft article 7 was drawn almost word for word from article 12 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, except that the latter required States only to investigate but not to cooperate with other States. The Rome Statute of the International Criminal Court made provision for the latter duty only in respect of the cooperation of States parties to the Statute with the International Criminal Court. In draft article 7, paragraphs 1 and 2, the phrases "reasonable ground to believe" or "well-founded reason to believe" would be more consonant with international treaties than the expression "reason to believe". For example, the expressions "reasonable basis to believe" and "reasonable grounds to believe" were to be found in articles 53 and 58 of the Rome Statute of the International Criminal Court. While paragraph 2 might be useful, whether it could be applied in a State's domestic law was a moot point, because the last sentence concerned the duty

[87] See *Yearbook ... 2014*, vol. II (Part Two), pp. 92 *et seq.*, para. 65.

of other States. Moreover, since that sentence might give rise to competing jurisdiction among States, it might be wise to draft a separate provision on that matter. The first sentence could be simplified to read: "Any State which determines that a crime against humanity is being or has been committed shall communicate, as appropriate, to any other State or relevant international organization the general findings of that investigation." A new paragraph stating that the purpose of a general investigation was to determine whether a situation might be described as a widespread or systematic attack on the civilian population would likewise be useful, in that it might guide States' investigative activities, especially those of States which were unfamiliar with the legal framework with regard to crimes against humanity.

74. With regard to draft article 8, States should, as provided for in draft article 7, open a preliminary investigation when the alleged offender was present in their territory or under their jurisdiction, in order to establish an effective system of criminalization and prosecution of crimes against humanity. However, States' obligations – to conduct a preliminary investigation, to ensure the alleged offender's continuing presence in its territory by taking that person into custody and to notify other interested States – must be carried out in compliance with its legal system and practice. The question could be asked whether the obligation to notify other interested States under draft article 7, paragraph 2, and draft article 8, paragraph 3, had been established under customary international law, as it might create a burden on the State concerned.

75. Although the *aut dedere aut judicare* principle that formed the subject of draft article 9 appeared to be necessary in order to fill in the gaps in the existing treaty-based regime, sufficient consensus would have to be reached among States on its inclusion, for there was nothing to say that this principle had been recognized as a rule of customary international law, as Mr. Kittichaisaree and Mr. Murase had noted. As stated in the second report, although draft article 9 was based on the "Hague formula", which had already been incorporated into many international treaties, there had to be a sufficient legal basis for the application of that principle to crimes against humanity as part of customary international law. Lastly, he suggested the insertion of the phrase "whose jurisdiction it has recognized" at the end of draft article 9, paragraph 1, for that was an essential prerequisite.

The meeting rose at 1.05 p.m.

3297th MEETING

Thursday, 12 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)

[Agenda item 9]

Second report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of crimes against humanity (A/CN.4/690).

2. Mr. FORTEAU said that he had been impressed by the quality of the Special Rapporteur's second report. However, it was perhaps unreasonable to expect the Commission members to have had time to fully grasp all the implications of the report, which, at more than 100 pages, was more than double the maximum length recommended by the Commission in 2011. While the English version of the second report had been informally distributed to the Commission members in January 2016, the regrettable delay in the issuance of the other language versions until April 2016 had added to the difficulties in examining the report, especially in view of the highly technical nature of the topic, which required a particular focus on specific legal terminology. Moreover, the second report contained six new draft articles on fundamental, diverse and, in some cases, controversial issues.

3. He was concerned that the length of the second report might result in excessively detailed commentaries, like those adopted the previous year, even though experience had repeatedly shown that short and succinct commentaries were more useful. He therefore called for moderation and suggested that the Commission might perhaps draw inspiration from the explanatory reports to Council of Europe treaties. Given that the draft convention was primarily intended for incorporation into national law, and bearing in mind the diversity of domestic legal systems, the Commission should also be careful not to elaborate overly detailed draft articles.

4. In the light of the foregoing, his comments on the Special Rapporteur's proposals were necessarily very selective and, in some respects, provisional in nature. With regard to draft article 5, some caution was perhaps required in relation to the Special Rapporteur's conclusion that the failure to criminalize crimes against humanity as such might preclude prosecution and punishment, bearing in mind that international criminal law allowed States a margin of discretion with regard to how they should punish international crimes. A study of the case law of the International Criminal Court in relation to the principle of complementarity might have been useful in determining the type or degree of criminalization under national law that would be required in order for a State

to be considered to have fulfilled its obligation to combat impunity. Criminalization comparable to that provided for in draft article 3 might well be sufficient. The link between draft article 3[88] on the definition of crimes against humanity and draft article 5 on criminalization should be clarified, in particular to determine whether the obligation to criminalize crimes against humanity applied to the entire definition in draft article 3, to the first three paragraphs, or only to the first paragraph. Regrettably, the Special Rapporteur had not explained the reasoning behind the language proposed in draft article 5, including why he had not referred to "legislative" measures in paragraph 1 thereof, in line with such instruments as the 1994 Inter-American Convention on the Forced Disappearance of Persons. He seemed to have relied instead on the language of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment. That said, the proposed draft article also deviated somewhat from the 1984 Convention, again without explanation, in that it provided that each State "shall take the necessary measures" whereas that Convention had the wording "shall ensure", which seemed stricter. Concerning criminalization of the attempted commission of a crime against humanity, he wondered why the Special Rapporteur had not aligned the wording of draft article 5, paragraph 1, with the stricter formulation of article 25, paragraph 3, of the Rome Statute of the International Criminal Court, which was modelled on article 2 of the 1996 draft code of crimes against the peace and security of mankind.[89] There was surely a risk of introducing contradictions by not reflecting the wording of article 25, paragraph 3, of the Statute, including the conditions contained therein. That concern was all the more valid given that elsewhere, such as in draft article 5, paragraph 3 (*b*), the Special Rapporteur had quite rightly reproduced the language of the corresponding provisions of the Rome Statute of the International Criminal Court. As suggested by the Special Rapporteur in his introductory statement, consideration should be given to the inclusion, in draft article 5, paragraph 3 (*a*), of a reference to "an order of a Government" in addition to "an order of a superior", as most international instruments – including the Rome Statute of the International Criminal Court – referred to both. On the question of appropriate penalties, paragraph 3 (*c*) should specify that the penalties should take into account the "extreme seriousness" or the "extremely serious nature" of crimes against humanity.

5. With regard to draft article 6 on the establishment of national jurisdiction, he supported the Special Rapporteur's decision to draw on the more complex model used in the Convention against torture and other cruel, inhuman or degrading treatment or punishment, rather than simply reproducing article 8 of the 1996 draft code of crimes against the peace and security of mankind.[90] While that might be seen as a step backwards, it was important to bear in mind that in order to successfully prosecute crimes against humanity, the parties and the courts must have sufficient investigative capacity, which often required a certain link between the prosecuting State and the crime committed or the victims. In that sense, he considered the Special Rapporteur's proposed text to be generally well balanced. In fact, the same approach had been adopted *mutatis mutandis* by the Institute of International Law in its 2015 resolution on universal civil jurisdiction with regard to reparation for international crimes, article 2, paragraph 2, of which provided that courts "shall be considered to provide an available remedy if they have jurisdiction and if they are capable of dealing with the claim in compliance with the requirements of due process and of providing remedies that afford appropriate and effective redress".[91] He also welcomed the fact that draft article 6 did not prohibit universal jurisdiction, since paragraph 3 thereof stated that the draft article did not exclude the establishment of other criminal jurisdiction by a State, in accordance with international law. That formulation was in line with the view taken by the International Court of Justice in its judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* that article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, which only obliged the contracting parties to exercise territorial jurisdiction, "certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law" (para. 442 of the judgment). That formulation could be reflected in draft article 6, paragraph 3, by replacing "[w]ithout prejudice to applicable rules of international law" (*[s]ans prejudice des règles applicables du droit international*) with "in a manner compatible with international law" (*d'une manière compatible avec le droit international*). Draft article 6, paragraph 2, incorporated the principle of *aut dedere aut judicare*, the only condition being that the alleged offender must be present in territory under the State's jurisdiction or control; in his view, that corresponded to the concept of universal jurisdiction as currently understood by most authors. Perhaps a provision concerning the hierarchy among, or the coordination of, the types of jurisdiction provided for in draft article 6 could be added, or guidance on that point could be included in the commentary. Given that there was less risk of several courts declaring themselves competent at the same time than of none doing so, he proposed deleting the words "and the State considers it appropriate" from draft article 6, paragraph 1 (*c*). Although the Rome Statute of the International Criminal Court provided only for territorial jurisdiction and active personality jurisdiction, it was legitimate, at least in terms of progressive development, to require States to provide in their national legislation for passive personality jurisdiction, which in practice was often the best, if not the only, basis for establishing jurisdiction to prosecute international crimes.

6. It was difficult to come to any firm conclusions concerning draft article 7, since insufficient information was provided in the second report. The Special Rapporteur had relied primarily on the Convention against torture and other cruel, inhuman or degrading treatment or punishment and other human rights treaties, whereas it would have been more helpful to analyse the practice of the investigative bodies mandated by the Human Rights

[88] See *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.

[89] *Yearbook ... 1996*, vol. II (Part Two), pp. 18–22.

[90] *Ibid*., pp. 27–30.

[91] See Institute of International Law, *Yearbook*, vol. 76 (Session of Tallinn, 2015), pp. 263–265. The resolution is also available from the website of the Institute of International Law: www.idi-iil.org.

Council or the Security Council when mass crimes were committed. In particular, the reports issued in recent years on the international crimes committed in Libya and the Syrian Arab Republic described useful developments in investigation and evidence-gathering methods. Since the general obligation to investigate applied both to the obligation to punish a specific crime against humanity and to the obligation to prevent crimes against humanity more generally, a distinction should be made between the general obligation to investigate in draft article 7 and the more specific one in draft article 8. It should also be stipulated in article 7 that, in addition to carrying out an investigation, the States concerned should take the necessary measures to halt the crimes, thereby creating a link with draft article 4 on the obligation of prevention.[92]

7. He welcomed draft article 9, although he wondered why the Special Rapporteur had included paragraph 2, which was less clear than the Hague formula and seemed superfluous. The Special Rapporteur had wisely chosen not to go into detail about the rules that would govern extradition, although, in order to ensure respect for the rights of the extradited person, it might be useful to specify that the extradition or surrender of the alleged offender should be "in accordance with the applicable rules" [*dans le respect des règles applicables*], and provide an explanation in the commentary. The relationship between draft article 8, especially paragraph 2 thereof, and draft article 10, paragraph 2, should be clarified, since they were somewhat contradictory and greater protection was currently provided under draft article 10, paragraph 2, than under draft article 8, paragraph 2. It would be important to ensure that the two provisions were in line with existing bilateral and multilateral extradition conventions. In conclusion, he was in favour of referring all six draft articles to the Drafting Committee.

8. Mr. HMOUD said that an effective law enforcement instrument was needed to ensure universal criminalization, effective investigation and prosecution and active cooperation by States and other relevant actors in combating crimes against humanity. It was thus essential that the proposed rules, which were generally based on existing treaty law, customary law or case law, be balanced and take into account the capacity of States to implement any proposed obligations in a manner compatible with their legal systems. In general, he considered the approach adopted by the Special Rapporteur to be acceptable. Since the aim was to draft a convention, it was imperative to ensure that the draft articles were harmonized with other international legal instruments, especially in the fields of criminal justice and human rights. The obligations set out in the draft articles must be sufficiently clear and specific to avoid any misinterpretation and legal gaps in the protection regime, while allowing for a degree of flexibility. With regard to the relationship with customary international law, it was clear from the report under consideration that there was sufficient practice to warrant the inclusion of the proposed draft articles, and it could be argued that there was a customary basis underpinning several of them, particularly with regard to the establishment and exercise of national jurisdiction and the treatment of the alleged offender. While certain aspects of the proposed rules were still subject to debate, emerging norms supported their inclusion in any future instrument relating to crimes against humanity. The draft articles proposed in the second report focused on the criminal responsibility of perpetrators and the measures that States could adopt to punish and prevent such crimes, in accordance with the goals of the project, and were in line with the principle of legality and the common interest of the international community in combating crimes against humanity.

9. Turning to draft article 5, he said that criminalization under national law was among the core obligations of the project, as many States still did not have any form of legislation criminalizing crimes against humanity. The definition contained in draft article 3 should form the basis for criminalization under national law. At the same time, criminal responsibility should be established on the basis of the forms of commission or participation in the crime provided for in draft article 5, paragraph 1, as such forms were well established under the general principles of criminal law. It was important also to criminalize incitement, provided that the link between incitement and commission of the crime was established. It could be argued that there was an increasing trend in national legal systems to impose criminal responsibility on corporations and other legal persons. While the inclusion of that form of criminalization in the draft articles might contribute to the goal of deterrence, the logic of the International Military Tribunal at Nürnberg remained valid: "[c]rimes against international law are committed by [natural persons], not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[93] While criminal sanctions could be provided for under the draft articles, his preference would be for civil and administrative sanctions against corporations involved in the commission of crimes against humanity.

10. The case cited in paragraph 38 of the second report, in which a defendant had been found guilty because he had been a member of an organization that committed torture, was not an example of the kind of participation in the commission of a crime that should be covered by draft article 5, as the accused had to have taken part in the specific act that constituted the crime in order to be held criminally responsible. There were, of course, examples in national legal systems of cases where such a distinction had been made.

11. There was significant jurisprudence and literature on the issue of command responsibility, and the elements contained in draft article 5 reflected the current applicable standard, as set out in article 28 of the Rome Statute of the International Criminal Court. However, the courts of the parties to any future instrument would still have to interpret certain elements, such as the test for "objective knowledge" of the commander. In that respect, it would be useful to elaborate in the commentary on the meaning of various elements, taking into account the case law of international courts and tribunals.

[92] *Yearbook ... 2015*, vol. II (Part Two), pp. 47–52.

[93] "Judicial decisions: International Military Tribunal (Nuremberg), judgment and sentences", AJIL, vol. 41, No. 1 (1947), pp. 172–333, at p. 221.

12. He agreed with the Special Rapporteur that draft article 5, paragraph 3, should cover orders from Governments as well as from superiors. It should be made clear in the commentary that, while such orders might be seen as a mitigating factor, the punishment should be commensurate with the gravity of the crime. States would not object to the notion that crimes against humanity should not be subject to any statute of limitations. That provision would play an important preventive role and would also ensure harmonization among States that had specific legislation on the inapplicability of the statute of limitations and those that did not, thus preventing a situation where extradition to a State that had jurisdiction could be refused by the authorities of another State because the act was no longer considered a crime in the latter. Although the draft articles were silent on the issue of retroactivity, he wondered whether States could be given the option to apply the draft instrument retroactively, for example by making a declaration to that effect upon signature or ratification. The consequences of such a declaration would have to be spelled out, including whether other States would be obliged to extradite to the declaring State individuals present in their territories who were sought for crimes committed before the entry into force of the draft instrument.

13. With regard to the establishment of national jurisdiction, the draft articles should allow for the establishment of the broadest possible jurisdiction. That said, while draft article 6, paragraph 1 (*a*) and (*b*), provided for the non-controversial territorial and active personality jurisdictions as mandatory jurisdictions, he was not convinced that the formulation for passive personality jurisdiction in paragraph 1 (*c*) was the correct one, since it stated that it was mandatory to establish such a jurisdiction but then provided if "the State considers it appropriate", which meant that the establishment of such jurisdiction was in fact discretionary. It would be better to reformulate the phrase to indicate that "each State may establish jurisdiction if the victim is one of its nationals". The provision concerning the establishment of jurisdiction when the defendant was present in the territory of the State was a welcome inclusion. While the Special Rapporteur considered that it was not a form of universal jurisdiction, it served the same purpose as traditional universal jurisdiction in that it allowed a State with no connection whatsoever to the crime to exercise jurisdiction, while avoiding the complications that would arise if the draft instrument provided for universal jurisdiction in the strict sense, which did not require the presence of the alleged offender in the State's territory. Although some were of the view that the draft articles should include universal jurisdiction *stricto sensu*, there did not seem to be either a customary basis for that proposition in relation to crimes against humanity or sufficient treaty practice. If the draft articles were to be adopted as a convention, States might decide to include traditional universal jurisdiction at a later stage.

14. He noted that draft article 6, paragraph 3, deviated from the formulation in article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. While he understood the point made by the Special Rapporteur in paragraph 119 of his second report, the draft article should not limit a State's ability to establish its jurisdiction, as long as that did not interfere with the application or operation of the draft articles. He was therefore not in favour of the phrase "[w]ithout prejudice to applicable rules of international law".

15. He agreed with the text of draft article 7 and the fact that under paragraph 3 thereof all States, not only those that had jurisdiction, had an obligation to cooperate in identifying persons who might have committed a crime against humanity; however, that obligation should not be limited to identifying the perpetrators but should extend to all circumstances relating to the commission of the crime. Furthermore, the obligation set out in draft article 7, paragraph 2, for a State to communicate the general findings of its investigation to the other States whose nationals might be involved in the crime was perhaps limiting; the obligation should be towards all States where elements of the crime might have been committed, and those States ought in turn to promptly and impartially investigate the matter themselves.

16. He supported the thrust of draft article 8, noting that its obligations did not place an undue burden on the relevant State. However, it would be advisable to add language in paragraph 3 to the effect that other States having jurisdiction over the crime should be notified of the general findings of the preliminary investigation within a reasonable period of time after its conclusion.

17. Concerning the obligation to extradite or prosecute (*aut dedere aut judicare*), addressed in draft article 9, the Hague formula seemed the most appropriate approach and better served the goal of fighting impunity, as it was not contingent on another State or tribunal requesting extradition or surrender. The question of whether the act of sending an alleged offender to a hybrid court should be considered as extradition to another State or as surrender to an international court or tribunal would be determined by the instrument establishing the hybrid court. Thus, if it was clear from that instrument that the nature of the court was essentially national, the act of sending the accused would be considered as extradition, whereas if the prevailing character of the court was international, it would be considered as surrender. Though that question should be determined on a case-by-case basis, the Commission might wish to include in the commentaries some guidance on the elements that determined the character of the court. The inclusion of the "triple alternative" form of *aut dedere aut judicare* in the draft articles would necessitate careful drafting of relevant provisions on the relationship with other international courts and tribunals, especially the International Criminal Court.

18. With regard to draft article 10, he was of the view that it should be left to each State in accordance with its national legal system to determine whether to try an individual in military or special courts. The test should be the nature of the process, in other words whether all stages of the trial were fair, rather than the nature of the court *per se*. Given that many States still mandated their special or military courts to try the most serious crimes, any outright exclusion of the competence of such courts might be restrictive. Extra guarantees could perhaps be provided by mandating a treaty monitoring body to supervise the fair trial obligation. In conclusion, he supported referring the draft articles to the Drafting Committee.

19. Mr. KITTICHAISAREE, referring to the phrase "otherwise assisting in or contributing to the commission … of such a crime" in draft article 5, paragraph 1, said that, although several legal systems provided for the concept of joint criminal enterprise, they might not go so far as to endorse the third, extended, form of joint criminal enterprise, which was the most controversial. He wondered whether the Commission should take a position on that matter. The Special Rapporteur could perhaps elaborate on the case law of *ad hoc* international criminal tribunals and the fact that there was corresponding practice in national law. Whether parties to the draft convention on crimes against humanity would accept the concept of joint criminal enterprise in their national law would depend on their national practice; however, the Commission would have to warn them that, if the third, extended, form were accepted, they would have to respect the rule of legality.

The meeting rose at 10.55 a.m.

3298th MEETING

Friday, 13 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)

[Agenda item 9]

Second report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the second report on crimes against humanity (A/CN.4/690).

2. Mr. HASSOUNA thanked the Special Rapporteur for his second report on crimes against humanity. It was a clear, well-structured and well-researched document that would enable the Commission to proceed with its work on the basis of the proposals made therein. While it was somewhat long, it contained detailed analyses that would assist States in deciding whether to adopt a new convention based on the proposed draft articles and then to ratify and incorporate its provisions into their national legislation. He also wished to commend the Special Rapporteur for his efforts to explain the project to States, organizations and institutions. In particular, during the International Law Seminar organized by the United Nations for Arab States and held in November 2015 in Cairo, the Special Rapporteur had discussed the topic of crimes against humanity with representatives of Arab States and with the Secretary-General of the League of Arab States. Such direct contacts were very useful, since they offered an opportunity to convince Governments of the importance and relevance of a convention on crimes against humanity, so as to ensure its wide acceptance and implementation.

3. During the debate in the Sixth Committee in 2015, many States had indicated that they supported the drafting of articles for the purpose of adopting a new convention on crimes against humanity. Other States had referred to the initiative of developing a new convention on legal assistance and extradition, relating not only to crimes against humanity but also to the most serious international crimes. The Special Rapporteur could perhaps explain to the Commission the background to that initiative and how it would relate to the current draft articles, in order to avoid overlapping and achieve complementarity between the two texts.

4. As part of his general comments, he noted that the new draft articles proposed by the Special Rapporteur underlined some of the main goals of the new convention, such as introducing an obligation of States to prohibit crimes against humanity in their domestic legislation, enhancing inter-State cooperation, ensuring that all suspects, regardless of their rank or status, had to answer for their acts before the law and clarifying the content of the obligation to extradite or prosecute. Most of the provisions did not constitute codification: the Special Rapporteur had analysed existing international instruments on matters other than crimes against humanity in developing them, but the specific nature of the crimes and the special contexts in which those instruments had been adopted should be borne in mind, and the proposed draft articles should be clear and in harmony with the provisions in those instruments.

5. Concerning draft article 5, he said that the Special Rapporteur had indicated in paragraph 55 of his second report that all jurisdictions that addressed crimes against humanity permitted grounds for excluding criminal responsibility – for instance, mental illness. The draft article should therefore stipulate that States had the discretion to allow mitigating factors to be taken into consideration in prosecuting crimes against humanity. The term "appropriate penalties" in draft article 5, paragraph 3 (*c*), could be explained in the commentary by indicating the nature of the penalties that could be considered proportional to the gravity of the crimes; that would help in harmonizing the penalties and preventing a State with weak legislation from becoming a safe haven for perpetrators of crimes against humanity. It should also be explained whether the principle of non-retroactivity applied in such cases, and whether the penalties could be applied to crimes against humanity that predated the entry into force of the relevant national legislation and that had continued to be perpetrated after that date.

6. Draft article 6 referred to different types of jurisdiction but created no hierarchy in cases when several States were able to establish jurisdiction. It should therefore establish priorities in order to resolve competing requests

for extradition: that would help to promote cooperation among States and expedite the prosecution of crimes against humanity. He wished to refer to a recent case about jurisdiction over crimes against humanity, namely the trial that had opened in France on 10 May 2016 for crimes against humanity committed in Rwanda in 1994. The two accused offenders, formerly local mayors in Rwanda, had been present in French territory at the time the judicial investigation was opened. The case thus involved jurisdiction based on the alleged offender's presence in the State's territory.

7. Draft article 7 referred to the obligation to carry out an investigation "whenever there is reason to believe" that a crime against humanity had been committed, which raised the question of who was to make that determination and whether it was a subjective or objective determination. It might also be necessary to carry out an investigation, if a State claimed that there was no "reason to believe" that an investigation was warranted for a crime that had been committed.

8. Regarding draft article 8, he said that it should be made clear that the investigation mentioned in paragraph 1 of that text was different from the investigation referred to in draft article 7, paragraph 1. He therefore proposed that different terminology should be used in order to avoid any danger of confusion. Draft article 8, paragraph 3, should include a reference to the need for the State to notify the other States of the findings of the investigation "without delay" or "within a reasonable period of time".

9. With respect to draft article 9, which referred to the obligation to extradite or prosecute (*aut dedere aut judicare*), he noted that paragraph 161 of the second report cited the judgment of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite*, in which the Court had pointed out that various factors, such as financial or implementation difficulties, could not be used by a State to justify a failure to comply with its international obligations. What, however, would be the factors that did justify such a failure, and should that be a matter governed by national law? It could also be mentioned that such extradition should be carried out in accordance with the relevant conventions on extradition.

10. Concerning the fair treatment of the alleged perpetrator of crimes against humanity and the protection of his or her rights, the Special Rapporteur stated, in paragraph 192 of his second report, that a "fair trial" was increasingly being seen to mean, in principle, that persons alleged to have committed crimes against humanity should not be tried in military court. He agreed with the suggestion that such matters should be left to the legislation of each State to resolve, as long as there were full guarantees of a transparent and fair process. He also pointed out that draft article 10 was significantly more limited than the Vienna Convention on Consular Relations. By way of example, he cited the 2004 judgment of the International Court of Justice in the *Avena* case, in which the Court had found that the United States had breached several of its obligations under the Vienna Convention on Consular Relations by arresting, detaining, trying, convicting and sentencing 54 Mexican nationals to death without allowing Mexico to exercise the rights accorded to it in article 36 of that instrument. The Court had said that the United States had breached its obligation to inform the Mexican nationals of their rights and its obligation to notify the Mexican consular authorities of the detention, thereby depriving Mexico of the right to communicate with its nationals, to visit them in prison and to arrange for legal representation. Since all those rights should be afforded to alleged perpetrators of crimes against humanity, he proposed that they be mentioned in draft article 10.

11. Lastly, with regard to the future programme of work detailed in chapter VII of the report under consideration, he took note of the issues that the Special Rapporteur considered should be the subject of future reports and proposed the addition of the following: State responsibility; *jus cogens*; immunities and amnesties; the liability of legal persons (which was only partly covered in the second report); reservations; the enforcement of the mandatory rules of the convention; and rules of interpretation. All of those issues should be examined on the basis of their relevance and importance to the subject of crimes against humanity. In that context, it would also be useful to address the relationship between a convention on crimes against humanity and the concept of responsibility to protect, as well as the relationship between the convention and other instruments, resolutions of the Security Council and judicial decisions covering terrorism. In conclusion, he recommended that all the draft articles proposed by the Special Rapporteur be referred to the Drafting Committee.

12. Mr. NIEHAUS commended the Special Rapporteur on his excellent second report, the outcome of meticulous, in-depth research on a particularly important topic. He likewise commended the Secretariat for its memorandum on treaty-based monitoring mechanisms (A/CN.4/698), a valuable contribution to the work of the Commission.

13. As a general remark, he said that, like the Special Rapporteur, he considered it crucial for crimes against humanity to be punishable under domestic law – it would greatly facilitate compliance with the relevant rules, even though on that point there were no ironclad guarantees. Ancient and recent history was replete with evidence of bias among States and the international community with regard to persons who committed crimes against humanity during armed conflicts, depending on whether they were on the side of the victors or the losers. It went without saying that thanks to the development of international law and its institutionalization, anyone who wished to accuse a person of crimes against humanity could go to an international body or a competent regional or international institution like those listed in paragraph 11 of the Secretariat memorandum, irrespective of the person's State of nationality. Nevertheless, mention should be made in draft article 5 of the risk that persons who committed crimes against humanity during armed conflict might not be accused and brought to justice if they belonged to the side of the victors. Moreover, the criminal responsibility of corporate entities must be taken into account, despite the objections of some, since behind such entities stood individuals who would otherwise go unpunished.

14. Draft article 5, which he thought was too long, addressed two interrelated but distinct matters: first, the

definition of the offences *per se*, and second, the listing of the various measures to be taken in respect of them. It would be preferable to split the draft article into two, with paragraphs 1 and 2 becoming draft article 5 and paragraph 3, which dealt with the measures that States must take, to become draft article 5 *bis*.

15. Regarding draft article 6, he proposed that the phrase "or on board a ship or aircraft registered in that State" be deleted, since it might be seen as excluding other physical spaces, such as the territorial sea; instead, the words "or space" should simply be inserted after "in any territory". Draft article 6, paragraph 1 (*a*), would thus read: "the offence is committed in any territory or space under its jurisdiction or control".

16. Concerning draft article 7, he agreed that the obligation to cooperate could be extended to all States affected in any way by any aspect of the offence, as Mr. Hmoud had suggested. As to draft article 8, he agreed with Mr. Murase that a preliminary investigation based on rumours of human rights violations might become problematic if the person under investigation proved to be innocent. Everything depended on the extent to which the information received was reliable and on the way in which the State reacted to such information. The matter needed further consideration, taking into account the possibility that an accusation might be groundless and the importance of respect for the human rights of the person concerned.

17. He had no specific comments on draft article 9, which dealt with the principle of *aut dedere aut judicare*. Lastly, with regard to draft article 10, he said that while the principles set out therein were perfectly valid and logical, since they corresponded to the fundamental principles on which all civilized criminal justice systems were based, there was no need for them to be included in a separate draft article, and draft article 9 could be deleted.

18. Mr. SABOIA, noting that chapter I of the second report emphasized the importance of criminalization at the national level and of harmonization among national legislations, said that he fully agreed with that goal, since proceedings undertaken in national courts were often more efficient and less costly than those in international courts. However, that required the procedures to be in accordance with international norms, the rule of law to prevail and the judicial system to be independent and capable of conducting a fair trial, with respect for the international norms and principles regarding the prosecution of grave crimes of international concern. When those conditions were present, national courts might well be a preferable option. The last footnote to paragraph 15 seemed in fact to suggest that national courts had greater legitimacy than international ones. However, the legitimacy of a national court, or even of an international court, was a rather subjective factor that was difficult to assess: it depended mostly on respect for national and international norms concerning the independence and impartiality of the judiciary and its capacity to hold fair trials, particularly in cases of crimes against humanity.

19. The study on crimes against humanity cited in paragraph 18 of the second report pointed to the fact that 34 per cent of States parties to the Rome Statute of the International Criminal Court had not adopted national laws relating to crimes against humanity, and that was regrettable. Nevertheless, the conclusion reached by the Special Rapporteur that such States did not consider themselves to be bound by the rules of customary international law concerning international crimes was not necessarily correct. In Brazil, for instance, a bill providing for the incorporation of the relevant definitions was still pending approval by Congress, but that had not prevented judges from accepting and referring to the rules of customary international law on international crimes.

20. Turning to the draft articles, he said that draft article 5, according to which States were under an obligation to qualify as offences the acts defined in draft article 3 as crimes against humanity,[94] was a central provision. While he had no particular objections to draft article 5, paragraph 2, which set out the various acts or omissions that formed the basis for responsibility, he did think, as other members of the Commission had suggested, that paragraph 3 (*a*) should explicitly mention orders emanating from Government authorities, as was the case in the Rome Statute of the International Criminal Court and other instruments. Lastly, the non-applicability of a statute of limitations with regard to crimes against humanity was rightly mentioned in paragraph 3 (*b*).

21. As to draft article 6, he considered the criteria for establishing national jurisdiction to be broad enough to provide a basis for prosecution of alleged perpetrators of crimes against humanity. He had no comments on draft articles 7 and 8, both being based on treaty law and both having been convincingly defended by the Special Rapporteur. As to draft article 9, it should be entitled "Obligation to extradite or prosecute," as Mr. Kittichaisaree had rightly pointed out. Lastly, the wording of draft article 10, paragraph 2, should be more closely aligned with that of article 36 of the Vienna Convention on Consular Relations through the use of the terms "prison, custody or detention". It should also include a provision regarding assistance by consular agents to a foreign national in establishing legal representation. In conclusion, he recommended that all of the draft articles be submitted to the Drafting Committee.

22. Ms. ESCOBAR HERNÁNDEZ thanked the Special Rapporteur for his excellent second report, well researched and well balanced, as well as for his illuminating introductory statement. She agreed with Mr. Forteau that the report raised a range of difficulties, due to its vast scope and the numerous issues it canvassed. Above all, it was the Special Rapporteur's desire to formulate draft articles on each of those issues that caused problems. Although his wish to advance rapidly in the work was entirely laudable, the consequences of such rapidity for the final result of the work needed to be kept in mind. It was not always possible to give in-depth analysis to each of the issues, especially as they were multifaceted in themselves, and it was an open question whether the Commission and the Drafting Committee would have sufficient time to debate the topic in detail. In any event, the complexity of the issues raised by the second report on crimes against humanity called for the most painstaking

[94] *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.

analysis possible; she was certain that such an analysis would be undertaken by the Commission, both at the current session and in future, and that such an in-depth study of the issues relating to crimes against humanity would yield a solid result that was useful to States in an area that was linked first and foremost to the protection of the values and principles underpinning contemporary international society, including the fight against impunity for the perpetrators of the most grave international crimes.

23. Turning to the draft articles themselves, she drew attention to the disparity between the Spanish text of the title of draft article 5, *Tipificación en el derecho nacional*, and the content of the draft article. The provision was not just about *tipificación*, which according to the dictionary of the Royal Spanish Academy (*Diccionario de la lengua española de la Real Academia Española*) meant to define a specific act or omission and to set a penalty or punishment for it. Instead, the Special Rapporteur had incorporated a general obligation of States to take legislative measures, of which there were four aspects: to ensure that crimes against humanity were offences under national law; to adopt rules on the various types of individual responsibility (all aspects of commission or participation and the particular cases of responsibility on the part of the military commander and of the hierarchical superior) and on grounds for excluding responsibility ("due obedience"); to ensure the non-applicability of a statute of limitations; and to envisage consequences of individual responsibility (the obligation to apply penalties proportionate to the grave nature of the acts).

24. All of those aspects, which went well beyond the notion of criminalization, were generally dealt with separately in international treaties. Certainly that was the case in the Rome Statute of the International Criminal Court, where they were addressed from three different angles covered in separate provisions relating to: the jurisdiction of the Court; individual criminal responsibility; and the general principles of criminal law that were applicable. The Special Rapporteur had opted for a different approach, combining into a single draft article all the aspects of the obligation incumbent upon States of criminalization, except for aspects relating to the adoption of the requisite legislative measures for the establishment of national jurisdiction and to the obligation to extradite or prosecute. There was nothing wrong with that approach, but it could lead to errors and above all it was debatable from a technical point of view. The Commission should consider breaking the long draft article into several provisions, by analogy with the Rome Statute of the International Criminal Court. If it decided not to change the wording or structure of the draft article, then it should at least change the title in Spanish to make it reflect the content, by replacing the term *tipificación* with *incriminación*, the latter term being frequently used in general international law to designate the whole set of legislative measures on the basis of which a given (criminal) act could give rise to the exercise by the State of its jurisdiction for the purpose of determining the criminal responsibility attributable to the perpetrator of the offence.

25. As to the content of draft article 5, she was not wholly convinced by the distinction drawn in paragraph 2 (*a*) and (*b*) between the responsibility of a military commander and that of a superior. Whether the distinction could be applied to crimes against humanity, the military component of which was fortunately no longer required, was especially debatable. If the Special Rapporteur's intention was to use that distinction to set up entirely separate legal regimes and distinct forms of responsibility for military commanders and their hierarchical or civilian superiors, she would be opposed to such an approach. It would undoubtedly be preferable to simply refer to a "superior, whether civilian or military", and to combine the provisions in paragraph 2 (*a*) and (*b*) into a single provision.

26. Draft article 5, paragraph 3, should contain an express reference to an "order of a Government", the phrase used in the 1996 draft code of crimes against the peace and security of mankind[95] that had subsequently been taken up in the Rome Statute of the International Criminal Court. The inclusion of that phrase was essential in order to close the loophole in enforceability created by the wrongly named exception of "due obedience" and, more importantly, it would be in line with the Statute, which excluded such a cause for exoneration of responsibility in connection with the manifestly unlawful crimes against humanity. Lastly, she pointed out that draft article 5 did not cover the full range of aspects of individual responsibility that States must take into account when fulfilling the obligation to criminalize. As Mr. Park had indicated, draft article 5 did not prohibit immunity for crimes against humanity. The decision not to make such a pronouncement might be seen as prudent at the present stage of the work, since the Commission had not yet examined the issue of exceptions to the immunity of State officials to foreign criminal jurisdiction and would do so only later in the current session. The fact remained that immunity was a very important matter that must not be skirted, and if draft article 5 was adopted at the current session, that would not, as she saw it, prevent the Commission from reverting to the matter later.

27. As to draft article 6, which set out the general obligation incumbent on a State to take the necessary measures to establish its jurisdiction over crimes against humanity, she noted that the Special Rapporteur had followed the model of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. The draft article established three clearly delineated categories of jurisdiction: compulsory jurisdiction based on the link of territoriality and the nationality of the offender; optional jurisdiction based on certain specific criteria (passive personality, victim); and optional jurisdiction based on undefined criteria ("the establishment of other criminal jurisdiction by the State in accordance with its national law"). Although she supported the general thrust of the draft article, she wished to point out that it entailed a jurisdictional policy decision that was not entirely in line with the Commission's previous work. The 1996 draft code of crimes against the peace and security of mankind called for the establishment of universal jurisdiction over crimes against humanity, in order to prevent the perpetrators of such crimes from evading responsibility and enjoying impunity simply because no State had been able to or wished to establish its jurisdiction. It was true that universal jurisdiction was always the highest level of jurisdiction

[95] *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

and, as such, must have different rules compared to other systems in which jurisdiction was attributed based on territoriality or the nationality of the perpetrator or of the victim. Nevertheless, she could not go along with what the Special Rapporteur said on that subject, especially in paragraph 119 of his second report, where he seemed to argue that although the establishment of universal jurisdiction must take place in conformity with international law, that did not mean that draft article 6, paragraph 3, was "authorizing" that form of "national" jurisdiction. However, unless she was mistaken, that argument was a contradiction in terms: a provision could not say one thing and its opposite simultaneously. The Drafting Committee should therefore look into the advisability of retaining the phrase "in accordance with its national law", and the Special Rapporteur should make sure to provide an explanation in the commentary that did not seem to go against logic.

28. Lastly, she had a number of comments to make about the relationship between draft article 6 and draft articles 7, 8 and 9. True, the Special Rapporteur had opted for a model of jurisdiction based on the link of territoriality and the nationality of the perpetrator or the victim, but the model was not at all clear. For example – and she would return to that point – the way in which the notion of the "custodial State" was introduced raised questions about its legal status and whether or not it constituted a jurisdictional link.

29. Draft articles 7, 8 and 9, which were closely interrelated, could all be commented on together. The texts were the foundation for the exercise of jurisdiction according to the model sketched out in the second report. Specifically, the first two draft articles defined successive stages in the exercise of jurisdiction. Draft article 7 provided for an initial investigation that enabled the identity of each suspect to be established and criminal jurisdiction exercised. There, the Special Rapporteur appeared to be following the model of the Rome Statute of the International Criminal Court, according to which jurisdiction was exercised in two separate stages: the investigation of a situation in which a crime might have been committed, followed by the institution of individual criminal proceedings against the perpetrator of such a crime. It was noteworthy that, although the two stages were separated by the filing of charges by the Prosecutor, that in no way contradicted the unity of the exercise of jurisdiction, since both stages took place before a single institution, the International Criminal Court. However, that model was difficult to apply when a number of courts might have jurisdiction, because the State carrying out the initial investigation mentioned in draft article 7 was not necessarily the one carrying out the preliminary investigation and prosecuting the perpetrators under draft articles 8 and 9.

30. Although such a variety of overlapping jurisdictions was not unusual in international practice, the fact that it existed and the problems that it generated were not handled properly in draft articles 7 and 8 – in general, more substance and appropriate clarification of the procedure were required. For example, a hierarchy had to be established among the overlapping jurisdictions, something that was not immediately visible upon reading the draft articles. Draft article 9 supplemented the two previous draft articles and dealt with modalities for applying the principle of *aut dedere aut judicare*.

31. Commenting in detail on each of the draft articles, she said that, as worded in Spanish, draft article 7, paragraph 1, imposed on a State in whose territory there was reason to believe a crime against humanity had been or was being committed no obligation whatsoever to carry out an investigation: the expression *velará* was obviously devoid of any binding quality. That was a point that needed to be further considered, because an investigation had to occur before jurisdiction could be exercised, either by the territorial State or by any other State of jurisdiction. It might be possible to replace *velará* with *se asegurará* in Spanish, but she would actually prefer to see a clear statement that States were under an obligation to take the necessary measures, legislative or other, to ensure that an investigation was carried out. There was some doubt as to whether the obligation set out in draft article 7, paragraph 2, namely to communicate to any other State the findings of the investigation, had any basis whatsoever in international law: certainly, the analysis produced by the Special Rapporteur in chapter III of his second report did not permit such a conclusion. Moreover, imposing the obligation to communicate the findings of the investigation solely upon the State of nationality of the alleged perpetrator of a crime against humanity seemed at variance with draft article 6, as well as with draft article 8, paragraph 3. It was legitimate for the State that received the findings to be obligated to investigate the matter, as stipulated in draft article 7, paragraph 2, but that was hard to reconcile with the structure set up by draft articles 6, 7, 8 and 9. Lastly, although the obligation to cooperate to establish the identity and location of alleged perpetrators of an offence was absolutely essential to the effective suppression of crimes against humanity, the relevant provision, being written in very general terms, was not conducive to such an end. The scope of the obligation to cooperate should be much more clearly delineated, and the activities to be carried out in fulfilling that obligation needed to be better defined in terms of whether the obligation could be fulfilled by "all States", independently of their other obligation to take the necessary internal measures to establish their jurisdiction over crimes against humanity.

32. Draft articles 8 and 9 had one thing in common: they were applicable only when a suspect was present in the territory of a State. If that was the case, then the State was required to perform certain acts involving the exercise of jurisdiction – carry out a preliminary investigation to establish the relevant facts, locate the person and take him or her into custody, as draft article 8 indicated, or decide to prosecute the person, extradite him or her to another State that wished to exercise its jurisdiction or surrender the person to an international tribunal, as stated in draft article 9. Without going into a more extensive textual analysis, she wished simply to point out that both imposed on the "State of detention" precise obligations that entailed acts of jurisdiction. Since that State was not necessarily the one in which the offences were committed or the State of nationality of the perpetrators, the draft articles could have the surprising effect of imposing upon a State the obligation to perform certain acts that did not fall within its competence – unless the custodial State had a jurisdictional link that took priority over that of all the other States listed in draft article 6, paragraph 1. However, that interpretation was hard to reconcile with the model apparently espoused by the Special Rapporteur in his

second report. It would be useful to look into the matter further, in order to avoid potential gaps and ambiguities that might make it impossible to prosecute the perpetrator of a crime against humanity. Moreover, the same problem arose with the surrender of a person to an international criminal tribunal. In addition, the various modalities for attributing competence to such tribunals or recognizing their competence should be given closer scrutiny.

33. Thus, although the second report addressed various ways in which States could establish their jurisdiction over crimes against humanity, there was no rule governing the interrelations among States: the Special Rapporteur simply set out obligations to communicate and to cooperate, described in very abstract terms. The Special Rapporteur and the Commission must therefore look more closely at the two draft articles in order to determine the order of priority among the overlapping jurisdictions and ensure that the system set up by draft articles 6, 7, 8 and 9 did not leave any gaps that might open the way to impunity.

34. Draft article 10 corresponded to the absolute necessity of guaranteeing the fundamental rights of persons who were being investigated or prosecuted in connection with a crime against humanity. It was thus perfectly justified, because any criminal responsibility that might arise from such a crime must be established in the context of respect for the rules on a fair trial and the procedural guarantees set out in international human rights law, at both the international and regional levels. However, there were a number of problems with its wording and structure. First, one might wonder why the Special Rapporteur combined in a single text all the provisions guaranteeing human rights. To deal simultaneously with, on the one hand, the right to a fair and impartial trial, procedural guarantees and the right to a defence, as did paragraph 1, and on the other hand, with the very specific regime of the right to consular assistance, as did paragraph 2, was perhaps not the best solution. Although those legal institutions had the same objective of protection, there were major differences between them, in terms both of the substance of the protection and of the nature of the rights. It should not be lost from sight that while the rights and guarantees set out in paragraph 1 were autonomous substantive rights applicable in relations between the State and the individual, the right to consular assistance was an instrumental right relating more to recognition that all States were entitled to offer protection and assistance to their nationals abroad, and applicable in a triangular relationship – as the International Court of Justice had demonstrated in the *LaGrand* and *Avena* cases. In addition, the international systems for the protection of human rights and the rules regarding consular assistance occupied very different places in contemporary international law. Consequently, for substantive reasons, the two systems must be dealt with in two separate texts, and the essential nature of consular assistance with regard to the protection of the rights of the individual must be highlighted.

35. Draft article 10, paragraph 1, should be amended for two separate but complementary reasons: first, to align the terminology used to refer to the person who was being investigated or prosecuted with the terms commonly employed in international human rights instruments, for example, by listing the rights involved; and second, to make more specific reference to the applicable international law that must be used to frame the rights recognized, something that did not emerge from the phrase "under applicable national and international law", which failed to indicate that internal rules must always conform to international law, and particularly to international human rights law. Moreover, draft article 10, paragraph 2, should be written in prescriptive terms, emphasizing rights, rather than simply stating that the person being investigated or prosecuted "shall be permitted to communicate … with the nearest appropriate representative of the State or States of which such person is a national" or to be visited by such a representative. More clarity should be provided in order to dispel any ambiguity in the current wording of the paragraph. The protection regime set up must also be altered to reflect all the elements set out in the applicable rules of international law, particularly the right to receive legal assistance. The Drafting Committee could draw for that purpose on article 36, paragraph 1 (*c*), of the Vienna Convention on Consular Relations.

36. She wished also to alert members of the Commission to a common feature of the two paragraphs, namely that they both granted rights and protection to the perpetrator without simultaneously envisaging any obligations for the State in whose territory or control the person was being investigated or prosecuted. That was all the more striking in that the texts proposed by the Special Rapporteur generally placed obligations upon States, as was clear from draft articles 4,[96] 5, 6, 8 and 9. The same held true for draft article 10, which should clearly set out the obligation of the State to take the necessary measures in internal law, legislative or otherwise, to guarantee respect for the rights envisaged.

37. Lastly, she wished to comment briefly on the controversial subject of military courts, which the Special Rapporteur discussed in paragraphs 188 to 192 of the second report. She agreed in general with his approach of saying that recourse to such courts was not in itself a violation of the right to a fair trial, as long as it was strictly limited to cases when the accused person was a member of the military and was accused of crimes committed in the context of armed conflict.

38. Military courts should not be seen as "special" courts in the pejorative sense of the term. In general, the extent to which they were conducive to a fair trial depended on three factors: their composition; their independent and impartial functioning; and the susceptibility of their decisions to appeal before a civilian judicial institution. When those three criteria were met, and as long as civilians were not subject to their jurisdiction, military courts were true judicial bodies and there was no reason why they could not exercise jurisdiction over crimes against humanity without it being a violation of the right to a fair trial. In conclusion, she supported the referral of the draft articles to the Drafting Committee.

39. Mr. KOLODKIN congratulated the Special Rapporteur on his second report and its very rich content. He also welcomed the memorandum by the Secretariat on treaty-based monitoring mechanisms. In general terms, although

[96] *Yearbook … 2015*, vol. II (Part Two), pp. 47–52.

he had some reservations on the wording of the draft articles proposed by the Special Rapporteur, he endorsed nearly all the positions of principle on which they were based. In particular, he agreed with the idea in draft article 5, paragraph 1, that States had the obligation to take the necessary measures to criminalize crimes against humanity, although he was not convinced of the need to describe the offences in detail. Recalling that, as he had stated at the sixty-seventh session, the main point was to harmonize the definition of crimes against humanity in national law with the one set out in the relevant instruments of international law, he proposed that draft article 5 be amended to specify that States had the obligation to make the acts listed in draft article 3[97] criminal offences.

40. He agreed with the idea of including in draft article 5 a provision establishing criminal responsibility for military commanders or persons acting in that capacity when the forces under their command committed crimes against humanity, and of a provision on the non-applicability of a statute of limitations to crimes against humanity. Indeed, it would be surprising if, nearly half a century after the adoption of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, that principle was not set out in the text.

41. Similarly, it would be appropriate for the draft articles to include a provision placing States under an obligation to ensure that crimes against humanity were punishable by penalties that took into account their grave nature. In that connection, he shared the Special Rapporteur's view that there was no need to impose upon States an obligation to establish the criminal responsibility of legal persons in respect of crimes against humanity. In view of the diversity of legal systems, it was preferable to leave it to States to regulate the matter themselves.

42. He endorsed the grounds for establishing national jurisdiction set out in draft article 6, and the Special Rapporteur's innovative proposal in draft article 7, paragraphs 2 and 3, concerning the obligation of States to cooperate in an investigation. He likewise endorsed the grounds for the exercise by the State of its national jurisdiction specified in draft article 8, and draft article 9 on the obligation to extradite or prosecute, although he thought the provisions of the latter text should be based on the Hague formula. Lastly, he supported draft article 10 on fair treatment of the perpetrator of crimes against humanity and was in favour of referring the entire set of new draft articles proposed by the Special Rapporteur to the Drafting Committee.

43. Nevertheless, he wished to make a number of remarks on methodology. Although the second report contained abundant examples of the provisions of international instruments, it was sometimes difficult to see why the Special Rapporteur had chosen a given formulation to include in the new draft articles. In the chapters referring to each draft article, he cited various provisions in the international instruments in force to show how diverse the existing wording was, but he then made a proposal without explaining his choice. For example, the English text of draft article 10, paragraph 2 (*a*), stated that any person taken into custody "shall be … permitted to communicate" – in other words, was authorized to communicate with or be visited by a representative of a State of which the person was a national. However, the many international instruments cited in paragraph 199 of the second report proclaimed the right of the perpetrator of an offence to communicate with or be visited by a representative of a State of which he or she was a national. That divergence in wording was far from the only one in the draft articles and it would be useful for the Drafting Committee if the Special Rapporteur could explain his choices.

44. According to paragraphs 95 to 100 of the second report, the main link enabling the criminal jurisdiction of a State to be established was the fact that the offence was committed in the territory of the State in question. Such territorial jurisdiction could also be extended to offences committed on board a vessel or aircraft registered to the State. However, the corresponding provisions in draft article 6, contained in paragraph 1 (*a*), referred to any territory under the jurisdiction or control of the State. Without wishing to enter into a debate on whether a wider notion than that of the territory of a State should be used in the text, he wished nevertheless to emphasize that in the explanatory paragraphs of the chapter relating to draft article 6, paragraph 1 (*a*), the Special Rapporteur did not address the question of whether the fact that an act was committed in a territory under the jurisdiction or control of a State could be invoked to establish the jurisdiction of that State. The same remark applied to paragraphs 109 to 116 of the second report and to draft article 6, paragraph 2. Certainly, one might argue that draft article 4, already adopted by the Commission, indicated that each State undertook to prevent crimes against humanity by taking measures "in any territory under its jurisdiction or control",[98] but prevention and the establishment of jurisdiction were two separate things. It would therefore be useful for the Special Rapporteur to explain why the reference to "jurisdiction or control" was used in draft article 6.

45. With regard to draft article 7, he said that cooperation among States in the struggle against crimes against humanity was an important matter that should be the subject of a separate article rather than of two paragraphs in an article on general investigation; otherwise, it would be preferable to insert the two paragraphs into draft article 8, which dealt with mutual legal assistance. Furthermore, the notion of general investigation did not exist in all legal systems, and that might complicate the ratification of a future convention for certain States, not to mention the fact that draft article 7, paragraph 1, dealt with a matter that in fact entailed the exercise of national jurisdiction. For all those reasons, he proposed that draft articles 7 and 8 be merged, with the necessary modifications, into a single text on the exercise of national jurisdiction. Lastly, he said that he was prepared to participate in the work of the Drafting Committee on the draft articles.

46. Mr. McRAE said that, like Mr. Forteau, he was not sure that a *magnum opus* like the Special Rapporteur's second report was the most effective way of moving the Commission's work forward, although it obviously made a major contribution to the study of the subject.

[97] *Ibid.*, pp. 37–47.

[98] *Ibid.*, p. 34.

47. With regard to the Commission's working methods, Mr. Murase had said that the Commission seemed to be departing from its usual methods by developing draft articles on the basis of what was perceived to be a desirable outcome – namely, a convention – after looking at various treaties and national laws. In fact, the report under consideration was an excellent compendium of comparative national law provisions, as Mr. Forteau had pointed out. That the Commission was not following its traditional approach had been made clear when the Special Rapporteur had referred to draft article 7, paragraph 2, in the presentation of his second report as a "useful innovation". It did not suffice to say that the process was different because the Commission was setting out to draft a convention, however. Other draft articles, for example, those on the protection of persons in the event of disasters,[99] on aquifers[100] and on the responsibility of international organizations,[101] had been prepared with a view to the adoption of a convention, but that had not prevented the Commission from going through the process of identifying the law on the subject, crafting rules that reflected that law and proposing appropriate extensions of it. It was not a process of selecting provisions because they were found in other conventions or simply because they seemed appropriate. In fact, at the sixty-seventh session there had been a debate over whether the term "common concern of mankind" could be used, and the conclusion had been that it could not, because it was not generally accepted by States and was contained in no treaties. Should that test not be applied to the use of terms in the draft articles now under consideration?

48. Some members had been analysing the draft articles in terms of whether they reflected existing international law – in other words, they had been using the Commission's normal methodological approach. The Special Rapporteur himself seemed somewhat ambivalent about it, since he rejected the inclusion of legal persons within the scope of the draft articles because of a lack of agreement among States on the criminal liability of corporations. However, if the Commission did not need to concern itself with the established law or what was widely agreed among States, then surely it would include the wrongdoing of corporations in the scope of the draft articles; after all, the example of corporations that provided ground or air transportation for troops that were going to commit atrocities was not so far-fetched. The problem with the open-ended approach, as had become evident in the debate at the two previous meetings, was that there was no objective basis for deciding what should be included and what should not. Mr. Kolodkin had rightly raised the question of which sources should be used for the draft articles. Should something be included because it was found in other treaties, or because it seemed to be a good idea? That was the problem with the corporate liability issue: on what basis should it be included or excluded?

49. He raised those matters, not to criticize the Special Rapporteur's second report, which provided excellent coverage of the topic, even though, as Mr. Kolodkin had pointed out, the source cited did not always exactly match the formulation that was supposed to emerge from it. Without wishing to reignite the discussion about the relationship between codification and progressive development, he did think it odd that the Commission had debated how to characterize its work on the draft articles on the protection of persons in the event of disasters, but not its work on crimes against humanity, when in both cases both codification and progressive development were involved. Of course, there was no need to state in every instance whether the Commission was engaged in progressively developing the law or in codifying it, but nevertheless, the distinction between the work on the two topics was striking.

50. What was clear was that the members of the Commission did not have an agreed view about the methodology to be followed and what it meant to undertake the preparation of a draft. That had perhaps not been so important when the Commission was preparing draft articles, but it was now pursuing other objectives, and the problem was exacerbated. In order to retain its credibility and to provide a clear explanation of how it intended to go about its work, the Commission must address those questions of methodology. To analyse using one method a report structured using another method was of little utility. The Commission should take up that question when undertaking its annual consideration of its methods of work. As he had already suggested, the Commission would benefit from setting up a working group at the next session to consider its methods of work and the final form of its work in more detail, if only to establish an agreed approach.

51. Turning to the draft articles, he said that the level of detail that must be included in provisions on criminalization by national courts should be considered. A treaty that was to be interpreted by an international tribunal established under the same treaty did not need to be particularly detailed, but an instrument that required States to enact legislation to criminalize certain offences must be more explicit. Care had to be taken in the use of language in criminal law, insofar as the rights of individuals were involved. That explained in part the amount of detail contained in draft article 5. But would all States interpret the obligations set out in that text in the same way? Some had already queried the differences between the terms "soliciting" and "inducing" and questioned whether all domestic courts would apply the legislation in the same way.

52. While repeating provisions found in the Rome Statute of the International Criminal Court had its attractions, the question was whether that would lead to a patchwork of interpretations in the different national courts. The Special Rapporteur had said that in his next report he would discuss the relationship of the draft articles with the Statute. As the Special Rapporteur had pointed out on previous occasions, a treaty on crimes against humanity could not be an alternative normative regime in relation to the Statute.

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[99] The draft articles on the protection of persons in the event of disasters adopted by the Commission on first reading and the commentaries thereto are reproduced in *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

[100] The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

[101] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

53. With reference to draft article 6, paragraph 1 (*c*), he found it strange to say that a State would establish its jurisdiction if a victim was one of its nationals and it considered such a step to be appropriate. Of course, a State could establish jurisdiction on any grounds that it considered appropriate, but the real question was whether such grounds were permitted under international law. The Special Rapporteur had apparently tried to use a tactic often employed by the Drafting Committee, namely to strike a compromise by tacking wording onto an existing provision, in the present instance an article from the Convention against torture and other cruel, inhuman or degrading treatment or punishment, rather than rewriting the provision to give it more substance. But why restrict the jurisdiction of the State to situations when the victim was one of its nationals? Why not add the phrase "or on any other jurisdictional basis recognized by law" at the end of the draft article? That left open the possibility of asserting universal jurisdiction where a State considered it appropriate to do so, and it avoided awkward terminology. Perhaps such was the purpose of paragraph 3; if so, then paragraph 1 (*c*) was superfluous.

54. In respect of draft article 9, he shared the views of others that paragraph 2 needed some attention. It was not appropriate to try to direct the way prosecutorial discretion was exercised, and the concept of an "ordinary offence of a serious nature" was confusing. By definition, an offence of a serious nature could not be characterized as an ordinary offence, especially not in the context of crimes against humanity. The fact that the concept might have different meanings in different legal systems must also be taken into account.

55. With respect to draft article 10, he said he had some reservations about paragraph 2. The Special Rapporteur pointed out in his second report that the most recent conventions dealing with criminal matters included provisions of that nature, notwithstanding the wide acceptance of the Vienna Convention on Consular Relations. What was not made clear, however, was why it had been seen as necessary to include such provisions, how those provisions had been interpreted in practice and whether they established a regime different from the regime of that Convention. Absent some good reason for a separate legal regime, it might be wiser, in the interests of coherence, to simply incorporate the rights established under the Vienna Convention on Consular Relations.

56. Subject to those remarks, he supported sending the draft articles to the Drafting Committee.

57. Mr. TLADI said that if the draft articles under consideration had been prepared using a methodology that differed from the one used for other texts, it was because Special Rapporteurs usually sought to develop a text that reflected internal law, whereas in the present case, the Special Rapporteur had clearly signalled from the start that he had other intentions. That approach had been approved by the Commission, and the General Assembly had not objected to it.

58. Ms. ESCOBAR HERNÁNDEZ said that she did not feel that the draft articles under consideration followed a different approach than did others or that the Commission had ever agreed to develop some sets of draft articles solely in order to reflect existing practice, like the text on the protection of persons in the event of disasters, and others, in order to set out the law as a given Special Rapporteur believed it should be, necessitating different working methods. As Special Rapporteur on immunity of State officials from foreign criminal jurisdiction, she had never intended to restrict her work to the compilation of existing practice. In any case, the final form of the draft articles and the working methods used were two different things. At previous sessions, she had indicated that even if the Commission should decide to recommend to the General Assembly the preparation of a convention based on the draft articles she was preparing, she could not take it for granted that the text would give rise to a convention, or still less, change her methods of work.

59. Mr. McRAE said that, having not been present when the Commission had decided to take up the topic currently under consideration, he could not say whether or not there had been consensus on the subject of working methods. Nevertheless, the discussion and commentary to which the draft articles had given rise clearly showed the disparity of views. It would therefore be useful for the Commission to look into the matter: that could only bolster the efficacy of its work.

60. Mr. CANDIOTI said that watching the Commission still debating its own working methods now, as the quinquennium drew to a close, was somewhat disconcerting. In 2011, he had proposed that the Commission ask a working group made up of old and new members to analyse its working methods. He now recommended that the matter be taken up as a matter of priority at the start of the next quinquennium.

61. Sir Michael WOOD said that, in studying its own working methods, the Commission should perhaps look into the role played by the debates, which were not always very constructive. While congratulating the Special Rapporteur for the clarity and thoroughness of his second report, he suggested that, when a lengthy chapter discussed a range of issues, each leading to a single text, that text should be set out immediately after the relevant section of the chapter, and not at the end of the chapter. Also, as Mr. Forteau had pointed out, it was not always clear why the Special Rapporteur had chosen one formulation instead of another.

62. That having been said, there were convincing reasons for the Commission to work on a set of draft articles with a view to proposing a convention on the prevention and punishment of crimes against humanity. Such an instrument would fill a significant gap in international criminal law. Moreover, the interaction between the Commission and the General Assembly revealed that the latter was perfectly aware of what the Commission was doing and which working methods it had established for itself. No purpose would be served by analysing those working methods, since the Commission had so far fulfilled its tasks very well. In addition, it would be wrong to assume that the draft articles under consideration must reflect customary international law. The whole purpose of having such a text was to propose to States the adoption of an instrument under which they would undertake greater and more specific obligations than they currently had, either under treaties or under customary law.

63. As for the scope of the convention, it should be confined to crimes against humanity, because to address crimes against humanity, genocide and war crimes in one and the same text would make it far more complicated. While the criminal responsibility of corporations was certainly an important issue, it should not be covered in the future convention, because it fell under national law.

64. In order to maximize the participation of States in an eventual convention, it should be focused on the criminalization of crimes against humanity in domestic law as well as on the investigation and prosecution, or extradition or surrender, of an alleged offender. As Mr. Hmoud had said, while it might be tempting to deal with the various aspects of crimes against humanity, it was important to develop an effective law enforcement instrument, and thus to concentrate on the criminal responsibility of the perpetrators of crimes against humanity and the measures that States could adopt to punish and prevent such crimes. The 1970 Convention for the suppression of unlawful seizure of aircraft was a good model, and one that had been used as a basis for drawing up new instruments, such as the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, the draft of which had been prepared by the Commission.

65. However, the Special Rapporteur had suggested that some additional elements that did not appear in the earlier conventions should be included in the Commission's text. That was unlikely to give rise to too many difficulties for States, so long as the additional elements were drawn from widely ratified instruments, such as the Rome Statute of the International Criminal Court, and were suited to national criminal law. In general, however, the draft should not be overloaded with elements whose inclusion might make it harder for States to join a future convention.

66. Turning to the six new draft articles, he said that the terms used in draft article 5, paragraph 1, to define participation were rather unclear. In order to avoid contradictions, the Commission should use the definition set out in the Rome Statute of the International Criminal Court, as it had done at the previous session for crimes against humanity. As to the definition of command responsibility in draft article 5, paragraph 2, the language there should also be taken directly from the Statute, as the Special Rapporteur had proposed.

67. Draft article 6 was aligned closely on earlier treaties and called for no comments of substance. By contrast, the innovations introduced in draft article 7 needed careful thought. Was it appropriate to place even a weak legal obligation on a State to communicate "the general findings of [an] investigation" to the State of nationality of those who were "involved in the crime"? As the words "as appropriate" seemed to acknowledge, many factors might come into play, making the communication of such information not the right thing to do. The competent authorities of the State concerned should have a free hand to decide what should be done, based on domestic legal provisions and human rights commitments. The communication of information was not a matter to be regulated by treaty provisions. If the draft article was referred to the Drafting Committee, it was to be hoped that it would approach it with a view to its appropriateness for inclusion in the text to be proposed to the General Assembly.

68. The relationship between draft articles 7 and 8 was difficult to understand. In their current form, they seemed to overlap somewhat. Draft article 7 dealt with the obligation of States to carry out "general" investigations, while draft article 8 addressed the conduct of "preliminary" investigations in the exercise of national jurisdiction, but the reason for that distinction was not immediately apparent. In paragraph 121 of his second report, the Special Rapporteur stated that there was value in conducting general investigations, as they allowed immediate measures to be taken to prevent the further occurrence of crimes and to establish a general basis for more specific investigations. That would not necessarily be the case, however. Moreover, the instruments to which the Special Rapporteur referred to support his proposal did not necessarily make a distinction between a "general investigation" and a preliminary investigation in the exercise of national jurisdiction.

69. The lack of a clear distinction between draft articles 7 and 8 was apparent, for example, in draft article 7, paragraph 2, where it was stipulated that the State of nationality was to investigate the matters communicated to it by the State that carried out the initial general investigation. Given that the Special Rapporteur indicated in paragraph 125 of his second report that only the State in which offences might have occurred was under the obligation to carry out general investigations, the State of nationality must be required to carry out not general but preliminary investigations under draft article 7, paragraph 2. However, that obligation was also covered by article 8. If article 7 was retained, a clearer link should be made between it and draft article 4, so as to emphasize the preventive nature of general investigations, and the ways in which a general investigation might be carried out should be specified. Another point was that it was not clear why under draft article 8, paragraph 3, the State that carried out a preliminary investigation had to notify of its general findings all the States referred to in draft article 6, paragraph 1, while the State that carried out a general investigation under draft article 7, paragraph 2 had to notify only the State of nationality.

70. Draft articles 8 and 9 were central to the text. The obligation to extradite or prosecute was central to all recent criminal law treaties. The corresponding provisions in the Convention against torture and other cruel, inhuman or degrading treatment or punishment had been the subject of careful consideration by the International Court of Justice in its 2012 judgment in *Questions relating to the Obligation to Prosecute or Extradite*; they had also been the subject of the Secretariat's excellent survey, done in 2010, on multilateral conventions that might be of relevance for the Commission's work on the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*).[102] Such materials could prove useful to the Commission in framing the draft articles, and the Drafting Committee would no doubt examine them very carefully, particularly insofar as the Special Rapporteur's proposals departed significantly from the provisions of certain conventions that had already gained wide acceptance.

[102] *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/630.

71. In connection with draft article 9, paragraph 2, the Special Rapporteur had asked for views on whether the sending of an alleged perpetrator of crimes against humanity to be prosecuted before a "hybrid" court or tribunal constituted "extradition" to another State or "surrender" to an international jurisdiction. The reason why the question needed to be asked was not clear, at least not in the context of the Commission's work. In any event, the answer would depend on having a look at each "hybrid" court individually, and in particular, at what its place was within the legal system of the country concerned.

72. Although draft article 10 might seem superfluous, other criminal law instruments contained comparable provisions and there might be good reasons for wanting to ensure fair treatment of accused persons. It therefore seemed apt to include it in the draft articles.

73. Regarding the future programme of work, the Special Rapporteur had suggested that his third report address, among other things, the rights and obligations applicable to extradition. He himself hoped that the Special Rapporteur did not intend to go into detail on the subject but would propose instead a simple but important provision that was found in other criminal law conventions, for example, in article 8 of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents.

74. Like Mr. Kittichaisaree, he would have preferred to see the Commission move more quickly on what he himself saw as an urgent, important and yet relatively straightforward topic. He recalled in that connection that in 1972, in the course of just one session, the work on the draft articles on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents had been completed,[103] and the draft articles had been adopted as a Convention by the General Assembly one year later.[104]

75. As to the commentaries that should accompany the draft articles, he said there was no need to repeat all that was said in the report. The Commission's task, after all, was not to write a treatise on international criminal law, and it would be better if the commentaries were concise.

76. In conclusion, he supported referring the draft articles to the Drafting Committee.

The meeting rose at 12.55 p.m.

3299th MEETING

Tuesday, 17 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)

[Agenda item 9]

Second report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the topic of crimes against humanity (A/CN.4/690).

2. Mr. EL-MURTADI SULEIMAN GOUIDER said that the Special Rapporteur's second report dealt primarily with national measures relating to acts that were already established in international law as serious crimes and, as such, a source of concern for the entire international community. In his report, the Special Rapporteur highlighted the advantages of drafting a convention on the topic; differing views had been expressed on a number of issues, including what the role of the General Assembly should be and whether the codification or the progressive development of international law was more appropriate. Ultimately, the decision regarding the outcome of the Commission's work on the topic would be taken by Member States in the General Assembly.

3. The time had long passed when crimes against humanity had been considered simply as violations of moral codes. At the international level, such crimes had for decades been proscribed by customary law and many relevant judicial precedents existed at the national and international levels. That had paved the way for crimes against humanity to be incorporated into the statutes of international criminal tribunals, and ultimately the Rome Statute of the International Criminal Court, which described specific crimes against humanity in detail. It was important to question why such developments had not had greater influence on national and international law. During the consideration of the Special Rapporteur's first report[105] by the Sixth Committee, at the General Assembly's seventieth session, many Member States had advocated drafting a convention on crimes against humanity, whereas others had remained sceptical. Some positions taken, and echoed by members of the Commission, had emphasized the links between the proposed new convention and existing treaties, noting that some crimes were already recognized under the Rome Statute of the International Criminal Court. It was therefore important for the Commission to approach the topic cautiously, taking care to avoid overlap at the international level between the draft articles under discussion and other treaties, especially the Rome Statute of the International Criminal Court. Crimes against humanity were not committed with intent to destroy a

[103] *Yearbook ... 1972*, vol. II, pp. 312–323, document A/8710/Rev.1.

[104] General Assembly resolution 3166 (XXVIII) of 14 December 1973, annex.

[105] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/680.

group, in whole or in part – a concept that was covered by the Convention on the Prevention and Punishment of the Crime of Genocide – but instead constituted systematic attacks directed against a population. Furthermore, the fact that crimes against humanity were carried out both in times of war and in times of peace was a topical issue, in the light of the numerous internal conflicts in North Africa and the Middle East. It was all the more important, therefore, to draw a clear distinction between genocide and crimes against humanity.

4. Legislative measures needed to be taken to fill national and local gaps, including in the areas of competent tribunals, cooperation and the obligation to extradite or prosecute (*aut dedere aut judicare*). The analysis contained in the Special Rapporteur's second report would contribute significantly to bridging those gaps. He was in favour of referring the draft articles to the Drafting Committee.

5. Mr. PETER, welcoming the Special Rapporteur's second report, said that the reproduction therein of the draft articles provisionally adopted at the Commission's sixty-seventh session was particularly helpful. The Commission's consideration of the topic was important because the outcome, which would build on existing international law, would uphold a culture of respect for human rights at the global level. He approved of the decision to take up just one core crime – namely crimes against humanity – and deal with it comprehensively before moving on to another, if deemed necessary. With regard to the form of the second report, he drew attention to several discrepancies between the soft copy, dated 20 January 2016, and the hard copy, dated 21 January 2016, concerning the list of references, footnotes and the number of pages of the document.

6. In paragraph 78 of the second report, the list of States that permitted the death penalty was incomplete, as reliable sources indicated that in 2015 some 25 States had executed persons convicted for various offences. The information contained in the paragraph should be updated. Notwithstanding the truth of the statement in the first sentence of paragraph 79, referring to the fact that international treaties did not dictate to States parties the penalties to be imposed but rather left to them the discretion to determine the punishment, States should be encouraged to avoid imposition of the death penalty. With regard to paragraphs 109 to 116, which referred to the principle of universal jurisdiction, it was worth noting that few African States had adopted national laws on universal jurisdiction. The envisaged convention, if well crafted, could fill a lacuna in that continent, although the implementing process would not be easy.

7. In draft article 5, paragraph 1, the words "committing a crime against humanity" should be qualified with the words "as defined in article 3 of these draft articles" for the sake of clarity. With regard to draft article 5, paragraph 3 (*b*), the lack of application of any statute of limitations to an offence referred to in draft article 5 should be extended to cover the draft convention as a whole. Draft article 5, paragraph 3 (*c*), was too vague; the subparagraph should instead specifically prohibit the death penalty for those convicted.

8. Draft article 6 should be streamlined. The importance of the nationality of the offender in criminal law in general was not clear; he was therefore unconvinced of the relevance of draft article 6, paragraph 1 (*b*). Moreover, all victims should be treated equally. The double standard introduced in draft article 6, paragraph 1 (*c*), allowing States to handle victims who were their nationals differently undermined the entire paragraph. The whole draft article should be revised so as to provide for the equality of both offenders and victims irrespective of their nationality.

9. In draft article 7, paragraph 2, the use of the mandatory verb "shall" was inappropriate and the reasons behind it unclear. A sovereign State that was investigating an alleged crime should not be compelled to inform another State of its investigation simply on the grounds that the alleged offender was a national of that second State. The allegation of a commission of crimes against humanity, rather than the nationality of the alleged offenders and the victims, should be the most important element. He urged the Special Rapporteur to re-examine draft article 7, paragraph 2.

10. In draft article 8, paragraph 2, the proviso that "custody and other legal measures … shall be in conformity with international law and maintained for only such time as is reasonable" was unacceptable as it created a situation whereby certain suspects were afforded superior treatment to that generally available to other suspects in the same jurisdiction. Moreover, those being given special treatment were the very suspects suspected of committing the most serious crimes. Similar provisions adopted in the past had resulted in objectionable precedents. The proviso should therefore be deleted. Draft article 8, paragraph 3, was also unnecessary, as it had no legal or logical basis and undermined the quality of the draft convention as a whole by giving a suspect importance that was undeserved and unwarranted in inter-State relations.

11. Draft article 9, on the other hand, was commendable for the neutral language it employed in placing alleged offenders on the same footing as any other suspect. It should be left as drafted. Draft article 10 was also acceptable. In conclusion, he recommended that all the proposed draft articles be referred to the Drafting Committee, which should not only discuss the form the draft articles would take, but should also review their content and relevance.

12. Mr. HUANG said that the topic of crimes against humanity was complex and sensitive, as indicated not least by the lack of consensus during the Sixth Committee's debate on the topic. The Commission should not necessarily have to limit itself to the sole objective of developing a single international convention on crimes against humanity. Although no such convention existed, the area of crimes against humanity, unlike war crimes and genocide, had relatively few gaps in terms of international law. It could be concluded, on the basis of the sixth and tenth preambular paragraphs of the Rome Statute of the International Criminal Court, that States parties had an obligation to enact domestic laws on crimes covered in the Statute, including crimes against humanity. In practice, in order to ensure that their judicial systems could prosecute crimes covered in the Statute, many countries

had adopted relevant legislation, or had amended existing laws to comply with the Statute's provisions. In accordance with article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, the enactment of such legislation could be viewed as constituting practice in the application of the treaty that established the agreement of the parties regarding its interpretation. Furthermore, the Rome Statute of the International Criminal Court had also brought crimes against humanity under the jurisdiction of the International Criminal Court.

13. In producing draft articles, full consideration should be given to national practices and legal systems. The second report of the Special Rapporteur and the commentaries adopted by the Commission focused more on the practice of international judicial institutions, making comparatively little mention of the general practice and *opinio juris* of States. For example, while draft article 3,[106] provisionally adopted by the Commission, avoided inconsistency with the Rome Statute of the International Criminal Court by reproducing the definition of a crime against humanity provided in the Statute, that definition itself was not generally accepted by the international community. With regard to draft article 5 proposed by the Special Rapporteur, which imposed on States the obligation of criminalizing crimes against humanity, it should be noted that many States, especially those that had not acceded to the Rome Statute of the International Criminal Court, had not made such crimes as "enforced disappearance of persons" separate offences under national law. He wondered how those States would implement the provision; to what extent they would fulfil the obligation; and how the national law and relevant international law would be harmonized in cases of inconsistency. The Commission should examine such issues.

14. In his second report, the Special Rapporteur relied excessively on induction and analogy in taking stock of existing international treaties and national laws. For instance, by citing obligations to develop national legislation, establish jurisdiction, investigate and cooperate, extradite, or prosecute as provided for in a number of international treaties relating to other crimes, without directly referring to treaty laws or practice regarding crimes against humanity, the Special Rapporteur was arguing that such obligations should also apply to States parties in the case of crimes against humanity. It was on that basis that he had proposed draft articles 6 to 8.

15. With regard to draft article 5, States had varying definitions of crimes against humanity. Moreover, some States' national legislation did not address specific crimes that fell under the definition of crimes against humanity. Issues such as ways to resolve inconsistencies between that provision and national laws so as to ensure their alignment, and the extent to which States should enjoy discretion, should be clarified in the commentary to the draft articles.

16. Referring to the suggestion by some Commission members that a draft article similar to article 27 of the Rome Statute of the International Criminal Court be added, so that the draft articles applied equally to all persons, with no exemption permitted for State officials, he said that, although crimes against humanity, the crime of genocide and other crimes were defined as serious international crimes by the international community, there was no customary international law that precluded exemption from immunity of State officials. The Commission should therefore approach the issue of immunity with caution. Furthermore, the immunity of State officials was procedural in nature, which did not exempt them from their substantive responsibility. As had been found by the International Court of Justice in its judgment in *Arrest Warrant of 11 April 2000*, measures such as prosecution before domestic courts, waivers of immunity, prosecution subsequent to a State official's period in office, and criminal proceedings before certain international criminal courts could be used, without any absence of immunity from jurisdiction, to hold State officials criminally liable. That such measures were permitted was not intrinsically linked to the issue of impunity.

17. With regard to the suggestion by some members that criminal responsibility of legal persons be included in the Commission's work on the topic, it was worth noting that several international conventions dealt with the concept of liability of legal persons; the legal system of China also addressed the concept of crimes committed by entities. Furthermore, since one of the main components of a crime against humanity was "a widespread or systematic attack", an entity capable of such a crime was most likely a legal person. However, given that the criminal responsibility of legal persons did not come under the domestic laws of many States, and that States themselves were legal persons, one question that arose, if the Commission were to consider including the liability of legal persons, was whether that would mean that States had criminal responsibility. While he concurred with the Special Rapporteur's position in not referring explicitly to the liability of legal persons, he suggested that the commentary might indicate that States were free to make provision for such liability according to their domestic laws.

18. With regard to draft article 6, it was possible to identify two different approaches to the exercise of jurisdiction over international crimes: one required States to establish jurisdiction on the basis of national laws without additional obligations, while the other, reflected in draft article 6, provided for the obligation of States to establish jurisdiction. The Commission might wish to consider whether it was necessary to formulate an obligation of such extensive jurisdiction and might also wish to reflect on the considerable overlap of jurisdictions that would result from the exercise of such broad jurisdiction.

19. States' views were still quite divergent on the definition and scope of universal jurisdiction. Not only was consensus on that issue unlikely to be reached in the near future, but a few States had, in recent years, amended their national legislation in such a way as to restrict the scope of implementation of universal jurisdiction. It was therefore not advisable to include universal jurisdiction in the draft articles.

20. With regard to draft article 7, paragraphs 2 and 3, he agreed that the communication of the general findings of investigations into crimes against humanity should not be a treaty obligation. Noting that draft article 8, which took on board the provisions of a number of international

[106] *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.

instruments, including the Convention against torture and other cruel, inhuman or degrading treatment or punishment, had been developed *mutatis mutandis*, with few supporting arguments, he suggested that the Special Rapporteur provide a comprehensive argument for including the obligation to conduct preliminary investigations in the draft articles. Regarding draft article 9, neither international practice nor international law demonstrated that *aut dedere aut judicare* had become a principle of customary international law, nor was that obligation provided for in conventions addressing grave crimes. Notwithstanding the fact that *aut dedere aut judicare* had not yet been applied to crimes against humanity as a customary international law principle, he was not opposed to its inclusion in draft article 9. That said, the situation referred to in the draft article was quite complex. According to draft article 9, the transfer of an alleged offender by a State to the competent international criminal tribunal was deemed to have fulfilled the obligation of *aut dedere aut judicare*. However, an international dispute could arise if another State, with a sounder basis for jurisdiction, also demanded the alleged offender's extradition to its territory, was opposed to the decision of the State on whose territory the alleged offender was present to transfer the suspect to the international tribunal, and deemed its legitimate jurisdiction violated by the transfer, and if furthermore the other State did not recognize the jurisdiction of the international criminal tribunal.

21. Regarding draft article 10, given the focus of the draft articles on the punishment of crimes against humanity, it was not necessary to over-elaborate on the right to a fair trial or human rights protection. The principles of due process and human rights law were, in any case, generally applicable even if they were not provided for in the draft articles. It was therefore advisable to consider deleting or streamlining that draft article. In conclusion, he supported referring the draft articles, as contained in the Special Rapporteur's second report, to the Drafting Committee for its consideration.

22. Mr. WISNUMURTI said that, as indicated in paragraph 18 of the Special Rapporteur's second report, States did not regard themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity. It was therefore essential for the Commission to proceed to develop a convention on crimes against humanity, with, among its main objectives, the aim of preventing impunity for such crimes. Draft article 5 on criminalization under national law was one of the most important components of such a convention. There was merit in adding the act of "planning", or "instigating", a crime against humanity – terms used in the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia[107] and in the Statute of the International Tribunal for Rwanda[108] – to the list of offences set out in draft article 5, paragraph 1, as it reflected the reality on the ground, where crimes against humanity were being or had been committed. He also supported the proposal to replace the word "inducing" in that paragraph with the more commonly used term "inciting".

23. The fact that draft article 5, paragraph 2, which replicated article 28 of the Rome Statute of the International Criminal Court, was divided into subparagraphs (*a*) and (*b*), dealing with a military commander or a person effectively acting as a military commander, and superior and subordinate relationships, respectively, might give rise to differing interpretations that could lead to difficulty in their implementation. One solution might be to merge the two provisions without changing their substance.

24. He supported the provision contained in draft article 5, paragraph 3 (*b*), on the non-applicability of any statute of limitations, in view of its compatibility with General Assembly resolution 2338 (XXII) of 18 December 1967 and with the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.

25. In draft article 5, paragraph 3 (*c*), the phrase "take into account their grave nature" must be read by national courts in conjunction with their interpretation of the words "appropriate penalties". He supported the Special Rapporteur's decision not to include in the draft articles any provision that required States to impose criminal responsibility on corporations, as it was up to each State to decide for itself whether it would do so.

26. With regard to draft article 6, paragraph 1 (*c*), it was necessary for any State to be able to establish its jurisdiction over an offence where the victim was one of its nationals, but the phrase "and the State considers it appropriate" seemed to weaken that message. It was also necessary for draft article 6 to address the issue of competing requests for extradition.

27. It was confusing that the term "[g]eneral investigation" appeared in the title of draft article 7, whereas the word "investigation" appeared in draft article 7, paragraph 1, and "preliminary investigation" appeared in draft article 8, paragraph 1. Furthermore, the term "general investigation" did not exist in the penal codes of some countries. It might be helpful for the Special Rapporteur to clarify those terms in order to avoid such confusion.

28. With regard to draft article 7, paragraph 2, he endorsed the use of the words "as appropriate", since the State concerned would otherwise be unduly burdened by the obligation expressed in that provision. The same words should be inserted in draft article 8, paragraph 3. In the light of those considerations, he endorsed the proposal to merge draft articles 7 and 8.

29. In relation to the obligation to extradite or prosecute (*aut dedere aut judicare*), addressed in draft article 9, the question raised by the Special Rapporteur in his introductory statement – as to whether the sending of an alleged offender to be prosecuted before a hybrid court or tribunal constituted extradition to another State or surrender to an international court or tribunal – was more theoretical than practical, making it premature to consider it at the current stage of the Commission's work on the topic. To his

[107] The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993, is annexed to the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1).

[108] The Statute of the International Tribunal for Rwanda is annexed to Security Council resolution 955 (1994) of 8 November 1994.

recollection, it was a question that had never arisen in the context of the Extraordinary Chambers in the Courts of Cambodia, which comprised a hybrid court.

30. With regard to draft article 10, paragraph 1, the emerging view mentioned in paragraph 192 of the report was in line with his own country's legislation, which provided that military personnel had to be tried in a military court that guaranteed them a fair trial.

31. As to draft article 10, paragraph 2, he shared the view that the provisions on consular protection in that paragraph were more limited than those contained in the 1963 Vienna Convention on Consular Relations, and he agreed that paragraph 2 should be brought into line with the relevant provisions of that Convention. He recommended the referral of all the draft articles to the Drafting Committee.

32. Mr. FORTEAU said that he endorsed the view expressed by Sir Michael at the 3298th meeting that, given the nature of crimes against humanity, the Commission should not unduly prolong the debate on the current topic and that, in its work on the topic, it should draw inspiration from the methodology it had used in 1972 for its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, which it had completed in the space of one year. He proposed that, in order to expedite the Drafting Committee's work, the Special Rapporteur, with the help of the secretariat and other Commission members, should, for each proposed draft article, indicate the equivalent provisions of the existing conventions that were most directly pertinent to the topic and transmit that information to Commission members electronically.

33. Mr. KAMTO said that, although the nature of the topic warranted an expedited approach, there were certain substantive issues that required lengthier consideration by the Commission, such as the criminal responsibility of corporations implicated in the commission of crimes against humanity. If the prohibition of crimes against humanity was indeed a *jus cogens* norm, there was no reason why corporations involved in the commission of such crimes should not be held criminally responsible for them at the international level. In the interest of producing an effective convention, the Commission should not rule out such situations, at least not before having debated the issue in plenary session.

34. The CHAIRPERSON said that, since the Commission had already approved a timetable for its work on the current topic, any proposal to change it significantly would require further deliberation, as well as some convincing arguments. On the question of the criminal responsibility of corporations, he endorsed the views expressed by Mr. Kamto.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

35. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that he would provide an overview of the activities of the Office of Legal Affairs since his last visit to the Commission in May 2015.

36. The Codification Division, which provided substantive secretariat services to the Commission, had prepared a background information note on the work of the Sixth Committee at the seventieth session of the General Assembly. During that session, it had considered 20 agenda items. It had also transacted business through three working groups and had maintained its recent practice of adopting all its resolutions and decisions without a vote. A total of 12 draft resolutions and 5 draft decisions had subsequently been adopted by the General Assembly. In its resolution 70/236 of 23 December 2015, entitled "Report of the International Law Commission on the work of its sixty-seventh session", the General Assembly had taken note of the final report on the topic "The most-favoured-nation clause"[109] and had encouraged the widest possible dissemination of that report.

37. The United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law had commemorated its fiftieth anniversary in 2015. The Programme was no longer dependent on voluntary contributions, given that the General Assembly had approved sufficient resources under the regular budget for the organization each year of the United Nations Regional Courses in International Law for Africa, Latin America and the Caribbean, and Asia–Pacific, and for the continued development of the Audiovisual Library of International Law. Efforts were being made to improve access to the Audiovisual Library in developing countries.

38. At the seventy-first session of the General Assembly, the Sixth Committee would revert to the consideration of four items emanating from work completed by the Commission: responsibility of States for internationally wrongful acts;[110] diplomatic protection;[111] the law of transboundary aquifers;[112] and consideration of prevention of transboundary harm from hazardous activities[113] and allocation of loss in the case of such harm.[114]

39. The Office of the Legal Counsel had addressed a number of complex legal matters involving international humanitarian law. One such issue concerned humanitarian

[109] *Yearbook ... 2015*, vol. II (Part Two), pp. 91 *et seq.*, annex.

[110] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[111] The draft articles on diplomatic protection adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 49–50. See also General Assembly resolution 62/67 of 6 December 2007, annex.

[112] The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

[113] The draft articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and the commentaries thereto adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

[114] The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

access, and, in particular, the difficulties encountered in delivering humanitarian assistance across borders, which had been highlighted by the situation in the Syrian Arab Republic. In order to address that issue, the Security Council had eventually adopted resolution 2165 (2014) on 14 July 2014, which authorized United Nations humanitarian agencies to use Syrian border crossings to deliver humanitarian assistance and provided for the establishment of a United Nations monitoring mechanism in order to confirm to the Government of the Syrian Arab Republic the humanitarian nature of the aid crossing its border. In so doing, the Security Council had struck a compromise between respect for State sovereignty and the urgent need for humanitarian aid.

40. As to the question of compliance with international humanitarian law, bearing in mind the lack of approval by the ICRC for the establishment of a new mechanism to discuss international humanitarian law issues, the Office of the Legal Counsel had sought to draw attention to the importance of existing United Nations mechanisms that contributed to strengthening compliance with international humanitarian law, including the General Assembly, the Security Council, and the Human Rights Council. Such existing mechanisms should be used to the fullest extent until a new mechanism was adopted.

41. Regarding the applicability of international humanitarian law to United Nations peacekeeping operations, the Office had been closely following questions such as: whether a response by a peacekeeping operation to an attack against it meant that the situation had evolved into an armed conflict; whether the concerned peacekeeping operation had become a party to the conflict and was thus bound by international humanitarian law obligations; and whether the military personnel in question continued to benefit from the protection afforded under the 1994 Convention on the Safety of United Nations and Associated Personnel.

42. Of the many peacekeeping operations with which the Office of the Legal Counsel had been involved in the last year, none had required more advice or sustained engagement than the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), which the Security Council had established in April 2014.[115] The transitional authorities of the Central African Republic had now completed their mandate, and a new era was unfolding for the Central African authorities and for the population. The role of MINUSCA beyond the transitional period remained crucial for supporting the Government in the extension of State authority and the preservation of the country's territorial integrity.

43. The extremely volatile situation and the weakness of critical State institutions had led the Security Council to give MINUSCA a very strong mandate, *inter alia*, to protect civilians and to end the impunity of perpetrators of human rights violations, by arresting and detaining suspects at the Government's request in areas where national security forces were not present or operational. The mandate to adopt such urgent temporary measures had been expressly qualified by the Council as exceptional, without creating a precedent and without prejudice to the agreed principles of United Nations peacekeeping operations. It was expected that an advance team of internationally recruited experts would arrive in Bangui towards the end of 2016 in order to assist the special criminal court that was to be established under Central African legislation to investigate those crimes and bring the perpetrators to justice. As he had explained in 2015, the United Nations would provide logistical support and technical assistance, but would not directly appoint staff to serve in the court.

44. Unfortunately, MINUSCA had also been in the news on account of some shocking allegations of sexual exploitation and abuse committed by members of its peacekeeping units. The external independent review panel appointed by the Secretary-General to investigate those allegations had recommended that the Organization abandon the principle whereby the contributing country had exclusive jurisdiction over crimes committed by its soldiers in the host country of a United Nations peacekeeping mission and that it should follow the example of the 1951 Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces. Having carefully considered that recommendation, however, the Office of the Legal Counsel had found that the principle of exclusive jurisdiction was a key provision of the United Nations memorandums of understanding with troop-contributing countries and the model status-of-forces agreements that were essential to peace operations. As the contents of those agreements had been endorsed by the General Assembly and the Security Council, any substantial changes to them would require extensive consultations with Member States, especially those that contributed peacekeeping troops. Such consultations, in which the Fourth Committee and the Special Committee on Peacekeeping Operations would participate, had already begun. His Office had likewise noted that the 1951 Agreement applied to the armed forces of the North Atlantic Treaty Organization (NATO) member States in the context of collective defence, but not to NATO forces deployed in the territory of non-NATO States; status-of-forces agreements covering NATO out-of-area operations provided for the exclusive criminal jurisdiction of the contributing countries over their troops, in the same way as the United Nations agreements and memorandums did. The purpose of exclusive criminal jurisdiction was not to shield soldiers serving under the United Nations from prosecution, but rather to avoid their prosecution and trial in conflict or post-conflict settings by national authorities whose legal traditions might differ from those of the contributing countries and where respect for the rule of law might be at issue. It was, however, generally agreed that more needed to be done by the United Nations and regional organizations deploying forces under an international mandate, as well as by the various troop-contributing countries, to make sure that the commission of grave criminal acts by peacekeeping forces became a scourge of the past.

45. Turning to the question of respect by Member States for the privileges and immunities enjoyed by the United Nations, in particular its immunity from legal process, he said that the Organization had increasingly been confronted with adverse judgments by national courts,

[115] Security Council resolution 2149 (2014) of 10 April 2014.

which had in some cases awarded large amounts of compensation in labour claims submitted by locally recruited personnel. The courts in question appeared to be basing their decisions on a restrictive approach to privileges and immunities, combined with a view that the Constitution of the State in question prevailed over any conflict between the constitution and the State's international legal obligations under the Charter of the United Nations and the 1946 Convention on the Privileges and Immunities of the United Nations. Such decisions rested on a fundamentally flawed understanding of the principles of international law and, in particular, the 1969 Vienna Convention. The argument that a labour dispute concerned an act *jure gestionis* and, as such, would not be covered by immunity from legal process, might be applicable to States but could not be applicable to the United Nations, since the source of the Organization's immunity was to be found in Article 105 of the Charter of the United Nations and in the Convention on the Privileges and Immunities of the United Nations, which provided for absolute immunity without drawing any distinction between acts *jure imperii* and acts *jure gestionis*. In practice, the contracts of locally recruited personnel contained a provision establishing arbitration as the mechanism for solving a dispute between them and the Organization; thus, contractors were not without remedy and the United Nations was not hiding behind its immunity. In most cases, the Governments of the States concerned appeared to accept the legal position conveyed to them by the Office of the Legal Counsel, but found it difficult to properly inform their courts of the appropriate legal regime to be applied to the United Nations. A situation might soon arise where the Organization was compelled to invoke formal dispute resolution measures under the Convention on the Privileges and Immunities of the United Nations. Although States Members of the United Nations could change the absolute approach to immunity reflected in the aforementioned texts if they so wished, he was of the opinion that such absolute immunity was essential for the efficient functioning of the Organization.

46. The Office of Legal Affairs had continued to provide daily support to the international and United Nations-assisted criminal tribunals that strove to secure accountability for international crimes. The International Tribunal for Rwanda had concluded its judicial work and all its remaining functions had been transferred to the International Residual Mechanism for Criminal Tribunals, which would try the eight remaining fugitives indicted by the International Tribunal for Rwanda, once they were arrested. The International Tribunal for the Former Yugoslavia had almost completed its final trials. Appeals, if any, in the *Prosecutor* v. *Radovan Karadžić* and *Prosecutor* v. *Vojislav Šešelj* cases would be heard by the Residual Mechanism. In December 2015, the Extraordinary Chambers in the Courts of Cambodia, which had reached their peak workload, had been placed on a more secure footing thanks to a subvention granted by the General Assembly. The Special Tribunal for Lebanon, which was distinct in jurisdiction and nature from the other international and United Nations-assisted criminal tribunals, was continuing the trial in absentia of five accused in the *Ayyash*, et al. case. As for the Residual Special Court for Sierra Leone, the Office of the Legal Counsel had been devising a future financing arrangement for the Court, in close consultation with the members of the Oversight Committee, since voluntary contributions were plainly not a sustainable means of financing a judicial institution.

47. He noted the increasing involvement of regional organizations in the establishment and operation of new hybrid tribunals. In October 2015, the United Nations had for the first time been tasked with providing a regional organization, the African Union, with technical assistance in establishing a hybrid tribunal, namely, the Hybrid Court for South Sudan. The Organization was therefore currently liaising with the African Union Commission in order to share its expertise and lessons learned. In addition, an increasing number of domestic courts were exercising jurisdiction in respect of the most serious crimes of international concern under the complementarity principle and national judicial systems also remained the principal venue for accountability in respect of broader classes of middle and lower-level perpetrators. International assistance to strengthen the capabilities of national courts in that regard was therefore essential. The Office of the Legal Counsel was discussing issues of accountability in contexts that entailed some measure of involvement of the domestic judiciary, including in the Central African Republic and Sri Lanka. The United Nations stood ready to assist the Government of Sri Lanka with the establishment of a judicial mechanism with a special counsel to investigate allegations of human rights abuses and violations of international humanitarian law.

48. The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs continued to provide substantive services for activities in relation to the United Nations Convention on the Law of the Sea, including the work of the Preparatory Committee established by General Assembly resolution 69/292 of 19 June 2015 with a view to developing an international legally binding instrument under that Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. The Division would service the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which would be resumed in May 2016. It had also continued to provide substantive servicing to the Meeting of States Parties to the Convention and the Commission on the Limits of the Continental Shelf, a body of independent experts that issued scientific and technical recommendations, but did not consider issues of sovereignty over land territory or unresolved land or maritime disputes.

49. On the subject of international administrative law, he said that the General Legal Division of the Office of Legal Affairs played a key advisory role in formulating the Organization's administrative and human resources management policies, and represented the Secretary-General in all cases heard by the United Nations Appeals Tribunal. As of 19 April 2016, the case law of the United Nations Dispute Tribunal comprised 1,230 judgments and that of the Appeals Tribunal, 609 judgments. Both Tribunals contributed on an ongoing basis to the development of international administrative law.

50. With regard to the activities of the Treaty Section, a highlight of the year had been the adoption of the Paris Agreement under the United Nations Framework Convention on Climate Change at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change. The Section had been involved in the negotiation of the text of the Agreement and had supplied legal assistance to the Ad Hoc Working Group on the Durban Platform for Enhanced Action throughout the Conference, especially with regard to questions related to the law of treaties. The Treaty Section had also prepared the original of the Agreement for signature and had ensured the proper organization of the signature ceremony convened by the Secretary-General, as depositary, on 22 April 2016. Another new agreement deposited with the Secretary-General was the International Agreement on Olive Oil and Table Olives, 2015, which had been adopted on 9 October 2015 and opened for signature on 1 January 2016. Furthermore, the Intergovernmental Agreement on Dry Ports had entered into force on 23 April 2016. During the year, the Treaty Section had been asked to provide legal assistance for the negotiation of a regional arrangement for the facilitation of cross-border paperless trade within the United Nations Economic and Social Commission for Asia and the Pacific. The diversity of those multilateral treaties demonstrated the wide range of topics dealt with by the Treaty Section. General Assembly resolution 70/118 of 14 December 2015 had recognized the importance of depository functions as well as the registration and publication of treaties performed by the Section, and had welcomed the efforts made to develop and enhance the treaty database. The Office of Juridical Affairs was in the process of setting up a new website which would permit faster, easier access to information on the status of treaties deposited with the Secretary-General and registered and published under Article 102 of the Charter of the United Nations. The General Assembly had also reaffirmed its support for the annual Treaty Event.

51. The Commission's work was of ongoing interest to the international legal community. He commended the Commission for completing its deliberations on the topics "Expulsion of aliens", "Obligation to extradite or prosecute (*aut dedere aut judicare*)" and "Most-favoured-nation clause". Member States were extremely interested in the topic "Protection of persons in the event of disasters", which should be completed at the current session. The Commission's work would certainly help States to resolve legal and institutional problems which often arose in very difficult circumstances. The Office of Legal Affairs would make every effort to provide the Commission with all necessary assistance in adjusting its working methods to the new challenges posed by a constantly changing environment. As requested by the Commission, the Codification Division had prepared two memorandums on the topics "Identification of customary international law" and "Crimes against humanity", and had contributed to the consideration of the Commission's long-term programme of work.

52. Mr. TLADI thanked the Legal Counsel for his Office's support for the United Nations Regional Courses in International Law, which were much appreciated in Africa. He was also grateful for the attention that the Office of the Legal Counsel was paying to the issue of sexual exploitation, which jeopardized the credibility of United Nations peacekeeping operations. In that connection, he wondered whether some answers to that very difficult issue might be found in the Sixth Committee's debates on the criminal accountability of United Nations officials and experts on mission.

53. Mr. VALENCIA-OSPINA said that the Legal Counsel was to be commended for his successful efforts to place the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law on a sound financial footing, thus ensuring that Regional Courses would once again be held in Latin America. As Special Rapporteur on the topic of protection of persons in the event of disasters, he had been particularly interested to hear the Legal Counsel discuss the decision to dispense with the requirement to obtain the consent of the affected State in order to authorize the delivery of humanitarian assistance to the Syrian Arab Republic. Although the Commission's work on the protection of persons in the event of disasters dealt with disasters in peacetime and not situations of armed conflict, draft article 14, paragraph 2, proposed by the Special Rapporteur in his eighth report (A/CN.4/697, para. 277) addressed the arbitrary withholding of consent and mirrored the Security Council resolution of July 2014. He recalled that the topic of relations between States and international organizations had long been on the Commission's programme of work. The Commission had divided the topic into two parts, and the outcome of its work on the first part had been the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The Commission had begun work on the second part – the status, privileges and immunities of international organizations and their personnel – but had eventually discontinued it given States' lack of interest in the first Convention. In view of the current problems, he wondered whether it might not be a good idea for the Commission to revive the topic.

54. Mr. MURASE said that the Audiovisual Library of International Law was an excellent resource. He had recorded three lectures himself, but had not fully appreciated the value of the Library until he had begun teaching at the China Youth University of Political Studies. Given the limited access to foreign literature and material on international law, the Audiovisual Library was an ideal solution. Following difficulties caused by slow download speeds, the Codification Division had kindly agreed to make the material available on DVDs, which could now be borrowed from that University's library and had helped improve the performance of the University's moot court team.

55. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the support of the Commission, and Commission members who had participated as course lecturers, had been fundamental in convincing Member States to include the Programme of Assistance in the regular budget. He had fully understood the importance and impact of the courses during his first visit to a regional course in Addis Ababa, when he had had the opportunity to talk with students from such countries as Somalia and South Sudan, where access to international law resources was difficult.

56. With regard to sexual exploitation and abuse by peacekeeping forces, his Office was focusing on 2 of the 12 recommendations contained in the independent panel's report: it was reassessing how, in the context of privileges and immunities, the United Nations should deal with documents or testimonies that might be relevant to the investigation and prosecution of serious allegations of sexual exploitation and abuse, and it was reviewing confidentiality policies so as to strike the right balance between confidentiality and accountability.

57. With regard to the point made by Mr. Tladi concerning the criminal accountability of United Nations officials and experts on mission, the adoption of the draft convention, which had been held up in the Sixth Committee for many years, would not immediately and fully resolve the complex problem of sexual exploitation and abuse, but it did contain some interesting elements and he hoped that it would be adopted. However, such a complex problem required complex solutions, involving both prevention and accountability. Both the United Nations and the Member States must play their part in terms of accountability; for instance, States that did not have criminal jurisdiction over acts committed abroad by their nationals might consider extending their jurisdiction to such acts in the case of serious sexual crimes.

58. The question of humanitarian access was not a new one; there had been serious disagreements in the Secretariat on that issue at the time of the Kosovo crisis, and, not surprisingly, the lawyers had taken a more conservative approach than humanitarian and other actors. In the case of the Syrian Arab Republic, he personally had been heavily criticized in the press for stating that the consent of the State was required in the absence of a Security Council resolution. He was pleased that the requirement of consent had been included in the eighth report of the Special Rapporteur on the protection of persons in the event of disasters, which he had carefully analysed. Thankfully, the Security Council had adopted a resolution on the matter in relation to the Syrian Arab Republic, since what mattered most was alleviating the suffering of people on the ground. Humanitarian assistance was being provided efficiently and cooperation with the Government was satisfactory.

59. There was an increasing trend for diplomatic privileges and immunities to be aggressively challenged in certain parts of the world. As a general principle, immunities were fundamental to international relations and the work of the United Nations. He had sought to take a proactive approach by discussing the matter with legal advisers in the various capitals concerned. However, as the United Nations Legal Counsel, he was bound by the legal regime that had been defined by the Member States. If they no longer considered that regime adequate, they needed to state clearly their position.

60. Regarding the Audiovisual Library of International Law, he had been surprised to learn that 400 universities in China offered international law courses. He had visited the country twice in an official capacity, had published two items in the *Chinese Yearbook of International Law*, and had recently participated in a discussion organized by Chatham House on China and international law.

61. Mr. MURPHY said that the Commission was very grateful for the work done by the Codification Division. Noting that it had begun publishing on the Commission's website comments by Governments in response to requests for information, he wondered whether it might be possible to upload archived statements from past decades, since that would create a rich database for research on government views on various aspects of international law.

62. Mr. FORTEAU said that he was grateful to the Legal Counsel for championing the principle of linguistic diversity by using both of the Secretariat's working languages and hoped that the Commission would be able to count on his continued support in that regard. Linguistic diversity significantly enriched the work of the Commission, and working in at least two languages in the Drafting Committee helped to ensure a high quality of drafting. With regard to immunities, and, in particular, the link between immunity and the right to obtain a judicial determination, he asked to what extent section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations could be considered to limit the immunity of the United Nations, in the sense that immunity would apply only if the United Nations offered appropriate modes of settlement in the case of disputes.

63. Mr. PETRIČ said it was a matter of concern that the International Tribunal for the Former Yugoslavia would soon be concluding its mission and that hundreds of cases would now be transferred to the national courts of Bosnia and Herzegovina, where there was serious reason to believe that they would not be dealt with properly. It was important to leverage the experience built up by the staff members who had worked for the Tribunal for almost 20 years; perhaps they could provide assistance to the national courts of Bosnia and Herzegovina so as to ensure that outstanding cases were handled independently and efficiently.

64. Mr. HMOUD said that he wondered when, in the context of a multidimensional peacekeeping operation in which troops used force and the situation evolved into an armed conflict, the protection afforded under the Convention on the Safety of United Nations and Associated Personnel ceased to apply.

65. Ms. ESCOBAR HERNÁNDEZ said that she shared the Legal Counsel's concerns about the problems faced by international organizations in connection with locally recruited personnel, although she also understood Mr. Forteau's position. The regime of immunities continued to be essential in contemporary international law, but it was necessary to take account of the major developments that had taken place over the last three decades. Spain had recently adopted Organic Law 16/2015 on the jurisdictional immunities of foreign States and international organizations, article 35 of which struck a good balance in that it generally recognized the right to immunity but provided for limitations in respect of particular issues under private law and employment law. Immunities did not apply if an organization could not prove that it had an equivalent dispute settlement mechanism. However, if the organization did have such a mechanism, immunity was absolute. Given that the United Nations had the mandate to establish an alternative dispute settlement mechanism, there should be no problem in that regard.

66. On the issue of accountability for international crimes, she wondered how the Legal Counsel envisaged the contribution of the United Nations to strengthening national criminal prosecution capacity, in particular its relationship with regional organizations in the establishment of hybrid tribunals and its relationship with the International Criminal Court in achieving positive complementarity.

67. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel), responding to Mr. Murphy's comment, said that efforts would be made to compile and publish more materials, within the limited resources available. He agreed with Mr. Forteau about the importance of linguistic diversity, as using only one language led to narrow ways of thinking.

68. He had followed with interest the discussions in the various international tribunals on the link between immunity and the right to obtain a judicial determination, although none of those tribunals had taken such a progressive approach as the national courts. There was clearly a need to be more practical in that regard. In line with section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations, on alternative modes of settlement of disputes, all employment contracts contained a clause providing for arbitration. Although that form of dispute settlement was indeed used, in certain cases the arbitration clause was ignored and cases were brought before the national courts on the basis of the national constitution, which was an abuse of the right to obtain a judicial determination. Very often national judges held the prejudice that the worker was always the weaker party, and the Organization was systematically found to be at fault. He would carefully examine the law cited by Ms. Escobar Hernández, although he already had some doubts about it, as it seemed to reflect a unilateral decision to change the international obligations arising under the Convention. He was aware that the discussion on the immunities of States had evolved and that a distinction was now made between absolute immunity and relative immunity for issues of employment law. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property was an important instrument; although it had not been widely ratified and had not yet entered into force, some of its principles might perhaps be emerging rules of customary international law. However, the same distinction between relative and absolute immunity did not apply to international organizations, and the International Court of Justice had adopted a very conservative position in *Jurisdictional Immunities of the State*. If States concluded that the immunity of the United Nations was no longer valid, the rules would have to be changed, bearing in mind that, as the Organization had a presence in almost every State, it would need legal officers able to represent it before national courts worldwide, which would significantly change the state of play.

69. With regard to Mr. Petrič's comments, his duty to exercise discretion as the Legal Counsel meant that it was difficult for him to comment on the work of a judicial body. The International Tribunal for the Former Yugoslavia had done very impressive work in a number of cases, as he had explained to Member States when they had complained that the process was too long and expensive. He agreed that the experience built up over the last 20 years should not be wasted, and trusted that some of that expertise would be used in the process of ensuring accountability for international crimes. On the issue of accountability, the Office of Legal Affairs would be providing technical assistance to South Sudan and the African Union for the establishment of a hybrid tribunal, but work had just started and there were not yet any results. Work with the Government of Sri Lanka was also at a preliminary stage. With regard to Mr. Hmoud's question, it was clear that protection under the Convention on the Safety of United Nations and Associated Personnel ceased once the peacekeepers had become part of a conflict. International humanitarian law applied thereafter.

70. Ms. JACOBSSON drew attention to the views she had circulated on the importance of a gender-based perspective in ensuring the protection of persons in the event of disasters, for possible consideration by the Drafting Committee.

The meeting rose at 1.25 p.m.

3300th MEETING

Wednesday, 18 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)

[Agenda item 9]

Second report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the second report on crimes against humanity (A/CN.4/690).

2. Mr. ŠTURMA commended the Special Rapporteur on his excellent second report on crimes against humanity, which was very clear and well structured and contained numerous references to relevant treaty law, case law of international courts and tribunals and doctrine. As a debate had arisen on the nature of the topic and working methods, he wished to comment on those issues before moving on to the draft articles themselves. First, the topic was well within the Commission's mandate, part of which had always been to prepare draft articles for future

conventions, and it was thus a perfectly appropriate matter for the Commission to take up. The topic involved both codification and progressive development of international law: the definition of crimes against humanity contained in draft article 3[116] and the general obligation to prevent and punish such acts as crimes under international law obviously involved the codification of customary international law, while most of the other draft articles proposed by the Special Rapporteur involved progressive development. The main added value of the topic was in the promotion of horizontal cooperation among States in ensuring that crimes against humanity were criminalized under national law and in investigation, mutual legal assistance and extradition. However, as such obligations could only be established by way of a convention, the debate on the nature of the topic had little meaning from a practical point of view: the obligations would either become binding on States as treaty obligations or they would not be binding at all.

3. Nevertheless, the nature of the topic had an impact on the Commission's working methods. While the first cluster of codified rules reflected a decision to maintain the established rules of international criminal law – in addition to the definition of crimes against humanity, which was consistent with the one set out in the Rome Statute of the International Criminal Court, he would add at least the principles of command or superior responsibility and superior orders – the second cluster of draft articles required the Commission to make policy choices.

4. That distinction was a key aspect of the working methods adopted by the Special Rapporteur. Since most of the draft articles presented in the second report dealt with new treaty obligations, it made sense to base them primarily on examples and comparisons of existing multilateral criminal law conventions. That approach, which allowed the Special Rapporteur to propose draft articles whose wording was based on best practices, was thus fully justified, as the Commission was aiming to develop a new, progressive, state-of-the-art convention.

5. Turning to the draft articles themselves, he noted that the criminalization of crimes against humanity under national law, as set out in draft article 5, was a key obligation. He appreciated the fact that the Special Rapporteur had included in his research the laws of many countries on crimes against humanity, although the reference to Act No. 140/1961, containing the Criminal Code of the Czech Republic, was outdated, as that law had been repealed and replaced by Act No. 40/2009. The Special Rapporteur had, however, correctly pointed out that, according to information submitted by the Government, the definition of crimes against humanity under Czech law, as provided for in section 401 of the new Criminal Code, was essentially aligned with the definition in the Rome Statute of the International Criminal Court. Moreover, in some respects the Czech Criminal Code even provided for broader criminalization: in relation to the crime of apartheid, for example, it penalized other similar acts such as segregation or discrimination based on race, ethnicity, nationality, religion or class. That illustrated the distinction between crimes under international law, as defined in article 7 of the Rome Statute of the International Criminal Court and draft article 3, and the same crimes under national law. In his view, the treaty obligation requiring that acts constituting crimes against humanity be criminalized under national law simply amounted to the harmonization of national laws. States parties to the future convention on crimes against humanity would be free to adopt or maintain a criminalization broader than that strictly required under their international obligations.

6. He supported the inclusion of draft article 5, paragraph 2 (*a*) and (*b*) and paragraph 3 (*a*), which were based on the corresponding provisions of Part III of the Rome Statute of the International Criminal Court on general principles of criminal law (arts. 28 and 33). Those provisions, which were already part of general international law, as was evident in the development of practice from the Nürnberg trials to contemporary international criminal tribunals and the International Criminal Court, should perhaps form separate draft articles. He also supported the inclusion of paragraph 3 (*b*) on the non-applicability of a statute of limitations to crimes against humanity, which was fully in keeping with the development of international law. In addition to the international instruments cited by the Special Rapporteur in support of that rule, there was also considerable State practice on the matter. In the early 1960s, even before ratifying the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, Czechoslovakia had introduced such a rule in its national laws, and section 35 of the current Criminal Code provided for the non-applicability of statutory limitations to genocide, crimes against humanity and war crimes, *inter alia*. He supported draft article 5, although he believed it could be split into several separate provisions.

7. He agreed with the Special Rapporteur's analysis in paragraph 71 of his second report with regard to the retroactive effects of the non-applicability of statutory limitations. Even more importantly, a number of States, as had been shown in the Czech example, already had the capacity to prosecute the perpetrators of crimes against humanity without any limitations. As indicated in paragraph 73 of the report, they could continue to do so after the convention on crimes against humanity had entered into force. In his view, the prohibition of statutory limitations for crimes against humanity was now part of customary law, as had also been confirmed by the Court of Cassation of France in the *Barbie* case.

8. Some other very interesting, related questions had been raised during the plenary debate, including the issue of amnesties, raised by Mr. Murase. In Mr. Šturma's view, there was no need to include such a provision in draft article 5, as amnesties were a matter of national law that would not necessarily come within the scope of the future convention. However, there was a clear trend in international law, including human rights law, towards a restrictive approach to amnesties for crimes under international law. In that respect, *Barrios Altos* v. *Peru*, *Almonacid-Arellano* et al. v. *Chile*, *La Cantuta* v. *Peru* and *Gomes Lund* et al. v. *Brazil*, which had come before the Inter-American Court of Human Rights, and *Marguš* v. *Croatia*, which had come before the European Court of Human Rights, as well as general comment No. 20 of the

[116] See *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.

Human Rights Committee,[117] were particularly illuminating. Therefore, perhaps amnesties should be addressed, either in a draft article, such as the one on the obligation to investigate, or in the commentary.

9. The proposal by Mr. Park to add a paragraph on the irrelevance of official capacity as a Head of State or Government or a government official, based on article 27 of the Rome Statute of the International Criminal Court, should be supported, although it could be argued that the Statute and the draft articles did not have the same purpose. It should be noted, however, that similar provisions could be found in several multilateral treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, article IV of which provided that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". Other examples were article 7 of the 1996 draft code of crimes against the peace and security of mankind[118] and articles 1 and 16 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

10. He agreed that there was no need for a draft article on the responsibility of legal persons, and supported the Special Rapporteur's analysis of the matter in paragraphs 41 to 44 of his second report. Most international conventions that made reference to such responsibility dealt with organized crime, financial crime or corruption, in other words fields in which it played an important role, which was not the case in the context of crimes against humanity. Once again, the absence of a treaty obligation for States in that regard did not prevent them from introducing provisions on corporate criminal responsibility in their national law more generally.

11. With regard to draft article 6, he supported the inclusion of the main bases for criminal jurisdiction, noting that the presence of the alleged offender in any territory under the jurisdiction of the State was a condition for the exercise of jurisdiction, a principle also provided for in several conventions. He supported Mr. Park's proposal that paragraph 1 (*b*) be extended to cover not only nationals but also other persons lawfully resident in the territory of the State. For example, section 6 of the Criminal Code of the Czech Republic extended the principle of personality also to stateless persons who had been granted permanent residence. He also supported paragraph 3 of the draft article, which did not exclude the establishment of other criminal jurisdiction by a State in accordance with its national law, and noted that section 7, paragraph 1, of the Czech Criminal Code provided for universal jurisdiction in respect of a limited number of crimes, including crimes against humanity.

12. The issue of international or "hybrid" criminal tribunals, raised by several members, should not be addressed in draft article 9 for a number of reasons. Hybrid tribunals differed from each other in their nature, legal basis and level of internationalization, *inter alia*. While some were closer to international tribunals, others could be described as part of the national judicial system. Moreover, their statutes could better set rules on jurisdiction and the relationship between such courts and other, mainly national, courts. In summary, for the purpose of a general convention on crimes against humanity, the words "extradites or surrenders" seemed to be sufficient.

13. As to the future programme of work, which was ambitious yet realistic, he understood that the third report might also cover the issue of concurrent requests for extradition and surrender. Other aspects not yet expressly mentioned by the Special Rapporteur also warranted consideration. For example, a provision on the protection of victims and their right to redress might be considered. In conclusion, he recommended referring all of the proposed draft articles to the Drafting Committee.

14. Mr. WAKO said that he appreciated the Special Rapporteur's excellent second report on crimes against humanity and his oral presentation. He also thanked the Secretariat for its memorandum on existing treaty-based monitoring mechanisms (A/CN.4/698), which would be useful to the Commission in its work on the topic. A very interesting debate had been sparked by Mr. Murase and Mr. McRae on the approach and methodology for the topic, as well as the relationship between codification and progressive development and the question of how to characterize the Commission's work on each draft article. Mr. Murase had warned that, as the Commission had not been requested by the General Assembly to draft a convention on crimes against humanity, it would have to consider the topic under its usual mandate of codification and progressive development of international law; consequently, the issue of customary international law was likely to arise continuously. In his view, it was important that the Commission be seen to be consistent; even when it adopted a pragmatic approach, that approach should be based on reasonable justification. Everything seemed to indicate, based on the exchanges to date with the General Assembly, which was very much aware of the work being done by the Commission, that the latter was fully justified in proceeding. As indicated in paragraph 2 of the second report, 38 Member States had addressed the issue, generally supporting the Commission's work and viewing the four draft articles as reflecting State practice and jurisprudence. In its future work on the topic, the Commission must bear in mind that Member States had expressed appreciation that the Commission considered the topic as complementary to the system established under the Rome Statute of the International Criminal Court, and had underscored the need to avoid establishing new obligations that would conflict with those existing under the Statute or other treaties. As of 2013, 104 of the 193 States Members of the United Nations had legislation expressly on crimes against humanity, in terms identical or very similar to the definition of such crimes in article 7 of the Rome Statute of the International Criminal Court. One such State was Kenya, which in 2008 had enacted the International Crimes Act, providing that the Statute had the effect of law and the offences it covered were also offences under Kenyan law, and reproducing the definition contained in article 7 of the Statute. However, as the Special Rapporteur indicated in paragraph 18

[117] Human Rights Committee, General comment No. 20, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A.

[118] *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

of his second report, it did not appear that States regarded themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity. However, it was to be hoped that the impetus provided by the Statute and the draft convention on crimes against humanity would encourage Member States not only to criminalize such acts, but also to adopt a definition of crimes against humanity similar to the one contained in the Statute.

15. As draft article 5 dealt with an issue provided for under the Rome Statute of the International Criminal Court, the Commission should try to follow the wording of that instrument as closely as possible. The Special Rapporteur had thus rightly taken up the wording of article 25, paragraph 3 (*c*), of the Statute, although it was difficult to understand why he had left out the last phrase of that subparagraph. Given that crimes against humanity presupposed a group acting in concert, he wondered why the Special Rapporteur had also omitted article 25, paragraph 3 (*d*), of the Statute. He agreed entirely with Mr. Park's proposed amendments to draft article 5, paragraphs 1 and 2.

16. He also supported Mr. Park's proposals concerning draft article 6, and was of the view that the content of paragraph 2 should become a new paragraph 1 (*d*). He would have welcomed more analysis by the Special Rapporteur of the concept of universal jurisdiction, including in the draft articles themselves. With that in mind, the Commission could perhaps draw on the separate opinion of President Guillaume attached to the ruling of the International Court of Justice in *Arrest Warrant of 11 April 2000*.

17. With regard to draft article 7, the expression "[g]eneral investigation" had created some confusion, and several members had proposed replacing it with "specific investigation" or "preliminary investigation", although the latter would not be appropriate, as it was already used in draft article 8. Draft article 7 did not deal with specific offenders. As the Special Rapporteur indicated in paragraph 121 of his second report, the investigation in question was intended to establish whether crimes against humanity had been or were occurring, in order to allow the State to take immediate measures to prevent further occurrence and to establish a basis for more specific investigations in accordance with draft article 8. The Special Rapporteur cited a number of sources in support of that argument, including article 12 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment and article 8 of the Inter-American Convention to Prevent and Punish Torture. However, the word "general" was not used to describe the "investigations" in either of those articles. The emphasis was not on the "general" nature of the investigations, but on the urgency of dealing with the matter not only to put an immediate stop to the crimes being committed, but also to ensure that those responsible for crimes already committed were investigated, prosecuted and punished. He therefore proposed deleting the word "general", which was confusing, and retaining simply "investigation", or adding the qualifier "initial". It would also be useful to add that such investigations must be carried out promptly in order to stop any further criminal acts from being committed and to punish the perpetrators.

18. With regard to draft article 9, he did not have any particular comments to make at that stage, although consideration should be given to concurrent extradition requests or competing interests. Draft article 10 could be expanded with elements of article 14 of the International Covenant on Civil and Political Rights on the right to a fair trial. Investigation, extradition and prosecution were critical for combating impunity and filling the gaps left by the Rome Statute of the International Criminal Court, since the International Criminal Court obviously did not have a police force or prison system of its own. The Statute did not deal with investigations conducted by States, except to the extent that they triggered the initiation of an investigation by the Prosecutor in accordance with article 53. The Statute had an entire part on international cooperation and judicial assistance, but such cooperation was between the Court and States parties. He was therefore glad that the Commission would be discussing those issues under its future programme of work.

19. He shared the view of Mr. Kittichaisaree, Sir Michael and other members that, as the Special Rapporteur had prepared two very comprehensive reports and participated in various seminars and consultations, the Commission should speed up its work on the topic, which could probably be shortened by a year. He supported referring all the proposed draft articles to the Drafting Committee.

20. Ms. JACOBSSON, welcoming the fact that draft articles 5 and 6 were intended to be comprehensive, said that the success of the fight against impunity obviously depended on the willingness of States to criminalize certain acts and establish national jurisdiction. Given the gravity of crimes against humanity, such jurisdiction should be as wide as possible so as to avoid any doubt about the rights and obligations of States in that area. Like other members of the Commission, she would like to see the right of States to exercise universal jurisdiction expressly mentioned in draft article 6.

21. The Special Rapporteur had mentioned that draft article 5, paragraph 1, covered participation in an act or in an attempt to commit an act, but did not reproduce other terms, such as planning and instigation, that were used in the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia [119] or the statutes of other tribunals. For obvious reasons, it was not possible or useful to list all the terms used in various national laws and statutes of tribunals. It should nonetheless be made clear that the list was not exhaustive, but endeavoured to cover all types of attempts, and that it was for each State to legislate in accordance with its own legal terminology, which could certainly be done in a manner that did not challenge the *nulla poena sine lege* principle. However, the concept of incitement should not be ignored: the *Radio Télévision Libre des Mille Collines* broadcasts were a prime example of the terrible effects that incitement could have. Even if the Special Rapporteur considered that the concept was covered in draft article 5, paragraph 1, she was of the view that it should be listed expressly. With regard to the

[119] The Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by the Security Council in its resolution 827 (1993) of 25 May 1993, is annexed to the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 and Add.1).

Special Rapporteur's choice of the formulation "appropriate penalties" in paragraph 3 (*c*), with the aim, it seemed, of avoiding the issue of the death penalty, it went without saying that a person accused of crimes against humanity would be in a better position if referred to the jurisdiction of the International Criminal Court than if prosecuted by a State that allowed the death penalty. However, the solution proposed was not satisfactory, even for those who were not opposed to the death penalty. A majority of States – more than 100 – had abolished the death penalty, and that figure was increasing, albeit slowly. It must therefore be made clear in the draft article, and in the commentary, that no body of the United Nations General Assembly, including the Commission, encouraged the death penalty in any way. She therefore proposed adding the phrase "and the obligations of States under other international instruments" to the end of the sentence.

22. With regard to draft article 6, as noted by the Special Rapporteur in paragraph 41 of his second report, criminal responsibility mostly concerned the liability of natural persons, for obvious reasons. However, legal persons were represented by natural persons, who could be held responsible for violations of financial regulations, environmental law or labour law. It was therefore not sufficient to leave States to deal with the responsibility of corporations as they saw fit. On the contrary, a modern draft convention on one of the most heinous crimes must also reflect the ambitions of the international community to combat such crimes at all levels. It might be difficult to establish clear criminal intent on the part of an executive director while, at the same time, it could be very clear that actions taken by a company could aid or abet the commission of crimes against humanity. In many States, close ties between the State, corporate representatives and corporations themselves could make it even more difficult to establish intent. The transnational structures of many corporations called for closer inter-State cooperation. At the same time, many, if not most, States had legislation that held representatives of corporations responsible for breaches of the law. The Commission could perhaps take inspiration from the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, although it was not yet in force. Even if it was not possible to establish the existence of a rule of customary international law on the matter, it would be overly cautious not at least to attempt to put pressure on States to hold corporations responsible for their part in crimes against humanity, as the role of corporations in the commission of such crimes had already been recognized after the Second World War. The Special Rapporteur had mentioned I. G. Farben, but Krupp was another example.

23. The responsibility of international organizations during peace operations should also be more clearly stated. When the Commission had dealt with the issue of the responsibility of international organizations, it had avoided taking a real decision on the subject of criminal responsibility. She wondered how article 7 of the draft articles on the responsibility of international organizations[120] and the "without prejudice" clause in article 66 of those draft articles related to the draft articles under consideration, and said that the matter should be considered in the current context. The wording of draft article 6, paragraph 3, was too passive, as it allowed States to establish jurisdiction but did not oblige or encourage them to do so. However, States should be encouraged to establish jurisdiction broader than that provided for in paragraphs 1 and 2, so as to cover jurisdiction over legal persons.

24. With regard to draft article 7, the obligation to cooperate should be at the heart of the new convention on crimes against humanity. Historically, the softly-worded obligation to cooperate in the context of international criminal law had prevented forward-looking provisions on the *aut dedere aut judicare* principle from working effectively. That had already been the case with the provisions on grave breaches in the Geneva Conventions for the protection of war victims, and it had not been until the 1977 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) that a cautious article on mutual assistance in criminal matters and a very restrained article on cooperation had been adopted. She would therefore welcome the inclusion in the draft article of a clear and compulsory obligation to cooperate. The implications of draft article 7, paragraph 2, which seemed to require a decision on the part of the State, were unclear. She believed that communication should be established at an earlier stage, when it was suspected that a crime against humanity had been or was likely to be committed, as that might even make it possible for the crime to be prevented.

25. With regard to draft article 9 on the *aut dedere aut judicare* principle, the Special Rapporteur had raised the very relevant question of the appropriate terminology for referring to the extradition or surrender of the perpetrator to another State, a competent international tribunal or a "hybrid" tribunal. In general, she believed that, as currently worded, the draft article risked establishing a legal loophole that must be closed. While it was perfectly legitimate to do whatever was possible to establish a system in which a suspect could not be tried or convicted twice for the same crime, it was also legitimate to ensure that a draft convention did not allow a State to escape its responsibility by handing over the alleged offender to an international tribunal that was less likely to hand down a conviction for the crime in question. It was well known that proceedings before international tribunals were extremely long and costly, and that the questions of evidence and witnesses were complicated because the international tribunal was dependent on the State in whose territory the crime had been committed and on the other States whose cooperation and contributions were needed for the criminal investigation. Draft article 9, paragraph 1, gave the impression that the State was relieved of its primary responsibility if it extradited or surrendered the suspect; the former was less problematic, in her view. It was to be assumed that surrender was preceded by a request from the international tribunal. She agreed that it was relevant to address the situation in which a State decided to transfer a case to a competent international tribunal. However, the circumstances in which that occurred or was likely to occur raised so many legal questions that the matter should be dealt with in a separate draft article.

[120] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

Draft article 9, paragraph 1, should therefore end after the words "for the purpose of prosecution" and a new draft article should be prepared, which should begin: "If a State extradites or surrenders a suspect to another State or international tribunal, the following must be taken into account". It could also be explained in the commentary that other forms of transfer might be legitimate as long as they were in accordance with international law, in particular human rights law.

26. With regard to draft article 10 on the fair treatment of the alleged offender, she welcomed the inclusion of the basic rules of *jus protectionis*, which protected the rights of a State's nationals abroad, as formulated by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. It should be recalled, however, that those rules had not originally had the same aims as the rules on human rights and that, although *jus protectionis* was increasingly used to safeguard human rights, the two sets of rules had not yet merged. One conferred rights on the State of nationality, while the other imposed an obligation on the detaining State to ensure that the human rights of the individual were respected. A State could waive its right to act under the rules of *jus protectionis*, but it could never be relieved of its human rights obligations; that point would be clearer if draft article 10 was split in two. In her view, draft articles 8 and 10 did not overlap, but it should be made clearer that they referred to different rights and obligations. It should also be made clear that the suspect was always entitled to be represented by counsel. Furthermore, additional guarantees of due process under the rule of law, such as access to an interpreter, needed to be elaborated. Specific guarantees should be provided to safeguard the rights of stateless persons.

27. In conclusion, she recommended sending the proposed draft articles to the Drafting Committee.

28. Mr. CAFLISCH said that he appreciated the Special Rapporteur's excellent, in-depth second report and oral presentation. However, he was not convinced that such a degree of detail had been necessary since, as Mr. Tladi had pointed out, the main purpose of treaty and other practice was not to prove the existence of a particular rule, but rather to provide examples. In the elaboration of the draft articles, it would be appropriate to follow the wording of the provisions of the Rome Statute of the International Criminal Court very closely. Any significant divergence between the draft articles and the Statute, to which there were 124 States parties, could prevent those States from becoming parties to the new treaty or could give rise to conflicts between the two instruments. For that reason, the Commission had noted with satisfaction, at its preceding session, that draft article 3 was almost identical to article 7 of the Statute. As two members had noted, certain provisions of draft article 5 as proposed in the second report departed somewhat from articles 25 and 28 of the Statute. It was nevertheless reassuring that, in the last chapter of his second report, the Special Rapporteur indicated that he planned to address means of avoiding conflict with treaties such as the Rome Statute of the International Criminal Court. Mr. Calfisch agreed with Mr. Tladi that it was regrettable that the topic was limited to crimes against humanity, as it would have been more effective for the Commission to extend the topic to cover genocide and war crimes.

29. With regard to draft article 5, which was acceptable in principle, he believed it would be useful and necessary to impose on States parties an obligation to criminalize crimes against humanity, including the different ways of contributing to and being associated with the commission of such crimes, under their domestic law. He would like clarification of the distinction between "aiding" and "assisting" that appeared to be made in paragraph 1. He agreed generally with the Special Rapporteur's approach to dealing with relations between hierarchical superiors and subordinates, and with what was said about the non-applicability of statutes of limitations and the proportionality of the punishment to the seriousness of the crime, although that requirement seemed to go without saying, except in respect of the death penalty problem raised by Ms. Jacobsson.

30. The points made by the Special Rapporteur concerning the capacity of legal persons to be held accountable and punished for crimes against humanity seemed to have led to a decision not to include such persons, with which he agreed, even though certain types of penalties (fines, seizure, dissolution) would be possible. The proposed solution seemed to be in line with article 25 of the Rome Statute of the International Criminal Court. That said, it was still possible, of course, to punish natural persons who sought to shield themselves behind legal persons, even though, as Mr. Kolodkin had noted, it should be left to each State to find a solution to that problem.

31. As to whether the prosecution of crimes against humanity could come under the jurisdiction of military courts, he did not see why that should not be possible, provided that the situation in question came under military jurisdiction at the domestic level and the military courts had the necessary independence and impartiality, which was not always the case, as could be seen from the jurisprudence of the European Court of Human Rights. With regard to the interesting issue of amnesty raised by Mr. Murase, there seemed to be no reference to the matter in either the draft articles or the Rome Statute of the International Criminal Court. However, persons granted amnesty at the national level would remain unpunished only so long as they were not prosecuted. In other words, a person could commit a crime against humanity and be exempt from any punishment at the national level, but that would not prevent the competent international tribunal from taking action. It therefore seemed that amnesties were possible but were not sufficient to allow perpetrators to escape punishment.

32. As to the three subparagraphs of draft article 6, paragraph 1, the links mentioned by the Special Rapporteur seemed to reflect the traditional rules on the matter. As Mr. Park had proposed adding, in paragraph 1 (*b*) on active personality, a reference to persons residing in the State in addition to the nationals of the State concerned, it would be interesting, before proceeding in that direction, to know whether at least some domestic legal orders provided for jurisdiction based on "active personality" resulting from residence. Another solution might be to limit that link to stateless persons and refugees. Noting

that Mr. Hmoud had proposed deleting the words "and the State considers it appropriate" in paragraph 1 (*c*) and replacing that subparagraph with a new paragraph 2 indicating that each State could establish jurisdiction if the victim was one of its nationals, he said that he would support that amendment, even though States that made use of that possibility did so because they considered it useful, and it therefore did not need to be spelled out.

33. He agreed with the Special Rapporteur that draft article 7, paragraphs 2 and 3, contained "useful innovations", and thus elements of progressive development – if that expression was still permitted – that were useful and even necessary. He had only two minor comments to make in relation to that draft article: first, the expression "preliminary investigation" should be used in the title and in the first paragraph in order to distinguish more clearly between such an incomplete initial inquiry and the full investigation (which was no longer "preliminary") described in article 8. Second, the second sentence of paragraph 2 could be deleted, as it was understood, and could be presumed, that the State would proceed promptly and impartially, and there was thus no need to lecture States in that regard.

34. He had no particular comments concerning draft article 8, but would recommend avoiding the expression "preliminary investigation", as the draft article dealt with an "investigation" to establish the relevant facts.

35. Draft article 9 dealt with the principle of *aut dedere aut judicare*. Paragraph 1 addressed the options available to the State, namely to submit the matter to its competent authorities "for the purpose of prosecution", or to "extradite" the person to another State or "surrender" him or her to an international criminal tribunal. The question that had been raised was whether a transfer to a "hybrid" tribunal would constitute "extradition" or "surrender". Like other Commission members, he considered that the issue should be dealt with on a case-by-case or, better yet, on a tribunal-by-tribunal basis. He shared the doubts expressed by Mr. Forteau concerning paragraph 2. They were perhaps due to the translation, but, in any case, the paragraph should be clarified or deleted.

36. Despite its seeming banality, draft article 10 was of utmost importance: throughout the proceedings, alleged offenders benefited from all the legal protections afforded to individuals under national and international law, including human rights law, regardless of whether they themselves had failed to respect human rights. The provision seemed appropriate, on two conditions. First, it should be specified that the "representative" of the State mentioned in subparagraphs (*a*) and (*b*) of draft article 10, paragraph 2, was one of the officers mentioned in article 36, paragraph 1 (*c*), of the 1963 Vienna Convention on Consular Relations. Second, it should be noted, preferably in the commentary, that one of the rights protected under draft article 10 was the right to proceedings of a "reasonable duration". It would not always be easy to comply with that requirement, as investigations into crimes against humanity could be long and difficult for reasons that were beyond the control of the State and its authorities, and that element must be borne in mind when determining whether proceedings had exceeded a "reasonable duration".

37. He believed that the proposed draft articles should be referred to the Drafting Committee, but recalled that, in his view, the outcome of the Commission's work should be a series of clear, concise articles that were as simple as possible and aimed at complementing, without contradicting, the Rome Statute of the International Criminal Court and fully realizing the subsidiarity inherent in the jurisdiction of the International Criminal Court.

38. Mr. PETRIČ said that the six draft articles proposed by the Special Rapporteur in his second report touched upon the most important topics that arose in the elaboration of a convention on the prevention and punishment of crimes against humanity and thus decisively contributed to that endeavour. Accordingly, all the draft articles should be sent to the Drafting Committee, which would have sufficient time to discuss them and to make changes and improvements. As a member of the Drafting Committee, he would make specific comments and drafting proposals concerning the draft articles in that context rather than in the plenary.

39. Similarly, it was not necessary to discuss the legal background and basis in customary international law of the Commission's exercise in codification and progressive development of international law. Although it was true, as indicated in paragraph 18 of the second report, that it did not appear that States regarded themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity, there was a clear trend in that direction in international law, from the International Military Tribunal at Nürnberg and the International Military Tribunal for the Far East to the special international courts established by the Security Council, such as the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, the Rome Statute of the International Criminal Court and the establishment and work of the International Criminal Court, several international treaties, statements by States, resolutions of the United Nations and other international organizations, and the jurisprudence of international and national courts dealing with crimes against humanity. The general consensus, based on the commonly recognized need to prevent and punish such crimes also in international law by establishing the obligation of States to criminalize them in their national laws and establish jurisdiction over them, seemed to be crystallizing. In that context, paragraph 138 of the 2005 World Summit Outcome document, in which the General Assembly declared that "[e]ach individual State has the responsibility to protect its populations from … crimes against humanity",[121] was worthy of mention. The need for and appropriateness of the Commission's endeavour to draft a convention to prevent and punish crimes against humanity had been confirmed in 2015, and when the topic had been added to the Commission's programme of work, by positive reactions from States in the General Assembly's Sixth Committee. Thus, there was increasing practice and *opinio juris* to support the prevention and punishment of such crimes at the international and national levels, including in the context of inter-State cooperation. The adoption of a convention would be an important step towards ending impunity and safe havens for the perpetrators of those crimes.

[121] General Assembly resolution 60/1 of 16 September 2005.

40. The proposed draft articles were crucial and sensitive, as they addressed issues that were often dealt with differently in national legislation as a consequence of significant differences in legal traditions, cultures, concepts and institutions in various States. In the proposed draft articles, in particular draft article 5, but *mutatis mutandis* in all of them, the Commission should not go too far in obligating States to harmonize their legislation. The Commission should not develop unduly concrete and specific stipulations that might dissuade States from acceding to the new convention. It was crucial to encourage States to accept the international legal obligation to criminalize crimes against humanity in their national laws, but it was necessary to show flexibility in order to do so. It was a question of harmonization and not standardization.

41. It had been said during the debate that the Special Rapporteur should make clear why he had opted for a specific solution or wording taken from an existing international legal instrument; it would no doubt be useful for him to do so in the commentaries. It would be safest and most convenient to follow, whenever necessary and possible, the wording of the most authoritative and generally accepted international instruments, such as the Rome Statute of the International Criminal Court. For example, in draft article 10, paragraph 2, it would be appropriate to reflect the wording of the Vienna Convention on Consular Relations.

42. Given that the distinguishing characteristic of crimes against humanity was that they were committed systematically and had more profound criminal goals and wider dimensions than other offences, special attention should be paid not only to those who murdered, raped or tortured, but also to those who "solicited" or "induced" others to commit such crimes. He therefore strongly supported the wording of draft article 5, paragraph 1. Those who had not personally committed murder, rape or torture but had, through their political activities, statements, propaganda campaigns and calls for "action" or "revenge", solicited and induced others to commit such crimes were more dangerous than those who responded to their solicitation and inducement.

43. As crimes against humanity were the most heinous crimes, he supported draft article 5, paragraph 3 (*b*), which provided for the non-applicability of statutes of limitations to such crimes. Most States were in agreement that the most serious crimes, such as genocide, torture and crimes against humanity, were not subject to any statute of limitations, and a failure to stipulate that in the draft convention would represent an unnecessary departure from general practice and consensus.

44. During the debate, the interesting problem of competing claims for extradition had been raised. The Commission should proceed with caution in trying to stipulate any order of priority. While it might, *prima facie*, appear that the extradition claim of the perpetrator's State of nationality should be given priority, that could result in more favourable treatment of the perpetrator as a national of that State; on the other hand, giving priority to the extradition claim of the State in which the crimes had been committed also had its drawbacks, bearing in mind, for example, the pressure of public opinion on the State. Besides, States had different constitutional and legal limitations concerning the extradition of their nationals and of foreigners. It would therefore be wise to leave it to the extraditing State to decide, in each case, which of the competing claims for extradition should prevail.

45. The provision concerning the principle of fair treatment in draft article 10 should not be overly detailed. The Commission members and some States had expressed doubts about military courts. Indeed, the independence of the courts was the main guarantee of fair treatment, but such independence was contingent on many factors, ranging from legal culture and traditions to the political and even ideological context of the State and the personal freedom and independence of the judge, which was crucial. Was the judge ready and able to take decisions independently, in accordance only with the law, ignoring the pressures and consequences he or she might face, and in spite of his or her own political, ideological or other views or preferences? In other words, both civil and military courts could either be independent or lack independence. Since institutions, guarantees and safeguards concerning fair treatment varied from country to country, it was important not to go too far in regulating "fair treatment" in draft article 10. However, the principle should be strongly affirmed for the perpetrators of crimes against humanity. He would not support a provision disqualifying military courts simply because they were military.

46. Another issue to which due attention should be paid, and which concerned all the draft articles, was the ratification by States – in other words, the acceptability – of the future convention. In order to avoid delays in ratification or refusals to ratify, the provisions should be clear and should avoid dealing with matters that remained controversial and would best be regulated under national law. Corporate responsibility for crimes against humanity seemed to be one such matter. In trying to regulate it in the draft articles, the Commission might be venturing into extremely controversial territory, at least at the current stage. He was stressing the issue of ratification because, in his view, if it took decades for the draft convention to be ratified by a significant number of States and to enter into force, that could be considered proof that its provisions were not accepted by States as international law.

47. Decisions concerning future work should be left to the Special Rapporteur. Nevertheless, more in-depth research and wisdom would be required in relation to the problem of retroactivity and especially the problem of reservations to ensure that the draft convention was attractive to States while at the same time making an important contribution towards the prevention and universal prosecution of crimes against humanity. It was clear that existing international courts, and any new courts that might be established at the regional level, could not achieve those objectives alone. Without effective criminalization, prosecution, jurisprudence and engagement at the national level, many such crimes would remain unpunished, as shown by the examples of Bosnia, Cambodia, Kosovo, Rwanda and Sierra Leone.

48. In conclusion, he wished to make two suggestions to the Special Rapporteur. First, since some States, including Slovenia, were working on a parallel project to promote

legal cooperation among States in prosecuting the most serious crimes, including crimes against humanity, the Special Rapporteur should try to coordinate his activities with those of the States concerned, as the two endeavours sought, albeit in different ways, to achieve the same goal, namely effective cooperation among States to combat such crimes. At a later stage, perhaps on completion of the first reading, the Special Rapporteur or even members of the Commission might wish to consult experts on criminal procedure with regard to the procedural provisions of the draft articles.

49. Mr. VÁZQUEZ-BERMÚDEZ said that he appreciated the Special Rapporteur's excellent second report and that, unlike some members who considered it excessively long, he did not find it particularly lengthy, bearing in mind that it served as the basis for six draft articles, which themselves were fairly well developed. That said, the Commission's maximum word count should ideally not be exceeded; to that end, limiting the number of draft articles covered in each report would be one way of reducing the length of reports and making their consideration easier for the members.

50. With regard to the approach adopted by the Special Rapporteur in dealing with the topic, he stressed that, while the draft articles were intended to serve as the basis for a future draft convention and the Commission would make a recommendation to that effect to the General Assembly, that did not mean that the work being done did not constitute part of the Commission's primary mission, namely the progressive development and codification of international law. To illustrate that point, he recalled that, at the Commission's sixty-seventh session, during the introduction of the Drafting Committee's report (A/CN.4/L.853), the Chairperson had noted that, in draft article 2, the phrase "whether or not committed in time of armed conflict" had been maintained because customary international law had evolved since the time of the International Military Tribunal at Nürnberg,[122] and it was now established that the existence of a link between such crimes and an armed conflict was no longer required.[123] That clearly would not prevent the Commission from drawing inspiration from the provisions of relevant international instruments and taking up those it considered most appropriate, bearing in mind the primary objective of the draft articles, namely the general obligation of States to prevent and punish crimes against humanity. In that regard, he recalled that, at the sixty-seventh session, he had highlighted that the prohibition of crimes against humanity was a rule of *jus cogens*, which had been recognized by the Commission and the International Court of Justice and other courts; that fact should be stated expressly in the preamble to the draft articles.

51. Turning to draft article 5, he noted that paragraph 1 consisted of a list of acts to be criminalized by States, including various forms of participation in the commission of an offence. It would be helpful if the Special Rapporteur could explain why he had drawn largely on the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance rather than on article 25 of the Rome Statute of the International Criminal Court. With regard to paragraphs 2 and 3, he supported the Special Rapporteur's decision to more or less reproduce article 28 of the Statute. Unlike paragraphs 1 and 2, paragraph 3 did not expressly specify, as it should do, that the measures to be adopted were legislative in nature. He was in favour of the proposal made orally by the Special Rapporteur to add to paragraph 3 (*a*) by citing, in addition to the order of a military or civilian superior, the order of a Government, as in article 33 of the Statute. In the same subparagraph, the words "or other" should be added after "military or civilian", so as to also extend the application of the provision to the commanders or superiors of non-State armed groups, who could not be considered either military commanders or civilian superiors. As amended, subparagraph (*a*) would read: "(*a*) the fact that an offence referred to in this draft article was committed pursuant to an order of a superior, whether military, civilian or other, is not a ground for excluding criminal responsibility of a subordinate".

52. In paragraph 51 of his second report, the Special Rapporteur noted that some States, including Ecuador, had recently adopted laws to implement the Rome Statute of the International Criminal Court that did not address the issue of command responsibility. Mr. Vázquez-Bermúdez pointed out that command responsibility was covered under article 80 of the Constitution of Ecuador, which provided that several serious offences, such as genocide and crimes against humanity, were not subject to statutes of limitations; that the perpetrators of such acts could not be granted amnesty; and that superiors could not argue that the offences had been committed by a subordinate, nor could subordinates argue that they had acted on the orders of a superior.

53. Given that crimes against humanity were among the most serious crimes and had consequences for the international community as a whole, he proposed amending draft article 5, paragraph 3 (*c*), to the effect that all offences referred to in the draft should be punishable by "appropriate penalties that take into account their extremely grave nature", in line with article 7 of the International Convention for the Protection of All Persons from Enforced Disappearance and article III of the Inter-American Convention on Forced Disappearance of Persons. In addition, although he supported the substance of paragraph 3 (*b*), he proposed amending the wording to make it clear that the non-applicability of any statute of limitations to crimes against humanity was valid for both prosecution and enforcement of sentences. The draft article could be completed with the addition of a new provision to the effect that the perpetrators of crimes against humanity could not be granted amnesty.

54. He noted that, in paragraph 41 of his second report, the Special Rapporteur indicated that, in recent years, corporate criminal responsibility had become a feature of many national jurisdictions, in some cases extending to international crimes, which had prompted calls for developing the law in that area. Mr. Vázquez-Bermúdez said that, in 2014, Ecuador had adopted a Criminal Code that provided for corporate criminal responsibility for international crimes. Furthermore, as the Special Rapporteur

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[122] The Charter of the International Military Tribunal is annexed to the 1945 Agreement for the prosecution and punishment of the major war criminals of the European Axis.

[123] See *Yearbook ... 2015*, vol. I, 3263rd meeting, p. 141, para. 9.

indicated in paragraph 42 of his second report, the Charter of the International Military Tribunal authorized it to designate any group or organization as criminal if one of its members had committed an offence covered by the Charter, thus enabling the Tribunal to convict several Nazi organizations. A provision establishing corporate responsibility had not been included in the Rome Statute of the International Criminal Court so as not to unduly expand the jurisdiction of the International Criminal Court, which dealt with individual criminal responsibility. The 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which gave the Court jurisdiction over offences committed by corporations, was an important new development in that regard.

55. Many national laws and various international instruments already contained provisions establishing corporate criminal responsibility. However, those instruments gave States leeway to establish corporate criminal responsibility in their legislation in accordance with their domestic legal principles. That flexibility was afforded by several international instruments, such as the International Convention for the Suppression of the Financing of Terrorism, the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the Council of Europe Convention on the Prevention of Terrorism. The establishment of corporate criminal responsibility in those instruments had not deterred States from becoming parties to them. In the light of the development of international law in that area, he was of the view that the draft articles should include a provision on that matter. Legal persons could be used to commit crimes against humanity, and the establishment of their criminal responsibility could help to prevent such crimes, punish the perpetrators and make reparations to the victims. It would thus be appropriate to add a new draft article based on article 26 of the United Nations Convention against Corruption, which reads:

Article 26. Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

56. Although he supported the substance of draft article 6, it would be useful to add a new paragraph providing that the State could exercise its jurisdiction when the alleged offender was resident in its territory, which would include stateless persons and refugees. Furthermore, the beginning of paragraph 3 should be amended, based on provisions such as article 22 of the International Convention for the Suppression of the Financing of Terrorism, so as to make it clear that the establishment by the State of other criminal jurisdiction in accordance with its national law must be compatible with international law.

57. Although international instruments did not generally establish a hierarchy of grounds that would justify the exercise of criminal jurisdiction by States, it would be useful to draft a provision on which States could rely when there were several competing grounds for establishing criminal jurisdiction. Ecuadorian criminal legislation, for example, provided that, in the case of offences that might give rise to the exercise of universal jurisdiction, the judge could determine which court was best placed to hear the case, ensure the protection of the victim and grant reparation. The draft articles should also include provisions on mutual legal assistance. If the State in which the alleged perpetrator of crimes against humanity had been arrested did not agree to extradite or surrender the latter to an international court and decided to submit the matter to its own competent authorities for prosecution, its authorities must request assistance from the judicial authorities of other States, in particular the State in the territory or under the jurisdiction or control of which the crimes against humanity were committed, and actively cooperate with them.

58. He agreed with the substance of draft article 7, particularly the emphasis on the temporal aspect. Since crimes against humanity were committed in the context of systematic and widespread attacks against the civilian population, they often took place over long periods. Consequently, bearing in mind the obligation of States to proceed to a prompt and impartial investigation, the State must investigate even while the crimes were being committed.

59. Regarding draft article 9, although the Special Rapporteur expressed a preference for the Hague formula concerning the obligation to extradite or prosecute, the wording of the draft article departed somewhat from it, and was less strict. In addition to the two options mentioned, exercise of national jurisdiction and extradition, a third should be given, namely the surrender of the alleged offender to a competent international criminal court. As that third option was not covered by the expression "obligation to extradite or prosecute", since a person could not be extradited to an international criminal court, the expression *aut dedere aut judicare* should be kept in the title, as *dedere* covered both extradition to another State and surrender to an international criminal court. In that regard, paragraph 1 should be reworded to link "extradites" only to "another State" and "surrenders" only to "a competent international criminal tribunal". The point of making that distinction was to prevent misinterpretations and avoid a situation in which, for example, a State whose national had been arrested by another State requested the latter to surrender the person to it, when in fact its objective was to shield the person from legal proceedings in the detaining State or prevent him or her from being surrendered to an international criminal court.

60. He supported the content of draft article 10, subject to any improvements the Drafting Committee might wish to make, such as including an express reference to the right of consular officers of the State of nationality of alleged offenders to communicate with them, visit them if in detention, converse with them and arrange for their legal representation, in accordance with article 36 of the Vienna Convention on Consular Relations. The Spanish-speaking

members of the Commission would have to closely examine the Spanish version of that draft article, particularly the use of expressions such as *trato justo* and *trato equitativo*, as well as *juicio justo*, *juicio imparcial* and *juicio con las debidas garantías*, as the Spanish versions of universal and regional human rights instruments were characterized by the diversity of terms used.

61. Concerning military courts, draft article 10, or at least the commentary thereto, should mention the tendency of national legal systems to limit the jurisdiction of military courts by restricting it to cases involving acts committed by military personnel in the exercise of their duties, and to exclude international crimes. Paragraph 192 of the second report could prove helpful in that regard. In conclusion, he said that he was in favour of sending all the new draft articles to the Drafting Committee.

62. Mr. SINGH said that he appreciated the Special Rapporteur's very thorough second report and oral presentation, as well as his efforts to bring the Commission's work on the topic of crimes against humanity to the attention of a range of stakeholders. He also thanked the Secretariat for its detailed memorandum on existing treaty-based monitoring mechanisms (A/CN.4/698). With regard to the scope of the draft convention, he agreed with other members who were in favour of confining it to crimes against humanity, and dealing with genocide and war crimes in a separate draft.

63. Noting that the Special Rapporteur had decided not to address corporate criminal responsibility, considering it more appropriate to leave it to each State to legislate on the matter, he said that this important matter should be addressed in a draft article providing that persons responsible for the management and control of a legal person that committed a crime against humanity must be held accountable.

64. Draft article 5, paragraph 1, was an important component of the draft articles. However, in order to more clearly distinguish between the main offence – crimes against humanity as defined in draft article 3 – and ancillary offences such as attempt, abetment and participation, the latter should be listed in a separate paragraph or subparagraph. The Commission had decided at its sixty-seventh session to reflect the definition of crimes against humanity contained in the Rome Statute of the International Criminal Court; it should do the same for ancillary offences, as had been proposed by some members. He supported the substance of draft article 5, paragraph 3 (*b*), which was in line with the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity.

65. The provisions of draft article 6 concerning the exercise of jurisdiction by a State in cases where the victim was one of its nationals were not clear. It would be preferable to adopt wording based on the provisions of the United Nations counter-terrorism conventions, such as the International Convention for the Suppression of Terrorist Bombings. Those provisions could also serve as a model to improve draft article 8 and draft article 9, paragraph 1. He shared the concerns of Sir Michael Wood regarding the appropriateness of including draft article 7.

66. In relation to draft article 9, paragraph 2, the Special Rapporteur had raised the question of whether sending someone suspected of the commission of crimes against humanity for trial before a hybrid court could be regarded as extradition to another State or surrender to an international court. However, as the Special Rapporteur had also noted, a future draft article could provide that obligations under the draft articles were without prejudice to States' obligations in respect of a competent international criminal court or tribunal. In any case, if a person suspected of crimes against humanity were surrendered to an international court or tribunal, it would probably be under the rules applicable to the court or tribunal in question. It was thus not necessary for the draft article to include a provision on that point.

67. With regard to draft article 10, paragraph 2, he agreed with other members that the provisions on consular protection should be brought into line with the relevant provisions of the Vienna Convention on Consular Relations. In closing, he supported sending all the draft articles proposed by the Special Rapporteur to the Drafting Committee.

68. Mr. KAMTO said that his comments would focus on three points: the approach taken to dealing with the topic, the scope of the topic and the draft articles proposed in the Special Rapporteur's second report.

69. On the first point, he noted that the interest in the topic among certain States had generated enthusiasm among the members and prompted them to call for the Commission to speed up its work. He had a number of comments concerning that approach. First, as several members had already recalled, the Commission had not been mandated by the General Assembly to develop a draft convention on the topic. In paragraph 4 of his second report, the Special Rapporteur noted that "[m]any States [had] indicated that they supported the drafting of the articles for the purpose of a new convention", but the actual number of States in question, according to the first footnote to the paragraph, was only 13. That did not even amount to a majority of the States that had expressed their views on the topic, and represented only a fraction of the 193 States Members of the United Nations. He recalled the uncompromising positions of some members who, when discussing the draft articles on the expulsion of aliens adopted on first reading, had defended to the hilt the idea that the Commission should not develop a set of draft articles to be used as a basis for a convention, on the grounds that some of the provisions involved progressive development rather than codification of the law.

70. However, the provisions proposed to date constituted, for the most part, progressive development. They essentially involved the adaptation, or transposition, of existing treaty regimes on certain serious international crimes to the topic of crimes against humanity. He was not criticizing the Special Rapporteur on that score, but it was important to bear that fact in mind. In order to maintain its credibility, the Commission should be careful not to vary its policy depending on the topic or to give the impression that it was particularly sensitive to the views not of States in general – which would be entirely legitimate and commendable – but of certain States thought to

have too much influence not only on the Commission's programme of work but also on its working methods. Although he would personally prefer that the draft articles on the topic serve as the basis for a convention that could contribute to the peace and security of humankind, the Commission must show consistency.

71. With regard to the scope of the topic, further discussion was required on the issue of the liability of legal persons, including corporations, which was addressed in paragraphs 41 to 44 of the second report, albeit in insufficient detail. The prohibition of crimes against humanity was a rule of *jus cogens* that applied to all, not only to State authorities in their individual capacity, but also to States themselves as legal persons. Already in 1974, General Assembly resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression, which was considered to reflect customary law, had established the principle of State responsibility. In those circumstances, it was difficult to see why the Commission would hesitate to admit that this rule of *jus cogens* also applied to corporations. By excluding them, the Commission would be making a political rather than a legal choice, or, more specifically, would be expressing a political preference without any legal justification. Moreover, such a choice would not only ignore the contemporary reality of corporate participation in the commission of certain serious international crimes, but would also run counter to the current evolution of international law.

72. The individual responsibility of business leaders was not a matter of particular debate, even in international law. The precedents set by the trials resulting from the Second World War were enlightening on that point. In the Nürnberg trials and the trials before the Allied military courts, 50 corporate leaders had been prosecuted. Not all of them had been convicted. The American military courts had held 12 trials involving corporations suspected of war crimes or complicity in such crimes, 3 of which had involved the leaders of the companies Krupp, I. G. Farben and Flick. It had been with those precedents in mind, as well as other more recent cases of involvement by corporations in the commission of serious crimes in countries in conflict, that former United Nations Secretary-General Kofi Annan had appointed a Special Representative on the issue of human rights and transnational corporations and other business enterprises. In a series of reports, the Special Representative had highlighted the increasing responsibility of major corporations and their leaders, particularly in conflict zones in which the worst international crimes were committed and in which the main actors were often financed by the illegal exploitation and export of natural resources. The recent cases of the Democratic Republic of the Congo and Sierra Leone were prominent examples, and the relevant reports submitted to the Human Rights Council in June 2008 had received overwhelming support, following which the Special Representative's mandate had been extended until 2011.[124] Among the Special Representative's tasks had been the consideration of how to improve access to justice and remedies for victims of such international crimes and mass human rights violations. In that regard, he recalled that, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the States members of the Southern African Development Community had already called for the jurisdiction of the International Criminal Court to be extended *ratione personae* to corporations and other legal persons and that, as mentioned by the Special Rapporteur in paragraph 43 of his second report, the Protocol on the Statute of the African Court of Justice and Human Rights had been amended in 2014 to expand the Court's jurisdiction to corporations.

73. It was already possible to take action under some national legal systems. For example, in the civil law of the United States, the Alien Tort Claims Act provided for a range of class actions and remedies for groups of victims who were non-nationals to apply for reparations from the United States federal authorities for harm suffered outside the country.

74. Furthermore, in September 2008, the International Commission of Jurists had published an extensive three-volume study[125] on the subject, which examined various aspects of corporate complicity in relation to the development of international criminal law and international humanitarian law. During the Commission's 2014 debate on the protection of the environment in relation to armed conflicts, some members had strongly argued, no doubt rightly, that corporations should be subject to criminal prosecution as legal persons when they caused environmental damage. It seemed strange, then, that they should be spared when they committed crimes against humanity or participated in the commission of such crimes, given that the principle of corporate liability was clearly acknowledged in the various conventions cited by the Special Rapporteur. The provision of the International Convention for the Suppression of the Financing of Terrorism on which the provision of the United Nations Convention against Corruption read out by Mr. Vázquez-Bermúdez was based could serve as a model for drafting an article on the matter. For those reasons, and for the ones lucidly explained by Ms. Jacobsson at the current meeting, a set of draft articles the scope of which did not extend to corporations would seem sclerotic and would contribute almost nothing new in relation to existing treaty regimes on the most serious international crimes.

75. In his view, the draft articles proposed by the Special Rapporteur were sometimes difficult to understand, but that was perhaps due to the French translation. In any case, he was in favour of referring them to the Drafting Committee, and would like the Commission to give the Committee a clear mandate to include corporations in the scope of the draft articles.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

76. The CHAIRPERSON invited the Second Vice-Chairperson to announce the composition of the Planning Group on behalf of Mr. Nolte.

[124] Human Rights Council resolution 8/7 of 18 June 2008, para. 4.

[*] Resumed from the 3292nd meeting.

[125] International Commission of Jurists, *Corporate Complicity and Legal Accountability*, vol. 1, *Facing the Facts and Charting a Legal Path*, vol. 2, *Criminal Law and International Crimes*, and vol. 3, *Civil Remedies*, Geneva, 2008. Available from the website of the International Commission of Jurists: www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes.

77. Mr. SABOIA (Vice-Chairperson) said that the Planning Group would be composed of Mr. Nolte (Chairperson), Mr. Caflisch, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Petrič, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Mr. Park, *ex officio*, and himself.

The meeting rose at 1 p.m.

3301st MEETING

Thursday, 19 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kamto, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)

[Agenda item 9]

Second report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to congratulate the Special Rapporteur on his detailed and comprehensive second report (A/CN.4/690), which dealt with a topic whose relevance could not be underestimated. The regrettable frequency with which crimes against humanity occurred in today's turbulent and dangerous world called for strong measures, legal or otherwise, aimed at preventing such crimes and punishing their perpetrators. A convention on crimes against humanity, solely by virtue of its existence, would help to stir the conscience of humankind and promote efforts to that end. His conviction about the need for the Commission to deal with the topic in a serious and profound manner was strengthened by, among others, cases of crimes against humanity in his own country, Mozambique. In that connection, he would strongly recommend that the Special Rapporteur should consult the report entitled "Summary of Mozambican refugee accounts of principally conflict-related experience in Mozambique", also known as the "Gersony report", which had been commissioned and published by the United States Department of State in April 1988.

2. In general, he agreed with the six new draft articles proposed by the Special Rapporteur in his second report. Draft article 5, which dealt with criminalization under national law, was of crucial importance, since, as stated by the Special Rapporteur in paragraph 15 of his second report, the prosecution and punishment of persons for crimes against humanity must operate at the national level to be fully effective. Furthermore, as other Commission members had correctly pointed out, clearly established measures to criminalize and punish crimes against humanity under national law were also necessary in order to abide by the fundamental criminal law principles of *nullum crimen sine lege* and *nulla poena sine lege*.

3. With regard to the wording of draft article 5, paragraph 2, he agreed that the most appropriate language to use was that of article 28 of the Rome Statute of the International Criminal Court. The Statute had become a landmark in the history of treaties and a yardstick against which to measure other legal instruments that aimed to punish the perpetrators of heinous crimes. It was therefore important that, whenever possible, the Commission should adhere to its letter and spirit. As to draft article 5, paragraph 3 (*b*), he concurred with the Special Rapporteur that the offences referred in the draft article should not be subject to any statute of limitations.

4. The issue of corporate criminal liability, to which the Special Rapporteur devoted paragraphs 41 to 44 of his second report, was an important one that warranted closer examination. While some members had argued that the matter should be left to the discretion of national legislators, he agreed with Ms. Jacobsson, Mr. Kamto and Mr. Vázquez-Bermúdez that it should be addressed in the body of the draft articles. The Commission must be guided by the object and purpose of the future convention and ensure that all impunity gaps were completely closed. He saw no reason why a corporation that had engaged in the acts defined in draft article 3[126] should escape liability under that convention; no corporate veil or indirect immunity should be allowed to cover any company that benefited from conflicts around the world. In order for the Commission to develop a more solid position on that issue, it would be helpful if a brief concept note could be prepared, together with a proposal for a draft article on corporate criminal responsibility.

5. In paragraphs 150 to 167 of his second report, the Special Rapporteur had provided an excellent overview of the all-important principle of *aut dedere aut judicare*, the core objective of which was to promote and enhance international cooperation in the fight against impunity. He therefore welcomed its inclusion in draft article 9, paragraph 1, which closely followed the so-called "Hague formula" and previous work of the Commission. He had no problem with draft article 9, paragraph 2, which was perfectly acceptable.

6. He endorsed the road map for the future programme of work, outlined by the Special Rapporteur in paragraphs 202 to 204 of his second report. The topic rested on a firm political and legal footing; any change of direction at the current juncture would be unwise. In conclusion, he supported the referral of the six draft articles to the Drafting Committee.

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[126] *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.

7. Mr. MURPHY (Special Rapporteur), summing up the discussion, said that he wished to thank Commission members for their contributions to what had been an exceptional debate. Although he would not be able to do justice in his summary to all the points raised by the 26 members who had spoken, he had paid very close attention to, and kept a record of, all the views expressed.

8. Mr. Murase had begun the debate by advancing a view as to the Commission's "usual mandate" of codification and progressive development, under which it was supposedly precluded from elaborating a draft convention. However, as pointed out by other members, it seemed clear that the Commission could, if it so wished, pursue a topic by formulating draft articles with the intention that they might ultimately form the basis of a convention. Indeed, article 15 of the Commission's statute defined the expression "progressive development of international law" as meaning, in part, "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". While article 16 of the statute acknowledged that the General Assembly could refer to the Commission a proposal for the progressive development of international law, article 17 expressly contemplated the drafting of conventions without such a referral and, in any event, the statute did not preclude the Commission from pursuing such an approach on its own initiative. There was thus no basis for claiming that the Commission was proceeding improperly with regard to its mandate under the statute.

9. Likewise, the manner in which the Commission was proceeding was fully consistent with its past practice. There was precedent for a special rapporteur to submit reports that oriented the project towards a draft convention – for example, the draft articles on the law of transboundary aquifers – without prejudice to any final decision that the Commission might reach at the end of the project. There was also precedent for the Commission to submit an instrument that it had expressly called a "draft convention", and not just "draft articles", such as had been done in the case of its draft convention on the elimination of future statelessness and its draft convention on the reduction of future statelessness.[127]

10. As Mr. Šturma had noted, the extent to which the project constituted codification of existing law or its progressive development depended on the particular draft article in question, not on whether the General Assembly had referred a proposal for progressive development to the Commission. For example, it was not possible to argue that the detailed notification requirements or dispute resolution requirements set forth in the Commission's 1994 draft articles on the law of the non-navigational uses of international watercourses[128] constituted codification of existing international law. For the Commission to have refrained from crafting such provisions in the belief that it was limited to codifying the law would have severely inhibited its ability to assist States in developing what had eventually taken the form of a convention on that topic. Consequently, there was no basis either for claiming that the Commission was proceeding improperly with respect to its mandate based on its past practice.

11. Finally, the 2012 topic proposal that had been adopted by the Commission in 2013 had stated quite explicitly that the Commission's objective was to draft articles for what would become a convention on the prevention and punishment of crimes against humanity.[129] Governments' reactions to the proposal in 2013, 2014, and 2015, as had been noted by Mr. Tladi and Mr. Wako, had been largely positive with regard to the objective. In any event, the fact remained that, each year, for the past three years, the General Assembly had taken note of the Commission's work on the topic, and neither the General Assembly nor any State had indicated that the Commission was operating outside its mandate.[130]

12. Differing views had been expressed in the debate as to whether, in the current project, the Commission was mostly codifying customary international law or mostly progressively developing the law. When engaging in progressive development, there was value in analysing existing treaties on matters other than crimes against humanity to determine whether they could serve as useful models for crafting the Commission's draft articles. Mr. McRae had suggested that such an approach might be problematic, since there was no objective basis for deciding what should and should not be included in the draft articles. While that might be correct to a degree, the Commission could take guidance from the standard provisions repeatedly used by States in widely adhered-to treaties that dealt with other crimes, since that would shed light on the kinds of rights and obligations that States embraced when seeking to prevent and punish criminal behaviour. The consistent use or absence of a particular provision in treaties to which the vast majority of States had adhered gave the Commission an objective basis for action in the context of the current project. With that in mind, he would pursue Mr. Forteau's suggestion that members of the Drafting Committee be provided with a document that connected each of the proposed draft articles to existing provisions in other treaties.

13. Mr. Caflisch and Mr. Tladi had indicated a preference for the topic to address genocide and war crimes, as well as crimes against humanity, while several other members, including Mr. Hmoud, Mr. Singh and Sir Michael Wood, preferred, as he himself did, to retain the scope that had been decided upon by the Commission in 2013.[131]

14. Mr. Hassouna had asked how the Commission's project related to the initiative launched by Belgium, the Netherlands and Slovenia in November 2011, and Mr. Petrič had proposed that the Special Rapporteur be in contact with relevant officials in those countries. In that regard, he could report that he had met with lawyers from the Ministry of Foreign Affairs and the Ministry of Justice of the Netherlands in The Hague in November 2015

[127] *Yearbook ... 1954*, vol. II, document A/2693, pp. 142 *et seq.*, para. 25.

[128] *Yearbook ... 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222.

[129] *Yearbook ... 2013*, vol. II (Part Two), annex II, p. 99 *et seq.*

[130] See General Assembly resolutions 68/112 of 16 December 2013, 69/118 of 10 December 2014 and 70/236 of 23 December 2015.

[131] *Yearbook ... 2013*, vol. II (Part Two), pp. 78–79, para. 170, and annex II, p. 99 *et seq.*

to discuss the matter. Although no draft text associated with the initiative had yet been produced, his impression was that the latter was both broader and narrower than the Commission's project. It was broader in that it would cover the crime of genocide and war crimes, but narrower in that it would focus exclusively on extradition and mutual legal assistance. Thus, as he understood it, the initiative would not, for instance, seek to impose an obligation on States to criminalize the conduct in question, to establish jurisdiction over offenders or to address issues of prevention. As noted in the first footnote to paragraph 15 of his first report,[132] a resolution on that initiative had been presented before the United Nations Congress on Crime Prevention and Criminal Justice in April 2013 but had been withdrawn after extensive debate in the Committee of the Whole, where several delegations had raised "serious concerns" regarding the competence of the Congress in that matter. Although it was unclear whether there was a better forum in which to pursue that initiative, he, along with the Netherlands officials, took the position that, rather than being competitors, they were united in a search for ways to improve inter-State cooperation with a view to preventing atrocities.

15. If the Commission decided to formulate commentaries to the draft articles, he would do his best to accommodate members' proposals in that regard. Every member who had taken the floor on the topic had been in favour of referring the six draft articles to the Drafting Committee. At the same time, most had expressed ideas for improvements, which he had carefully noted and which could significantly inform the drafting process.

16. With regard to draft article 5, Mr. Huang had argued that the Commission should not focus on the adoption of national legislation. Yet such a focus figured prominently in the topic proposal that the Commission had approved in 2013, and so, in his view, the Commission was past the point of saying that this was not something that it should do. Indeed, several members had applauded the approach taken in draft article 5, paragraph 1, of listing a series of "modes" of liability, without trying to regulate in detail exactly how those modes should operate at the national level. Mr. Hmoud, Mr. Kolodkin, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Tladi, Mr. Vázquez-Bermúdez and Mr. Wisnumurti had all seemed to endorse the approach of recognizing that national legal systems worldwide already had rules, jurisprudence and doctrine surrounding such concepts as "committing" an act, "attempting to commit" an act and "participating" in an act and that the Commission should not be trying to micromanage such matters. The approach tracked that taken in other treaties dealing with crimes, which essentially set down basic rules that States must follow, while at the same time allowing them to shape those rules within their existing legal systems. Mr. Petrič had nicely captured that approach with the phrase "harmonization yes, uniformity no". Other members, including Mr. Forteau, Mr. Singh and Sir Michael Wood, had stated a preference for more detailed language in draft article 5, paragraph 1, perhaps borrowed from the Rome Statute of the International Criminal Court. His own sense, however, was that some of the detail contained in the Statute had been included precisely because an entirely new institution was being created which did not already have a backdrop of rules, jurisprudence, and doctrine and which therefore had to be regulated in greater detail. In any event, while it was true that the Commission should avoid any conflicts with the Statute, it should not assume that all the detailed rules set forth therein could or should be grafted onto national legal systems, which had long-standing rules of their own.

17. That said, a balance clearly needed to be struck; some draft articles should be very detailed. Draft article 5, paragraph 2, which was drawn verbatim from the Rome Statute of the International Criminal Court, was such an article. He had initially considered having a more general provision on command responsibility but had ultimately concluded that there was value in pressing States to modernize and harmonize their laws on that issue. Most of the members who had spoken appeared to agree with that approach.

18. With respect to draft article 5, paragraph 3, several members had been in favour of including a reference to an "order of a Government"; doing so would improve the current text. Various suggestions had been made by, among others, Ms. Escobar Hernández, Mr. Niehaus and Mr. Wisnumurti, for merging or splitting parts of draft article 5. While he remained of the view that the current structure was correct, those suggestions could be considered by the Drafting Committee, if the draft article were referred to it.

19. Views on whether explicitly to address the criminal responsibility of legal persons had been about evenly split. Ms. Jacobsson had also raised the possibility of addressing the criminal responsibility of international organizations during, for example, peacekeeping operations. His own view remained that, for the purpose of answering the Commission's core concerns, it was not necessary to include the criminal responsibility of legal persons in the draft article and that doing so might render the draft articles less acceptable to States, especially given their reluctance to include such criminalization in most contemporary treaties, including the Rome Statute of the International Criminal Court.

20. The best course of action might be to stress three points in the commentary. First, that natural persons working for corporations and NGOs, including directors and managers, could be prosecuted under that article if they committed crimes against humanity. Second, that States could impose criminal responsibility or other sanctions on corporations and NGOs under their national law, if they so wished, since the draft articles did not preclude such action. Third, that precedents for such sanctions already existed in national and international law. The Drafting Committee might wish to consider such an approach.

21. Most members had supported the structure and text of draft article 6, with the amendment to paragraph 1 (*b*) that he had proposed in his opening statement. Some members had questioned the phrase in paragraph 1 (*c*) which indicated that passive personality jurisdiction

[132] See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/680, at p. 229.

should be exercised if "the State considers it appropriate". The formulation that he had employed was quite common in relatively recent treaties addressing crimes and it acknowledged the fact that many States did not wish to exercise such passive personality jurisdiction and even held that it was impermissible under customary international law for a State to do so. That formulation appeared to be a compromise approach that was acceptable to States; the matter could, however, be re-examined in the Drafting Committee if the draft article were referred to it.

22. The overall objective of draft article 7 was to promote the investigation of crimes against humanity and cooperation among relevant States, principally in order to ascertain whether a crime against humanity was being or had been committed and to lay the groundwork for identifying offenders, thereby allowing draft articles 8 and 9 to operate effectively. The key point to bear in mind with regard to draft article 7 was that it did not deal with State cooperation in the context of investigating and prosecuting a specific individual, but rather in the context of examining a general situation with a view to connecting specific individuals to the crimes committed. While many members, including Mr. Hmoud, Mr. Kolodkin, Mr. Murase, Mr. Saboia, Mr. Šturma, Mr. Tladi and Mr. Vázquez-Bermúdez, had considered that the overall objective of the draft article was a good one, they and others had indicated that its language could be improved. In particular, there had been concern about the use of the term "investigation" and confusion as to the exact relationship between draft article 7 and draft articles 8 and 9. Mr. Singh and Sir Michael had made the point that it was hard to deal with that subject in the abstract and that, in some situations, general cooperation might not be needed, in which case the draft article itself might not be needed. His own view was that, while context was important, the very nature of crimes against humanity was such that States in which those crimes occurred should be obliged to look into the matter, whether that action was called an "investigation" or some other term.

23. The reasoning behind paragraph 2 of the draft article had been that, since crimes against humanity would typically involve a large number of offenders, some of whom might well be foreign nationals, there was value in specifically calling for the cooperation of their State of nationality. As that kind of provision did not exist in other treaties on combating crimes, the concept and the text might be amenable to improvement.

24. It would also be useful to obtain States' general cooperation in identifying offenders, as indicated in paragraph 3. He disagreed with Mr. Kolodkin that such cooperation would be identical to that which arose with respect to mutual legal assistance, because the latter usually referred to situations where States afforded one another assistance in connection with criminal proceedings that had already been brought against a particular offender.

25. Some light might be shed on the idea animating draft article 7 by looking at the 2016 commentary of the ICRC on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I),[133] particularly the commentary to article 49 thereof, which asserted that "each State Party must provide in its national legislation for the mechanisms and procedures to ensure that it can actively search for alleged offenders" and that "a State Party should take action when it is in a position to investigate and collect evidence, anticipating that either it itself at a later time or a third State, through legal assistance, might benefit from this evidence, even if an alleged perpetrator is not present on its territory or under its jurisdiction". Similar action was what was at issue in draft article 7. It was nonetheless an area where caution was merited; he welcomed all the proposals that had been made for specific improvements to that draft article.

26. The few drafting suggestions made in connection with draft article 8 could be passed on to the Drafting Committee. While most members had been in favour of draft article 9, including the use of the "triple alternative", Mr. Kittichaisaree and Mr. Saboia had felt that the title of the article could be improved. However, he himself, like Mr. Vázquez-Bermúdez, would prefer to retain a term which was widely used as a convenient shorthand for the process dealt with in the draft article. While the question of whether "hybrid" criminal courts were international or national in nature was not of great significance with regard to the draft article under consideration, it might be with respect to the issues to be covered in a third report; he was therefore grateful for some of the insights offered by members on that matter.

27. Some members had expressed interest in a provision that would address what happened when there were multiple requests for extradition. He agreed with Mr. Petrič that caution was warranted in assigning priority to any particular State in such a situation. That matter was normally left to the discretion of the requested State, as provided for in article 16 of the 1990 Model Treaty on Extradition.[134] In any event, that was an issue which could be addressed in a future report containing a draft article on extradition procedures.

28. Turning to draft article 10, he said that, although some concern had been expressed about whether it took sufficient account of article 36 of the 1963 Vienna Convention on Consular Relations, it was interesting to note that none of the approximately 20 treaties on crimes which had been concluded since 1963 and which contained a provision along the lines of draft article 10 had seen the need to replicate article 36. The approach seemed to be that, so long as basic communication with a representative of the State of nationality existed, all the protections available for consular access would fall into place under the influence of the Vienna Convention on Consular Relations and associated customary international law. While replicating article 36 was certainly a matter that the Drafting Committee could consider, he was of the opinion that there was some value in acknowledging widespread treaty practice with respect to other crimes.

[133] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Cambridge, Cambridge University Press, 2016.

[134] General Assembly resolution 45/116 of 14 December 1990, annex.

29. While most of the members who had addressed the issue had expressed a preference not to include a provision prohibiting the use of a military court to prosecute a person for crimes against humanity, they had been in favour of stressing in the commentary that all courts, whether civilian or military, must accord fair treatment and a fair trial to the alleged offender and must have due regard for his or her rights.

30. As far as the future programme of work was concerned, no members had disagreed with the proposals made in paragraphs 202 and 203 of the second report, but some had suggested the inclusion of other subjects. He had taken note of those suggestions. As he had stated the previous year, he was of the view that the Commission's goal was to develop a useful, meaningful and effective series of draft articles which States and civil society would welcome because they were neither devoid of meaning nor overburdened with unattainable aspirations.

31. Mr. Petrič had encouraged consultations with experts in the area of criminal law and procedure. The workshop that he himself had organized in Nürnberg in November 2015 had been designed in part to accomplish that objective; the guidance that he had received on that occasion was reflected in the proposals contained in his second report. His hope was that a workshop to be held in Singapore in December 2016 would serve a similar purpose.

32. In conclusion, he hoped that, in the light of views expressed by members, the Commission would be in a position to refer all six proposed draft articles to the Drafting Committee.

33. Mr. KAMTO said that, although he was aware that it was the Commission's tradition not to reopen the debate on a topic after the Special Rapporteur's summing up, he wished to raise an issue of fundamental importance, on which he would like the Commission to take a clear decision. The Special Rapporteur, having acknowledged that members' opinions were evenly split on whether to include a provision explicitly dealing with the criminal responsibility of legal persons, had nevertheless maintained his position that it was unnecessary to do so. The main objections to the inclusion of such a provision that had been put forward during debates in plenary meetings had not been legal or technical; rather they had been of a political nature, or had centred on advisability. The basic contention that States would not accede to a convention containing a provision to that effect disregarded the fact that some States had actually been calling for one. As Special Rapporteur on the topic "Expulsion of aliens", he had bowed to the wishes of certain members who had been opposed to adopting a human rights approach to the subject. When members' views were divided, it was up to the Special Rapporteur to suggest a genuine compromise which, in the case of a draft article on the subject in question, could possibly take the form of the wording proposed by Mr. Vázquez-Bermúdez. He therefore requested a vote on the matter.

34. Sir Michael WOOD, supported by Mr. PETRIČ and Mr. TLADI, said that Mr. Kamto had raised an important point. The views expressed during the debate had clearly been divided. He suggested that the Special Rapporteur be requested to include the issue at hand in his next report, in order that, at the next session, the Commission in its new composition might take a decision based on detailed information compiled in the light of what had been said at the current session and the Special Rapporteur's considered recommendation. It would be preferable not to take a decision at the current session in the heat of the moment.

35. Mr. HMOUD said that he supported Sir Michael's proposal. The Commission had not really discussed the issue at length; it would be preferable to have some kind of report on the matter before considering it further. As he had indicated previously, it would be helpful to have the opportunity to consider options other than criminal sanctions, for example civil and administrative sanctions. However, it was important to bear in mind that, under the definition of crimes against humanity set out in draft article 3, individuals acting on behalf of non-State actors who committed such crimes could be held criminally responsible for those acts.

36. The CHAIRPERSON suggested that the Special Rapporteur prepare a concept paper and a draft article in line with the wording proposed by Mr. Vázquez-Bermúdez, which the Commission could discuss at the current session.

37. Mr. FORTEAU said that the Special Rapporteur had already dealt with the issue under discussion in paragraphs 41 to 44 of his second report and that the Drafting Committee therefore had enough material to adopt a position on it. That said, the question of the criminal responsibility of legal persons went beyond the scope of the aspects of the topic examined during the current session – since those paragraphs examined solely the obligation to criminalize crimes against humanity – and covered the entire set of draft articles. Moreover, he was uncertain as to whether the question arose solely in respect of corporations, since the current commentary to draft article 4 indicated that, while States could commit crimes against humanity, they could not be held criminally responsible therefor. Consequently, it might be worth examining the subject of criminal responsibility of legal persons which concerned the topic as a whole, after the adoption of the draft articles on first reading, at which point the Commission would have a better idea of the scope which it wished to give to the draft convention.

38. Mr. KAMTO said that the Commission should not try to dismiss such a difficult issue after the second report had devoted a number of pages to it and several members had referred to it in their statements. Of course, the Commission was perfectly entitled to defer the debate until the following year. It was not, however, being asked to develop a whole set of new or specific rules. In the past, Mr. Forteau and Mr. Saboia had provided examples showing that legal persons could bear criminal responsibility. He therefore failed to understand why the Commission was reluctant to address the matter. Since legal persons could not be exempt from a *jus cogens* rule, the

Commission could not decline to deal with cases where a legal person in the form of a corporation committed, or was an accessory to the commission of, a crime against humanity. He would have liked the Commission to decide at the current session to ask the Special Rapporteur to prepare a specific report on the issue with a view to drafting a provision.

39. Mr. HMOUD said that, as the term "legal person" might include registered charities, consideration would also have to be given to the question of whether criminal measures could be applied against such organizations. It should also be borne in mind that the point at issue was the attribution of an act to an individual who was subject to the proposed instrument and not the attribution of an act to a State.

40. Mr. MURPHY (Special Rapporteur), supported by Mr. FORTEAU and Mr. KOLODKIN, said that, although he was perfectly prepared to address the issue of corporate criminal responsibility in a future report or in a concept paper, it would be preferable to allow the Drafting Committee to consider various approaches in an effort to find one on which the Commission could agree. A possible solution might be to include language along the lines suggested by Mr. Vázquez-Bermúdez, or to deal with the subject in the commentary.

41. The CHAIRPERSON said that his preference would be for a brief concept paper and a short draft article to be prepared at the current session. In any case, serious consideration needed to be given to the points raised in paragraphs 41 to 44 of the second report.

42. Mr. SABOIA said that, although he had not referred to the issue in his statement during the plenary debate, he agreed with others that, in the particular case of the current draft articles and in certain regions, it was important that the question of the criminal responsibility of legal persons be addressed. He supported the course of action proposed by the Chairperson; a concept paper, to be discussed first briefly in the plenary, would provide a clearer basis for the Drafting Committee to consider the matter.

43. Mr. HASSOUNA said he agreed that it was an extremely important issue that had not been addressed in sufficient detail in the second report. In his view, the best way forward would be for the Special Rapporteur to develop a concept paper for consideration in the Drafting Committee. If the Drafting Committee was unable to come up with a solution, the matter could be reviewed in the plenary.

44. Mr. McRAE said that, although he could see merit in both of the proposed approaches, his problem with bringing the matter directly to the Drafting Committee was that it was a very small group and not sufficiently representative to ensure a balanced debate. He would therefore support the idea of preparing a concept paper or collecting further information before taking a decision on such an important issue.

45. Mr. ŠTURMA said that, as Chairperson of the Drafting Committee, he would prefer not to be in the position of having to develop a draft article only on the basis of the current debate and the four relevant paragraphs in the report under consideration, particularly as opinion seemed divided on the matter. Like the previous speaker, he would be in favour of the idea of preparing at least a short position paper, possibly incorporating the written proposal by Mr. Vázquez-Bermúdez.

46. The CHAIRPERSON asked the Special Rapporteur whether he would be able to prepare, together with Mr. Šturma, a paper for consideration by the plenary and subsequent referral to the Drafting Committee.

47. Mr. MURPHY (Special Rapporteur) said that he would be happy to assist in whatever way was useful. However, he would propose preparing the paper, based on the second report and the specific proposals made in the debate, as soon as possible for discussion in the Drafting Committee. While he was not opposed to having a further plenary debate on the issue, there was just one more plenary meeting before the Drafting Committee was due to begin work the following week, which would not allow much time for him to draft a paper. He did not understand the resistance to referring the issue directly to the Drafting Committee, particularly since many members on both sides of the argument would be in the Committee. The Commission could, of course, defer discussion of the issue until the second part of the session, although there would then likely not be enough time to incorporate whatever emerged from the debate in the annual report. Another alternative would be to include the issue in the third report and to have a full debate at the next session.

48. Mr. PETER said that, in his view, discussion of such an important issue should not be postponed; the Commission should try to develop a concept paper and possibly a draft article to inform the discussion first in the plenary and then in the Drafting Committee.

49. The CHAIRPERSON said that, as there seemed to be a consensus that the Special Rapporteur should prepare a short concept paper and a draft article, the only question was whether those texts should be discussed in the plenary or in the Drafting Committee.

50. Mr. MURPHY (Special Rapporteur) said that, in terms of timing, it would be preferable to bring the issue directly to the Drafting Committee, which might well come up with a solution so that the matter could advance at the same pace as other aspects of the draft articles.

51. Mr. KAMTO said that he supported the Special Rapporteur's proposal. As the Drafting Committee would be reporting back to the plenary, the Commission could revisit the question if it was not satisfied with the outcome.

52. The CHAIRPERSON said that he took it that the Commission agreed to the course of action proposed by the Special Rapporteur and wished to refer the six draft articles to the Drafting Committee.

It was so decided.

Identification of customary international law[135] (A/CN.4/689, Part II, sect. B,[136] A/CN.4/691,[137] A/CN.4/695 and Add.1,[138] A/CN.4/872[139])

[Agenda item 6]

Fourth report of the Special Rapporteur

53. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the identification of customary international law (A/CN.4/695 and Add.1).

54. Sir Michael WOOD (Special Rapporteur) said that he saw the eventual outcome of the Commission's work on the topic to be threefold: first, a set of draft conclusions with accompanying commentaries; second, a bibliography on the topic, which would include sections that corresponded broadly to the draft conclusions; and, third, a further study of ways and means for making the evidence of customary international law more readily available.

55. As he saw it, there were just two action points arising out of his fourth report: first, to decide whether to refer certain minor changes to the draft conclusions to the Drafting Committee; and, second, to consider whether to request the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available. The main action by the Commission at its current session would be to consider on first reading the 16 draft conclusions provisionally adopted by the Drafting Committee and the commentaries that he would shortly present to the Commission. He thanked the Working Group, chaired by Mr. Vázquez-Bermúdez, that had been set up to review an informal draft of the commentaries for its input, which would enable him to submit a greatly improved draft to the Commission in the coming weeks.

56. He was grateful to the Secretariat for its comprehensive and informative memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691). The memorandum first considered the text of Article 38, paragraph 1 (*b*) and (*d*), of the Statute of the International Court of Justice, as well as its *travaux préparatoires*, and then analysed the case law of various international courts and tribunals and summarized its findings in 22 specific and 3 general observations. In each case, it considered the extent to which the court or tribunal concerned had referred to decisions of domestic courts for the identification of rules of customary international law. In his view, the three general observations set out in the memorandum confirmed the Commission's approach to the role of domestic court decisions, as reflected in draft conclusions 6, 10 and 13.

57. He noted that memorandums by the Secretariat were frequently a valuable part of the Commission's work on a particular topic. He would welcome it if, when appropriate, the Secretariat might be invited to introduce its own papers at a meeting of the Commission. Perhaps the matter could be considered when the Commission next took up its working methods or when the next such study was produced. He was also grateful to the Secretariat for having posted on the Commission's website copies of the written responses that had been received from Governments to the Commission's requests for information on the topic since 2014.[140] Only one further response had been received since the previous session – a highly informative one from Switzerland, which shed light on many aspects of the topic.

58. There continued to be a good deal of interest in the topic, not only among Governments but also among NGOs, practising lawyers and academics. He had spoken on the subject at a number of universities and had participated in various meetings at which the provisionally adopted draft conclusions had been discussed, including a meeting of the Asian–African Legal Consultative Organization's informal expert group on customary international law. In addition, a growing number of articles and books made reference to the Commission's work on the topic.

59. As to the fourth report itself, which considered the Commission's work to date and possible future steps, it was divided into four sections and an annex; a fairly extensive bibliography would appear as annex II. He would welcome suggestions for additions to the bibliography, in any language, as it would be updated as the Commission proceeded with its work. In the introductory paragraphs of the fourth report, he recalled that once again in 2015 there had been a valuable debate on the topic in the Sixth Committee. Delegations had generally commended the Commission on the work accomplished so far and had, in particular, reiterated their support for the general approach followed in the draft conclusions provisionally adopted by the Drafting Committee. They had provided a number of useful suggestions, many of which he would try to address in the draft commentaries. Others, which essentially required drafting changes, could be considered at the current session, while yet others might require more significant or complex changes, which could more appropriately be considered on second reading.

60. As mentioned in paragraph 12 of of the fourth report, some delegations had asked whether the term "guidelines" might not be more appropriate than "conclusions", given the objective of providing practical guidance. In his view, the word "conclusion" was satisfactory, but the matter could be reconsidered on second reading if necessary. It had been suggested that draft conclusion 1 on scope could instead be taken up in a general commentary. He tended to agree with that suggestion; however, if the draft conclusions were read without the

[135] At its sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur (*Yearbook ... 2015*, vol. II (Part One), document A/CN.4/682). It then took note of draft conclusions 1 to 16 [15] provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions of the Commision (see *Yearbook ... 2015*, vol. II (Part Two), pp. 27–28, para. 60, and document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session).

[136] Available from the Commission's website, documents of the sixty-eighth session.

[137] Reproduced in *Yearbook ... 2016*, vol. II (Part One).

[138] *Idem.*

[139] Available from the Commission's website, documents of the sixty-eighth session.

[140] *Yearbook ... 2014*, vol. II (Part Two), p. 19, para. 29.

accompanying commentaries, the information contained in the current draft conclusion 1 might be lacking. Again, if deemed appropriate, such a change could be made on second reading. As reflected in paragraphs 19 and 20, the precise role of international organizations continued to be debated. It had been suggested that the reference in draft conclusion 4, paragraph 2, to the practice of international organizations, with the possible exception of the European Union, put such practice on the same level as that of States, and that the former did not contribute directly to customary international law. A suggestion had been made in that connection to delete that paragraph and either to explain in the commentary the roles that international organizations played or to deal with the matter in a separate draft conclusion. It had also been noted that the reference to international organizations was not entirely consistent throughout the draft conclusions as a whole, since in places the latter referred explicitly to State practice alone. He considered, however, that the practice of international organizations might well contribute to the creation, or expression, of customary international law. As the provisionally adopted draft conclusions made clear, that was only "[i]n certain cases", with the practice of States being "primarily" relevant.[141] However, he would endeavour to clarify the references to States and international organizations in the commentaries. Any more extensive restructuring would have to await the second reading.

61. As noted in paragraph 26 of the fourth report, some delegations and members of the Commission would prefer to see a separate conclusion on, or at least a specific reference in the commentaries to, the role of the Commission's output in the identification of customary international law. It had been said that such output did not easily equate to scholarly work, given the Commission's status and relationship with States as a subsidiary organ of the General Assembly. While he shared the understanding of the Commission's particular relevance, he believed that the matter would be best dealt with in the commentaries.

62. As indicated in paragraph 27 of the report under consideration, the inclusion of a draft conclusion on the persistent objector rule had been supported by almost all delegations who had addressed the matter in the Sixth Committee, indicating widespread agreement that the rule did form part of the corpus of international law. As the Special Rapporteur highlighted in his fourth report, the argument that, in practice, objections by a persistent objector were rarely upheld did not undermine the principle itself. Some delegations had expressed concern that recognizing the rule in the draft conclusions might destabilize customary international law or be invoked as a means to avoid customary international law obligations. He proposed that the commentary, like draft conclusion 15 itself, emphasize the stringent requirements associated with the rule. As indicated in paragraph 29 of the fourth report, there had been some concern that a draft conclusion on particular customary international law might be seen as encouraging the fragmentation of international law. Yet it was undisputed that rules of particular customary international law existed and might play a significant role in inter-State relations. Further guidance in the commentary as to how such rules were to be identified might thus prove useful.

63. In chapter II of the fourth report, some minor changes were proposed to the draft conclusions adopted by the Drafting Committee in 2014 and 2015. Although they could be left for second reading, he would prefer that they should be considered by the Drafting Committee at the current session. The exact changes were set out in annex I and affected the following draft conclusions: draft conclusion 3 (para. 2); draft conclusion 4: draft conclusion 6, paragraph 2; draft conclusion 9 (para. 1); and draft conclusion 12 (paras. 1 and 2).

64. The practical aspect of the topic addressed in chapter III of the fourth report – ways and means for making the evidence of customary international law more readily available – was closely related to the mandate given to the Commission in article 24 of its statute. The work done by the Commission, together with the Secretariat, in 1949 and 1950 to fulfil that mandate had been of huge practical significance.[142] Although the Commission's work continued to make an important contribution to making the evidence of customary international law more readily available, thorough enquiry into the two constituent elements of customary international law – a general practice and *opinio juris*, nevertheless posed significant challenges, which were compounded by the volume of available data – the various forms in which it was found and the absence of a common classification system to compare and contrast the practice of States and others. In addition, coverage of much of the practice remained limited, given that many official documents and other indications of governmental action were unpublished and thus unavailable. Thus, consideration by the Commission of additional ways and means for making the evidence of customary international law more readily available, taking into account the significant changes that had occurred since 1950, and perhaps making suggestions as to how those could be addressed, might assist those attempting to identify the existence and content of rules of customary international law. Several Member States had voiced support for such an undertaking during the debate of the Sixth Committee at the seventieth session of the General Assembly. He would welcome the thoughts of the Commission on whether and, if so, how the matter should be revisited. In any event, he would suggest requesting the Secretariat to prepare a memorandum on the ways and means for making the evidence of customary international law more readily available, to include the results of a survey of the present state of such evidence and suggestions for improving the process.

65. In chapter IV of his fourth report, the Special Rapporteur identified three components for the proposed future programme of work: a set of conclusions, with commentaries; a bibliography; and a further review of the ways and means for making the evidence of customary international law more readily available. If the Commission completed the first reading of the draft conclusions, with commentaries, at its current session, a second reading could take place at its seventieth session; at which

[141] See document A/CN.4/L.869, draft conclusion 4 [5] (available from the Commission's website, documents of the sixty-seventh session).

[142] See *Yearbook ... 1949*, vol. I, chap. V, pp. 283 *et seq.*; and *Yearbook ... 1950*, vol. II, document A/1316, Part II, pp. 367 *et seq.*

time it might also consider the proposed memorandum by the Secretariat, if finalized. States should be invited to send to the Commission written comments on the draft conclusions and commentaries by 31 January 2018. He hoped that States would provide initial observations during the Sixth Committee's debate at the seventy-first session of the General Assembly, and that others, including international organizations, NGOs and academics, would also provide their views.

66. If there was no objection, he would prepare a specific proposal for the drafting of a memorandum by the Secretariat, to be considered by the Commission, so that the Secretariat could begin making the necessary preparations.

67. Mr. TLADI said that he was grateful for the opportunity to consider the commentaries to the draft conclusions prior to the adoption of the report, when members would be limited to making superficial changes, owing to time constraints. Regarding the proposed changes to the draft conclusions, the amendment to draft conclusion 3 seemed largely cosmetic; he had no objection to it. As for draft conclusion 4, although he was not opposed to replacing the phrase "contributes to the formation, or expression" with the phrase "as expressive, or creative", he nevertheless preferred the original language. Without wishing to reopen the debate as to the relative emphasis to be given to the formation and identification of customary international law, he noted that such a change might further erode the "formation" element in the draft conclusions. While the word "creative" might serve the function of retaining whatever "formation" element remained, the meaning of the word in the context was unclear. For related reasons, he did not support the proposed changes to draft conclusion 12, paragraph 2.

68. He could not agree to the proposed deletion in draft conclusion 6, paragraph 2. Both reasons advanced by the Special Rapporteur for the deletion were unconvincing. The first reason, namely that resolutions adopted by international organizations or at intergovernmental conferences were already covered in forms of evidence of *opinio juris*, could presumably apply to most of the other forms set out in the same paragraph. The second reason given, that the list was merely illustrative, could also easily apply to the other forms of practice; it was therefore not clear why that particular form was being singled out. More importantly, there was an unfortunate trend to downplay the significance of resolutions, which constituted one of the most easily identifiable and accessible forms of practice. That was particularly significant given the point raised in chapter III of the fourth report that resource constraints affected the ability of some States to compile a digest of State practice. Lastly, he did not agree with the statement in paragraph 34 of the fourth report that conduct in connection with resolutions were "more often useful as evidence of acceptance as law (*opinio juris*)". The extent to which conduct in connection with the adoption of a resolution was more useful as practice or *opinio juris* ultimately depended on, among other things, the nature and content of the conduct in question, as well as the content of the resolution itself. He therefore opposed the proposed changes and did not support referring draft conclusion 6, if amended, to the Drafting Committee.

69. As to the proposed change in draft conclusion 9, he had a strong preference for retaining the original language, primarily on the grounds that the words "undertaken with" conveyed more forcefully the connection between practice and *opinio juris*. Notwithstanding the absence of such a notion in the draft conclusions or in the commentaries under consideration, the idea that *opinio juris* and practice must be connected was an important element of customary international law. He supported the Special Rapporteur's suggestion that the Commission revisit the issue of the ways and means of making evidence of customary international law more readily available, and that the Secretariat update its 1949 memorandum to that end. In so doing, the Commission should consider not only how to make practice more readily available, but also how to enhance its availability in a uniform manner to ensure that all practice, including that of resource-constrained States, was readily available.

70. Mr. MURASE said that several important issues remained pending and would need to be resolved before the Commission could complete its first reading of the draft conclusions and the commentaries thereto. Among other things, the Special Rapporteur's draft text provided no definition of customary international law, which seemed odd since the outcome of the Commission's work was meant to be a comprehensive set of conclusions on the topic. Nor was any reference made to the fact that customary international law, unlike treaty law, was binding on all States, without exception. Customary law could be created spontaneously and there was no way of knowing systematically when, where and how a rule of customary international law was created. That aspect should be clearly indicated as a word of caution to States. The fact that any official comment on customary international law made by a State or a State official could subsequently be used against that very State in future litigation, without warning, was yet more reason for States' legal advisers to be extremely cautious. The unwritten nature of customary international law, an aspect that was also not mentioned in the draft conclusions, provided some flexibility, but also created difficulties, for its application. For instance, many States required a statutory law to convict a criminal under the rule *nullum crimen sine lege*, on the grounds that no conviction could be made by customary law, given that it was unwritten.

71. If the draft conclusions were to be used by judges of domestic courts, the Commission should explain the status of customary international law in domestic law, another matter not addressed in the draft conclusions. It should be made clear that, since domestic constitutional systems varied with regard to the adoption or transformation of customary international law into domestic law, not all the draft conclusions were equally applicable to all States. The use of various words similar in meaning, such as "identification", "determination", "ascertainment" and "assessment", was confusing. If they were to be used interchangeably, their meaning should be clarified. Similarly, since the change in title of the topic,[143] it was not clear whether the term "identification" held the

[143] At its sixty-fifth session (2013), the Commission decided to change the title of the topic from "Formation and evidence of customary international law" to "Identification of customary international law" (*Yearbook ... 2013*, vol. II (Part Two), p. 64, para. 65.

same meaning as the term "evidence". Did it include the application of a given rule? Was "identification" an exercise to be carried out prior to application, and therefore confined to the intellectual recognition of the existence and content of a rule, or did it include a normative determination? If the process of determination was not simply an exercise of identification, but also included a subjective or inter-subjective interpretation and application of a rule of customary international law, then it necessarily concerned the question of the evidential value of State practice and *opinio juris*, which in turn raised the complex issue of the burden of proof. Generally speaking, it was unclear where the process of identification ended and where the processes of interpretation and application began. If it was not possible to provide a sufficiently clear explanation of the term "identification", it might be better to revert to the language in the original title of the topic, "evidence of customary international law".

72. The draft conclusions seemed to place State practice and *opinio juris* on a more or less equal footing. In reality, however, the density of State practice and *opinio juris* varied depending on the rule concerned, and there were numerous situations where State practice was precarious, conflicting or inconclusive, the *opinio juris* of States could not be clearly established, or there was a discrepancy between State practice and *opinio juris*. Furthermore, in the post-war world, *opinio juris* sometimes preceded State practice. All such situations needed to be explained if the draft conclusions were to become a useful guide to practice. While maintaining the two-element model at a theoretical level, the Commission should take a more flexible approach to the actual identification of the two elements, along the lines of section 19 of the London statement of principles applicable to the formation of general customary international law adopted by the International Law Association.[144] Under that approach, *opinio juris* could compensate for a relative lack of State practice, thus assuming a complementary function. Such an approach would also be in conformity with the general trend of decisions by the International Court of Justice, which in fact rarely demanded concrete evidence of either element.

73. Referring to article 15 of the Commission's statute, he said that doctrine was particularly important for the present topic, which was predominantly theory-dependent. He hoped therefore that the commentaries would refer extensively to academic writings in footnotes; simply including a bibliography at the end of the commentaries was inadequate. As for the reference to State practice and precedent in article 15 of the statute, he continued to be critical of the excessive reliance on the case law of the International Court of Justice to support commentaries to the draft conclusions on the topic at hand. The primary function of the Court was to settle disputes between parties, and not to develop international law, while the Commission's function was to codify and progressively develop international law for the whole world. Besides, as one writer had pointed out, the Court did not apply any coherent methodology with regard to its application of customary international law. Given the number of unresolved issues on the topic, the Commission should not rush to finish the first reading with the current membership. That said, he had no objections to the proposed amendments to the draft conclusions, which should be referred to the Drafting Committee.

74. Mr. MURPHY welcomed both the Special Rapporteur's fourth report and the memorandum by the Secretariat, the latter of which confirmed the soundness of the Commission's approach of regarding national court decisions both as a form of State practice and as a subsidiary means for determining the existence of a customary rule. He supported the proposed amendment to draft conclusion 3. As for draft conclusion 4, he continued to believe that existing State practice and jurisprudence did not support paragraph 2 as currently drafted; he therefore regarded both the original texts of paragraphs 1 and 2, and the proposed amendments thereto, as inadequate. The draft conclusion was misleading with regard to the role of international organizations in the formation of customary international law and would likely confuse the consumers of the Commission's work. The practice of international organizations in the identification of customary international law had not featured in any judgment of the International Court of Justice or, as far as he was aware, in any other international court. The inclusion of a reference to the relevance of such practice was, in his opinion, largely a product of theorizing, built principally around the anomaly of the European Union, which had ultimately resulted in a series of unsupported assertions that presented a distorted picture of international law. A number of Member States had also expressed concerns about the approach during their debate on the topic within the Sixth Committee. He therefore encouraged the use of more cautious language in draft conclusion 4, for example, by deleting, in paragraph 1, the word "primarily" and by inserting, in paragraph 2, the word "may" before the word "also". Doing so would allow for the inclusion of the practice of international organizations, but with stronger caveats than the phrase "In certain cases", in paragraph 2, currently provided.

75. Regarding draft conclusion 6, he remained unconvinced by the argument made by the Special Rapporteur to support his proposed deletion, in part because "conduct in connection with resolutions" potentially embraced not just a State's vote in favour of a resolution, but also other conduct that was fully consistent with such a vote. Even if one accepted the narrower understanding of what constituted conduct in connection with resolutions, it was not clear why the reference to "conduct in connection with treaties" should be retained. In both instances, the conduct at issue was not in the nature of "practice" for purposes of identifying customary international law. In other words, the act of ratifying a treaty seemed in the nature of *opinio juris*; for the real practice relevant to the existence of a customary rule in such a scenario, it was necessary to look elsewhere, such as to the consistency of State acts with the treaty rule, even *vis-à-vis* States who were not parties to the treaty. Therefore, if the clause in draft conclusion 6 relating to international organizations was deleted, there was a good argument for also deleting the clause

[144] "London statement of principles applicable to the formation of general customary international law" (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39. For the text of the London statement, see *ibid*., pp. 712–777. Also available from the website of the International Law Association: www.ila-hq.org.

that related to treaties. He supported the referral of all the Special Rapporteur's proposed amendments to the Drafting Committee, including any others that might be made during the Commission's first reading on the basis of the discussions in the Working Group.

76. He supported the Special Rapporteur's proposal to develop both a bibliography for the topic and a document on the ways and means for finding evidence of customary international law. Noting that the Codification Division had recently begun posting the written submissions of States on the Commission's website, he said that over time an extraordinary amount of information on State practice and *opinio juris* would thus become available for all. It would be useful if the written submissions from Governments to the Commission dating back to 1947 could be retrieved from the Commission's files and also uploaded to the website. There was now an astounding amount of information available online about the activities of Governments, legislatures and courts, much of which potentially related to international practice relevant to customary international law. Therefore, the Commission might consider making it a key objective to indicate not just the best ways to make evidence of customary international law available, but also the best ways to identify the most relevant, probative and reliable evidence. The future programme of work proposed by the Special Rapporteur was clear and appeared achievable.

The meeting rose at 1 p.m.

3302nd MEETING

Friday, 20 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Identification of customary international law (*continued*) (A/CN.4/689, Part II, sect. B, A/CN.4/691, A/CN.4/695 and Add.1, A/CN.4/872)

[Agenda item 6]

Fourth report of the Special Rapporteur (*continued*)

1. Mr. FORTEAU said that he wished to thank the Special Rapporteur for his fourth report (A/CN.4/695 and Add.1), which had many commendable qualities, not least of which its concision. He also wished to thank the Secretariat for its memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691), which was very useful and illuminating.

2. In chapters I and II of his fourth report, the Special Rapporteur had begun what could be referred to as a "first reading *bis*" of the draft conclusions provisionally adopted by the Drafting Committee and of which the Commission had taken note at the previous session without formally adopting them.[145] The Special Rapporteur was to be commended on his efforts to take account, in real time, of the observations made by Member States. At the same time, it was important not to radically change the Commission's normal procedures. At the first reading stage, the Commission should adopt what it considered appropriate to propose; it was at the second reading stage that the draft conclusions should be amended, if necessary, in the light of comments and observations made by States. The Commission should continue to follow that order if it wished to maintain its independence as an expert body.

3. He agreed with the Special Rapporteur that, in response to the observations made by certain States, the commentaries to the draft conclusions should "provide the necessary additional depth and detail". In particular, it should be ensured that sufficient examples were provided in the commentaries so that readers understood how to go about identifying customary international law in practice. He also agreed with many of the observations made by the Special Rapporteur in chapter I of his fourth report, particularly the fact that the draft conclusions aimed to assist in the determination of the state of customary international law at a particular time, and not to address the more general issue of how customary international law was formed. He also supported the Special Rapporteur's clarification in paragraph 26 of his fourth report that the particular role played by the Commission in the identification of customary international law, which extended well beyond "scholarly work", would be highlighted in the commentaries to several of the draft conclusions. Indeed, international courts and tribunals, particularly the International Court of Justice and the European Court of Human Rights, attached particular weight and particular authority to the work of the Commission, as noted by the Special Rapporteur in paragraph 44 of his report, in which he recalled that the process of codification by the Commission furnished a convenient way of discovering the actual practice of States. The commentaries to the draft conclusions would have to be very explicit on that point. Lastly, he supported the sensible statement by the Special Rapporteur to the effect that the practice of international organizations could, in itself, contribute to the formation or expression of customary international law in certain cases.

4. With regard to the amendments proposed by the Special Rapporteur in chapter II of his fourth report, since they involved only "minor" changes, he believed they could be dealt with by the Drafting Committee. The proposal in paragraph 35 was welcome, as it relaxed the definition

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[145] See *Yearbook ... 2015*, vol. II (Part Two), p. 12, para. 15; and document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session.

of *opinio juris*. In addition, as Mr. Tladi had pointed out, it would be useful to retain the reference to "conduct in connection with resolutions adopted by an international organization" in draft conclusion 6, paragraph 2.

5. Turning to chapter III of the fourth report, which in his view dealt with a crucial issue, he said that, as he had repeatedly argued since the beginning of the consideration of the topic, the draft conclusions on the method of identifying customary international law had meaning only if, in parallel, international law practitioners had effective access to the elements that supported such identification and thus the establishment of customary international law in a way that was truly representative of the international community as a whole. Failing that, the method codified by the Commission would remain a dead letter, as custom would reflect only the position of States that had the means to disseminate their practice. He therefore welcomed the Special Rapporteur's intention to examine the means of making the evidence of customary international law more readily available.

6. There were two aspects to the issue addressed in chapter III of the fourth report. The first, a normative matter that had to date been insufficiently explored by the Commission, involved determining what was meant by the word "available". Draft conclusion 7, paragraph 1, provided that account was to be taken of "all available practice" of a particular State, but it was necessary to know what was understood, from a legal perspective, by the word "available", whose definition would, of course, have an impact on the means of identifying customary international law. If "available" was taken to mean any document that existed, the task of those charged with identifying customary international law would be an impossible one, as it was difficult to see how all the practice of all the bodies of all States and international organizations could be searched for and found in a reasonable time frame. The matter would thus have to be considered further, and limits would have to be put on what was to be understood by "available" in the context of the draft conclusions and the identification of customary international law. Inspiration could be drawn, for example, from the regime applied by the International Court of Justice to "readily available" evidence, which could be used at all stages of the proceedings since it was supposed to be known to the parties. The Court's Practice Direction IX *bis*, which was available on its website,[146] provided in that regard that a document was considered readily available if it was part of a publication, in other words was in the public domain, and specified that the publication could be in any format (printed or electronic), form (physical or online, such as posted on the Internet) or on any data medium (on paper, on digital or any other media). It also stated that the publication was considered readily available to the extent that it was accessible both to the Court and the other party, which meant in particular that it should be possible to consult the publication within a reasonably short period of time. There was no need to specify references for documents whose source was well known which, according to the Court, covered United Nations documents, collections of international treaties, major monographs on international law and established reference works, for example. On the basis of those elements, it seemed that a particular effort should be made in the commentaries to help the users of the draft conclusions to determine the areas to which they should direct their research and how in-depth that research should be when it came to establishing practice and *opinio juris*. From that point of view, he supported the citation in the first footnote to paragraph 46 of the fourth report, which aptly stated that "one can never prove a rule of customary law in an absolute manner but only in a relative manner – one can only prove that the majority of the evidence *available* supports the alleged rule".[147] Such sensible limits should also be applied to the draft conclusions because, in their absence, the methodology codified by the Commission would make it impossible to recognize the existence of even the most minor rule of customary international law.

7. The second aspect to the issue addressed in chapter III was determining what the Commission could do to help enhance the dissemination of existing practice. On that point, he supported the Special Rapporteur's recommendation that it would be useful for the Commission to consider once more the issue covered in article 24 of its statute and his proposal that the Secretariat should be requested to provide an account of the evidence currently available by updating its 1949 memorandum,[148] including its recommendations. That said, times had changed and the Commission would have to take a slightly different approach. Since 1950, there had been two developments that had changed the way in which the question of availability of evidence was addressed and that necessarily had an impact on the recommendations the Commission could make in that regard. First, as had rightly been noted by the Special Rapporteur, there was an extraordinarily high number of publications, documents and examples of case law in the various branches of international law. In that context, what mattered most was not so much exhaustively collecting everything that existed, which would be impossible, but rather helping practitioners to find their way through the maze of publications by guiding them towards the most relevant sources for each subject. In other words, what practitioners needed was not an encyclopaedic digest, but rather a navigation system to help them get directly to the relevant source. The Secretariat's new memorandum should be prepared with that in mind, in the form of a general mapping of all available resources and the places, physical or electronic, where they could be found. Second, as the Special Rapporteur also noted, many States had major difficulties in disseminating their practice, for financial and practical reasons. The Commission should give some thought to the recommendations it could make in order to help those States, for example by recommending to the international institutions and organizations that financed university research projects that they allocate a portion of such funding to projects that would facilitate greater dissemination of the practice

[146] See www.icj-cij.org/en/practice-directions.

[147] M. Akehurst, "Custom as a source of international law", *The British Year Book of International Law 1974–1975*, vol. 47 (1977), pp. 1–53, at p. 13.

[148] *Ways and Means of Making the Evidence of Customary International Law More Readily Available: Preparatory work within the purview of article 24 of the Statute of the Internaitonal Law Commission*, memorandum submitted by the Secretary-General (United Nations publication, Sales No.: 1949.V.6). Available from the Commission's website, documents of the first session.

of States that had difficulty in doing so. Similarly, a call could be put out to universities to support thesis projects dealing with unexplored areas of international practice. International law journals should also more systematically include a review of national practices in international law. National societies of international law, some 50 of which had assembled in Strasbourg in 2015 at the initiative of the French Society of International Law, culminating in the establishment of a global network of national societies of international law, should also be called on to contribute. At the institutional level, although the resources of the United Nations were limited, other recommendations could be formulated with a view to enhancing the collection and dissemination of State practice. The United Nations Development Programme had played a role in that regard in some States, as had the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law; the Codification Division should also play a leading role in that regard.

8. With regard to chapter IV of the fourth report on the future programme of work, he wished to make a comment on the form the final outcome of the Commission's work should take. To the extent that the draft conclusions and commentaries thereto were intended to guide the work of practitioners, it would be useful to give some consideration to the best way of presenting the final text. In general, the Commission presented its projects in the form of a set of draft articles or conclusions, accompanied by commentaries. If the intention was to adopt a methodological guide, it might be useful to take a different approach, starting with a brief introduction to explain the purpose, objective and content of the project, before inserting the draft conclusions accompanied by their commentaries. A brief index of key terms would allow readers to consult specific elements of practice, pointing them to the conclusions in which they would find answers to their questions. The bibliography should be annexed to the project and, ideally, it should be presented thematically, again to make the reader's task easier.

9. Mr. HMOUD said that the Secretariat's memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law confirmed, as the Special Rapporteur had noted in his oral introduction to the fourth report, the draft conclusions on the subject, namely draft conclusion 6, on forms of practice, draft conclusion 10, on forms of evidence of acceptance as law (*opinio juris*), and draft conclusion 13, on decisions of courts and tribunals. The memorandum also showed that the jurisprudence of the international courts and tribunals recognized the dual nature – as forms of State practice and as evidence of *opinio juris* – of the decisions of national courts, and also cited them as subsidiary means to determine the existence and content of rules of law, including rules of customary international law.

10. The approach adopted by the Special Rapporteur and the Commission struck the right balance between the need to draft flexible and practical conclusions, on the one hand, and the need to substantiate such conclusions on a solid basis, such as the decisions of the International Court of Justice, the legal positions and practice of States and their organs or the opinions of legal scholars, on the other, all while maintaining the dynamism by which the rules of customary international law were created and identified. Furthermore, the commentaries were a particularly important component of the project and should be read together with the draft conclusions they were intended to explain, in order to give practitioners the specific guidance they needed in order to be able to identify the existence of a rule of customary international law at a particular point in time. Nonetheless, although the conclusions were intended to provide guidance to practitioners, they were and should be an expression of *lex lata*, and some of them might need to be revisited on second reading based on the reaction of States. That was particularly true with regard to the conclusions concerning the practice of international organizations inasmuch as it contributed to the expression and creation of customary rules, or the role of the conduct of other actors. It would also be helpful for States to give their views on the role of silence or inaction as both an objective and subjective element.

11. The Special Rapporteur and the Commission had rightly decided not to widen the scope of the topic unduly to issues related to the content of the rules of customary international law or the process of the formation of such rules and the element of time. Nonetheless, more substantial conclusions on certain issues, such as the transformation of a particular rule of customary law into a general customary rule, including the conditions relating to the general practice and the required *opinio juris*, could be useful for practitioners.

12. As to whether the term "guidelines" should be used rather than "conclusions" to describe the output of the work on the topic, he was of the view that the latter term should be retained because, even though they purported to be a guide to practice, they were in fact conclusions on the state of the law concerning the identification of customary international law.

13. Regarding the difficulty of assessing when a critical mass of practice accompanied by acceptance of law occurred, the Special Rapporteur rightly noted that this was not the purpose of the draft conclusions, which aimed to provide practitioners with the means to determine the existence and content of a rule at a particular time. It would be counterproductive to focus on the element of time, even though customary rules were created over time rather than at a particular moment in time.

14. Concerning the practice of international organizations, draft conclusion 4, paragraph 2, fell into the ambit of *lex ferenda* in that it indicated that, in certain cases, such practice contributed to the expression or creation of rules of customary international law because, as Mr. Murphy had explained, there was no evidence to support that proposition. Indeed, the forms of practice provided for in draft conclusion 6 involved only State practice. Paragraph 2 of draft conclusion 4 should therefore be worded in a less definitive manner, or at least confine the role of practice of international organizations at the current stage to an evidentiary role or a subsidiary role to State practice.

15. With regard to inaction or silence as a form of practice or evidence of *opinio juris*, it was necessary to exercise caution. It was therefore to be welcomed that both the relevant draft conclusion and the commentary thereto explained that, in order for silence to be considered a subjective element and proof of acquiescence, the State in question must have been in a position to react and the circumstances must have called for such a reaction.

16. The same caution had to be applied to the resolutions of international organizations and their evidentiary value in relation to the existence of a customary rule, as they had to be corroborated by State practice and *opinio juris*. As to whether the Commission's output came under the category of the "teachings" of the most highly qualified publicists, the subject of draft conclusion 14, he was of the view that, in the light of the Commission's statute and its mandate for the codification and progressive development of international law, its work should be treated separately, even though it was of subsidiary value in determining customary rules.

17. With regard to the persistent objector rule and the concept of particular customary law, due attention had been paid to the reservations expressed by certain delegations in both the relevant draft conclusions and the commentaries. As stated in the fourth report, the persistent objector rule was subject to stringent conditions, in accordance with *lex lata*. As for particular customary law, its existence was widely recognized by States and international courts and tribunals; not mentioning its rules would have no effect in terms of the fragmentation of international law, as they already existed under international law.

18. Turning to the proposed amendments to the draft conclusions, he did not have strong views on the amended wording of draft conclusion 3, since it did not change the content. It was understood that the evidence of the existence of each of the two elements must be assessed separately. He had no objection to replacing the word "formation" with "creation" in draft conclusion 4 to conform to the language used by the International Court of Justice. He welcomed the deletion of the words "contributes to" in paragraph 1, which made it clearer that the practice of international organizations did not have the same value as that of States.

19. Concerning draft conclusion 6, the proposed deletion of forms of practice involving "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" was not strictly necessary, since it was clarified in the commentary that such conduct should be considered more as evidence of acceptance as law than as practice. He had no objections to the proposed amendments to draft conclusions 9 and 12, although he believed it should be made clear in the commentary on the contribution of the resolutions adopted by international organizations to the development of customary rules that such resolutions did not themselves create customary rules, but could corroborate State practice or *opinio juris*.

20. Making documentation on customary international law more readily available was the aspect of the Commission's mandate, set out in article 24 of its statute, which had received the least attention. The Secretariat's 1949 memorandum and the Commission's report of the following year,[149] based on Mr. Hudson's working paper,[150] were the only two documents to address the issue. Many changes had taken place in the more than six decades since then: the quality of evidence reflecting State practice had improved, as had its volume; information technology had made such evidence more accessible; and there had been a proliferation of treaties codifying customary international law or creating new rules that were now part of general international law. Furthermore, much of the material available related to the practice of developed countries and States that wished to make their views on international law known. It would therefore be very useful if the Secretariat were to revisit the issue, as proposed by the Special Rapporteur; it should explain in its future study the weight to be given to the various examples of State practice and *opinio juris*, including the resolutions of bodies of international organizations; provide a categorization of diplomatic and political correspondence; and give examples of other acts of State that could be pertinent in establishing the existence of a practice, *opinio juris* or both. The study should also include examples of the practice and *opinio juris* of States that were less actively involved in international relations and whose international law practice was less developed. Examples should be provided concerning the treatment of silence in the context of practice and *opinio juris*, as well as the practice of international organizations that had contributed or could contribute to the creation of rules of customary international law. From a practical perspective, it might be very helpful for the Secretariat if the Commission were to ask the General Assembly, in its resolution on the Commission's report, to call on States to provide it with the necessary information for the study and respond to its enquiries.

21. Mr. HASSOUNA said that the review of the informal draft commentaries undertaken by the Working Group established for that purpose would certainly assist the Special Rapporteur in preparing the formal draft of his commentaries. The new method of work could be used for other topics under consideration; it had already been proposed in the past to circulate an informal draft of the commentaries among all Commission members so as to allow the Special Rapporteur to prepare his or her formal commentaries in the light of their views. Such a collective process of preparing draft commentaries or other legal texts could be considered in the years ahead as the Commission updated its methods of work.

22. He thanked the Special Rapporteur for widely consulting on the draft conclusions provisionally adopted by the Drafting Committee and participating in meetings at which they had been discussed, including a meeting of the AALCO Informal Expert Group on Customary International Law. He was gratified to learn that the Special Rapporteur seemed to consider the work of that Group as generally perceptive and constructive based on the Group's comments on the need for a rigorous and

[149] *Yearbook ... 1950*, vol. II, document A/1316, Part II, pp. 367 *et seq.*

[150] "Article 24 of the Statute of the International Law Commission", working paper by Mr. Manley O. Hudson, Special Rapporteur, *Yearbook ... 1950*, vol. II, document A/CN.4/16 and Add.1, pp. 24 *et seq.*

systematic approach to the identification of customary rules, the relevance of the practice of international organizations, the concept of "specially affected States" and the persistent objector rule.

23. Other comments made by the AALCO Expert Group were also worthy of mention, particularly given that the Secretary-General of AALCO had been unable to present them, as he had had to cancel his visit to the Commission. For example, the Group had noted that the outcome of the work should serve to protect State sovereignty; that only the exercise of State functions in the field of international relations was relevant to the formation of customary international law; that the evidence to be relied upon should be primary materials – secondary materials such as the decisions of the international courts and tribunals could be given weight only if they were well supported by primary materials; and that the two-element approach was the proper one, but that the uneven rigour with which international courts and tribunals applied it in their decisions to identify the rules of customary international law was a matter of concern. With regard to the relations between treaties and custom, the identification of a rule of customary international law should be conducted in the normal way, on the basis of the two-element approach, with treaties as part of the materials to be considered either as practice or acceptance as law.

24. The comments and suggestions made by States in the Sixth Committee in 2015 demonstrated that they were overwhelmingly supportive of the approach adopted by the Commission. As a result, the proposed amendments to the draft conclusions, set out in chapter II of the fourth report, improved the clarity and consistency of the provisions and were not controversial. Delegations had, however, expressed concern with regard to draft conclusion 4, paragraph 2, according to which "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law". Some delegations had argued that the paragraph should be deleted, but the Special Rapporteur appropriately took the view that the contribution of international organizations to the formation of customary norms was recognized under international law and should not be controversial. At the same time, he had also rightly proposed explaining in the commentary that the practice of international organizations must be appraised with caution, as they varied greatly in their membership and functions. It seemed helpful, both to alleviate the aforementioned concerns and to provide practical guidance to those called upon to identify rules of customary international law, which was the central aim of the Commission's work on the topic, to give examples of cases in which the practice of international organizations had been found relevant to the identification of customary norms.

25. As to the other proposals made by States in the Sixth Committee, they related to issues that had already been discussed in the Commission and on which the members' views had been fully expressed and, as such, there was no need to revisit them.

26. Chapter III of the fourth report dealt with the need to make the evidence of international customary law more readily available. It referred to various ways of achieving that objective, including the wide distribution of publications on customary international law, the publication of information provided by States in response to requests made by the Commission and the publication of State practice. In his view, there were a number of challenges in that regard: first, the financial implications for the Secretariat of preparing and disseminating such publications on a wide scale; second, the rather limited number of States, particularly developing States, that responded to the Commission's questionnaires; and third, the fact that only a small number of States published their practice. Despite those challenges, the Special Rapporteur's outline of the history of the Commission's previous work on the topic and the changes that had occurred in the meantime, including, in particular, the new forms of evidence and the new technologies available to access them, convincingly demonstrated that a renewed consideration of the issue by the Commission, which would take such changes into account, would be of significant benefit to practitioners. In that respect, he supported the proposal to request the Secretariat to provide an account of the evidence currently available by updating the General survey of compilations and digests of evidence of customary international law.[151] He also believed that an investigation into the Model Plan for the Classification of Documents concerning State Practice in the field of Public International Law of CAHDI could be a helpful starting point.[152] He considered acceptable most of the Special Rapporteur's proposed amendments to the draft conclusions in the light of the suggestions and comments made since the Commission's sixty-seventh session. However, he was of the view that they should be referred to the Drafting Committee for a final "clean-up", as the Special Rapporteur would say.

27. As to the future programme of work, it was his hope that the first reading of the draft conclusions and the commentaries thereto could be completed at the current session so that a second reading could take place in 2018, although amendments to the draft conclusions and their commentaries were still possible on both first and second reading. It would be useful to annex a bibliography to the report; in order to be truly comprehensive and representative, the bibliography should cite sources from all regions, legal systems and languages.

28. Mr. CANDIOTI, noting that the draft conclusions covered only one part of the topic under consideration, namely the identification of customary international law, when "locating" customary international law was just as important, said that all those who had taken the floor had highlighted the importance of preparing a memorandum on available evidence to update the 1949 study. That practical part – where to look for and find customary international law in the available sources – could take the form of an annex to the draft conclusions. He also supported Mr. Forteau's proposal to add an introductory note to precede the draft conclusions.

[151] *Ways and Means of Making the Evidence of Customary International Law More Readily Available …* (see footnote 148 above), Part Two, chap. I, pp. 9–87.

[152] Resolution (68) 17 of the Committee of Ministers of the Council of Europe, of 28 June 1968, appendix A. This Model Plan was amended in 1997; see Recommandation No. R (97) 11 of the Committee of Ministers of the Council of Europe, of 12 June 1997, appendix.

29. Mr. PARK thanked the Special Rapporteur for his introduction to his fourth report and for the addendum containing a selected bibliography, and welcomed the memorandum by the Secretariat on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law. He said that the 25 observations set out in the memorandum would help clarify the content of draft conclusions 6 and 13 with regard to the role of decisions of national courts in determining customary international law. He drew attention to the fact that, in the English version, the words "identification" and "determination" were used interchangeably, whereas in the French version both had been translated as *détermination*.

30. The fourth report was concise but provided a good summary of the comments and suggestions made by States concerning the 16 draft conclusions provisionally adopted by the Drafting Committee in 2014 and 2015, on the basis of which the Special Rapporteur had proposed amendments to some of the draft conclusions. In paragraph 27 of his fourth report, the Special Rapporteur stated that "[t]he inclusion of a draft conclusion on the persistent objector rule was supported by almost all delegations who addressed the matter in the Sixth Committee, indicating widespread agreement that the rule does form part of the corpus of international law". However, as the persistent objector rule was still controversial among scholars and there was insufficient State practice in that area, the aforementioned passage might be misunderstood by legal practitioners who were not so familiar with the theory of international law.

31. Concerning chapter II of his fourth report, the Special Rapporteur's proposed amendments to draft conclusions 3 and 9 were essentially editorial changes, while those to draft conclusions 4, 6 and 12 were substantive. With regard to the latter and, in particular, the proposed amendment to draft conclusion 4, he noted that, in paragraph 32 of his fourth report, the Special Rapporteur justified replacing the words "formation, or expression" with "expressive, or creative" on the grounds that this formulation drew inspiration from the language of the 1982 International Court of Justice judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. He was not convinced by the reasoning behind that proposed amendment, as the word "creative" in the English version seemed less commonly used than the words "formation, or expression".

32. As to draft conclusion 6, in which the Special Rapporteur proposed deleting the phrase "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" on the grounds that such conduct was more often useful as evidence of acceptance as law (*opinio juris*), in his view what was more important was whether States complied with or ignored the resolution adopted rather than how they had reacted when adopting the resolution. Their conduct in that context could become important evidence not only of acceptance as law (*opinio juris*), but also of the existence of practice; he would therefore prefer the text adopted by the Drafting Committee not to be amended.

33. Turning to draft conclusion 12, which dealt with the effect of resolutions of international organizations and intergovernmental conferences on customary international law, he noted that, in paragraph 37 of his fourth report, the Special Rapporteur stated that his proposal to delete the words "or contribute to its development" in paragraph 2 of draft conclusion 12 was intended to better focus the draft on the identification of customary international law and that the potential contribution of resolutions of international organizations and intergovernmental conferences to the development of the law could be covered in the relevant commentary. However, it was well established that such resolutions could contribute to the development of customary international law. Furthermore, the Special Rapporteur had himself acknowledged the pertinence of the issue of the formation of customary international law in paragraph 16 of his fourth report. Consequently, he would prefer to keep the text adopted by the Drafting Committee as it stood.

34. At the end of chapter III of his fourth report, on ways of making the evidence of customary international law more readily available, the Special Rapporteur said that he would welcome the views of members of the Commission on whether and, if so, how, the matter should be revisited. Given that the term "evidence" in the English version had been translated as *documentation* in the French version, the question might be interpreted as having to do with how to proceed effectively and appropriately with the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, as provided for in article 24 of the Commission's statute. However, in his view, that was not necessarily the most pressing question: in the information era, the question was rather how to collect and publish the relevant documents, on the one hand, and how to classify and evaluate such information, on the other. Moreover, the changing nature of customary international law should not be ignored. Indeed, State practice could be contradictory, inconsistent or evenly divided when it came to the implementation of certain international instruments. With respect to the United Nations Convention on the Law of the Sea, for example, the question of whether the "[r]ocks" referred to in article 121, paragraph 3, could be considered to be islands when they had been modified and enlarged by a State had not yet been decided. Similarly, there were differing interpretations of articles 58 and 59 of that Convention concerning whether a State could carry out military manoeuvres in the economic zone of another State without the latter's consent. Concerning the delimitation of the exclusive economic zone and of the continental shelf, provided for in articles 74 and 83 of the Convention, respectively, some States preferred the equidistance method, while others preferred the principle of equity, in view of the circumstances. The creation of an air defence identification zone could also be contrary to the rules of international law, particularly the freedom of the high seas. At the plenary meeting of the Conference on Disarmament in Geneva in 2016, many States had insisted on the need for the complete removal and destruction of nuclear weapons from nuclear arsenals, relying on the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. Was that the sign of the emergence of new *opinio juris*?

Or were nuclear-weapon States trying to test draft conclusion 15 on the persistent objector rule *vis-à-vis* emerging rules of *jus cogens*?

35. He did not have any clear answers on those issues but, through those examples, he wished to emphasize that it was not sufficient to compile the evidence of customary international law, but also important to accurately analyse State practice and select the most reliable evidence for collection or publication. The question of whether and, if so, how, the matter should be revisited should be put to States and be included in the annex to the draft conclusions, as had been done for the conclusions on the reservations dialogue adopted by the Commission in 2011, which had been annexed to the Guide to Practice on Reservations to Treaties.[153] States and international organizations should periodically review and publish their practice concerning customary international law because the cooperation of States would be crucial to the availability of documentation.

36. Ms. ESCOBAR HERNÁNDEZ thanked the Special Rapporteur for his fourth report on the identification of customary international law and commended him on the work he had carried out during the quinquennium, thanks to which the Commission would be able to adopt all of the draft conclusions and commentaries thereto at the current session. She said that the Special Rapporteur had faithfully followed the workplan he had announced in 2012; the result he had achieved largely corresponded to the objective he had set, namely the preparation of a document to help legal practitioners, particularly at the national level, to identify the existence of customary rules and their content.[154] She had no doubt that, under the capable chairpersonship of Mr. Vázquez-Bermúdez, the Working Group tasked with examining the informal draft commentaries proposed by the Special Rapporteur would be able to present a new version of the draft for consideration and adoption in the plenary.

37. She also wished to express her sincere congratulations to the Secretariat for its memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law. The highly interesting and well-structured memorandum added considerably to an understanding of the reasoning followed by international courts and tribunals in their consideration of the decisions of national courts. The memorandum, particularly general observations 23, 24 and 25, which were especially important, should be reflected in the final outcome of the Commission's work, for example in the commentaries, and more specifically in the general commentary mentioned in paragraph 13 of the fourth report.

38. Before addressing the amendments proposed by the Special Rapporteur, she wished to comment briefly on two issues touched on in paragraphs 12 and 14 of the fourth report: the final outcome of the Commission's work – conclusions or guidelines – and the statement that the conclusions and commentaries thereto should be read together as an indissoluble whole. Those two issues were closely linked, since the outcome of the work would largely depend on the content of the draft conclusions and commentaries thereto. It should be noted in that regard that their current form did not seem fully consistent with the stated objective of adopting a "guide to practice". The Special Rapporteur's proposal to wait until the second reading to decide on the final outcome of the work thus seemed a sensible one. With respect to Mr. Murase's proposal to include the bibliographical references in the final outcome of the project, she was of the view that the contribution of teachings to the identification of customary international law could not be ignored in the commentaries, particularly as, according to the draft conclusions, teachings constituted a "subsidiary means" of identification. It thus did not seem justified to delete all bibliographic references from the commentaries, although an effort should be made to ensure that they were concise. The Special Rapporteur had made an effort to draw up a bibliography that helpfully provided the relevant references systematically and in groups. In addition to individual references to particular teachings, the commentaries could include a generic reference to the bibliography, and mention could be made of the role of teachings in a general commentary. She supported the approach outlined by the Special Rapporteur in paragraph 16 of his fourth report, which was more balanced in respect of the debate in the Commission on the pairing of identification/formation of custom.

39. Turning to the Special Rapporteur's proposed amendments to draft conclusions 6 and 12 and the question of the weight to be given to the practice of international organizations, she said that such practice undeniably contributed to the formation of customary international law, both directly and through the will expressed by States during the process of adopting resolutions and through their subsequent conduct in that regard. That contribution was not in any way extraordinary or exceptional; quite the opposite, in fact. She could therefore not support the amendments proposed by the Special Rapporteur concerning those two draft conclusions. The phrase "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" referred to a relevant form of practice that must be taken into account in the identification of customary international law. The Special Rapporteur's proposal to delete the word "cannot" in draft conclusion 12, paragraph 1, was also inappropriate, as the paragraph would be overly categorical if thus amended. It would call into question the relationship between the resolutions of international organizations and customary international law and would not accurately reflect reality. Furthermore, deleting the words "or contribute to its development" in draft conclusion 12, paragraph 2, would be to disregard the debate in the Commission on that point. Given that the reference to international organizations was the result of a compromise between the various proposals made by members, it would be ill-advised to amend the version adopted on first reading.

40. The concerns expressed by certain States, which the Special Rapporteur described in paragraph 25 of his fourth report, could be better addressed through the commentaries, including by referring to several objective indicators of the contribution of the resolutions of international organizations. It was also important to clearly highlight the difference between the role of States, international organizations

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[153] *Yearbook ... 2011*, vol. II (Part Two), chap. IV, p. 26, and *ibid*., vol. II (Part Three) and Corr.1–2, p. 23.

[154] See *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/653.

and other non-State actors in the process of forming customary law and, consequently, the differing relevance of their respective practice for the purpose of identifying the material element of custom. Since that distinction was adequately reflected in the current draft conclusion 4, that provision should be left as it was. Any amendment would only upset a delicate balance and could give the impression that the Commission wished to minimize the contribution of the practice of international organizations.

41. She had no objection to the proposal to replace, in draft conclusion 4, the word “formation” with “creation”, as it was not a substantive amendment. However, it seemed that it referred, at least in the Spanish version, to an intentional element, which was not really in line with the informal nature of the customary process. If that proposal were accepted, the necessary clarification would have to be provided on that point in the commentary.

42. She agreed with the Special Rapporteur’s comments concerning the special rules on the persistent objector and particular custom, which adequately reflected the Commission’s previous work. A set of draft conclusions on the identification of customary international law would not be complete without an express reference to particular custom, particularly regional custom. She also supported the Special Rapporteur’s observations on the issues to be addressed in the commentary. His comments on the persistent objector were also relevant, although it should be borne in mind that States sometimes made objections on a purely provisional and strategic basis before expressing a definitive position, which often led to the rule in question being ultimately accepted. Perhaps that point could be reflected in the commentary.

43. The Special Rapporteur’s proposal to indirectly reflect in the commentaries to the relevant draft conclusions the role of the Commission in the identification of customary international law was not the most appropriate solution, as it did not take into account one particularly important element: the Commission was not a “university” body or similar structure, but a subsidiary body of the General Assembly tasked with the codification and progressive development of international law. Accordingly, it had contributed and was called on to contribute significantly to the process of identifying customary international law, as illustrated by the repeated references to its work by international courts and tribunals, for example. The best way of resolving the issue would therefore be to draft a separate draft conclusion. Once again, referring to the work of the Commission in the commentary to the draft conclusion on teachings was not the most appropriate solution. She supported the Special Rapporteur’s proposals concerning the future programme of work and agreed that it would be very useful for the Secretariat to prepare a report on the means of making evidence of customary international law more readily available. It had been many years since the publication of the first study on the subject; the changes that had taken place following the creation of the Internet and new technologies must be taken into account to ensure better representation of the various legal cultures and different regional and interest groups. In conclusion, she supported referring the proposed draft conclusions to the Drafting Committee.

44. Mr. KOLODKIN thanked the Special Rapporteur for his introduction to his fourth report and for his informal draft commentaries, which the Working Group had already had the chance to consider. He also thanked the Secretariat for its memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law.

45. He supported most of the specific amendments proposed by the Special Rapporteur. However, he did not consider appropriate the proposed amendments to draft conclusion 4, paragraph 1, particularly with regard to the Russian version, even though they had been inspired by the judgment of the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. As originally worded, paragraph 1 stated that the practice of States, while important, only contributed to the formation or expression of rules of customary international law. If amended as proposed by the Special Rapporteur, it might be interpreted to mean that practice could, in itself, create a rule of customary international law. In his view, paragraph 1, as currently worded, was not incompatible with the Court’s judgment and there was no reason to amend it.

46. Concerning the Special Rapporteur’s proposal to replace the word “establishing” with “determining” in draft conclusion 12, paragraph 2, he would prefer the verb “determine” not to be used systematically throughout the draft articles. That word was generally associated with authoritative decisions by courts, tribunals and other competent bodies, such as the International Court of Justice, with respect to the existence of rules of customary international law and their content, while the English word “identification” generally referred to the establishment of the existence of customary rules and their content, not only by the aforementioned bodies, but also by practitioners of international law. Accordingly, it would be preferable to use “identification” in the English version or to use “identification” and “determination” interchangeably. He would like his comments to be taken into consideration by the Drafting Committee.

47. Although the Special Rapporteur’s proposal to request the Secretariat to prepare a report on the evidence of customary international law seemed at first glance interesting, he was of the view that the Commission should not rush to take a decision on that matter. The United Kingdom had recently submitted to CAHDI a proposal to update the amended Model Plan for the Classification of Documents concerning State Practice in the field of Public International Law, which was along the same lines as the Special Rapporteur’s proposal. The proposal by the United Kingdom had not garnered much enthusiasm within CAHDI, perhaps because its implementation would require the mobilization of resources not available to all States. Consequently, he proposed that the Commission limit itself for the time being to requesting the Secretariat to prepare the document in question, without specifying, as the Special Rapporteur had done in paragraph 49 of his fourth report, that this would constitute an initial step. Once members had received the document, they could resume consideration of the matter. It would be worth consulting States in order to ascertain whether they considered it appropriate for the Commission to deal with that subject.

48. Mr. PETRIČ said that he had doubts about the appropriateness of the Special Rapporteur's proposed amendments to draft conclusions 6 and 12. However, as the proposals were editorial in nature and did not give rise to any objections concerning their substance, he was sure that the Drafting Committee would be able to resolve the problems raised. With regard to the future programme of work, he unreservedly supported the Special Rapporteur's proposal that the ways and means of making the evidence of customary international law more readily available continue to be considered, since it was a crucial problem that required long-term solutions.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

49. The CHAIRPERSON invited the Chairperson of the Drafting Committee to announce the composition of the Drafting Committee on crimes against humanity.

50. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of crimes against humanity was composed of Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood, together with Mr. Murphy (Special Rapporteur) and Mr. Park (*ex officio*).

The meeting rose at 11.55 a.m.

3303rd MEETING

Tuesday, 24 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Identification of customary international law (*continued*) (A/CN.4/689, Part II, sect. B, A/CN.4/691, A/CN.4/695 and Add.1, A/CN.4/872)

[Agenda item 6]

Fourth report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the identification of customary international law (A/CN.4/695 and Add.1).

2. Mr. ŠTURMA said that he wished to commend the Special Rapporteur on his fourth report, which was well structured, clear and well documented, and to thank the Secretariat for its extremely useful memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

3. Like Mr. Forteau, he was not convinced that the Special Rapporteur's proposal to modify, in the light of comments made by States, some of the 16 draft conclusions provisionally adopted by the Drafting Committee[155] was wise at the current juncture. That said, some of the proposed modifications, namely those relating to draft conclusions 3, 4 and 9, were purely a matter of drafting and were mostly acceptable. He would therefore confine his comments to the proposed amendments to draft conclusions 6 and 12, which were more substantive in nature.

4. The reasons given by the Special Rapporteur in paragraph 34 of his fourth report for the proposed deletion, in draft conclusion 6, paragraph 2, of the phrase "conduct in connection with resolutions adopted by an international organization or an intergovernmental conference" was unconvincing. First, while such conduct might often be useful evidence of *opinio juris*, it could also be relevant as State practice, depending on the kind of conduct in question. Put simply, it was important to distinguish between words and deeds. Second, the same paragraph of draft conclusion 6 included as a form of practice "conduct in connection with treaties". He agreed with the Special Rapporteur's analysis regarding the role of treaties contained in paragraph 24 of his fourth report, in particular the assertion that ascertaining whether a conventional formulation corresponded to an alleged rule of customary international law could not be done simply by looking at the text of a treaty, but that in each case the existence of that rule would have to be confirmed by practice. If that was so, then a particular importance would be attached to the practice of third States. He therefore saw no major difference between the conduct of such a State in connection with a treaty, which was not binding on it as treaty law, and the conduct of a State in connection with recommendatory resolutions of international organizations or conferences. In both cases, it was the conduct of the State that was able to form a custom-creating practice.

5. Concerning draft conclusion 12, he supported the view that a resolution adopted by an international organization or an intergovernmental conference did not, of itself, create a rule of customary international law. However, like other colleagues, he was against the deletion of the phrase "or contribute to its development" in the second paragraph, since he saw no reason to deny that such a resolution might also contribute to the development of customary international law.

6. With regard to other aspects of the fourth report, he mostly supported the analyses presented by the Special Rapporteur, including his analysis of particular customary international law contained in paragraph 29. He agreed that

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[*] Resumed from the 3300th meeting.

[155] Document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session.

some rules which originated in one region might ultimately be embraced as part of general international law.

7. A further review by the Commission of ways and means for making the evidence of customary international law more readily available would be most welcome. Databases covering State practice in the field of public international law, such as those developed by CAHDI, might be a good model for such an endeavour.

8. In conclusion, he recommended that all the draft conclusions be referred to the Drafting Committee.

9. Mr. LARABA congratulated the Special Rapporteur on the masterly way in which he had made a particularly complex subject eminently accessible. He said that he also wished to thank the Secretariat for its excellent memorandum, which would help judges, government officials and practitioners to appreciate the importance of the interaction between domestic law and international customary law.

10. He endorsed the view that the proposed minor modifications to the draft conclusions be examined in the Drafting Committee. The Special Rapporteur's detailed analysis of the debates in the Sixth Committee showed that States generally accepted the draft conclusions, but that some questions still remained as to the nature of customary international law, its formation and the crucial point in time at which a customary rule emerged. It would undoubtedly be wise to provide answers to some of those questions in the commentaries and to defer a response to others, such as the use of the term "conclusions", until the second reading.

11. Turning to chapter III of the Special Rapporteur's fourth report, he said that improving the accessibility of evidence of customary international law was indeed of paramount importance. While advances in information technology had completely transformed the way in which access to such evidence could be made available, and members had made some valuable suggestions in that connection, it had to be remembered that those developments did not concern a very large number of States, contrary to what was said in the passage cited in the last footnote to paragraph 43 of the fourth report. Similarly, he was sceptical whether those advances had eliminated the gap between States, and by that he did not mean States' reluctance to place manifestations of their practice on record, but rather an issue discussed by the Special Rapporteur in paragraphs 16 and 38 of his fourth report.

12. In paragraph 16, it was noted that several delegations had suggested that the formation of customary international law not be overlooked in the draft conclusions and commentaries. As the Special Rapporteur stated therein, the identification of the existence and content of a rule of customary international law might well involve consideration of the processes by which it had developed. That viewpoint had also been expressed in the course of debates in the Sixth Committee; for instance, one State had requested that the draft conclusions be more detailed, while others had asked for the inclusion of examples of practice in the commentaries or had referred to the difficulty in determining the precise moment when a rule of customary international law was formed. All those comments indicated that the knowledge and grasp of a subject, the essence of which still remained somewhat of a mystery, varied from one group of States to another. That reality should not be ignored or underestimated.

13. In paragraph 38, the Special Rapporteur drew attention to the fact that the practical challenges of access to evidence in order to ascertain the practice of States and their *opinio juris* were closely linked to the nature of customary international law as *lex non scripta*. Read together, paragraphs 16 and 38 were a reminder of the topic's primary purpose, namely to produce a set of practical conclusions with commentaries, aimed at assisting practitioners and others in the identification of rules of customary international law. That aim should not be forgotten, since, ultimately, the success of the draft conclusions would depend on whether all those for whom they were intended could understand and accept them. That was not a foregone conclusion in some States where practitioners had been raised not in a culture of *lex non scripta*, but one in which written law was considered sacred. The principle of giving primacy to international law, which was enshrined in certain constitutions, concerned only treaty law. If the situation were to evolve towards a greater acceptance of customary international law, it might prove necessary, in some countries, to raise awareness among judges and prosecutors of the existence of international customary law, to give them access to evidence of it and to train them in its application in national courts. The progress made in applying human rights conventions in the Maghreb and the Middle East thanks to the academic activities of the Amman Office of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law showed what a valuable role training institutions could play in that respect.

14. Mr. KAMTO said that he wished to congratulate the Special Rapporteur on his remarkable fourth report. The formation and identification of customary international law was an area of international law where learned writers vied with one another to introduce new theories peppered with brilliant turns of phrase which often delighted students, but rarely offered States and practitioners the rigour and precision required to tackle such a delicate and often controversial matter. According to one such theory, customary international law was "spontaneous law". Mr. Roberto Ago, who had introduced that concept, was such an eminent lawyer that the pertinence of his assertion had probably never been explored sufficiently. Customary international law was not spontaneous law. The customary process was a tortuous mode of forming a rule of law. The very idea that customary international law was a general practice accompanied by *opinio juris*, which was understood to mean "acceptance" or a "sense of legal obligation", gave the lie to any idea of spontaneity. It clearly reflected the fact that *opinio juris* was a conscious act entailing some deliberation – which was not necessarily synonymous with consent – whereas a spontaneous act involved no forethought and might often be regretted later by the person who had engaged in it on the spur of the moment. For that reason, he endorsed the Special Rapporteur's statement in paragraph 17 of his fourth report that "the creation of customary international law is not an event that occurs at a particular moment".

15. He fully supported the Special Rapporteur's caution in dealing with the contribution made by the resolutions and practice of international organizations to the formation of customary international law. In an effort to show that non-binding resolutions of international organizations, especially those of the United Nations General Assembly, could produce legal effects, writers had also posited that *opinio juris* could precede practice. That was an aporia. If *opinio* preceded practice it could not be *opinio juris*, because what was needed for *opinio* to be *opinio juris* was not yet in place at that moment. The sense of law which, together with a general practice, formed customary law did not exist as such; it produced the desired legal effect only because the practice that gave rise to such a feeling was in place. In the absence of that practice, any *opinio* could exist only in regard to the resolution that existed at that time and not to a string of resolutions or States' subsequent conduct *vis-à-vis* the series of resolutions that would contribute to the formation of a customary rule as general practice.

16. Like Mr. Tladi, he was of the view that it would be difficult to delete all reference to the term "formation" in the draft conclusions contained in the Special Rapporteur's fourth report. Not only was the term employed throughout the fourth report but, as Mr. Laraba had noted, the Special Rapporteur, in paragraph 16 of his fourth report, agreed that "the identification of the existence and content of a rule of customary international law might well involve consideration of the processes by which it ha[d] developed". Furthermore, the Special Rapporteur acknowledged that the draft conclusions indeed referred in places, explicitly or otherwise, to the formation of rules of customary international law. The matter should be resolved by the Drafting Committee, to which all the draft conclusions contained in the fourth report should be referred.

17. Like a number of other colleagues, he still thought that the role of the Commission's work in the identification of international customary law must be dealt with separately; first, on account of its special status compared with classic theoretical sources and, second, on account of the Commission's unique working method which, albeit long and slow, allowed a collective deliberation that guaranteed the quality and authoritative nature of the final product. In that regard, he commended the outstanding support provided by the Secretariat, in particular its excellent memorandum, and endorsed the Special Rapporteur's proposal to request the Secretariat to provide an account of the evidence of customary international law currently available and on ways and means of making it more accessible.

18. Mr. VÁZQUEZ-BERMÚDEZ said that he wished to thank the Special Rapporteur for his fourth report, which contained important elements for consideration by the Commission, particularly with regard to making the evidence of customary international law more readily available. He also wished to thank the Secretariat for its memorandum; the observations contained therein were in line with the Commission's conclusions in considering the decisions of national courts both as forms of evidence of the two constituent elements of customary international law and as subsidiary means for the determination of a rule of customary international law.

19. As to the use of the term "conclusions" to describe the outcome of the Commission's work, he agreed with the Special Rapporteur that the matter should be considered on second reading. In any event, it should be noted that, although the draft conclusions were intended to provide guidance to legal practitioners, they were drafted more in the form of conclusions than actual guidelines. Regarding the degree of detail of the draft conclusions, while some conclusions might at first sight seem rather general, they were in fact broad – even complex – in content and scope, hence the importance of their being read in conjunction with the commentaries.

20. He had no problem with the expressions "identification of customary international law" and "determination of customary international law" being used interchangeably. The matter could, however, be revisited on second reading. As to the relevance of inaction as evidence of *opinio juris*, the legal significance of inaction by a State in response to the practice of another State should be sought not in an alleged acquiescence, which in practice would amount to a tacit consent, but rather in the possibility of attributing to such inaction the belief that the practice in question was mandated or permitted under customary international law. In short, silence or inaction must reflect *opinio juris*. The Special Rapporteur seemed to share that understanding in paragraph 22 of his fourth report.

21. Turning to the proposed amendments, he said that he had no objection to clarifying the text of draft conclusion 3, paragraph 2, by indicating that "[e]ach of the two elements" was to be separately ascertained. With regard to draft conclusion 4, the current wording adequately reflected the primary role of State practice and the role played in some cases by international organizations in the formation and expression of customary international law. It was not advisable to further downplay the importance of the practice of international organizations, which were important subjects of customary international law. The proposal to replace, in paragraph 1, the phrase "that contributes to the formation, or expression," with "as expressive, or creative," should be discussed in the Drafting Committee.

22. The Special Rapporteur proposed the deletion, in draft conclusion 6, paragraph 2, of the reference to "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". However, the fact that such conduct might also be useful as evidence of acceptance as law (*opinio juris*) did not mean that its usefulness as evidence of State practice should not be recognized. He did not, therefore, consider that the deletion was warranted.

23. The current formulation of draft conclusion 9, paragraph 1, was correct if viewed from the perspective of the State or States that developed a practice based on a belief in the existence of a legal obligation or right. However, if the intention was to refer to the *opinio juris* of both States that developed the practice and third States, then the proposed amendment was appropriate.

24. With regard to draft conclusion 12, he supported the proposal to replace, in paragraph 1, the word "cannot" with "does not". As to paragraph 2, while he could

understand the Special Rapporteur's wish to replace the word "establishing" with "determining" to ensure greater terminological consistency, he pointed out that, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had used the verb "establish". He did not support the proposal to delete the words "or contribute to its development" in that paragraph, since the contribution of resolutions to the development of customary international law was sufficiently important to deserve a mention in the draft conclusion itself and not merely in the commentary. He recalled that, in the aforementioned advisory opinion, the Court had stated that "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*" (para. 70 of the advisory opinion).

25. He welcomed the fact that the Commission would consider once more ways and means for making the evidence of customary international law more readily available, after more than 65 years. There had obviously been major changes in the intervening period, particularly as a result of the availability of digital tools. He supported the proposal to request the Secretariat to prepare a new study on the matter. It would, of course, also be important to receive input from States; in that connection, it would be particularly helpful if the General Assembly could recommend States to submit written comments, in addition to any statements they might make in the Sixth Committee. Such contributions, together with the memorandum, would provide the Commission with a firm basis to debate the topic with the thoroughness it deserved. He supported the future programme of work and the final outcome of the topic proposed by the Special Rapporteur.

26. Mr. HMOUD, referring to the role of inaction and silence, said that, in the *Fisheries case*, the International Court of Justice had actually recognized acquiescence in that regard; the Commission would do likewise in the future commentaries to draft conclusion 10, paragraphs 3 and 7.

27. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to congratulate the Special Rapporteur on his excellent fourth report and to thank the Secretariat for its very rich memorandum. As to whether to use the term "conclusions" or "guidelines" to describe the Commission's output on the topic, either term would be acceptable, but his preference would be to stick to the word "conclusions", which seemed less rigid and less dogmatic.

28. While he agreed that draft conclusion 1[156] was not strictly a conclusion, it should be retained, since it provided readers with a useful introduction to the topic. In that connection, he tended to agree with Mr. Murase that it might be helpful to provide a definition of the concept of customary international law. He therefore suggested that the title of the draft conclusion be changed from "Scope" to "Introduction" and that the text be improved and expanded.

[156] See *Yearbook ... 2015*, vol. II (Part Two), pp. 27–28, para. 60, and document A/CN.4/L.869; available from the Commission's website, documents of the sixty-seventh session).

29. Regarding draft conclusion 4, he would rather maintain the phrase "that contributes to the formation, or expression" in paragraph 1, and include in the commentary the terms "expressive or creative", as used by the International Court of Justice in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. He supported the Special Rapporteur's decision to retain the reference, in paragraph 2, to the contribution of the practice of international organizations to the expression or creation of rules of customary international law; the commentaries clearly underlined the caution required in appraising such practice.

30. He welcomed the Special Rapporteur's wise decision to maintain draft conclusion 15 on the persistent objector rule and to emphasize in the commentary the stringent requirements associated therewith. In certain parts of the world, that legal mechanism could help right some wrongs of history; rejecting it out of hand could only contribute to the further fragmentation of international law.

31. He endorsed the proposed future programme of work and final outcome of the topic. His only reservation concerned the idea of the bibliography, which, at a time of strong academic dynamism, might be quickly superseded and possibly outdated in some respects; it might also be geographically unbalanced. His suggestion would be for the Commission or the Special Rapporteur to prepare the bibliography and for it to be published by the Secretariat. An important initiative would be to prepare a table of cases before the Permanent Court of International Justice and the International Court of Justice or other international courts or tribunals that dealt authoritatively with issues of customary international law. He would support any course the Commission might wish to take on that matter.

32. Sir Michael WOOD (Special Rapporteur), summing up the debate on his fourth report, said that he was grateful to all those who had taken part; he had taken careful note of their comments.

33. It had been suggested that the Commission's output on the topic begin with a brief introduction explaining the object, purpose and content of the draft. Perhaps the sort of general commentary that had been included in the draft articles on the responsibility of States for internationally wrongful acts[157] or the draft articles on the responsibility of international organizations[158] would suffice in substance, but, if it was thought appropriate, it could certainly be presented as an introduction, as had been done in the Guide to Practice on Reservations to Treaties.[159] Such an introduction could explain, in a little more detail than the draft commentaries to the individual conclusions, the nature and role of customary international law, thus setting the conclusions in context. It could perhaps address Mr. Murase's and the Chairperson's wish for a definition of customary international law, something which the Commission had decided to drop from the Special Rapporteur's original proposals in an earlier report. It could

[157] See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 31–32.

[158] See *Yearbook ... 2011*, vol. II (Part Two), pp. 46–47.

[159] See *ibid.*, vol. II (Part Three) and Corr.1–2, pp. 35–37.

also take up Ms. Escobar Hernández's suggestion for an explanation of the significance of certain writings in the field; it might even include the text of the current draft conclusion 1 on scope, as suggested in paragraph 13 of his fourth report. In any event, it seemed best to consider the suggestion for an introduction at second reading, when the final shape of the conclusions and commentaries would be clearer.

34. The practice of international organizations continued to be the subject of controversy. It was becoming almost an ideological debate, with the repetition of rather entrenched positions. He suspected, however, that the practical differences between members were not so great. It was his belief that the present draft conclusions were reasonably balanced in their approach to the role of organizations and that they reflected reality. He did not think that draft conclusion 4, paragraph 2, which was cautiously drafted, could reasonably be described as *lex ferenda*, as it had been by one colleague. No doubt, improvements could be made in due course, but now was not the time to change the texts of the draft conclusions on that matter. He would try to meet the various concerns in the commentaries, although they were at times conflicting. In any event, that was clearly a matter to which the Commission would return on second reading.

35. In that regard, he wished to place on record that the changes that he had suggested to draft conclusions 6 and 12 had not been intended to reduce the potential role of international organizations or, more precisely, of resolutions adopted by them. His intention had simply been to improve the coherence and logic of the draft. In any event, he had heard what had been said in the debate and would not be asking the Drafting Committee to consider those changes at the first reading stage.

36. Another issue that had come up again was how best to reflect, in the conclusions and/or commentaries, the role of the Commission itself. He would do his best to describe that role at an appropriate point and in an appropriate way in the commentaries; the discussion in the Working Group that had reviewed the draft commentaries had been very helpful in that context, as in others. He did not think that there was any real difference among members on substance; the sole question was where best to deal with the matter. It was something that deserved a period of reflection and could be taken up again on second reading.

37. A number of useful suggestions had been made concerning the content of the draft commentaries. He had noted them all and would endeavour to take account of them in the draft commentaries that he would submit to the secretariat shortly.

38. Mr. Forteau's suggestion that more examples be provided in the commentaries in order to give practical guidance to the users was undoubtedly a good one, but a balance needed to be struck with another important practical requirement, that of conciseness. The discussion in the Working Group had shown that some examples might be problematic, inasmuch as their citation – for the purpose of illustrating methodology – might be viewed as approval of their substance. He would try to address that concern in the commentaries.

39. Ms. Escobar Hernández and others had suggested that the commentaries refer to some literature, including with cross references to the bibliography. It had been recalled in that context that the teachings of the most highly qualified publicists were a subsidiary means for the determination of rules of law under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. That was, of course, uncontested and was already reflected in draft conclusion 14. However, another question was how far the literature could be used to determine the methodology for identifying rules of international law. Furthermore, it was, of course, difficult to be selective. Accordingly, at least for first reading, he would not be proposing references to the literature in the commentaries. The bibliography would be available and was to some degree arranged thematically so as to correspond to particular draft conclusions; he would propose that reference should be made to it in the commentaries so that anyone reading the conclusions and commentaries would be made aware of the literature.

40. As for the future programme of work, there seemed to be widespread agreement with the timetable restated in chapter IV of the fourth report. However, that would, of course, be a matter to be decided in the next quinquennium.

41. The changes that he had suggested in chapter II of the fourth report could be considered either at the current session, as part of the first reading, or on second reading. In the light of the comments made during the debate, he was of the opinion that, at the first reading stage, the Commission should ask the Drafting Committee to exercise caution and confine itself to changes that were uncontroversial and that could be adopted without lengthy discussion. He hoped that, on that understanding, the Commission would agree to refer the suggestions in annex I of the fourth report to the Drafting Committee. It was not his intention to invite the Committee to consider more than a couple of those suggestions at the current stage.

42. Lastly, he wished to invite the Commission to request the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement. He hoped that it would be possible to adopt the proposal, for which there was widespread support within the Commission, following the current debate so that the Secretariat could immediately begin the preparatory work for what would be quite a large exercise, involving wide consultation.

43. There seemed to be considerable interest among members in the "ways and means" part of the topic. During the current debate, a range of important suggestions and views had been heard, which he hoped the Secretariat would be able to take into account if requested to produce a memorandum. A number of speakers had made the point that the challenges might well be very different now from 70 years ago; no doubt that, too, would be reflected in the new memorandum.

44. It would, of course, be for the next Commission to decide whether and, if so, how to take up that part of

the topic; the Secretariat's memorandum would be without prejudice to future action by the Commission, but it should be invaluable in helping members reach a decision in due course.

45. The CHAIRPERSON said that he took it that the Commission wished to refer the proposed amendments to draft conclusions 3, 4, 6, 9 and 12 to the Drafting Committee.

It was so decided.

46. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to request the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, as proposed by the Special Rapporteur.

It was so decided.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties[160] (A/CN.4/689, Part II, sect. D,[161] A/CN.4/694,[162] A/CN.4/L.874[163])

[Agenda item 4]

Fourth report of the Special Rapporteur

47. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as contained in document A/CN.4/694.

48. Mr. NOLTE (Special Rapporteur) said that the main part of the report concerned pronouncements of expert bodies. The best-known such bodies were those established under human rights treaties to monitor and contribute to the application of those treaties; their pronouncements were addressed to States parties, who were encouraged to take them into account in their application of the treaty in question. Thus, both the pronouncements of expert bodies and the reaction of States thereto constituted a body of practice whose purpose under the treaty was to contribute to its proper application.

49. Regarding terminology, the term "pronouncement" had been chosen to describe the various forms of action of expert bodies because it was sufficiently neutral and was able to cover all relevant factual and normative assessments by such bodies, as indicated in paragraph 14 of the fourth report. The term "expert body" had been chosen in preference to "treaty body" in order to make clear that only bodies that were composed of independent experts were dealt with in the report. However, as indicated in the second sentence of draft conclusion 12, paragraph 1, for the purposes of the draft conclusions, the term "expert body" did not include expert bodies that were organs of an international organization, since the project was limited to the scope of application of the 1969 Vienna Convention and did not therefore address the practice of international organizations and their organs, with the exception of practice relating to their constituent instruments, in keeping with article 5 of the Convention.

50. The aim of the fourth report was modest: it made no general claim as to the strength or otherwise of the legal effect, for the purpose of treaty interpretation, of pronouncements of expert bodies; rather, it emphasized that any such effect depended, first and foremost, on the treaty itself, as properly interpreted. The report and the proposed draft conclusions simply aimed to articulate how the practice of expert bodies and the related conduct of States parties contributed to the proper interpretation of the treaty in question under articles 31 and 32 of the 1969 Vienna Convention.

51. It emerged from an assessment of relevant sources that there appeared to be general agreement that pronouncements of expert bodies did not, as such, constitute subsequent practice under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention because they did not, by themselves, establish agreement between the parties regarding the interpretation of the treaty concerned. It seemed to be equally generally agreed that subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32 "may arise from, or be reflected in" such pronouncements, although it was often not easy to establish that States parties had reached agreement on the basis of such pronouncements.

52. The more difficult question was what interpretative weight, if any, pronouncements of expert bodies established under human rights treaties might have as such. According to the International Court of Justice, great weight should be ascribed to the interpretation adopted by such bodies. For its part, the Commission, in the commentary to its Guide to Practice on Reservations to Treaties, had stated that States parties were obliged to take account of the conclusions of the expert bodies of human rights treaties in good faith, even though those conclusions were not legally binding. In his fourth report, the Special Rapporteur suggested that the distinction between the formulation of the Court and that of the Commission corresponded to the distinction in the 1969 Vienna Convention, between the formulation of an obligation, in article 31, to take certain means of interpretation into account, and the formulation of a permission, in article 32, to take certain other means of interpretation into account. Based on a number of considerations, the Special Rapporteur suggested that the Commission should adopt the approach of the International Court of Justice and recognize that the formulation that appeared in the commentary to the Guide to Practice on Reservations to Treaties was limited to the special case of pronouncements regarding reservations. Such an approach, if applied to the rules of the 1969 Vienna Convention on interpretation, would mean that pronouncements of expert bodies should be recognized

[160] At its sixty-fifth session (2013), the Commission provisionally adopted draft conclusions 1 to 5 and the commentaries thereto (*Yearbook ... 2013*, vol. II (Part Two), pp. 16 *et seq.*, paras. 38–39). At its sixty-sixth session (2014), the Commission provisionally adopted draft conclusions 6 to 10 and the commentaries thereto (*Yearbook ... 2014*, vol. II (Part Two), pp. 107 *et seq.*, paras. 75–76). At its sixty-seventh session (2015), the Commission provisionally adopted draft conclusion 11 and the commentaries thereto (*Yearbook ... 2015*, vol. II (Part Two), pp. 55 *et seq.*, para. 129).

[161] Available from the Commission's website, documents of the sixty-eighth session.

[162] Reproduced in *Yearbook ... 2016*, vol. II (Part One).

[163] Available from the Commission's website, documents of the sixty-eighth session.

as a form of other subsequent practice that might be taken into account under article 32 of the Convention. The other possibility would be to recognize that the duty of cooperation in good faith under a treaty usually implied a duty of States parties to consider, and thus to take into account, the pronouncements of those bodies which they had established pursuant to the treaty. In that case, such pronouncements would constitute a form of practice that States parties were obliged to take into account, just as they needed to take into account the means of interpretation that were referred to in article 31 of the 1969 Vienna Convention.

53. The fourth report was not limited to pronouncements of expert bodies established under universal human rights treaties. It only highlighted those expert bodies because their activities had given rise to the most profound debate regarding the interpretative weight of their pronouncements. Those bodies were part of a larger group of expert bodies, all of which had been mandated by different kinds of treaties to give non-binding recommendations regarding the application and, explicitly or implicitly, the interpretation of those treaties. In paragraphs 66 to 92 of his fourth report, the Special Rapporteur described some other, particularly important, expert bodies, for example the Commission on the Limits of the Continental Shelf and the Compliance Committee of the Kyoto Protocol, and examined the weight of their pronouncements for the interpretation of the treaties concerned. The report sought thereby to show that the issues that had been discussed regarding expert bodies established under human rights treaties also arose, *mutatis mutandis*, with regard to expert bodies more generally.

54. By proposing a general draft conclusion, draft conclusion 12, on pronouncements of expert bodies which applied to all such bodies, as defined in paragraph 1 thereof, the Special Rapporteur did not aim to level the differences that existed between different expert bodies and the interpretative weight of their pronouncements. On the contrary, draft conclusion 12 was formulated carefully so as to leave room for possible specificities; paragraph 3 thus attempted to express the relevance of pronouncements of expert bodies without being unduly prescriptive. As explained in paragraphs 49 to 65 of the fourth report, the weight of such pronouncements as a means for the interpretation of a treaty depended on a multitude of factors that might or might not be present in a specific case.

55. Draft conclusion 12, paragraph 4, addressed the question of the relevance of silence in the context of determining the interpretative weight of a pronouncement of an expert body. Such weight depended to a significant extent on the degree to which a particular pronouncement had been accepted by States parties. Since most treaties that provided for the establishment of expert bodies had many parties, the question as to whether silence signified acceptance would often arise in that context. According to the general rule set out in draft conclusion 9, paragraph 2, which the Commission had provisionally adopted in 2014, the answer depended on whether the circumstances called for some reaction. That in turn gave rise to the question of whether the adoption of a pronouncement of an expert body could generally be regarded as a circumstance calling for some reaction by States parties. Paragraph 4 proposed, on the basis of the reasoning contained in paragraphs 47 and 48 of the fourth report, that a pronouncement of an expert body was usually not such a circumstance, although that presumption might be refuted.

56. The terminology chosen for draft conclusion 12 followed, as far as possible, that of draft conclusion 11, which the Commission had provisionally adopted in 2015. Draft conclusion 11 was similar insofar as it also dealt with treaties that provided for the establishment of a body mandated to contribute to the application of the treaty concerned.

57. In his fourth report, the Special Rapporteur also addressed decisions of domestic courts, which merited separate attention for two reasons. First, such decisions themselves might be a form of subsequent practice in the application of a treaty, and the way in which they dealt with subsequent agreements and subsequent practice as a means of treaty interpretation was particularly significant for the uniform interpretation of a given treaty. Decisions of domestic courts, being official acts by State organs, did not raise specific problems as far as their recognition as possible forms of subsequent practice under article 31, paragraph 3 (*b*), and article 32 of the 1969 Vienna Convention were concerned. Accordingly, the possibility of their constituting such practice was simply confirmed in paragraph 1 of proposed draft conclusion 13. Since decisions of domestic courts were not formally coordinated at the international level, it could not be lightly assumed that such decisions reflected the agreement of the parties under article 31, paragraph 3 (*b*), of the Convention. Even if those decisions had been informally coordinated, such informal coordination in itself would not be sufficient to establish an agreement of the parties in substance.

58. The second reason why decisions of domestic courts merited separate attention was that one of the purposes of the work on the topic was to provide guidance to domestic courts on the proper interpretation and application of treaties. Such guidance could also be provided by reviewing the way in which domestic courts had approached subsequent agreements and subsequent practice as means of treaty interpretation and by assessing whether such practice reflected the draft conclusions that the Commission had provisionally adopted thus far. Such an assessment must necessarily be incomplete, as it was impossible to comprehensively review the practice of domestic courts in that regard; nevertheless, even a limited assessment could be helpful and provide important indications, as long as the review of the available decisions of domestic courts merely served to provide an illustration for questions that had arisen in practice. It was to that end that, in his fourth report, the Special Rapporteur described a number of issues that had arisen in leading cases from jurisdictions around the world.

59. As suggested by the decisions referred to in the fourth report, the case law of domestic courts relating to the interpretation of treaties had regularly dealt with a number of issues concerning the use of subsequent agreements and subsequent practice. Those issues included the influence of constraints under domestic law, the classification of subsequent agreements and subsequent practice, the use of subsequent practice that did not establish the

agreement of the parties and the identification of subsequent agreements and subsequent practice.

60. Proposed draft conclusion 13, paragraph 2, was somewhat unusual in the context of the draft conclusions on the present topic in that it contained recommendations, or guidelines, that were addressed specifically to domestic courts. The basis for those recommendations were decisions of domestic courts that were described in the fourth report and assessed in the light of the previously adopted draft conclusions. Thus, while draft conclusion 13, paragraph 2, was a conclusion in the sense that it was based on a collection of materials, it differed from the other draft conclusions in that it was not aimed at elucidating and clarifying the pertinent rules of interpretation as such. Draft conclusion 13, paragraph 2, was not intended to inappropriately constrain domestic courts; rather, it served to identify certain issues that had given rise to questions in practice and offered approaches in the light of the international rules and practices that had been identified in previous draft conclusions. It should therefore be a particularly useful part of the set of draft conclusions; its specific character could perhaps be set out more clearly by the Drafting Committee.

61. The fourth report also included a few smaller proposals with a view to enabling the Commission to adopt a full set of draft conclusions on first reading. The first proposal concerned the formulation of an introductory draft conclusion l*a*, which read: "The present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties." The Commission had adopted a similar draft article for the topic "Protection of persons in the event of disasters" on first reading,[164] and the Drafting Committee had the previous week adopted the same formulation on second reading.

62. The second proposal, which was contained in paragraph 113 of the fourth report, related to the structure of the set of draft conclusions and was made in order to facilitate the latter's comprehension and readability. The order of the draft conclusions that the Commission had provisionally adopted had been maintained within the proposed structure, except for draft conclusion 3. It was proposed to place draft conclusion 3 in part III, which related to the process of interpretation, rather than in part II, which concerned basic rules and definitions. The proposal in paragraph 113 of the report to add a final clause with a new final draft conclusion 14 had been included by mistake.

63. The third proposal, which concerned draft conclusion 4, paragraph 3, was the only one in the report to revise a draft conclusion that the Commission had provisionally adopted. The reason for the proposal was that, as currently formulated, draft conclusion 4, paragraph 3, was limited to conduct by States parties to a treaty. However, the Commission had, in the meantime, provisionally adopted draft conclusion 11, paragraph 3, which recognized that the practice of an international organization itself might contribute to the interpretation of a treaty under article 32 of the 1969 Vienna Convention. In addition, the Commission would hopefully adopt draft conclusion 12, paragraph 3, according to which pronouncements of expert bodies might contribute to such interpretation when applying article 31, paragraph 1, and article 32 of the 1969 Vienna Convention. That suggested that there were certain forms of subsequent practice in the application of treaties that might emanate from a limited group of actors, in addition to States parties, that were mandated by the treaty concerned to contribute to its application. The proposed revised draft conclusion 4, paragraph 3, attempted to circumscribe the conduct of those who were called upon to apply a treaty by using the term "official conduct", instead of "conduct by one or more parties". The use of the term "official conduct" was supported by the conclusion of the International Court of Justice in its advisory opinion of 15 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, according to which the term "officials of the Organization", as contained in Article 105, paragraph 2, of the Charter of the United Nations, permitted the application of the Convention on the Privileges and Immunities of the United Nations to experts on missions. Although those experts were not officials in the sense of occupying an administrative position within the Organization, the Court had considered the nature of their mission to be such that they could be covered by the Convention.

64. Of course, the term "official conduct" was not the only possible term that draft conclusion 4, paragraph 3, could use in order to make clear that the practice of international organizations, as well as pronouncements by expert bodies within their sphere of competence, constituted other forms of subsequent practice under article 32 of the 1969 Vienna Convention. An alternative possibility to reach that goal might, for example, be to add the words "or other authorized actors" after the words "conduct by one or more parties", in the text of the draft conclusion provisionally adopted in 2013.

65. Other aspects of the topic could be added to the set of draft conclusions, for example, the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations and between international organizations or in relation to the practice of international organizations more generally. However, on previous occasions, the Commission had dealt with such treaties and practice separately. Given the character of the present topic as an elucidation of particular means of interpretation under the rules of interpretation set forth in the 1969 Vienna Convention, it seemed neither necessary nor reasonable to aim for completeness. As was the case for certain other topics, it should be sufficient to cover the most important aspects. It would, of course, be possible to add a saving clause, should the Commission consider that to be necessary.

66. In conclusion, he expressed the hope that, after considering his fourth report, the Commission would be in a position to refer the proposed draft conclusions to the Drafting Committee.

The meeting rose at 11.55 a.m.

[164] See *Yearbook ... 2014*, vol. II (Part Two), pp. 62–63 (draft article 1).

3304th MEETING

Wednesday, 25 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/689, Part II, sect. D, A/CN.4/694, A/CN.4/L.874)

[Agenda item 4]

Fourth report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/694).

2. Mr. MURASE said that he wished to thank the Special Rapporteur for his excellent fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and recalled that, in his view, the outcome of the topic should take the form of guidelines rather than conclusions.

3. With regard to new draft conclusion 1*a*, it was a good idea to begin with a provision on the scope of application. However, it would be better to delete the word "significance", which could give the impression that the draft conclusions predetermined the importance of subsequent agreements and subsequent practice relative to other means of interpretation. It was clear, as stated in paragraph (3) of the commentary to draft conclusion 1, that all means of interpretation were part of "an integrated framework for the interpretation of treaties"[165] and that the weight accorded to a particular means of interpretation varied in each case.

4. Turning to draft conclusion 12, he noted that the legal significance of the pronouncements of expert bodies varied depending on the nature of the body, the context in which the pronouncement was issued and other factors. For example, the pronouncements made by the Human Rights Committee, including concluding observations on State party reports, views in response to individual communications and general comments, which shared the characteristic of being non-binding, were not all of the same relevance to the interpretation of the International Covenant on Civil and Political Rights. The variety of those pronouncements should be noted, at least in the commentary. The distinction drawn in paragraph 1 of the draft conclusion between expert bodies and organs of an international organization was not sufficiently clear, partly because the term "organ of an international organization" was not defined in draft conclusion 11 or in the commentary thereto.[166] He did not understand why an expert body that happened to be an organ of an international organization should be treated differently to an expert body that was not an organ of an international organization if the two bodies performed the same function. There were organs of an international organization whose members served in their individual capacity. As noted by the Special Rapporteur in the first footnote to paragraph 12 of his fourth report, and as he had alluded to in his oral presentation, the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO) was an organ of an international organization whose role was to provide an impartial and technical evaluation of the legislative conformity of national laws and regulations with the requirements of ratified ILO conventions. The Committee of Experts clearly played a significant role in the interpretation of treaties based on subsequent practice; he would return to that matter later.

5. There were other examples of expert bodies that were also organs of international organizations, such as the Independent Advisory Committee and the technical expert groups established under the auspices of the World Health Organization. If the Special Rapporteur's intention was to exclude those expert bodies from the scope of draft conclusion 12 – which should be avoided – he would need to explain in the commentary why those bodies were treated differently. He himself had doubts about the advisability of taking into consideration the Compliance Committee of the Kyoto Protocol. Although article 18 of that Protocol established that "[a]ny procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol", the establishment of the Committee, which entailed binding consequences for the parties, had come about not by way of an amendment but by a 2005 decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol.[167]

6. Draft conclusion 12, paragraph 2, which was the core of the draft conclusion, caused concern for two reasons. First, while he did not disagree with the Special Rapporteur that subsequent agreements and subsequent practice might "be reflected in" the pronouncements of expert bodies, he wished to stress that it was the independence of those bodies that gave them special authority and that, as a corollary, it was because of their independence that their pronouncements were often criticized by States parties as not reflecting the intent of those States parties. It should thus be clarified in the commentary under what circumstances it might be assumed that subsequent agreements and subsequent practice were reflected in a particular

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[165] *Yearbook ... 2013*, vol. II (Part Two), p. 18.

[166] See *Yearbook ... 2015*, vol. II (Part Two), pp. 55 *et seq.*, para. 129.

[167] See decision 27/CMP.1, "Procedures and mechanisms relating to compliance under the Kyoto Protocol", addendum, adopted on 9 and 10 December 2005 by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (FCCC/KP/CMP/2005/8/Add.3).

pronouncement. More importantly, it seemed that, in draft conclusion 12, paragraph 2, the pronouncements of expert bodies and the reactions of States thereto were conflated, despite the warning in paragraph (10) of the commentary to draft conclusion 2 to the effect that subsequent agreements and subsequent practice as authentic means of treaty interpretation were not to be confused with interpretations of treaties by international courts, tribunals or expert treaty bodies in specific cases.[168] To support his position, the Special Rapporteur cited the report of the sixty-fifth session of the International Law Commission held in 2013, the statement made by the representative of the United States of America to the Sixth Committee on 6 November 2015[169] and the Final report on the impact of findings of the United Nations human rights treaty bodies, which had been adopted in 2004 by the International Law Association.[170] However, those sources merely referred to the reactions of States to the pronouncements of expert bodies and not to the pronouncements themselves. He did not deny that there were cases in which such pronouncements triggered actions by States that led to a subsequent agreement or subsequent practice but, even in those cases, the pronouncements of expert bodies gave rise to a subsequent agreement or subsequent practice only indirectly, through the reactions of States. It should therefore be made clear that it was the reactions that resulted in subsequent agreements and subsequent practice.

7. Draft conclusion 12, paragraph 4, did not appear to be consistent with draft conclusion 9, paragraph 2, which provided that "[s]ilence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction".[171] On the subject of silence, he wished to draw members' attention to a recent controversy over the role of the Committee of Experts on the Application of Conventions and Recommendations of the ILO, which, as members were aware, had for the past 30 years interpreted the 1948 Convention (No. 87) concerning freedom of association and protection of the right to organise as protecting the right to strike. In 2012, the Employers' Group had objected to that interpretation and had decided to refuse to participate in the consideration of any case of serious non-compliance with the Convention by a State party. In a statement delivered in 2015, the Government Group had temporarily resolved the dispute by occupying the middle ground, recognizing that the right to strike was a fundamental principle, but also asserting that it was not an absolute right. He wondered whether, in that case, the decades-long silence of States constituted their acceptance of the interpretation of a treaty as expressed in the pronouncement of an expert body. In a recent article, Hofmann and Schuster argued that the fact that the rulings of the ILO supervisory bodies had gone unchallenged for decades could be regarded as a subsequent practice within the meaning of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention.[172]

8. He had no particular objection to the revised version of draft conclusion 4, paragraph 3, though the unqualified term "official conduct" was perhaps a little abrupt. He therefore proposed returning to the previous version and adding the words "or by expert bodies" after "conduct by one or more parties". Lastly, he wished to stress that he was not in any way underestimating the relevance of the pronouncements of expert bodies to the interpretation of a treaty. He fully agreed with the Special Rapporteur that the legal significance of such pronouncements had been acknowledged by the International Court of Justice, among others. In many cases, however, the legal significance of the pronouncements had been acknowledged not because they constituted "subsequent practice" but for other reasons.

9. Concerning draft conclusion 13, he broadly agreed with paragraph 1 but had some doubts about paragraph 2. The draft conclusions as a whole were intended to serve as guidance not only for domestic courts but also for international courts and other treaty interpreters. It seemed odd, therefore, to have special guidelines only for domestic courts. In addition, subparagraphs (*a*) and (*c*) of paragraph 2 simply repeated what was said in the preceding draft conclusions, and subparagraph (*b*) added nothing. If the Special Rapporteur considered that special guidelines should be given to domestic courts, those guidelines could perhaps be set out in the commentary. To conclude, he supported the referral of the draft conclusions to the Drafting Committee.

10. Mr. HMOUD said that he wished to thank the Special Rapporteur for his fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The report, which was well researched and comprehensive, provided a thorough analysis of the case law of international and national courts, and conclusions that tended to reflect the state of the law in relation to the relevance of the pronouncements of expert bodies and national courts to the interpretation of treaties. Before turning to the draft conclusions, he wished to make some general comments. In his opinion, the Special Rapporteur, having noted the scarcity of practice and of pronouncements by States and international courts and tribunals on the relationship between the pronouncements of expert bodies and subsequent agreements and subsequent practice as means of interpretation, had adopted a deductive approach. He had thus drawn analogies without necessarily basing his conclusions on established practice or even on settled positions on the legal value of the pronouncements of expert bodies in relation to the interpretation of treaties in the context of subsequent agreements and subsequent practice. The fourth report in general, and draft conclusion 12 in particular, seemed to extend the scope of the topic, in that they dealt not only with the relationship between such pronouncements and subsequent agreements and subsequent practice but also with the relevance of the pronouncements according to the rules of interpretation of the 1969 Vienna Convention. In that regard, too, the Special Rapporteur based his analysis on a limited number of sources that referenced the views of a few States or the isolated findings of courts

[168] See *Yearbook ... 2013*, vol. II (Part Two), pp. 23–24.

[169] A/C.6/70/SR.22, para. 46.

[170] International Law Association, "Final report on the impact of findings of the United Nations human rights treaty bodies", *Report of the Seventy-First Conference held in Berlin, 16–21 August 2004*, London, 2004, pp. 621 *et seq.*, especially at pp. 628–629, para. 21.

[171] *Yearbook ... 2014*, vol. II (Part Two), p. 123.

[172] C. Hofmann and N. Schuster, "It ain't over 'til it's over: the right to strike and the mandate of the ILO Committee of Experts revisted", Working Paper No. 40, February 2016, ILO and the Global Labour University, p. 23. Available from: www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No.40.pdf.

in certain countries. While he understood the constraints deriving from the scarcity of practice and case law, it was essential for the Commission to base its conclusions on *lex lata*. The link between the Special Rapporteur's analysis and the outcome sought was not always very clear, and his observations were sometimes difficult to connect to article 31, paragraph 1 or 3, or to article 32 of the 1969 Vienna Convention on the Law of Treaties. That connection was, however, essential to the preparation of relevant draft conclusions, particularly on the pronouncements of expert bodies.

11. He agreed with the Special Rapporteur that the pronouncements of treaty bodies comprising State representatives and those of organs of international organizations fell outside the scope of draft conclusion 12. Since the conduct of such bodies was attributable to States and to international organizations, one might question the usefulness of having a separate draft conclusion on the specific category of bodies of experts who served in their individual capacity and who were tasked with contributing to the "proper" application of the relevant treaties. That definition was not specific enough and could be interpreted broadly. The draft conclusion should relate only to bodies whose function was to interpret the treaty under which they had been established and not merely to contribute to its proper application. It was not specified in the fourth report how contributing to the proper application of a treaty was linked to subsequent agreements and subsequent practice under articles 31 and 32 of the 1969 Vienna Convention. Moreover, if the body in question was explicitly or implicitly tasked with interpreting the provisions of the treaty under which it had been established (by applying the rules of interpretation), the value of its pronouncements might be determined by article 32, but not by its "conduct". It followed that the value of the pronouncements of expert bodies in relation to interpretation could be assessed only on a case-by-case basis. To consider as subsequent practice the pronouncement of a body that contributed to the proper application of a treaty but that had no direct or indirect power to interpret it would be to attach more value to that pronouncement for the purpose of interpretation than it actually had. The cases cited in that connection in the fourth report served only to underline the assertion that such views, comments or recommendations had an interpretative value not because they were the pronouncements of bodies tasked with contributing to the proper application of a treaty, but because they were the pronouncements of bodies that performed some kind of interpretative function. That was not to say that the bodies had to be judicial or quasi-judicial in nature, or that their pronouncements had to be binding. Consequently, he proposed inserting, in the definition of expert bodies, a reference to their interpretative function in addition to the reference to their contribution to the proper application of treaties. The scenario in which the pronouncement of an expert body interpreted a treaty provision that was not in the part of the treaty that the body was tasked with interpreting should be addressed either in the definition of expert bodies or in a separate paragraph.

12. He agreed with the Special Rapporteur that the pronouncements of expert bodies could not constitute subsequent practice within the meaning of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention. However, they could not constitute subsequent practice within the meaning of article 32, either, because that would put them on the same level as the practice of States and international organizations despite there being insufficient legal grounds to do so. In addition, that assertion would not prevent such pronouncements from being interpreted as constituting subsequent practice in the application of a treaty that might establish the agreement of the parties. It would thus be helpful to add a paragraph to draft conclusion 12 excluding the pronouncements of expert bodies from the scope of subsequent practice under article 31, paragraph 3 (*b*), which the current wording of draft conclusion 12, paragraph 2 did not do.

13. The issue of human rights treaty bodies was worth commenting on in several respects. First, while the Commission had rightly discussed the legal value of the views expressed by such bodies in their work on reservations to treaties, it did not seem necessary to place special emphasis on the matter in the context of the topic under consideration. The Commission was free to discuss the interpretative value of the views expressed by such bodies on the human rights treaties under which they had been established, but not in the context of subsequent agreements and subsequent practice. The Special Rapporteur should not attempt to distort the rules of interpretation based on subsequent agreements and subsequent practice to accommodate the special character of treaty monitoring bodies and their pronouncements. The analysis of the pronouncements of human rights treaty bodies should substantiate the content of draft conclusion 12 and not the other way around. The argument in the 2004 report adopted by the International Law Association that the pronouncements of human rights treaty bodies could amount to subsequent practice was not convincing. In draft conclusion 12, the Commission should not place on the pronouncements of such bodies a value that they did not have by considering them to be a form of subsequent practice in the interpretation of treaties. There was no evidence in the report to substantiate that view and, even though examples were given of cases in which such pronouncements had been viewed as anything from worthless to authoritative, the value of the pronouncements should be judged on a case-by-case basis. Again, such pronouncements could not be regarded as subsequent practice under articles 31 and 32 of the 1969 Vienna Convention, because there was no evidence to that effect in the fourth report, except maybe the judgment referred to in paragraph 30. Other examples given in the first two footnotes to paragraph 33 of the fourth report, and in chapter II, illustrated the weight that some domestic courts had attached to the pronouncements of treaty bodies, but did not show that the pronouncements constituted subsequent practice; the courts in question could have determined that to be the case, but had not done so. Moreover, as noted in paragraph 35 of the fourth report, "domestic courts have only rarely attempted to explain the legal basis for their assessment that such pronouncements … should or need to be taken into account". Indeed, in the *Ahmadou Sadio Diallo* case, the International Court of Justice had found that pronouncements of the Human Rights Committee were relevant for the purpose of the interpretation of the International Covenant on Civil and Political Rights, and that it should give them "great weight" (para. 66 of the judgment). Even so, it had stated not that they amounted

to subsequent practice in the application of a treaty, but that they were one of several means of interpretation. In addition, the International Court of Justice and national courts were more concerned with the binding nature of the interpretations of treaty bodies than with determining whether the pronouncements of such bodies could amount to subsequent practice or whether they fell under articles 31 or 32 of the 1969 Vienna Convention. In fact, most of the sources cited in the fourth report essentially referred to the weight of the pronouncements of treaty bodies, but not to whether those pronouncements constituted subsequent practice.

14. In his presentation, the Special Rapporteur had stated that the distinction between an obligatory "taking into account" of such pronouncements and a discretionary "taking into account" echoed the distinction made between means of interpretation in articles 31 and 32 of the 1969 Vienna Convention. Again, there was no evidence to support drawing such a parallel. Moreover, the claim that the duty of States to cooperate with treaty bodies implied a duty to consider and take into account their pronouncements did not mean that such pronouncements constituted subsequent practice or, in other words, a means of interpretation under article 31.

15. The arguments put forward by the Special Rapporteur in paragraphs 49 to 57 of his fourth report to support the wording of draft conclusion 12, paragraph 3, related to the legal weight of the pronouncements of expert bodies and not to their relevance to article 31, paragraph 1, of the 1969 Vienna Convention. To put it differently, it was not explained in the fourth report how such pronouncements could be factored into the application of article 31, paragraph 1: did they contribute to clarifying the meaning of the treaty, or its object, purpose or context? That was not what emerged from the report, and the Commission certainly could not associate the potential legal value of such pronouncements with article 31, paragaph 1, of the 1969 Vienna Convention.

16. As to the contribution of the pronouncements of expert bodies to interpretation under article 32 of the 1969 Vienna Convention, he could agree that such pronouncements constituted a supplementary means of interpretation, but there was nothing to suggest that they amounted to subsequent practice. Regarding the other aspect of the pronouncements of expert bodies, namely whether subsequent agreements and subsequent practice under article 31, paragraph 3, and article 32, of the 1969 Vienna Convention could arise from, or be reflected in, those pronouncements, he supported the wording of draft conclusion 12, paragraph 2, which was sufficiently flexible and did not prejudge the legal value of the pronouncements or their relationship with the subsequent agreements and subsequent practice of the parties to the treaty concerned or of relevant actors. Nevertheless, it was important to include in the commentaries to the draft conclusions examples of how such pronouncements had given rise to agreements of the parties under article 31, paragraph 3, of the Vienna Convention or had been viewed as constituting subsequent practice.

17. He was not at all sure that there was any legal basis for considering that silence on the part of States with regard to the pronouncements of expert bodies would create any legal effect, unless the treaty in question provided otherwise. This latter exception aside, there was no rule according to which silence on the part of a State party with regard to the pronouncements of an expert body had to be seen as acquiescence, presumed or otherwise, to subsequent practice in the context of article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, even if the circumstances warranted a reaction. The Special Rapporteur's assertion that it could not be excluded, however, that a particular pronouncement or practice might exceptionally "call for some reaction", was not substantiated in law.

18. While the Special Rapporteur's proposed modification of draft conclusion 4, paragraph 3, seemed necessary in order to adapt the draft conclusions to accommodate the practice of international organizations and the pronouncements of expert bodies, it should be stressed that, although the interpretative value of the practice of international organizations and their organs had been recognized, the same could not be said for the pronouncements of expert bodies, for the reasons explained earlier. There was no relationship between the acts of an organization, which could be official because they were performed "in the exercise of an element of public authority", and such pronouncements, even when issued by bodies whose function was to interpret the treaty under which they had been established. It could be argued that expert bodies acted, through their pronouncements, on behalf of States parties, but in reality, that depended on the provisions of each treaty. While the pronouncements of expert bodies could indeed be supplementary means of interpretation under article 32 of the 1969 Vienna Convention, he doubted that they could be categorized as subsequent practice.

19. Regarding draft conclusion 13, it should be noted that only a limited number of national court decisions were studied in assessing the treatment of subsequent agreements and subsequent practice in the interpretation of treaties and the value of such decisions as subsequent practice. It should also be emphasized that double value could unintentionally be placed on the decisions of national courts as an authentic means of interpretation under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention and as a supplementary means of interpretation under article 32. In that connection, it might be useful to clarify in the commentary that a single example of subsequent practice could not be used for both. As to the possibility that national court decisions, as a subsequent practice, could establish the agreement of the parties under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, he agreed with the Special Rapporteur that a "judicial dialogue" would be insufficient to establish that agreement. That should be made clear in the commentary, where it should also be specified that, in that situation, the agreement of the parties had to be established by other means.

20. Concerning draft conclusion 13, paragraph 2, he agreed with the Special Rapporteur that the decisions of domestic courts had not been uniform with regard to the relative weight attached to subsequent agreements and subsequent practice, but he saw no need to provide guidance in that respect. The draft conclusions as a whole were intended to, *inter alia*, provide practitioners, States, international organizations, international courts and other

actors with guidance on subsequent agreements and subsequent practice in relation to the interpretation of treaties. One might therefore wonder why specific guidelines should be laid down for national courts – particularly as the content of the guidelines in draft conclusion 13, paragraph 2, mirrored the other draft conclusions – and why the same should not be done for other actors. To conclude, he recommended the referral of the draft conclusions to the Drafting Committee.

21. Mr. KITTICHAISAREE said that he would like Mr. Murase to clarify his comments on draft conclusion 12, paragraph 3, as he appeared to have concluded that the reactions of States to the pronouncements of expert bodies constituted an interpretation of treaties, but that the pronouncements themselves did not. However, he himself understood that, in paragraphs 109 to 111 of its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had recognized that expert bodies contributed to the interpretation of treaties, which was in line with draft conclusion 12, paragraph 3.

22. Mr. TLADI said that he would make a few general comments about certain aspects of the fourth report before turning to the proposed draft conclusions. First, it was not clear to him why the Special Rapporteur initially drew a distinction between expert bodies under human rights treaties and other expert bodies. It was particularly surprising since, in paragraph 15 of the fourth report and then again in paragraph 67, it was correctly stated that the legal effect of pronouncements had to be determined "by way of applying the rules on treaty interpretation" according to the 1969 Vienna Convention. Thus, it was not the type of treaty, or rather the subject matter of the treaty, that determined the legal effect of pronouncements, but the provisions under which the expert body operated. The meaning of the relevant provision, as correctly noted by the Special Rapporteur, should be determined by an interpretation of that provision based on the generally agreed rules of interpretation, which included subsequent agreements and subsequent practice as defined by the Commission.

23. With regard to the statement in paragraph 41 of the fourth report that the Commission had left the question open as to whether it should refer to the nature of a treaty, the Commission had, as he recalled, in fact decided not to consider the "nature" of a treaty to be a decisive factor, and the conclusion that articles 31 and 32 were sufficient was testament to that. Ultimately, that distinction was of little consequence, since the Special Rapporteur concluded that those "other bodies" were not intended to play a role in the interpretation of treaties. However, even that conclusion was doubtful. Based solely on the fourth report itself, it appeared that, rightly or wrongly, those bodies did interpret the treaties under which they had been established. In paragraph 92, the Special Rapporteur gave examples of the way in which the International Narcotics Control Board seemingly interpreted the conventions whose implementation it was tasked with monitoring. At any rate, to ensure the execution and implementation of those conventions, the Board had to interpret to some extent. Similarly, the treatment of the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the Compliance Committee of the Kyoto Protocol revealed that those expert bodies also interpreted the treaties under which they had been established.

24. Regarding the treatment of the Commission on the Limits of the Continental Shelf, while he agreed to a large extent with the Special Rapporteur, in reality, the "recommendations" submitted to a State party, though based on the interpretation of treaties, did not in themselves constitute interpretation. In fact, it was the Scientific and Technical Guidelines of the Commission[173] that constituted an interpretation of article 76 of the United Nations Convention on the Law of the Sea, an interpretation that formed the basis of the recommendations submitted to the State party. While the Guidelines were not legally binding, either, States generally followed them when drafting their submissions to the Commission, even if they did sometimes voice their disagreement with certain interpretations. Nevertheless, it would have been interesting for the Special Rapporteur to consider the attitudes of States and other entities towards the Guidelines, with a view to determining the potential role of the Guidelines in establishing subsequent agreements and subsequent practice.

25. With regard to the treatment of expert bodies under human rights treaties, the Special Rapporteur mentioned a number of sources and spared no effort in establishing the non-binding nature of the pronouncements of such bodies. The key issue, however, was not whether those pronouncements were legally binding, but what role, if any, they played in terms of interpretation, particularly with regard to subsequent agreements and subsequent practice. What mattered for the purposes of the topic at hand was whether those pronouncements could constitute subsequent agreements and subsequent practice for the interpretation of treaties. On that question, he broadly subscribed to the Special Rapporteur's conclusion. He raised the point only because, in the fourth report, there seemed at times to be a conflation of the role of the pronouncements of expert bodies as means of interpretation and their binding or non-binding character. For example, in paragraph 29 of the fourth report, after a discussion of the report of the International Law Association citing the *Ahmadou Sadio Diallo* case before the International Court of Justice, it was stated that the International Law Association and regional human rights courts had adopted the same approach as the Court and had treated the pronouncements of expert bodies "as a possible source of inspiration, but they have not treated them as binding". That conflation was even more evident in the discussion of how domestic courts treated the pronouncements of expert bodies, particularly in paragraph 33. It was clear, from reading the fourth report as a whole, that the Special Rapporteur himself did not conflate those two distinct concepts, as evidenced by the proposed draft conclusion, but the treatment of the issue in the fourth report gave a different impression.

26. The oral presentation of the fourth report by the Special Rapporteur had led him to wonder whether those issues were raised in order to determine the "interpretative weight, if any," of such pronouncements, and thus

[173] Available from: www.un.org/Depts/los/clcs_new/commission_guidelines.htm.

whether they were legally binding, or whether they should merely be taken into account. In his view, such considerations did not fall within the scope of the topic, which concerned not the interpretation of treaties in general, including the weight to be accorded to various elements, but subsequent agreements and subsequent practice. In the same vein, the conclusions on the relevance of the pronouncements of expert bodies for the purposes of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice did not seem necessary as they also fell outside the scope of the topic. Even though the fourth report did not contain any proposed draft conclusions on the subject, there was no reason why the issue should be dealt with at that time.

27. As a final general comment, he wished to commend the Special Rapporteur for his conscious decision to go off the beaten track by exploring jurisprudence from outside Europe and the Americas, even though the geographical scope of his work could have been extended. He wished to make a few comments about South African jurisprudence. First, in the first footnote to paragraph 53 of the fourth report, reference was made to "South Africa", but the footnote appeared to concern the *Residents of Bon Vista Mansions* v. *Southern Metropolitan Local Council* case. Second, the footnote contained a reference to the *Minister of Health and Others* v. *Treatment Action Campaign and Others* case, presumably as a source regarding the non-binding nature of the pronouncements of human rights treaty bodies. In that case, however, the Constitutional Court of South Africa had refused to apply the pronouncement on "minimum core obligations" not because it was not authoritative – indeed, its decision was not at all based on the role of the pronouncements of the Committee on Economic, Social and Cultural Rights – but because, regardless of the Committee's interpretation, the doctrine of "minimum core obligations" was not part of the South African constitutional fabric. There were, of course, countless other decisions of the Constitutional Court that shed light on its approach towards the pronouncements of treaty bodies, notably in the *State* v. *Makwanyane and Another* case, in which it relied on pronouncements of the Human Rights Committee, and in *Carmichele* v. *Minister of Safety and Security*, and *National Coalition for Gay and Lesbian Equality and Another* v. *Minister of Justice and Others*.

28. Turning to the draft conclusions proposed by the Special Rapporteur, he had no objection to draft conclusion 12, but wished to make a few observations. While he did not disagree with paragraph 2, he was not sure that it was needed. The point that was really being made was that the pronouncements of expert bodies could give rise to subsequent agreements and subsequent practice or that, once subsequent agreements and subsequent practice as defined had been established, the pronouncements of expert bodies could capture them. Thus, those pronouncements could be the reason for, or the repository of, subsequent agreements and subsequent practice. That statement of fact was absolutely true, but its normative value was somewhat limited, though that had not prevented the Commission from adopting, on first reading, a similar draft conclusion concerning the practice and agreements of international organizations. The observations made by Mr. Hmoud and by Mr. Murase about draft conclusion 12 related to editorial, rather than substantive, issues. As to paragraph 3, as he had noted at the previous session with regard to international organizations, such subsequent practice was more valuable in contributing to the application of article 31, paragraph 1, of the 1969 Vienna Convention. In other words, he doubted that such pronouncements constituted subsequent practice. There was one major difference between articles 31 and 32 of the 1969 Vienna Convention that the Special Rapporteur and the Commission might wish to consider: the application of article 32 was relevant only in limited cases, namely cases of ambiguity or absurdity.

29. Regarding draft conclusion 13, the proposition in paragraph 1 was correct, but the Special Rapporteur could perhaps find an appropriate term to clarify which decisions of domestic courts qualified as subsequent practice under article 31, paragraph 3 (*b*), in order to determine whether they met the criteria laid down in draft conclusion 4, paragraph 2, as provisionally adopted in 2013.[174] He had the same reservations about paragraph 2 as Mr. Hmoud and Mr. Murase. He considered that the draft conclusions as a whole were directed at domestic courts, too, so he did not understand why specific guidelines should be developed with regard to the decisions of those courts, unless there was a suggestion that the guidelines in question applied only to domestic courts, and that international courts and tribunals could ignore them. At the same time, he fully supported some of the conclusions in paragraph 2, but would prefer them to be of a general nature rather than directed at domestic courts. Lastly, as Mr. Hmoud had rightly noted, some of the provisions were already to be found in the draft conclusions that had been adopted. The concern expressed by Mr. Murase did not appear to be well founded, since draft conclusion 13, paragraph 2 (*d*), and draft conclusion 12, paragraph 4, seemed rather to be mutually reinforcing.

30. To conclude, he supported the referral of the draft conclusions to the Drafting Committee.

31. Mr. FORTEAU said that, as in previous years, the Special Rapporteur's report was based on extensive research and a very thorough analysis of the material available. From a theoretical standpoint, the Special Rapporteur addressed some particularly interesting issues, on which he shed new light. Since the Commission had started working on the topic, there had been a question mark over how to deal with expert bodies and domestic courts, and fortunately, thanks to the fourth report, the Commission was now able to take a position on the two issues and to adopt the draft conclusions as a whole on first reading. To that end, in chapters III and IV of his fourth report, the Special Rapporteur made some proposals for the final "clean-up", which it would be up to the Drafting Committee to consider.

32. At the present juncture, he wished to make three comments on those proposals. First, he was not sure that it was right to state, as the Special Rapporteur did in paragraph 115 of his fourth report, that the issue of treaties between States and international organizations had not been addressed in relation to the topic at hand. Indeed,

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[174] *Yearbook ... 2013*, vol. II (Part Two), p. 28.

many of the commentaries to the draft conclusions adopted at previous sessions contained references to practice in relation to treaties to which States, but also at least one international organization, were parties. That was the case with the practice in relation to World Trade Organization agreements and to the United Nations Convention on the Law of the Sea, to which the European Union was a party. Second, while the introductory draft conclusion proposed by the Special Rapporteur in paragraph 117 of the fourth report seemed useful and in line with the Commission's established practice, he was not sure that he fully understood what was meant by the word "significance" in that context. Lastly, he agreed with the Special Rapporteur that draft conclusion 4, paragraph 3, needed to be revised to reflect the conclusions that had already been adopted, but only to take into account the practice of an international organization in the application of its constituent instrument. He did not believe, on the other hand, for reasons that he would set out later, that it was necessary to include the practice of expert bodies in the draft conclusion. In his view, it would thus be sufficient to state, in draft conclusion 4, paragraph 3, that other subsequent practice consisted of "conduct in the application of the treaty".

33. With regard to the fourth report, in which the Special Rapporteur, after very thorough consideration, proposed two new draft conclusions, it seemed to him that neither of the draft conclusions was necessary, and he was inclined to think that there was no reason to refer them to the Drafting Committee. That was not to say that the Special Rapporteur's analyses on the matter were of no value. They were, but only as a means of confirming the commentaries to the draft conclusions that had already been adopted by the Commission. They did not justify the adoption of two new draft conclusions for the following reasons. First, concerning the pronouncements of expert bodies, which would be better translated in French as *prononcés*, he would not comment on the wording of draft conclusion 12, which, as highlighted by Mr. Hmoud and Mr. Murase, raised several questions, because, more fundamentally, he did not think that it was possible to regard the pronouncements of such bodies as subsequent "practice" within the meaning of that term for the purposes of the interpretation of treaties or for the purposes of the present topic. Such pronouncements were more akin to international court decisions that stated the law rather than implementing it. As very rightly recalled by the Secretariat in the memorandum that it had prepared on treaty-based monitoring mechanisms for the purposes of the topic of crimes against humanity (A/CN.4/698), the role of such mechanisms was not to implement treaties – in other words, to execute or give effect to the rights and obligations that they enshrined – but to "monitor" their implementation or application. One could not, therefore, speak of practice in the proper sense of the term.

34. He was surprised that Mr. Hmoud, having made the same comments, had nevertheless recommended the referral of draft conclusion 12 to the Drafting Committee. The fact that the pronouncements of expert bodies were not a form of practice within the meaning of the draft conclusion was clear from the jurisprudence of the International Court of Justice. In 2010, in the *Ahmadou Sadio Diallo* case, the Court had taken into consideration the pronouncements of expert bodies not as a form of "practice" but as quasi-judicial "precedents" or as "case law". In that regard, it had been absolutely right to refer to the "interpretative case law" of the Human Rights Committee (para. 66 of the decision). Similarly, in its general comment No. 33, which was cited by the Special Rapporteur in paragraph 20 of his fourth report, the Committee itself recalled that "the Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision",[175] specifically an international judicial decision. In the *Ahmadou Sadio Diallo* case, the Court also equated the case law of the Human Rights Committee with that of the African Commission on Human and Peoples' Rights, and, in the following paragraph of its judgment, that of the European Court of Human Rights and that of the Inter-American Court of Human Rights. The International Law Commission, too, treated the pronouncements of expert bodies and the decisions of international courts as parts of a single whole in its Guide to Practice on Reservations to Treaties,[176] as recalled by the Special Rapporteur in paragraphs 36 to 40 of his fourth report.

35. That was why he strongly disagreed with the Special Rapporteur when, for example, he stated in paragraph 16 of his fourth report that the pronouncements of expert bodies might be relevant for the interpretation of a treaty as "a form of practice subsequently arrived at under the treaty". Such pronouncements did not amount to a "practice", but to international "case law" or, if one preferred, to "subsidiary means" for the interpretation of rules of law, which was entirely different from subsequent practice as a means of interpretation. In the context of its work on customary international law, the Commission had clearly drawn a distinction between, on the one hand, judicial decisions that were an element of practice (which covered domestic court decisions and nothing else) and, on the other, decisions that were merely subsidiary means for the determination of rules of law, namely any international judicial or quasi-judicial decision and, in certain cases, some domestic court decisions. That did not mean, however, that the pronouncements of expert bodies were not relevant for the interpretation of treaties. The Special Rapporteur was quite right to state, in paragraph 32 of his fourth report, that "such pronouncements … 'deserve to be given considerable weight in determining the meaning'" of a treaty, as recalled by the International Court of Justice in paragraph 66 of its decision in the *Ahmadou Sadio Diallo* case when it stated that it should "ascribe great weight to the interpretation adopted by" the Human Rights Committee. The Special Rapporteur was also right to state that such pronouncements were a "relevant means of interpretation", but, once again, the fact that the pronouncements of expert bodies were a means of interpretation did not make them a form of practice. Care should be taken not to conflate the genus and the species: while the pronouncements of expert bodies belonged to the general

[175] Human Rights Committee, General comment No. 33 (2008) on the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 40*, vol. I (A/64/40 (Vol. I)), annex V, para. 11.

[176] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq.*

category of means of interpretation, they did not belong to the specific category of subsequent practice.

36. The fact that the pronouncements of expert bodies were a supplementary means for the interpretation of the law rather than a form of subsequent practice meant that none of what was said in draft conclusion 12 was specific to expert bodies. The Commission could adopt the same text with the words "of expert bodies" replaced by "of the International Court of Justice", since a practice could arise from, or be reflected in, a decision of the Court, which could also contribute to the interpretation of treaties. For example, the Court's interpretation of the Convention against torture and other cruel, inhuman or degrading treatment or punishment in *Questions relating to the Obligation to Prosecute or Extradite* in 2012 could give rise to a certain form of subsequent practice. That the ruling of an international court should have that effect clearly did not, however, make it a form of practice within the meaning given to the term in the draft conclusion. In that regard, draft conclusion 12 and, in particular, paragraph 64 of the Special Rapporteur's fourth report, were, in his view, based on a misinterpretation of the legal nature of the pronouncements of expert bodies. Since such pronouncements did not constitute a form of practice, there was no reason to devote a whole draft conclusion to them in a set of draft conclusions focusing solely on subsequent agreements and subsequent practice, and which did not concern other means of interpretation.

37. He did not see the usefulness of draft conclusion 13, either. He fully accepted, of course, that the decisions of domestic courts were indeed a possible form of subsequent practice in relation to the application or interpretation of a treaty, but, on the one hand, that was true of the conduct of all State organs, not only that of domestic judicial bodies, and, on the other, the Commission had already adopted draft conclusion 5, paragraph 1 of which provided that "[s]ubsequent practice under articles 31 and 32 [of the 1969 Vienna Convention] may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law".[177] It was thus difficult to understand why it was necessary to repeat that principle of attribution in a new draft conclusion. It was true that the Special Rapporteur complemented the general reminder with a number of clarifications in draft conclusion 13, paragraph 2, but it was not clear why those clarifications were useful and, in that regard, he aligned himself with the comments made by Mr. Murase. The aim of the clarifications was to regulate the conduct of domestic courts by recommending that they follow certain guidelines when applying a treaty, but it was hard to understand why the guidelines were expressed using the verb "should", since domestic courts were required, as organs of the State, to follow the international law principles of treaty interpretation. In any event, and like Mr. Hmoud and Mr. Murase, he was not sure why such recommendations should be made to domestic courts but not to the executive or legislative authorities. There was nothing to justify that distinction. If the objective was to guide the practice of State organs, it should be done in a consistent manner by addressing recommendations to every kind of organ, not just judicial bodies. Moreover, even if there were a need to coordinate domestic practice, as maintained by the Special Rapporteur, that need related mainly to the practice of the executive authorities, which was far more extensive than judicial practice.

38. Lastly, and in any case, he did not think that it would be appropriate for the Commission to adopt such guidelines. Given that States were bound by the rules of interpretation embodied in articles 31 and 32 of the 1969 Vienna Convention, all State organs were expected to follow those rules, and it was enough to read draft conclusions 1 to 11 to determine how to take into account subsequent agreements and subsequent practice. There was therefore no need to repeat, in draft conclusion 13, what flowed from the draft conclusions that had already been adopted. In that connection, all the material presented by the Special Rapporteur in paragraphs 95 to 111 of his fourth report would prove very useful in supplementing the commentaries to draft conclusions 1 to 11, whose substance was thus corroborated. It was, however, important to be fair to the Special Rapporteur. As the Special Rapporteur had noted in his oral presentation, the Commission itself and some delegations to the Sixth Committee had asked him to examine the specific issues of the pronouncements of expert bodies and the decisions of domestic courts, and it was worth recalling that, at the previous session, the Commission had submitted questions on those matters to States.[178] The Special Rapporteur could thus not be criticized for considering the issues in his fourth report, but the conclusion that emerged from that consideration was nevertheless that separate draft conclusions should not be devoted to the issues.

39. To conclude, he recommended the referral of the introductory draft conclusion and of revised draft conclusion 4 to the Drafting Committee. Subject to a final "clean-up" of the draft conclusions that had already been adopted, the Commission should be in a position to adopt, on first reading, draft conclusions 1 to 11 and an introductory draft conclusion, as proposed by the Special Rapporteur.

40. Mr. TLADI said that he wished to know whether Mr. Forteau was arguing that paragraphs 2 and 3 of draft conclusion 12 were not necessary or that their content was inaccurate. He agreed with Mr. Forteau, Mr. Hmoud and Mr. Murase that the pronouncements of expert bodies did not amount to practice, but there was nothing in the draft conclusions to indicate that they did. He would therefore like to know in what way draft conclusion 12 suggested that the pronouncements of expert bodies constituted practice.

41. Mr. FORTEAU said that either the pronouncements of expert bodies were a form of practice, in which case the same kind of draft conclusion should be used for the decisions of any international court; one might wonder, in that regard, whether an interpretation adopted by the International Court of Justice in a case involving two States could establish a practice that could be relied on against the other States parties to the convention in question. Or, as he saw it, they were not a form of practice, in

[177] *Yearbook ... 2013*, vol. II (Part Two), p. 34.

[178] See *Yearbook ... 2015*, vol. II (Part Two), p. 14, para. 26.

which case he questioned the usefulness of such a draft conclusion in the context of a topic that focused solely on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

42. Mr. MURPHY said that chapter I of the Special Rapporteur's fourth report was devoted to the "[p]ronouncements of expert bodies", but that, since most of the bodies in question were "expert treaty bodies", it would perhaps be best to employ that term in the draft conclusions and the commentaries thereto. Moreover, if the topic was indeed expert treaty bodies, examples to support a draft conclusion on the issue should not be drawn from the practice of other kinds of bodies. For example, the Working Group on Arbitrary Detention, which was referred to in the second footnote to paragraph 11 of the the fourth report, was a special mechanism of the Human Rights Council and not an expert treaty body. Similarly, the Committee on Economic, Social and Cultural Rights, which was referred to in paragraph 45 of the fourth report, had been established by the Economic and Social Council. In addition, it was stated in paragraph 10 of the report under consideration that the members of such expert treaty bodies served in their "individual" capacity. It would probably be better, in the English text, to describe them in the same way as in the treaties in question, namely as serving "in their personal capacity".

43. In paragraph 14 of his fourth report, the Special Rapporteur listed different kinds of statements by expert treaty bodies, as though the bodies were all of the same nature. It would be useful, however, to analyse the actual competence assigned to each body and then for what purpose they issued "pronouncements", with a particular focus on whether their mandate was to interpret the treaties under which they had been established. For example, with regard to the International Covenant on Civil and Political Rights, the term "general comments" was expressly used in the Covenant to describe the views expressed by the Human Rights Committee in the context of its consideration of the periodic reports submitted by States parties on their implementation of the Covenant, not in the context of interpreting it. The term "concluding observations and recommendations" appeared nowhere in the Covenant, but had emerged from the Committee's practice. The "views" that the Committee might issue were in response to individual communications alleging human rights violations under the first Optional Protocol to the International Covenant on Civil and Political Rights. Care was needed, in that respect, to avoid the inappropriate use of terms. Thus, it was asserted in the fourth report that the expression "findings" might be "misunderstood as being limited to factual determinations", but in fact, in the Covenant, "findings" concerned only "findings … of fact"[179] and hence could not be viewed as "pronouncements" relevant to the interpretation of the Covenant. In paragraph 14 of the fourth report, it was stated that "the work of expert bodies often consists of action which is, explicitly or implicitly, declaratory (of law)", but no support could be found for that statement in the fourth report and certainly not in the relevant treaties themselves. In his view, the statement was incorrect and should not be included in the commentary. At best, one could say that the work of expert treaty bodies often consisted of advisory action that was, explicitly or implicitly, declaratory of their interpretation of applicable obligations. It was further stated in the same paragraph that it was "usually not the case" that the action of an expert body possessed "a judicial quality", whereas that was clearly never the case, unless the Special Rapporteur considered international courts to be expert treaty bodies.

44. He was not sure why, in paragraph 19 of the fourth report, the Special Rapporteur singled out the views of the Government of the United States of America. In fact, a substantial number of Governments had commented on draft general comment No. 33, and many of them had disagreed with the Human Rights Committee's initial position. Similarly, he was not sure why the Special Rapporteur did not cite all three paragraphs of the general comment that were relevant to the function and authority of the Committee, notably paragraph 12. Lastly, if mention was to be made of the general comment, why did the Special Rapporteur not discuss the reactions of States to the final version, given that those reactions appeared to be equally relevant?

45. In paragraph 26 of his fourth report, the Special Rapporteur referred to an "approach" adopted by a committee of the International Law Association whereby the pronouncements of expert treaty bodies were viewed as falling under article 31, paragraph 3, of the 1969 Vienna Convention. He did not think that the approach should be mentioned in the Commission's commentaries. At the same time, one might conclude that the only reason to advance such highly strained arguments was precisely that the treaties at issue did not accord to those bodies an express power of interpretation.

46. Paragraph 46 of the fourth report seemed highly problematic in that it suggested that a general comment of the Human Rights Committee could reflect an agreement of the States parties to the International Covenant on Civil and Political Rights as to the interpretation of the treaty simply because the Committee asked States for their views before publishing the final version of the general comment. The problem was that States parties typically made observations opposing, and not agreeing with, the position taken by the Human Rights Committee, which then often dismissed the observations in whole or in part. Moreover, while the views of States parties were typically posted on the Committee's website during the comment period, they were rarely left on the website thereafter, which could give the impression of acceptance of the Committee's position. Consequently, it was not logical to say that a general comment by the Human Rights Committee reflected an agreement of the States parties merely because the final version thereof was established after the Committee had received observations from those States. Indeed, he seriously doubted that one could find a single instance in which unanimity among States parties could be gleaned from the observations that they submitted to an expert treaty body. If anything, the existence of observations from States that opposed the Committee's position was evidence of disagreement with the Committee's views rather than acquiescence, let alone agreement.

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[179] International Covenant on Civil and Political Rights, art. 42, para. 7 (*c*).

47. In addition, he did not think that the analysis in paragraph 51 of the report under consideration, which the Special Rapporteur had highlighted at the previous meeting, accurately captured the Commission's 2011 Guide to Practice on Reservations to Treaties. As correctly noted by the Special Rapporteur in paragraphs 37 and 38 of his fourth report, the relevant guideline from the Commission provided that States and international organizations "shall give consideration to" the expert treaty body's assessment of the permissibility of the reservations. That was the language used in the guideline, but not in paragraph 51, in which the Special Rapporteur quoted from the commentary to the 2011 Guide to Practice on Reservations to Treaties. Moreover, it was made clear in the commentary that the expression "shall give consideration to" was simply setting out a general duty of States to cooperate with treaty monitoring bodies in the context of making reservations to a treaty.[180] Nothing in the Commission's guideline or commentary concerned the interpretation of treaties; the matter was simply not addressed, either expressly or implicitly. He did not find it credible, therefore, to say that the Commission "appears to designate such pronouncements as a means of interpretation which needs ('shall') be taken into account, as under article 31" of the 1969 Vienna Convention. Furthermore, the assertion at the end of paragraph 52 of the fourth report that the Guide to Practice on Reservations to Treaties "does not exclude" a particular assertion was beside the point; it did not exclude many potential assertions, but that was not to say that those assertions were correct.

48. He did not follow the logic in the first sentence of paragraph 56 of the fourth report, either, according to which "an individual pronouncement [of an expert treaty body] normally carries less weight than a series of pronouncements or a general comment reflecting a settled position on a question of interpretation". The Special Rapporteur did not provide any evidence of State practice or case law to support that proposition. The International Court of Justice did indeed refer to a "constant" practice, but said nothing about the relative weight to be accorded to a series of pronouncements as opposed to an individual pronouncement. Furthermore, the assertion later in the paragraph that "[t]he level of acceptance of a particular pronouncement … by States parties" was an important factor was not explained and unhelpful; how exactly was such "acceptance" to be determined? If one or more States rejected the view of the expert treaty body, did that mean that there was no acceptance?

49. With reference to paragraph 58 of the fourth report onwards, it was unsustainable to regard the pronouncements of expert treaty bodies as "subsequent practice" within the meaning given to the term in the context of the topic. The Commission's work on the topic was built on the understanding that "subsequent agreements" and "subsequent practice" referred to the agreements and practice of parties to treaties. Using those terms to refer to the actions of other entities risked confusing the reader as to the nature of the pronouncements of expert treaty bodies, which were certainly not parties to treaties. Perhaps the Special Rapporteur felt the need to characterize the pronouncements of those bodies as "subsequent practice" in order to justify the draft conclusions that he devoted to them, but those conclusions were simply not necessary. In 2015, in draft conclusion 11, paragraph 3, and in the commentary thereto, the Commission had addressed the practice of international organizations as contributing to the interpretation of their constituent instruments.[181] In so doing, it had consciously and carefully referred to such practice not as "subsequent practice", but simply as "practice". It could do the same with regard to the pronouncements of expert treaty bodies. He therefore strongly opposed revisiting draft conclusion 4, paragraph 3, for the purpose of including in the definition of "subsequent practice" a practice other than that of parties to treaties. During the debate on the advisory opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Mr. Kittichaisaree had asserted that expert treaty bodies could contribute to the interpretation of treaties, but that was not relevant to the question under consideration, which was whether the pronouncements of those bodies could be labelled as "subsequent practice" within the meaning given to the term in the context of the topic; he himself did not think that they could.

50. The analysis in paragraph 60 of the fourth report was unpersuasive. In particular, the Special Rapporteur asserted that the pronouncements of expert treaty bodies "are 'official statements regarding [their treaty's] interpretation' even if they are not binding". As noted by other members of the Commission, that assertion was wholly unsubstantiated. He did not see how one could assert that such pronouncements were "official" without analysing the specific mandate of the expert treaty body at issue, let alone assert that they were official statements "regarding treaty interpretation". When, in 2013, the Commission had addressed the issue of official statements regarding treaty interpretation, it had listed a series of actions taken by States, but had in no way indicated that actions taken by other entities constituted official statements. Similarly, it was stated in paragraph 62 of the fourth report that the purpose of the pronouncements of expert treaty bodies was "to contribute to [the treaty's] proper application" and to "contribute to [the treaty's] interpretation". Again, there was a need to analyse the mandates of the bodies concerned in order to support such an assertion, but he believed that the mandates of most, if not all, expert treaty bodies assigned no such purpose to pronouncements.

51. In paragraph 63 of the fourth report, it was claimed that such pronouncements might exhibit some of the characteristics of the subsidiary means referred to in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. He had doubts about that assertion, but, in any event, an analysis of that provision of the Statute of the International Court of Justice fell outside the scope of the topic and should thus not be included in any commentary that the Commission might prepare.

52. Paragraphs 69 to 76 of the fourth report contained an in-depth analysis of the Commission on the Limits of the Continental Shelf. There, too, caution was needed.

[180] See *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, p. 239 (para. (3) of the commentary to guideline 3.2.3).

[181] See *Yearbook ... 2015*, vol. II (Part Two), p. 55 *et seq.*, para. 129 (draft conclusion 11 and the commentaries thereto).

Paragraph 70 gave the impression that the establishment by a coastal State of the outer limits of its continental shelf was final and binding on "all parties" to the United Nations Convention on the Law of the Sea so long as that coastal State accepted the recommendation of the Commission on the Limits of the Continental Shelf. It was not quite right, however, to speak of the coastal State "accepting" the recommendation; rather, if the coastal State established the outer limits of its continental shelf "on the basis" of a recommendation by the Commission, those limits would be final and binding, which was not the same. Moreover, the issue of whether those limits were binding on "parties" to the Convention was controversial, and it would perhaps be advisable for the International Law Commission not to take a position on it in the context of the topic under consideration. In paragraph 71, the Special Rapporteur seemed to underemphasize the core function of the Commission on the Limits of the Continental Shelf, which was to interpret article 76 of the United Nations Convention on the Law of the Sea, and to overemphasize the ancillary issue – which had also been disputed to a degree – of the Commission's lack of competence to interpret article 121 of the Convention. In addition, the reference in paragraph 74 to the Guide to Practice on Reservations to Treaties was confusing in that context, given that the United Nations Convention on the Law of the Sea did not permit reservations and that the role of the Commission on the Limits of the Continental Shelf had nothing to do with them. In any event, the description of the functions of that Commission in paragraph 74 was somewhat misleading. Under article 3 of annex II to the United Nations Convention on the Law of the Sea, the Commission on the Limits of the Continental Shelf was assigned two functions: first, to consider data and make recommendations concerning the outer limits of the continental shelf (article 3, paragraph 1 (*a*)); and, second, to provide scientific and technical advice (article 3, paragraph 1 (*b*)). The first function was the core one and should be emphasized. To his knowledge, the Commission on the Limits of the Continental Shelf had never exercised the second, at least not as a body.

53. In the interests of time, he would not comment on the part of the fourth report devoted to expert bodies established under treaties other than human rights treaties, such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change and other conventions, but he did think that paragraph 93 of the fourth report, which came at the end of that part, was unclear: did the Special Rapporteur consider that the pronouncements of those other bodies were not relevant for the purposes of the interpretation of treaties?

54. While the issue of the decisions of domestic courts, which was addressed in chapter II of the fourth report, was interesting inasmuch as it could contribute to the discussion of other aspects of the topic, he, like Mr. Forteau, Mr. Hmoud and Mr. Murase, did not see the need for a draft conclusion on the matter. Domestic and other courts should of course take into account the draft conclusions as a whole, but he saw no point in synthesizing the draft conclusions in a single draft conclusion intended for a particular "consumer". Moreover, the synthesis in proposed draft conclusion 13 was incorrect. While paragraph 1 was unobjectionable, paragraph 2 gave the impression that the process by which domestic courts should interpret a treaty was different from that followed by other entities, which, from the standpoint of international law, was not correct. In addition, the specific provisions of subparagraphs (*a*) to (*e*) seemed unnecessary and potentially confusing or misleading.

55. As to the draft conclusions proposed by the Special Rapporteur, he was in favour of sending new draft conclusion 1*a* to the Drafting Committee, although he, like other members, considered that the word "significance" should be reviewed. He had doubts about draft conclusion 12 and thought that Mr. Forteau had put forward some very convincing arguments against referring it to the Drafting Committee. Moreover, for the reasons that he had stated, he opposed sending proposed revised draft conclusion 4 and draft conclusion 13 to the Drafting Committee. Lastly, he supported the Special Rapporteur's proposal to move draft conclusion 3 and the Special Rapporteur's decision to retain the focus of the draft conclusions on the rules associated with the 1969 Vienna Convention, which was consistent with the approach taken so far and with relevant State practice, jurisprudence and doctrine.

56. Mr. GÓMEZ ROBLEDO said that the members of the Commission should exercise caution when deciding whether to refer certain draft conclusions proposed by the Special Rapporteur in his fourth report to the Drafting Committee. Irrespective of the arguments presented at the current meeting, it was essentially a matter of determining the nature of many expert bodies, including those established under human rights treaties. Such bodies performed a quasi-judicial role, increasingly perceived themselves to be genuine courts and acted as such. A distinction should be drawn between the powers emanating from the general competence granted to those bodies and the optional competence that they had when States accepted the individual complaints procedure. Many matters still needed to be examined, and the Commission should be wary of making decisions too hastily. In his view, the draft conclusions proposed by the Special Rapporteur could be sent to the Drafting Committee *ad cautelam*.

57. Mr. KITTICHAISAREE said that he had made a mistake in his earlier statement about Mr. Murase's comments: he had meant to refer to paragraph 2 of draft conclusion 12, not paragraph 3, and that was why Mr. Murase had been unable to provide a response, though Mr. Murase had subsequently and privately offered all the necessary explanations. Second, since several members of the Commission were of the opinion that some of the draft conclusions proposed by the Special Rapporteur in his fourth report should not be sent to the Drafting Committee, he wished to know how the Commission should proceed: should it request the Special Rapporteur to revise those draft conclusions and to submit them to the Commission in plenary before it made a decision, or should it continue the discussion and, once that was over, vote on whether to refer the draft conclusions to the Drafting Committee?

58. Mr. SABOIA said that Mr. Gómez Robledo had been right to draw attention to some important aspects of the issue of expert bodies, whether they were treaty bodies or entities that had been established within international organizations and that liaised with States. Some of

those bodies had expanded their competence and, as part of their practice, had opened a dialogue with States, a dialogue that had played a very important role in the development of human rights and in other areas. Some might argue that the issue fell outside the scope of the topic, but he considered that it would be useful for the Commission to take a position on the significance and importance of the pronouncements of expert bodies in a draft conclusion like proposed draft conclusion 12. It would therefore be premature to request the Special Rapporteur to rephrase the draft conclusions or to decide against sending them to the Drafting Committee.

59. Mr. KAMTO, agreeing with the observations of Mr. Gómez Robledo and Mr. Saboia, said that many members of the Commission had not yet spoken on the topic and that it would thus be more than premature at that stage to decide whether to refer the draft conclusions proposed by the Special Rapporteur in his fourth report to the Drafting Committee.

60. Mr. PARK said that he wished to thank the Special Rapporteur for his fourth report, in particular for his thorough examination of the pronouncements of expert bodies and the decisions of domestic courts, and for his analysis of the doctrine regarding the interpretation of treaties, which was a particularly complex subject matter. Noting, as Mr. Forteau had done, that the term "pronouncements" had been rendered in French as *décisions*, he too considered that it would be preferable to translate the word differently.

61. In his fourth report, the Special Rapporteur gave prominence to "expert bodies under human rights treaties". The fourth part of chapter I, which was devoted to those bodies, was 20 pages long – equal to two fifths of the report – whereas the fifth part of that chapter, which dealt with "other expert bodies", was a mere 7 pages long and covered only four bodies. One might therefore question whether there was an imbalance between the attention devoted to human rights bodies and that given, to a lesser extent, to other bodies. In the circumstances, questions remained over the general applicability of draft conclusion 12, which appeared to be based on a specific category of expert bodies.

62. With regard to draft conclusion 12, according to the Special Rapporteur, the use of the words "may arise" in paragraph 2 was intended to cover, on the one hand, cases in which the pronouncements of expert bodies constituted subsequent agreements and subsequent practice, and, on the other, cases in which subsequent agreements and subsequent practice resulted from the reactions of States parties to those pronouncements. While he agreed with the Special Rapporteur on that matter, he, like Mr. Murase, feared that the use of the expression "may arise" might suggest that subsequent agreements and subsequent practice could flow directly from the pronouncements of expert bodies, without the involvement of States parties. It would be preferable to amend that wording.

63. Regarding draft conclusion 12, paragraph 3, which dealt with the impact of the pronouncements of expert bodies on the interpretation of treaties, it seemed that, rather than the interpretation of treaties through the pronouncements of expert bodies, the issue addressed was that of the interpretation of treaties in general, which fell outside the scope of the topic. Indeed, the Commission should limit itself to clarifying the role of subsequent agreements and subsequent practice in the interpretation of treaties; its mandate was not to examine the legal significance of the pronouncements of expert bodies in relation to the interpretation of treaties. Moreover, it was not clear how paragraph 3 differed from paragraph 2, apart from the fact that one of them, paragraph 2, focused on subsequent agreements and subsequent practice, while the other dealt with the pronouncements of expert bodies as they related to subsequent agreements and subsequent practice. The phrase "when applying articles 31, paragraph 1, and 32" also raised issues. It was worth recalling, in that regard, that in 2015, in the Sixth Committee, some States had been opposed to draft conclusion 11, paragraph 3, with the United States arguing that, *inter alia*, article 31, paragraph 1 of the 1969 Vienna Convention did not concern subsequent practice. It would therefore be preferable to amend draft conclusion 12, either by dealing with article 32 separately from article 31 or by rewording draft conclusion 12, paragraphs 2 and 3, the former of which could stipulate a general principle to read: "A pronouncement of an expert body cannot, as such, constitute subsequent practice under article 31, paragraph 3 (*b*)." The latter could provide for an exception to paragraph 2, to read: "Pronouncements of expert bodies may, however, reflect or give rise to a subsequent agreement or a subsequent practice by the parties themselves which establish their agreement regarding the interpretation of the treaty under article 31, paragraph 3 (*a*) and (*b*)."

64. As to draft conclusion 12, paragraph 4, it would again be preferable to amend the wording to read: "The weight that should be given to such pronouncements in each case depends on specific considerations which include the cogency of their reasoning, the character of the treaty and of the treaty provisions in question, the professional composition of the responsible body, the procedure and other factors." Paragraph 4 would thus define the scope of draft conclusion 12. The impact and meaning of silence on the part of a State party varied according to the nature of the pronouncement of the expert body. Such a pronouncement could, for example, be addressed to all the States parties to a treaty in the form of a general comment, or to only some States parties in the form of views. That distinction should be borne in mind when interpreting silence on the part of a State party.

65. With respect to draft conclusion 13, in paragraph 96 of his fourth report, the Special Rapporteur gave two reasons for dealing with the decisions of domestic courts. The first corresponded to the content of draft conclusion 13, whereas the second, namely that domestic courts should properly assess subsequent agreements and subsequent practice, constituted the ultimate aim of the topic under consideration by the Commission. The very purpose of the Commission's work was to provide guidance to domestic courts and States for the purposes of the interpretation of the treaties to which they were parties. There was thus no need to say so in draft conclusion 13, paragraph 2, which should focus primarily on the legal value of the decisions of domestic courts, as a subsequent practice, in the interpretation of treaties. It was also unclear

why the Commission should retain subparagraphs (*a*) and (*c*) of paragraph 2, which merely repeated what was already explained in the commentaries to other draft conclusions. In the same way, subparagraphs (*b*), (*d*) and (*e*) were only restatements of other draft conclusions adopted by the Commission; for example, subparagraph (*b*) contained wording similar to that of draft conclusion 7,[182] with the added fact that it was limited to describing the current conduct of domestic courts and did not, therefore, guide those courts in the interpretation of treaties. Consequently, it would be preferable, as proposed by other members, to keep paragraph 1 and to delete or extensively modify paragraph 2, subparagraph (*b*) of which could, for example, be moved to the commentaries. One might also wonder whether draft conclusion 13, as proposed by the Special Rapporteur, was applicable in all cases, including in the event of a conflict between the decision of a trial court and that of an appeals court.

66. With regard to new draft conclusion 1*a*, he, like Mr. Forteau and Mr. Murase, wondered whether the word "significance" was the most appropriate. He also thought that it would be better to confine the scope of the draft conclusion to article 31, paragraph 3 (*a*) and (*b*), of the 1969 Vienna Convention and, possibly, article 32 thereof.

67. Revised draft conclusion 4 seemed to be incomplete, and it would be advisable, in order to understand to whom the Special Rapporteur was referring when he used the term "official conduct", to specify that it encompassed the official conduct of some States parties to a treaty, of international organizations and of expert bodies. In paragraph 121 of his fourth report, the Special Rapporteur proposed that such clarification be given in the commentary, but he himself considered that it should be included in the draft conclusion itself; the commentary, meanwhile, could contain the required list of examples of what fell within the scope of that conduct. Lastly, he agreed with the future programme of work as proposed by the Special Rapporteur.

68. Mr. KOLODKIN said that he, like other members, was not entirely convinced of the need for draft conclusions 12 and 13 as proposed by the Special Rapporteur. Why should special attention be paid to the decisions (or pronouncements) of expert bodies established under international instruments? The decisions of international organizations, which were far more numerous and which played a much more prominent role in the interpretation of international instruments, particularly in the context of subsequent practice, were not the subject of a draft conclusion. Only one sentence was devoted to the practice of international organizations, in draft conclusion 11, which dealt solely with the capacity of that practice to contribute to the interpretation of the constituent instruments of international organizations, even though it played a crucial role in the interpretation of other international instruments.

69. It could not be deduced from draft conclusions 4 and 5 as adopted by the Commission[183] that the decisions of non-State actors constituted subsequent practice under articles 31 and 32 of the 1969 Vienna Convention. Paragraph 1 of draft conclusion 5 provided that "[s]ubsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law", and paragraph 2 established that "[o]ther conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32". Could it be considered, however, that the decisions of a body established under an international instrument and composed of independent experts were attributable to the States parties to that instrument? And could it be said that the pronouncements of expert bodies did not constitute the conduct of non-State actors mentioned in paragraph 2 of the draft conclusion? As a rule, it was unlikely that one could respond affirmatively to those questions. Moreover, it was stated in the commentary to draft conclusion 5, paragraph 2, that "other conduct" might be a pronouncement by a treaty monitoring body in relation to the interpretation of the treaty concerned.[184] The Commission had thus chosen to cite the pronouncements of expert bodies as an example of "other conduct" that did not constitute subsequent practice under articles 31 and 32 of the 1969 Vienna Convention.

70. In his fourth report, the Special Rapporteur asserted – and he agreed – that the pronouncements of an expert body could not, as such, constitute subsequent practice under article 31, paragraph 3 (*b*). The Special Rapporteur also stated, however, that it was sufficient to consider those pronouncements to be "other subsequent practice" under article 32 of the 1969 Vienna Convention: based on that premise – which, again, he did not object to – it would be necessary, to avoid misleading the reader, to modify not only draft conclusion 1, paragraph 4, and draft conclusion 4, paragraph 3, as proposed by the Special Rapporteur, but also draft conclusion 5 and the corresponding paragraphs of the commentaries thereto. One nevertheless had to question, once again, whether the pronouncements of expert bodies warranted such treatment, especially as the Commission had paid little attention to the practice of international organizations. In his view, there was no justification for devoting a separate draft conclusion to the pronouncements of expert bodies, which could be adequately addressed in a few lines in a commentary. In any event, such pronouncements remained a supplementary means of treaty interpretation under article 32 of the 1969 Vienna Convention.

71. Should the Commission decide to devote a draft conclusion to those pronouncements after all, he wished to make two remarks about draft conclusion 12: first, it would be a good idea to include a provision similar to the first sentence of paragraph 15 of the fourth report, which established that "[t]he legal effect of pronouncements by an expert body depends, first and foremost, on the applicable treaty itself"; Second, the draft conclusion should contain an express reminder that the pronouncements of expert bodies fell within the scope not of article 31 of the 1969 Vienna Convention, but of article 32 only. It would also be advisable to clarify the meaning of paragraph 3, which was rather obscure, as was draft conclusion 11, paragraph 3, according to some States.

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[182] *Yearbook ... 2014*, vol. II (Part Two), p. 113.

[183] *Yearbook ... 2013*, vol. II (Part Two), pp. 28 and 34.

[184] *Ibid.*, pp. 35–36 (para. (12) of the commentary to draft conclusion 5).

72. Lastly, with regard to draft conclusion 13, it was unclear why the Special Rapporteur had chosen to highlight that specific aspect of the subsequent practice of States rather than another in relation to the interpretation and application of treaties. Was the conduct of the executive branch, for instance, less important? And would it not be better to deal with the issue covered in paragraph 1 in the commentary to draft conclusion 4? Moreover, paragraph 2, which was written in a different style to that found in the rest of the draft conclusions, was incongruous. It brought together a set of guidelines for domestic courts, which was something that the Commission had never set out to do, and one might well wonder why such guidelines should be addressed only to domestic courts. As useful as it might be, the development of such guidelines was not part of the Commission's mandate, particularly in view of the fact, emphasized by several members, that the draft conclusions were supposed to be addressed to all parties involved in the application and interpretation of international instruments.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

73. The CHAIRPERSON invited the Chairperson of the Drafting Committee to announce the composition of the Drafting Committee on the identification of customary international law.

74. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the identification of customary international law was composed of Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Tladi, Mr. Vázquez-Bermúdez, together with Sir Michael Wood (Special Rapporteur) and Mr. Park, *ex officio*.

The meeting rose at 1 p.m.

3305th MEETING

Thursday, 26 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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[*] Resumed from the 3302nd meeting.

Cooperation with other bodies

[Agenda item 13]

Statement by the representative of the Inter-American Juridical Committee

1. The CHAIRPERSON welcomed Mr. Collot, of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

2. Mr. COLLOT (Inter-American Juridical Committee) said that it was a pleasure to represent the Inter-American Juridical Committee before the International Law Commission for the purpose of reporting on the Committee's current activities. The IAJC served as an advisory body to the Organization of American States (OAS) on juridical matters, promoted the progressive development and codification of international law and studied juridical problems related to the integration of developing countries in the region.

3. In 2015, the IAJC had held two regular sessions at its seat in Rio de Janeiro, Brazil, at which it had adopted three reports. Two of the reports, entitled, respectively, "Privacy and data protection"[185] and "Guide on the protection of stateless persons",[186] had been prepared in response to mandates from the OAS General Assembly, while the third, entitled "Migration in bilateral relations",[187] had been prepared at the Committee's own initiative.

4. The report on the protection of personal data set out 12 principles, together with commentaries, on privacy and data protection, which could serve as the basis for the formulation and adoption by member States of legislation to ensure respect for people's privacy, reputation and dignity. The guide on the protection of stateless persons contained normative suggestions concerning the legislation and practices of States and also called on States that had not yet done so to ratify relevant international instruments. In addition, it recommended that States adopt measures to facilitate access to basic services for stateless persons, enabling them to enjoy fundamental human rights. The report on migration contained a series of recommendations aimed at strengthening bilateral relations in that area, particularly between States with common borders or adjacent islands.

5. At its plenary meeting in August 2015, the IAJC had decided to keep the following topics under consideration: electronic warehouse receipts for agricultural products; the law applicable to international contracts; representative democracy; and the immunity of States and international organizations.

6. The aim of the topic of electronic warehouse receipts for agricultural products was to develop a mechanism to facilitate harmonization of data in a secure computerized system, so as to enable the creation of negotiable receipts. The topic

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[185] "Privacy and data protection" (CJI/doc.474/15 rev.2), *in* Organization of American States, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2015, OEA/Ser.Q, CJI/doc.495/15, 8 September 2015, pp. 55 *et seq.* Available from: https://scm.oas.org/pdfs/2016/CP35451EREPORTCJI.pdf.

[186] "Guide on the protection of stateless persons" (CJI/RES.218 (LXXXVII-O/15)), *in ibid.*, pp. 102 *et seq.*

[187] "Migration in bilateral relations" (CJI/doc.461/14 rev.3), *in ibid.*, pp. 47 *et seq.*

of the law applicable to international contracts was an initiative aimed at ascertaining the views of States and experts on the application of the Inter-American Convention on the Law Applicable to International Contracts in the light of a questionnaire that had been circulated to both groups. The topic of representative democracy involved the preparation of a study of the mechanisms for collective action established under the Inter-American Democratic Charter with a view to enhancing the latter's implementation and strengthening representative democracy in the Americas. The objective of the topic of jurisdictional immunities was to update the scope and validity of the jurisdictional immunities of States and international organizations by means of a study of the domestic legislation of States and international norms. A Rapporteur had been assigned for each of the topics and the responses submitted by States to an IAJC questionnaire would be taken into account in each case.

7. In 2015, the IAJC had on its own initiative decided to take up two new topics. The first concerned the preparation of a guide for the application of the principle of conventionality, which would involve an analysis of the incorporation into domestic law of inter-American conventions. The second was aimed at producing a compilation of topics of public and private international law of relevance to the OAS.

8. In August 2015, the IAJC had met with the OAS Secretary General to exchange ideas on the inter-American agenda with a view to establishing a medium-term programme of work that would seek to coordinate the activities of the IAJC with the agenda of OAS political organs. The Committee had also met with the legal adviser of the Ministry of Foreign Affairs of Brazil, a judge of the Inter-American Court of Human Rights and representatives of international bodies, such as the African Union Commission, the ICRC, the Office of the United Nations High Commissioner for Refugees and the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights.

9. The forty-second IAJC Course on International Law had been held from 3 to 21 August 2015. The Course, which had taken as its main theme the current inter-American legal agenda, had been attended by 31 students, 20 of whom had received OAS-funded scholarships. Lecturers had included judges from the International Court of Justice and the Inter-American Court of Human Rights, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, the President of the Paris Bar Association and the head of the law faculty of the University of Buenos Aires. Representatives of international organizations active in various fields of international law had also attended. He invited the members of the Commission to participate in the course as lecturers. The next edition would take place in Rio de Janeiro in October 2016.

10. In August 2015, the Committee had organized the First Meeting on Private International Law, a joint initiative with the American Association of Private International Law. The meeting had brought together eight members of the Association, along with IAJC members, to discuss three topics: the 1994 Inter-American Convention on the Law Applicable to International Contracts; consumer protection and the codification of international law; and issues of interest in the field of private international law in the inter-American system. Given the success of the initiative, the Department of International Law, in its capacity as the technical secretariat of the Committee, had organized a further meeting on private international law during the IAJC working session in Washington, D.C. in April 2016. At that session, it had been decided to undertake a study on consumer protection, with four rapporteurs representing the four regional groups; the first report was expected to be ready in October 2016.

11. Turning to the reports that the IAJC had prepared for OAS political bodies in recent years, he recalled that, in 2009, the Committee had adopted a resolution that had emphasized the vital link between the effective exercise of representative democracy and the rule of law. Based on a legal analysis of inter-American agreements and declarations on democracy and human rights, the resolution recalled, *inter alia*, that "the principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the State".[188] The IAJC had also indicated that risks and threats to, as well as violations and the breakdown of, the democratic order were situations that must be seen in the light of the validity of the essential elements of representative democracy and the fundamental components of its exercise. The resolution had also stressed the need to strengthen independent judicial powers that were endowed with autonomy and integrity, were professional and non-partisan and subject to a non-discriminatory regime of selection. The IAJC had indicated that democracy was not confined to electoral processes alone, but was also expressed through the legitimate exercise of power within the framework of the rule of law.

12. In 2012, the IAJC had adopted the Model Act on the Simplified Stock Corporation,[189] which provided for a hybrid form of corporate organization that reduced the costs and facilitated the incorporation of micro- and small businesses, making use of the experience of Colombia in that area. The IAJC considered that the inclusion of such corporate models in countries' domestic laws could contribute to the economic and social development of member States.

13. In 2013, the IAJC had adopted a Model Law on the Protection of Cultural Property in the Event of Armed Conflict,[190] with a view to providing States with guidance aimed at promoting the identification of cultural property

[188] See "The essential and fundamental elements of representative democracy and their relation to collective action within the framework of the Inter-American Democratic Charter" (CJI/RES. 159 (LXXV-O/09)), para. 3, *in* OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2009, OEA/Ser.Q/XIX.40, CJI/doc.338/09, 14 August 2009, pp. 44–45. Available from: www.oas.org/en/sla/iajc/docs/infoanual.cji.2009.eng.pdf.

[189] "Project for a Model Act on Simplified Stock Corporation" (CJI/RES. 188 (LXXX-O/12)), *in* OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2012, OEA/Ser.Q, CJI/doc.425/12, 10 August 2012, pp. 68 *et seq.* Available from: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2012.ENG.pdf.

[190] "Model legislation on protection of cultural property in the event of armed conflict" (CJI/doc.403/12 rev.5), *in* OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2013, OEA/Ser.Q, CJI/doc.443/13, 9 August 2013, pp. 41 *et seq.* Available from: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2013.ENG.pdf.

and its protection against theft, pillaging and vandalism, taking into account existing instruments in that area. The legislation included provisions on capacity-building, training programmes for officials and monitoring and compliance mechanisms; it also provided for the establishment of a cultural property protection fund.

14. In 2014, the IAJC had adopted a report on corporate social responsibility in the area of human rights and the environment in the Americas that had examined national legislation and corporate practice in the region and proposed a set of guidelines on the topic.[191] The guidelines set forth a system of shared responsibility in which States and enterprises were called upon to comply with specific obligations; the system also involved the participation in that effort of other actors, including universities, NGOs, unions, the media and churches.

15. The aforementioned topics had dealt with areas of particular importance to member States and had resulted in reports containing specific proposals and recommendations of considerable interest both to States and their citizens. To the extent possible, the IAJC endeavoured to meet and even exceed the expectations of the OAS General Assembly in relation to the development, codification, harmonization and standardization of law in the region. As well as carrying out projects requested by the Assembly, the IAJC was developing its capacity to take up topics on its own initiative. Details of its activities, including its annual reports from the past 20 years, could be consulted on its website. He invited the Commission to send a representative to participate in the the next IAJC regular session in Rio de Janeiro in October 2016.

16. Mr. VÁZQUEZ-BERMÚDEZ, noting that the Inter-American Democratic Charter provided for the adoption of measures by the OAS Permanent Council in the event of an unconstitutional alteration of the constitutional regime that seriously impaired the democratic order in a member State, asked Mr. Collot what his understanding was of the scope of the notion of "alteration of the constitutional regime" in that context and whether he could cite any examples thereof, in the light of the practice or opinions of States or academic opinions. He observed that, while some provisions of the Charter made express mention of the need for the consent of the Government concerned prior to the adoption of certain specific measures, others did not – which could be interpreted as meaning that State consent was not required in all such situations. He asked whether the Charter, which was not a treaty, was legally binding nonetheless or, as some States asserted, purely a political instrument and whether, as might be inferred from its preamble, it could be understood as a subsequent agreement of member States in relation to the interpretation of provisions on democracy in the Charter of the Organization of American States, in the context of article 31 of the 1969 Vienna Convention.

17. Mr. COLLOT (Inter-American Juridical Committee) said that there was no clear-cut answer to the question of the legal status of the Inter-American Democratic Charter. As it had never been ratified by member States, it could not be considered to be an international treaty within the traditional meaning of that term; however, like certain other texts, such as model laws, it could be regarded as an international legal instrument understood in a broad sense. It had a certain referential value, inasmuch as all current reflection on representative democracy in the region was undertaken with reference to it. It had, for example, inspired a number of practices that were key to guaranteeing representative democracy, such as the deployment of electoral observation missions.

18. As to the unconstitutional alteration of the constitutional regime, an example of such a situation would be where a democratically elected head of State subsequently established, on the basis of his popularity, a sort of popular dictatorship which engaged in conduct – for example, the systematic violation of citizens' rights and the mismanagement of State resources – that constituted a form of governance no longer capable of being characterized as representative of the general interests of the country. Thus, although the manner of the head of State's election had been democratic, it had ultimately resulted in a *de facto* situation in which the democratic order had been impaired.

19. Mr. GÓMEZ ROBLEDO said that instruments produced within the inter-American system in the 1990s with a view to preventing and repressing the sort of the military *coups d'état* that had occurred in the preceding three decades did not take into account the infinitely more sophisticated alterations of representative democracy that currently existed. Although the Inter-American Democratic Charter sought to address those new threats, the procedure it had established, based on the cooperation of the Government concerned, had been criticized as ineffective. He asked whether the current IAJC study on representative democracy was being undertaken with a view to proposing to the OAS General Assembly amendments to the Charter or its transformation into a fully-fledged treaty.

20. Mr. COLLOT (Inter-American Juridical Committee) said that the two main approaches being considered by the IAJC in its study were precisely the transformation of the Inter-American Democratic Charter into an inter-American convention and the establishment of effective observance mechanisms. That said, it was still possible, as had been done in the past, to use the Charter in its present form as a basis for developing new mechanisms aimed at promoting representative democracy. Consideration should be given, for example, to ways of ensuring that sanctions directed against those responsible for political crises did not penalize the population at large.

21. Mr. KITTICHAISAREE said that the best way forward might be to identify any remaining gaps in the existing inter-American human rights regime and to seek to close them by, for instance, adopting additional protocols where appropriate. As to Governments that came to power irregularly, for example by a *coup d'état*, the matter should perhaps be dealt with as a question of the recognition of States under international law rather than within the framework of a particular treaty. He would be interested to know the extent to which the IAJC took account of the work of the Commission in its deliberations.

[191] "Corporate social responsibility in the area of human rights and the environment in the Americas" (CJI/RES.2005 (LXXXIV-O/14), *in* OAS, Annual Report of the Inter-American Juridical Committee to the General Assembly, 2014, OEA/Ser.Q, CJI/doc.472/14, 25 September 2014, pp. 58 *et seq*. Available from: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2014.ENG.pdf.

22. Mr. COLLOT (Inter-American Juridical Committee) said that the most important task in relation to the Inter-American Democratic Charter was to ensure its relevance for OAS member States and the achievement of its stated objectives. Any gaps in the Charter could be filled by drawing on existing provisions contained in the various international human rights treaties.

23. Mr. PARK, noting that only one State in the Latin American and Caribbean region had ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, said that he would be interested to know what approach the IAJC was planning to take in the area of State immunity. He wondered whether, for example, it was preparing a new regional convention or guidelines or considering promoting the ratification of the Convention among OAS member States with a view to enabling it to enter into force.

24. Mr. COLLOT (Inter-American Juridical Committee) said that it was important to reflect on the various aspects of the topic of State immunity, in anticipation of the Convention's entry into force and implementation.

25. Mr. MURPHY said that it was very interesting for the Commission to hear about the work of the IAJC and thereby further understand how laws and practices were developed within the inter-American system. Likewise, the Commission was working on a number of projects that were likely to be of interest to the IAJC, such as those on the protection of persons in the event of disasters and the identification of customary international law. Its work on the latter project concerned, among other things, regional customary international law, the possible existence of special custom between a small number of States and the persistent objector rule. He would welcome any observations on those matters, based on the work of the IAJC as a whole or Mr. Collot's own reflections.

26. Mr. KITTICHAISAREE, referring to the ruling of the International Court of Justice in the *Colombian-Peruvian asylum case*, in which the Court had found that no regional custom existed among Latin American States relating to the granting of asylum, asked whether there had been any change in that situation.

27. Mr. COLLOT (Inter-American Juridical Committee) said that there was indeed a body of customary international law in the region, especially the body of customary rules in the area of trade law that were commonly referred to as *lex mercatoria*. An important example of regional customary law was the Code of Private International Law (Bustamante Code),[192] which was applied by States that had not signed or ratified it. Despite its subsequent amendment, some of the practices stemming from the Code still persisted in the region, and he would tend to consider those practices as regional customary rules.

28. Mr. CANDIOTI said that he would like to urge the IAJC to recommend OAS member States to ratify the United Nations Convention on Jurisdictional Immunities of States and Their Property, which represented a major advance in the law on immunity, with a view to its entry into force. It would be interesting to know whether the IAJC had had the opportunity to examine the Commission's work; if so, he would welcome the comments of the IAJC thereon. The Commission would also welcome suggestions on new topics for inclusion in its long-term programme of work.

29. Mr. COLLOT (Inter-American Juridical Committee) said that the fact that the IAJC was conducting a survey among States to ascertain whether or not they had ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property served as encouragement in that regard. Nevertheless, he agreed that it was necessary to urge States to do so more directly.

30. As to interaction between the two bodies, he said that the bridge between the IAJC and the Commission had been set up so that each could benefit from the other's reflections and enrich their respective programmes of work. In that connection, the Commission's work on the protection of persons in the event of disasters was of particular interest to the IAJC.

31. The CHAIRPERSON thanked Mr. Collot for his valuable comments and observations.

The meeting rose at 11.35 a.m.

3306th MEETING

Friday, 27 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere[193] (A/CN.4/689, Part II, sect. A,[194] A/CN.4/692,[195] A/CN.4/L.875[196])

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his third report on the protection of the environment (A/CN.4/692).

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[192] The Bustamante Code is annexed to the Convention on Private International Law, signed at Havana, 20 February 1928.

[193] At its sixty-fifth session (2013), la Commission decided to include the topic in its programme of work and appointed Mr. Shinya Murase as Special Rapporteur for the topic (*Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168). At its sixty-seventh session (2015), the Commission provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs, and the commentaires thereto (*Yearbook ... 2015*, vol. II (Part Two), pp. 19 *et seq.*, para. 54).

[194] Available from the Commission's website, documents of the sixty-eighth session.

[195] Reproduced in *Yearbook ... 2016*, vol. II (Part One).

[196] Available from the Commission's website, documents of the sixty-eighth session.

2. Mr. MURASE said that he wished to thank the members of the Commission for participating actively in the informal dialogue with atmospheric specialists held on 4 May 2016. He had sent members electronic copies of the digital slide presentations made by those scientists along with a brief summary of the meeting. He wished to thank the many academics and researchers who had provided him with valuable suggestions and advice for the preparation of his third report. He also thanked the secretariat for its very helpful comments and welcomed the opportunity he had had over the previous two years to meet with researchers and graduates from the China Youth University of Political Studies School of Law in Beijing, where he taught, as well as those from Renmin University and Peking University.

3. He had submitted his third report in February, and a preliminary version of it had been distributed to members shortly thereafter. It was unfortunate that the translation services' significant workload had prevented them from translating the report more quickly, even though it did not exceed the specified page limit. He wished to draw attention to two errors in the annex to the English version of the third report: the words "special situations" should be replaced with "special situation" and, in draft guideline 7, the phrase "with caution and prudence" should be replaced with the words "with prudence and caution".

4. The most important development since the Commission's previous session had unquestionably been the adoption of the Paris Agreement under the United Nations Framework Convention on Climate Change, which, significantly, provided that "climate change is a common concern of humankind". The international community had come back to that concept 23 years after the "Rio Conventions";[197] the Commission might wish to reconsider his original proposal in due course.

5. In his third report, the Special Rapporteur dealt with two important issues: the obligation of States to protect the atmosphere, which included the duty to assess environmental impacts; and obligations relating to the sustainable and equitable utilization of the atmosphere, which would require studying the legal limits on intentional modification of the atmosphere, commonly known as "geoengineering activities".

6. With regard to the obligation of States to protect the atmosphere, he recalled that at the Commisssion's previous session he had proposed a draft guideline entitled "General obligation of States to protect the atmosphere",[198] which was modelled on the language of article 192 of the United Nations Convention on the Law of the Sea. As some members had found that title too open-ended and general, he had decided not to ask that the draft guideline be referred to the Drafting Committee. In chapter I of his third report, he proposed to differentiate between two types of duties: the duty to prevent transboundary atmospheric pollution and the duty to mitigate the risk of global atmospheric degradation. That division corresponded respectively to the definitions provisionally adopted by the Commission in draft guideline 1 (*b*) and (*c*).

7. The duty of States to prevent transboundary atmospheric pollution was a firmly established rule of customary international law, reflected in the maxim *sic utere tuo ut alienum non laedas*, which had been confirmed in the decisions of international courts and tribunals, including the *Trail Smelter* case (1941), the *Gabčíkovo–Nagymaros Project* case (1997), the *Arbitration regarding the Iron Rhine Railway* (2005), the case concerning *Pulp Mills on the River Uruguay* (2010), the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on the *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area* (2011), the *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)* (2013) and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (2015), to name only a few. The principle of *sic utere tuo ut alienum non laedas* had been reaffirmed in the Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration")[199] and the Rio Declaration on Environment and Development (1992),[200] which had broadened the principle's scope to include long-range transboundary effects caused by the activities of States and also imposed on States "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[201] The same principle could be found in many conventions, including the 1979 Convention on long-range transboundary air pollution.

8. The following points, corollaries of the *sic utere tuo ut alienum non laedas* principle, were dealt with in paragraphs 15 to 33 of the current report: prevention; due diligence; knowledge or foreseeability; degree of care; burden of proof and standard of proof; and jurisdiction and control. Those fundamental concepts were raised explicitly or implicitly in draft guideline 3 (*a*).

9. Turning to the principle of *sic utere tuo ut alienum non laedas* in the context of global atmospheric degradation, he said that the judgment in *Pulp Mills on the River Uruguay* had expanded the geographical scope of that principle, as confirmed in the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, which essentially stated that the general obligation of States also applied to the global commons. In the *Gabčíkovo–Nagymaros Project* case, the International Court of Justice had recognized the importance of that principle "not only for States *but also for the whole of mankind**" (para. 53 of the judgment). The Vienna Convention for the Protection

[197] The United Nations Framework Convention on Climate Change, the Convention on biological diversity and the Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa.

[198] See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/681, p. 210, draft guideline 4.

[199] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

[200] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June* 1992, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

[201] Principle 21 of the Stockholm Declaration de Stockholm and Principle 2 of the Rio Declaration on Environment and Development.

of the Ozone Layer and the United Nations Framework Convention on Climate Change expressly enshrined that principle in their preambles, thus evincing the principle's status as an integral component of international law relating to the global atmosphere.

10. In the context of the protection of the atmosphere from global atmospheric degradation, substantive obligations incorporated in the relevant conventions were those of precautionary measures. There were two types of precaution: "precautionary measures" (also called the "precautionary approach") and the "precautionary principle". The former implied administrative measures to implement the rules of precaution; the latter was a legal principle applicable before a court of law, the main function of which was to shift the burden of proof from the party alleging the existence of damage to the defendant party, who was required to prove the non-existence of damage. While there were a few conventions that provided for a precautionary principle, international courts and tribunals had thus far never recognized that principle as customary international law, although it had been invoked several times by claimants. It would therefore be inappropriate to refer to that principle in the present draft guidelines, especially in the light of the Commission's 2013 understanding.[202] Relevant conventions did, however, incorporate the precautionary approaches or measures, either explicitly or implicitly, as essential elements for the obligation of States to minimize the risk of atmospheric degradation. On that basis, he proposed draft guideline 3, contained in paragraph 40 of his third report.

11. The Special Rapporteur next dealt with the issue of environmental impact assessments, which arose out of States' obligation of due diligence. The issue of environmental impact assessments, well established in treaty practice, the case law of international courts and tribunals, and customary international law, was reviewed in paragraphs 41 to 60 of the third report.

12. As indicated in paragraphs 44 to 50 of his third report, there were a large number of conventions governing environmental impact assessments, including the leading multilateral instrument, the 1991 Convention on environmental impact assessment in a transboundary context. There had also been a number of judicial decisions dealing with that issue, all of which had confirmed States' obligation under customary international law to undertake environmental impact assessments. Accordingly, he proposed draft guideline 4, contained in paragraph 61 of his third report.

13. The next important topic, dealt with in chapter II of the third report, was the sustainable and equitable utilization of the atmosphere. The atmosphere had long been considered to be a non-exhaustible and non-exclusive resource from which everyone could benefit without depriving others. That was no longer the accepted view. The atmosphere must be seen as a limited resource with limited assimilation capacity and, like any limited resource, it must be used in a sustainable manner. The notion of sustainable development had a long history in international law, beginning with the well-known 1893 *Fur Seal Arbitration*, but whether it remained a "concept" or was regarded as an "emergent principle" was still unsettled. In light of the term's ambiguous normative character, he suggested using the word "should" in draft guideline 5 on the sustainable utilization of the atmosphere.

14. While equity and sustainable development were frequently considered to be inherently interrelated, equity had particular aspects in the context of international environmental law. The notion of equity had created some confusion in international legal discourse because everyone had their own idea of what was equitable. The International Court of Justice, in its 1986 decision in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, had identified three categories of equity in international law: equity *infra legem* (within the law), equity *praeter legem* (outside, but close to, the law) and equity *contra legem* (contrary to law). According to that decision, equity *intra legem* was "that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes" (para. 28 of the judgment); equity *praeter legem* was particularly important for its function of filling gaps in existing law; and equity *contra legem* was similar to settlement *ex aequo et bono*, as provided for in Article 38, paragraph 2, of the Statute of the International Court of Justice, which might, upon agreement of the parties concerned, serve as a mechanism to correct existing legal rules that might otherwise lead to an unreasonable or unjust consequence, but it should be distinguished from the interpretation and application of existing law. The Commission, as it worked to codify and progressively develop international law, should concentrate on equity *infra legem* and equity *praeter legem*. Equity *contra legem* belonged to the area of law-making, *de lege ferenda*, for which the Commission had no mandate.

15. In the context of the law of the atmosphere, equity addressed distributive justice in allocating resources, on the one hand, and in allocating burdens, on the other hand. Therefore, its inherently twofold nature must be taken into account. It was largely a case of achieving a proper balance within the law. More specifically, in relation to the protection of the atmosphere, it postulated an equitable balance between the present generation and future generations and called for an equitable global "North–South" balance, reflected in the concept of "common but differentiated responsibilities", to which he would return.

16. There was abundant conventional practice relating to equity and equitable principles, as set out in paragraphs 72 to 74 of the third report. Provisions on those topics could be found in numerous instruments, including: the Vienna Convention for the Protection of the Ozone Layer; the Montreal Protocol on Substances that Deplete the Ozone Layer; the United Nations Framework Convention on Climate Change; the Convention on biological diversity; the Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa; and the United Nations Convention on the Law of the Sea. Each of those instruments dealt in some way with protection of the atmosphere.

17. With regard to the previous work of the Commission, reference had been made to the draft articles on the

[202] *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

law of the non-navigational uses of international watercourses[203] (adopted as a convention in 1997), the draft articles on the law of transboundary aquifers[204] and the draft articles on prevention of transboundary harm from hazardous activities.[205] Taking into account the above, he proposed draft guideline 6, as contained in paragraph 78 of the third report.

18. He reiterated that equity was intrinsically linked to the issue of inequalities between developed and developing countries. The concept of common but differentiated responsibilities was reflected in the provisions of the United Nations Framework Convention on Climate Change and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and was strictly applied. The 2011 Conference of the Parties, held in Durban, had decided that the new instrument to be developed would apply to all parties, but would make no reference to that concept. The 2015 Paris Agreement under the United Nations Framework Convention on Climate Change, which was the result of the Durban process, obliged all parties to undertake the commitments set out in article 3 relating to the mitigation of greenhouse gas emissions. However, while parties were still to be guided generally by the principle of common but differentiated responsibilities, in the light of different national circumstances, in accordance with the Paris Agreement under the United Nations Framework Convention on Climate Change, there had unquestionably been some regression in the application of that concept in the context of climate change.

19. The Commission's 2013 understanding, through the inclusion of a "without prejudice clause", did not preclude referring to the principle of common but differentiated responsibilities. He suggested, however, that it would be prudent to use more moderate language in draft preambular paragraph 4, modelled on the Commission's draft articles on transboundary aquifers. He therefore proposed draft preambular paragraph 4, as contained in paragraph 83 of the third report.

20. Turning to chapter II, chapter C, on the legal limits on intentional modification of the atmosphere, commonly called "geoengineering activities", he recalled the quite detailed presentations on that topic made by the scientists at the dialogue. Geoengineering activities included weather modification, afforestation (large-scale planting of trees), ocean fertilization, carbon dioxide removal and solar radiation management, even though many of those activities were still experimental.

21. The use of such environmental modification techniques in warfare was prohibited by the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques. That Convention did not deal with the issue of environmental modification for peaceful purposes but offered a possible solution for regulation of the deliberate manipulation of natural processes that had "widespread, long-lasting or severe effects" of a transboundary nature.

22. Some recommendations relating to weather control had been made by the General Assembly, the United Nations Environment Programme and the World Meteorological Organization; they called on States to be prudent in their use of such technologies on a large scale. Afforestation had been incorporated into the Kyoto Protocol and the Paris Agreement under the United Nations Framework Convention on Climate Change as a valuable climate change mitigation measure. Soil carbon sequestration, on the other hand, was not mentioned in the Kyoto Protocol to the United Nations Framework Convention on Climate Change. Carbon capture and storage in subseabed geological formations for permanent sequestration was allowed under certain conditions by the 1996 Protocol to the 1972 Convention on the prevention of marine pollution by dumping of wastes and other matter and the relevant regulations of the International Maritime Organization. Ocean fertilization, as a form of marine geoengineering, was allowed only for scientific research. In 2010, the Parties to the Convention on biological diversity had agreed to ensure that "no climate-related geo-engineering activities that may affect biodiversity take place, until there is an adequate scientific basis on which to justify such activities and appropriate consideration of the associated risks for the environment and biodiversity and associated social, economic and cultural impacts, with the exception of small scale scientific research studies".[206] The 2013 Oxford Principles on climate geoengineering governance[207] provided good guidance in that regard from both a science and an international law perspective.

23. It was clear that the principles of "prudence and caution", to use the words of the orders of the International Tribunal for the Law of the Sea, would govern all geoengineering activities, even where permitted, and that in any event international law required that environmental impact assessments be undertaken. Accordingly, he proposed draft guideline 7, on geoengineering, as contained in paragraph 91 of the third report.

24. With regard to the future programme of work, he suggested that at its next session the Commission deal with the interrelationship of the law of the atmosphere with other fields of international law, such as the law of the sea, international trade and investment law, and international human rights law and that, at its 2018 session, it deal with the issues of implementation, compliance and dispute settlement in relation to the protection of the environment, with a view to completing the first reading of the topic. When considering draft articles, the Commission was required to wait one year before adopting

[203] The draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222.

[204] The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

[205] The draft articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and the commentaries thereto adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

[206] Report of the Tenth Meeting of the Conference of the Parties to the Convention on biological diversity (UNEP/CBD/COP/10/27), decision X/33, para. 8 (*w*) (footnote omitted).

[207] S. Rayner, *et al.*, "The Oxford Principles", *Climatic Change*, vol. 121, No. 3 (2013), pp. 499–512. Abstract available from: https://link.springer.com/article/10.1007/s10584-012-0675-2.

them on second reading. He believed, however, that for the draft guidelines the Commission could proceed to second reading at its next session, as it had done with the topic of reservations to treaties. The second reading of the draft guidelines might therefore be completed by 2019, although it would of course be for the Commission to decide.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)[*] (A/CN.4/689, Part II, sect. D, A/CN.4/694, A/CN.4/L.874)

[Agenda item 4]

Fourth report of the Special Rapporteur (*continued*)[*]

25. The CHAIRPERSON thanked the Special Rapporteur for introducing his third report on the protection of the atmosphere and invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/694).

26. Mr. HASSOUNA said that the Commission had decided to consider the current topic because it had great practical importance for States. That was what had prompted the Sixth Committee to suggest in 2008 that the Commission undertake a general review of how treaties adapted to changing circumstances, with a special emphasis on subsequent agreements and subsequent practice. Indeed, providing for a clearer understanding of the definition, role and interpretative weight of subsequent practice was crucial for States to understand and meet their evolving treaty obligations, and for judges to correctly construe the meaning of a treaty in the light of those changing circumstances.

27. In the course of the debate on the work of the Commission in the Sixth Committee in 2015, delegations had generally welcomed the adoption of draft conclusion 11 on the constituent instruments of international organizations,[208] although some had said that the four paragraphs should be clearer and more detailed. He trusted that the Special Rapporteur would address those concerns in the commentary. A relatively small number of States had responded to the Commission's request for examples of their national practice, which might be explained by a lack of State practice in that field. That should not, however, deter the Commission from continuing to ask States for their opinions and for examples of their practice.

28. Subject to certain reservations and comments that he would address later, he agreed with the general approach of the Special Rapporteur, who in his fourth report had chosen to focus on the legal effect of the pronouncements of expert bodies and the decisions of domestic courts, in the context of the interpretation of treaties.

29. In chapter I of the fourth report, on the pronouncements of expert bodies, the Special Rapporteur referred to guidelines 3.2.1 and 3.2.3 of the Commission's Guide to Practice on Reservations to Treaties.[209] However, those guidelines had little to do with the topic because, although they dealt with the legal effects of the pronouncements of expert bodies, they related solely to the role of those bodies with regard to reservations made by States parties upon accession to a treaty, at which time they should give consideration to the treaty body's assessment. That differed from an expert body's determination of a State's application of a treaty after it had become a party and was therefore obliged to take account of such an assessment. Furthermore, the guidelines relied on by the Special Rapporteur concerned expert body pronouncements addressed to specific States in the context of making reservations to a treaty, whereas the decisions referred to in draft conclusion 12 were general in nature and were meant to provide recommendations on the interpretation of treaties for all treaty parties.

30. With regard to draft conclusion 12 itself, an explanation of what was meant by the phrase "pronouncement of an expert body" should be added, either in the draft conclusion or the commentaries, to the definition of the term "expert body" provided in paragraph 1. Furthermore, while the role of pronouncements by expert bodies was described in general terms in paragraphs 2 and 3, it was not clear when those pronouncements played the roles described. The commentary should also indicate the weight to be given to such pronouncements taking into account the treaty in question, the type of expert body and its membership and rules of procedure, the legal content of the pronouncement and the extent to which it was accepted by States parties.

31. Given that the term "expert bodies" did not include organs of international organizations, a definition of the latter should be provided, together with an explanation of the reason for distinguishing them from the former, especially since they often performed the same function. Furthermore, in view of its increasing importance, the role of international organizations in the interpretation of treaties should be dealt with in a separate draft conclusion. Draft conclusion 12 should likewise make clear that what was important in the interpretation of treaties was the practice of the parties to the treaties, not the practice of other actors, for example expert bodies, whose role was solely to monitor the application of the treaties. The pronouncements of expert bodies might therefore give rise to subsequent practice as expressed through the reaction of States, but only that reaction constituted a subsequent practice in the true sense of the term. As a general rule, expert bodies should not be able to change the interpretation of a treaty without the consent of the parties. Under treaty regimes, States were the parties; they undertook the obligations set out in the treaties and had a duty to apply their provisions. While independent experts were important, they must not be able to modify a regime, unless the treaty in question provided otherwise; without that limitation, the parties to the treaty would be undermined, and the expression of sovereignty would be meaningless. Regarding paragraph 4 of draft conclusion 12, while it was clear that States should not necessarily be expected to react to all pronouncements of expert bodies, it would be appropriate to provide them

[*] Resumed from the 3304th meeting.

[208] *Yearbook ... 2015*, vol. II (Part Two), pp. 55 *et seq.*

[209] See *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 238 and 239.

with guidance as to when a reaction was necessary and under which circumstances they were expected to respond to a pronouncement.

32. He agreed that draft conclusion 13 might not be necessary, since its provisions were dealt with in other draft conclusions. Paragraph 1 could perhaps be retained, but it was not clear why the recommendations in paragraph 2 were addressed only to domestic courts and not to international courts and more generally to all other relevant actors. Furthermore, if paragraph 2 were to be retained, its formulation should be completely revised so as to ensure that it provided guidance rather than instructions, as currently seemed to be the case.

33. With regard to chapter IV of the fourth report, on the revision of draft conclusion 4, paragraph 3, which would provide that other subsequent practice under article 32 of the 1969 Vienna Convention consisted of official conduct in the application of the treaty, the meaning of "official conduct" should be clarified and perhaps limited.

34. He, too, had reservations about the term "significance" in new draft conclusion 1*a*. As to the use of other terms, he shared the view that the term "expert body" should be replaced with "expert treaty body" in the draft conclusions and the commentaries. He also suggested that on second reading the Commission seriously consider replacing the term "conclusions" with "guidelines" in order to better reflect the object and purpose of the topic.

35. There had been an animated discussion as to the need for draft conclusions 12 and 13 and the appropriateness of referring them to the Drafting Committee. In his view, criticism was always welcome as long as it was constructive and aimed at helping the Special Rapporteur to improve his report. The Special Rapporteur had responded to members' concerns and explained his choice of wording for the draft conclusions. Taking into account members' views and the Special Rapporteur's explanations, he was of the view that all the draft conclusions should be referred to the Drafting Committee with a view to reaching a consensus based on mutually acceptable language, failing which the matter would have to be brought back to the plenary for further consideration. It would be helpful if the Special Rapporteur were to redraft some of his proposals in the light of the discussion in plenary in order to facilitate the work of the Drafting Committee. That approach had already been used successfully by the Commission for a number of other topics, including protection of the atmosphere and provisional application of treaties.

36. Lastly, he expressed support for the proposed future programme of work contained in chapter V of the fourth report.

37. Ms. ESCOBAR HERNÁNDEZ said that, with regard to the role of expert bodies and the legal effects of their pronouncements, she largely shared the view expressed by Mr. Forteau that the role of such bodies was basically to monitor and supervise the conduct of States in applying the treaties pursuant to which they had been established. Other members of the Commission had expressed similar views. Treaty bodies were not tasked with applying the treaty, but with ensuring that the States parties applied it. It followed that, in fulfilling that role, they interpreted the treaty and their interpretation could not be ignored when defining the scope of the treaty. Furthermore, their interpretation was pertinent inasmuch as it was the States themselves that had tasked them, albeit implicitly, with interpreting the treaty in question; that task was inherent to the supervisory role of those expert bodies.

38. Given the very nature of those bodies and the powers granted to them by States, the pronouncements of expert bodies could under no circumstances be regarded as mere suggestions or recommendations without legal effect. Two examples served to illustrate that assertion. First, the Human Rights Committee could exercise its supervisory role through various procedures: consideration of periodic reports of States parties; consideration of communications from individuals or States; and the adoption of general comments. The first case was an automatic and obligatory function granted by a State upon ratification of the International Covenant on Civil and Political Rights. The second procedure was a function that a State chose to give the Human Rights Committee by making a declaration expressly recognizing that role. In the third procedure, the Committee explained its interpretation of various provisions of the Covenant, thereby facilitating its supervisory role and helping States meet their obligations under the Covenant. It was clearly the will of States to invest the Human Rights Committee with those powers. How, then, could the pronouncements of the Committee be considered to have no legal effect? Why would States voluntarily accept to be monitored by the Committee if they did not accept its pronouncements or if they considered them to be without legal effect? Those pronouncements could not be considered to be nothing more than the opinion of individuals acting solely in their capacity as experts. Their pronouncements unquestionably had legal effect and contributed to the interpretation of the Covenant because States took them into account when designing national policies and aligning their domestic legislation with the Covenant. Such pronouncements were comparable to decisions handed down by a judicial body. It was not therefore surprising that numerous publications described expert bodies as "quasi-judicial". That was even truer with regard to the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the European Commission on Human Rights, whose decisions undeniably had legal effect.

39. While it was true that the Commission on the Limits of the Continental Shelf could not, for example, be said to "authorize" a State to extend its continental shelf, only a favourable recommendation from that Commission in response to a State's request could be cited to justify an extension of its continental shelf to third parties, who could not object, so long as the extension was in accordance with the United Nations Convention on the Law of the Sea. The recommendations of the Commission on the Limits of the Continental Shelf could not therefore be said to have no legal weight or effect. States themselves had freely established that Commission as an authority on the interpretation of the Convention whose competence was recognized by States when they acceded to or ratified the Convention.

40. There could be no doubt that expert bodies had a mandate to interpret the instruments under which they had been established and that their interpretation of those instruments had legal effect. That interpretative role must, however, be defined, because it did not fall under the category of subsequent agreements or subsequent practice, which never referred to a particular form of interpretation but rather to a particular mechanism for interpretation. While that mechanism was not precisely defined in the 1969 Vienna Convention, there was no basis to conclude that any act of interpretation constituted a subsequent agreement or subsequent practice.

41. While it was not possible to make a general statement that the work of expert bodies presented no element that made it possible to establish the existence of a subsequent agreement or subsequent practice within the meaning of article 31, paragraph 3 (*a*) and (*b*), and article 32 of the 1969 Vienna Convention, the "pronouncements" of the expert bodies, the subject of draft conclusion 12, clearly did not constitute a subsequent agreement or subsequent practice. Closer examination of the practice of such expert bodies showed that, in some cases, certain aspects of their procedures might constitute a subsequent agreement or subsequent practice, but would in any case be attributable to the States themselves and not to those bodies. In other words, while the work of expert bodies might be useful in determining subsequent agreements and subsequent practice, it could not in itself constitute a subsequent agreement or a subsequent practice.

42. She therefore had serious reservations about draft conclusion 12, in particular paragraphs 2 and 3. Furthermore, the Special Rapporteur's conclusion in paragraph 4 was not entirely justified by the arguments set out in the fourth report. In addition, the paragraph should be compatible with the other draft conclusions provisionally adopted by the Commission that dealt with the issue of silence on the part of a State. Lastly, she was unsure of the Special Rapporteur's intention in draft conclusion 12, paragraph 5, which did not seem to be in line with the general structure of the draft conclusions.

43. Regarding draft conclusion 13, she fully endorsed the comments made by other members. Paragraph 2 seemed out of place in the draft conclusion under consideration. It consisted of recommendations to domestic courts on how to interpret article 31, paragraph 3 (*a*) and (*b*), and article 32 of the 1969 Vienna Convention, whereas it was for domestic and international courts themselves to draw the appropriate conclusions in the light of the draft conclusions as a whole. It was therefore somewhat incongruous to tell them what they should interpret and how. Furthermore, if the Commission were to decide to make recommendations, it was not clear why those recommendations would not apply to all. In any case, amending the object of the draft conclusions at the end of first reading would not be appropriate or consistent with the Commission's methods of work.

44. She had no objection to the substance of draft conclusion 13, paragraph 1, but had real doubts about the desirability of a draft conclusion that highlighted a particular type of State practice. While she was not opposed to the Special Rapporteur expressly mentioning judicial practice, it would probably be preferable to include a reference thereto in another draft conclusion. Furthermore, in paragraph 2 of the Spanish version of the text, the word "should" had been translated as *deben*; the latter should be replaced with *deberían*. It was an important detail because it could have significant legal consequences.

45. She agreed with new draft conclusion 1*a*, although she had doubts about the term *importancia* in the Spanish version. It seemed that the translation of the word "significance" raised problems in other language versions too, as other members had noted. The Special Rapporteur's suggested amendment to draft conclusion 4, paragraph 3, did not seem timely or necessary and in any case would require further explanation. Furthermore, there would be an opportunity to make any necessary changes on second reading.

46. In conclusion, she said that she was not opposed to sending the draft conclusions proposed by the Special Rapporteur to the Drafting Committee if the Commission so decided. That said, referral of the draft conclusions should give rise to a more in-depth discussion of the issues raised by various members and make it possible to identify points that should perhaps be given more emphasis within the context of other draft conclusions. In other words, a decision to refer the draft conclusions to the Drafting Committee should not be taken as implying that the Commission wished to include the draft conclusions proposed by the Special Rapporteur, in particular draft conclusions 12 and 13, in the final text to be adopted on first reading.

47. Mr. ŠTURMA said that, in his view, it was for the Drafting Committee to review new draft conclusion 1*a* and draft conclusion 4, although any decision on the proposed amendments would depend on the decision taken with regard to draft conclusion 12.

48. He shared the concerns expressed by other members concerning the pronouncements of expert bodies, but nevertheless supported sending draft conclusion 12 to the Drafting Committee. The discussion thereof had highlighted differences of opinion among the members. Some thought that the draft conclusion served no purpose because the pronouncements of expert or treaty bodies could not be considered to be subsequent practice, since they constituted quasi-judicial precedents or jurisprudence. Other members had taken a very cautious approach regarding the judicial nature of those conclusions or pronouncements and had recommended verifying the legal basis and nature of the expert bodies in question and the decisions they adopted under their different treaty regimes. Those differences of opinion were an additional reason for closer study of the role of the pronouncements of expert bodies.

49. Those pronouncements were similar but not identical to those of international courts. Judicial decisions were legally binding on the parties to a dispute and constituted, for other States, subsidiary means for the determination of rules of law. Pronouncements of expert bodies had a quasi-judicial nature. While he generally agreed with Mr. Forteau in that regard, he recognized that there was no consensus on that point for various reasons: pronouncements of

expert bodies were not binding; they were not always recognized as a subsidiary source of law; and, lastly, there were different types of expert bodies and pronouncements. Expert bodies nevertheless played an important role in the interpretation and application of treaties. They were often cited in legal literature as well as by national and international courts, and could – but sometimes did not – influence the subsequent practice of States.

50. He wondered whether it was necessary to exclude expert bodies that were bodies of an international organization from the definition of expert bodies in draft conclusion 12. In other words, what were the key characteristics of such bodies: the way they had been established (for example pursuant to a specific treaty or the constituent instrument of an international organization and/or a secondary source of law); or the nature of their work under the provisions of the treaty in question?

51. He agreed with Mr. Park that the draft conclusion should make it clear that the pronouncements of expert bodies could not constitute, by themselves, subsequent practice within the meaning of article 31, paragraph 3, and article 32 of the 1969 Vienna Convention. The subsequent practice of States could however be highlighted in a pronouncement of an expert body or arise from or be reflected in that pronouncement. Since States often reacted differently to those pronouncements, it would seem that the latter generally did not establish an agreement but nonetheless constituted subsequent practice, at least within the meaning of article 32.

52. With regard to draft conclusion 13, he said that it was true that in applying international instruments domestic courts were in principle involved in their interpretation. At the same time, as State bodies, they were contributing to subsequent practice. They were perhaps different from other national bodies in that they interpreted those instruments more often, sometimes by making specific reference to methods of interpretation. Therefore, given the structure of the draft conclusions as described by the Special Rapporteur in paragraph 113 of his fourth report, it might be more appropriate to include paragraph 1 of the draft conclusion in that part of the report that dealt with specific forms and aspects of subsequent agreements and subsequent practice. He still had some concerns about paragraph 2, not with regard to its content, but rather because it contained recommendations for domestic courts, rather than conclusions. Those recommendations should be redrafted or placed in the commentaries.

53. He concluded by recommending that all the draft conclusions be referred to the Drafting Committee.

54. Sir Michael WOOD said that he agreed with the Special Rapporteur that it would be helpful to include a draft conclusion of an introductory nature, such as draft conclusion 1*a*. The Drafting Committee might wish to consider whether the paragraph should track the title of the topic rather than referring to "significance".

55. Chapter I of the fourth report, on pronouncements of expert bodies, was intended to support new draft conclusion 12 and also led the Special Rapporteur to suggest amending draft conclusion 4, paragraph 3. While it was helpful to have an overview of the positions of learned societies and the legal literature relating to "pronouncements of expert bodies", in particular the 2004 report of a committee of the International Law Association,[210] the main conclusion that he drew was that the Special Rapporteur used the expression "pronouncements of expert bodies" to describe very different pronouncements about which it was very difficult to generalize even when limited to human rights bodies, and more so with regard to bodies like the Commission on the Limits of the Continental Shelf, a technical body with a very particular function. That Commission was not necessarily the type of treaty body the draft conclusions should deal with; however, its inclusion in the report under consideration in fact served to indicate that the term "expert bodies" as used in the report covered such a variety of bodies that it was hardly a useful category. The legal effect, if any, that the pronouncements of treaty bodies might have on the interpretation of the treaties under which they were established depended primarily on the provisions of those treaties. That might explain why the Special Rapporteur explained that he had derived "an indicative conclusion regarding the possible effect of pronouncements by expert bodies for the interpretation of a treaty". The text of draft conclusion 12 as proposed seemed to be indicative in that its main provisions merely stated that subsequent agreements and subsequent practice "may arise from, or be reflected in" the pronouncements of expert bodies and that a pronouncement of an expert body "may contribute" to the interpretation of a treaty.

56. Like Mr. Kolodkin, Mr. Murase and other members, he did not really understand why the Special Rapporteur had excluded the organs of international organizations, whose members were likewise experts acting in their personal capacity, from his definition of "expert bodies" in draft conclusion 12. The reason appeared to be that the pronouncements of those bodies could be attributed to an international organization. In the first footnote to paragraph 12 of his fourth report, the Special Rapporteur referred to the Committee of Experts on the Application of Conventions and Recommendations of the ILO as an example of an organ that was not an "expert body" within the meaning of draft conclusion 12; yet its pronouncements seemed to have the same weight as those dealt with in the report. The same footnote also referred to information provided by the Legal Adviser of ILO giving examples of pronouncements of its Commission of Experts that had given rise to subsequent practice.

57. The Special Rapporteur seemed to envisage at least three different roles for pronouncements of expert bodies in relation to the interpretation of treaties. First, those pronouncements might give rise to a subsequent agreement or subsequent practice of the parties to the treaty within the meaning of article 31, paragraph 1 (*a*) and (*b*), of the 1969 Vienna Convention or reflect such an agreement or practice. Second, they might themselves constitute "other subsequent practice" in the application of the treaty and as such constitute a subsidiary means of interpretation under article 32 of the 1969 Vienna Convention, thereby

[210] International Law Association, "Final report on the impact of findings of the United Nations human rights treaty bodies", *Report of the Seventy-First Conference held in Berlin, 16–21 August 2004*, London, 2004, pp. 621 *et seq.*

making them relevant to the topic. Third, they might constitute a supplementary means of determining the rules of international law within the meaning of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, relating to judicial decisions and teachings.

58. The first of those roles seemed to have already been covered in the draft conclusions already adopted by the Commission. The third, as already noted by other members of the Commission, was not related to subsequent agreements and subsequent practice and thus was not within the scope of the topic at hand, which, as Ms. Escobar Hernández had said, dealt not with the interpretation of treaties in general but rather with subsequent agreements and subsequent practice.

59. As for the second, he, like other members, had grave doubts that the pronouncements of expert bodies could themselves constitute "other subsequent practice" in the application of treaties and as such also constitute a supplementary means of interpretation within the meaning of article 32 of the 1969 Vienna Convention. The Special Rapporteur seemed to base that conclusion on the following reasoning: first, in paragraph 58 of his fourth report, he stated that those pronouncements were "a form of practice", which seemed rather to beg the question. Mr. Forteau had quite rightly said that those pronouncements more closely resembled judicial or quasi-judicial decisions stating the law and did not constitute a form of practice in the application of the treaty. That position had been supported by the International Court of Justice in the *Ahmadou Sadio Diallo* case, in which the Court described the pronouncements of the Human Rights Committee as "interpretative case law" (para. 66 of the judgment). Second, in paragraph 60 of his fourth report, the Special Rapporteur said that the pronouncements of expert bodies were "official statements" within the meaning of paragraph (17) of the commentary to draft conclusion 4,[211] because they were acts undertaken in the exercise of a mandate and not in a private capacity. That argument was not convincing. Pronouncements of expert bodies were of course "official" in that they were not rendered by their members in their private capacity, but, as many members of the Commission had already pointed out, that did not mean that they were "official statements" within the meaning of that term as used in paragraph (17) of the Commission's commentary to draft conclusion 4. Read in the light of that commentary, the expression "official statements" referred to the official statements of the parties to a treaty, just as the expression "official acts" in the same sentence of paragraph (17) referred to official acts of the parties to the treaty. The text of draft conclusion 4 likewise made it clear that the Commission was referring to official acts by the parties to the treaty. That was also the point of view of the ICRC in its 2016 commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I), which referred to the work of the Commission, specifically draft conclusion 4, paragraph 3. The commentary stated that:

> Subsequent practice that does not fulfil the criteria of [article 31, paragraph 3 (*b*), of the 1969 Vienna Convention], i.e. to establish the agreement of the Parties regarding the interpretation of a treaty, may still be relevant as a supplementary means of interpretation under [a]rticle 32. This consists of conduct by one or more of the Parties in the application of the treaty after its conclusion. The weight of such practice may depend on its clarity and specificity, as well as its repetition.[212]

60. He was not trying to downplay the importance of the pronouncements of expert bodies for the interpretation of treaties, but the Special Rapporteur had not demonstrated that they amounted to subsequent practice, even though they might give rise to or reflect subsequent agreement or subsequent practice. The Drafting Committee should take that into account if draft conclusion 12 was referred to it.

61. He therefore did not believe it necessary to amend draft conclusion 4, paragraph 3. The adoption of draft conclusion 11 by the Commission in 2015 likewise did not warrant amending that paragraph. Draft conclusion 11 dealt with the very special case of constituent instruments of international organizations, for which the 1969 Vienna Convention made special provision in its article 5.

62. Regarding draft conclusion 13, paragraph 1 of which dealt with the role of decisions of domestic courts and paragraph 2 of which had the nature of an instruction to those courts telling them what they "should" do "when applying a treaty", it was not clear why the Special Rapporteur thought paragraph 1 was needed. As the Special Rapporteur noted in paragraph 95 of his fourth report, the Commission, when it had adopted draft conclusion 4, had said that subsequent practice under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention might also include judgments of domestic courts. The latter were already accounted for in draft conclusion 5, paragraph 1;[213] draft conclusion 13, paragraph 1, did not therefore seem necessary. He agreed with other members who felt that it was not appropriate for the Commission to adopt a draft conclusion that expressly purported to tell domestic courts what they should do when applying a treaty. It was one thing to indicate in general terms, as did the other draft conclusions, an approach for the interpretation of subsequent agreements and subsequent practice under articles 31 and 32 of the 1969 Vienna Convention with a view to assisting domestic courts. It was quite another to give explicit instructions to those courts to act in a certain way. That was not the Commission's role and it was doubtful that such instructions would be well received by the judges concerned.

63. The substance of the *chapeau* of draft conclusion 13, paragraph 2, raised two issues. Why did the paragraph apply to domestic courts "when applying a treaty" rather than "when interpreting a treaty"? Why did the sentence say that domestic courts only "should" do what was set out in (*a*) to (*e*), when the same principles were stated elsewhere more categorically? More seriously, the substance of subparagraphs (*a*) to (*e*) was already covered explicitly or implicitly in the other draft conclusions; there was no need to repeat it.

64. In conclusion, he said that if the Commission decided to refer draft conclusion 12 to the Drafting Committee, the latter should study it very closely to ensure

[211] *Yearbook ... 2013*, vol. II (Part Two), pp. 30–31.

[212] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Cambridge, Cambridge University Press, 2016, para. 34.

[213] *Yearbook ... 2013*, vol. II (Part Two), p. 34.

that its paragraphs could be integrated into the general structure of the draft conclusions that had already been adopted. Like other members, he had real doubts about sending draft conclusion 13 to the Drafting Committee, although the part of the fourth report dealing with draft conclusion 13 did contain very useful material that could, at the appropriate time, be used in the commentaries to the already adopted draft conclusions. He had no objection to referring draft conclusion 1*a* to the Drafting Committee, but there was no reason to request the Drafting Committee to amend draft conclusion 4, paragraph 3.

65. Mr. KAMTO said that the fourth report of the Special Rapporteur was an example of what could happen if one tried to respond to the sometimes contradictory concerns expressed by States in response to the work of the Commission; it was clear from paragraphs 5 and 6 of the fourth report that the Special Rapporteur was seeking to meet the expectations of certain States in proposing draft conclusions 12 and 13 and the amendment to the text of draft conclusion 4 that had already been adopted by the Commission.

66. The Special Rapporteur's approach to the category of "expert bodies" and to the legal effect he attributed to their "pronouncements", "recommendations" or "observations" as subsequent agreements or subsequent practice in the context of the interpretation of treaties was questionable. The major difficulty was essentially that the two draft conclusions that he proposed, draft conclusions 12 and 13, were in many ways not consistent with the arguments he used to justify them. That lack of consistency could lead to the solution suggested by some members of the Commission of not referring the two draft conclusions to the Drafting Committee. That solution seemed too severe because the fourth report did contain various, well-substantiated arguments that justified dealing with the case law of treaty bodies and domestic courts in the draft conclusions. Two points in particular called for comment: how to reflect developments relating to what the Special Rapporteur called "expert bodies" and analysis of the practice of domestic courts.

67. The expression "expert bodies" was too broad and went well beyond the Human Rights Committee and similar bodies. Indeed, in the *Ahmadou Sadio Diallo* case cited by the Special Rapporteur as a means of introducing his arguments in paragraph 28 of his fourth report, the International Court of Justice had expressly referred to the Human Rights Committee, but in a specific context that did not justify making its reasoning on that issue a general rule. Even if that case were to be used to justify a general rule, it would be prudent to keep to the accepted terminology and refer to "treaty bodies". The latter were empowered by the treaties under which they were established to interpret those treaties. An interpretation by those bodies was in many ways an authentic interpretation.

68. Similarly, replacing the words "by one or more parties" with the adjective "official", as suggested by the Special Rapporteur in paragraph 120 of his fourth report, would create confusion as to terminology and lead to a complete change of approach in the determination of subsequent agreements and subsequent practice. From a terminological perspective, the word "official", which referred to the established representatives of the State, was generally used in opposition to "unofficial" or "private", as in relation to the immunity of State officials from foreign criminal jurisdiction. In the fourth report, however, the word "official" meant something not only different but above all varied, mixing representatives of the State and bodies of independent experts. For that reason, the expression should be deleted, as should such related terms as "official means" and "official conduct", used in paragraphs 120 and 121 of the report.

69. Furthermore, it did not seem appropriate to raise the issue of the effect of silence on the part of States following pronouncements by treaty bodies. States could not be expected to react to everything for fear of being subject to acts that in themselves were not binding.

70. There was no doubt that decisions of domestic courts constituted subsequent practice of States under article 32, but solely article 32, of the 1969 Vienna Convention, in other words as a supplementary means of interpretation. As the Special Rapporteur had said in introducing his fourth report, there was no reason for the Commission to consider decisions of domestic courts to be a means of determining customary international law, in particular as an element of practice, but it could not also consider them to be subsequent practice under article 32 of the 1969 Vienna Convention.

71. The problem for the Commission was how to take into account both situations appropriately in the context of the draft conclusions without positing the existence of rules not provided for in article 31, paragraph 3 (*b*), and article 32 of the 1969 Vienna Convention. With regard to the case law of domestic courts, he agreed with Sir Michael that there was no need to repeat what had already been said in a previous draft conclusion.

72. The Commission should therefore retain draft conclusions 12 and 13 in principle but with a radically different text, shorter, much simpler and less normative because, as a number of members had said, draft conclusion 13, paragraph 2, in particular prescribed a set of norms that depart from the purpose of the Commission's work on the topic, which was to prepare draft conclusions, not to issue directives. Paragraph 3 of the previously adopted draft conclusion 4 should not be amended. Draft conclusions 12 and 13 should be reworded as follows, provided that, with regard to the latter, the Commission considered that the question of domestic courts had not been dealt with adequately in the draft conclusions already adopted:

"*Draft conclusion 12*

"Consideration may be given to interpretation by treaty bodies as a supplementary means of interpretation of treaties within the meaning of article 32 of the Vienna Convention on the Law of Treaties."

"*Draft conclusion 13*

"Decisions of domestic courts on the application of treaties may contribute to the determination of subsequent practice as a supplementary means of interpretation of treaties within the meaning of article 32 of the Vienna Convention on the Law of Treaties."

73. If the Commission were to reach an agreement to that effect, he would be in favour of sending draft conclusions 1*a*, 12 and 13 to the Drafting Committee.

The meeting rose at 11.50 a.m.

3307th MEETING

Tuesday, 31 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/689, Part II, sect. D, A/CN.4/694, A/CN.4/L.874)

[Agenda item 4]

Fourth report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the fourth report of the Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/694).

2. Mr. NIEHAUS said that in his fourth report the Special Rapporteur provided a thorough analysis of a topic that was of great importance for international law in general and treaty law in particular. In view of that importance and the intended role of the Commission's work on the topic, it would be more appropriate to describe the Special Rapporteur's draft proposals as "guidelines" rather than "conclusions". Furthermore, the term "guidelines" would differentiate those proposals from the official designation of the forms of action of expert bodies, which could be more accurately described as "conclusions" or, better still, "pronouncements", the term used by the Special Rapporteur in his fourth report. That said, he would, in order to avoid any confusion, use the term "draft conclusions" for the purposes of the debate.

3. New draft conclusion 1*a*, though somewhat brief, contained a clear reference to the topic of the interpretation of treaties, as contained in article 31, paragraph 3 (*a*) and (*b*), and article 32 of the 1969 Vienna Convention. It might therefore be advisable to refer to the Convention explicitly in the draft conclusion. It would, of course, be for the Drafting Committee to make the relevant changes, as appropriate.

4. With regard to the proposed revision of draft conclusion 4, paragraph 3, some members of the Commission had indicated the need to clarify what was meant by the term "official conduct". The term was, however, perfectly comprehensible and acceptable, since it was clear from the fourth report that all the activities of bodies established by a treaty and mandated to contribute to its application could constitute official conduct. It followed that members of international organizations qualified as officials, even when they were not acting on behalf of a State. Again, it would be a matter for the Drafting Committee to add any clarifications, taking into account members' comments and the Special Rapporteur's responses thereto.

5. As to draft conclusion 12, members had expressed divergent opinions regarding the role of the pronouncements of expert bodies. Some had argued that the latter had nothing to do with subsequent practice in relation to the interpretation of treaties, while others had defended the draft conclusion and had sought to equate such pronouncements with court decisions. In his opinion, it was important to bear in mind that, unlike court decisions, such pronouncements were not binding and merely contributed to the interpretation of a treaty. It was therefore correct to take the view that they were a form of practice in the application of a treaty. Likewise, as indicated in the draft conclusion, there was a need to distinguish between the pronouncements of expert bodies and the reactions of States. The influence of such pronouncements on the attitude of the parties to the treaty in question could not be disputed; they thus constituted practice within the meaning of article 31, paragraph 3, and article 32 of the 1969 Vienna Convention. The main problem that arose concerned the breadth of the term "expert body"; the draft conclusion should set out in greater detail the characteristics of those bodies.

6. As to draft conclusion 12, paragraph 4, he agreed with Mr. Hassouna that States could not always be expected to react to every pronouncement by an expert body and that a State's silence could not therefore be considered as, or automatically constitute, acceptance. Consequently, the paragraph in question should be reconsidered. In his view, the differences of opinion expressed regarding the content of draft conclusion 12, far from calling it into question, highlighted the need for it to be restructured.

7. Regarding draft conclusion 13, he fully endorsed the view that domestic courts, when applying a treaty, almost necessarily participated in its interpretation and, by extension, could contribute to a subsequent agreement or subsequent practice. Draft conclusion 13, paragraph 1, was logical and acceptable. The wording of draft conclusion 13, paragraph 2, was problematic in that it went further than mere recommendations. In the Spanish text, the use of the word *deben* – "should" in the English version – gave the impression that domestic courts were being instructed on how to deal with subsequent agreements and subsequent practice, rather than being provided with guidance on how to do so. The task of coming up with the proper wording could be entrusted to the Drafting Committee.

8. He recommended that all the draft conclusions proposed by the Special Rapporteur be referred to the Drafting Committee. The Commission was making steady

progress towards adopting the entire set of draft conclusions on first reading at the current session. He agreed with the Special Rapporteur that a second reading could be envisaged for 2018.

9. Mr. SABOIA said that he wished to congratulate the Special Rapporteur on his excellent fourth report, which was clear, well researched and carefully crafted. With the report, the topic was approaching its possible completion on first reading during the current session. At the current advanced stage of the debate on the topic, he would focus his comments on draft conclusion 12, entitled "Pronouncements of expert bodies", and concentrate in particular on human rights treaty monitoring bodies.

10. It was regrettable that the Special Rapporteur had decided to exclude from his consideration the outcome of the work of treaty bodies that, although technically organs of an international organization, were composed of independent experts and performed a role similar to that of other expert bodies. The Committee of Experts on the Application of Conventions and Recommendations of the ILO, for example, had itself recognized that its findings and conclusions could become authoritative in any binding sense only if independently established as such by a domestic court or by an international tribunal or instrument. National, international and supranational courts had been relying in their decisions on the Committee's pronouncements while referring to international labour standards to settle a dispute. The practice of the Inter-American Commission on Human Rights, which was an organ of the Organization of American States, was also relevant, particularly with regard to individual complaints, which it could refer to the Inter-American Court of Human Rights or help settle through mediation.

11. The discussion on draft conclusion 12 had focused on whether the pronouncements of expert bodies established by a treaty and mandated to supervise its application qualified as subsequent practice or as supplementary means of interpretation under articles 31 and 32, respectively, of the 1969 Vienna Convention. No substantial doubts had been raised over the great weight carried by such pronouncements, as recognized, in respect of the Human Rights Committee, by the International Court of Justice in its judgment in the case concerning *Ahmadou Sadio Diallo*, and by domestic courts, including the German Federal Administrative Court.

12. The Final report on the impact of findings of the United Nations human rights treaty bodies, which had been adopted by the International Law Association, outlined two approaches to the question of whether the pronouncements of expert bodies under human rights treaties fitted "into the traditional sources of international law, whether for the purposes of treaty interpretation or as a source relevant to the development of customary international law".[214] According to the traditional approach, which had been followed by the Commission on the topic of reservations to treaties, "the findings of the committees themselves would not amount to State practice", but "the responses of individual States or of the States parties as a whole to the findings of the committees would constitute such practice".[215] According to the second, alternative approach, the reference in article 31 of the 1969 Vienna Convention to subsequent practice was written "as if no monitoring body had been established by a treaty, as if no third-party interests existed, and as if it were only for other States to monitor each other's compliance and to react to non-compliance".[216] Given the particular nature of human rights treaties, which established obligations that were not reciprocal but consisted of common goals articulated and agreed among States parties, the International Law Association had stated that "it appears arguable that in interpreting these types of treaties … relevant subsequent practice might be broader than subsequent *State* practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties".[217] That statement was particularly relevant, as it compared the work of expert monitoring bodies to the monitoring of obligations by States parties. In the field of human rights, the latter also existed and played a significant role, too, although on the issue of human rights violations organs such as the Human Rights Council tended to be more subject to political considerations and polarization.

13. In conclusion, he recommended that draft conclusion 12 be referred to the Drafting Committee, in the light of the debate in the plenary.

14. Mr. EL-MURTADI SULEIMAN GOUIDER said that he wished to thank the Special Rapporteur for his fourth report, in which, once again, he had dealt successfully with a very complex and controversial topic. The report addressed two key issues, namely the pronouncements of expert bodies and decisions of domestic courts. Differing views had been put forward with regard to the legal effect of such pronouncements, which, as stated in paragraph 15 of the fourth report, depended, first and foremost, on the applicable treaty itself. The ordinary meaning of the term by which a treaty designated a particular form of pronouncement mostly indicated that such pronouncements were not legally binding. As the Special Rapporteur noted in paragraph 120 of his fourth report, however, pronouncements by expert bodies qualified as a supplementary means of interpretation, as envisaged in article 32 of the 1969 Vienna Convention.

15. An example of the complexity of the topic at hand was that, as indicated in paragraph 104 of the fourth report, domestic courts often did not distinguish clearly between subsequent agreements and subsequent practice under article 31, paragaph 3, of the 1969 Vienna Convention, which required agreement between the parties regarding the interpretation of a treaty, and other subsequent practice under article 32 of the Convention, which did not require such agreement.

16. He recommended that the draft conclusions should be referred to the Drafting Committee, taking into account the comments made by members of the Commission during the debate.

[214] International Law Association, "Final report on the impact of findings of the United Nations human rights treaty bodies", *Report of the Seventy-First Conference held in Berlin, 16–21 August 2004*, London, 2004, pp. 621 *et seq.*, at p. 627, para. 17.

[215] *Ibid.*, pp. 628–629, para. 21.

[216] *Ibid.*, p. 629, para. 22.

[217] *Ibid.*

17. Mr. NOLTE (Special Rapporteur) said that, in his summing up of the debate, he wished to highlight the main points, address some criticism and explore possible ways forward.

18. He trusted that differences of opinion with regard to, for example, the status of the Working Group on Arbitrary Detention and the Committee on Economic, Social and Cultural Rights, could be clarified on a bilateral or, if necessary, technical basis. He did, however, wish to respond to a remark by Mr. Murphy that the Special Rapporteur had "singled out" the reaction of the United States of America to draft general comment No. 33 of the Human Rights Committee, and not that of other States. The reaction in question was the only easily accessible statement by a State and had been accepted by the Human Rights Committee. In his fourth report, the Special Rapporteur thus did not single out the United States. Rather, it quoted the United States as an example of a State whose reaction had given rise to a general agreement on a particular question.

19. Most speakers had considered draft conclusion 13 to be unnecessary, with some speakers expressing reservations about giving domestic courts "instructions". While it was true that draft conclusion 13 was, strictly speaking, unnecessary, since it considered and applied to domestic courts draft conclusions that had already been provisionally adopted, without requiring any revision of those conclusions, he had included it because he had felt bound to do so. After all, in the original workplan for the topic, it had been stated that the practice of domestic courts would be considered, both for the sake of having a full analysis and in order to verify whether such practice was in conformity with the practice and sources at the international level.

20. It would not necessarily be inappropriate to formulate a draft conclusion that addressed domestic courts directly. Many domestic courts recognized a need to coordinate among themselves, or at least to inform themselves about relevant international case law, including that of other domestic courts. While it would not be appropriate to try to "instruct" domestic courts, it would be appropriate to offer domestic courts some respectfully worded guidance on their coordination efforts.

21. Nevertheless, he recognized that members of the Commission were reluctant to consider the adoption of draft conclusion 13 and he therefore withdrew his proposal in that regard. He did, however, wish to pursue the proposal by Mr. Forteau and Mr. Šturma to include a certain number of findings from the fourth report in the commentaries to the draft conclusions. Indeed, the research presented in the report contained useful elements that would nuance and improve the commentaries.

22. Given the current lively debate among international lawyers and politicians with regard to the legal relevance of the pronouncements of expert bodies, it was no surprise that draft conclusion 12 had elicited the most responses. Indeed, the debate had shown that in his fourth report, which concentrated on the most authoritative legal sources in an effort to treat opposing views in an unbiased manner, the Special Rapporteur should have addressed certain questions in greater detail.

23. Mr. Forteau, Mr. Hmoud, Mr. Kolodkin, Mr. Murase, Mr. Murphy, and Mr. Park, among others, had expressed the view that pronouncements of expert bodies were not a form of subsequent practice within the meaning of the present topic, while Mr. Forteau and Mr. Hmoud had even suggested that the Special Rapporteur characterized such pronouncements as "subsequent practice" in order to fit them into the project. Mr. Kittichaisaree, on the other hand, had drawn attention to paragraph 109 of the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had referred to the "constant practice" of the Human Rights Committee as a means of interpreting certain provisions of the International Covenant on Civil and Political Rights. Mr. Tladi had also accepted that such pronouncements could be a form of practice.

24. That apparent divergence of views on the basic question of whether pronouncements of treaty bodies fell within the scope of the topic might result, at least in part, from a misunderstanding. Some members assumed that, since draft conclusion 5[218] limited the term "subsequent practice" to conduct by States parties, the project itself could deal only with conduct by States parties. In 2015, the Commission had, however, adopted draft conclusion 11, paragraph 3, which stated that "[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32".[219]

25. That draft conclusion demonstrated that at least that form of non-State practice under a treaty was dealt with by the project. The issue of whether the practice of international organizations should be characterized as "subsequent practice" within the meaning of article 31 of the 1969 Vienna Convention, or whether it should simply be termed "practice" in order to distinguish it from the conduct of States parties was of lesser importance. As Mr. Murphy had suggested, what was important was that there were different forms of practice that were recognized as a means of interpretation of a treaty, even if only in connection with the subsequent practice of the States parties to the treaty in question.

26. Most members did not exclude the possibility that pronouncements of expert bodies constituted a kind of "practice" that might be relevant for the interpretation of a treaty, even if it were not subsequent practice in a narrower technical sense. As Mr. Niehaus and Mr. Šturma had remarked, any doubts in that connection seemed to be prompted by a wide variety of substantive, rather than terminological, concerns.

27. Mr. Forteau and other members had held that the pronouncements of human rights treaty bodies, albeit a form of practice, were not practice within the meaning of the topic, because such pronouncements were more in the nature of international judicial decisions. Although the International Court of Justice had, in paragraph 66 of its judgment in the *Ahmadou Sadio Diallo* case, spoken

[218] *Yearbook ... 2013*, vol. II (Part Two), p. 34.

[219] *Yearbook ... 2015*, vol. II (Part Two), pp. 55 *et seq.*, para. 129.

of the "jurisprudence" of the Human Rights Committee, that did not mean that the Court had considered those pronouncements to be forms of judicial decisions. Indeed, the Court had been careful to characterize the Human Rights Committee not as a court but as an independent body that had been established specifically to supervise the application of the International Covenant on Civil and Political Rights. Nor had the Court characterized the Committee's decisions as "judicial". As Mr. Šturma had observed, it was widely accepted that pronouncements of expert bodies were not in the same category as judicial decisions. There was no apparent reason to assume that, in 2010, the Court, by using the term "jurisprudence" in the *Ahmadou Sadio Diallo* case, had intended to change its own findings in the aforementioned advisory opinion that such pronouncements were a form of practice. One view did not exclude the other.

28. Mr. Murphy, on the other hand, had doubted whether expert bodies had any mandate to interpret their treaty, since the treaties at issue did not accord to those bodies an express power to do so. However, in the *Ahmadou Sadio Diallo* case, the Court had recognized that the International Covenant on Civil and Political Rights accorded the Human Rights Committee a power to interpret that treaty when it had spoken of the "interpretation adopted by this independent body" (para. 66 of the judgment). A further source in support of that view was a 2010 statement by the Government of the United States, in which it referred to the interpretations of the Human Rights Committee as one of the bases of its exhaustive review of whether the United States should continue to urge a strictly territorial reading of the Covenant.

29. Addressing what might have been Mr. Murphy's main concern, he noted that most members, in particular Mr. Hmoud, Mr. Kamto and Mr. Tladi, had reached the conclusion, that, while expert bodies usually did have a mandate to interpret their respective treaties, since otherwise they could not fulfil their mandate under the treaty, their competence to interpret the treaty did not necessarily imply that their interpretation had any particular legal effect. Indeed, the pronouncements of expert bodies did not acquire a binding character by virtue of the competence of such bodies to interpret the treaty, as Mr. Tladi had emphasized.

30. Proposed draft conclusion 12 sought to convey the idea that the legal effect of the pronouncements of expert bodies, as practice and for the purpose of the present project, lay somewhere between being a legally irrelevant statement and a court judgment. In order to capture that middle position, draft conclusion 12, paragraph 3, recognized that pronouncements of expert bodies "may contribute to the interpretation of [a] treaty". That middle position was supported by the case law of the International Court of Justice and by most authorities, as Mr. Saboia had confirmed. The proposed draft conclusion did not attempt to resolve differences of view on whether, for the purposes of interpretation, the legal effect of pronouncements of expert bodies was closer to that of judicial decisions and thus quasi-judicial, as Mr. Šturma and Sir Michael had suggested, or more akin to that of administrative practice, as Mr. Hassouna had suggested.

31. Proposed draft conclusion 12 left ample room for accommodating different viewpoints on the legal effect of the pronouncements of expert bodies, since, as Sir Michael had said, it was difficult to generalize given the disparity in the competences and functions of different expert bodies under different treaties. It was clear that different treaties provided for specific terms and tasks for those different bodies, as Mr. Murphy had emphasized. He agreed with Mr. Murase, Mr. Murphy and Sir Michael that caution was warranted regarding the powers of certain expert bodies, such as the Commission on the Limits of the Continental Shelf and the Compliance Committee of the Kyoto Protocol. The concern for leaving room for the diversity of treaties that established expert bodies was the reason for proposing draft conclusion 12, paragraph 5. Mr. Park had rightly observed that the Special Rapporteur, in his fourth report, dealt more with human rights treaty bodies than with other expert bodies. The reason for that was that the debate about the legal weight of such pronouncements had mainly centred on the former. The references to other expert bodies were merely illustrative.

32. It might not be possible to persuade Mr. Murphy that pronouncements of expert bodies possessed a judicial quality, or to persuade Mr. Forteau that the interpretative value of such bodies was slight or non-existent. The point of the proposed draft conclusion was not, however, to make a comprehensive statement on the interpretative weight of such pronouncements, but to recognize, for the purpose of the present project, that they were a form of practice under a treaty which might be relevant for its interpretation, either in connection with State practice, or as such, and that such pronouncements might have additional legal effects possibly deriving from their more or less quasi-judicial character. The commentary could make clear that the reference to article 31, paragraph 1, of the 1969 Vienna Convention covered that possibility.

33. Mr. Hmoud had said that the references in draft conclusion 12 to articles 31 and 32 of the 1969 Vienna Convention were not sufficiently grounded in practice and that the draft conclusion therefore represented a deductive approach. He took it that Mr. Hmoud had meant that international and national courts had only rarely explained the relevance of the pronouncements of expert bodies in terms of the 1969 Vienna Convention. However, the Commission did not need such explanations in order to conclude that those pronouncements, whether or not together with the reactions of States, were a means of interpretation which fitted the rules of interpretation of the Convention, since, at the outset of its work on the topic, the Commission had already found that articles 31 and 32 were the framework for treaty interpretation. It was therefore within the *lex lata* for the Commission simply to state the role that pronouncements of expert bodies might play as a means of interpretation under the aforementioned articles 31 and 32, whether in conjunction with the reactions of States, as suggested by Mr. Šturma, or by themselves. Mr. Hmoud had also accepted that such pronouncements could constitute a supplementary means of interpretation under article 32. While it was true, as Mr. Hmoud and Mr. Murphy had said, that examples of such pronouncements from which an agreement of the parties had arisen were more difficult to find, the Special Rapporteur provided examples to show that they did exist. Another

example was General Assembly resolution 65/221 of 21 December 2010, which, in its paragraph 5, reaffirmed elements of general comment No. 29 of the Human Rights Committee concerning the interpretation of article 4 of the International Covenant on Civil and Political Rights.[220]

34. The question of silence was relevant in that context. Mr. Murase had considered that draft conclusion 12, paragraph 4, was inconsistent with draft conclusion 9, paragraph 2.[221] However, the intention of paragraph 4 was to specify the circumstances under which a reaction was called for. As Mr. Hassouna had proposed, the commentaries could provide further clarification in that respect.

35. Mr. Hassouna, Mr. Murase, Mr. Saboia and Sir Michael had wondered why the Special Rapporteur, in his fourth report, dealt only with expert bodies which were not organs of international organizations. The reason, a purely formal one, was that he did not consider that the topic should delve any further into the law of organizations than the 1969 Vienna Convention did. He tentatively agreed with Mr. Šturma and Sir Michael that the pronouncements of expert bodies that were organs of international organizations and the reactions of States thereto would mostly have the same effect as the pronouncements of the bodies covered in the report under consideration.

36. Although he had defended the proposed draft conclusion 12 as contained in his fourth report, that did not mean that he was unreceptive to the various critical comments that had been made. In fact, as the project was a collective enterprise, he was quite prepared to reformulate certain elements of draft conclusion 12 to accommodate the concerns expressed by some members. It would be worthwhile confirming that the practice of States in relation to the pronouncements of an expert body, and the practice of that body, might play a role in the interpretation of a treaty, as that aspect had not been appropriately covered by the previous conclusions. The following points could be addressed in a reformulated proposal and be considered by the Drafting Committee. First, in order to meet the concerns of Mr. Murphy and Sir Michael, it could be stated explicitly at the beginning of the draft conclusion that it was first and foremost the treaty which determined the interpretative weight to be given to pronouncements of expert bodies, whether in connection with the reactions of States or as such. Second, it could be made clear that the draft conclusion did not claim to determine all aspects of the possible interpretative weight of pronouncements of expert bodies and the reactions of States thereto, but was confined to their weight as a form of "practice". That should meet the concerns of Mr. Forteau and others who wished to leave room for a quasi-judicial function of such pronouncements. It would also make it even clearer that the Commission recognized the position of the International Court of Justice in that regard. Third, the commentaries could be kept to a minimum and omit any reference to Article 38 of the Statute of the International Court of Justice, as Mr. Murphy and Mr. Tladi had requested. Fourth, the draft conclusion, or the commentary thereto, could reaffirm that observations by States that disagreed with the interpretations contained in the pronouncements of expert bodies precluded any agreement under article 31, paragraph 3 (*b*). Fifth, in order to allay Mr. Murase's concerns, it could be made plain that draft conclusion 12, paragraph 2, did not conflate reactions by States with the pronouncements of expert bodies themselves. Sixth, he was prepared to replace the term "expert body" with "expert treaty body" and to replace the expression "individual capacity" with "personal capacity", as proposed by Mr. Hassouna Mr. Kamto and Mr. Murphy. Seventh, the drafting proposals of Mr. Kamto and Mr. Park could also be considered. He hoped that those proposals would enable the Drafting Committee to find enough common ground to arrive at a reformulated draft conclusion 12.

37. Turning to draft conclusion 4, paragraph 3, the Special Rapporteur said that he had taken note of the reservations expressed by Mr. Hmoud, Mr. Kamto, Mr. Kolodkin, Mr. Murase, Mr. Murphy, Mr. Park and Sir Michael about his proposal to replace the phrase "conduct by one or more parties" with "official conduct". The intention behind that proposal was to make clear that the practice of an international organization, pronouncements of expert bodies or other forms of conduct mandated by the treaty as elements of its application were not to be placed on the same footing as the private conduct of non-State actors, but that they might contribute to the interpretation of a treaty when combined with the practice of the parties to the treaties themselves. Although, in his fourth report, he might not have sufficiently explained why the expression "official conduct" had been chosen, he remained convinced that it was an apt means of characterizing the practice of international organizations and the pronouncements of expert bodies as distinct from the private conduct of non-State actors. Nevertheless, he recognized that a majority of members were reluctant to place such practice on the same level as State conduct, in the same way that they had questioned the status of the practice of international organizations for the purpose of the formation and identification of customary international law. In that context, the Commission was about to give the practice of international organizations a sort of intermediate status that neither equated it with State practice nor put it on the same level as the conduct of private actors. Moreover, as Mr. Kamto had said, States had wanted the treaty-mandated conduct of international organizations and expert bodies to be characterized as forms of practice for the purpose of interpretation.

38. In a sense, draft conclusion 11, paragraph 3, recognized that intermediary status by indicating that the practice of an international organization might contribute to the interpretation of a treaty under article 31, paragraph 1, and article 32 of the 1969 Vienna Convention. If the same idea were to be expressed in a reformulated draft conclusion 12, it would then be unnecessary to explain the status of such pronouncements for the purpose of interpretation in more general terms. That task could be left until the second reading of the draft conclusions. On that basis, he would be prepared to withdraw his proposed revision of draft conclusion 4, paragraph 3, thereby obviating any need to discuss the revision of draft conclusion 5, a possibility raised by Mr. Kolodkin.

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[220] General comment No. 29 (2001) on derogations from the provisions of the Covenant during a state of emergency, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 40*, vol. I (A/56/40), annex VI.

[221] *Yearbook ... 2014*, vol. II (Part Two), p. 123.

39. In light of the statements made during the debate, he withdrew the proposal to adopt draft conclusion 13 and, for the time being, the proposal to revise draft conclusion 4, paragraph 3. However, it was still his wish that the Commission should adopt draft conclusions 1*a* and 12, as well as the general structure of the set of draft conclusions that he proposed in paragraph 113 of his fourth report. The question of whether the draft conclusions should be renamed "guidelines", as Mr. Murase had proposed, should be addressed on second reading and take account of the views of States.

40. Mr. KAMTO said that he would like to thank the Special Rapporteur for the flexibility displayed in his summing up of the debate, which would probably enable the Commission to follow his recommendation to refer two draft conclusions to the Drafting Committee. However, one point in draft conclusion 12 required clarification, namely whether the Commission should give some clear guidance to the Drafting Committee regarding that draft conclusion. He was concerned that draft conclusion 12 with the amendments proposed by the Special Rapporteur still referred to article 31, paragraph 3, and article 32 of the 1969 Vienna Convention. He was unconvinced that article 31, paragraph 3, could be applied in the context of pronouncements of expert bodies, because in order for there to be subsequent agreement within the meaning of article 31, paragraph 3 (*a*), or subsequent practice within the meaning of paragraph 3 (*b*) thereof, there first had to be an agreement. He had difficulty in accepting that the Commission could consider pronouncements of expert bodies to be subsequent practice within the meaning of article 31, paragraph 3 (*b*). He had therefore suggested that draft conclusion 12 be based on article 32 of the 1969 Vienna Convention. If reference were made to article 31, paragraph 3, in that context, it would be necessary to include a reference to the reaction of States. However, that reaction in itself would not suffice, unless it was held that an agreement had been reached between States; but, if the view were taken that the subsequent practice had not given rise to an agreement between States parties, what would be needed would be a reaction from one or more States to the pronouncement of the expert body. Even if only the agreement of one State to an interpretation under article 31, paragraph 3 (*b*), were required, it would be necessary to reintroduce the notion of a reaction from States to that agreement. It would therefore be better if the Commission were to confine itself to a reference to article 32 in connection with pronouncements of expert bodies; however, even that solution would be unsatisfactory, because it would be tantamount to excluding the possibility that an expert body could use its own pronouncement for the purpose of interpretation.

41. Mr. NOLTE (Special Rapporteur), replying to Mr. Kamto, said that it would be necessary to make absolutely clear that a pronouncement of an expert body as such could not constitute an agreement within the meaning of article 31, paragraph 3, of the 1969 Vienna Convention. The question was whether it could reflect or act as a catalyst for a subsequent agreement or subsequent practice between States. That was the notion underlying draft conclusion 11. He was open to considering the omission of any reference to articles 31 and 32 if another adequate solution could be found in draft conclusion 12. The fact that he had said that he was prepared to be flexible on certain points did not mean that he was inflexible on others. He would, however, be reluctant to exclude from the outset any reference to article 31 of the 1969 Vienna Convention, since it was the Convention's most important provision on the interpretation of treaties.

42. Mr. HMOUD said that he was in favour of referring the draft conclusions to the Drafting Committee so long as the latter had the mandate to change their substance. He still thought that it was innovative to regard article 31 of the 1969 Vienna Convention as applicable to pronouncements of expert treaty bodies. He would have something to say about practice under article 32 of the Convention in the Drafting Committee.

43. Mr. MURPHY said that the Special Rapporteur's proposal to withdraw some draft conclusions and to send others to the Drafting Committee was a sensible path forward. While it was not the Commission's practice to engage in a substantive debate at the current juncture, in light of the statements by Mr. Hmoud and Mr. Kamto, he wished to raise one point on which the Special Rapporteur might wish to reflect when reformulating draft conclusion 12. Although he could, to a certain extent, see that the reaction of States to an expert treaty body's pronouncement, as reflected in a General Assembly resolution, might constitute a subsequent agreement of States on interpretation, he still had great difficulty in regarding an expert treaty body's pronouncement as itself reflecting or embodying the agreement of States. The Special Rapporteur's response to his comments about singling out the reaction of the United States to general comment No. 33 of the Human Rights Committee highlighted the fact that the difficulty of finding statements by Governments made it very hard to know for sure whether Governments were in agreement with a treaty body's pronouncement and whether the latter reflected the views of States.

44. The CHAIRPERSON said that he had taken note of the fact that revised draft conclusion 4, paragraph 3, and draft conclusion 13 had been withdrawn. He had also taken note of the fact that the Special Rapporteur wished to pursue in the commentaries the proposals made by Mr. Forteau and Mr. Šturma in respect of draft conclusion 13.

45. He took it that the Commission wished to refer draft conclusions 1*a* and 12 to the Drafting Committee.

It was so decided.

Protection of the atmosphere (*continued*) (A/CN.4/689, Part II, sect. A, A/CN.4/692, A/CN.4/L.875)

[Agenda item 8]

Third report of the Special Rapporteur (*continued*)

46. The CHAIRPERSON invited the members of the Commission to resume their consideration of the third report on the protection of the atmosphere (A/CN.4/692).

47. Mr. MURASE (Special Rapporteur), referring to discrepancies between the draft guidelines contained in

the body of his third report and those in the annex thereto, said that the previous version of the draft guidelines had been mistakenly incorporated into the annex. He had requested that a corrected version of his third report be issued. In the meantime, members should ignore the draft guidelines as contained in the annex.

48. Mr. HMOUD said that the discussions in the Sixth Committee indicated that States had generally reacted positively to the Commission's dealing with the topic on the basis of the 2013 understanding.[222] Notwithstanding the continuing scepticism of a few States, he thought that the Commission's approach in striking a balance between the interest of the international community in the protection of the atmosphere and the need not to prejudice political negotiations or existing treaty regimes was the right one.

49. As to the Special Rapporteur's proposal to consider reintroducing the concept of "common concern of humankind", he did not see either the debate in the Sixth Committee or the inclusion of those words in the preamble to the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change as warranting any amendment to the preamble adopted by the Drafting Committee at the previous session. Most delegations in the Sixth Committee had agreed with the proposal to change the term "common concern of humankind" to "pressing concern of the international community as a whole". It was natural that the expression "common concern of humankind" had been used in the above-mentioned Agreement, given that it reflected the language of the preamble to the United Nations Framework Convention on Climate Change itself. The fact that the scope of the Commission's topic, protection of the atmosphere, was wider than that of the Agreement, climate change, also made the comparison inappropriate. The relation of the concept of "common concern of humankind" to atmospheric protection had no basis in general international law and its inclusion would have significant legal consequences, including potentially triggering obligations *erga omnes*. He also had reservations concerning the Special Rapporteur's intention to tackle the issues of implementation and compliance in future reports, since it suggested that the legal nature of atmospheric protection might be considered *erga omnes*. The inclusion of those issues and dispute settlement in the scope of the topic would be inconsistent with the 2013 understanding.

50. That said, he agreed that the draft guidelines should have at their core a general obligation on States to protect the atmosphere and, in that regard, he welcomed the reformulation of what was now draft guideline 3. During the previous year's debate, he had expressed the view that it was important to determine the legal content of any aspects of that obligation that went beyond the customary law principle of *sic utere tuo ut alienum non laedas*. He was therefore pleased to note that the Special Rapporteur had explained the legal consequences arising from an obligation to protect the atmosphere in terms of transboundary air pollution and atmospheric degradation.

51. He agreed that, under international law, the obligation to protect the atmosphere comprised a duty to prevent transboundary atmospheric pollution, as evidenced by the case law, starting with the *Trail Smelter* arbitration, and the inclusion of the principle in treaties and other instruments, such as the Stockholm Declaration[223] and the Rio Declaration on Environment and Development.[224] A State had to do everything reasonable and necessary within its capabilities to prevent the possibility of transboundary pollution, based on knowledge of the potential risk of the activities in question to cause harm. If it failed to conduct the necessary environmental impact assessment and damage occurred, it would be responsible for violating the obligation of due diligence. The Special Rapporteur, in his third report, did not explain whether there were minimum international standards to be employed in the measures of due diligence to prevent transboundary harm; it seemed reasonable to conclude that the degree of care was based on the best practicable means available to the State.

52. In his third report, the Special Rapporteur noted a trend to reduce the standard of proof from the high standard of the *Trail Smelter* arbitration of "clear and convincing evidence" to a lower standard of "balance of probabilities". While there might indeed be a case to be made for lowering that standard, the arguments advanced in the third report in that regard were not convincing. The issue of the burden of proof in a court or tribunal in the context of a dispute arising from transboundary harm was a totally different matter. What was relevant for the duty of due diligence was whether the State had been aware of the prospect of significant transboundary harm and whether the proof had been available to it to act in order to prevent the damage from occurring. Such proof was necessary to trigger its obligation; it was therefore not a procedural matter relating to judicial or arbitral proceedings.

53. In his third report, the Special Rapporteur provided examples of case law relating to *de jure* and *de facto* jurisdiction by a State over a territory or area as an element in determining the State's obligation to take preventive measures. However, the atmosphere was not an "area" as such. Therefore, even if the State had an obligation to prevent transboundary air pollution beyond its territorial jurisdiction, there did not seem to be any obligation under general international law to take preventive measures in areas outside its territory or in territories or areas under its jurisdiction or control. Nonetheless, in view of the goal of enhancing atmospheric protection, the idea that all activities under the control or jurisdiction of the State should be subject to preventive measures could be advanced as *lex ferenda*.

54. With regard to draft guideline 3 (*a*), he remained of the view that the relevant obligation under international law was to take measures of due diligence to prevent transboundary air pollution; pollution that was localized in the State's territory should therefore fall outside the scope of the topic.

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[222] See *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

[223] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

[224] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

55. Concerning the second aspect of the obligation to protect, namely the duty to minimize the risk of global atmospheric degradation, he was of the view that, to the extent that the obligation was related to the environment, and bearing in mind that the air was part of the environment, there was sufficient basis to assume that the *sic utere tuo ut alienum non laedas* principle might apply to atmospheric degradation, at least in relation to climate change and ozone depletion. The case law, including the case concerning *Pulp Mills on the River Uruguay*, the relevant principles in the Stockholm Declaration and the Rio Declaration on Environment and Development, and recent treaty developments supported the proposition that the duty not to cause atmospheric degradation was becoming part of general international law. The Commission should not base the application of the *sic utere tuo ut alienum non laedas* principle regarding atmospheric degradation on an unsubstantiated proposition that it somehow entailed *erga omnes* effects or *actio popularis*. Instead, it needed to determine the content of the State's obligations in terms of the protection of the atmosphere from degradation, in light of the existing rules of international law. Paragraph 39 of the third report referred to precautionary measures as obligations incorporated in the relevant conventions, but provided no examples of the kind of measures that could be taken to minimize the risk of atmospheric degradation. The matter should be considered further by the Special Rapporteur before being included in draft guideline 3. As the precautionary principle was excluded from the scope of the topic, draft guideline 3 should be formulated carefully in that regard.

56. The duty to assess environmental impact, addressed in draft guideline 4, was a procedural duty rather than a substantive one and, in relation to transboundary environmental harm, seemed to exist under general international law, as could be deduced from the pronouncements of the International Court of Justice in the *Pulp Mills on the River Uruguay* case and the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, as well as from State practice, relevant sectoral and regional treaty regimes and instruments of "soft law", such as the Rio Declaration on Environment and Development. Nonetheless, while it was established that such a duty existed in relation to transboundary environmental harm when the activity was likely to have a significant impact, the same could not be said of atmospheric degradation as such. Furthermore, in his third report, the Special Rapporteur did not specifiy why the obligation provided for in draft guideline 4 was to take measures to ensure an appropriate environmental impact assessment to prevent, mitigate and control the causes and impacts. If such elements were derived from the precautionary principle, they should be avoided. While he supported the principle of draft guideline 4, he believed that the duty should be tied to the prospect or possibility that the activity would cause significant environmental harm.

57. With regard to draft guideline 5, he agreed with the Special Rapporteur that the atmosphere was a limited resource with limited assimilation capacity. Properly balancing economic development with atmospheric protection could be advanced as a policy objective, but it was not a requirement under existing international law. While he agreed that sustainable utilization of the atmosphere should be provided for in a progressive, non-binding manner, the commentary would have to elaborate on the content of such a goal if the guideline were adopted. As to draft guideline 5, paragraph 2, ensuring a balance between economic development and environmental protection should not be a requirement under international law, since the concept of sustainable utilization was itself progressive in nature.

58. Concerning draft guideline 6, although the Special Rapporteur discussed in detail in his third report the principle of equity in international law, including references to treaties and judicial decisions, he did not indicate any symmetry that could be applied to deduce the content of the concept of the equitable utilization of the atmosphere. Under the United Nations Framework Convention on Climate Change, equity was associated with protection and the principle of common but differentiated responsibilities – not rights – while in judicial decisions it was usually employed to settle border disputes. The provisions on equitable utilization contained in the draft articles on the law of transboundary aquifers[225] and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses concerned the rights of aquifer States and river States, respectively. He looked forward to further explanations from the Special Rapporteur on how the content of draft guideline 6 could be deduced.

59. With regard to draft guideline 7 on geoengineering, it was clear from the third report and the recent discussion with scientific experts that there was significant uncertainty regarding the implications of modifications to the atmosphere. He would therefore be in favour of tackling the matter from a policy perspective and having the draft guideline suggest a course of action rather than a legal principle, as the latter would fall within the context of the precautionary principle.

60. In conclusion, he recommended referring draft guidelines 3, 4, 5 and 7, as well as the preambular paragraph, to the Drafting Committee.

61. Mr. TLADI said that, by and large, he agreed with the content of the proposed draft guidelines and that they should be sent to the Drafting Committee. Although all the guidelines required drafting changes, he would not make any specific proposals in that regard at the current stage.

62. At the outset, he wished to say that he was somewhat at a loss with respect to draft guideline 7. He did not object to it being sent to the Drafting Committee, but feared that the Commission was venturing into areas that it was ill-equipped to address. Although the third report was generally satisfactory, Mr. Tladi was very unhappy with the treatment of the precautionary principle and the principle of common but differentiated responsibilities. With regard to the concept of the "common concern of humankind", the fact that it was mentioned in the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change clearly suggested

[225] General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), p 19 *et seq.*, paras. 53–54.

that States had not abandoned the concept. He therefore supported the Special Rapporteur's suggestion that the Commission might wish to reconsider adopting it in place of the rather cumbersome phrase "pressing concern of the international community as a whole". The substitution could be made at the current session. On the point made by Mr. Hmoud, it did not follow that, because the expression "common concern of humankind" had been included in the United Nations Framework Convention on Climate Change, it would automatically be included in the abovementioned Agreement; after all, it had not been mentioned in the Kyoto Protocol to the United Nations Framework Convention on Climate Change, and, precisely because there had been no reference to the concept since 1992, the Commission had decided on the alternative formulation.

63. Referring to paragraph 9 of the third report, he pointed out that the Sustainable Development Goals[226] were intended to build on the Millennium Development Goals,[227] not replace the latter, as suggested in that paragraph. The objectives of the Millennium Development Goals therefore remained relevant, even under the new regime.

64. Noting that, in response to the concerns of some members, the Special Rapporteur proposed to differentiate between two dimensions of the protection of the atmosphere – transboundary atmospheric pollution and global atmospheric degradation – he wondered whether that distinction had been accurately captured. According to draft guideline 1 (*b*), atmospheric pollution referred to the release of substances "extending beyond the State of origin", while guideline 1 (*c*) defined atmospheric degradation as the alteration of "atmospheric conditions".[228] According to the statement made by the Chairperson of the Drafting Committee at the previous session, atmospheric degradation referred to a global phenomenon, not a transboundary one.[229] Similarly, paragraph (6) of the commentary to draft guideline 1 stated that atmospheric pollution referred to transboundary air pollution, while atmospheric degradation referred to global atmospheric problems.[230] That was not clear from the text itself, but, in any case, the distinction was largely inconsequential.

65. The *sic utere tuo ut alienum non laedas* principle was an apt illustration of the futility of the distinction. It would seem that one of the consequences of the distinction would be a recognition that the principle applied only to neighbouring States. Indeed, according to paragraph 14 of the third report, "the *sic utere tuo ut alienum non laedas* principle has been recognized as customary international law as applied to the relationship with an 'adjacent State' sharing a common territorial border", but its scope had been "broadened to the relationship with long-range transboundary causes and effects between the State of origin and the affected States". In short, as he understood it, the principle did not apply to "commons" or areas beyond national jurisdiction, or to the global degradation of the environment. Yet, there was nothing in the *Trail Smelter* decision, or any of the sources cited, that suggested such a limitation. Indeed, the Rio Declaration on Environment and Development expressly provided for the application of the principle beyond national jurisdiction. Analogously, article 117 of the United Nations Convention on the Law of the Sea imposed on States a duty to take measures to ensure that their nationals conserved the living resources of the high seas. What was particularly strange with respect to the treatment of *sic utere tuo ut alienum non laedas* was that paragraph 38 of the third report confirmed that the principle applied equally in a global context.

66. Further illustrating the futility of the distinction, draft guideline 3 (*a*) applied to atmospheric pollution, while draft guideline 3 (*b*) applied to atmospheric degradation; the primary duty, in the *chapeau*, applied to both equally. However, for atmospheric pollution there was a duty of due diligence, while the same did not appear to apply to atmospheric degradation. Moreover, measures to prevent atmospheric pollution were to be "in accordance with the relevant rules of international law", while measures relating to atmospheric degradation were to be "in accordance with relevant conventions". Nothing in the third report alluded to the distinction made in respect of due diligence, either expressly or by necessary implications. According to paragraph 17, the principle of prevention in environmental law was based on the concept of due diligence; since a duty of prevention applied to both degradation and pollution, surely measures of due diligence should be adopted in both instances. The distinction between "international law" and "relevant conventions" was even more puzzling, as it almost seemed to suggest that conventions were not international law. If the Special Rapporteur meant that the duty to adopt measures with respect to atmospheric pollution applied as a matter of customary international law, while the duty to adopt measures with respect to atmospheric degradation applied only as a matter of treaty law, there was nothing in the third report to justify that conclusion. Presumably, it was based on the conclusion reached previously concerning the limited application of *sic utere tuo ut alienum non laedas*, but there was nothing in the third report to justify such a narrow interpretation. The International Court of Justice had recognized the broader version of the principle in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. In any event, the phrase "under international law" would capture the idea.

67. He also had doubts about the dichotomy presented in paragraph 15 of the third report, namely that the principle of prevention consisted of two different obligations: the obligation to prevent before actual pollution or degradation occurred and the duty to eliminate, mitigate and compensate after they had occurred. It was not clear that the second obligation was a part of the primary obligation; rather, it seemed to be a secondary duty flowing from the failure to comply with the primary duty to prevent. That was certainly the case for the compensation aspect. Although the Commission might well conceive of a duty to mitigate potential pollution or degradation, there was no reason for it to apply after they had already occurred. In other words, he did not see the duty to mitigate as being similar to the duty to restore.

[226] General Assembly resolution 70/1 of 25 September 2015.

[227] See the United Nations Millenium Declaration, adopted by the General Assembly in its resolution 55/2 of 8 September 2000.

[228] *Yearbook ... 2015*, vol. II (Part Two), pp. 21–23.

[229] *Ibid*., vol. I, 3260th meeting, p. 120, para. 7.

[230] *Ibid*., vol. II (Part Two), p. 22.

68. The only authority cited in the third report for the dual nature of the duty to prevent was the Convention on the Law of the Non-Navigational Uses of International Watercourses; however, even there, it was clear that the duty to mitigate, eliminate and possibly compensate was a secondary duty flowing from the first and not a distinct independent duty. Presumably, the duty to compensate did not arise, absent a breach of the primary obligation.

69. The duty to mitigate was closely connected to rules relating to impact assessments and foreseeability, the best examples of which were the World Bank operational policies. Under those policies, where an environmental impact assessment revealed the potential for significant damage, there was a duty to mitigate the risk by, for example, making adjustments to the proposed plan. That, however, remained a primary obligation applicable before any harm occurred. The post-degradation or pollution duty seemed to be of a secondary nature flowing from failure to comply with the primary duty to prevent.

70. He also had concerns about the treatment of the due diligence obligation in the third report, which was described variously as the obligation to "make best possible efforts in accordance with the capabilities of the State", to "take all appropriate measures to control, limit, reduce or prevent human activities", and as requiring "the best available efforts not to cause adverse effects". The Special Rapporteur did not clarify whether those were equivalent standards or why draft guideline 3 used the expression "appropriate measures", a standard that seemed different from all of the others.

71. It was not clear why the third report contained a detailed discussion on the burden of proof, since, quite rightly in his view, none of the draft guidelines appeared to relate to that concept. In paragraph 28 of the report, it was suggested that the precautionary principle might result in a reversal of the burden of proof. However, as the International Court of Justice had stated, the precautionary principle was not about reversing the burden of proof. It was important to understand that the case law cited in the third report concerned factual disputes and that the Court had simply been applying its own approach to the establishment of facts. The Court's reasoning in those cases had not been intended to contribute to rules, principles or guidelines on issues related to the environment or the atmosphere.

72. While the analysis of the precautionary principle contained in the third report was useful, he did not share the conclusion that it would be inappropriate to refer to the precautionary principle in the draft guidelines because it had not been recognized as customary international law by the Court. That should not be the standard used by the Commission in determining whether a given element should be included in its texts. Since the Special Rapporteur had not engaged in a qualitative analysis of practice, including, for example, the advisory opinion of the International Tribunal for the Law of the Sea on *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, referred to in paragraph 25 of the third report, or the countless resolutions, treaties and acts related to those treaties and resolutions that could have been considered to support a conclusive determination about the status of precaution, it was inappropriate to suggest that no reference was made to the principle in the draft guidelines because of a lack of normative or doctrinal support. That said, he did not wish to suggest that the Commission include a guideline on precaution. Clearly, it was precluded from doing so by the 2013 understanding. However, he objected to the unsubstantiated conclusion reached in the third report that customary international law did not recognize the precautionary principle. He recalled that the understanding specifically stated that it was without prejudice to questions such as the precautionary principle. Regrettably, the Special Rapporteur's treatment of the principle in his third report was the definition of prejudice, and he wished to register his very strong disapproval.

73. He was largely in agreement with the Special Rapporteur's analysis, even if it was somewhat conservative, of the obligation to carry out an environmental impact assessment. The International Court of Justice had indeed found, in its judgment in the *Pulp Mills on the River Uruguay* case, that there was a duty under customary international law to conduct an impact assessment where an activity had the potential to have transboundary effects; incidentally, there was no reason why such duty should not also apply in the context of potential global effects. However, the Court had not accepted the argument put forth by Argentina concerning the quality and consequences of such an assessment. In other words, the Court had not accepted that international law prescribed the elements to be contained in an environmental impact assessment, nor had it accepted that international law prescribed such an assessment's consequences. That was in contrast to the policies of the World Bank on environmental impact assessments, which identified both elements and consequences, including a potential reorientation of the proposed activity.

74. It would be useful for the draft guidelines, as a whole, if draft guideline 4 were to include a reference to the principle invoked in the *Pulp Mills on the River Uruguay* case as a rule of customary international law and then, in more practical terms, if it were to include the elements of an effective environmental impact assessment and its consequences or the response measures to be carried out. The latter aspect would have to be carefully drafted to avoid any impression that such elements themselves constituted customary international law. Adopting such an approach would clearly distinguish between those elements of the guidelines that were representative of customary law and those that were not. For instance, he approved of the reference, in draft guideline 4, to transparency and public participation regarding environmental impact assessments but, in his third report, the Special Rapporteur did not justify them as legal requirements. Yet it would be useful to introduce into the draft guidelines ways in which States might give effect to the customary international law principle on the duty to conduct an environmental impact assessment, including rules on public participation and transparency.

75. Regarding the sustainable utilization of the atmosphere, he would hesitate to equate maximum sustainable

yield with sustainable development; it was note/worthy, in that connection, that the drafters of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks had abandoned that concept in favour of precaution. Moreover, even in the annual General Assembly resolution on oceans and the law of the sea, which focused on the United Nations Convention on the Law of the Sea, the concept of maximum sustainable yield was largely marginalized.

76. He welcomed the references in the third report to the principles of inter- and intragenerational equality. It was regrettable that the same treatment had not been given to the principle of common but differentiated responsibilities. While he understood that, just as with the precautionary principle, the principle of common but differentiated responsibilities had not been included in the draft guidelines on the basis of the 2013 understanding, he strongly objected to the impression created in paragraph 83 of the third report that it had not been included because it was not part of the body of international law. It was simply not true that the "without prejudice" clause was ambiguous. Any suggestion, moreover, that the principle of common but differentiated responsibilities was not part of the body of international law was without basis and no effort was made in the third report to support it. Virtually every modern international law instrument adopted since the United Nations Conference on Environment and Development, held in 1992, in Rio de Janeiro, Brazil, reflected in some way the principle of common but differentiated responsibilities – whether by express mention, through the creation of differentiated responsibilities, or through the linking of the performance of obligations on developing States to technology and financial transfer.

77. He was particularly baffled by the assertion in paragraph 81 of the third report that there was no longer any reference – presumably in the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change – to the concept of common but differentiated responsibilities. However, article 2, paragraph 2, of the Agreement made it clear that this concept – or, more appropriately, principle – was part of United Nations law on combating climate change. Similarly, and perhaps more importantly in terms of giving effect to the principle, article 4, paragraph 3, of the Agreement referred to the common but differentiated responsibilities of States parties. If the Special Rapporteur, in asserting that there had been a regression in the application of the concept, meant that all States had commitments under the Paris Agreement under the United Nations Framework Convention on Climate Change, whereas in the Kyoto Protocol to the United Nations Framework Convention on Climate Change developing States did not have quantified emissions and reductions commitments, that was only because the Agreement itself was a regression. After all, the Agreement did not set any binding commitments on any State; it was States themselves that must set commitments. Differentiation in that respect was therefore not possible.

78. It was not clear that geoengineering should be addressed in the draft guidelines, not least because the Commission lacked expertise in that area. The Commission's work on the topic should instead seek to lay down broad principles, supported by practical guidelines on the ways in which States could give effect to those principles. The principles should reflect rules of law, while the guidelines need not do so, and specific issues, such as geoengineering, should be addressed through the application of the draft guidelines. In other words, any geoengineering activity would presumably also be subject to the requirement of environmental impact assessments – and the guidelines to be developed thereunder – and to the duty to ensure that this activity did not cause atmospheric pollution or degradation under draft guideline 4. In that respect, a separate provision dealing specifically with geoengineering was unnecessary, and might even be dangerous.

79. He supported referring to the Drafting Committee the fourth draft preambular paragraph and draft guidelines 3 to 6; he was also in favour of the proposal whereby draft guideline 5, as provisionally adopted by the Commission at its sixty-seventh session,[231] would become draft guideline 8, and the guidelines as a whole would be renumbered accordingly. Although he would not stand in the way of consensus, he did not support referring draft guideline 7 to the Drafting Committee.

80. Mr. MURPHY, noting the serious concerns expressed by Member States during their debate on the topic in the Sixth Committee, said that the Commission had sought to avoid such issues from the outset by adopting its 2013 understanding and incorporating elements thereof into both the preamble[232] and draft guideline 2.[233] Given the support subsequently expressed by Member States in favour of the understanding, it was unfortunate that the third report on the topic once again departed from it. Despite the statement in the understanding that the topic would not deal with the precautionary principle, paragraphs 28 and 39 of the report under consideration dealt expressly with that principle. Moreover, the Special Rapporteur asserted, in the last footnote to paragraph 39 of the third report, that it had been agreed that the "precautionary approach" could be addressed in the draft guidelines, yet no such agreement had been reached and no such agreement was reflected in the 2013 understanding. Moreover, no "precautionary" formulation was implicit in draft guideline 3, and any suggestion that it was in the commentary to the draft guidelines would be in disregard of the understanding.

81. Similarly, despite the statement in the 2013 understanding that the topic would not deal with common but differentiated responsibilities, paragraphs 71, 72, 79 and 81 to 83 of the third report dealt expressly with that concept. Moreover, references to it were not casual; the Special Rapporteur was purporting to interpret the meaning of the concept in some depth, precisely for the purpose of injecting references to it into the draft guidelines, specifically in the preamble and with respect to the principle of equity. It was particularly troubling that, in paragraph 83 of his third report, the Special Rapporteur

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[231] *Yearbook ... 2015*, vol. II (Part Two), pp. 24–26.

[232] *Ibid*., pp. 19–20.

[233] *Ibid*., pp. 23–24.

claimed that the phrase "but is also without prejudice to" had been inserted in the 2013 understanding so as to allow the concept of common but differentiated responsibilities to be included in the draft guidelines; that statement was a misrepresentation of the understanding and should be corrected.He feared that otherwise future reports might include matters that had been excluded by the understanding.

82. Also according to the 2013 understanding, the topic was not to interfere with relevant political negotiations, including on climate change; yet, in paragraph 82 of the third report, the outcome of the recent Paris Agreement under the United Nations Framework Convention on Climate Change was characterized as regressive in its imposition of the obligation on all States, rather than just developed States, to develop nationally determined contributions. Such statements were precisely what the Commission had sought to avoid by adopting the 2013 understanding; indeed, it was not helpful to cast aspersions on the outcome of the careful and, in some respects, fragile balancing of interests captured in the Paris Agreement under the United Nations Framework Convention on Climate Change, especially at a time when States were deciding whether to ratify it.

83. He did not support referring the fourth draft preambular paragraph to the Drafting Committee and he hoped that the Special Rapporteur would not insist on including the language contained therein. Furthermore, language "[e]mphasizing the need to take into account the special situation of developing countries" was out of step with contemporary efforts to deal with atmospheric degradation. All States were now seen as being part of the solution to such complex problems as climate change. If the draft preambular paragraph was to be sent to the Drafting Committee, the focus should be not on "the special situation of developing countries", but on a more neutral and less category-driven acknowledgement of "the national circumstances and economic capabilities of States". He did not support the recent suggestion by the Special Rapporteur that the Commission might wish to revisit the language regarding the concept of the "common concern of humankind" adopted at its sixty-seventh session. The Paris Agreement under the United Nations Framework Convention on Climate Change did not support the idea that protection of the atmosphere, the context of the draft preambular paragraph currently under consideration, was a common concern of humankind. As pointed out by Mr. Hmoud, the United Nations Framework Convention on Climate Change and its Paris Agreement focused solely on climate change.

84. There was a structural ambiguity in draft guideline 3: it was not clear whether the very broad obligation set out in the *chapeau* exceeded the obligations set forth in subparagraphs (*a*) and (*b*), or whether those subparagraphs captured the totality of the overall obligation. If the former was intended, an explanation of the full scope of the obligation contained in the *chapeau* should be provided; if the latter was intended, the *chapeau* should conclude with a phrase such as "as follows:", to connect the *chapeau* directly with the subparagraphs. More importantly, though, the Commission should consider its intentions for the guidelines. Recalling that the Commission's Guide to Practice on Reservations to Treaties,[234] which the Special Rapporteur had recently invoked as a model for the present topic, contained not guidance in the form of obligations but rather a series of propositions designed to aid States' understanding, he said that the draft guidelines on the protection of the atmosphere had been drafted as diktats to States and therefore presented an altogether different tone. Therefore, if draft guideline 3 were to be referred to the Drafting Committee, it should be reformulated; for instance, one subparagraph might read, "Customary international law provides that appropriate measures of due diligence shall be taken by States to prevent atmospheric pollution", and the other, "In accordance with relevant conventions, States have agreed to appropriate measures for minimizing the risk of atmospheric degradation". The Commission's goal in providing such guidelines should be to encourage States to adopt certain behaviours, not to dictate orders to them, especially orders that could not be found in any treaty, principle or rule of law relating to the atmosphere.

85. Draft guideline 4 had the same general problem of tone and approach as that mentioned in relation to draft guideline 3. In addition, it departed from the standard language on environmental impact assessment that appeared in leading cases on the subject. Further, much of the language proposed in draft guideline 4 was unclear. For example, the second sentence on transparency could be read to require that a State must allow participation by other States and nationals of other States in its environmental impact assessment activities that did not have a transnational dimension, a proposition that clearly had no basis in international law. If such a draft guideline was deemed necessary, it should be crafted so as to follow the language of well-established precedents. For example, taking inspiration from the language of the *Pulp Mills on the River Uruguay* case, draft guideline 4 might be better drafted to read: "Customary international law provides that a State shall undertake an environmental impact assessment where there is a risk that an activity by that State may have a significant adverse impact in a transboundary context resulting in atmospheric pollution or atmospheric degradation."

86. The tone and style of draft guidelines 5 and 6 were an improvement on that of draft guidelines 3 and 4, in particular in that they used the hortatory word "should" rather than phrases such as "have the obligation to". He nevertheless had some reservations about the substance of the guidelines. For instance, there was no analysis in the third report to support the reference in draft guideline 5 to the atmosphere's "finite nature". Although the atmosphere was currently more polluted than previously and contained more greenhouse gases, the atmosphere remained what it had always been – an envelope of gases surrounding the Earth and of roughly the same size as the Earth. As such, the atmosphere could be understood as a renewable resource, similar to water, wind and solar

[234] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq.*

energy. If what was meant in draft guideline 5 was that excessive pollution of the atmosphere would change the composition of its gases, that was true, but it did not mean that the atmosphere itself was finite. If instead what was meant was that the absorption of an excessive quantity of greenhouse gases into the atmosphere would lead to catastrophic climate change, that too was true, but again it did not imply that the atmosphere was finite.

87. The unusual concept of "sustainable utilization" referred to in draft guideline 5 was not supported by treaties, jurisprudence or general practice. It appeared to be inspired by the concept of sustainable development, but, in the present context, seemed almost to commodify the atmosphere. Indeed, the use of the term "sustainable utilization" seemed to represent the atmosphere as a sort of gas or oil reserve that the Commission expected or even encouraged States to exploit, even though in the present context that would mean polluting or degrading the atmosphere. Given that the Commission did not wish States to engage in polluting activities, he had serious reservations about the use of the novel concept of sustainable utilization.

88. Noting that draft guideline 6 referred to utilization of the atmosphere on the basis of an undefined "principle of equity", he said that the term "equity" had radically different meanings for different actors, especially in the context of protection of the atmosphere. The reasons for including a reference to such a principle in the Commission's work on the topic remained unclear. With regard to the three categories of equity in international law – equity *infra legem*, equity *praetor legem* and equity *contra legem* – he said that, notwithstanding the Special Rapporteur's suggestion that equity *contra legem* be set aside as inappropriate, he had not found any such caveat in draft guideline 6. Furthermore, the exact meaning of "equity", for the purposes of the draft guidelines, and its connection to the concepts of distributive justice and common but differentiated responsibilities, was not clear. Did the reference to "equity" mean, for instance, that wealthy States must allocate resources to less wealthy States when they utilized the atmosphere? Did it mean that less wealthy States should allocate burdens to wealthy States? Given the lack of clarity, it would be unwise to advance such a principle without explaining its exact meaning. It would also be useful to determine how the principle related to the recent Paris Agreement under the United Nations Framework Convention on Climate Change, which had been widely acclaimed precisely because it sought to impose burdens on all States. In the operative paragraphs of the Agreement, the drafters had consciously avoided any open-ended references to a principle of equity in favour of more concrete formulations tailored to the particular issues at hand. Indeed, in none of the treaty instruments identified by the Special Rapporteur, in paragraphs 72 to 74 of the third report, was there a reference to a "principle of equity". The closest analogy to such a principle was found in those treaties that referred to "reasonable and equitable utilization" of a shared resource, as appeared in the Commission's 1994 articles on the law of the non-navigational uses of international watercourses,[235] which had resulted in the eponymous Convention. Perhaps, then, the phrase "on the basis of the principle of equity" in guideline 6 might be replaced with an expression such as "in a reasonable and equitable manner".

89. The fact that draft guideline 7, on geoengineering activities, seemed not to be directed at States, but at anyone carrying out such activities, raised certain structural issues. Moreover, the guideline did not define geoengineering activities. Recalling that some members had argued strongly in favour of a definition for the term "atmosphere", he said that the need for a definition of "geoengineering activities" seemed all the more warranted. Even if a narrow definition were found to suit the Commission's purposes, he wondered whether it would be appropriate for the Commission to declare broad support for such activities. As the Special Rapporteur noted in his third report, geoengineering science was advancing rapidly and there were calls by States, scientists and environmental groups to ban geoengineering activities completely, for two reasons: first, the concern that large-scale manipulation of the planetary environment might be extremely risky; and second, the concern that promoting geoengineering might undercut efforts to decrease greenhouse gas emissions, based on the theory that States would focus on novel methods of carbon sequestration rather than on elimination of carbon emissions. Therefore, he agreed with Mr. Tladi that draft guideline 7 should not be referred to the Drafting Committee.

90. With regard to the Commission's future work on the topic, he would suggest that, if a first reading was contemplated in 2018, then the second reading should occur in 2020, in keeping with the Drafting Committee's general practice to provide States with ample time to react to draft guidelines.

91. Mr. KITTICHAISAREE suggested that the Special Rapporteur be allowed to comment on the statements made by Commission members before the end of the Commission's debate on the topic.

92. Mr. TLADI said that each member had the right to make a statement on the topic and it would not be appropriate to pre-empt the Commission's debate.

93. He supported Mr. Murphy's point that the Commission ought not to create the impression that previously adopted instruments, such as the United Nations Framework Convention on Climate Change, did not impose obligations on a certain category of States. Indeed, such instruments did create some obligations for the latter, but they were obligations of a different nature. Similarly, in the Paris Agreement under the United Nations Framework Convention on Climate Change, it was the nature of the obligations between States that were different: the concept of common but differentiated responsibilities was taken into account when States set their nationally determined contributions.

94. The CHAIRPERSON said that the Commission took decisions on the basis of consensus. Therefore, he could not force the direction of the Commission's discussion one way or another, nor could he pre-empt individual members' contributions thereto.

[235] *Yearbook ... 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

95. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties was composed of Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Nolte (Special Rapporteur) and Mr. Park, *ex officio*.

The meeting rose at 1.05 p.m.

3308th MEETING

Wednesday, 1 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Al-Marri, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/689, Part II, sect. A, A/CN.4/692, A/CN.4/L.875)

[Agenda item 8]

Third report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report on the protection of the atmosphere (A/CN.4/692).

2. Mr. PARK said that he wished to thank the Special Rapporteur for presenting his third report and for organizing a second meeting with scientists on 4 May 2016, which had enabled members to learn more about the protection of the atmosphere and to understand the scientific background. As an introductory remark, he noted that, in accordance with the workplan detailed in paragraph 79 of the second report,[236] the third report was devoted to an analysis of the basic principles of international environmental law that were of relevance to the topic under consideration. The third report also contained a modified version of the draft guideline on the obligation to protect the atmosphere, discussion of which had been deferred by the Commission at its sixty-seventh session, and a large number of references to international instruments and judicial decisions that made it possible to study the topic in greater depth.

3. As illustrated by, for example, the phenomenon affecting North-East Asia that consisted in yellow-dust storms that kicked up fine particles, transboundary atmospheric pollution and global atmospheric degradation were of fundamental importance to all human beings and States. The topic dealt with by the Special Rapporteur was thus a timely one for the international community, and the Commission should take care to formulate relevant and appropriate draft guidelines that met with the approval of as many States as possible. However, he still doubted whether the topic had special features that set it apart from other subjects linked to the protection of the environment. The purpose of the draft guidelines was to regulate human activities that could result in atmospheric pollution and degradation, not to protect the atmosphere *per se*. It should be borne in mind that not all principles of environmental law were applicable *mutatis mutandis* and that one could not ignore the differences between, on the one hand, the atmosphere, which was the envelope of gases surrounding the Earth, and, on the other, the marine environment, fresh water and other natural resources in liquid form and living or non-living ecosystems.

4. Turning to the draft guidelines set forth in the third report, he recalled that the previous version of draft guideline 3, namely former draft guideline 4, had been a single sentence that had read: "States have the obligation to protect the atmosphere."[237] That proposal by the Special Rapporteur had been criticized by some members, including him, for being too abstract and because the obligation was characterized in the second report as being *erga omnes*. In the new version, the Special Rapporteur distinguished between transboundary atmospheric pollution and global atmospheric degradation, and proposed saying, in relation to the former, that States should take appropriate measures of due diligence to prevent transboundary atmospheric pollution in accordance with the relevant rules of international law and, in relation to the latter, that States should take appropriate measures to minimize the risk of global atmospheric degradation in accordance with relevant conventions. The wording implied that States had two different kinds of international obligation to protect the atmosphere: one based on customary international law and another based on relevant international instruments. Consequently, States had responsibilities towards not only neighbouring countries but also the international community.

5. The new language called for two observations. First, there was no significant difference between the draft under consideration and the previous version, as both established the overall obligation of the State to protect the atmosphere. Moreover, atmospheric pollution and atmospheric degradation were, in reality, closely linked, and, while he was aware that they were defined as distinct phenomena in draft guideline 1[238] as adopted by the Commission at its sixty-seventh session, he doubted whether it was possible, in practice, to distinguish clearly between the obligation to prevent transboundary atmospheric

[*] Resumed from the 3304th meeting.

[236] *Yearbook* ... 2015, vol. II (Part One), document A/CN.4/681, pp. 215–216.

[237] *Ibid*., p. 210, para. 59.

[238] *Ibid*., vol. II (Part Two), pp. 21–23.

pollution and the obligation to prevent global atmospheric degradation, given that the atmosphere was mobile by nature and flowed like a gas. In fact, scientists considered that those closely related phenomena were nonetheless different, particularly in terms of the introduction into the atmosphere of substances produced by human activities, including molecules and particles, as underlined by one of the participants in the meeting with scientists held at the beginning of the session. Some people believed that transboundary atmospheric pollution, far from being merely a local problem, was becoming a global issue, and that there was a link between atmospheric pollution and climate change. As a result, transboundary atmospheric pollution might lead or amount to global atmospheric degradation. It was thus difficult to distinguish clearly between human activities that caused atmospheric pollution and those that gave rise to atmospheric degradation.

6. Second, even if a distinction was drawn between atmospheric pollution and atmospheric degradation, doubt remained over whether the obligation to protect the atmosphere constituted an *erga omnes* obligation. In particular, he was not sure whether the principle of *sic utere tuo ut alienum non laedas* applied to global atmospheric degradation, which was, by nature, not simply a transboundary issue. In other words, one might wonder whether there was a specific legal obligation on a State not only to refrain from producing transboundary atmospheric pollution but also to prevent global atmospheric degradation, and whether that obligation could be imposed on all States, even though it was specified in subparagraph (*b*) that prevention measures should be taken in accordance with relevant conventions.

7. As explained in paragraphs 35 to 39 of the third report, the "no harm rule" in the context of transboundary atmospheric pollution between neighbouring States had been recognized as a rule of customary international law. It was not sufficient, however, to indicate that the obligation was far-reaching and applied to all States, and the notion of precaution inevitably came into play when the geographical scope of the obligation was extended. As noted by the Special Rapporteur, however, the precautionary principle was too controversial to be recognized as a rule of customary international law and went beyond the 2013 understanding.[239] During the consideration of the draft articles on the protection of persons in the event of disasters, similar legal points had been raised by some members of the Drafting Committee about draft article 9 on disaster risk reduction. He therefore thought that it might be better to follow the wording of principle 21 of the 1972 Stockholm Declaration[240] and of principle 2 of the 1992 Rio Declaration on Environment and Development,[241] and to amend draft guideline 3 to read: "States ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

8. Draft guideline 4 concerned the obligation to conduct a comprehensive environmental impact assessment. As pointed out in paragraph 42 of the third report, the Stockholm Declaration did not expressly refer to such assessments, but principles 14 and 15 of the Declaration implied the rationale underlying them. Principle 17 of the Rio Declaration on Environment and Development, meanwhile, provided that an assessment should be undertaken for activities that were likely to have a significant adverse impact on the environment and were subject to a decision of a competent national authority. The Special Rapporteur argued that international judicial precedents had confirmed the existence of an obligation to carry out an environmental impact assessment. However, in his draft guideline, he did not specify under which conditions the obligation arose for a State and referred only to "proposed activities", a general term that did not pinpoint those cases in which a significant impact on the environment was likely to result. Moreover, bearing in mind that international instruments with an environmental impact assessment clause did not address transboundary pollution, one might question the appropriateness of mentioning global atmospheric degradation in the first sentence of the draft guideline, since doing so unduly extended the scope of the obligation set out there. One might also wonder whether the words "all such measures that are necessary to ensure" reflected the different capacities of States to perform an impact assessment. It seemed that, in Europe, the obligation to conduct an environmental impact assessment had become a regional rule of customary law and was well established in international practice, at least as far as projects with transboundary effects were concerned. In the light of the foregoing, he proposed the reformulation of draft guideline 4 to say that States should take the measures needed to ensure an appropriate environmental impact assessment. If necessary, detailed explanations could be given in the relevant commentary.

9. Draft guidelines 5 and 6 could be examined together as they bore similarities. Some of the expressions that they contained, for example in the title of draft guideline 5, were not commonly employed. The term "sustainable utilization" did appear in article 5, paragraph 1, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, but it was not very meaningful in the context of the topic under consideration, as it was not clear how the atmosphere could be actually utilized. Similarly, the terms "finite nature of the atmosphere" and "proper balance" in subparagraphs 1 and 2, respectively, were too abstract. As for draft guideline 6, he was well aware that the concept of "equitable utilization" had already been referred to by the Commission in its previous work, including in article 4 of the draft articles on the law of transboundary aquifers[242] adopted in 2008, but, to reiterate, one could not ignore the differences between the atmosphere and living or non-living ecosystems, or transpose all the principles of environmental law *mutatis mutandis* to the topic at hand. In his view, draft guidelines 5 and 6 should be deleted.

[239] *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

[240] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

[241] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

[242] General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54.

10. Concerning draft guideline 7, he considered that it was too early for the Commission to pursue the progressive development of international law in the area of intentional modification of the atmosphere, as proposed by the Special Rapporteur in paragraph 85 of his third report. While the purpose of the draft guidelines was to determine well-established practice and principles, and to provide general guidance, geoengineering was a very specific and technical discipline that was still little-known. In addition, as highlighted by the scientists at the meeting in early May, the concept of geoengineering and its use remained ambiguous. The issue also exceeded the scope outlined in draft guideline 2,[243] in that it was directly related to climate change. Lastly, draft guideline 7 was essentially based on the 2013 Oxford Principles on climate geoengineering governance,[244] which had been published in 2013, and on several other documents concerning climate change, which meant that it covered most aspects of atmospheric degradation but did not deal with atmospheric pollution. It should therefore be deleted.

11. With regard to draft preambular paragraph 4, he recognized that the need for special consideration for developing countries was emphasized in several binding and non-binding international instruments, and was linked to the concept of "common but differentiated responsibilities", but noted that the normative quality of the concept was far from clear and remained in the grey area between international hard law and international soft law. Recalling that draft guideline 2, paragraph 2, established that the draft guidelines not only did not deal with several questions, including that of common but differentiated responsibilities, but were also "without prejudice" to them, he noted that, in paragraph 83 of his third report, the Special Rapporteur interpreted the inclusion of the words "but is also without prejudice to"[245] in draft guideline 2, paragraph 2, as a sign that the Commission intended to address the concept of common but differentiated responsibilities in the draft guidelines, an interpretation that he himself doubted was shared by all the members of the Commission.

12. To conclude, although the protection of the atmosphere was an important issue for the international community, the task was to draw up appropriate guidelines that could be accepted by most States. Concerning the workplan proposed in paragraph 92 of his third report, the Special Rapporteur might wish to explain why he had suggested tackling the question of the interrelationship of the law of the atmosphere with other fields of international law and the issues of implementation, compliance and dispute settlement relevant to the protection of the atmosphere.

13. Mr. FORTEAU, after thanking the Special Rapporteur for the oral presentation of his third report and for the very useful clarifications that he had provided, said that, before commenting on the proposed draft guidelines, he wished to point out that the French version of the report contained several errors, in particular because it did not reflect the wording that the Commission had deliberately chosen to use in the draft guidelines adopted at its sixty-seventh session. To cite just one example, in draft guideline 1, the term "atmospheric pollution", which the Commission had decided to render as *pollution atmosphérique*, was translated in the report under consideration as *pollution de l'air* ("air pollution"), a markedly different concept. In the rest of his statement he would therefore refer to his own translation of the English version of the Special Rapporteur's proposals.

14. Regarding the new paragraph to be inserted in the preamble, he noted that the language was a compromise that made it possible to overcome the divergences between the members who wished to refer explicitly to common but differentiated responsibilities in the draft guidelines and those who did not deem that appropriate. The wording of the paragraph should, however, be reviewed to take into account the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change, in which mention was made not only of the "special circumstances" of States but also of their "specific needs".

15. As to draft guideline 3, he thanked the Special Rapporteur for taking into consideration the criticisms expressed by several members at the sixty-seventh session. The proposed new wording was more precise and, as a result, seemed at first glance to be more operative from a legal standpoint. Nevertheless, it continued to pose a number of problems. The first of the three sentences in the draft guideline differed little from the previous version in that it was affirmed in absolute terms that States had the obligation to protect the atmosphere from atmospheric pollution and atmospheric degradation. The Special Rapporteur indicated in his third report that the draft guideline was based on the *sic utere tuo ut alienum non laedas* principle, but, in reality, the scope of the first sentence was considerably broader. Although specifying the nature of the adverse effects that States should prevent made it possible to limit the scope of the obligation in the light of the restrictive definition of atmospheric pollution and degradation adopted by the Commission at its sixty-seventh session, the obligation to protect was formulated in too general of a manner, which precluded it from having actual legal significance. Indeed, it was not clear what exactly the obligation entailed: should it be taken that the State had a general obligation to protect the atmosphere, irrespective of the activity in question, of where it was carried out or of its nature or effects? In the same way that States could not be said to have an obligation to protect all of humanity from the effects of war, one could not assert that they had an obligation under international law to protect the atmosphere. Moreover, the fact that the first sentence was followed by two subparagraphs and that it was hard to tell whether they supplemented it or limited its scope was an additional source of confusion. Reading the draft guideline, it was not clear whether it contained three successive legal obligations or a single obligation composed of two elements. Also, the words "transboundary" and "global", which appeared in the draft guideline as set out in paragraph 40 of the third report, should be removed as they were an integral part of the definitions adopted by the Commission at its sixty-seventh session, given that atmospheric pollution was necessarily transboundary, and atmospheric degradation, global.

[243] *Yearbook ... 2015*, vol. II (Part Two), pp. 23–24.

[244] S. Rayner, *et al.*, "The Oxford Principles", *Climatic Change*, vol. 121, No. 3 (2013), pp. 499–512. Available from: https://link.springer.com/article/10.1007/s10584-012-0675-2.

[245] See *Yearbook ... 2015*, vol. II (Part Two), pp. 23–24.

16. With regard to the obligation to protect, the considerations advanced by the Special Rapporteur about the system of proof were only partly convincing. It was not the task of the Commission to decide on the matter, which was, rather, at the discretion of international courts. In addition, the Special Rapporteur's analysis of international case law was incomplete. When he cited, in paragraph 31 of his third report, the judgment in the *Corfu Channel* case to support the idea that the International Court of Justice had agreed to a lessening of the standard of proof, he failed to mention that, immediately after the quoted passage, the Court also specified that, for State responsibility to be involved, there should be "*no room* for reasonable doubt" (p. 18 of the judgment). Consequently, it could not be said that the Court had relaxed the criteria applicable in that case.

17. Subject to those remarks, he believed that subparagraph (*a*) of draft guideline 3, as currently worded, reflected customary international law, at least when it came to atmospheric pollution, in other words, to transboundary harm affecting two clearly identifiable States. He doubted, however, that the *sic utere ut alienum non laedas* principle could simply be transposed from a bilateral to a global context and also be taken as a reference in the case of atmospheric degradation, as indicated in subparagraph (*b*). In that respect, paragraphs 35 and following of the third report were based on a certain confusion: while it was true that the *sic utere ut alienum non laedas* principle applied to areas beyond national control, it could not be deduced that its scope could also be global. The principle could be applied when a given State polluted a common area, such as the high seas. It was harder to see how it could apply to atmospheric degradation, which resulted from cumulative, interconnected actions by various actors whose legal liability was difficult to gauge, as acknowledged by the Special Rapporteur in paragraph 37 of his third report. Even if principle 21 of the Stockholm Declaration expanded the scope of application of the *sic utere ut alienum non laedas* principle to areas beyond national jurisdiction, the principle still followed the logic of transboundary harm, which was different from that of global atmospheric degradation. The experts who had met with the Commission at the start of the session had in fact confirmed that, although it was possible to prove scientifically that atmospheric degradation was due to human activity, it was impossible to assign responsibility for that degradation to a particular actor. The responsibility was thus global and could not be fragmented to the level of individual legal responsibility.

18. It should be emphasized that the negotiators of the Paris Agreement under the United Nations Framework Convention on Climate Change had decided not to address the issue of loss and damage from the point of view of legal responsibility. In fact, paragraph 51 of the decision adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change with a view to giving effect to the above-mentioned Agreement expressly provided that "Article 8 of the Agreement does not involve or provide a basis for any liability or compensation".[246] The Special Rapporteur should therefore clarify the scope of the obligation to protect the atmosphere that he planned to place on States with respect to global atmospheric degradation and specify, in particular, whether harming the atmosphere in absolute terms, outside the transboundary context, would or would not give rise to State responsibility under international law. Knowing how difficult it was to determine the cause of any given damage, one might also question whether it would be possible, if necessary, to establish that harm had occurred.

19. The Special Rapporteur seemed to be aware of the problem because, in subparagraph (*b*) of draft guideline 3, he used merely a watered-down version of the *sic utere tuo ut alienum non laedas* principle. However, he did not explain on what basis he was imposing on States the obligation to take appropriate measures to minimize the risk of atmospheric degradation. The nature and scope of such an obligation, if there was any, should be specified. It should be made clear, in particular, whether the obligation entailed undertaking commitments to reduce pollutant emissions. Thus, while subparagraph (*a*) of draft guideline 3 appeared to be in accordance with existing laws, the same could not be said for the first sentence and subparagraph (*b*).

20. Regarding draft guideline 4, in principle, he agreed with the Special Rapporteur that there was a requirement under contemporary international law to perform environmental impact assessments. It should be borne in mind, however, that the obligation applied not in a vacuum, but in relation to specific projects, plans and programmes. That was reflected in the judgment handed down in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, in which the International Court of Justice found that a State had to ascertain if there was a risk of significant harm "before embarking on an activity having the potential adversely to affect the environment of another State" (para. 104 of the judgment), and in principle 17 of the Rio Declaration on Environment and Development, which stipulated that impact assessments should be undertaken "for proposed activities". In addition, the Special Rapporteur, who cited other instruments in paragraphs 42 and 43 of his third report, should clarify whether the numerous conventions mentioned in paragraphs 44 and 45, and the non-binding instruments referred to in paragraph 51, concerned only transboundary harm, like the 1991 Convention on environmental impact assessment in a transboundary context, or were of general applicability. In the case concerning *Pulp Mills on the River Uruguay*, the International Court of Justice had held that the obligation to undertake an assessment applied only where there was a risk that a given industrial activity might have an adverse impact in a transboundary context, and the International Tribunal for the Law of the Sea had stated that the obligation applied to areas beyond national jurisdiction but only when there was a risk of those areas being damaged by particular activities.

21. The text proposed by the Special Rapporteur seemed to widen the scope of that customary law obligation considerably. As well as relating to both atmospheric pollution and atmospheric degradation, thus extending the obligation beyond the transboundary context, draft guideline 4 covered, in a very general manner, "proposed activities".

[246] FCCC/CP/2015/10/Add.1, decision 1/CP.21, para. 51.

It followed that the obligation applied not only to activities that created a risk of transboundary pollution, but also to all activities that might contribute to atmospheric degradation. In fact, in its current wording, the draft guideline established an obligation to carry out an impact assessment for almost all human activities, and particularly all industrial activities. The obligation was overly broad and hardly seemed compatible with the very nature of atmospheric degradation, which had not one source, but many, in that it resulted from multiple pollution factors that were problematic by the very fact of their accumulation. Consequently, the obligation to conduct an impact assessment could not be interpreted in the same way or arise from the same rules of law in the context of atmospheric pollution and in that of atmospheric degradation. Furthermore, it was hard to imagine providing for "broad public participation", to quote the language of the draft guideline, if the obligation to perform an impact assessment was so widely applicable.

22. Draft guideline 5 dealt with the "[s]ustainable utilization of the atmosphere", but one might question the appropriateness of that expression. In the same way that one could not say that a pollutant emission utilized the atmosphere, one could not reasonably cite the "sustainable utilization" of the atmosphere as grounds for imposing an obligation to limit sources of pollution. Moreover, although it had a worthy aim, the first subparagraph of the draft guideline seemed to be devoid of real normative value. It was also drafted, in the French text, in the conditional tense, which was not very consistent with the second subparagraph, which set out an obligation under international law. Given that the Special Rapporteur considered sustainable development to be only an emerging principle of international law, he was not sure that it was appropriate to try at all costs to define it in subparagraph 2. It would probably be wiser to convert draft guideline 5 into a preambular paragraph and to reformulate it in line with article 3, paragraph 4, of the United Nations Framework Convention on Climate Change, while recalling that, for all States, sustainable development was a right and an objective to be promoted.

23. The current wording of draft guideline 6 also left something to be desired. While he subscribed fully to the spirit of the text, he considered that the rule expressed therein pertained more to philosophical thought than to a norm of law. He did not know what was meant, in law, by the concept of the utilization of the atmosphere on the basis of the principle of equity, or what the concrete legal effects of such a principle would be. In existing instruments related to the atmosphere, equity was not considered to be a principle *per se*, but a notion that should guide the implementation of legal commitments. Such was the case in article 2 of the Paris Agreement under the United Nations Framework Convention on Climate Change and in article 3 of the United Nations Framework Convention on Climate Change, in which it was mentioned as a principle that should be followed when discharging the obligations laid down in the Convention and that was associated not with the utilization of the atmosphere, but with the protection of the climate system.

24. Besides, even though the concept of equitable util-ization appeared in instruments related to the sea and watercourses, the contexts were not necessarily comparable. Indeed, while it was conceivable to speak of the utilization of a watercourse, it was less conceivable to speak of the utilization of the atmosphere, which was not a resource whose benefits had to be shared equitably. The need to protect the atmosphere stemmed, above all, from a pollution and degradation problem whose scale should be reduced. The analogy with the sea and watercourses was thus not justified. The place accorded to equity in the jurisprudence of the International Court of Justice, particularly with regard to maritime delimitation, to which the Special Rapporteur devoted several passages of his third report, was not relevant to the matter at hand. It would therefore be better to rephrase draft guideline 6 and to turn it into a preambular paragraph. Also, if equity was to be mentioned in the draft guidelines under consideration, it should be in the context of the principle of common but differentiated responsibilities and respective national capabilities, as was the case in all the relevant instruments.

25. Concerning draft guideline 7, it was clear from what the scientists had said at the meeting in early May that geoengineering was a concept of great technical complexity. Since it was also a discipline with regard to which, by the Special Rapporteur's own admission, the law was still in its infancy, it did not seem opportune for the Commission to venture to examine it, especially given the fact that, under the 2013 understanding, the project should not seek to fill gaps in existing law. Although geoengineering ostensibly covered activities for which environmental impact assessments seemed particularly necessary, care should nevertheless be taken to ensure that the draft guideline could not be interpreted *a contrario* as justifying those activities, as the current text did by regulating but not prohibiting them. In that connection, it should be recalled that the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change contained no mention of geoengineering in terms of the measures to be taken. Regarding the Oxford Principles on climate geoengineering governance, some people believed that they had been established by supporters of testing and developing geoengineering and that they should thus be approached with caution.

26. Some authorities, such as the French National Research Agency, had adopted a more neutral standpoint. Following intensive work, the Agency had adopted a report in which it recalled that geoengineering should be viewed without any preconceived ideas and noted that international law would have great difficulty in taking into account all the questions raised by the issue of the governance of geoengineering research. Under those circumstances, it was perhaps premature for the Commission to take a stance on the matter.

27. Mr. EL-MURTADI SULEIMAN GOUIDER said that the third report usefully complemented the work already completed, which had resulted, at the previous session, in the adoption of five draft guidelines. Those guidelines had been well received by States in the Sixth Committee of the General Assembly, even though some concerns had been voiced, largely regarding political and technical aspects of the topic.

28. The report under consideration and the discussions within the Commission prompted two remarks. First, the

Special Rapporteur had fully respected the conditions under which the Commission had agreed to include the topic in its programme of work in 2013. The scope of the draft guidelines was sufficiently broad to encompass atmospheric degradation caused by both human activities and natural events. Pursuant to the aforementioned conditions, the third report excluded questions related to outer space, including its delimitation, and the question of dual-impact substances. As for the other conditions, it should be stressed, as many members of the Commission had done, that the fact that the work should not interfere with political negotiations regarding certain issues and that it was not intended to fill gaps in existing treaty regimes did not preclude the Commission from highlighting those gaps or from examining any other matter addressed in the context of negotiating a treaty. Moreover, the fact that the Commission had undertaken to leave aside certain questions, such as the liability of States and their nationals, did not prevent it from referring to them.

29. The protection of the atmosphere was of vital importance to the international community, and, in its work on the topic, it would be hard for the Commission not to take account of well-established principles such as the principle of good neighbourliness, the principle of prevention, the precautionary principle and the principle of sustainable development, or of some international obligations in force, like the obligation to utilize the atmosphere for peaceful purposes.

30. His second remark was more directly linked to the third report, in which the Special Rapporteur dealt with two important issues. The first concerned the obligation of States to protect the atmosphere, establishing a clear distinction between the obligation to prevent transboundary atmospheric pollution and the obligation to mitigate the risk of global atmospheric degradation, and the second concerned the sustainable and equitable utilization of the atmosphere and the legal limits on certain activities aimed at intentional modification of the atmosphere.

31. The dialogue with scientists had made it possible to gain a better understanding of the complex physical phenomena involved, but, as emphasized by one delegation in the Sixth Committee, it might also give rise to misleading conclusions, especially when many important elements were defined by physics and not by the law. The Special Rapporteur also gave an account of developments over the previous year, including the adoption of the post-2015 development agenda and of the Paris Agreement under the United Nations Framework Convention on Climate Change at the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change. It would be helpful if, in future reports, the Special Rapporteur took those developments into account for the purposes of the topic.

32. In addition, while, at its previous session, the Commission had requested States to provide information on their legislation and on the judicial decisions of their domestic courts concerning the protection of the atmosphere, only one State had done so, and it would be a good idea for the Commission to reiterate the request in its report on the current session.

33. In conclusion, he considered that the draft guidelines should be referred to the Drafting Committee.

34. Mr. AL-MARRI said that the protection of the atmosphere affected the very existence of humanity. The Commission had been able to capitalize on the experience of specialists in the matter during the dialogue with scientists, particularly regarding the impact of geoengineering. Like the Special Rapporteur, he considered that, in order to avoid any negative consequences, the protection of the atmosphere had to be managed on an international level.

35. Concerning draft guideline 4 and the need for transparency and for broad public participation in environmental management, Governments did have a responsibility in that regard and he supported the draft guideline as well as draft guideline 6. Draft guideline 7 was linked to the notion of common but differentiated responsibilities, which was a complex issue, but one that was backed by case law.

36. To conclude, he considered that the Commission should be able to carry out its work on the topic successfully and that the progress achieved as a result would contribute to international development.

37. Mr. KITTICHAISAREE said that he wished to thank the Special Rapporteur for preparing such a meticulous and well-documented report, especially as the Commission's work on the topic of the protection of the atmosphere could have a real impact on the future of humanity and, above all, on that of small island developing States.

38. It should be noted, however, that the analysis of the burden of proof and standard of proof on paragraphs 26 to 31 of the third report was circular, ambiguous and inconclusive: ultimately, it did not provide an accurate picture of the issue with regard to the protection of the atmosphere. The Special Rapporteur should have referred to the judgment in the concerning *Oil Platforms* case, in which the International Court of Justice spoke of "direct evidence", drawing a distinction between evidence that was "highly suggestive" and that which was "conclusive", and made clear that the burden of proof lay with the claimant State (paras. 59 and 71 of the judgment).

39. In paragraph 31 of his third report, the Special Rapporteur cited the Court's judgment in the *Corfu Channel* case. He should have noted that the Court used the terms "conclusive evidence" and "degree of certainty" and said that "[t]he proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt" (pp. 17–18). In the same vein, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court held that it had to "attain the … certainty" that the facts on which the claim was based were "supported by convincing evidence", and that the evidence should be "clear" (para. 29 of the judgment). In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, it alluded to the need to establish the evidence on the basis of facts that it regarded "as having been convincingly established" and to "weighty and convincing" evidence (paras. 72 and 136 of the judgment), and, in the case concerning *Application*

of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. *Serbia and Montenegro)*, it reaffirmed that claims had to be proved by evidence that was "fully conclusive" (para. 209 of the judgment).

40. The Special Rapporteur should have examined whether the criteria used by the Court were applicable in the context of environmental protection and in the light of the other cases that he had mentioned; the Commission might wish to do that in the commentaries to the draft guidelines in question. Having said that, he was in favour of referring the proposed draft guidelines to the Drafting Committee, provided that they fell within the parameters of the 2013 understanding.

41. Sir Michael WOOD said that he wished to thank the Special Rapporteur for his third report and for his introduction of it. He was grateful to him for having organized another meeting with scientists, which he hoped would become a tradition, given how useful it had proved to be.

42. The adoption of the Paris Agreement under the United Nations Framework Convention on Climate Change, to which the Special Rapporteur rightly drew attention, was a major achievement. It served as a reminder that States continued to strive to reach political agreements that could make a real difference to the situation. The success of the Conference of the Parties to the United Nations Framework Convention on Climate Change demonstrated that the Commission had been right to decide to carry out its work on the protection of the atmosphere in a manner that did not interfere with political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. In that respect, as highlighted by Mr. Hmoud, the fact that the authors of the Paris Agreement under the United Nations Framework Convention on Climate Change had chosen to use the expression "common concern of humankind" was irrelevant to the topic at hand.

43. He remained unconvinced about the appropriateness of examining the topic of the protection of the atmosphere. First, many multilateral agreements were already devoted to the main risks to the environment; second, the Commission's work had the potential to touch upon subjects that were being dealt with in sensitive ongoing negotiations among States, including those related to the Montreal Protocol on Substances that Deplete the Ozone Layer, or even to negotiated texts that were in the process of being ratified and implemented, such as the Paris Agreement under the United Nations Framework Convention on Climate Change. In any event, and as the Sixth Committee had again recalled in 2015, the International Law Commission should apply faithfully the understanding on which it had made its consideration of the topic conditional when it had decided to include the topic in its programme of work in 2013. Indeed, the Special Rapporteur acknowledged the understanding in his third report, though his reading of it was, in places, surprising. Similarly, in various places, he used the term "law of the atmosphere", as though it were his ambition to establish a new branch of international law. Yet, while it was indeed what he had initially proposed to do, that proposal had not been accepted.

44. Turning to the new draft guidelines, he shared many of the views expressed by other members of the Commission. It should be noted, in particular, that the Commission had agreed in 2013 that the concept of common but differentiated responsibilities would not fall within the scope of the draft guidelines on the protection of the atmosphere, yet the Special Rapporteur considered it in depth before instead deciding to refer, in the draft preamble, to "the special situation of developing countries". That phrase seemed to be somewhat rooted in the past, as did the placement of "developing countries" in a category of their own and the mention of a North/South divide, terminological choices that were reminiscent of old debates over a new global economic order. Since it covered outdated notions, the draft preamble, at least in its current wording, should not appear in the draft guidelines.

45. The opening sentence of draft guideline 3 began with the same language as draft guideline 4 as proposed at the previous session, which had been criticized for establishing an absolute and overly broad obligation, and which had thus not been referred to the Drafting Committee. The addition, at the end of the sentence, of the words "from transboundary atmospheric pollution and global atmospheric degradation" did not change the fact that the obligation placed on States was excessively broad. The new draft guideline also contained two subparagraphs. Subparagraph (*a*) stipulated that States should take appropriate measures in accordance with the relevant rules of international law, which presumably meant the rules applicable to the State concerned. Subparagraph (*b*) provided that the measures taken should be in accordance with relevant conventions. Again, that probably meant the conventions in force for the State concerned. However, as other members of the Commission had pointed out, there was no clear logical connection between the opening sentence and the subparagraphs. If the Special Rapporteur's intention was for States to fulfil the obligation imposed on them in the first sentence by the means described in subparagraphs (*a*) and (*b*), he should say so more clearly. The lack of logic in the draft guideline was further exacerbated by the fact that the adjectives "transboundary" and "global", which were used, in the opening sentence, to qualify atmospheric pollution and atmospheric degradation, respectively, did not appear in the text of the subparagraphs.

46. Draft guideline 4, which laid down a general obligation to take the necessary measures to "ensure an appropriate environmental impact assessment", was problematic in several respects. First, the Special Rapporteur submitted that there was "so far" no comprehensive global convention governing impact assessments, despite then listing some of the numerous instruments that contained provisions to that effect. Seemingly, his approach was aimed at filling gaps in the treaty regimes, which went beyond the Commission's self-imposed mandate. Second, as acknowledged by the Special Rapporteur, impact assessment regimes varied from region to region and from resource to resource. A draft guideline purporting to establish a common framework for all regions and resources was thus scarcely compatible with the fact that the Commission should not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. Third, as mentioned by other members

of the Commission, there was no definition in the text of the threshold of pollution or degradation above which the provisions of the draft guideline became applicable. In that respect, the Special Rapporteur referred merely to the 1991 Convention on environmental impact assessment in a transboundary context and to the need to conduct an impact assessment when consideration was being given to a major project that was likely to have a significant adverse environmental impact across boundaries. The draft guideline could therefore be interpreted as imposing on States an obligation to undertake an impact assessment even for small-scale activities, which would be not only disproportionate but also contrary to existing treaties and to State practice and case law. If the Special Rapporteur wished simply to restate the rule of customary international law that placed that obligation on States, he should draw upon the jurisprudence of the International Court of Justice, in particular the judgment in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*.

47. As Mr. Forteau had noted, draft guideline 5 raised several questions. For example, it was not clear how one should interpret the adjective "finite" in the context of the provision, or whether it was appropriate to speak of "utilization" in relation to the atmosphere. Furthermore, the Special Rapporteur contradicted himself, observing that "the atmosphere is not exploitable in the traditional sense of the word (such as in the context of mineral or oil and gas resources)", before adding that "any polluter in fact exploits the atmosphere". The arguments put forward to explain that paradox were not convincing, especially as they related primarily to the origin and use of the term "sustainable development", which was not used in the draft guideline. The Drafting Committee might wish to consider the issue.

48. Concerning draft guideline 6, it was worth recalling that, while the expression "for the benefit of present and future generations of humankind" was borrowed from the United Nations Framework Convention on Climate Change, it was approached from a different perspective. In the Convention, the benefit of present and future generations was invoked to impose on States an obligation to protect the climate system, whereas, in the third report, it was mentioned in the much broader context of the "utilization" of the atmosphere. The draft guideline could thus be read as requiring States to carry out certain activities in the atmosphere for the economic benefit of future generations, which would raise issues that went far beyond the topic under consideration. There was nothing in the third report to indicate on what basis the Special Rapporteur had given the draft guideline such a wide scope, or why he had separated the provision from draft guideline 5, which also addressed the sustainable utilization of the atmosphere. Lastly, as pointed out by other members of the Commission, the principle of equity was not a genuine principle of international law and could not, therefore, provide guidance to States.

49. Like previous speakers, he questioned the relevance of draft guideline 7. The provision dealt with "[g]eo-engineering activities", but contained no definition of the term, which did not appear to have any particular meaning in international law. If the Commission decided to use the term, it would thus need to explain what the activities in question were, or even define them, at least for the purposes of the draft under consideration. According to the Special Rapporteur, geoengineering was understood as the "intentional large-scale manipulation of the global environment". That definition seemed to be too broad and, in any case, did not explain the purpose of the draft guideline. In the second sentence, it was stated simply that environmental impact assessments were required for "geo-engineering activities". Once again, in addition to failing to define an action threshold, the Special Rapporteur had the apparent intention of filling a gap in existing treaty regimes.

50. As for the Commission's future workplan, it was not clear why the time frame between the first and second readings of a draft text should differ depending on whether it contained draft articles or draft guidelines. The period of time between the two readings was not regulated and certainly did not depend on the name given to the text produced by the Commission. The practice was for the period to be two years, and there must be good reason for any proposed change.

51. He wished to thank the Special Rapporteur for taking account of some of the concerns expressed at the previous session with regard to the future work of the Commission, but noted nonetheless that the concerns that he had voiced about the references to compliance and dispute settlement – issues that were, in his view, too technical to be included in general guidelines – had not been taken into consideration.

52. To conclude, with the possible exception of draft guideline 7, he did not object to referring the draft preamble and the draft guidelines to the Drafting Committee, provided, however, that the Committee was ready to re-examine all the issues raised during the debate on those provisions. The Commission should not refer a draft text to the Drafting Committee unless it considered that all its provisions should appear in the final document.

Mr. Nolte, First Vice-Chairperson, took the Chair.

53. Mr. PETER said that the third report was not only concise but also highly focused on the topic assigned to the Special Rapporteur. The introduction, which was almost in the form of a summary, helped the reader to evaluate the content of the report itself. The third report, which included proposals for five new draft guidelines and for some adjustments to the preamble and to the wording of draft guidelines 5 and 8, was easy to read and likely to be of interest to the many people across the world who supported the protection of the environment in general.

54. Concerning the importance of working with scientists, although it was a very technical subject, the Special Rapporteur's innovative idea of inviting scientists to address the members had been of enormous benefit to the topic and to the interests of the Commission. The involvement of scientists in the work of the Commission had been appreciated during the debates held in the Sixth Committee of the General Assembly in November 2015. Belarus, Finland, on behalf of the Nordic States, and Singapore had mentioned the relationship with the scientific community,

while Austria had welcomed "the dialogue which the Commission had had with scientists, thereby promoting a better understanding of the complex physical phenomena involved".[247] There was therefore no doubt that, if the Commission truly wished to produce a high-quality document that was scientifically irreproachable and based on the most recent data, it would succeed in doing so.

55. Regarding the distinction between draft articles and draft guidelines, he observed that, while the former could give rise to a convention the provisions of which would be binding on the parties, the latter were aimed only at helping States to behave in a particular manner: they were a form of gentlemen's agreement that did not have serious consequences, save for honour. Consequently, it made little sense to approach the topic as though it were a matter of life and death. Clearly, the Commission was not drafting a criminal code providing for sanctions and liabilities, and it would be better, given the nature of the document under consideration, to exercise restraint during the debate.

56. As to the preamble, he noted that members had so far recommended inserting in it everything that they deemed controversial. However, everyone was aware of the nature and value of the preamble to a legal document: according to case law, for example in *Jacobson* v. *Massachusetts*, the preamble was not part of the document and thus could not give rise to a dispute. A preamble was, in the strict sense of the term, merely a form of guidance as to the content of a document that was in keeping with its spirit. It was thus regrettable that, owing to the legal nature of the preamble, members should wish to consign to it everything that could not be agreed upon or that was subject to reservations, at the risk of it becoming a compilation of ideas that was devoid of any scientific rigour.

57. It was regrettable that, instead of moving forward, addressing fundamental issues and presenting sound arguments, the Commission was hiding behind the so-called "2013 understanding". As he had already said several times, that "understanding" undermined the reputation of the Commission as a whole, since it was unfair and ran counter to freedom of expression. He largely agreed with the content and structure of the third report and would limit himself to two general comments.

58. First, the way in which the topic of the protection of the atmosphere was perceived by the Sixth Committee of the General Assembly was the subject of debate within the Commission. Futile though it might be, that debate should be based on hard facts and not on beliefs. It emerged from the first two footnotes to paragraph 4 of the third report that 31 States parties had welcomed the consideration of the topic of the protection of the atmosphere and that only 5 States had expressed scepticism. However, some people spoke about those five States as though they were the most numerous, while the majority opinion was treated as negligible and not commented on.

59. Second, as for whether the atmosphere would endure indefinitely, it appeared that some people were trying to downplay the significance of destroying the atmosphere by saying, with regard to draft guideline 5, that "the atmosphere is still what it has always been – an envelope of gases surrounding the Earth and of roughly the same size". Unless the Commission had misunderstood the scientists' message or decided to heed their opinions selectively, it was clear that, owing to the rate of destruction that it was suffering, the atmosphere would never be the same again. It was the quality of the atmosphere, rather than its very existence, that was the bone of contention. Would it be credible, for example, to sanction the poaching of elephants while affirming that they had always been there and would never die out?

60. The beauty of the draft guidelines proposed by the Special Rapporteur was their brevity and precision, which removed any risk of speculating as to their interpretation.

61. Draft guideline 3, on the obligation of States to protect the atmosphere, was very well conceived. Any prudent State exercised due diligence in relation to all activities that might affect the environment, especially industrial activities. It was legitimate to extend that sovereign duty to the prevention of atmospheric pollution: no new obligation was being imposed on States; they were merely being given guidance.

62. Draft guideline 4 was also well thought out and useful – States usually undertook environmental impact assessments before giving their approval to any large-scale industrial activity. The draft text introduced two new elements, namely: transparency in the performance of environmental impact assessments; and the involvement of the public in that exercise, which was logical, because any damage to the environment affected the community. Once the draft guideline had been adopted, environmental impact assessments would cease to be a bureaucratic exercise and would be viewed from a social perspective.

63. The message contained in draft guideline 5, on the sustainable utilization of the atmosphere, was simple: one should live in the knowledge that no one would outlive the Earth. The Earth's resources should be utilized with due consideration for future generations, who had the right to live in a clean environment and atmosphere, which could not, therefore, be destroyed before those generations had been born. The draft guideline was thus guided simply by logic.

64. Leaving aside semantic considerations, the notion of equity was not complicated. It was not even to do with ideology; it was about fairness. Therefore, in accordance with draft guideline 6, it should govern the utilization of the atmosphere. He did not see what was wrong with that and considered that the draft guideline was very useful for States. However, not everyone believed in fairness, as was clearly demonstrated by the behaviour of some States during the debates that had led to the adoption of the 1982 United Nations Convention on the Law of the Sea. With regard, more particularly, to part XI of the Convention, which was entitled "The Area", some States had objected to the exploitation and coordination of mining sites on the deep seabed by the International Seabed Authority and by its economic arm, the Enterprise, and had invoked the concept of the common heritage of mankind put forward by the Ambassador of Malta, Mr. Pardo, on the grounds that it was a problem concerning third States. It had then

[247] A/C.6/70/SR.17, para. 81.

taken 12 years, until 1994, to achieve a very watered-down consensus in the field of the law of the sea, and it would no doubt be necessary to raise awareness for a long time in order for the public to appreciate fully the notion of the equitable utilization of the atmosphere.

65. Draft guideline 7, on geoengineering, addressed activities that, to some extent, affected the environment. It called for such activities to be carried out with prudence and caution, and for transparency and the performance of environmental impact assessments prior to the granting of a general licence or permit. It was an important guideline, and he agreed with Mr. Al-Marri that the issue of geoengineering should be looked at in depth.

66. In conclusion, in future reports, he would like the Special Rapporteur to reproduce the draft texts examined at previous sessions, including the preambular paragraphs, as that would enable the reader to obtain information on the status of the draft guidelines more easily and with no risk of error. He warmly congratulated the Special Rapporteur on the outstanding quality of his work and invited him not to be discouraged by negative comments. The approach of inviting scientists was commendable, and hopefully that collaboration, which was as useful as it was instructive, would continue. As for the future work of the Commission, the programme proposed by the Special Rapporteur was perfect, especially as it prevented the treatment of the topic from dragging on.

67. Lastly, he recommended that all the draft guidelines should be referred to the Drafting Committee.

68. Mr. TLADI said that Mr. Peter's statement prompted two remarks. First, the Commission should not be any less rigorous simply because it was producing draft guidelines rather than draft articles. The fact that they were guidelines did not in any way diminish their value.

69. Second, he had never been in favour of the conditions under which the Commission had agreed to include the topic in its programme of work in 2013, but they had been adopted by the Commission as a whole without any objections from the members, so it was unacceptable to contest them at the present juncture.

70. Mr. PETRIČ said that, in his plea for the protection of the atmosphere, Mr. Peter had raised the issue, just mentioned by Mr. Tladi, of the difference between draft guidelines and draft articles. While it was true that the Commission should not be any less rigorous when drawing up guidelines, it should not formulate them in the same way as it would formulate draft articles. In his opinion, expressions such as "States have the obligation", which suggested that the Commission was establishing legal obligations, had no place in a set of guidelines. His fears were further confirmed by the fact that the Special Rapporteur planned to deal with dispute settlement, since he did not see how guidelines could give rise to disputes. Similarly, he was not convinced of the need for a preamble in guidelines. He therefore requested that the Special Rapporteur and the members of the Drafting Committee strive to develop draft guidelines that were, of course, precise and clear, but that were not, in reality, legally binding provisions, which might not garner the support of States.

71. Mr. SABOIA said that, like Mr. Petrič and Mr. Tladi, he did not think that, just because the Commission was formulating draft guidelines, it should be less precise and rigorous in drafting them. As Mr. Petrič had said, the guidelines should not be expressed as legal obligations, either. In addition, provisions on implementation and dispute settlement had no place in a set of draft guidelines.

72. However, some comments had been made during the debate about issues that should be addressed. For example, it had been said that referring to "the special situation of developing countries" in the preamble was tantamount to going back in time 30 years, to the debate over a new global economic order. He did not share that view because, when it came to the environment and, in particular, to climate change, the special situation and needs of developing countries were worth mentioning, since some of them, like small island States, bore the brunt of the effects of that change, which could cause damage that was sometimes irreversible.

73. Some of the criticisms of the proposed draft guidelines were perhaps justified, but the issues that they raised could be resolved by the Drafting Committee.

74. Mr. KAMTO said that the members who had spoken before him had raised points that should be clarified. In its practice, the Commission always put the same level of care into drafting its texts, regardless of the form that it intended to give to the final outcome of its work – draft guidelines, draft articles or draft conclusions, or even, as with its study of the fragmentation of international law, a doctrinal report. What could sometimes pose a problem was that the Commission was not always very clear about how it would like States to regard that final outcome. It seemed to him that, when Mr. Peter had contrasted "draft guidelines" with "draft articles", he had meant to say not that the Commission should be lax in its work but that, in a set of guidelines, it could allow itself to focus more on the progressive development of law than on its codification. It was up to the Commission to tell States, in the general commentary or in an introductory one, that some of its conclusions were not sufficiently based on established practice for it to result in codification.

75. As to the remark by Mr. Petrič that guidelines should not be drafted in the same way as draft articles, he noted that there was at least one precedent, involving the Guide to Practice on Reservations to Treaties,[248] the guidelines of which established genuine obligations. In the case at hand, the problem stemmed from the fact that the draft guidelines on the protection of the atmosphere were not very different, in their form, from draft articles. It was, however, a general problem that could not be overcome there and then, and perhaps the new Commission would have to reflect on whether, when drawing up guidelines, it wished to break with previous practice or maintain it, while indicating in the commentary that the guidelines were in no way binding on States.

[248] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq.*

76. Mr. KITTICHAISAREE said that the issue should be put in its proper perspective. The Commission had included the topic of the protection of the atmosphere in its long-term programme of work in 2011, and, since 2011 had been another year in which the General Assembly had elected members of the Commission, he had spoken to delegations in the Sixth Committee and in the General Assembly and had noted that a very large number of States had been extremely interested in the topic. When the new Commission had met in 2012 and had begun to discuss the topic, most members had still doubted the usefulness of studying it; in 2013, the Commission had agreed to include it in its programme of work subject to certain conditions. Although he had not opposed those conditions, he had said at the time that he feared they might deprive the Commission's work on the topic of all substance, and he continued to believe that the Commission's room for manoeuvre in that regard was very limited. To those members who considered that work on the topic should be suspended or abandoned, he wished to say that the Commission was not a political body and that, having adopted the 2013 understanding, it should continue its work in line with that understanding and avoid politicizing the debate; the members of the Commission were legal experts and their credibility was at stake.

77. Mr. PETER said that, the last time that he had expressed similar views, two members of the Commission had directed some very harsh words at him, but he had not deemed it worthwhile to reply. In the current discussion, however, fundamental issues had been raised and called for a response.

78. Regarding the question of "draft articles" versus "draft guidelines", Mr. Kamto had given a very clear explanation. Guidelines provided guidance and lent themselves more readily to progressive development than draft articles, but at no point had he personally said that, because the Commission was developing guidelines, it should not be as serious and professional as it would be in the case of draft articles. Lastly, he recalled that he had never been in favour of the 2013 understanding, but had not formally opposed its adoption because he had felt confronted by a form of blackmail: either the work was made subject to that understanding or the topic would not be included in the Commission's programme of work.

79. THE VICE-CHAIPERSON, speaking as a member of the Commission, said that the Special Rapporteur had once again demonstrated his mastery of the subject matter and had provided the Commission with a document that would serve as an excellent basis for its future work on the topic. He would concentrate on certain substantive issues and, to a lesser extent, on points of detail. First, he supported the proposal for the Commission to revise the provisionally adopted preamble by replacing the words "pressing concern of the international community as a whole" with "common concern of humanity". Like Mr. Tladi, he thought that the main reason why the Commission had not chosen the term "common concern of humanity" in the first place was that States had stopped using it after the United Nations Framework Convention on Climate Change. Now that the concept had been reaffirmed in the Paris Agreement under the United Nations Framework Convention on Climate Change, that argument was no longer valid. Moreover, he was not persuaded by the argument that the Agreement contained no reference to, or did not address, the atmosphere as such, but that it dealt instead with climate change, since those concepts were inseparable, even if the word "atmosphere" had broader implications than "climate change".

80. As noted by Mr. Murphy and Mr. Tladi, the third report went beyond the scope of the topic as defined in the 2013 understanding, in that it dealt with the precautionary principle and with common but differentiated responsibilities. The understanding could be criticized for excluding such important aspects of the topic but, if the Commission wanted to be able, in the future, to adopt decisions regarding its work that took into account the views of different members, such understandings needed to be respected.

81. He did not share Mr. Peter's view that the understanding had given rise to a form of blackmail, since its purpose had been simply to determine the scope of the topic. He agreed with Mr. Tladi that, by not dealing with certain issues, the understanding excluded all substantive considerations that might lead to the conclusion that a particular principle was recognized as a rule of customary international law. He did not think that the understanding was being respected if one established a primarily terminological distinction between the precautionary principle and a precautionary approach, or if one used criteria that did not make it possible to establish a distinction, such as burden of proof. On the other hand, it should be recognized that there might be some overlap between the principle of prevention, which had been included, and the precautionary principle, which had not, and between the principle of the individual responsibility of States, which had been included, and that of common but differentiated responsibilities, which had not. The Special Rapporteur could perhaps come to useful conclusions on that basis, even if such conclusions would not cover every aspect of the topic as he and others saw it. Draft guideline 3 should therefore be formulated more cautiously, and any commentary should not address the precautionary principle.

82. He understood the point made by Mr. Kamto and Mr. Peter that producing draft guidelines gave the Special Rapporteur and the Commission more leeway. That being said, the reasoning behind a particular guideline was of great importance, and the Commission should be transparent by indicating whether it reflected existing law or political considerations.

83. With regard to the reasoning that underpinned draft guideline 3, he tended to share the view expressed by Mr. Tladi, but also agreed with certain reservations voiced by Mr. Murphy, Mr. Forteau and Sir Michael Wood about the drafting. Unlike Mr. Forteau, however, he believed that it might be justified, in some cases, to formulate and recognize legal principles that were not specific enough to establish clear rules of conduct. Such principles could provide general guidance and served an important purpose in many legal systems. As had been mentioned, that was particularly true in international law, for example in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the

Charter of the United Nations,[249] which were not always very precisely defined. That did not exclude, of course, that general principles should be formulated prudently so as not to produce unintended effects or overburden a law with expectations that it could not fulfil.

84. Concerning draft guideline 4, he was impressed by the analysis provided in the third report, but was not sure that it supported the broad formulation of the proposed draft guideline. After all, an environmental impact assessment made sense only for projects whose potential impact on the atmosphere as a whole could be measured. In that respect, he tended to agree with Mr. Forteau that draft guideline 4 was formulated too broadly.

85. With regard to draft guideline 5, he had no objection in principle to its underlying idea. While it might be true, in a formal sense, that the atmosphere was technically not finite, as Mr. Murphy had stated, he thought that it was finite in terms of its essential function for humankind and all States, as noted by Mr. Peter. That point could be clarified in the commentaries. On the other hand, he doubted that the expression "emerging principle under customary international law" was appropriate to describe the draft guideline. Like Mr. Tladi, he thought that the Commission should distinguish as clearly as possible between *lex lata* and *lex ferenda*, and not try to establish a legal definition of an "emerging principle". It would therefore seem preferable to replace the expression "is required under international law" in subparagraph 2 with a more cautious formulation, like the one used in subparagraph 1 of draft guideline 5.

86. Lastly, like other members, he was not sure that the Commission should explicitly address geoengineering in a guideline, and he supported the comments made by Mr. Murphy, who had cautioned against what the draft guideline implicitly permitted. Should the Commission wish to retain draft guideline 7, he would propose the deletion of the term "geo-engineering", since the essence of the text would remain. In substance, however, he thought that the scope of the draft guideline should be restricted to "activities intended to modify atmospheric conditions" that "could affect the atmosphere as a whole". That could be the "threshold" that Sir Michael had identified as lacking.

87. To conclude, he supported the referral of draft guidelines 3, 4, 5 and 7, and draft preambular paragraph 4, to the Drafting Committee, subject to the comments that he had made about their substance and to their compatibility with the 2013 understanding.

88. Mr. KAMTO said he was concerned that the issue of the conditions under which the Commission had agreed to study the topic in 2013 would arise every time that the Commission examined a report by the Special Rapporteur, who thus found himself somewhat trapped. He considered that the best solution to the issue was the one advocated by Mr. Forteau in his statement at the current meeting, which he fully endorsed. Indeed, it was in terms of their compliance with international law, and not with the 2013 understanding, that one should assess the legal validity of the draft guidelines proposed by the Special Rapporteur. If the draft guidelines were grounded in international law and sufficiently established in practice or, if necessary, by international custom, there was no reason to reject them and not to refer them to the Drafting Committee.

[249] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

89. The CHAIRPERSON, speaking as a member of the Commission, said that the 2013 understanding had been adopted by consensus by all the members of the Commission, even though the relevant *travaux préparatoires* had been carried out by only a group of them. In addition, he had always considered that the adoption of the understanding had simply been a way for the Commission to define the scope of the topic, in the same way as it defined the scope of other topics.

90. Mr. HMOUD said that, according to the 2013 understanding, the topic should not deal with the precautionary principle, but it seemed to him to be debatable whether one could disregard the principle, which underpinned three or four of the proposed draft guidelines, when addressing the protection of the atmosphere.

91. Mr. KITTICHAISAREE said that, to end the debate over the 2013 understanding, the Commission could perhaps give the Special Rapporteur the benefit of the doubt and believe that the draft guidelines that he proposed complied with the understanding, with the proviso that the Drafting Committee should change them as appropriate if it considered that they did not.

The meeting rose at 1 p.m.

3309th MEETING

Thursday, 2 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Identification of customary international law (*concluded*)[*] (A/CN.4/689, Part II, sect. B, A/CN.4/691, A/CN.4/695 and Add.1, A/CN.4/872)

[Agenda item 6]

Report of the Drafting Committee

1. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee

[*] Resumed from the 3303rd meeting.

on the topic of the identification of customary law (A/CN.4/L.872), said that the report should be read together with the interim report[250] that the Chairperson of the Drafting Committee had presented at the Commission's meeting on 7 August 2014[251] and the report[252] that the Chairperson of the Drafting Committee had presented at the Commission's meeting on 29 July 2015,[253] which described the work of the Drafting Committee on the topic at the sixty-sixth and sixty-seventh sessions of the Commission, respectively. It would be recalled that the Drafting Committee had provisionally adopted a set of 16 draft conclusions in 2014 and 2015, of which the Commission had taken note at its previous session.[254] The current report reproduced the text of all the draft conclusions that had been provisionally adopted by the Drafting Committee.

2. At the present session, the Drafting Committee had devoted one meeting, on 27 May 2016, to its consideration of the draft conclusions on the topic. It had considered the amendments to the draft conclusions which had been proposed by the Special Rapporteur in his fourth report (A/CN.4/695), in light of the suggestions and reformulations made by the Special Rapporteur. In order to respond to suggestions made, or concerns raised, in the plenary debate, the Special Rapporteur had suggested that the Drafting Committee confine itself to the changes proposed in the fourth report that were uncontroversial, since a number of other proposals might need more thorough discussion and would be best addressed at the second reading stage.

3. The only amendments made by the Drafting Committee at the current session to the draft conclusions provisionally adopted by the Committee in 2014 and 2015 concerned draft conclusion 3, paragraph 2, as well as the title of that draft conclusion. Draft conclusion 3, paragraph 2, now read: "Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element." The text of draft conclusion 3, paragraph 2, as provisionally adopted in 2014, had referred to "Each element", while the text now adopted by the Drafting Committee referred to "Each of the two constituent elements". The change was of a purely editorial character and did not affect the substance of that provision. The purpose of referring to "[e]ach of the two constituent elements" was to clarify the link between draft conclusions 2 and 3. The same amendment had been made in the title of draft conclusion 3, which accordingly read: "Assessment of evidence for the two constituent elements".

4. He sincerely hoped that the Commission would be in a position to adopt the draft conclusions on first reading, as set out in document A/CN.4/L.872.

[250] The interim report of the Drafting Committee is available in the Analytical Guide to the Work of the International Law Commission, from: https://legal.un.org/ilc/guide/1_13.shtml.

[251] See *Yearbook ... 2014*, vol. I, 3242ndh meeting, pp. 217–218, paras. 36–47.

[252] Document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session.

[253] See *Yearbook ... 2015*, vol. I, 3280th meeting, pp. 277–284, paras. 1–51.

[254] See *ibid*., vol. II (Part Two), pp. 27–28, para. 60.

Draft conclusions 1 to 16

5. The CHAIRPERSON said that he took it that the Commission wished to adopt the draft conclusions on the identification of customary international law, as a whole, as contained in document A/CN.4/L.872

It was so decided.

Draft conclusions 1 to 16 were adopted.

6. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries for inclusion in the report of the Commission on the work of its sixty-eighth session.

The meeting rose at 10.20 a.m.

3310th MEETING

Friday, 3 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (*concluded*)[*] (A/CN.4/696 and Add.1, A/CN.4/697, A/CN.4/L.871)

[Agenda item 2]

Report of the Drafting Committee

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Drafting Committee on "Protection of persons in the event of disasters" (A/CN.4/L.871).

2. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that he wished to pay tribute to the Special Rapporteur, whose constructive approach, flexibility and patience had once again greatly facilitated the work of the Drafting Committee, and to thank the other members of the Drafting Committee, as well as the secretariat and the interpreters, for their valuable assistance.

3. The Drafting Committee had held 10 meetings from 11 to 24 May 2016. It had considered the revised draft articles, prepared by the Special Rapporteur, taking into account the comments and suggestions made in plenary.

[*] Resumed from the 3296th meeting.

As the Special Rapporteur had proposed merging particular provisions, the numbering of the draft articles had changed. For each draft article adopted on second reading, he would indicate the corresponding number for the draft article adopted on first reading.[255] It should be noted that the Drafting Committee had sought to make the text more coherent, including by harmonizing the definitions set out in draft article 3 with the concept of disaster risk reduction, which, it should be recalled, had been introduced into the text after several provisions had already been adopted.

4. While the draft preamble came at the beginning of the report of the Drafting Committee, it had in fact been discussed last, after the rest of the draft text had been adopted, so that it could be considered in the light of the draft articles as a whole. The Drafting Committee had considered the revised draft preamble, submitted by the Special Rapporteur, which contained seven paragraphs. It had settled on a draft preamble containing five paragraphs, as set out in its report. The first preambular paragraph recalled the mandate of the General Assembly under Article 13, paragraph 1 (*a*), of the Charter of the United Nations. The second called attention to the frequency and severity of natural and human-caused disasters and their damaging impact. The Drafting Committee had deleted the word "increasing", which had been used to qualify the nouns "frequency" and "severity", judging that assertion too factual. The third preambular paragraph, which dealt with the essential needs of persons affected by disasters, reiterated the need for the rights of those persons to be respected in the circumstances covered by the draft articles. The Drafting Committee had rejected the proposal to make reference to human dignity in the preamble, as human dignity was already the subject of draft article 4. The fourth preambular paragraph recalled two basic principles of the protection of persons in the event of disasters, namely, solidarity in international relations and the importance of strengthening international cooperation in all phases of a disaster. The fifth and final preambular paragraph stressed the principle of the sovereignty of States and reaffirmed a core element of the draft articles, namely the primary role of the affected State in the provision of disaster relief assistance. After considering a number of different formulations, including the terms "by virtue of their sovereignty" and "sovereign equality of States", the Drafting Committee had decided to retain "the sovereignty of States", considering that this formulation contributed to the balance in the draft articles and thereby reflected the principle underlying the provisions as a whole. It had also considered adding the words "function and" before "role", but had decided on the current wording, which corresponded to that of draft article 10. It should be noted that it had not retained the proposal to introduce a paragraph recalling the mandate of the Commission under its statute, which was not usual practice, nor the proposal to add a paragraph reaffirming the applicability of the rules of customary international law to questions not covered by the draft articles, as the relationship between the text under review and other rules of international law was already the subject of draft article 18.

5. With regard to draft article 1 on the scope of application of the draft articles, the Drafting Committee had not made any changes to the text adopted on first reading, which it considered as having been generally supported by the Commission.

6. Draft article 2 dealt with the purpose of the draft articles, which the Drafting Committee had considered as meriting the inclusion of a provision in its own right. The Drafting Committee had retained the text adopted on first reading, the only change being the inclusion of a reference to the "reduction of the risk of disasters". It had initially considered the wording "reduction of risk of, and response to, disasters", but had ultimately decided on "facilitate the adequate and effective response to disasters, and reduction of the risk of disasters", which served to confirm that, while the main emphasis of the draft articles was on the provision of adequate and effective response to disasters, they also dealt with the reduction of the risk of disasters. The phrase "reduction of the risk of disasters", a well-established formulation also used in draft article 9, also served to recall the importance of risk reduction, as evidenced by the recently adopted Sendai Framework for Disaster Risk Reduction 2015–2030.[256] The words "that meets" had been replaced with "so as to meet" because the Drafting Committee wished to express more clearly the goal underpinning the provision. Lastly, the phrase "so as to meet the essential needs of the persons concerned, with full respect for their rights" should be understood to apply to both disaster response and risk reduction. Accordingly, depending on the context, the "persons concerned" were the victims of a disaster that had already occurred or individuals who would potentially be affected by a future disaster.

7. The Drafting Committee had decided to retain the phrase "with full respect for their rights" adopted on first reading because it allowed the text to refer to both the needs-based and rights-based approaches. It had considered the argument that the adjective "full" was superfluous and did not reflect the fact that some treaties provided for derogation of human rights, but had nevertheless decided not to delete that word, considering that doing so could lead to the misconception that the final text was less focused on the importance of respect for human rights than that adopted on first reading. It should be noted that the term "rights" was to be understood to be broader than just human rights and must be interpreted in the light of draft article 5, which referred to the need to respect human rights in accordance with international law. That point would be developed in the commentary.

8. Lastly, the title of the draft article, "Purpose", was the same as that adopted on first reading.

9. Regarding draft article 3, the Drafting Committee had merged two provisions adopted on first reading: draft article 3, on the definition of the term "disaster", and draft article 4, which contained the definition of other terms. The possibility of merging those provisions had been considered during the first reading, but a decision had been deferred until the second reading. The possible merger had been viewed favourably in the comments received and

[255] The draft articles and the commentaries thereto adopted by the Commission on first reading are reproduced in *Yearbook ... 2014*, vol. II (Part Two), pp. 61 *et seq.*, paras. 55–56.

[256] General Assembly resolution 69/283 of 3 June 2015, annex II.

had been supported during the plenary debate. Accordingly, the definition of "disaster" was now to be found in subparagraph (*a*) of draft article 3 and the other subparagraphs of the former draft article 4 had been renumbered.

10. Concerning draft article 3, subparagraph (*a*), the Drafting Committee had focused on the proposed changes to the text adopted on first reading, as reflected in the revised text submitted by the Special Rapporteur.

11. The first proposal was to specify that "disaster" referred to a calamitous "physical" event. The Special Rapporteur's intention was to address the concerns expressed in the plenary debate that the existing definition of disasters was too broad and might be understood to cover events such as the collapse of stock markets or other financial shocks that could also lead to the consequences referred to in the draft article, to which the Special Rapporteur had proposed the addition of "economic" damage. The Drafting Committee had decided not to include a reference to "physical" so as to avoid limiting the scope of application of the draft article, as it was not always easy to determine whether an event was physical or not.

12. The Special Rapporteur had also proposed the addition of a reference to "displacement" to the list of the possible consequences of disasters. The Drafting Committee had decided to refer to "mass displacement" so as to make clear that the draft articles applied only to displacement on a large scale. Accordingly, the phrase "widespread loss of life, great human suffering and distress, mass displacement" sought to reflect the impact on the persons affected by the disaster.

13. Lastly, the Special Rapporteur had proposed the addition of a reference to economic damage caused by disasters, as had been suggested in some of the comments received from States and international organizations. However, the Drafting Committee had considered that such a clarification was not necessary and might even cause confusion because the term "material damage" already included economic damage. Furthermore, the focus should be placed on the immediate damage caused by the disaster. The expression "economic damage" could also imply long-term loss, including structural damage to the economy, which was not within the scope of the draft articles. That position was in line with the view the Commission had taken on first reading, in that the draft articles did not apply in principle to economic damage. If necessary, the commentary would make clear that the expression "material damage" also covered economic damage, as indicated by the phrase "thereby seriously disrupting the functioning of society", and that the draft articles did not apply to events leading exclusively to widespread economic loss.

14. Draft article 3, subparagraph (*b*), dealt with the definition of "affected State", which was central to the draft articles. Of all the definitions adopted on first reading, it was the one that had undergone the most revision. The Drafting Committee had primarily sought to determine whether to take up the proposal to extend the scope of "affected State" to include cases where a disaster took place in territory over which a State exercised jurisdiction or control, as the Commission had done in 2001 in the draft articles on prevention of transboundary harm from hazardous activities.[257]

15. The Drafting Committee had sought to reformulate the subparagraph to avoid any ambiguity regarding which States could be considered "affected States" for the purposes of the draft articles. It had particularly wanted to ensure that the provision could not be interpreted too broadly, since some respondents had commented that the text adopted on first reading could be understood to mean that a State of nationality could be considered an "affected State" if any of its nationals happened to be on the territory where the disaster had occurred. It had therefore considered several formulations to make the territorial link clearer. It was worth noting that the sole purpose had been to define the scope of application of the draft articles and that the formulation adopted was without prejudice to the possibility that a State might exercise jurisdiction over its nationals in the territory of another State for the purposes of the application of other rules of international law, including international human rights treaties.

16. The Drafting Committee had begun by specifying that the term "affected State" referred to the State in whose territory the disaster had occurred. It had also replaced the word "the State" with "a State" in order to clarify that in situations where a disaster occurred in the territory of multiple States, each one was an "affected State".

17. The phrase "in the territory or otherwise under the jurisdiction or control of which persons, property or the environment are affected by a disaster" had been deleted and replaced with "in whose territory, or in territory under whose jurisdiction or control, a disaster takes place", a simpler and clearer formulation, which also had the advantage of being in line with the definition of "disaster".

18. The Drafting Committee was conscious that if "affected State" was understood to refer to States where the effects of the disaster were felt, the term could apply to a number of States. However, retaining only the territorial component, namely determining that the affected State was only that State on whose territory the disaster took place, would exclude from the definition the neighbouring State or States that might also suffer the consequences of the disaster, even though it had not taken place on their territory or on territory under their jurisdiction or control. The Drafting Committee had therefore decided that the definition of "affected State" needed to reflect the fact that the term "disaster" in subparagraph (*a*) referred to both the event and its effects. It had taken the view that the best solution was to use the phrase "in whose territory … a disaster takes place", thereby limiting the applicability of the draft articles to States in which the effects of the disaster caused serious disruption to the functioning of society.

19. In subparagraph (*c*), which contained the definition of the "assisting State", the Drafting Committee had deleted the phrase "at its request", which was considered

[257] The draft articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and the commentaries thereto adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

superfluous in the light of the reference to the consent of the affected State. While it agreed that the definition of the principle of assistance would be better placed in the operative provisions rather than in the draft article on the use of terms, the Drafting Committee nevertheless considered it important to clarify that, by definition, assistance required the consent of the affected State, as provided for in draft article 13.

20. Subparagraph (*d*) reflected the evolution of the concept of "other assisting actor". Having considered the revised wording proposed by the Special Rapporteur, the Drafting Committee had decided to retain the reference to NGOs, but not to draw a distinction between those organizations and international organizations, considering that it was more appropriate to do so in the draft articles on other assisting actors.

21. The new wording also differed from that adopted on first reading in that it made no reference to "individual external to the affected State". In his summing up of the debate, the Special Rapporteur had recommended deleting the phrase "other entity or individual external to the affected State" on the basis that the rights and obligations of States and international organizations could not be extended to other entities or individuals. The Drafting Committee agreed with that position with regard to individuals and had considered a number of options, including indicating that the list of actors mentioned in the draft article was not exhaustive by inserting the word "includes" before the list, but had decided that this approach would undermine the internal consistency of the text. The possibility of individuals providing assistance would therefore be mentioned in the commentary. However, the Drafting Committee had decided to retain the reference to external entities in order to ensure that the term "other assisting actor" covered entities like the IFRC. It had also considered including specific mention of "components of the Red Cross and Red Crescent Movement", as found in draft article 7, but had decided not to, given that the Red Cross was not the only entity that was not, strictly speaking, an NGO that might be involved in the provision of assistance to a State. It would be explained in the commentary that companies were not regarded as entities for the purposes of the draft articles.

22. The deletion of the phrase "external to the affected State" did not mean that the Drafting Committee had reversed its decision on the exclusion of internal actors, such as domestic NGOs, from the scope of application of the draft articles; instead, it had chosen to address the issue in the commentary rather than in the draft article.

23. In draft article 3, subparagraph (*e*), which defined "external assistance", the Drafting Committee had made only one amendment. As proposed by the Special Rapporteur, it had deleted the reference to disaster risk reduction that had appeared in the text adopted on first reading. As the Special Rapporteur had argued, the reference to risk reduction had been misleading since, in the draft articles, the term "other assisting actor" was used to refer to actors at the response stage.

24. With regard to subparagraph (*f*), which contained the definition of "relief personnel", the only amendment to the text adopted on first reading had been the removal of the reference to "disaster risk reduction", since "relief personnel" were by definition involved in relief activities undertaken during the response phase. It should be recalled that, in his eighth report (A/CN.4/697), the Special Rapporteur had proposed the addition of a reference to the use of military assets; he had withdrawn that proposal in his summing up of the debate in plenary, on the understanding that the issue would be addressed in the relevant substantive provision, namely draft article 15, on the facilitation of external assistance.

25. Subparagraph (*g*) contained the definition of the term "equipment and goods". In addition to the deletion of the reference to disaster risk reduction for the same reasons as in subparagraphs (*e*) and (*f*), a reference to "telecommunications equipment" had been inserted following a proposal in the comments received.

26. The title of draft article 3, "Use of terms", was the same as that adopted on first reading for the corresponding draft article.

27. With regard to draft article 4, on human dignity, the first issue that the Drafting Committee had needed to address was whether that concept should appear in the draft articles as an autonomous provision or be included in the preamble. The Drafting Committee had decided that, since respecting and protecting the human dignity of affected persons was central to the draft articles, it warranted being retained in a separate provision. A proposal to merge the draft article with what had become draft article 5, on human rights, had also been considered. The Drafting Committee had not accepted that proposal, considering that the same result could be achieved by placing the two draft articles one after the other. Keeping the two provisions separate also made it possible to indicate that they should not be treated on the same level.

28. As the Commission would recall, the Special Rapporteur, in summing up the debate in plenary, had proposed that the text be aligned with that adopted in the draft articles on the expulsion of aliens, which referred only to the "obligation to respect",[258] without mentioning protection. The Drafting Committee had, however, rejected that proposal and preferred to retain the wording adopted on first reading, which was a standard formulation for references to "human dignity".

29. The difficulty, however, had lain in linking the reference to protection to the entities involved, namely States and other assisting actors, as the text adopted on first reading had, and to the Special Rapporteur's subsequent proposals. While such a link was appropriate for States, it was less so for "other assisting actors" because of differences of opinion regarding the obligation of non-State entities, under international law, to protect the human dignity of affected persons. It was therefore necessary to find language that did not specify the entities responsible for respect and protection, and the draft article had thus been formulated in the passive voice, focusing solely on respect for and protection of human dignity. The words "in the event of disasters", which

[258] See *Yearbook ... 2014*, vol. II (Part Two), p. 36 (draft article 13).

mirrored draft article 1, were intended to confirm that, in accordance with the purpose of the draft articles defined in draft article 2, the provision applied to both disaster response and disaster risk reduction. The Drafting Committee had also decided not to limit the scope of application of the draft article by specifying that the persons involved were those in the affected State, in order not to restrict the scope of a fundamental concept that was central to the draft articles. The title of the draft article, "Human dignity", was the same formulation as that adopted on first reading.

30. With regard to draft article 5, on the human rights of persons affected by disasters, two main changes had been made to the text adopted on first reading. First, where the first reading text had "respect for" human rights, the text now read "the respect for and protection of" human rights. The Special Rapporteur had proposed aligning the wording of the draft article with that typically found in international human rights treaties and including the word "fulfillment", but had withdrawn the proposal in the light of the views expressed in plenary. The Drafting Committee had worked on a revised proposal by the Special Rapporteur, which maintained the concepts of respect and protection, and had adopted it in its current formulation. It had also considered whether it was necessary to align the text with that adopted for draft article 4, on human dignity, by adding the words "in the event of disasters", but ultimately had decided that such a parallel was not strictly necessary.

31. The second question had been how to formulate the reference to human rights. The text adopted on first reading simply referred to "their human rights", which the Special Rapporteur had retained in the text proposed in his eighth report. However, in response to several statements during plenary, he had amended the proposal to read "rights under international human rights law", the idea being to make reference to the entire body of international human rights law, including the possibility of suspension and derogation, which remained applicable in the event of a disaster. The Drafting Committee, however, had not considered it necessary to refer specifically to international human rights law, taking the view that the text adopted on first reading had a broader scope of application because it included human rights protection under the national law, for example constitutional law, of many States. It also considered that it was not wise to make a formal determination as to whether a particular "body" of law existed or not.

32. It should be recalled that the commentary adopted on first reading already indicated that the general reference to "their human rights" encompassed both substantive rights and limitations that existed in the sphere of international human rights law, in particular the affected State's right of derogation under existing treaties.[259] The Drafting Committee had nevertheless decided to make the point clearer by adding the words "in accordance with international law", based on a similar provision in the draft articles on the expulsion of aliens. The clarification acted as a reminder that the draft articles operated within the framework of the rules of international law which, as had already been indicated, provided for the possibility of suspension or derogation. The addition was also useful in that it recalled that other rules of international law, such as those dealing with refugees and displaced persons, might apply in the situations covered by the draft articles. Lastly, the Drafting Committee had decided to retain the title "Human rights", which was the same formulation as that adopted on first reading.

33. With regard to draft article 6, on the applicable humanitarian principles, the Drafting Committee had decided to retain the text adopted on first reading. It was nonetheless worth recalling, for the record, the various proposals that had been made. In his eighth report, the Special Rapporteur had proposed inserting references to the principles of "no harm" and "independence", but, in the light of the views expressed during the plenary debate, had subsequently proposed to revert to the text adopted on first reading. The Drafting Committee had agreed with the Special Rapporteur's proposal, including to retain the reference to the principle of "neutrality". In the view of the Drafting Committee, that principle should not be understood in the sense applied in the context of armed conflict, but rather in the more specific sense that it had acquired within the context of humanitarian assistance, as indicated in the commentary to the text adopted on first reading, namely that the "provision of assistance [should] be independent of any given political, religious, ethnic or ideological context".[260] The Drafting Committee had also decided to retain the structure of the relationship between impartiality and non-discrimination, which had been carefully negotiated during the first reading, so that in the draft articles the essence of impartiality was non-discrimination.

34. The Drafting Committee had further considered the possibility, on the basis of a proposal made in plenary, of including a reference to "applying a gender-based perspective" and had also considered using the term "gender sensitive", but had decided against including any such indication in the draft article itself, since the legal implications of doing so, and the relationship with the other principles mentioned, were unclear. Furthermore, it was concerned that such a reference within the article would expose the compromise text to proposals to include other sensibilities. It had decided to retain the approach adopted on first reading, which was to capture many such considerations by using the words "particularly vulnerable". The commentary would nonetheless emphasize the importance of adopting a gender-based approach and would also explain that the position of women was not necessarily to be dealt with under the reference to "particularly vulnerable", but rather under the principle of non-discrimination.

35. The title of draft article 6 remained "Humanitarian principles". In his eighth report, the Special Rapporteur had proposed that the title of the draft article be changed to "Principles of humanitarian response", but had withdrawn that proposal following the comments made in plenary.

36. Regarding draft article 7, on the duty to cooperate, the first issue had been that of the scope *ratione materiae*

[259] See *ibid*., p. 70 (para. (3) of the commentary to draft article 6).

[260] *Ibid*., p. 71 (para. (4) of the commentary to draft article 7).

of the provision. In the revised proposal submitted to the Drafting Committee, the Special Rapporteur had recommended incorporating into the draft article, as a second subparagraph, draft article 10, as adopted on first reading, on cooperation for disaster risk reduction. However, the Drafting Committee had decided that this was not necessary, since placing the two paragraphs side by side made it clear that the scope of draft article 7 was broad enough to cover cooperation for disaster risk reduction during the pre-disaster phase. In other words, the deletion of draft article 10, as adopted on first reading, should not be interpreted as indicating that the Drafting Committee had changed its mind, but rather was the result of the second reading process, which involved the integration of the various provisions, which had been adopted over several years during the first reading. Other effects of such streamlining included the fact that forms of cooperation during the response phase were covered by draft article 8 and that the various disaster risk reduction measures envisaged within the international cooperation mentioned in article 7 were detailed in draft article 9, paragraph 2. The matter was further clarified by a modification to the English text: the opening phrase "In accordance with the present draft articles" had been aligned with the French text to read "In the application of the present draft articles". That modification had also been motivated by the need to make clearer the link between the provision and the purpose of the cooperation. The Drafting Committee had also considered using the formula "For the purposes of the present draft articles" but had decided against it.

37. A series of amendments had been made to align the text with the wording adopted in other draft articles. In particular, the term "other assisting actors" served to refer to the definition of that concept contained in draft article 3 (*d*) and included competent intergovernmental organizations, relevant NGOs and any other assistance-providing entities. The draft article had been streamlined by deleting the explicit references that had appeared in the text adopted on first reading, with one exception. The Drafting Committee had felt that, given the important role played by the International Red Cross and Red Crescent Movement in international cooperation in the context of the situations covered by the draft articles, a specific reference to it should be maintained even if it was technically one of the "entities" covered by the term "other assisting actor", as defined in draft article 3. The reference had become "International Red Cross and Red Crescent Movement", at the express request of the entity in question. The modifications had been intended simply to refine the formulation of the provision, not to limit the scope of the cooperation envisaged.

38. It was also important to recall for the record that the Special Rapporteur had, in the proposal in his eighth report, recommended including a specific reference to the United Nations Special Coordinator for Emergency Relief; however, that reference had no longer appeared in the revised version of the draft article placed before the Drafting Committee. The Drafting Committee had agreed that the reference to the United Nations necessarily encompassed the United Nations Special Coordinator for Emergency Relief, whose role would be dealt with in the commentary.

39. The Drafting Committee had also considered a proposal to replace the words "as appropriate" with "within their capacity", so as to strengthen the obligation to cooperate. However, it had decided against that proposal, as the reference to "as appropriate" did not qualify the level of cooperation, but rather the entities with whom the cooperation should take place in any particular disaster, and as such, continued to qualify the entire draft article. The phrase had the effect of modifying the nature of the cooperation envisaged, depending on which entities were involved. The Drafting Committee had also considered placing the words "as appropriate" elsewhere in the draft articles, but had decided against it. The title of draft article 7, "Duty to cooperate", was the same as that adopted on first reading.

40. With regard to draft article 8, on forms of cooperation in the specific context of disaster response, the text adopted on second reading was substantively the same as that adopted on first reading. The opening phrase, "For the purposes of the present draft articles", had been deleted, as it was no longer necessary since, in the new text, the words "Cooperation in the response to disasters" clarified the context. That addition had been intended to align the text more clearly with the understanding reached for draft article 7, namely that draft article 8 would expand on the duty to cooperate in the specific context of response to disasters.

41. The Drafting Committee had also considered the possibility of adding a reference to the provision of financial support to the forms of cooperation, but had decided against doing so for fear of reopening the debate on the consensus text adopted on first reading, on the understanding that the commentary, as adopted on first reading, would indicate that the list of forms of cooperation contained in the draft article was not exhaustive and that other forms existed, including the provision of financial assistance.

42. The title of draft article 8 had become "Forms of cooperation in the response to disasters", so as to reflect the understanding reached at the current session regarding the scope of the draft article, as indicated above.

43. Regarding draft article 9, on the duty to reduce the risk of disasters, the Commission would recall that the Special Rapporteur had proposed expanding the text adopted on first reading to include a reference to the creation of new risk and the reduction of existing risk. Since the proposal had not met with general approval in the plenary debate, the Special Rapporteur had presented a revised proposal, which reverted to the wording adopted on first reading.

44. In the light of the proposals made in plenary to modify the obligation, the Drafting Committee had considered the possibility of adding the words "taking into account the means at their disposal", so as to anticipate the differing capacities of States. It had decided against doing so, out of concern that making such a specific reference in draft article 9 might induce an *a contrario* interpretation of other draft articles, such as draft article 7, which contained no such qualification. It had decided that the matter would be dealt with by retaining the explanation in the commentary adopted on first reading and streamlining the text adopted on first reading by deleting the words "necessary and", so

that the provision could not be interpreted as requiring the taking of all measures. Accordingly, the phrase "taking appropriate measures" was intended to indicate the relative nature of the obligation. The Drafting Committee had also recalled that it had been agreed on first reading that the obligation envisaged was one of conduct and not of result, in other words, not an obligation to fully prevent or mitigate disasters, but an obligation to reduce the risk of the harm caused thereby. Some flexibility was therefore inherent to the concept of disaster risk reduction, and the commentary would reinforce that point.

45. With respect to paragraph 2, the Drafting Committee had considered a proposal to include a reference to the reduction of vulnerability, but had decided against doing so for fear of introducing confusion. Reducing vulnerability and building resilience were not risk reduction measures *per se*, but rather the goal of the measures envisaged in paragraph 2. The Drafting Committee had therefore adopted the text of paragraph 2 as adopted on first reading, without modification.

46. The title of draft article 9 was "Reduction of the risk of disasters", as proposed by the Special Rapporteur in his eighth report. It no longer contained a reference to "duty", thereby reflecting the flexibility of the obligation contained in the article.

47. Regarding draft article 10, on the role of the affected State, amendments had been made in paragraph 1 only. The first modification had been to add the words "or in territory under its jurisdiction or control" at the end of the paragraph, in order to align the text with the expanded scope of the term "affected State", contained in draft article 3 (*b*). It would be recalled that the disparity in the text adopted on first reading between the provision dealing with the role of the affected State and the definition of the term "affected State", which was attributable to the fact that the latter had been adopted several years after the former, had been noted in some of the comments received.

48. As a consequence of the decision by the Drafting Committee to clarify what was to be understood by "affected State", in relation to territory under jurisdiction or control, the reference in the text adopted on first reading to the affected State having a duty "by virtue of its sovereignty" no longer fully accorded with the legal position. In particular, the Drafting Committee was concerned that treating that obligation as a function of the exercise of sovereignty would be difficult to sustain. At the same time, it was conscious of the fact that the words "by virtue of its sovereignty", which emphasized the link between sovereign rights and concomitant duties, had been key to the compromise adopted on first reading. A number of options had been considered as a way to reconcile the need to broaden the scope of the draft article and the need to refer to sovereignty in the standard case of the protection of persons on the territory of the affected State. One possibility had been to add a paragraph 1 *bis*, dealing solely with the protection of persons on territory under the jurisdiction or control of the affected State.

49. The Drafting Committee had ultimately decided to delete the words "by virtue of its sovereignty" in paragraph 1, but that decision should not be understood to indicate that it had changed its mind as to the origin of the duty of the affected State to protect persons on its territory: instead, it was simply motivated by the need to take into account the expanded definition of the term "affected State", as had already been indicated. The commentary would retain the important clarifications regarding the sovereignty of the affected State included in the commentary adopted on first reading. It should also be recalled that the principle of sovereignty had been included in the draft preamble, which applied to the entire set of the draft articles. That solution also took into account another proposal to refer to both the duty and the right of the affected State. Just as it was difficult to refer to sovereignty in the new wording of paragraph 1, the text of paragraph 2 would have been legally complex if it had provided that a State was acting by virtue of a "right" with regard to territory under its jurisdiction or control. Consequently, the Drafting Committee had retained paragraph 2, as adopted on first reading, with the technical amendment of deleting the word "and" between the words "relief" and "assistance".

50. The title of draft article 10 was "Role of the affected State", as adopted for the corresponding draft article on first reading. It should be noted for the record that the Special Rapporteur, in his revised proposal, had recommended that the title of the draft article be "Function of the affected State" in order to reflect a point made during the plenary debate, namely that the content of the article dealt with the function of the affected State. The Drafting Committee had also considered various other proposals that covered, *inter alia*, the "Duty" of the affected State, but it had not adopted any of them and had ultimately retained the formulation adopted on first reading.

51. Regarding draft article 11, on the duty of the affected State to seek external assistance, three amendments had been made to the text. The first had been to insert the word "manifestly" before the words "exceeds its national response capacity", thereby establishing a threshold. The Commission would recall that, in his eighth report, the Special Rapporteur had, in response to some of the comments received, proposed a more subjective standard, namely that the affected State itself would "determine that a disaster exceeded its national response capacity", but that, in the light of the opposition expressed in plenary, he had modified the proposal and proposed inserting the more objective reference to "manifestly". That proposal had met with support in plenary and had been adopted by the Drafting Committee.

52. The second amendment had been to streamline the reference to other assisting actors, who in the text adopted on first reading had been referred to as "other competent intergovernmental organizations and relevant non-governmental organizations". On second reading, the Drafting Committee had sought to integrate the various terms defined in draft article 3, including "other assisting actor"; the new reference at the end of the paragraph to "other potential assisting actors" should be understood in the light of the definition in draft article 3. Such actors were referred to as "potential" assisting actors because they were not yet providing assistance, but might do so.

53. The amendment relating to assisting actors meant that the words "as appropriate" were no longer best placed

at the end of the draft article. Accordingly, the Drafting Committee had moved them to an earlier position in the paragraph, placing them after the words "has the duty to seek assistance from" to qualify the list of potential actors from whom the affected State should seek assistance. The Drafting Committee had also decided that the word "among" was no longer necessary, since the words "as appropriate", in their new location, now served substantially the same function as the word "among" had in the text adopted on first reading.

54. Draft article 11 had been adopted by the Drafting Committee on the understanding that the draft articles would include an appropriate provision on the obligation of potentially assisting States. He would return to that point during his presentation of draft article 12.

55. Draft article 11 had the same title, "Duty of the affected State to seek external assistance", as the corresponding provision adopted on first reading.

56. Regarding draft article 12, on offers of external assistance, he wished to make two preliminary points. First, the Commission might recall that the corresponding provision had been adopted on first reading as draft article 16. The Drafting Committee had decided to place that provision between draft article 11, on the duty of the affected State to seek external assistance, and draft article 13, on the consent of the affected State to offers of external assistance. Second, it was the only provision that included new text not based on wording adopted on first reading. The provision consisted of two paragraphs: the first was based on the text of draft article 16, as adopted on first reading, and the second was new.

57. With respect to paragraph 1, the phrase "In responding to disasters", adopted on first reading, had been replaced with "In the event of disasters", so as to avoid confusion between the concept of "response", which had a technical meaning in the draft articles, and the more colloquial reference to an offer of assistance as a response to a disaster. The second amendment concerned the word "may". The text adopted on first reading had indicated that actors "have the right to offer" assistance, and the Special Rapporteur had proposed retaining that wording. However, the Drafting Committee had decided to replace it with the words "may offer", since an explicit reference to acting on the basis of right introduced complexity, including with regard to assistance being offered by other potential assisting actors, who, according to the definition contained in draft article 3, could include non-governmental actors. That change had in turn led to the elimination of the need for the additional sentence that had appeared in the text adopted on first reading.

58. As already indicated, paragraph 2 was new. The Drafting Committee had decided to adopt it on the basis of a proposal made by the Special Rapporteur following concerns expressed in plenary, when some members had considered that the draft articles did not sufficiently cover the obligations of potentially assisting States and other assisting actors. The addition of the paragraph had therefore been motivated by a desire to introduce a greater balance within the text, by providing a parallel obligation to that set out in draft article 13, paragraph 3, namely the obligation of the affected State to make known its decision regarding an offer in a timely manner. The Drafting Committee had considered various formulations before settling on the text under consideration.

59. Paragraph 2 had three components. First, a request for external assistance by the affected State would trigger the application of the provision. While draft article 11 assigned to the affected State a general duty to "seek" assistance, the paragraph dealt with the scenario where the affected State had done so "by means of a request addressed to" the list of potential assisting actors. The Drafting Committee had understood that clarification to be important because it limited the application of the provision to specific requests, without extending it to general requests for assistance. Second, the provision referred to the constellation of addressees of a request for assistance, including other States, the United Nations and other potential assisting actors, thereby cross-referencing the definition in draft article 3. The United Nations had been singled out for special mention given the central role it played in receiving requests for assistance. Third, the Drafting Committee proposed imposing on the addressee or addressees of the specific request a dual obligation to give due consideration to the request and to respond to the affected State. The addressee should fulfil its dual obligations "expeditiously", in other words, in a timely manner. The reference to the obligation to give due consideration to the request had been based on similar wording used in article 19 of the articles on diplomatic protection,[261] adopted in 2006. The word "due" referred more to the substance of the request than to the notion of timeliness, which was already covered by the words "expeditiously".

60. The Drafting Committee had also considered aligning the language of the draft article with that used in draft article 13 to define the obligation of the affected State. However, it recognized that the position of an affected State in the wake of a disaster falling within the scope of the present draft articles differed from that of an assisting State or other assisting entity, thereby justifying the formulation of a different obligation.

61. The title of draft article 12 remained "Offers of external assistance". The use of the plural form in the title should be understood broadly as covering not only spontaneous offers, but also offers made in response to a request.

62. Regarding draft article 13, on the consent of the affected State to external assistance, paragraphs 1 and 2 had been adopted without amendment to the text adopted on first reading.

63. With respect to paragraph 2, the proposal of the Special Rapporteur had made reference to the arbitrary "withdrawal" of consent. The Drafting Committee had decided not to use the word "withdrawal" for fear of reopening the debate on a delicately balanced provision adopted on first reading.

[261] The draft articles on diplomatic protection adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 49–50. See also General Assembly resolution 62/67 of 6 December 2007, annex.

64. With regard to paragraph 3, it should be recalled that the Special Rapporteur, in his eighth report, had proposed the inclusion of a reference to the making of a "good faith" offer of assistance. However, that reference had been considered superfluous in plenary and had not been included in the revised version that the Special Rapporteur had submitted to the Drafting Committee for consideration. Two changes had been made to paragraph 3. First, the word "extended" in the version adopted on first reading had been replaced with the word "made", out of concern that it might be wrongly interpreted as suggesting a duration. Second, the expression "in a timely manner" had been added at the end of the paragraph, as had been proposed by the Special Rapporteur in his eighth report and supported in plenary. The Drafting Committee had decided to accept the additional requirement in order to emphasize the importance of receiving timely responses when a disaster had occurred. However, it should be kept in mind that this requirement should be observed "whenever possible", a general qualification, which, in the view of the Drafting Committee, made it possible to retain the flexibility inherent to the provision.

65. The title of the draft article, "Consent of the affected State to external assistance", was the same as that of the provision adopted on first reading.

66. As to draft article 14, entitled "Conditions on the provision of external assistance", the title and the text were the same as those adopted on first reading.

67. Regarding draft article 15, on the facilitation of external assistance, the text remained substantially the same as that adopted on first reading, with only a technical modification to paragraph 1 (*a*). With a view to harmonization with the provision on the use of terms, contained in draft article 3, the words "civilian and military relief personnel", which had appeared in the text adopted on first reading, had been simplified to become "relief personnel", thereby including a reference to the definition in draft article 3 (*f*).

68. The title of the draft article, "Facilitation of external assistance", was the same as that adopted on first reading.

69. Draft article 16, on the protection of relief personnel, equipment and goods, had been adopted substantially in the same form as that adopted on first reading, including in the same spirit of flexibility expressed by the adjective "appropriate", which also made reference to the possibility of the affected State to perform the measures envisaged. That point would be elaborated on in the commentary.

70. The only textual changes consisted of harmonizing the reference to territory, as had been done in the draft articles as a whole, by adding the phrase "or in territory under its jurisdiction or control", and replacing the words "of relief personnel, equipment" with "relief personnel and of equipment".

71. The title of draft article 16 remained that adopted on first reading, "Protection of relief personnel, equipment and goods".

72. Draft article 17, on the termination of external assistance, had been the subject of extensive debate in the Drafting Committee. The Commission would recall that, in his eighth report, the Special Rapporteur had proposed that a further precision be added to the draft article by adding an express reference to the right of the actors concerned to terminate external assistance at any time. The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur, which took into account the views expressed in plenary. It had considered a number of proposals, including making an express reference to prohibiting the arbitrary withdrawal of consent to the provision of relief assistance. Ultimately, it had chosen to refine the Special Rapporteur's revised proposal and retain much of the text adopted on first reading to formulate a draft article consisting of three sentences.

73. The first sentence, the wording of which had been based on the Special Rapporteur's proposal, confirmed the basic right of the actors concerned, namely the affected State, the assisting State, the United Nations or other assisting actors, to terminate external assistance at any time. It was understood that the reference to termination of assistance included termination both in whole or in part. The Drafting Committee had not made an express reference thereto in the text, since it was understood that the possibility of termination in whole also assumed that of termination in part.

74. The second sentence reproduced the text of the last sentence of draft article 19, as adopted on first reading, establishing the requirement of notification, except that the word "intending" had been substituted for the word "wishing". It had been further streamlined to refer to "[a]ny such State or actor".

75. The third sentence reproduced, in substance, the first sentence of the text adopted on first reading, requiring consultation between the actors involved. The wording had been reworked, with the expression "as appropriate" being moved to the earlier part of the sentence so that it applied to assisting States, the United Nations and other assisting actors. The provision was intended to clarify that the anticipated consultations would take place between the affected State, on the one hand, and, on the other hand, any other entity (whether an assisting State, the United Nations or any other actor) providing the assistance.

76. The Drafting Committee had also added an explicit reference to the United Nations among the potential assisting actors, given its central role in the provision of relief.

77. The title of draft article 17, "Termination of external assistance", was the same as that adopted on first reading.

78. Draft article 18, on the relationship between the draft articles and other rules of international law, was the successor to draft articles 20 and 21, as adopted on first reading. The Drafting Committee had proceeded on the basis of a proposal by the Special Rapporteur, which merged the two provisions into a single draft article. It had accepted the general approach of having only one provision governing the relationship with other applicable rules and the rules of humanitarian law, but had preferred to draft two separate paragraphs.

79. Accordingly, paragraph 1 dealt with the relationship between the draft articles and other rules of international law, such as existing treaties dealing with disaster response or disaster risk reduction. The Drafting Committee had adopted substantially the same approach as that taken on first reading in draft article 20, in that it had agreed to depict the relationship in the form of a "without prejudice" clause. However, it had simplified the text, replacing the phrase "special or other rules of international law applicable in the event of disasters", adopted on first reading, with the phrase "other applicable rules of international law", which covered both regional and bilateral treaties applicable to the protection of persons in the event of disasters. The wording was intentionally flexible, without referring to other rules as being "special" in relation to the draft articles, since that designation depended on their content.

80. Paragraph 2 dealt with the specific question of the relationship with the rules of international humanitarian law. The Commission would perhaps recall that the issue had been discussed extensively in the comments and observations received. Draft article 21 of the text adopted on first reading had excluded the application of the draft articles to the extent that the rules of international law applied. In response to the comments and suggestions made, the Special Rapporteur, in his eighth report, had proposed depicting the relationship in the form of a "without prejudice" clause, as had been done with the relationship to other applicable rules. In his revised proposal, he had suggested presenting the rules of international humanitarian law as a subcategory of special rules of international law in a general "without prejudice" clause.

81. However, the Drafting Committee had decided to retain, in substance, the approach taken on first reading, namely indicating the relationship between the draft articles and the rules of international humanitarian law, as opposed to providing a simple saving clause. It had drawn inspiration from article 55 of the 2001 articles on the responsibility of States for internationally wrongful acts[262] in depicting the relationship with the rules of international humanitarian law in the formulation "do not apply to the extent that the response to a disaster is governed" by such rules. Based on that outcome, the draft articles could conceivably apply in the context of armed conflict, to the extent that the rules of international humanitarian law did not apply. That would also enable the parallel application of the draft articles in the context of complex emergencies. The commentary and the text of the draft article would be aligned, and a reference to the position taken in draft article 18 would also be included in the commentary on the definition of "disaster" set forth in draft article 3 (*a*) in order to further delineate the scope of application of that provision.

82. The Drafting Committee had not included a reference to disaster risk reduction in paragraph 2, since risk reduction measures were taken, by definition, in advance of the onset of a disaster, and would not involve recourse to the rules of international humanitarian law.

83. The title of draft article 18, "Relationship to other rules of international law", was that adopted on first reading, on the understanding that the reference to "other rules" included the application of the principle of *lex specialis*.

84. In conclusion, he said that the Drafting Committee recommended to the Commission the adoption on second reading of the draft articles on the topic "Protection of persons in the event of disasters".

85. The CHAIRPERSON invited the Commission to adopt on second reading the titles and texts of the draft articles on the protection of persons in the event of disasters, as contained in document A/CN.4/L.871.

86. Ms. JACOBSSON said that she regretted that draft article 6 did not include a clear reference to a gender-based approach, as she had requested in plenary. She had noted that it would be mentioned in the commentary.

87. Mr. KITTICHAISAREE said that, while he was not opposed to the adoption of draft article 13, he wished to put on record that the expression "whenever possible" meant "as appropriate" or "where appropriate". An affected State could refuse to respond to an offer of assistance from a State it regarded as an enemy, since relations between the two States could worsen if the affected State was obliged to respond and had to refuse the offer from the other State.

Draft articles 1 to 18

Draft articles 1 to 18 were adopted.

88. The CHAIRPERSON said that he took it that the Commission wished to adopt on second reading the titles and texts of the draft articles on the protection of persons in the event of disasters, as contained in document A/CN.4/L.871.

The draft articles on the protection of persons in the event of disasters, contained in document A/CN.4/L.871, as a whole, were adopted.

89. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries to the draft articles, for inclusion in the Commission's report to the General Assembly on the work of its sixty-eighth session.

The meeting rose at 11.30 a.m.

3311th MEETING

Tuesday, 7 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase,

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[262] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the atmosphere (*continued*)*
(A/CN.4/689, Part II, sect. A, A/CN.4/692, A/CN.4/L.875)

[Agenda item 8]

Third report of the Special Rapporteur (*concluded*)*

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of protection of the atmosphere (A/CN.4/692).

2. Mr. NIEHAUS said that he wished to thank the Special Rapporteur for his third report and for organizing the meeting with experts at the beginning of the session, which had helped to enlighten members on various aspects of a highly important subject, including the urgent need for effective international action to stop atmospheric pollution. Those who argued that the atmosphere had always existed and would always continue to exist were doubtless right, but the atmosphere had originally existed as a source of life, whereas now, as a result of human activity, it was on the way to becoming a reservoir of substances that would lead to the eradication of life on earth. Against such a background, the Special Rapporteur's efforts to find solutions that were acceptable to all and commensurate with the gravity of the situation took on particular importance. Mr. Murase had been working on the topic with skill, flexibility and humility for several years, in particular since his appointment as Special Rapporteur in 2013.

3. Strong opposition from certain members of the Commission, for reasons difficult to fathom, had made it necessary to impose restrictions, set out in an "understanding",[263] on how work on the topic would proceed, a situation which was very unusual. One of the main reasons for that opposition was the concern that the Commission's work should not interfere with ongoing political negotiations. However, it was difficult to understand how a set of clear, objective, non-binding legal guidelines could conflict with political initiatives in the same area and having the same objectives. On the contrary, it might be assumed that those guidelines would support such negotiations. As Chairperson of the Commission at the time, he had been able to observe developments first-hand; he did not agree, therefore, with the statement that had been made the previous week to the effect that those who had supported the inclusion of the topic in the Commission's programme of work had somehow been "blackmailed" into accepting the conditions demanded. In fact, consensus had been achieved through a difficult but necessary process of negotiation. Obviously, the right course of action would have been to agree to include the topic without any limitations and to decide on its content and format in the usual manner, but that had not been possible owing to the uncompromising attitude of those who had been opposed to the topic's inclusion. That was the background to the understanding that had been accepted by the Special Rapporteur and approved by all the members of the Commission who had been present at the time. It was a formal agreement which must, of course, be honoured, and the Special Rapporteur's efforts to that end should be recognized. Nonetheless, the slightest comment in his reports that came even close to the limits agreed in 2013 was met with strong criticism and attacks. Such an attitude was unconstructive and detrimental to the work of the Commission. The Special Rapporteur's flexibility and understanding of differing opinions should serve as an example to those who did not share his ideas and lead to an acceptance on their part that, in some instances, it was simply impossible to comply absolutely with the restrictions imposed by the 2013 understanding. That did not mean that the understanding should be abandoned, but rather that members should show the flexibility and objectivity required in undertaking a scientific project. The third report might contain aspects that were unacceptable to some, but they could be highlighted without referring to the understanding.

4. Turning to the proposed texts, he said that the somewhat outdated term "developing countries", which appeared in the fourth draft preambular paragraph, should be replaced with the words "many countries". While the content of draft guideline 3 on the obligation of States to protect the atmosphere was excellent, he agreed with Mr. Forteau that the overly broad formulation of its provisions made the guideline vague and deprived the obligation of its legal content. However, if the Special Rapporteur's intention was to refer to the relevant obligations in subsequent provisions, he could accept the guideline as it stood. Draft guideline 4 on environmental impact assessments contained a very valuable analysis and a welcome reference to public participation. However, he considered the draft guideline's formulation to be excessively broad, for the same reason as that he had given regarding draft guideline 3. Draft guideline 5 on the sustainable utilization of the atmosphere addressed the crux of the problem, namely the finite nature of the atmosphere, something which was scientifically indisputable; the need to strike an appropriate balance between economic development and environmental protection, addressed in paragraph 2, was also a central issue. Draft guideline 6 on the equitable utilization of the atmosphere, which contained an important reference to future generations, should address specific legal aspects rather than matters of a philosophical nature. Regarding draft guideline 7 on geoengineering, he agreed that, although geoengineering provided a series of very interesting possibilities for the future, the Commission should be cautious in dealing with a very new area that was still in its infancy. If it were to address that issue, it would have to do so in very general terms, with an emphasis on promoting research rather than on legal aspects; it might therefore be more appropriate at the current stage not to refer to the matter at all. However, if the majority of members considered it appropriate to include a provision to the effect that geoengineering activities should be conducted with prudence and caution, he would not object.

5. In conclusion, he recommended referring all the draft guidelines to the Drafting Committee.

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* Resumed from the 3308th meeting.

[263] *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

6. Mr. HASSOUNA said that he wished to commend the Special Rapporteur on his comprehensive, well-argued and well-researched third report and his outreach efforts to promote and explain the project to Governments, organizations and academic institutions. In 2015, he had participated with the Special Rapporteur in the annual session of the Asian–African Legal Consultative Organization, at which the topic had aroused great interest and received much support. The recent dialogue with experts had enhanced members' understanding of the scientific and technical aspects of the topic, although the distinction between the scientific and legal approaches to the problem, which could sometimes result in misleading conclusions, must always be borne in mind.

7. Although a few States in the Sixth Committee continued to question the suitability of the topic and had even called for its withdrawal, he strongly believed that the Commission should continue its work on what was an important and timely subject, in line with the 2013 understanding, which had been agreed upon by the entire Commission. Much had been said at the current session about the terms of that understanding; those in favour of pursuing the topic and those who had doubts about its suitability had expressed differing views as to whether the understanding had been fully adhered to in the third report. In his view, the Commission should continue to adopt a positive and balanced approach based on identifying the existing legal principles applicable to the protection of the atmosphere, while avoiding policy debates related to political negotiations on environmental issues. He was confident that the Commission could achieve that objective, as it had already succeeded at its previous session in reaching agreement on the draft guidelines contained in the second report.[264]

8. Regarding the draft preamble, he was in favour of returning to the formulation "common concern of humankind" instead of "pressing concern of the international community as a whole", which did not carry the same connotation of a shared responsibility for the protection of the atmosphere. The concept of common concern of humankind had already been included in the United Nations Framework Convention on Climate Change, the Convention on biological diversity and, more recently, in the preamble to the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change. While that Agreement addressed a different topic from the one the Commission was dealing with, it reinforced the proposition that the international community had accepted the notion of "common concern".

9. In the draft preamble, the Special Rapporteur proposed adding a paragraph on the need to take into account the special situation of developing countries, an idea which was closely related to the concept of common but differentiated responsibilities enshrined in the Rio Declaration on Environment and Development[265] and the United Nations Framework Convention on Climate Change. The Paris Agreement under the United Nations Framework Convention on Climate Change expressly referred to "the principle of common but differentiated responsibilities" and stated that developed countries were to bear the brunt of the burden in reducing greenhouse gas emissions, while developing countries were encouraged to increase their reduction efforts. The rationale for applying that principle in environmental agreements was that the greatest impacts of climate change were mostly felt by developing countries, while the greatest per capita greenhouse gas emissions were concentrated in developed countries. Thus, under the Paris Agreement under the United Nations Framework Convention on Climate Change, a State's obligation to help solve the issue of climate change was directly linked to its contribution to the problem in the first place. However, under the current draft guidelines, the response to atmospheric issues did not relate directly to how much States had damaged the atmosphere, but rather focused on regulating their future collective use thereof, whether they were developed or developing States. The Commission should consider adopting the Paris Agreement under the United Nations Framework Convention on Climate Change as terms of reference for its work on the topic, since its principles had been endorsed by a very large number of States. Article 2, paragraph 2, of the Agreement provided that it was to be implemented in accordance with the principles of equity and "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances", which reflected a more individualistic approach to that principle. Perhaps the draft guidelines could include a similar standard, based on States' individual capacity for implementation.

10. With regard to draft guideline 3, the Special Rapporteur had attempted to reflect a narrower perspective of the general obligation of States to protect the atmosphere than that contained in the second report. It was not clear from subparagraph (*a*) whose "atmospheric pollution" States were expected to prevent – pollution emanating from their own territory or that produced by any State. The expression "[a]ppropriate measures" in both subparagraphs (*a*) and (*b*) should be elaborated upon in order to clarify the standard to be used. The "measures of due diligence" in subparagraph (*a*) could also be referred to in subparagraph (*b*). A sentence to read: "A State may be deemed to have failed in its duty of due diligence only if it knew or ought to have known that the particular activities would cause significant harm to other States" should be added, along with an explanatory commentary on when a State "ought to have known" of such harm. It should be mentioned in subparagraphs (*a*) and (*b*) that the requirements were to be applied in accordance with the draft guidelines, as well as the relevant rules of international law and conventions, respectively.

11. The obligation to assess environmental impact, as currently formulated in draft guideline 4, seemed overly broad. The obligation should not apply to all activities, but only to planned activities and those that caused significant harm to the environment. Mention could also be made of a threshold requirement for triggering the environmental impact assessment. A definition of "environmental impact assessment" should be provided either in draft guideline 1 on the use of terms or in the commentary to draft guideline 4. The commentaries could also explain

[264] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/681.

[265] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

which relevant actors were to be taken into account in the "broad public participation" process mentioned in draft guideline 4. Since multilateral financial institutions often provided for their own environmental impact assessment procedures, reference should be made in the commentaries that guideline 4 was without prejudice to additional requirements imposed by such institutions.

12. With regard to draft guideline 5 on the sustainable utilization of the atmosphere, the "finite" nature of the atmosphere should be explained, since it remained scientifically and legally somewhat controversial. The Special Rapporteur might add language from his third report, namely that "the atmosphere is a limited resource with limited assimilation capacity". It should be clarified that "utilization" of the atmosphere referred to the "use of the atmosphere" or "activities conducted in the atmosphere". The adjective "sustainable" should be defined in the commentary to draft guideline 5; similar language to that of the World Commission on Environment and Development cited in paragraph 71 of the third report could be used, namely, "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[266]

13. Draft guideline 6 on the equitable utilization of the atmosphere was based on the principle of equity, which in the current context addressed both distributive justice in allocating resources and distributive justice in allocating burdens. The Commission had already referred to the principle in several of its projects and could therefore rely on the terminology of the 1994 draft articles on the law of the non-navigational uses of international watercourses[267] – "principle of equitable and reasonable utilization" – rather than simply "principle of equity". Since the principle of equity in draft guideline 6 was of a broad and undefined character, it should be carefully explained in the commentaries. In particular, mention should be made of how States were to balance the "needs of the present" and those of "future generations" and to find and apply an "equitable global balance". The factors to be taken into account in order to achieve an equitable balance of interests set forth in the 2001 draft articles on prevention of transboundary harm from hazardous activities[268] should be included in the commentaries so as to provide clearer guidance to States.

14. With regard to draft guideline 7 on geoengineering, the term "existing international law" should be replaced with "applicable international law". However, since geoengineering was still a new concept in relation to which international norms and legal rules had not yet been developed, he agreed with others that, at the current stage, it would be inappropriate to address it within the scope of the draft guidelines. It might be sufficient to refer in the commentaries to the existence of such activities and potential scientific and legal developments.

15. Regarding the future programme of work, as the Special Rapporteur proposed dealing with the question of the interrelationship of the law of the atmosphere with other fields of international law, such as the law of the sea and international human rights law, perhaps informal meetings could be arranged between the Commission and experts in those fields in order to enhance members' knowledge and the quality of subsequent debates. He agreed with others that a dispute settlement clause would not be appropriate in the context of draft guidelines.

16. In conclusion, he recommended referring the draft guidelines, with the exception of draft guideline 7, to the Drafting Committee.

Mr. Nolte, First Vice-Chairperson, took the Chair.

17. Mr. McRAE said that he wished to commend the Special Rapporteur on his third report, his creative attempts to provide a workable framework of guidelines and his dedication to educating himself and the Commission members on the scientific aspects of the topic.

18. On the issue of the "common concern of humankind", the Special Rapporteur had pointed out that, although the expression had been rejected by the Commission at the previous session, its use had been endorsed at the 2015 Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. Some members had argued that the Commission should therefore reverse its decision, while others had drawn a distinction between the climate change context of the Paris Agreement under the United Nations Framework Convention on Climate Change and the Commission's topic of protection of the atmosphere. It had further been pointed out that a number of States in the Sixth Committee had endorsed the Commission's decision not to use the expression. The divergence between what had been said in the Sixth Committee and what had been done at the Paris Conference probably showed nothing more than that the delegates in the two forums were not the same and did not share the same perspective. The fact that different parts of government might hold different views was not an unusual phenomenon; too much should not be read into it. The lesson he had drawn from the use of the term "common concern of humankind" in the Paris Agreement under the United Nations Framework Convention on Climate Change was that it had been a mistake for the Commission to allow its actions to be guided by what it believed Governments wanted. It had rejected the term because it had been argued that States no longer wished to use it, even though there had been no real evidence for that apart from the fact of non-use. The Commission had been prepared to second-guess States and adopt the conservative approach it believed they wanted, which had turned out to be wrong. States had been much more radical in Paris than the Commission had been prepared to be – a rather disturbing role reversal. If the Commission were now to reinsert the term "common concern of humankind", States might well decide, for whatever reason, not to use it at the next environmental conference. Where would that leave the Commission?

[266] World Commission on Environment and Development, *Our Common Future*, Oxford/New York, Oxford University Press, 1987, p. 43.

[267] The draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222.

[268] The draft articles on prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm and the commentaries thereto adopted by the Commission at its fifty-third session are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98. See also General Assembly resolution 62/68 of 6 December 2007, annex.

The Paris Agreement under the United Nations Framework Convention on Climate Change had provided a lesson on how the Commission should act in the future, not guidance as to what it should do now. There might well be good reasons for reinserting the expression, but the Commission should not do so solely on the basis of its inclusion in the Paris Agreement under the United Nations Framework Convention on Climate Change. His concern about second-guessing Governments also applied to the way in which the views expressed in the Sixth Committee were used in the Commission's debates. There was a developing practice of citing what had been said in the Sixth Committee as if what Governments said should be decisive. Although an important ingredient in the Commission's consideration of a topic, the views expressed in the Sixth Committee did not generally give clear guidance; ultimately, it was for the Commission to decide on issues based on its independent expertise. After all, while it reported to the General Assembly, the Commission was not a subcommittee of the Sixth Committee.

19. With regard to the 2013 understanding, there appeared to be widely divergent views about the circumstances of its adoption – although it had been adopted by the Commission under its normal practice of decision-making by consensus – and whether the Special Rapporteur's third report violated what had been agreed. The understanding was a decision of the Commission on the scope of the topic, not some kind of constitutional document and, as such, the Commission could choose whether it wished to modify it. The Commission in its new composition would have to decide whether to continue on the basis of the understanding or whether it wished to define the scope of the topic differently. How the understanding was interpreted and whether it had been complied with was ultimately a decision for the Commission. The Special Rapporteur did not speak on behalf of the Commission, but merely provided the raw material on the basis of which the Commission decided what it wished to endorse. If members of the Commission disagreed for whatever reason with what the Special Rapporteur had proposed, there was an opportunity for them to do so in the plenary debate or in the Drafting Committee and during the final adoption of the draft articles or guidelines.

20. It was therefore not productive for members to engage in a debate on the consistency or inconsistency of the Special Rapporteur's reports with the 2013 understanding or, for that matter, to ask the Special Rapporteur to affirm that he was following that understanding. Specifically, it was unproductive to debate whether the reference to precaution in the third report violated the 2013 understanding. As had been pointed out in the debate, it was difficult to cover prevention without mentioning precaution. In any event, the Special Rapporteur had not included the concept of precaution in either the proposed preambular paragraph or the draft guidelines and had in fact stated that the precautionary principle was not recognized as customary international law. Regardless of the 2013 understanding, it was clear that the Commission had from the outset precluded the inclusion of the precautionary principle in its work on the topic and, unless it changed its mind, the Commission could not adopt a guideline that related to it. Ultimately, it was for the Commission to decide on the way that the 2013 understanding was to be applied. Castigating the Special Rapporteur for his reference to precaution on the basis of individual members' interpretations of the understanding ignored the real impact of that understanding and was not a profitable use of the Commission's time.

21. Recalling the recently revived debate over the difference between draft guidelines and draft articles, he said that the Commission did not have a consistent or coherent view of the consequences of a decision to prepare draft articles as opposed to draft guidelines, draft conclusions or draft principles. However, whatever the topic, the Commission's task remained the progressive development of international law and its codification and it should strive to accomplish that task by identifying the established international law on a given topic, the direction in which the law was developing and the principles or rules that were relevant to the particular issues within the scope of the Commission's work. In most of its work, the Commission did not, and realistically could not, establish clear-cut standards for broad application. In his third report, the Special Rapporteur had set out to do precisely what the Commission expected of him – to identify the principles of international environmental law that applied to the atmosphere whether by way of treaty or customary international law – and where nothing directly applicable existed, he had reasoned by analogy. In many respects, the protection of the atmosphere was a new topic, dealt with in part or collaterally in some agreements, but never directly or as a whole; it was also a complex topic, requiring some understanding of a phenomenon that was generally known but not necessarily in the sense that scientists understood it.

22. Turning to the individual proposals of the Special Rapporteur, he said that, while he understood the political value of the proposed preambular provision in a binding convention, he did not consider it as a matter that fell within the particular expertise of the Commission in recommending a series of guidelines. The provision did not result from the Commission's legal analysis, particularly as the Commission had decided not to deal with the question of common but differentiated treatment, and it had not analysed the legal implications of a provision on the special situation of developing countries for the protection of the atmosphere. Therefore, although the provision was in a sense impossible to disagree with, its inclusion was to some extent gratuitous. That said, he did not object to the principle *per se* and would not object to the inclusion of a reference thereto if that was the consensus.

23. It was difficult to disagree on principle with the ideas behind the draft guidelines. Yet, as many members had noted, the wording of the draft guidelines was often so general as to make their objective and the means for achieving it unclear. He proposed that the Special Rapporteur improve the language to facilitate the work of the Drafting Committee. In draft guideline 3, the fact that States should act to protect the atmosphere was almost axiomatic and whether that should be done by means of the verb "should" or by a specific reference to an obligation seemed to be a matter of personal choice. However, there should be a more specific link between the *chapeau* and subparagraphs thereunder. He proposed to reformulate the draft guideline as a single sentence, which would read:

"States have an obligation to protect the atmosphere by taking appropriate measures of due diligence to prevent atmospheric pollution and by taking appropriate measures to minimize the risk of atmospheric degradation." The elaboration of the appropriate measures and the reference to relevant rules of international law and relevant conventions, which was somewhat unclear as set out in the guidelines, might be explained in the commentaries.

24. With regard to draft guideline 4, while there was no doubt that environmental impact assessments ought to be applied to activities that could cause harm to the atmosphere, the criteria for and timing of such an assessment were not clear. Draft guideline 7 stated that environmental impact assessments were required in the case of geoengineering activities; however, that was the only such reference within the draft guidelines. He did not support the wording "all necessary measures to ensure an appropriate environmental impact assessment", as it did not provide much guidance to States; instead, he proposed that the Drafting Committee opt for language such as that used by the International Court of Justice in the cases concerning *Pulp Mills on the River Uruguay*, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, in which it had referred to "significant adverse impact" and "significant harm". Indeed, "appropriate measures" might be the right term, but "all necessary measures" seemed quite indeterminate and would depend on the explanations, if any, given in the commentary to the draft guideline.

25. In draft guidelines 5 and 6, the concept of utilization did not seem wholly appropriate in the context of the atmosphere. On the other hand, the broader point that activities that had a negative impact on the atmosphere must be conducted in a way as to ensure sustainability could not be controverted; draft guideline 5 should be revised to reflect it accordingly. With regard to draft guideline 6, while activities that had an impact on the atmosphere should take account of future generations – that was simply another aspect of sustainability – and must involve notions of fairness and equality between States, it was not clear that a reference to the term "equity" alone provided sufficient guidance. Noting the reference in the report to the development of the notion of equity in the context of maritime boundary delimitation, he said that reliance on the notion of equity in that area had led to considerable confusion, and the invocation of equity and transparency by courts and tribunals had often masked considerable subjectivity. Therefore, the Drafting Committee should search for a better way to express the ideas of fairness and equality than a simple reference to "equity".

26. With regard to draft guideline 7, he understood the concerns expressed by members to the effect that it was based on assumptions about science and technology that the Commission should not make and that it might inhibit future developments to prevent geoengineering activities because of a conclusion that such activities were in themselves harmful. He also understood the point made by Mr. Tladi that all the obligations set out in the draft guidelines should be applicable to geoengineering activities. There was, however, a broader issue: geoengineering was, in a sense, a surrogate for undertaking new activities that could have an impact on the atmosphere. It was not possible to ignore such future activities and he wondered whether the guideline might be generalized to cover all types of new activities, rather than just geoengineering, even if that one was currently the most prominent. The notion that caution and prudence should be exercised in respect of all new activities that could have a negative impact on the atmosphere should be maintained; a draft guideline that focused specifically on geoengineering was not useful in that regard. The commentaries could refer to geoengineering and other activities intended to modify atmospheric conditions as examples of a more general phenomenon, and the draft guideline could focus on any other new activities that might affect the atmosphere. The Drafting Committee would also need to consider the scope and nature of the obligations of disclosure and transparency in draft guideline 7 as it stood, and their relationship to the obligations contained in draft guidelines 3 and 4. The obligation to conduct a risk assessment would be better placed in draft guideline 4; moreover, it should be made clear that the relationship between any obligations set out in a revised draft guideline 7 should be read in accordance with draft guidelines 3 and 4.

27. In conclusion, he recommended referring all the draft guidelines to the Draft Committee and at the same time encouraged the Special Rapporteur to consider making some revisions in the light of the Commission's debate on the topic for consideration by the Drafting Committee.

28. Mr. HMOUD said that he agreed that the Commission should revisit the 2013 understanding, if necessary. Until such time, however, it was important to abide by the principles adopted. The Commission should therefore take a careful approach to issues such as the non-interference with relevant political negotiations and the scope of the topic, including the precautionary principle. That was especially important with regard to draft guideline 2. Similarly, the question of revisiting the language regarding the concept of the "common concern of humankind" adopted at the Commission's sixty-seventh session required serious consideration, given the potential political repercussions.

29. The CHAIRPERSON said that he agreed that the Commission should observe its 2013 understanding until such time as it decided to change it. In any case, the Commission's debate on the protection of the atmosphere reflected members' different interpretations of the understanding, including with respect to the Paris Agreement under the United Nations Framework Convention on Climate Change. He was confident that the Special Rapporteur would comment on such matters in his summing up of the debate and would not draw any undue conclusions.

30. Mr. VÁZQUEZ-BERMÚDEZ expressed appreciation for the Special Rapporteur's excellent third report, which contained an in-depth analysis of the material relevant to the topic as well as for his organization of a second dialogue with scientists, which had contributed usefully to the Commission's work. He noted that the Sixth Committee had responded favourably overall to the Commission's work on the topic thus far. He said that the Special Rapporteur's task was far from easy, given not only the

complexities inherent in the topic, but also the need to hew to the Commission's 2013 understanding. That was clearly not the Commission's standard practice; its guidance to any given Special Rapporteur was not typically given in advance, but rather on the basis of the Special Rapporteur's proposals in his or her reports. Nevertheless, the Commission had adopted an understanding for the current topic and the Special Rapporteur must endeavour to heed it. So far he had succeeded in doing so, even to the extent of incorporating the elements of the understanding in the draft preamble and draft guidelines on the topic. Once the draft guidelines had been adopted on second reading, the draft preamble would need to be revised, since it would no longer make sense, for instance, to include a reference to the requirement of the Commission's work to proceed in a manner so as not to interfere with relevant political negotiations, as set out in the 2013 understanding. That said, the decision not to include in the draft guidelines references to, for instance, the concept of "common but differentiated responsibilities" and the precautionary principle, had been taken, not on the grounds that they had not attained the status of a principle of international law or that they were irrelevant to the topic, but because the Commission had decided not to deal with them in the context of the topic, in line with the 2013 understanding. He supported the proposed fourth draft preambular paragraph, which simply recognized a *de facto* situation that was relevant to the topic at hand. He likewise supported adding a reference to "the special needs of developing countries". It was important for the Commission to seriously examine the Special Rapporteur's suggestion that the Commission might wish to consider anew the inclusion of the expression "common concern of humankind" in the draft preamble. That concept, contained in instruments such as the United Nations Framework Convention on Climate Change and the Convention on biological diversity and, more recently, in the Paris Agreement under the United Nations Framework Convention on Climate Change, transcended individual States' interests and concerns and related to critical situations requiring urgent attention and therefore concerted collective action. In any event, while the legal implications of such a notion were far from clear, it would appear useful to include a reference to situations that affected the international community as a whole.

31. The Special Rapporteur's decision at the Commission's sixty-seventh session not to request the referral of the previous draft guideline 4 to the Drafting Committee had been a wise one, as it had allowed him to provide a more in-depth analysis of the support for and scope of such obligations. His decision in the current report to differentiate in draft guideline 3 between two dimensions of the protection of the atmosphere was also judicious and consistent with the terminology adopted by the Commission on atmospheric pollution and degradation. The Special Rapporteur provided adequate support for the obligation to prevent transboundary atmospheric pollution on the basis of the maxim *sic utere tuo ut alienum non laedas*, which had been affirmed in international instruments and international case law. As a result, the application of that principle was no longer limited to the obligation to prevent transboundary atmospheric pollution in the context of adjacent States sharing a common territorial border, meaning a strictly transboundary context, but now extended to include the environment of other States in general and areas beyond the limits of their national jurisdiction. The International Court of Justice had confirmed the wider scope of the principle in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, as well as in its judgments in the *Gabčíkovo–Nagymaros Project* and *Pulp Mills on the River Uruguay* cases. In the draft preamble, as adopted by the Commission, it had been recognized that the atmosphere was essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems.[269] The atmosphere was an important part of the global environment, whose protection and preservation was in the interest of States and humankind as a whole, precisely because it was necessary in order to sustain life on Earth.

32. In the context of the atmosphere, as demonstrated by the Special Rapporteur, the *sic utere tuo ut alienum non laedas* principle implied the obligation of States to protect the atmosphere from transboundary atmospheric pollution and atmospheric degradation. That obligation was of a general nature and required the adoption of preventive measures on the basis of due diligence, namely the obligation to make best possible efforts in accordance with the capabilities of the State controlling the activities, prior to starting such activities and throughout the time that they were carried out, so as to avoid harmful effects. As the Commission had indicated in its articles on the responsibility of States for internationally wrongful acts,[270] obligations of prevention were usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event would not occur. Referring to the *Trail Smelter* arbitration, the Special Rapporteur asserted that the tribunal in question had set a higher standard of proof for transboundary atmospheric pollution, but rightly added that the special context and circumstances of that case should not be overlooked. Since that arbitration in 1941, there had been increasingly less tolerance for environmental harm, and consequently a lowering of the threshold of the extent of environmental harm before it was considered as such. He supported the referral of draft guideline 3 to the Drafting Committee, without prejudice to any formal changes the Committee might wish to make. For instance, it was unnecessary and even inconvenient for the *chapeau* to include the word "transboundary" to describe atmospheric pollution, as "atmospheric pollution" was already defined in draft guideline 1 (*b*)[271] for the purposes of the draft guidelines as a whole. Furthermore, atmospheric pollution and atmospheric degradation were two sides of the same coin, involving actions and consequences. In that sense, it did not seem appropriate to refer specifically to international law in draft guideline 3 (*a*) and specifically to relevant conventions in draft guideline 3 (*b*). It did not seem useful to set out the obligation to adopt appropriate measures to minimize the risk of atmospheric degradation only in

[269] See *Yearbook ... 2015*, vol. II (Part Two), pp. 19–20.

[270] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[271] See *Yearbook ... 2015*, vol. II (Part Two), pp. 21–23.

accordance with relevant conventions, without taking into account international law already in existence or yet to be developed.

33. With regard to draft guideline 4, environmental impact assessments were an indispensable means for States to obtain scientifically reliable information on the potential environmental effects of their activities or of the activities they authorized within their jurisdictions. Referring to paragraphs 41, 55 and 56 of the report under consideration, he said that it was clear, on the basis of decisions taken by the International Court of Justice and other international authorities, that States were expected to comply with the obligation to carry out environmental impact assessments, where appropriate, under international treaty law and customary international law. The third report contained much information on the incorporation of environmental impact assessments into the legislation of most States and on their widespread adoption in various binding and non-binding international agreements, as well as case law. The Special Rapporteur's analysis supported the notion that such an obligation should be considered in a transboundary context, on the basis of customary international law – a context that included both atmospheric pollution and atmospheric degradation. Furthermore, the obligation to carry out an environmental impact assessment was tied to the risk that a given planned activity might have considerable adverse effects.

34. With regard to draft guideline 5, the fact that sustainable development was referred to as a principle in the United Nations Framework Convention on Climate Change and as an objective in the Marrakesh Agreement Establishing the World Trade Organization did not make it any less normative in character, despite the Special Rapporteur's suggestion to the contrary in paragraph 64 of his third report. The International Court of Justice, in its judgment in the *Gabčíkovo–Nagymaros Project* case, had stated that the "need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development" (para. 140 of the judgment). It could be argued that the Court had implicitly demonstrated the normative character of sustainable development in that case, since as a result of its decision, the parties together would need to look afresh at the effects on the environment of the Gabčíkovo power plant. Sustainable development could be seen as a principle that guided States' decision; its definition could be based on principles 3 and 4 of the Rio Declaration on Environment and Development. Furthermore, the concept of sustainable development had given rise to principles such as the sustainable use of natural resources and the sustainable use of components of biological diversity, as contained in articles 2 and 10 of the Convention on biological diversity. Sustainable utilization must be used in the context of the environment in order to have normative value. In that sense, draft guideline 5 was satisfactory in that it prescribed that the utilization of the atmosphere be undertaken in a sustainable manner. However, the word "should" should be replaced with the word "shall" in paragraph 1. Clearly, "sustainable utilization" in the current context should not be understood in the traditional sense of the term, as it might be in relation to mineral or other natural resources, but rather, whatever the activity concerned, it should be understood as not contributing to atmospheric pollution or degradation, as defined in draft guideline 1. The fact that the atmosphere had a limited capacity for absorbing pollution, and therefore for maintaining a certain level of quality, meant that atmospheric pollution and atmospheric degradation had significant adverse effects that ultimately endangered human life and health and the Earth's natural environment. It was because of the atmosphere's limited capacity that it was necessary to ensure its sustainable utilization. He supported paragraph 2 of the draft guideline, which largely reflected the judgment of the International Court of Justice in the *Gabčíkovo–Nagymaros Project* case.

35. With regard to draft guideline 6, equity, as a corollary of sustainable development, was another major principle in international environmental law and had both intra- and intergenerational dimensions. The first dimension was related to the need to take into account the economic and technological differences between States in the conservation and management of global resources, and their equitable exploitation; the second referred mainly to the need to ensure the protection of the atmosphere for the benefit of future generations. In several cases, the International Court of Justice had referred to both those dimensions. He supported the application of the principle of equity in terms of utilization of the atmosphere as a substantial component of the global environment.

36. With regard to draft guideline 7, he shared the other members' concern that the current draft might appear to legitimize States' use of geoengineering, whose environmental consequences were potentially negative or even catastrophic. However, such activities seemed to be a reality and therefore should be carried out in compliance with strict parameters to avoid any adverse effects on the environment, especially if they proved to be irreversible. Draft guideline 7 referred to important aspects such as the need for prudence and caution; the obligation to conduct such activities in a fully disclosed, transparent manner and in accordance with existing international law; and the requirement of environmental impact assessments. He proposed that the draft guideline should not refer specifically to geoengineering, but instead to all activities designed to intentionally modify the atmosphere. Given the possible effects worldwide of such activities – which could in turn result in atmospheric degradation – the word "should" in the draft guideline should be replaced with the word "shall".

37. He supported the proposed programme of work, but suggested that, should the first reading be completed in 2018, the second reading take place in 2020, in keeping with the Commission's general practice, in order to provide States with sufficient time to review the draft guidelines.

38. Ms. JACOBSSON said that she wished to thank the Special Rapporteur for his well-researched third report and for organizing another valuable meeting with scientists at the beginning of the Commission's session. Cooperation with technical and scientific experts had been endorsed by the Sixth Committee and was particularly welcome when addressing topics such as the protection of the atmosphere.

39. Regarding the Special Rapporteur's suggestion that the Commission might wish to consider reintroducing the concept of the "common concern of humankind" in the light of its inclusion in the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change, she recalled that, at the Commission's previous session, she had stated that she had no problem with the affirmation in the then draft guideline 3 that the degradation of the atmosphere was a common concern of humankind, provided that the Commission took it to be a general statement, devoid of legal effects. However, bearing in mind the (highly unlikely) legal consequences that might arise from the combination of the words "common concern" and "humankind", she had underlined that the Commission needed to tread carefully. During subsequent discussions within the Drafting Committee, it had been decided that the expression "common concern of mankind" should be replaced with "pressing concern of the international community as a whole", to appear in a preamble to the draft guidelines rather than in the draft guidelines themselves. She was of the view that the Commission should retain that formulation.

40. She welcomed the Special Rapporteur's decision to differentiate, in draft guideline 3, between two dimensions of the obligation of States to protect the atmosphere, namely to prevent transboundary atmospheric pollution, on the one hand, and to minimize the risk of global atmospheric degradation, on the other.

41. In general terms, she supported draft guideline 4 on environmental impact assessments. As had been pointed out in the literature, environmental impact assessment was a procedure to be undertaken; it did not impose substantive environmental standards or indicate what results were to be achieved. Nevertheless, the obligation to conduct such assessments had become a part of both national and international law, notably in the 1991 Convention on environmental impact assessment in a transboundary context. There was still disagreement among lawyers as to whether an obligation to undertake environmental impact assessments with respect to possible risks to the atmosphere already existed. However, the International Court of Justice had widened the scope of the obligation to undertake environmental impact assessments when, in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, it had ruled that environmental impact assessments had to be carried out in connection with all potentially harmful activities, not only in the context of industrial activities, to which reference had been made by the Court in the *Pulp Mills on the River Uruguay* case. Given that the Commission was developing guidelines, rather than legally binding rules, and that environmental impact assessments were procedures, not substantive obligations, it was appropriate that reference be made to such assessments in draft guideline 4. That said, consideration could be given to making the wording of the guideline more concise and to emphasizing the procedural nature of environmental impact assessments.

42. Regarding draft guideline 5, she shared the view of the Special Rapporteur that there seemed to be a definite trend toward recognizing the character of sustainable development as an emerging principle, assuming that he meant a legal and not a political principle. She recalled that she had addressed the nature of the concept of sustainable development in her preliminary report on the protection of the environment in relation to armed conflicts[272] and had concluded that, although there was a trend in that direction, sustainable development had not yet been recognized as a legal principle. She noted that the Special Rapporteur did not refer to the concept of "sustainable development" in the draft guideline, but used the words "sustainable utilization". With respect to the wording of draft guideline 5, she was not convinced that it was possible to refer to the "finite nature" of the atmosphere or that the expression "utilization of the atmosphere" was the right expression. She therefore had doubts as to whether the draft guideline served a practical purpose. However, since it was important to interpret the proposed guidelines in relation to each other, it would be premature to decide not to send it to the Drafting Committee.

43. She welcomed the inclusion of draft guideline 7, on geoengineering, and found the argument that the Commission should refrain from addressing the issue owing to a lack of expertise unpersuasive for two reasons. First, the guideline was formulated in general terms only; and second, international lawyers had always been required to address factual developments and could not shy away from an issue because of a lack of knowledge. The scientific experts who had attended meetings with the Commission had alerted it to the pros and cons of geoengineering. She failed to see why a cautiously formulated guideline on the issue could not be included in the topic. The Convention on the prohibition of military or any other hostile use of environmental modification techniques, for example, contained sweeping formulations about environmental modification techniques, despite the fact that those who negotiated it could hardly have claimed to be experts on the matter.

44. In conclusion, she recommended that all the draft guidelines be referred to the Drafting Committee.

45. Mr. LARABA said that he wished to thank the Special Rapporteur for his concise third report, in which he sought to strike a balance between scientific and legal matters, and for organizing another informative meeting with scientists. He recommended that draft guidelines 3, 4, 5 and 6 and the fourth draft preambular paragraph be referred to the Drafting Committee, taking into account the remarks he would make.

46. Regarding draft guideline 3, the Special Rapporteur had stated in paragraph 35 of his third report that the *sic utere tuo ut alienum non laedas* principle had two distinct dimensions, one in a transboundary context and the other in the global context, and had cited in that regard the judgment of the International Court of Justice in the *Pulp Mills on the River Uruguay* case, which had distinguished two different forms of obligations flowing from the principle. At the same time, the Special Rapporteur had referred readers to paragraph 12 of his third report. It was not clear, however, why he had done so, since paragraph 12 contained no mention of the *Pulp Mills on*

[272] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/674.

the River Uruguay case. Consequently, it was difficult to understand on what basis the distinction in draft guideline 3 between transboundary atmospheric pollution and global atmospheric degradation had been made.

47. Also in paragraph 35 of his third report, the Special Rapporteur had stated that, in its judgment in the *Pulp Mills on the River Uruguay* case, the Court had interpreted the *sic utere tuo ut alienum non laedas* principle in a broader sense than that given to it in the *Trail Smelter* arbitration, citing paragraph 193 of the judgment in support of his claim. However, it would have been helpful if the Special Rapporteur had further developed his analysis of paragraph 193, including by taking into account paragraph 194 of the same judgment, particularly in respect of his assertion that the scope of the *sic utere tuo ut alienum non laedas* principle had been expanded to encompass a broader geographical context.

48. The overall logic and coherence of draft guideline 3 was questionable. Strictly speaking, its title, "Obligation of States to protect the atmosphere", covered only the first sentence of the guideline and, moreover, it was identical to the title of chapter I of the third report, which dealt with both draft guideline 3 and draft guideline 4. In sections A and B of chapter I, the Special Rapporteur had done little to substantiate the proposition contained in the first sentence of draft guideline 3, perhaps because he considered that the issue had already been dealt with in paragraphs 52 to 57 of his second report on the protection of the atmosphere.[273] If that were the case, it would have been better to say so more explicitly, particularly as the wording of the first sentence of draft guideline 3 was not exactly the same as that of draft guideline 4 as proposed in the second report. As had been pointed out by other members of the Commission, there was no link between the obligation to protect the atmosphere set out in the first sentence of draft guideline 3 and subparagraphs (*a*) and (*b*), which might give the impression that the three propositions contained in those provisions were independent of one another. It would be helpful if the Special Rapporteur could explain the relationship between those provisions. While paragraphs 35 to 38 of his third report did not provide a compelling justification for the prescriptive character of subparagraph (*b*), the Special Rapporteur had justified the prescriptive nature of subparagraph (*a*), despite the fact that his arguments relating to knowledge or foreseeability, burden of proof and standard of proof, and jurisdiction and control were not entirely conclusive and were not reflected at all in the text of the subparagraph.

49. Regarding draft guideline 4, he agreed with the Special Rapporteur about the need to address the question, considered in paragraph 60 of the third report, of whether the requirement to conduct an environmental impact assessment applied to projects intended to have significant effects on the global atmosphere, such as geoengineering activities, in the same way as it did in transboundary contexts. The Special Rapporteur's reasoning for making the leap from a transboundary context to a global one was condensed into one sentence, in which he submitted that geoengineering activities, for example, were likely to carry a more extensive risk of widespread, long-term and severe damage than projects causing transboundary harm and that, therefore, the same rules should *a fortiori* be applied to them. The Special Rapporteur's decision to use the word "should" in relation to the application of the rules in a global context was prudent; such prudence was called for, given that the issue of geoengineering activities was the subject of debate within the Commission. Draft guideline 4, in which more prescriptive language was used, would benefit from being redrafted with the same degree of prudence.

50. As to draft guidelines 5 and 6, which were drafted cautiously, it could be left to the Drafting Committee to address such issues as the appropriateness of transposing the rules and principles relating to the notion of sustainability and that of equity in international law to the protection of the atmosphere, the relationship between paragraphs 1 and 2 of draft guideline 5, and the applicability of the judicial decisions relating to maritime delimitation mentioned in paragraph 77 of the third report to the equitable utilization of the atmosphere.

51. He had misgivings regarding the fourth draft preambular paragraph, not from a substantive point of view, but rather in connection with the Commission's 2013 understanding, in particular concerning the exclusion from the scope of the topic of the notion of "common but differentiated responsibilities". While the content of the understanding was not as clear as it might seem, what was clear was that the understanding should be respected. However, his reservations regarding the fourth draft preambular paragraph did not prevent him from recommending its referral to the Drafting Committee.

52. Mr. CANDIOTI said that he wished to thank the Special Rapporteur for his third report and for establishing a dialogue with the scientific community, whose input was crucial in ensuring that the Commission's draft guidelines were solidly based on scientific evidence. He supported all the draft guidelines proposed by the Special Rapporteur and the proposal to mention "the special situation of developing countries" in the preamble. He noted that the preamble was still in its embryonic stages and its content would require further modification in due course. He also agreed with the inclusion, in the revised third draft preambular paragraph circulated in the meeting room, of the phrase "common concern of humankind", which was in more widespread use than the expression "pressing concern of the international community as a whole".

53. In his view, the draft guidelines proposed by the Special Rapporteur should be formulated as guiding principles and, consequently, the word "should" was to be avoided in favour of a more normative formulation. The wording of draft guideline 3 could be simplified, while a definition of geoengineering, which was the subject of draft guideline 7, could usefully be added to draft guideline 1, on the use of terms. In draft guideline 6, it would be helpful to elaborate on the principle of "equity", perhaps by providing an illustrative list of factors for States to bear in mind with a view to preserving the atmosphere.

54. Lastly, the 2013 understanding concerning the scope of the topic was not set in stone and could be altered or

[273] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/681, pp. 207–209.

abandoned, as appropriate. It would be for the Commission in its new composition to consider afresh the absurd conditions imposed on the Special Rapporteur.

55. Mr. MURASE (Special Rapporteur), summing up the discussion on his third report, said that he wished to thank all those who had taken part in the debate for their helpful comments, suggestions and constructive criticisms, which he would certainly take into account in the preparation of the fourth report, were he to be re-elected to the Commission. As members had found the informal meeting with scientists and experts extremely useful, it would be worthwhile, in view of the planned focus of the fourth report on the interrelationship between the protection of the atmosphere and the law of the sea, to hold a similar meeting the following year on the linkages between the atmosphere and the oceans.

56. A wide range of opinions had been expressed regarding the 2013 understanding; for his part, he could only say that he had complied with, and remained faithful to, the understanding. The "without prejudice" clause had been inserted into the understanding to allow the Commission to deal with common but differentiated responsibilities; consequently, he had considered it his duty to refer to that concept in his third report. As he had stressed during the drafting of the understanding, the precautionary principle, as a legal principle, had a meaning and status in international law distinct from that of precautionary measures or approaches. In any event, as he had dealt with neither common but differentiated responsibilities nor precaution in the draft guidelines, the issue of compatibility with the understanding did not arise.

57. With respect to the annex, he had originally prepared a single text with the new proposed guidelines underlined, but that format had been rejected by the editors. He would, in any future report, produce one annex with the draft guidelines that had already been adopted and a second containing the new proposed guidelines. His intention in including "settlement of disputes" in the future workplan had been not to draft a set of dispute settlement clauses, but to highlight some unique features of environmental disputes relating to the atmosphere, which tended to be fact-intensive and science-heavy. The issue of burden of proof would be addressed in the fifth report in 2018. He agreed with Sir Michael that there would have to be a good reason for the Commission not to wait for a year before proceeding to the second reading of the draft guidelines.

58. Many members had expressed support for draft guideline 3, with some considering it an improvement on the previous year's proposal. It had been suggested that the relationship between the *chapeau* and the subparagraphs, as well as that between subparagraphs (*a*) and (*b*), be clarified. His intention had been that the *chapeau* set out the general principle, while subparagraphs (*a*) and (*b*) specified the meaning of the principle in the contexts of transboundary atmospheric pollution and global atmospheric degradation, respectively. As to the relationship between the subparagraphs, subparagraph (*a*) was concerned with the obligation to protect the atmosphere under customary international law and treaty law, while subparagraph (*b*) dealt with the obligation under the relevant conventions. That said, he agreed with Mr. McRae that it would be a good idea to combine the three sentences into a revised draft guideline 3. He therefore wished to propose that draft guideline 3 be amended to read: "States have the obligation to protect the atmosphere by taking appropriate measures of due diligence in accordance with international law to prevent transboundary atmospheric pollution and to minimize the risk of global atmospheric degradation." Although some members had noted that the language of the draft guideline, as proposed in his third report, was vague, he agreed with Mr. Nolte that it might sometimes be appropriate to avoid specific language when providing for general principles. Clarification of the meaning of the draft guideline would be given in the commentary.

59. Regarding draft guideline 4, most members had agreed that States had the obligation to undertake appropriate environmental impact assessments in relation to transboundary atmospheric pollution. He welcomed Mr. Tladi's suggestion that practical guidance be provided to States on how to conduct such assessments, along the lines of that offered in the World Bank's *Operational Manual*.[274] Several members had suggested that the draft guideline clarify the circumstances in which States' obligation to carry out an environmental impact assessment was triggered. In the light of that suggestion, he would like to propose that the guideline be revised to read: "States have the obligation to undertake an appropriate environmental impact assessment on proposed activities which may cause significant adverse impact on the atmosphere. It should be conducted in a transparent manner with broad public participation." Mr. Forteau and Mr. Murphy had expressed concern that the inclusion of a reference to broad public participation in the draft guideline could be read to require that a State must allow participation by other States and nationals of other States in its environmental impact assessments that did not have a transnational dimension. However, only those activities with a transnational dimension fell within the scope of the draft guideline; in any event, the guideline simply recommended that States allow broad public participation and did not create a legal obligation to do so.

60. There had been general support for the inclusion of the concept of sustainable utilization of the atmosphere in draft guideline 5. As had been recommended by some members, the concept would be further clarified and elaborated upon in the commentary. As to the question that had been raised about the appropriateness of the reference in the draft guideline to the finite nature of the atmosphere, he said that the atmosphere was a limited resource because, as he had pointed out in his second and third reports, its quality and its capacity to assimilate pollutants could be reduced by its exploitation. That point had been reflected in a commentary to the preamble, adopted the previous year, which stated that "[i]t must be borne in mind that the atmosphere is a limited resource with limited assimilation capacity".[275]

[274] See World Bank, "OP 4.01 – Environmental Assessment", *Operational Manual*, January 1999. Available from the World Bank's website: https://policies.worldbank.org/en/policies/all/ppfdetail/1565.

[275] See *Yearbook ... 2015*, vol. II (Part Two), pp. 19–20 (para. (2) of the commentary to the draft preamble).

61. As to draft guideline 6, while Mr. Park had expressed doubt concerning the relevance to the topic of the concept of equitable utilization of the atmosphere, many other members had welcomed its inclusion. Mr. Hmoud, Mr. Murphy and Sir Michael had expressed concern that the meaning of "equity" in the draft guideline was not sufficiently clear. Their concern could be addressed by refining the text of the guideline and clarifying its meaning in the commentary. In that regard, he welcomed Mr. Murphy's suggestion that the phrase "on the basis of the principle of equity" be replaced with "in a reasonable and equitable manner". He therefore proposed amending draft guideline 6 to read: "States should utilize the atmosphere in a reasonable and equitable manner and for the benefit of present and future generations of humankind." Although Mr. Forteau had suggested that the content of draft guidelines 5 and 6 be dealt with in the preamble rather than the draft guidelines themselves, it was perhaps preferable not to place everything controversial in the preamble.

62. Some members had considered draft guideline 7, which called for prudence and caution in geoengineering activities, to be important, while others had expressed reservations about making a separate guideline on the issue in the light of the uncertainties surrounding such activities. It was, however, because of those very uncertainties that the guideline cautioned against conducting such activities without a careful prior assessment of their potential impact on the environment. The guideline should also reflect the emerging rules of international law in that field. While, as some members had noted, geoengineering was a highly technical issue, the Commission was primarily concerned with assessing its legal aspects in the light of applicable international law. Furthermore, the draft guideline sought to lay out basic principles, without creating any legal obligations regarding geoengineering activities. Some concern had been expressed that the term was not sufficiently clear and should be either dropped or given a legal definition. He therefore proposed moving draft guideline 7 to draft guideline 5 on sustainable utilization of the atmosphere, as a new paragraph 3 and without referring to geoengineering as such. The new paragraph 3 of draft guideline 5 would then read: "Any activities intended to modify conditions of the atmosphere should be conducted with prudence and caution in a fully disclosed, transparent manner and in accordance with existing international law. Environmental impact assessments are required for such activities."

63. The phrase "the special situation of developing countries" in the fourth draft preambular paragraph had been taken from the preamble to the 2008 articles on the law of transboundary aquifers.[276] While some members had considered that such language was not in line with the current approach to atmospheric pollution and atmospheric degradation, others had argued persuasively that there was a continuing need to take into account the special situation of developing countries. In that regard, he welcomed the proposal made by Mr. Forteau and Mr. Murphy to mention the circumstances of each country, thus echoing the Paris Agreement under the United Nations Framework Convention on Climate Change. With that in mind, he proposed revising the wording of the fourth draft preambular paragraph to read: "Emphasizing the need to take into account the special situation of developing countries in the light of different national circumstances".

64. A large number of members had supported his suggestion that the Commission reconsider its decision adopted the previous year to use the term "pressing concern of the international community as a whole" rather than "common concern of humanity". The fact that the Paris Agreement under the United Nations Framework Convention on Climate Change referred to the "common concern of humankind" clearly suggested that States had not abandoned the concept. While some members had considered that the context of the Paris Agreement under the United Nations Framework Convention on Climate Change was different from that of the present project, the atmosphere and climate change were inseparable, as Mr. Nolte had pointed out; reconsideration of the decision was therefore warranted. He proposed that the third draft preambular paragraph be amended to read: "Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a common concern of humankind".

65. There had been general support for referring all the draft guidelines and the fourth draft preambular paragraph to the Drafting Committee. He had taken note of the preference expressed by Mr. Murphy, Mr. Tladi and Sir Michael not to send draft guideline 7 to the Committee. However, as he had indicated earlier, he was of the view that their concerns in that regard could be addressed by the Committee within the context of draft guideline 5. While Mr. Murphy had not been in favour of sending the fourth draft preambular paragraph to the Drafting Committee, the changes he had proposed could be used to improve its wording. He therefore requested that all the draft guidelines and the new paragraphs of the draft preamble, as proposed in his third report and as revised in his new proposal, be referred to the Drafting Committee.

66. Mr. FORTEAU asked whether the Special Rapporteur was proposing that the third draft preambular paragraph, which had been adopted, together with a commentary, at the previous session, also be sent to the Drafting Committee and whether, if the paragraph were amended, a new commentary to the preamble as a whole would have to be adopted. He raised the matter since it was his understanding that the Commission had settled the question the previous year, given that, when deciding on the formulation to be used, it had already taken into account the fact that the 1992 United Nations Framework Convention on Climate Change stated that climate change was a common concern of humankind. He would therefore be grateful if the Special Rapporteur could clarify whether he was proposing that the Commission should modify the approach that it had adopted at the previous session and adopt a new draft preamble along with a new commentary thereto. In his view, it would be particularly unfortunate if the Commission were to proceed in that manner, since it would be sending out, from one year to the next, conflicting messages to States.

[276] The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

67. Mr. MURASE (Special Rapporteur) said that he was proposing that the third draft preambular paragraph be sent to the Drafting Committee and that the phrase "pressing concern of the international community as a whole" be replaced with "common concern of humankind". He was proposing that change in wording in the light of the adoption of the Paris Agreement under the United Nations Framework Convention on Climate Change; the change to the wording would entail an amendment of the commentaries.

68. Mr. MURPHY said that it was his understanding that it was the Commission's usual practice to refer to the Drafting Committee draft texts that had been proposed in a report and debated by the Commission. While he had no problem with referring to the Committee the proposals contained in the Special Rapporteur's third report, he was concerned that it was being asked at the current juncture to approve texts that it had not debated and that might or might not reflect the views of the plenary. He would prefer that only the proposals contained in the Special Rapporteur's third report be referred to the Drafting Committee, which could subsequently take into account any recommendations that the Special Rapporteur might have. Regarding the proposed change to the wording of the third draft preambular paragraph, the Commission had decided the previous year not to include the term "common concern of humankind" because of concerns about the highly contested nature of the term and the fact that its precise meaning would be difficult to explain. Those concerns had not changed.

69. Mr. MURASE (Special Rapporteur) said that he had followed the previous year's practice in circulating his proposed amendments; he had no problem, however, with the original proposals being referred to the Drafting Committee.

70. Mr. HMOUD said that he was against sending the proposed revised version of the third draft preambular paragraph to the Drafting Committee for the reasons that he had given during the plenary debate. At its previous session, the Commission had decided against the inclusion of a reference to "common concern of humankind" because of the legal implications that would arise therefrom, in particular in respect of obligations *erga omnes*. During discussions on the issue in the Sixth Committee in November 2015, at the time the Paris Agreement under the United Nations Framework Convention on Climate Change was being negotiated, most States had opposed any such reference.

71. Sir Michael WOOD said that the procedural position was quite simple: the Commission should agree to refer all the draft guidelines and the preambular paragraph, as proposed in the third report, to the Drafting Committee. The Special Rapporteur could then raise his proposed amendments in that context.

72. Mr. CANDIOTI said that it was not usual practice to draft a preamble before completing the operative part of a project. The Commission had stated in paragraph 53 of the report on its work at its sixty-seventh session[277] that some other paragraphs might be added to the preamble and that the order of the paragraphs might be coordinated at a later stage. It had further stated in footnote 20 of that report that the terminology and location of the fourth preambular paragraph would be revisited at a later stage in the Commission's work on the topic. In order to avoid repeated discussion on fragmented parts of the text, the Drafting Committee and the Special Rapporteur should delay consideration of the preamble until the Commission had a clearer idea of the draft guidelines as a whole.

73. Mr. PETRIČ said that he fully supported Mr. Candioti's suggestion. Although there might well be good reasons for changing the preamble, he did not consider that it was necessary to do so at the present juncture.

74. The CHAIRPERSON said that the Commission was master of its own procedure and, as such, could refer matters to the Drafting Committee even if they had not been formally proposed by the Special Rapporteur in the report under discussion. However, an extraordinary procedure of that kind should be undertaken very carefully and without undue haste. His sense was that the Commission should not send the revised third draft preambular paragraph to the Drafting Committee, but that it should authorize the Committee to reflect on the matter; once the Drafting Committee had completed its work, the plenary could take a decision on what the Commission's report on its work at the current session should say in that regard.

75. Sir Michael WOOD said that he would be in favour of the referral of all the draft guidelines and the draft preambular paragraph, as set out in the third report, to the Drafting Committee.

76. Mr. HMOUD said that he supported the referral to the Drafting Committee of the draft texts, as proposed in the Special Rapporteur's third report; he was not in favour of referring to the Committee the proposed revised version of the third draft preambular paragraph.

77. Mr. McRAE said that he had no problem with the suggestions made by Mr. Hmoud and Sir Michael, provided that it was understood that the issue of the third draft preambular paragraph remained open and that it could be discussed again when the preamble as a whole was considered in plenary.

78. Sir Michael WOOD said that nothing was final until a text was adopted on second reading. The third preambular paragraph had been discussed at great length the previous year and adopted with commentaries. While it could be discussed again in the Drafting Committee, the plenary should refer to the Committee only those texts proposed in the third report.

79. Mr. FORTEAU said that he agreed with Mr. Hmoud and was opposed to undoing something that had been completed the previous year. There would be ample opportunity during the first reading to review any draft text and consider any necessary adaptations, in the light of any developments that had occurred since taking up the topic.

[277] See *Yearbook ... 2015*, vol. II (Part Two), pp. 18–19.

80. Mr. CANDIOTI said that he agreed with Sir Michael's proposal. The Drafting Committee had stated the previous year that some parts of the preamble were provisional; the Commission should continue to move forward on that basis.

81. Mr. MURASE (Special Rapporteur) said that he endorsed Sir Michael's suggestion.

82. The CHAIRPERSON, speaking in his personal capacity, said that he welcomed the emerging consensus with respect to the proposal that the Commission refer the draft guidelines, as proposed in the third report, to the Drafting Committee, on the understanding that other matters might be raised in the Drafting Committee; there was no need to make a general practice statement.

83. Mr. HMOUD said that the proposals contained in the third report should be forwarded to the Drafting Committee without any qualification or understanding.

84. The CHAIRPERSON said that he took it that the Commission wished to refer draft guidelines 3, 4, 5, 6 and 7, together with the fourth draft preambular paragraph, as proposed in the third report, to the Drafting Committee.

It was so decided.

Organization of the work of the session (*continued*)*

[Agenda item 1]

85. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of protection of the atmosphere was composed of Mr. Forteau, Mr. Hmoud, Mr. Kittichaisaree, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Saboia, Mr. Vázquez-Bermúdez, Sir Michael Wood, together with Mr. Murase (Special Rapporteur) and Mr. Park, *ex officio*.

The meeting rose at 1.15 pm.

3312th MEETING

Thursday, 9 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)**

[Agenda item 9]

Report of the Drafting Committee

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the report of the Drafting Committee on the topic "Crimes against humanity" (A/CN.4/L.873).

2. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee had devoted eight meetings, from 24 May to 2 June 2016, to its consideration of the topic of crimes against humanity and had examined the six draft articles initially proposed by the Special Rapporteur in his second report (A/CN.4/690), together with the reformulations he had presented in response to the comments and concerns expressed in the plenary. At the current session, the Drafting Committee had provisionally adopted six draft articles on the topic.

3. He wished to pay tribute to the Special Rapporteur, whose guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Drafting Committee for their active participation and valuable contributions, as well as the secretariat for its invaluable assistance.

4. Draft article 5, entitled "Criminalization under national law" as proposed by the Special Rapporteur in his second report, set out several important obligations of each State relating to the establishment of crimes against humanity as offences under its criminal law. In addition to obliging the State to regard such crimes as offences under its criminal law, the draft article addressed the associated modes of liability, the responsibility of superiors for such crimes, the fact that the orders of a Government or of a superior did not exclude criminal responsibility, the inapplicability of a statute of limitations for crimes against humanity, and the issue of penalties. Those issues were addressed in turn in each of the draft article's six paragraphs.

5. Paragraph 1 read: "Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law." That provision had not been included in the draft article initially proposed by the Special Rapporteur in his second report. He recalled that, in the plenary debate, it had been proposed that a link be established between the State's obligation to make crimes against humanity an offence under its national law and the definition of such crimes set out in paragraphs 1 to 3 of draft article 5. The members of the Drafting Committee had shared the view that the obligation of criminalization under national law implied that the State should not only take account of the various modes of criminal responsibility in its legislation, but also expressly make "crimes against humanity", as such, offences under criminal law.

* Resumed from the 3307th meeting.

** Resumed from the 3301st meeting.

6. A similar approach had been followed in various existing treaties in relation to the obligation to criminalize conduct in national law, such as in article 4 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment and in article 4 of the International Convention for the Protection of All Persons from Enforced Disappearance, which had served as the model for paragraph 1.

7. Draft article 5, paragraph 2, provided:

> "Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:
>
> "(*a*) committing a crime against humanity,
>
> "(*b*) attempting to commit such a crime; and
>
> "(*c*) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime."

8. The purpose of that provision was to ensure that States criminalized all modes of liability, including committing, attempting to commit and other forms of participation in crimes against humanity.

9. A discussion had taken place as to how detailed such a provision should be. Most existing treaties indicated in general terms the various modes of liability to be included in national legislation in order to take account of the fact that all States already had fully functioning criminal law systems that contained long-standing and well-developed doctrine and jurisprudence defining the various forms of participation. If much more detail were provided, as was the case in the Rome Statute of the International Criminal Court, States might have difficulties in adjusting to rules that departed from their criminal law and jurisprudence.

10. The Drafting Committee had therefore decided to adopt for paragraph 2 the general formulation proposed in the Special Rapporteur's second report for paragraph 1, without any changes. It had considered that a detailed provision, while appropriate in the context of creating an international criminal court or tribunal, was not required for a series of draft articles intended to be incorporated into an existing national criminal system. However, as the structure of the paragraph had been modified, the three principal modes of liability now appeared in three separate subparagraphs.

11. The Drafting Committee had also discussed the possibility of referring expressly to "incitement" as one of the modes of participation listed in subparagraph (*c*). It had acknowledged the significance of that particular mode of liability in the context of crimes against humanity, but had eventually decided not to refer to it in paragraph 2, in part because the term "incitement" had not been included in certain international treaties, such as the Rome Statute of the International Criminal Court, and in part because the concept did not exist in some national legal systems. Members of the Drafting Committee had considered that the concept of incitement was covered under the concepts of "soliciting" and "inducing" in subparagraph (*c*), and that would be reflected in the commentary.

12. The Drafting Committee had noted that the concept of "contributing" mentioned in subparagraph (*c*) covered the possibility of contributing to the commission or attempted commission of a crime against humanity by a group of persons acting with a common purpose. It had considered whether to elaborate further in the draft article on that particular mode of liability, but had considered it preferable to keep a more general reference, again given the differences in national criminal systems.

13. Paragraph 3 addressed the criminal responsibility of military commanders and other superiors for offences committed by subordinates in certain circumstances. That type of criminal liability, often referred to as "command responsibility", was covered in a number of international instruments, in particular the statutes of international criminal courts and tribunals. Some of those instruments, such as the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), addressed the matter in general terms, while others provided more detail on situations in which acts committed by subordinates engaged the criminal responsibility of a military commander or other superior. While many national legal systems recognized the concept of command responsibility, State practice in that area was uneven and might benefit from greater harmonization based on a more contemporary definition. The Drafting Committee had thus generally agreed that it should opt for a more detailed approach, modelled on article 28 of the Rome Statute of the International Criminal Court, as the Special Rapporteur had suggested in his second report. The Drafting Committee had maintained the text proposed by the Special Rapporteur for draft article 5, paragraph 2, with a minor change to the *chapeau* in the English version, with the order of the words "also shall" being inverted to read "shall also". Subparagraphs (*a*) and (*b*), which dealt with the criminal liability of military commanders or persons effectively acting as such, and the superior and subordinate relationships not described in subparagraph (*a*), respectively, then reproduced the provisions of article 28 of the Rome Statute of the International Criminal Court.

14. Paragraphs 4, 5 and 6 corresponded to the subparagraphs of the third paragraph of draft article 5 as proposed by the Special Rapporteur. Given that the three subparagraphs dealt with different, though interrelated, issues, the Drafting Committee had deemed it appropriate, in the light of the suggestions made in the plenary, to separate them into three separate paragraphs.

15. Paragraph 4 read: "Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate."

16. Since all jurisdictions addressing crimes against humanity permitted grounds for excluding criminal responsibility, the purpose of that paragraph was to exclude orders of a Government or of a superior from such grounds. For the first part of the sentence, the Drafting Committee had used the wording of the *chapeau* of paragraph 3 proposed by the Special Rapporteur

in his second report. For the sake of consistency with paragraphs 1 and 2, the Drafting Committee had decided to add the expression "under its criminal law" to paragraph 3, which also focused on an important aspect of criminalization in the national legal order. It should be noted that, in that context, the expression broadly encompassed not only legislative measures, but also other measures that a State could employ to fulfil its obligation and, in general, to all national law that was applied in the context of criminal proceedings, including the Constitution. That would be made clear in the commentary. For the same reasons, the expression in question had been used consistently in paragraphs 4, 5 and 6.

17. Paragraph 4 referred not only to orders of a superior but also to those of a Government. It had followed from the plenary debate that such a reference, which already appeared in article 8 of the Charter of the International Military Tribunal[278] and was firmly established in international law, needed to be made explicitly.

18. Paragraph 5 provided that: "Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations." The purpose of the provision was to ensure that States did not include in their legislation a rule forbidding prosecution of an alleged offender for a crime that had been committed more than a specified number of years prior to the initiation of the prosecution. A rule on statutes of limitations had not been systematically included in all treaties dealing with crimes. However, article IV of the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted in 1968, required States parties to adopt "any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment" of those two types of crimes. It had been agreed in the Drafting Committee that such a provision was necessary in the draft articles.

19. Paragraph 5 corresponded to the proposal made in the second report under draft article 5, paragraph 3 (*b*). The expression "under its criminal law" had been added for the reasons already explained. Moreover, the word "offence" was used in the plural instead of the singular.

20. Finally, paragraph 6 read: "Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature."

21. As indicated in the second report, international treaties on crimes did not dictate the penalties to be imposed or not to be imposed but, rather, left to States parties the discretion to determine the appropriate punishment, taking into account the particular circumstances of the offender and the offence. The purpose of that provision was to ensure that, while recognizing that the penalties attached to crimes against humanity might vary under the criminal law of each State, such penalties must be proportionate to the gravity of the offences. The formulation used in paragraph 6, which appeared in numerous treaties, such as article 4 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, thus allowed a balance to be struck between, on the one hand, allowing States a certain degree of discretion in terms of punishment, taking into account the particular circumstances of the offence, and, on the other, indicating to them that such punishment must be proportionate to the gravity of the crime against humanity in question.

22. Paragraph 6 corresponded to the text of draft article 5, paragraph 3 (*c*), as proposed in the second report. As in paragraph 5, the expression "under its criminal law" had been added, and the word "offence" had been replaced with the plural.

23. Draft article 6, entitled "Establishment of national jurisdiction", as proposed in the second report, set out the obligation of States to establish their jurisdiction over crimes against humanity in certain circumstances. It comprised three paragraphs.

24. Paragraph 1 read:

> "Each State shall take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in the following cases:
>
> "(*a*) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> "(*b*) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;
>
> "(*c*) when the victim is a national of that State if that State considers it appropriate."

25. That paragraph concerned the obligation of States to establish several types of national jurisdiction. In particular, it addressed the establishment of territorial jurisdiction, active personality jurisdiction and passive personality jurisdiction. The provision, which appeared in a number of treaties, including article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, sought to make it difficult for an alleged offender to escape a State's jurisdiction.

26. Following the model of existing treaties, such as the 1973 Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, draft article 6 provided that each State should "take the necessary measures to establish its jurisdiction over" the relevant offences in three cases.

27. The first case, set out in subparagraph (*a*), concerned establishing jurisdiction based on the location of the commission of the crime, often referred to as "territorial jurisdiction". Consistent with the terminology used in

[278] The Charter of the International Military Tribunal is annexed to the 1945 Agreement for the prosecution and punishment of the major war criminals of the European Axis.

draft article 4,[279] the proposal made in the second report referred to any territory under "the jurisdiction or control" of a State. The Drafting Committee, however, had considered it appropriate to refer to "any territory under [the State's] jurisdiction". The change was not substantive in nature, as the expression "any territory under its jurisdiction" was intended to encapsulate the *de jure* territory of the State, as well as the territory under its *de facto* control. Rather, the drafting change had been made to align the terminology used in the draft articles with that used in relevant treaties on the subject, such as article 5, paragraph 1 (*a*), of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which referred only to "territory under its jurisdiction" to cover both situations. The text of draft article 4 would therefore need to be reviewed in the future to ensure consistency.

28. The second case, set out in subparagraph (*b*), concerned "active personality jurisdiction", a common form of jurisdiction in national law based on the nationality of the alleged offender. He recalled that proposals had been made in the plenary for the consideration of the closely related issue of stateless persons. The Drafting Committee had therefore included in draft article 6 an optional basis of State jurisdiction relating to "a stateless person who is habitually resident in that State's territory". The adopted formulation was based on the language of existing conventions, such as article 5, paragraph 1 (*b*), of the 1979 International Convention against the taking of hostages.

29. The third case, mentioned in subparagraph (*c*), concerned "passive personality jurisdiction", which was based on the nationality of the victim. Although that type of jurisdiction existed in many national criminal systems, it remained controversial, which was why, as in many existing treaties, it was provided for on an optional basis, as reflected by the words "if that State considers it appropriate".

30. Paragraph 2 read: "Each State shall also take the necessary measures to establish its jurisdiction over the offences referred to in draft article 5 in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles."

31. The paragraph indicated that a State should also establish its jurisdiction over the offences based solely on the presence of the alleged offender on its territory. The text of paragraph 2 had been amended, following the model of article 3 of the Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents, and article 5 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, in order to use the phrase "cases where" and to refer to territory in the same manner as previously indicated. As in other treaties, under paragraph 2, States were obliged to establish such jurisdiction, while acknowledging the possibility that they could extradite or surrender the alleged offender to another jurisdiction, a matter that was addressed in greater detail in other draft articles, such as in the context of exercising jurisdiction under article 9.

32. According to paragraph 3, "[t]he present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law". The purpose of that provision was to indicate that the draft articles did not preclude a State from adopting other types of criminal jurisdiction under its national law relating to crimes against humanity. The Drafting Committee had deleted the opening part of paragraph 3, as proposed in the second report, which contained a "without prejudice" clause referring to "applicable rules of international law". The members of the Committee had agreed that, given the ongoing debate on the exercise of national criminal jurisdiction, it would be more appropriate, at that stage, for the Commission not to include such a clause in a draft article. The Drafting Committee had therefore adopted a formulation used in many existing and widely adhered to international instruments.

33. Draft article 7, entitled "Investigation", consisted of a single paragraph. Its purpose was to trigger an investigation by the State where crimes against humanity were occurring or had occurred. It read: "Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction."

34. He recalled that the draft article, as proposed in the second report, had given rise to a number of comments and suggestions during the plenary debate. The proposal made in the second report had addressed two issues, namely investigation by certain States and cooperation among States. In the light of the plenary debate, the Drafting Committee had considered that the issue of cooperation among States should be dealt with in other draft articles. The Committee members had also agreed that it was for the State in whose territory crimes against humanity had occurred or were occurring to deal with the issue of investigation, an approach that followed models of existing international instruments. For that reason, the formulation of draft article 7 was modelled on article 12 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. In particular, the Drafting Committee had deemed it appropriate to use the expressions "proceed to a prompt and impartial investigation" and "reasonable ground to believe", which were accepted standards in international practice and jurisprudence. In addition, for the sake of consistency with the other draft articles, draft article 7 was applicable when "crimes against humanity have been or are being committed in any territory under [the] jurisdiction" of the State.

35. The purpose of draft article 8, entitled "Preliminary measures when an alleged offender is present", was to set forth the obligation of a State to exercise its jurisdiction when an alleged offender was present on any territory under its jurisdiction. Each of the draft article's three paragraphs addressed a category of measures, namely the obligation to take the alleged offender into custody if necessary to ensure his or her presence, the obligation to carry out a preliminary inquiry and the obligation to notify other relevant States.

[279] *Yearbook ... 2015*, vol. II (Part Two), pp. 47–52.

36. The Drafting Committee had considered that the structure and text of draft article 8 should be modelled on article 6 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, whose provisions could be reproduced, *mutatis mutandis*, in the context of crimes against humanity.

37. Paragraph 1 read: "Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence referred to in draft article 5 is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted."

38. The purpose of that provision was to set forth the obligation of each State to take into custody any person suspected of having committed a crime against humanity, if necessary to ensure his or her presence pending an investigation to determine whether the matter should be submitted to prosecution. Such prosecution could be carried out by the authorities of that State, or of other relevant States, as well as by international criminal courts or tribunals. The provision was modelled on article 6, paragraph 1, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, which had been reproduced with some minor editorial changes. In line with the approach taken for other draft articles, paragraph 1 referred to the territory under the jurisdiction of the State and also made a distinction between criminal, extradition and surrender proceedings.

39. Paragraph 2 read: "Such State shall immediately make a preliminary inquiry into the facts." That type of preliminary investigation was common in most national criminal systems and a provision of that kind appeared in many international instruments. In essence, the provision set forth the obligation of a State to conduct a preliminary investigation when it had information that an alleged offender was present in any territory under its jurisdiction. The adopted text was exactly the same as article 6, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment.

40. Finally, paragraph 3 read: "When a State, pursuant to this draft article, has taken the person into custody, it shall immediately notify the States referred to in draft article 6, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction." The purpose of that provision was to identify an obligation for a State exercising its criminal jurisdiction to notify other States that had or might have established jurisdiction over the offences so that they could consider whether to request extradition of the alleged offender. The Drafting Committee had deemed it appropriate to reproduce the formulation of article 6, paragraph 4, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, with only minor editorial changes to bring the text into line with the draft articles.

41. Draft article 9, entitled "*Aut dedere aut judicare*", set out the obligation to extradite or prosecute, which appeared in a number of treaties, according to which a State in whose jurisdiction an alleged offender was present was obliged either to prosecute him or her itself or to extradite the alleged offender to another State or to an international criminal court or tribunal. The draft article consisted of a single paragraph, which read: "The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

42. The first sentence set forth the obligation to extradite, surrender or prosecute, as proposed in draft article 9, paragraph 1, of the Special Rapporteur's second report. The members of the Commission had generally supported the provision in the plenary. The Drafting Committee had therefore introduced only linguistic changes, using the expression "territory under whose jurisdiction" for the sake of consistency between the draft articles.

43. The formulation adopted drew upon the provisions of a number of existing instruments, in particular article 11, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance, in which the concept of "surrender" of the offender appeared. The introduction of that concept expressly recognized the possibility that States might surrender the alleged offender to a competent international criminal tribunal. On reflection, the Drafting Committee had decided not to limit the concepts of "extradition" and "surrender" to association solely with a State or an international criminal tribunal, respectively. Given that the terminology used in national criminal systems varied, the Committee had considered it preferable to use a formulation that covered all possible situations, including sending the alleged offender to the authorities of another State or to an international tribunal.

44. The Drafting Committee had also considered whether it should be specified, as was the case in article 11, paragraph 1, of International Convention for the Protection of All Persons from Enforced Disappearance, that the sending State must have recognized the jurisdiction of the "international criminal tribunal". It had been decided, however, that such a qualification was not necessary, as a State that was not already bound under international law to send a person to an international criminal tribunal could choose to submit the matter to prosecution in its own national criminal system.

45. The Drafting Committee had also considered whether to state, as was done in some treaties, that the obligation contained in the draft article applied to States "without exception whatsoever and whether or not the offence was committed in a territory under its jurisdiction". The Committee had concluded, however, that the unequivocal nature

of the obligation did not need to be stressed in the draft article itself, but rather in the commentary.

46. The second sentence of the paragraph related to an issue addressed in draft article 9, paragraph 2, as proposed in the Special Rapporteur's secpmd report. For ease of reading, the Committee had simplified the formulation put forward by the Special Rapporteur, using the wording of several existing instruments to signal that, if the State submitted the matter to its competent authorities for prosecution, the latter must take their decision in the same manner as for any other offence of a grave nature under the law of that State.

47. The title of draft article 10, "Fair treatment of the alleged offender", had been kept. The draft article consisted of three paragraphs, the first of which read: "Any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law."

48. The purpose of that provision was to set forth the obligation of a State to guarantee fair treatment to an alleged offender against whom it had taken certain measures. The text provisionally adopted by the Drafting Committee was close to the text proposed by the Special Rapporteur. The members of the Drafting Committee had considered, however, that, in the light of the relevant treaties, a general formulation was appropriate, rather than a very detailed one modelled on the provisions of the International Covenant on Civil and Political Rights and the Vienna Convention on Consular Relations.

49. The term "legal measures" had been simplified to "measures" in order to avoid restricting the rights of the alleged offenders to certain limited situations. Moreover, the word "provided" had been replaced with "guaranteed", in line with the terminology generally employed in existing treaties.

50. The text of the second paragraph was:

"Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

"(*a*) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

"(*b*) to be visited by a representative of that State or those States; and

"(*c*) to be informed without delay of his or her rights under this paragraph."

51. Under that paragraph, a person detained in a State of which he or she was not a national for offences referred to in draft article 5 was entitled to the rights listed in subparagraphs (*a*), (*b*) and (*c*).

52. A proposal had been made in the plenary to reproduce the wording of article 36 of the Vienna Convention on Consular Relations. The members of the Drafting Committee had considered, however, that it was not a matter of aligning the provision with that article but rather of ensuring that certain key steps were taken so that the alleged offender's rights to consular assistance, under that Convention, other relevant conventions and customary international law, could be applied as they normally would. The formulation used therefore drew on treaties adopted after the Vienna Convention on Consular Relations, including the 1997 International Convention for the Suppression of Terrorist Bombings, which provided for the right to consular assistance in more general terms.

53. It was to be noted that, in the *chapeau* of paragraph 2, reference was made to a person "in prison, custody or detention". The purpose was to cover all possible situations in which a person accused of crimes against humanity could be deprived of his or her liberty and, consequently, of external communication. Under subparagraph (*a*), the detainee was entitled to communicate with a representative of the State of which he or she was a national or, in the case of a stateless persons, with a representative of the "State which, at that person's request, is willing to protect that person's rights". That allowed for the possibility for a stateless person to communicate with a representative of his or her State of residence or any other State willing to offer assistance. Subparagraphs (*b*) and (*c*) drew on the provisions of existing treaties, such as article 7, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings.

54. Paragraph 3 was a new provision. The members of the Drafting Committee had considered it appropriate to add it to cover cases in which the State might limit the alleged offender's right to communicate for the sake of protecting witnesses or preserving evidence. The paragraph read: "The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended."

55. The provision was modelled on the text of existing conventions, such as article 7, paragraph 4, of the International Convention for the Suppression of Terrorist Bombings.

56. He recalled that it had been suggested in the plenary that the Special Rapporteur draft a concept paper on the issue of criminal responsibility of legal persons so that the Drafting Committee could examine the issue when considering the six draft articles. The requested document, which put forward three options, had been prepared in advance of the Drafting Committee's first meeting. However, due to a lack of time, the Committee had had to postpone consideration of the paper until the second part of the current session.

57. In conclusion, he said that he hoped that the Commission would be in a position to adopt the draft articles on crimes against humanity, as presented.

58. The CHAIRPERSON invited the members of the Commission to adopt the draft articles, starting with draft article 5.

Draft article 5. *Criminalization under national law*

59. Ms. ESCOBAR HERNÁNDEZ proposed that, in the title of the draft article in the Spanish version, the word *Tipificación*, which was incorrect, be replaced with *Incriminación*.

60. Mr. CANDIOTI said that he supported the adoption of the draft article, but wished to make a comment in relation to subparagraphs (*a*) (ii) and (*b*) (iii) of paragraph 3. Those provisions provided for the criminal responsibility of military commanders or superiors who failed to report the commission of a crime to the competent authorities to enable them to conduct the necessary investigations and prosecutions. However, as the provisions criminalized the concealment of a crime – an act that was often considered as serious as attempt, incitement and complicity – there was no reason that they should apply only to military commanders and superiors. In the context of crimes against humanity, anyone could be involved in concealment, as had been seen during the period of enforced disappearances and during the Second World War, when extermination camps had been made to look like accommodation and leisure centres to Red Cross inspectors. Since the concealment of crimes against humanity was a serious crime in its own right, the Commission might consider it appropriate to examine the matter in greater depth on second reading.

61. Mr. MURPHY (Special Rapporteur) thanked Mr. Candioti for having raised the important issue of concealment of crimes against humanity and said that he planned to discuss it even before the second reading, in the context of new draft articles that would be developed.

62. Mr. CANDIOTI stressed that, as had been seen in the case of Argentina, it was sometimes the competent authorities themselves, in particular the judicial organs of the Governments responsible for crimes against humanity, who endeavoured to cover up the facts.

63. Mr. HMOUD said that treatment of the issue of cover-up varied depending on the national law of the State. Under Jordanian criminal law, for instance, concealment was considered one of the possible forms of participation in the commission of the crime and, in his view, that was also true in the draft articles as they stood. That said, the Commission could revisit the issue on second reading.

64. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that draft article 5, paragraph 2 (*c*), which set out the various modes of participation, including aiding, abetting or otherwise assisting in the commission of a crime against humanity, seemed to cover the concept of concealment.

65. Mr. VÁZQUEZ-BERMÚDEZ recalled that, during the debates on the Special Rapporteur's report, he had pointed out that concealment should be mentioned in the draft articles as an act that constituted a crime against humanity. However, some members of the Drafting Committee had not supported that proposal, as they considered that the concept was covered by draft article 5, paragraph 2. The Commission should resume its discussion of the issue when it examined the new draft articles to be submitted by the Special Rapporteur or on second reading of the draft articles.

66. Mr. CANDIOTI said that the acts listed in subparagraph 2 (*c*) of draft article 5 took place before or after the commission of the crime, whereas concealment necessarily happened after the act had been committed. It could therefore not be considered to be covered by that subparagraph.

67. The CHAIRPERSON thanked Mr. Candioti for his explanations and said that the discussion of the issue would be resumed in the second part of the session. In the light of the rich debate that had just taken place, he did not consider it necessary to adopt draft article 5 paragraph by paragraph, but instead proposed adopting it as a whole.

Draft article 5 was adopted subject to an amendment in the Spanish version.

Draft article 6. *Establishment of national jurisdiction*

Paragraph 1

68. Mr. KITTICHAISAREE said that, although he did not object to the adoption of paragraph 1, he wished to place on record his opinion concerning subparagraph (*c*), which was modelled on a formulation used in several existing international instruments, and made the establishment of passive personality jurisdiction optional. In that regard, he wished to cite an extract from the joint separate opinion by three judges of the International Court of Justice, Judges Higgins, Kooijmans and Buergenthal, attached to the judgment handed down by the Court in the *Arrest Warrant of 11 April 2000* case, which read: "Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries [including the United States of America and France], and today meets with relatively little opposition, at least so far as a particular category of offences is concerned" (para. 47 of the joint separate opinion).

69. Given that this opinion had been published more than 14 years earlier and that the establishment of passive personality jurisdiction for serious crimes had become a principle of customary international law, he was of the view that subparagraph (*c*) should have been formulated such that the establishment of jurisdiction over crimes against humanity was an obligation rather than a choice for the State of nationality of the victim. In that way, the Commission could have filled the legal void left in 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which had chosen not to adopt a provision authorizing the State of nationality of the victim to exercise jurisdiction under the Rome Statute of the International Criminal Court.

70. Mr. MURPHY (Special Rapporteur) said that he had taken note of Mr. Kittichaisaree's comments and was grateful to him for not requesting an amendment to subparagraph (*c*). One of the reasons why the Drafting Committee

had decided to use the formulation that appeared in the current version of the draft was that, even though, according to the opinion of the three judges cited by Mr. Kittichaisaree, the principle of passive personality jurisdiction was broadly accepted, that formulation appeared in the international instruments adopted since the publication of that opinion, including the International Convention for the Protection of All Persons from Enforced Disappearance – which suggested that States continued to have a preference for a provision that did not make the attribution of jurisdiction to the State of nationality of the victim obligatory.

71. The CHAIRPERSON thanked the Special Rapporteur for his explanations but said that he shared the views expressed by Mr. Kittichaisaree. As there were no comments on the other paragraphs of draft article 6, he took it that the members wished to adopt the draft article as a whole.

Draft article 6 was adopted.

Draft article 7. *Investigation*

Draft article 7 was adopted.

Draft article 8. *Preliminary measures when an alleged offender is present*

Draft article 8 was adopted.

Draft article 9. Aut dedere aut judicare

Draft article 9 was adopted.

72. Mr. KITTICHAISAREE said that it should be noted in the commentaries to draft articles 7, 8 and 9 that those articles should be read in parallel with the Commission's final report on the obligation to extradite or prosecute (*aut dedere aut judicare*), published in 2014.[280]

73. Mr. MURPHY (Special Rapporteur) said that this proposal would be taken into account in the commentary.

Draft article 10. *Fair treatment of the alleged offender*

Draft article 10 was adopted.

The report of the Drafting Committee on crimes against humanity, as a whole, as contained in document A/CN.4/L.873, was adopted.

74. Mr. PETER said that the issue of responsibility of legal persons, which the members had discussed during their consideration of the Special Rapporteur's second report, had not been addressed in the Drafting Committee's report.

75. The CHAIRPERSON said that the issue would be considered by the Drafting Committee during the second part of the session and that the Special Rapporteur would present his concept paper on the issue at that stage.

76. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that, as he had indicated in his oral presentation, the Drafting Committee had not had time to address the issue of the responsibility of legal persons, but would do so during the second part of the session since, according to the provisional programme of work drawn up by the secretariat, it should have a meeting allocated to preparing a draft article on the issue, which would then be submitted to the plenary for consideration.

The meeting rose at 11.20 a.m.

3313th MEETING

Friday, 10 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*concluded*)[*] (A/CN.4/689, Part II, sect. D, A/CN.4/694, A/CN.4/L.874)

[Agenda item 4]

Report of the Drafting Committee

1. Mr. ŠTURMA (Chairperson of the Drafting Committee) introduced the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Drafting Committee on first reading and as contained in document A/CN.4/L.874. He said that the Committee had devoted four meetings, from 1 to 6 June 2016, to its consideration of the draft conclusions. It had examined two draft conclusions originally proposed by the Special Rapporteur in his fourth report (A/CN.4/694), together with a number of amendments to respond to suggestions made or concerns raised during the debate in plenary; it had also considered the structure of the entire set of draft conclusions, of which there were 13, in light of proposals made by the Special Rapporteur.

2. He commended the Special Rapporteur, whose constructive approach and flexibility had greatly facilitated the work of the Drafting Committee. Thanks were also due to the other members of the Committee and the Secretariat for their significant contributions.

3. The draft conclusions provisionally adopted by the Drafting Committee had been divided into four parts, on

[280] *Yearbook … 2014*, vol. II (Part Two), pp. 92 *et seq.*, para. 65.

[*] Resumed from the 3307th meeting.

the basis of the proposal made by the Special Rapporteur in his fourth report: Part One, entitled "Introduction", contained draft conclusion 1; Part Two, entitled "Basic rules and definitions", contained draft conclusions 2 to 5; Part Three, entitled "General aspects", contained draft conclusions 6 to 10; and Part Four, entitled "Specific aspects", contained draft conclusions 11 to 13. Moreover, the draft conclusions as a whole had been reorganized and subsequently renumbered. In addition to renumbering former draft conclusion 1*a* ("Introduction"), which had been adopted at the current session as draft conclusion 1, former draft conclusion 3 ("Interpretation of treaty terms as capable of evolving over time") had been moved to part three and now appeared as draft conclusion 8. The original numbering appeared in square brackets in document A/CN.4/L.874.

4. Draft conclusion 1 had been proposed by the Special Rapporteur to explain the purpose and scope of the draft conclusions as a whole. The commentary would make it clear that the draft conclusions as a whole did not address all conceivable circumstances in which subsequent agreements and subsequent practice might be taken into account in the interpretation of treaties. For instance, one aspect not specifically dealt with was the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations. The Drafting Committee had considered it appropriate to use the word "role", rather than the word "significance" proposed in the Special Rapporteur's fourth report, since the word "role" more adequately conveyed the aim of the draft conclusions of clarifying the function of subsequent agreements and subsequent practice in the interpretation of treaties. The Drafting Committee had also made minor editorial changes.

5. The objective of draft conclusion 13, as indicated by the Special Rapporteur during the Commission's debate in plenary, was to recognize, for the purpose of the Commission's work on subsequent agreements and subsequent practice, that pronouncements of expert bodies, as a form of practice under a treaty or otherwise, might be relevant for its interpretation, either in connection with the practice of States parties, or as such. Paragraph 1 of the draft conclusion defined the term "expert treaty body" for the purpose of the present draft conclusions. Further to the suggestions made during the debate in plenary, the Special Rapporteur had proposed replacing the term "expert body" with the term "expert treaty body" and the term "individual capacity" with the term "personal capacity". The Drafting Committee had considered that the expression "expert treaty body" was appropriate, since it excluded bodies established by organs of international organizations, which were not the object of draft conclusion 13. Paragraph 1 stated that, for the purposes of the draft conclusions, an "expert treaty body" was a body that was "established under a treaty" and was "not an organ of an international organization". The exclusion of treaty bodies that were organs of international organizations from the scope of the draft conclusion had been made for formal reasons; therefore, a substantive conclusion should not be drawn to the effect that the pronouncements of expert treaty bodies that were organs of international organizations might, or might not, bear similar effects in the context of the interpretation of treaties. The purpose of that part of the sentence was to make clear that draft conclusion 13 did not purport to make any determination of the effects of the pronouncements of such bodies. The commentary would provide examples of expert treaty bodies, including those cases that might appear *sui generis* "established under a treaty". Moreover, the Drafting Committee had found appropriate the proposal to refer to "personal" rather than "individual" capacity given its consistency with the terminology used in most treaties. On the suggestion of the Special Rapporteur, the Committee had also decided to delete the phrase "for the purpose of contributing to its proper application", since it was conceivable that such bodies might also be created for other purposes depending on the applicable rules of the treaty.

6. Paragraph 2 of draft conclusion 13 sought to import the idea contained in previous draft conclusion 12, paragraph 5, the purpose of the provision being to signal to the interpreter that, when assessing pronouncements of expert treaty bodies, in the context of the interpretation of a treaty, the necessary first step was to examine the treaty that established said body for indications regarding its role. Those important indications were to be found in "the applicable rules of the treaty". Those rules needed to be taken into consideration when assessing the relevance of a pronouncement of an expert treaty body. Pronouncements of such bodies were no more binding or authoritative than what the respective treaty establishing such bodies provided.

7. The purpose of paragraph 3 of draft conclusion 13 was to indicate the role that a pronouncement of an expert treaty body might perform with respect to a subsequent agreement or subsequent practice by the parties to a treaty. The first sentence of that paragraph reflected the proposal made in the fourth report under draft conclusion 12, paragraph 3. As indicated in the Special Rapporteur's fourth report, a pronouncement of an expert treaty body could not, as such, constitute subsequent practice under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, since that provision required that a subsequent practice in the application of the treaty should establish the agreement of the parties. That self-evident point would be reflected in the commentary. However, such pronouncements might have indirect effects in the application of article 31, paragraph 3, or article 32 of the same Convention. First, a pronouncement could refer to a subsequent agreement and subsequent practices by parties under article 31, paragraph 3, or other subsequent practice under article 32. Following some debate, the Drafting Committee had considered it appropriate to use the verb "refer" rather than the verb "reflect" to clarify that any subsequent agreement of the parties was not comprised in the pronouncement itself. Second, a pronouncement of an expert treaty body could play a catalyst role and give rise to a subsequent agreement or a subsequent practice by the parties.

8. The second sentence of paragraph 3 of the current draft conclusion 13 had been proposed in the Special Rapporteur's fourth report under previous draft conclusion 12, paragraph 4. It indicated to the interpreter that caution should be exercised when interpreting silence by a party in respect of a pronouncement of an expert treaty body, which was a circumstance with respect to which

the silence of a party did not typically indicate acceptance. The formulation proposed in the fourth report had been simplified to highlight that a subsequent practice that established the agreement of the parties under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention was not to be presumed in such instances.

9. Whereas paragraph 3 of draft conclusion 13 dealt with the possible “indirect” effect of a pronouncement, paragraph 4 sought to address the situation covered in the Special Rapporteur’s fourth report of the possible “independent” effect of the pronouncement of an expert treaty body. Paragraph 4 provided that draft conclusion 13 was without prejudice to the contribution that the pronouncement of an expert treaty body might otherwise make to the interpretation of a treaty. The use of the word “otherwise” sought to draw a link between paragraph 3, which acknowledged the possible “indirect” effect of the pronouncement of an expert treaty body, and paragraph 4, which left unprejudiced the possible “independent” effect of such a pronouncement.

10. The title of draft conclusion 12, “Pronouncement of expert treaty bodies”, was based on the Special Rapporteur’s proposal in his fourth report. The word “expert” had been added to reflect the current orientation of the draft conclusion.

11. In conclusion, he expressed the hope that the Commission would be in a position to adopt the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as contained in document A/CN.4/L.874.

Draft conclusions 1 to 12 were adopted.

Draft conclusion 13

12. Mr. PARK said that, as a member of the Drafting Committee, he had not opposed the adoption of draft conclusion 13. However, during the Committee’s deliberations, he had been strongly in favour of including in draft conclusion 13 a sentence to the effect that the pronouncements of a treaty body could not, as such, constitute subsequent practice under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention, since that was a well-established principle. Although the role of the draft conclusions on the topic was to demonstrate the status of the law on the basis of State practice, draft conclusion 13 did not expressly point out the aforementioned well-established principle, but merely set out, in paragraphs 3 and 4, the potential effects of the pronouncements of expert treaty bodies in the context of the interpretation of treaties. While he continued to believe that the proposed sentence would have been better placed in the draft conclusion itself, he had agreed, in order not to block the emerging consensus in the Drafting Committee, that it should instead be included in the commentary to the draft conclusion.

13. The CHAIRPERSON said that he took it that the Commission wished to adopt draft conclusion 13.

It was so decided.

14. The CHAIRPERSON said that he took it that the Commission wished to adopt the report of the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as a whole, as contained in document A/CN.4/L.874.

It was so decided.

15. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare the commentaries to the draft conclusions, for inclusion in the Commission’s report on its sixty-eighth session.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

16. The CHAIRPERSON drew attention to the proposed programme of work for the second part of the Commission’s sixty-eighth session, to be held from 4 July to 12 August 2016.

17. Mr. LLEWELLYN (Secretary to the Commission) said that the four first weeks of the second part of the session would be devoted to consideration of Special Rapporteurs’ reports on four topics: *jus cogens*; protection of the environment in relation to armed conflicts; immunity of State officials from foreign criminal jurisdiction; and provisional application of treaties. In the light of the large quantity of text and commentaries expected to be contained in the Commission’s report on its sixty-eighth session, the Bureau had allowed two weeks, from 2 to 12 August 2016, for the discussion and ultimate adoption of the report.

18. The CHAIRPERSON said that he took it that the Commission wished to adopt the programme of work for the second part of its sixty-eighth session.

It was so decided.

19. After the usual exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-eighth session closed.

The meeting rose at 10.40 a.m.

[*] Resumed from the 3311th meeting.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-EIGHTH SESSION

Held at Geneva from 4 July to 12 August 2016

3314th MEETING

Monday, 4 July 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, M. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Jus cogens[281] (A/CN.4/689, Part II, sect. H,[282] A/CN.4/693[283])

[Agenda item 10]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited Mr. Tladi, the Special Rapporteur on the topic "*Jus cogens*", to present his first report (A/CN.4/693).

2. Mr. TLADI (Special Rapporteur) thanked the members of the Commission for the trust they had shown him in appointing him Special Rapporteur for such an important and sensitive topic as *jus cogens* and said that he would undertake his task with the greatest of care, seriousness and devotion. In accordance with the spirit of collegiality that characterized the Commission's work, the outcome of the work on the topic could not, and should not, reflect the views of one person but, rather, should be the collective effort of the Commission as a whole. He therefore looked forward to hearing the views, comments, criticisms and proposals of the members, with a view to achieving an outcome of which all members could be proud and which would receive the acceptance of States. As with other topics on the Commission's programme of work, *jus cogens* garnered much attention. In the course of preparing his first report, he had spoken on the topic at several engagements, and delegates of the Sixth Committee had asked him to give a briefing, which he hoped to be able to organize in the near future.

3. He wished to thank all those who had contributed to the first report, whose names were mentioned in the note on the first page of the report. In that regard, it would be necessary to correct the errors that had inadvertently been introduced by the editing service to the affiliations of some of the persons mentioned. He was pleased with the geographical and linguistic diversity of the various contributors and wished to extend his appreciation in particular to members of the Codification Division for their assistance and to everyone who had commented on an earlier draft of the report. This included several members of the Commission, in particular Mr. Nolte, who had hosted him in Berlin while he was writing the report, from October 2015 to January 2016. He also wished to express his gratitude to those States that had provided information in response to the Commission's request in the report on the work of its sixty-seventh session.[284] Although that information had not been used in the current report because it had been received too late, it would be relevant for aspects of the topic to be covered in the second and third reports.

4. The first report was to be read in conjunction with the informal note distributed on 13 July 2015, in which certain methodological issues had been raised, although owing to a lack of time, it had not been discussed in an informal consultation as planned. As an advance copy had been circulated on 8 March 2016, he hoped that the members of the Commission had had sufficient time to study the report, which addressed mainly conceptual issues related to *jus cogens*, including its nature and definition. In his first report, the Special Rapporteur also traced the historical evolution of the concept and the acceptance in international law of its central elements. He also raised a

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[281] At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and to appoint Mr. Dire Tladi as the Special Rapporteur for the topic (*Yearbook ... 2015*, vol. II (Part Two), p. 85).

[282] Available from the Commission's website, documents of the sixty-eighth session.

[283] Reproduced in *Yearbook ... 2016*, vol. II (Part One).

[284] *Yearbook ... 2015*, vol. II (Part Two), p. 14, para. 31.

number of methodological issues on which he would be grateful to receive comments from the members. The three draft conclusions proposed in section VI of his first report were rather basic and, he hoped, uncontroversial. Rather than repeating the contents of his first report, he would sketch out the general framework and explain some of the language choices made in the draft conclusions.

5. Chapter I of the first report addressed the debate on the topic in the Sixth Committee in 2014 and 2015. By and large, States had expressed support for the topic, with only three States expressing reservations. One of the issues raised by the Member States, to which he would return, concerned methodology, in particular the materials on which the Commission would base its work and conclusions. Another issue raised by several delegations was whether the Commission should address the third element in the syllabus, namely the drafting of an illustrative list of norms that had already acquired the status of *jus cogens*. It should be recalled that the syllabus contained four elements: the nature of *jus cogens*; the requirements for the elevation of a norm to the status of *jus cogens*; the establishment of an illustrative list of norms of *jus cogens*; and the consequences of *jus cogens*.[285]

6. Some States, such as Austria and Slovakia, had been in favour of the Commission drawing up an illustrative list, while others had raised serious questions about that possibility. Finland, for example, speaking on behalf of the Nordic States, had cautioned that an illustrative list would, by definition, not be exhaustive, and expressed concern that rules of international law that had the status of *jus cogens* but were not included in the list might be deemed to have inferior status to those listed. Similarly, Spain had suggested that such a list, even if it were stressed that it was illustrative, would come to be considered as a *numerus clausus*. South Africa had pointed to the risk that the list, even if accurate at the time of its adoption, would eventually become outdated or incomplete. New Zealand, meanwhile, had adopted a "wait and see" approach, stating that the requirements for a norm to achieve the status of *jus cogens* should determine whether it would be useful to draw up an illustrative list.

7. Those views were reflective of the internal discussions in the Working Group on the long-term programme of work. While he continued to be of the view that the Commission should not refrain from drawing up a list that was clearly described as illustrative simply because it might be misinterpreted as a *numerus clausus*, he did wonder whether the compilation of such a list might substantially change the nature of the topic. The topic was concerned with methodological rules concerning the determination of the status of *jus cogens*, not with the substantive or normative rules in different areas of international law, such as *jus ad bellum*, international criminal law, international human rights law or international environmental law. For example, if the Commission decided to include the prohibition of genocide in the illustrative list of *jus cogens* norms, would it be required to undertake an in-depth study of the rules of international law relating to genocide? If such a study were considered necessary for a norm such as the prohibition of genocide, which clearly had *jus cogens* status, it would be all the more so for other norms whose *jus cogens* status was not as clear. The compilation of an illustrative list might also blur the nature of the topic, which was fundamentally oriented on methodology and process, by shifting the focus towards the legal status of particular primary rules of international law. He would be grateful to hear the views of the Commission members on that matter. His own view had evolved and he now believed that the Commission should consider dispensing with an illustrative list, on the understanding that it could consider other ways to provide guidance to States and practitioners on norms which, at the current time, met the requirements for *jus cogens* status.

8. The question of the materials on which the Commission would base its work had been vigorously debated in the Sixth Committee. The United States of America, for example, had suggested that the focus be on actual practice and not, as appeared in the syllabus, on jurisprudence. That question was an important one for any topic, but perhaps more so for a topic like *jus cogens*, on which there were so many divergent materials. In his view, the Commission should undertake a thorough analysis of the rich variety of practice, both State practice and judicial practice. While literature could not, and should not, be dispositive, it could assist in placing the materials at the Commission's disposal in their particular context. It would be key when assessing all the materials to accord proper weight to each one.

9. Chapter III of the first report contained a detailed analysis of what could be referred to as the historical antecedents of *jus cogens*, of which he would simply highlight the most important points. While the term *jus cogens* in international law had not appeared in the doctrine or practice before the twentieth century, the peremptory character of natural law, considered immutable and superior to positive law, had been stressed by writers of the seventeenth and eighteenth centuries, such as Groot, de Vattel and Wolff. That school of thought had then declined in influence with the rise of positivism in the nineteenth and twentieth centuries. Even then, however, the idea that there were some rules from which States could not derogate, even by agreement, could be found in the literature. That was the theoretical basis of "non-derogation", which was often the subject of controversy.

10. Prior to the Commission's work, there had been much literature supporting the idea of norms from which no derogation was permitted, but little practice to support that proposition. There were agreements, of course, containing non-derogation provisions, such as Article 20 of the Covenant of the League of Nations, but that provision, being a treaty rule applicable to parties, did not fulfil the criteria for *jus cogens*.

11. There was also some judicial practice recognizing rules from which States were not free to contract out of. Examples included the arbitral award in the *Pablo Nájera* case by the French–Mexican Claims Commission and the separate opinion of Judge Schücking of the Permanent Court of International Justice in the *Oscar Chinn* case, although both conclusions had been based on a treaty obligation. In summary, at the time of the Second World War, the literature, going back to the seventeenth century,

[285] See *Yearbook ... 2014*, vol. II (Part Two), annex, p. 173, para. 13.

had recognized the existence of norms from which States could not derogate, and that proposition had not been seriously questioned, even though there might have been disagreement on the basis of the proposition. Practice supporting the proposition, however, had been rather thin, and the little practice that could be found concerned peremptory treaty rules that applied to the parties to the treaties and not rules of general international law.

12. As noted in the syllabus, the Commission had contributed to the development, acceptance and mainstreaming of *jus cogens* in international law. Indeed, as could be gleaned from the first report, much of the practice, both judicial and State practice, had been inspired by the work of the Commission. Paragraphs 29 to 32 of the report under consideration illustrated that the concept of *jus cogens*, already broadly accepted by pre-war scholars, had been accepted without much difficulty by the members of the Commission, which, when it had examined the proposition of invalidity on the grounds of *jus cogens*, had debated the drafting and theoretical basis of the proposition, but had never questioned the proposition itself nor its status in international law. It was, however, the reaction of States to the work of the Commission that had highlighted an element that had not been taken into account up to that point: the acceptance of the proposition by States. Almost all States had expressed support for the idea put forward by the Commission, although some had expressed reservations and called for caution, particularly in relation to the drafting of the provision. Only Luxembourg had objected to the provision, arguing that it was designed to "introduce as a cause of nullity criteria of morality and 'public policy' such as are used in internal law",[286] a clear indication that it considered that the provision constituted progressive development. It had been against that background of support, both within the Commission and beyond, particularly among States, that draft article 50 had been included in the draft articles on the law of treaties.[287]

13. The support by States for the idea that treaties in conflict with *jus cogens* were invalid had been confirmed at the United Nations Conference on the Law of Treaties, although certain States, while expressing support for the provision, had raised important concerns about the drafting. France, the United Kingdom, and the United States, in particular, had worried that, without clearer guidelines as to what norms constituted *jus cogens*, the text was likely to be abused in order to call into question validly concluded treaties. The response to that concern, which would be considered in a future report, was found in article 66 of the 1969 Vienna Convention, which established an important role for the International Court of Justice in relation to the invocation of *jus cogens* to invalidate a treaty. It was important to stress, however, that those States had not questioned the idea of *jus cogens* or its status as part of international law, contrary to popular belief. Other States, notably Australia and Turkey, had questioned that status, but at the time of the adoption of the 1969 Vienna Convention, there had been widespread support, both in the literature and the statements by States, for recognition of *jus cogens* as part of the international law of the time. Moreover, the work of the Commission seemed to have inspired some judicial practice, even prior to the adoption of the Convention; *jus cogens* had been mentioned by the International Court of Justice in the *North Sea Continental Shelf* cases, for example, and by Judges Fernandes and Tanaka in their dissenting opinions in the cases concerning *Right of Passage over Indian Territory* and the *South West Africa* cases (*Second Phase*), respectively.

14. Since the adoption of the 1969 Vienna Convention, States had consistently invoked *jus cogens*, particularly in their diplomatic correspondence. National, regional and international courts had also done the same, in particular the International Court of Justice, which, although it had earlier adopted a very prudent position on the matter, had recently explicitly recognized *jus cogens* as an element of international law.

15. While the place of *jus cogens* in international law could now no longer be seriously questioned, its theoretical basis had continued to be debated since the seventeenth century, as was described in paragraphs 50 to 60 of chapter IV of the first report. Although the report did not seek to resolve the debate concerning *jus cogens*, it was necessary to examine the theoretical debate in order to attempt to list the criteria for establishing *jus cogens* norms. There was support for each of the two main schools of thought – the natural and positive law approaches – but, as illustrated by the analysis in the first report, neither had yet adequately explained the uniqueness of *jus cogens* in international law.

16. Section C of chapter IV of the first report attempted to distil, on the basis of State practice and judicial decisions and the writings of scholars, the core elements of *jus cogens*, which were reflected in the draft conclusions proposed in chapter VI. Rather than summarizing that section, he would present the proposed draft conclusions.

17. Draft conclusion 1, which was not, strictly speaking, a "draft conclusion", defined the scope of the draft conclusions. The Commission had included a similar provision in the draft conclusions on the identification of customary international law provisionally adopted by the Drafting Committee[288] and in draft guideline 2 on the protection of the atmosphere provisionally adopted by the Commission at its previous session.[289] The Commission might, however, wish to address the scope of the draft conclusions in an introductory section, as it had done in the draft principles on the protection of the environment in relation to armed conflict provisionally adopted by the Drafting Committee at the previous session.[290] Draft conclusion 1 set out the main elements to be considered under the topic, namely the way in which *jus cogens* norms were to be identified and the consequences flowing from them. He proposed that the word "rules" be replaced with "norms" for the sake of

[286] *Yearbook ... 1966*, vol. II, document A/CN.4/183 and Add.1–4, p. 20.

[287] See *ibid.*, document A/6309/Rev.1, Part II, pp. 177 *et seq.*, para. 38.

[288] See draft conclusion 1 in the report of the Drafting Committee on the identification of customary international law (A/CN.4/L.872, available from the Commission's website, documents of the sixty-eighth session). The Commission adopted the draft conclusions on first reading on 2 June 2016 (see the 3309th meeting above, para. 5).

[289] See *Yearbook ... 2015*, vol. II (Part Two), pp. 23–24.

[290] See *ibid.*, pp. 64–65, footnote 372.

consistency with the language used in relation to the topic, notably in the 1969 Vienna Convention. He had not referred to the illustrative list in draft conclusion 1 because he believed that the Commission should consider dispensing with such a list, a view that appeared to be shared by most members. Even if it were to include one, the scope of the project was formulated in sufficiently broad terms to cover that possibility.

18. Draft conclusion 2 was intended to draw a distinction between norms of *jus cogens* and other rules of international law which could be modified, abrogated or derogated from by the agreement of States (*jus dispositivum*). That distinction, which went without saying in many ways, had appeared in the 1969 judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, as well as in several dissenting and separate opinions, examples of which were provided in the first report. More importantly, the distinction had also been recognized by States, both in the context of the work of the Commission on the law of treaties and in the context of the United Nations Conference on the Law of Treaties, as illustrated in the first two footnotes to paragraph 66 of the first report. The second sentence of the first paragraph of draft conclusion 2, which set out the modes through which rules of *jus dispositivum* could be modified, abrogated or derogated from, should be similarly uncontroversial.

19. The principle set out in the second paragraph of draft conclusion 2, according to which *jus cogens* was an exception to the general *jus dispositivum* character of international law, was supported by classical writings as well as judicial and State practice. The provision that *jus cogens* norms could be modified only by other *jus cogens* norms was based on article 53 of the 1969 Vienna Convention. The words "abrogated", "derogated from" and "modified" had been chosen carefully to reflect the various effects that agreement could have on *jus dispositivum* rules, and represented the different ways that rules of international law could be "contracted out of". The verb "modified" referred to the adjustments or amendments made to specific rules. Thus, two States might agree that an existing rule of *jus dispositivum* would be applied as between them in a different manner than was generally understood. While abrogation and derogation were similar, there was an important difference. To derogate from a rule was to depart from applying it, in whole or in part, without affecting its validity. Thus, States could, by agreement, decide not to apply a particular rule of *jus dispositivum* in a specific instance, while continuing to apply it thereafter. Abrogation, however, meant that a rule was no longer valid, either in general or as between the abrogating States.

20. Draft conclusion 3 described the general character of norms of *jus cogens*. The first paragraph was also based on the definition of norms of *jus cogens* in the 1969 Vienna Convention, with the addition of a reference to the fact that such norms could not be modified or abrogated. On reflection, however, he wondered whether that addition was necessary, since it referred not to the application of the rules but to their modification, which was addressed in draft conclusion 2, and it might be better to return to the language of the 1969 Vienna Convention.

21. The second paragraph of draft conclusion 3 provided that norms of *jus cogens* protected the fundamental values of the international community, were hierarchically superior and were universally applicable. Each of those elements was reflected in practice and was widely accepted in the literature. The idea that *jus cogens* protected the values of the international community proceeded from article 53 of the 1969 Vienna Convention, which provided that for a norm to qualify as *jus cogens* it must be "recognized by the international community of States as a whole". The values in question were, to quote the International Court of Justice in its advisory opinion on *Reservations to the Convention on Genocide*, those that "confirm and endorse the most elementary principles of morality" (p. 23 of the advisory opinion).

22. In their comments on draft article 50 of the Commission's draft articles on the law of treaties, States had also emphasized that *jus cogens* protected the interests of the international community. Reference had been made, in particular, to the statements by Nigeria and Lebanon, cited, respectively, in the penultimate footnote to paragraph 35 and the first footnote to paragraph 36 of the first report. The fundamental link between the nature of the values being protected by a norm and the recognition of that norm as *jus cogens* had also been confirmed by the International Tribunal for the Former Yugoslavia and the Inter-American Court of Human Rights, for example in relation to the prohibition of torture and enforced disappearances.

23. With respect to the hierarchical superiority of norms of *jus cogens*, the Commission had already recognized, in the conclusions of the Work of the Study Group on the fragmentation of international law adopted in 2006, that those norms were superior to other rules of international law "on account of the importance of its content as well as the universal acceptance of its superiority".[291] Finally, the universally applicable character of *jus cogens* rules had been recognized by the International Court of Justice, for example in its advisory opinion on *Reservations to the Convention on Genocide*, and by the International Tribunal for the Former Yugoslavia and domestic courts in numerous decisions. The commentary to article 50 of the draft articles on the law of treaties also suggested that the Commission viewed *jus cogens* norms as universally applicable, since, in response to the denial by some jurists of the existence of *jus cogens* rules in international law, it had pointed out that the law of the Charter of the United Nations concerning the prohibition of the use of force constituted an example of a norm of *jus cogens*.

24. With regard to the form the Commission's work should take, he was strongly of the view that draft conclusions were the most appropriate form for a topic such as *jus cogens*. Finally, on the future work programme, he proposed, without prejudice to the decisions to be taken by the Commission in its new composition, that the second report in 2017 should focus on the criteria for determining norms of *jus cogens*, the third report in 2018 on the consequences of *jus cogens*, and the fourth report in 2019 on miscellaneous issues arising from the debates in the Commission and the Sixth Committee.

[291] *Yearbook ... 2006*, vol. II (Part Two), para. 251, pp. 177 *et seq.*, at p. 182, conclusion (32).

25. Mr. MURASE thanked the Special Rapporteur for his excellent first report on *jus cogens* and his oral introduction and commended him on his impressive research and his treatment of a difficult topic by digesting the most qualified academic writings on the subject. However, he was puzzled as to why the Special Rapporteur limited the scope of the topic to the context of the law of treaties and did not deal with the function of *jus cogens* in the context of the law of State responsibility, which was an equally important aspect of the topic. In 2013, during a meeting of the Working Group on the long-term programme of work, Mr. Murase had stressed that the Commission could not ignore the concept of *jus cogens* in the context of the law of State responsibility, where it played a distinct role.

26. His comments would focus on the scope of the topic and were offered in the spirit of constructive criticism. If the Special Rapporteur considered that the concept of *jus cogens* was the same under both the law of treaties and the law of State responsibility, he should have explained why in his first report, which he had not done. He was not convinced, however, that the legal nature, content and function of *jus cogens* were the same in the law of treaties and the law of State responsibility. If that was the case, a broad definition of *jus cogens* would have to be elaborated, applicable to both branches of international law. It would also have to be stated in the draft conclusion on the scope of the topic that it would not be limited to the law of treaties.

27. It was unfortunate that the first report did not contain any analysis of *jus cogens* in the context of the law of State responsibility. The absence of a reference to State responsibility, with the exception of a brief mention in the first footnote to paragraph 43, was striking. Chapter III (Historical evolution of the concept of *jus cogens*) and section C of chapter IV (Core elements of *jus cogens*) did not reflect the importance of State responsibility, which had been one of the major topics dealt with by the Commission. It was also regrettable that the Special Rapporteur did not intend to include it in his future workplan.

28. Paragraphs 43 and 48 of the first report referred to the role of *jus cogens* "beyond the [1969] Vienna Convention" and "beyond treaty law", without giving any further details; he hoped that the Special Rapporteur would provide further explanation in that connection. It appeared, however, on reading the first report, that the consequences and effects of *jus cogens* would be addressed in future reports only from the perspective of the law of treaties. However, the effects of a breach of *jus cogens* rules under the law of treaties were already clearly indicated in articles 53 and 64 of the 1969 Vienna Convention, which stated that a treaty concluded in breach of a *jus cogens* norm was "void", but did not provide for the consequences of a breach of a *jus cogens* norm itself. Furthermore, article 71 of the Convention, according to which the parties had an obligation to "eliminate … the consequences" of the invalidity of a treaty that conflicted with a peremptory norm of general international law, did not refer to State responsibility. The consequences of the breach of *jus cogens* norms were, however, very different in that context. In order to properly define the scope of the topic, it was necessary to clarify at the outset the content, role and effects of *jus cogens* in both branches.

29. He recalled that the first part of the draft articles on State responsibility adopted by the Commission on first reading in 1980[292] had referred to international crimes, which were considered violations of *jus cogens* norms. Article 26 of the draft articles on State responsibility adopted by the Commission on second reading in 2001 provided that "[n]othing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law".[293] Articles 40 and 41 covered serious breaches of obligations arising from a peremptory norm of general international law. Article 48 concerning the invocation of responsibility by a State other than an injured State set out obligations *erga omnes* and *erga omnes partes*. Obligations *erga omnes* were based on a "horizontal" expansion of State obligations, while *jus cogens* obligations denoted a "vertical" relationship of norms. Of course, not all *erga omnes* obligations were *jus cogens* obligations, but some might overlap. Article 50, paragraph 1 (*c*), referred to the *jus cogens* obligations as exceptions to countermeasures. Article 54 was generally interpreted as recognizing the possibility of lawful countermeasures in case of serious breaches of *jus cogens* norms.

30. It was well known that the Commission's draft articles on State responsibility provided for the application of secondary rules with respect to illicit acts and that they were not concerned with the primary rules of obligations of States under international law. However, those provisions were based on the existence of *jus cogens* obligations, the breach of which entailed State responsibility. The Commission should therefore bear in mind the differences between the notion of *jus cogens* in the law of treaties and in the law of State responsibility. In the former, the concepts of hierarchy of norms and non-derogation from the higher law were essential elements of *jus cogens*, and the notion of "hierarchy of norms" was used to mean that a higher law invalidated a lower law. In contrast, under the law of State responsibility, the notion of *jus cogens* involved simply a group of norms that were fundamentally important and, in that context, it was not the concept of "hierarchy of norms" but rather the "primacy of norms" that was an essential component of *jus cogens*.

31. In the first part of the draft articles on State responsibility adopted in 1980, draft article 19, paragraph 3, contained an illustrative list of international crimes to serve as examples of *jus cogens*. However, the crimes had been selected not because they constituted higher laws of international law but because they were critically important for the international community as a whole. Thus, while there was obviously no higher law that prohibited, for instance, massive pollution of the atmosphere, that prohibition was nonetheless considered a *jus cogens* norm in the context of State responsibility, simply because it was a very important norm in international law. A number of decisions of international courts and tribunals of

[292] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*, para. 34.

[293] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

relevance to *jus cogens* were cited in the first report, for example in the footnotes to paragraph 46, the first footnote to paragraph 47 and the footnotes to paragraph 54. However, *jus cogens* had been invoked, in part, in support of the alleged invalidity of treaties under the law of treaties in only two cases. The other cases cited were all concerned with State responsibility in one way or another, as the States in question were accused of genocide, torture, illegal use of force and other serious violations of *jus cogens* norms.

32. As to whether an illustrative list of norms with *jus cogens* status should be drawn up, it was crucial to take into account the Commission's work on State responsibility. Articles 53 and 64 of the 1969 Vienna Convention did not include specific examples of *jus cogens* and the illustrative list contained in the aforementioned draft article 19 had not been kept by the Commission on second reading, which was very telling. The issue of the scope and title of the topic – which he considered inappropriate – should be examined further by the Special Rapporteur. In accordance with the Special Rapporteur's current approach, that title should be "*Jus cogens* in the law of treaties". However, the commentaries to articles 53 and 64 of the 1969 Vienna Convention were already very dense and if the Commission were to follow that approach, it would simply be writing a commentary on the commentaries. The project would only be meaningful if State responsibility were included, and the title would then be "*Jus cogens* in international law". The Commission might wish to set up a working group to consider the scope of the topic. The draft conclusions would be considered on the basis of the Special Rapporteur's future reports, which he hoped would address the issue of State responsibility. In addition to a draft conclusion on the scope of the topic, it would also be necessary to draft a conclusion defining the concept of *jus cogens* so that it was clear what was being dealt with in the draft conclusions. The definition could be included in a new draft conclusion 3, a proposal he would discuss later.

33. With regard to draft conclusion 1, it should be noted that, in defining the scope, what the Commission should be concerned with was not "the way in which *jus cogens* rules are to be identified" but the existence and content of the *jus cogens* rules. As he had repeatedly mentioned in connection with the topic on customary international law, the words "identify" and "identification" could give rise to confusion. Was "identification" not simply an intellectual exercise of recognition or did it include a normative exercise of determination of the existence and content of a norm and its interpretation and application? If the Commission decided to study *jus cogens* in the context of State responsibility, draft conclusion 1, which was modelled on article 53 of the 1969 Vienna Convention, would have to be entirely reformulated. Regarding draft conclusion 2, the reference to *jus dispositivum*, in paragraph 1, was rather misleading and should be moved to the commentary. Furthermore, since paragraph 2 of that draft conclusion and paragraph 1 of draft conclusion 3 were almost identical, they should be merged into a single provision. Draft conclusion 3 was circular and would make sense only if it set out a definition of *jus cogens*. The question also arose as to what constituted the "fundamental values" of the international community, to which reference was made in paragraph 2 of the draft conclusion. In the same paragraph, the words "hierarchically superior" were valid to describe *jus cogens* in the context of the law of treaties, but that element of hierarchy was not necessarily present in the law of State responsibility, under which *jus cogens* norms were simply considered "especially important".

34. Mr. CAFLISCH, noting that article 139, paragraph 3, of the Federal Constitution of the Swiss Confederation on popular initiatives requesting constitutional revision provided that "[i]f the initiative … infringes mandatory provisions of international law, the [Parliament] shall declare it to be invalid in whole or in part",[294] said that this provision clearly showed that the concept of *jus cogens* was recognized under Swiss constitutional law and that his country attached great importance to the identification of *jus cogens* norms. For that reason, he was in favour of drawing up at least an illustrative list of such norms. There were, of course, uncertainties in that field, but the work undertaken by the Commission would be of much less relevance and value if an attempt were not made to at least draw up such a list. Despite the uncertainties, it would be regrettable if the Commission, instead of drawing up just an "illustrative" and provisional list, limited itself to citing "examples", on the pretext that "[t]he topic, as proposed in the syllabus, is inherently about process and methodology rather than the content of specific rules and norms", as indicated in paragraph 16 of the first report. In paragraph 73 of the report, the Special Rapporteur proposed that the outcome of the Commission's work take the form of draft conclusions. He supported that proposal, as well as the three draft conclusions proposed in paragraph 74, which could be referred to the Drafting Committee, although perhaps the order of draft conclusions 2 and 3 should be inverted.

35. In paragraph 14 of his first report, the Special Rapporteur mentioned a methodological issue that had arisen during the debate in the Sixth Committee: should the work of the Commission be based on State practice, jurisprudence or writings? The Commission usually based its work on the three elements and there was no reason to depart from that practice for the topic at hand. In that regard, State practice, including texts such as the aforementioned Swiss constitutional provision, and international and national jurisprudence played a key role.

36. He also agreed with the Special Rapporteur's reflections on the historical evolution of the concept of *jus cogens*, contained in paragraphs 18 to 41 of the first report. It was generally considered that the existence of a body of peremptory rules in international law was recent, but it had played a central role in the history of that branch of law, albeit by different means. However, it seemed possible to conclude that *jus cogens* had in a way superseded natural law when it came to "moralizing" international public law. While it was no doubt informative and relevant to point out, in paragraphs 46 and 47 of the first report, that the International Court of Justice had referred to *jus cogens* 11 times and that the concept had been mentioned 78 times in the individual opinions of the

[294] Federal Constitution of the Swiss Confederation, of 18 April 1999, available from the website of the Government of Switzerland: www.admin.ch/opc/fr/classified-compilation/19995395/index.html.

Court's members, he was of the view that the existence of peremptory rules of international law was no longer seriously disputed.

37. With regard to the basis for those rules, the Special Rapporteur had rightly highlighted in paragraph 50 of his first report that there was no natural law theory to *jus cogens*, just as there was no positive law theory to it, even though exponents of natural law might be more inclined to allege the existence of such rules where there was none. In principle, however, the problem, and the solution to it, went beyond differences of opinion between schools of thought. *Jus cogens* was certainly not immutable, contrary to what exponents of natural law might have claimed in respect to that branch of law. In fact, it was just the opposite that emerged from article 64 of the 1969 Vienna Convention.

38. Was it true, as the Special Rapporteur had stated in paragraph 53 of his first report, that *jus cogens* arose from the consent of the community of States? Could one really refer in that context to "consent", a concept that tended to reduce international law as a whole to a consensual phenomenon? In his view, *jus cogens* rules, which fell under the category of customary rules, were binding, like all rules of that kind, because of a general practice followed by States which accepted them as law. Furthermore, there was a third element in addition to the other two: States considered that there could be no derogation from the rule in question, even if the rule could be replaced by another rule of the same type but with a different content. The reasons for the existence of such a rule did not, strictly speaking, come under the jurist's remit, but rather that of moralists, theologians, sociologists, philosophers, economists or politicians. A theory of consent in the strict sense of the term was not essential, in that context, to explain the basis and custom of *jus cogens*.

39. In paragraphs 61 to 72 of his first report, the Special Rapporteur sought to identify the "[c]ore elements of *jus cogens*", in other words its characteristics. He had no objection to the elements identified by the Special Rapporteur, who raised two interesting questions in drawing up his list. The first was whether the idea of *jus cogens* could be applied in regional international law. The Special Rapporteur was of the view that it could not, which seemed appropriate for a number of reasons. First, the idea of regional rules of *jus cogens* was contrary to the argument that such rules were universal. Second, the existence of such norms would raise the issue of their effects: what would happen to a treaty concluded between a State that belonged to a given "region" and a State situated outside that region? Third, it had already been observed that the spatial scope of a regional rule was defined by the territory of the States that had adhered to it: what would be the effect of a *jus cogens* norm *vis-à-vis* a State in the region that had not accepted it? Fourth, what would be the relationship between the universal norms of *jus cogens* and any contrary regional peremptory rules?

40. With regard to the issue of the persistent objector, which unfortunately reappeared in the first report on *jus cogens*, he recalled that he had been opposed to the inclusion of a rule on the matter in the draft articles on the identification of customary international law. He hoped that the Commission would firmly reject the idea that there were peremptory rules of international law that were binding on everyone but persistent objectors. Finally, in his first report, the Special Rapporteur had not addressed the question of possible conflicts between binding peremptory rules or how to resolve them.

41. Mr. KAMTO said that, unless it was considered that the rules of customary international law and rules of *jus cogens* were identical, he did not consider it possible to argue that, because the persistent objector principle had been accepted with respect to the former, it must necessarily be valid for the latter.

42. Sir Michael WOOD said that he was grateful to the Special Rapporteur for his first report and his introduction. The report was a most interesting read, with a judicious mix of theory and practice, appropriate for an initial report, and based on an essentially practical approach, which was also appropriate for the topic. The fact that it was an initial report which the Special Rapporteur seemed to be describing as preliminary meant that the Commission should not adopt any texts at that stage, unless it was confident that it had a full picture of all available materials and practice.

43. While the topic was undoubtedly a challenging one, it was by no means new to the Commission, as it had already addressed it in connection with its work on other topics, such as the law of treaties, State responsibility, reservations to treaties and the fragmentation of international law. Both the Commission and States had already addressed *jus cogens* in some depth, starting in 1953, with Hersch Lauterpacht's first report on the law of treaties.[295] The outcome of that work, in particular articles 53, 64 and 66 (*a*) of the 1969 Vienna Convention, would inevitably be one of the central aspects of the topic. The negotiating history of article 53, which the Special Rapporteur had summarized in paragraphs 28 to 41 of his first report, was of great importance. He would slightly nuance what was said in paragraph 41, namely that States had questioned the inclusion of paragraph 53 "out of concern for the lack of clarity about the particular norms that had achieved the status of *jus cogens*". The concerns expressed by States in that regard had been more fundamental and had also extended to the uncertainty over how to identify such norms in practice. For some States, the meaning of the phrase "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" was not self-evident. Explaining how norms of *jus cogens* were to be identified would be one of the key aspects of the Commission's work on the topic.

44. In chapter I of his first report, the Special Rapporteur helpfully described the debates in the Sixth Committee in 2014 and 2015. States seemed to have been generally in favour of studying the topic, although they had stated that the Commission should approach it with caution. In paragraph 11 of the report, the Special Rapporteur agreed with those words of caution and said that he would take great care in ensuring that his reports reflected contemporary practice and did not stray into untested theories.

[295] *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 90 *et seq.*

45. In chapter II of his first report, the Special Rapporteur raised a number of methodological questions. In particular with respect to the sequence in which the various elements identified in the syllabus might be addressed, he had indicated that, given their interconnectedness, he would propose a fluid and flexible approach. By that, he appeared to mean that some draft conclusions, even those already adopted by the Commission, might need to be reconsidered even prior to the first reading in the light of more in-depth study. To the extent that such an approach had already been followed in the past, for example under the guidance of Mr. Gaja on the topic of the responsibility of international organizations, it had been in response to the comments of States on drafts adopted by the Commission after careful consideration, rather than the Commission having second thoughts about its decisions in the light of more in-depth study. Generally speaking, it did not seem very sensible to adopt draft conclusions lightly, in the knowledge that their formulation could always be reviewed before first reading. That should be the exception, not the rule, since otherwise the Commission's regular procedures might be subverted and it would be even more difficult for States, and others, to see at what stage the Commission was on a particular topic. He did not see, for example, why "questions of definition … will need to be revisited as the project proceeds and as more practice is evaluated". Of course, everything might need to be revisited on second reading, and that would in fact be the case, but that was true of every topic and did not mean that in the current instance the Commission should proceed to adopt texts on anything less than a full assessment of relevant practice. To the extent that the various elements identified in the syllabus and refined in the first report were so interconnected that it was impossible to reach a conclusion on one aspect without considering others, that should not prompt the Commission to adopt a text provisionally with the intention of coming back to it, but rather to adopt a group of texts at the same time. That was in effect what had happened with the topic of customary international law: the Commission had not adopted any draft conclusions until the current session, at which a full set of draft conclusion had been drawn up by the Drafting Committee in light of the plenary debates on the Special Rapporteur's four reports, the two studies by the Secretariat and successive debates in the Sixth Committee.

46. The Special Rapporteur had asked for members' views on whether to draw up an indicative list of *jus cogens* norms. He shared the doubts expressed in the Sixth Committee on that point and agreed that there might be reasons to reconsider the idea. However, the Special Rapporteur had indicated in paragraph 17 of his first report that, even if the Commission did not draw up an indicative list, it would have to provide examples of *jus cogens* norms when discussing how to identify those norms, and the examples could perhaps be collected together and presented in an annex. However, the Special Rapporteur had also pointed to the difficulties that would arise in doing that. Which examples would be included in the list – since, when considering norms, the Commission would not necessarily be taking a position on their status as *jus cogens*? What would the status of such a list be and why should norms be included simply because they had been mentioned in the commentaries by way of examples? In short, he was sceptical about the idea of adding an "indirect" list as an annex, including for reasons similar to those given in the first report.

47. With regard to the fact that there had been different views in the Sixth Committee on the materials that should be examined for the topic, he agreed with the Special Rapporteur that the Commission should, as usual, examine all the materials it could find; the weight to be given to them was a different matter.

48. Chapter III was in two sections. Section A was an interesting summary of some of the historical antecedents of the notion of *jus cogens*, from which the Commission could not, and should not, draw any specific conclusions. Section B provided important background information, recalling how the Commission, States and the United Nations Conference on the Law of Treaties had come to develop the *jus cogens* provisions of the 1969 Vienna Convention. While the first report naturally focused, at that preliminary stage of the project, on what had become article 53, the Commission should not lose sight of the fact that at the United Nations Conference on the Law of Treaties States had paid great attention to the procedural requirements for the invocation of *jus cogens*. That had resulted in article 66 (*a*) of the Convention, which provided that where a party invoked *jus cogens* as a ground for impeaching the validity of a treaty, and if following objection thereto no solution was reached within a year, "any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration". It would be important for the Commission to bear those procedural aspects in mind as it proceeded with work on the topic; he had been pleased to hear that the Special Rapporteur intended to address that point in a future report.

49. In section A of chapter IV of his first report, the Special Rapporteur convincingly demonstrated, on the basis of State practice and case law, that *jus cogens* was now part of contemporary international law, which was the cornerstone of the Commission's work on the topic. He had read with interest section B on the theoretical basis for the peremptory character of *jus cogens*. While the Special Rapporteur rightly stated that it was not necessary to enter deeply into those theoretical questions, he seemed to unnecessarily enter into detail on some of them. At that initial stage, what needed to be said, and what could be said, could be found in the definition of *jus cogens* in the second sentence of article 53 of the 1969 Vienna Convention, which stated that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Although the sentence opened with the words "For the purposes of the present Convention," there was no suggestion that "for the purposes of the present topic" the Commission needed to come up with a different definition. The Commission had not done so in the case of other topics dealing with *jus cogens*. As the definition in the 1969 Vienna Convention was widely accepted by States and by international lawyers generally, there would

have to be a very good reason for the Commission to depart from it. He therefore believed that the precise language of the Convention should be retained and included very early in the draft conclusions.

50. In section C of chapter IV, entitled "Core elements of *jus cogens*", the Special Rapporteur attempted, not very convincingly, to elaborate on what was written in article 53 of the 1969 Vienna Convention by introducing the notion of "core elements". In paragraph 63 of his first report, he suggested that in addition to the elements explicitly referred to in article 53 of the 1969 Vienna Convention, there were three other "core elements" that characterized *jus cogens* norms: they were universally applicable, superior to other norms and served to protect fundamental values of the international community. In his view, those elements were not helpful, and by adding them the Special Rapporteur seemed to depart from his initial commitment to ensure that his reports reflected contemporary practice. In fact, there was virtually no reference to practice to support the inclusion of those elements. In any event, as a matter of substance, it was difficult to see that the elements added anything to the terms of article 53 – and, if they did add something, that would raise difficult issues. The Commission needed to be very careful about seeming to create new requirements for the recognition of a *jus cogens* norm, but it was not clear from the formulation of draft conclusion 3 whether the Special Rapporteur was saying that those additional elements must be proven to show that a *jus cogens* norm existed. That was presumably not the case, but then what was their effect?

51. On reading the Special Rapporteur's explanation, the notion of universal applicability seemed to add nothing to non-derogability. In paragraph 68 of his first report, the Special Rapporteur set out the two implications of that additional element, with the caveat that they were provisional considerations to which he would return in future reports: first, the persistent objector rule would not be applicable to *jus cogens* norms and, second, *jus cogens* norms could not apply on a regional or bilateral basis. He himself would call for caution with respect to those statements, as it was difficult to see to what extent they were accurate without having first studied in depth article 53 of the 1969 Vienna Convention and State practice. How could the Commission state that the persistent objector rule was not applicable to *jus cogens*, which he believed was the case, without having reached an agreement on the meaning of the expression "accepted and recognized by the international community of States as a whole"? And were members being asked to exclude the possibility of regional *jus cogens*, when that precise issue was to be examined in a later report? Mr. Caflisch had made very interesting comments on those two points, which would no doubt be taken into consideration later.

52. The notion of "superiority" was unclear and potentially misleading. Consequently, speaking of a "hierarchy" within international law, or saying that certain rules were "superior" to others, without explaining in what way, did not mean a great deal. The Commission might know what effect, if any, *jus cogens* had in relation to treaties and in the fields of international responsibility and State immunity, but the whole question of the effects and consequences of *jus cogens* was to be dealt with in a later report and should not be pre-empted by invoking some vague notion of "superiority". The question of the relationship between *jus cogens* norms themselves would presumably be dealt with in a later report. Since any given *jus cogens* norm was not superior to another *jus cogens* norm, it might be problematic to say that *jus cogens* norms were "superior to other norms of international law".

53. The reference to the "values of the international community" was similarly unhelpful. The existence of a *jus cogens* norm depended on its acceptance and recognition as such by the international community of States as a whole, not on a subjective assessment of "values".

54. With regard to chapter V of the first report, he agreed that draft conclusions would be the most appropriate form for the outcome of the Commission's work on the topic, and he welcomed the Special Rapporteur's intention that the draft conclusions would "reflect the current law and practice on *jus cogens* and will avoid entering into … theoretical debates".

55. Turning to the draft conclusions proposed in chapter VI of the first report, he said that draft conclusion 1 seemed to capture well the intended scope of the draft conclusions, and he had no comments other than drafting ones, particularly concerning the curious use of the expression "*jus cogens* rules", already mentioned by the Special Rapporteur. The text reflected the Special Rapporteur's description of the object of the Commission's study of the topic, namely to "provide a set of draft conclusions that reflect the current state of international law relating to *jus cogens*". Draft conclusion 2 seemed to be largely of an explanatory nature and its provisions would perhaps be more appropriate for the commentaries than the body of a draft conclusion. In any event, much of the draft conclusion was rather questionable. The first paragraph, for example, referred to "modification, derogation and abrogation", and he would review carefully the explanations given by the Special Rapporteur on that point when introducing his first report, particularly since, for draft conclusion 3, he had decided to revert to the language of the 1969 Vienna Convention, which of course did not mention derogations. The phrase "can take place through treaty, customary international law or other agreement" raised several questions concerning the relationship between different sources of international law that were of no relevance to the Commission in its work on the topic. Draft conclusion 2 should therefore not be adopted, at least for the time being. It could be discussed by the Drafting Committee, if the Special Rapporteur so wished, but not with a view to adopting it as a draft conclusion. Certain aspects of it might feature in a later draft conclusion or eventual commentary. While the first paragraph of draft conclusion 2 seemed to be a statement about the modification and abrogation of, and derogation from, rules of international law in general, he wondered why it was necessary to first explain how rules of international law could "normally" be changed or terminated before considering *jus cogens* norms. In fact, it was not easy to describe the "normal" way that rules changed in a single paragraph of a draft conclusion.

56. Regarding draft conclusion 3, entitled "General nature of *jus cogens* norms", he was of the view that

the Commission should seek not to set out the "general nature" of *jus cogens*, whatever that expression might mean in that context, but to give a definition of *jus cogens*. For that purpose, as he had already said, it would be better to use the exact language of the second sentence of article 53 of the 1969 Vienna Convention, as it would be a serious mistake to change it in any way. As he had already mentioned, he did not find the propositions in the second paragraph of draft conclusion 3, concerning values, hierarchical superiority and universality, to be helpful, and if they meant anything, they addressed matters that would need to be considered in depth, and with caution, at a later stage. Even on the understanding, mentioned by the Special Rapporteur, that the Commission could review it before the first reading, it would be premature to adopt paragraph 2, which should therefore be left aside, at least for the time being.

57. He agreed with the Special Rapporteur's proposed future work on the topic, set out in chapter VII of his first report, and hoped that it meant that the topic could be completed in the course of the next quinquennium; that should be the aim.

58. In conclusion, despite his considerable doubts about aspects of draft conclusion 3, he would not object to referring draft conclusions 1 and 3 to the Drafting Committee, if that was what the Special Rapporteur wished at the end of the debate. That would not necessarily mean that the Drafting Committee should adopt the three draft conclusions at that stage, before the Commission had considered later reports from the Special Rapporteur. Finally, he agreed with the comments made by Mr. Murase in relation to the draft conclusions.

Protection of the atmosphere (*continued*)[*] (A/CN.4/689, Part II, sect. A, A/CN.4/692, A/CN.4/L.875)

[Agenda item 8]

Report of the Drafting Committee

59. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that he was pleased to present the fifth report of the Drafting Committee for the sixty-eighth session of the Commission, addressing the topic of protection of the atmosphere and contained in document A/CN.4/L.875. The report comprised a preambular paragraph and five draft guidelines. At the current session, the Drafting Committee had devoted five meetings, on 7, 8 and 9 June 2016, to the consideration of draft guidelines 3, 4, 5, 6 and 7 and the draft preambular paragraph, which had been referred to it by the Commission at its 3311th meeting, on 7 June 2016. He thanked the Special Rapporteur, whose mastery of the subject, constructive spirit and cooperation had greatly facilitated the work of the Drafting Committee and his task as Chairperson, as well as the members of the Committee for their active participation. The Drafting Committee had also had before it a working paper containing the proposed amendments to the draft guidelines and preambular paragraphs, as contained in the Special Rapporteur's third report (A/CN.4/692). The Special Rapporteur had presented the proposals during his summing up of the debate, taking into account the various comments made in the plenary. He recalled that the Drafting Committee was elaborating draft "guidelines" on the topic, in line with the 2013 understanding,[296] and that it had left open the question of whether the "guidelines" would be presented as containing "guiding principles relating to" or "dealing with" the protection of the atmosphere. He further recalled that, at the previous session, on the recommendation of the Drafting Committee, the Commission had adopted three draft guidelines, namely draft guidelines 1, 2 and 5, together with four preambular paragraphs.[297] Following the proposal by the Special Rapporteur in his third report, the Drafting Committee had renumbered draft guideline 5, on international cooperation, as draft guideline 8, which appeared as such in the Drafting Committee's report, on the understanding that the number 5 in square brackets denoted the previous number and that the text remained as adopted at the previous session. In addition to draft guidelines 3, 4, 5, 6 and 7, the Drafting Committee had, on the basis of the Special Rapporteur's proposal in his third report, adopted a preambular paragraph, which would appear as the fourth paragraph of the preambular text adopted thus far.

60. Turning to the draft guidelines, he said that draft guideline 3, on the obligation to protect the atmosphere, was central to the draft guidelines as a whole. Draft guidelines 4, 5 and 6, which had also been adopted at the current session, flowed from draft guideline 3 and sought, in particular, to establish an analogous link between various principles of international environmental law and the specific situation of the protection of the atmosphere. It should be recalled that, at the previous session, the Special Rapporteur had proposed in his second report[298] a draft guideline; its referral to the Drafting Committee had been deferred following the debate in the plenary pending further analysis by the Special Rapporteur, taking into account the criticism that his characterization of the duty to protect as an obligation *erga omnes* had not been fully substantiated in the second report. In an effort to allay that concern, the Special Rapporteur had made a proposal in his third report to limit the seemingly broad scope of the obligation specifically to atmospheric pollution and atmospheric degradation, and to differentiate the kinds of obligations pertaining to the two dimensions, while refraining from making a determination as to whether a duty to prevent in the context of protection of the atmosphere was an obligation *erga omnes*.

61. The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur, taking into account comments made in the plenary, in particular the need to better link the *chapeau* of the draft guideline and the two paragraphs dealing respectively with atmospheric pollution and atmospheric degradation. It had ultimately been decided to merge the elements into a single paragraph. As currently formulated, draft guideline 3 provided that States had an obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation. That formulation had its genesis in principle 21 of the Stockholm

[*] Resumed from the 3311th meeting.

[296] *Yearbook ... 2013*, vol. II (Part Two), p. 78, para. 168.

[297] *Yearbook ... 2015*, vol. II (Part Two), pp. 19 *et seq.*, para. 54.

[298] *Ibid.*, (Part One), document A/CN.4/681.

Declaration,[299] channelling the *Trail Smelter* arbitration, and was also related to principle 2 of the Rio Declaration on Environment and Development.[300] The reference to "States" for the purposes of the draft guidelines covered both the possibility of States acting "individually" or "jointly", as appropriate.

62. It should be recalled that draft guideline 1, provisionally adopted at the previous session, already defined atmospheric pollution as "the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin, of such a nature as to endanger human life and health and the Earth's natural environment".[301] That definition already contained a "transboundary" element. Moreover, the definition of atmospheric degradation as "the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment"[302] also had a "global" dimension. Accordingly, the Drafting Committee had decided to delete the words "transboundary" and "global" from the draft guideline proposed by the Special Rapporteur.

63. As currently formulated, the draft guideline was without prejudice to whether the obligation to protect the atmosphere was an obligation *erga omnes*. That point would be addressed in the commentary. It would also be clarified in the commentary that the duty of due diligence was an obligation of conduct and not of result, which required States to take appropriate measures to control public and private conduct. Due diligence implied a duty of vigilance and prevention. It also required that the context and evolving standards, from a regulatory or technological perspective, be taken into account.

64. The Commission had already acknowledged the fluctuating and dynamic nature of the atmosphere that resulted in the transport and dispersion of polluting and degrading substances within it. Moreover, the atmosphere was essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems. It was on that basis that it was stated in one of the preambular paragraphs provisionally adopted by the Commission at the previous session that "the protection of the environment from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole".[303] Accordingly, the reference to "prevent, reduce or control" denoted a variety of measures that could be taken by States, whether individually or jointly, in accordance with applicable rules as might be relevant to atmospheric pollution on the one hand and atmospheric degradation on the other. That phrase drew upon formulations contained in article 194 of the United Nations Convention on the Law of the Sea and article 4 of the United Nations Framework Convention on Climate Change. Moreover, article 2 of the Paris Agreement under the United Nations Framework Convention on Climate Change provided that the global average temperature should be held to certain agreed levels, recognizing that "this would significantly reduce the risks and impacts of climate change" by "[i]ncreasing the ability to adapt to adverse impacts of climate change and foster climate resilience and low greenhouse emissions development".

65. Even though the appropriate measures to "prevent, reduce or control" applied to both atmospheric pollution and atmospheric degradation, it was understood that the reference to "applicable rules of international law" was intended to signal a distinction between measures taken, bearing in mind the transboundary nature of atmospheric pollution and the global nature of atmospheric degradation, and the different rules that were applicable thereto. Different "applicable rules of international law" were implicated in each of the two situations, and their contours would be further explored in the commentary.

66. The title of draft guideline 3, which was now "Obligation to protect the atmosphere" following the deletion by the Drafting Committee of the words "of States" after "obligation", sought to accentuate the centrality of the obligation to protect.

67. Draft guideline 4 dealt with environmental impact assessment. It was the first of three draft guidelines that flowed from draft guideline 3. In paragraph 153 of its judgment in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, the International Court of Justice had affirmed that "a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State" (para. 153 of the judgment). As currently formulated, draft guideline 4 provided that: "States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation."

68. The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur, which sought to take into account views expressed in the plenary. The main points of discussion had revolved around the scope of the draft guideline, which was still considered overly broad. First, the provision had been reformulated in the passive voice: "States have the obligation to ensure that an environmental impact assessment is undertaken", as opposed to "States have an obligation to undertake an appropriate environmental impact assessment", in order to indicate that it was an obligation of conduct and that, given the diversity of economic actors, the obligation did not necessarily attach to the State itself. What mattered was that it was the State that put in place the necessary legislative, regulatory and other measures for an assessment of the proposed activities to be conducted. Notification and consultations were key to such assessments.

[299] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

[300] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

[301] *Yearbook ... 2015*, vol. II (Part Two), pp. 21–23 (draft guideline 1 (*b*)).

[302] *Ibid.* (draft guideline 1 (*c*)).

[303] *Ibid.*, pp. 19–20 (draft third preambular paragraph).

69. Second, concern had been expressed that the proposal had not been limited in space. The phrase "of proposed activities under their jurisdiction or control" was intended to indicate that the obligation of States to ensure that an environmental impact assessment was undertaken related to activities under their jurisdiction or control. Since environmental threats had no respect for borders, that would, in principle, not exclude the possibility of a group of States, as part of global environmental governance, coming together and agreeing that an assessment should be undertaken with respect to an activity under their jurisdiction or control or likely to have an impact on areas under their jurisdiction or control.

70. The third concern had related to whether a threshold was needed, considering in particular that the definition of the terms "atmospheric pollution" and "atmospheric degradation" in draft guideline 1, provisionally adopted in 2015, already provided for a threshold. The Drafting Committee had considered such a threshold necessary, as exceeding the threshold provided for in the current draft guidelines formed the basis for triggering an environmental impact assessment. The formulation "which are likely to cause significant adverse impact" drew on principle 17 of the Rio Declaration on Environment and Development. Moreover, other instruments, such as the 1991 Convention on environmental impact assessment in a transboundary context, provided for a similar threshold. The International Court of Justice had also, in several judgments, including those in the cases concerning the *Gabčíkovo–Nagymaros Project*, *Pulp Mills on the River Uruguay* and the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, alluded to the importance of an environmental impact assessment. In the *Pulp Mills on the River Uruguay* case, it had indicated that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource" (para. 204 of the judgment). The threshold set by the formulation "likely to cause significant adverse impact" in draft guideline 4 meant that an environmental impact assessment would not be necessary for an activity whose impact was likely to be minor or transitory. The impact of the potential harm must be "significant", and given that the topic covered both "atmospheric pollution" and "atmospheric degradation", what constituted "significant" remained a factual determination. To ensure that the threshold of foreseeability was met before an obligation arose, the qualifier of "appropriate" had been omitted from the reference to "an environmental impact assessment".

71. While the Drafting Committee had considered that the phrase "in terms of atmospheric pollution or atmospheric degradation" was not, from a drafting perspective, entirely felicitous, it had considered it important to mention the two main issues addressed by the draft guidelines with respect to the protection of the environment, namely transboundary atmospheric pollution and atmospheric degradation. Further explanation would be provided in the commentary as to the extent to which the obligation to ensure that an environmental impact assessment was undertaken applied in transboundary and global contexts.

72. The Drafting Committee had acknowledged that transparency and public participation were important components aimed at ensuring access to information and representation, but it had considered that procedural aspects of an environmental impact assessment should be addressed in the commentary and not in the draft guideline, as the Special Rapporteur had proposed.

73. Principle 10 of the Rio Declaration on Environment and Development provided that environmental issues were best handled with the participation of all concerned citizens, at the relevant levels. Such participation included access to information, the opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters addressed those issues. Draft guideline 4 was entitled "Environmental impact assessment", as originally proposed by the Special Rapporteur.

74. Draft guideline 5 dealt with the sustainable utilization of the atmosphere. The atmosphere was a limited resource with limited assimilation capacity. It was often not conceived of as exploitable in the sense that mineral, oil and gas resources were explored and exploited, but, in fact, it was exploited in its physical and functional components. The polluter exploited the atmosphere by reducing its quality and its capacity to assimilate pollutants. First and foremost, draft guideline 5 drew an analogy with the concept of "shared resource", while also recognizing that the unity of the global atmosphere required a recognition of the community of interests. Accordingly, the draft guideline was based on the premise that the atmosphere was a limited resource whose ability to sustain life on Earth was affected by anthropogenic activities. In order to ensure the protection of the atmosphere, it was important to see it as an exploitable resource, which subjected it to the principles of conservation and sustainable use. Some members had expressed doubts that the atmosphere could be treated in the same way as aquifers or watercourses.

75. Draft guideline 5 comprised two paragraphs. In the first paragraph, it was acknowledged that the atmosphere was a "natural resource with a limited assimilation capacity". The Drafting Committee had preferred that phrase to "the finite nature of the atmosphere," as proposed by the Special Rapporteur, which it had considered to be imprecise and bound to raise questions, as it was the introduction or release of substances into the atmosphere and alterations to the atmospheric condition that necessarily impacted the atmosphere. The second part of paragraph 1 sought to integrate conservation and development to ensure that modifications to the planet did not compromise the survival and well-being of organisms on Earth, by indicating that the utilization of the atmosphere "should be undertaken in a sustainable manner". That wording was inspired by articles 4 and 5 of the draft articles on the law of transboundary aquifers adopted by the Commission in 2008[304] and articles 5 and 6 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.

[304] The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

76. The term "utilization" was used broadly and in general terms, evoking notions beyond actual exploitation, and the commentary would elaborate further on that point. Some members of the Drafting Committee had had difficulties with the notion of "utilization", given that it was often the activities of humans that, directly or indirectly, had an impact on the atmosphere as an envelope of gases and not the utilization of the atmosphere as such that was the major concern. The Drafting Committee had nonetheless considered that the formulation "its utilization should be undertaken in a sustainable manner" was simple and not overly legalistic. That formulation better reflected the paradigm shift towards viewing the atmosphere as a natural resource that should be utilized in a sustainable manner. It was presented more as a statement of international policy and regulation than an operational code to determine rights and obligations of States.

77. Paragraph 2 built upon the language of paragraph 140 of the judgment of the International Court of Justice in the case concerning the *Gabčíkovo–Nagymaros Project*, which referred to the "need to reconcile economic development with protection of the environment". The formulation proposed by the Special Rapporteur, invoking the need to "ensure proper balance" had been considered unnecessarily conflictual, pitting economic development against environmental protection. Moreover, the use of the expression "protection of the atmosphere" sought to focus the paragraph on the subject matter, which was protection of the atmosphere.

78. Some members of the Drafting Committee had been of the view that paragraph 2 was unnecessary, as it simply reflected a statement that could be contained in a commentary to explain the guideline, for example.

79. The title of draft guideline 5 was "Sustainable utilization of the atmosphere", as originally proposed by the Special Rapporteur. As noted earlier, draft guideline 5 on international cooperation, provisionally adopted in 2015, was now draft guideline 8.

80. Draft guideline 6 dealt with equitable and reasonable utilization of the atmosphere, an important but autonomous element of sustainability, as reflected in draft guideline 5. The Drafting Committee had discussed it on the basis of a reformulated text by the Special Rapporteur, taking into account comments made in the plenary. As they had done with the preceding draft guideline, some members had questioned the usefulness of draft guideline 6 in relation to the atmosphere, particularly as draft guideline 5 already addressed sustainable utilization.

81. Like draft guideline 5, draft guideline 6 was formulated in a broadly abstract and general way. Instead of indicating that States "should utilize the atmosphere", it provided that: "The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations."

82. The draft guideline was formulated in general terms, seeking to apply the principle of equity to the protection of the atmosphere as a natural resource shared by all. The first part dealt with "equitable and reasonable" utilization. The formulation that the "atmosphere should be utilized in an equitable and reasonable manner" drew, in part, on article 5 of the Convention on the Law of the Non-Navigational Uses of International Watercourses and article 4 of the draft articles on the law of transboundary aquifers. The differences between the atmosphere, on the one hand, and watercourses or aquifers, on the other, had been stressed by some members of the Drafting Committee. That required a balancing of interests and consideration of all relevant factors that might be unique either to atmospheric pollution or to atmospheric degradation.

83. The second part of the draft guideline addressed intra- and inter-generational equity. In order to make the link between the two aspects of equity, the Drafting Committee had elected to use the phrase "taking into account the interests of present and future generations" rather than "and for the benefit of present and future generations of humankind". The words "taking into account the interests" had replaced "for the benefit of" in order to signal the integrated nature of the atmosphere, whose "exploitation" needed to take into account a balancing of interests to ensure sustenance of life for Earth's living organisms.

84. The draft guideline was entitled "Equitable and reasonable utilization of the atmosphere", the words "and reasonable" having been added to the title proposed by the Special Rapporteur.

85. Before turning to the last draft guideline, he wished to say a few words about the preambular paragraph that the Drafting Committee had considered and adopted, as it had been proposed by the Special Rapporteur in relation to considerations of equity, in particular intra-generational equity.

86. The Drafting Committee had worked on a revised proposal by the Special Rapporteur, which had sought to reflect the concept of "different national circumstances" in the text. Such a reference had been considered inappropriate in that context, as it reflected a broader notion and was associated with the concept of common but differentiated responsibilities, which was not part of the topic according to the 2013 understanding.

87. The text originally proposed by the Special Rapporteur in his third report had been drawn from the ninth preambular paragraph of the draft articles on the law of transboundary aquifers, whereas the current text was inspired by the seventh preambular paragraph of the Convention on the Law of the Non-Navigational Uses of International Watercourses. As currently formulated, the paragraph read: "*Aware* of the special situation and needs of developing countries". Following the proposal of the Special Rapporteur, it would appear as the fourth preambular paragraph. It simply acknowledged the particular factual situation and needs of developing countries.

88. Draft guideline 7 dealt with activities whose very purpose was to alter atmospheric conditions, the clear and concrete intention being to modify them on a large scale. The Special Rapporteur had originally proposed it as draft guideline 7, but had then presented it as a new paragraph 3 of draft guideline 5 in the revised proposals he had made following the plenary debate; finally, following discussion in the Drafting Committee, it had been considered

that the issue deserved a separate guideline. Moreover, on the substance, the Special Rapporteur had proposed in his third report a draft guideline on geoengineering, which had been revised in general terms following the plenary debate. It was on the basis of that revised text that the Drafting Committee had worked.

89. In the Drafting Committee, even though the formulation in general terms had been considered a step in the right direction, there had been some concerns about the seemingly broad scope of the proposed provision. Indeed, several members had remained unconvinced that there was a need for a draft guideline on matters that essentially remained controversial and were based on scant practice.

90. As currently formulated, the text of the draft guideline read: "Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law."

91. The term "[a]ctivities" was understood broadly, but they were "[a]ctivities aimed at intentional large-scale modification of the atmosphere". The Draft Committee had considered different formulations before settling on that language, which was based on the definitions of "geoengineering" and "environmental modification techniques" under the 1976 Convention on the prohibition of military or any other hostile use of environmental modification techniques, which referred, in its article II, to "any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space".

92. As had already been noted, the term "[a]ctivities" was to be understood in a broad sense. Certain other activities were prohibited under international law, but the Drafting Committee was of the view that they were not covered by the draft guideline in question. The Convention on the prohibition of military or any other hostile use of environmental modification techniques, for example, was specifically intended to prevent use of the environment as a means of warfare, by prohibiting the deliberate manipulation of natural processes that could produce phenomena such as hurricanes, tidal waves or changes in climate or that had "widespread, long-lasting or severe effects" (art. 1, para. 1). Furthermore, the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) contained provisions that were complementary to the Convention on the prohibition of military or any other hostile use of environmental modification techniques in the event of armed conflict: while that Convention prohibited deliberate modifications of the environment as a means of warfare, Protocol I prohibited attacks on the environment as such, regardless of the means used (article 35, paragraph 3, and article 55; see also article 8, paragraph 2 (*b*) (iv), of the Rome Statute of the International Criminal Court).

93. In the course of the discussion in the Drafting Committee, a proposal had been presented to specify that the term "activities" referred only to "non-military" activities. Given that it was understood that the draft guideline did not apply to military activities, there had been an exchange of views on whether the draft guidelines as a whole applied only to "non-military" activities. Some members had considered that this limitation applied only to draft guideline 7, as any other interpretation would call into question the scope of the draft guidelines, defined in a guideline provisionally adopted in 2015 without any similar limitations. Other members had been of the view that the withdrawal of the aforementioned proposal so that "activities" were not qualified as "non-military" had been made precisely because they had been given to understand that the draft guidelines as a whole would not apply to military activities.

94. Some of the activities were subject to regulation and would continue to be governed by the various applicable regimes. For example, afforestation had been incorporated into the regime of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and in the Paris Agreement under the United Nations Framework Convention on Climate Change (art. 5, para. 2). Measures had been adopted to regulate carbon capture and storage under some international legal instruments. The 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter now included an amended provision and annex, as well as new guidelines for controlling the dumping of wastes and other matter. To the extent that "ocean iron fertilization" and "ocean alkalinity enhancement" related to questions of ocean dumping, that Convention and the Protocol thereto were relevant.

95. The draft guideline was not intended to stifle innovation and scientific progress. Principles 7 and 9 of the Rio Declaration on Environment and Development highlighted the importance of new and innovative technologies and cooperation in those areas. Draft guideline 7 therefore did not seek to prohibit such activities, although States could agree to do so; it simply set out the principle that such activities should be conducted with prudence and caution. The reference to "prudence and caution" was inspired by the language of the rulings of the International Tribunal for the Law of the Sea in the case concerning *Southern Bluefin Tuna* (para. 77), *The MOX Plant Case* (para. 84) and the case concerning *Land Reclamation by Singapore in and around the Straits of Johor* (para. 99). The draft guideline was cast in hortatory language, aimed at encouraging the development of rules to govern such activities in the context of the regimes applicable in the various fields relevant to atmospheric pollution and atmospheric degradation.

96. It should also be noted that the draft guideline provided for an important threshold for such activities: they had to involve "intentional" modification and be conducted on a large scale.

97. The draft guideline ended with the words "subject to any applicable rules of international law". There had been some discussion in the Drafting Committee as to whether it was appropriate to use in a hortatory guideline the formulation "and in accordance with existing international law," as had originally been proposed by the Special Rapporteur. Some members had proposed deleting the reference. As currently formulated, the first part of the draft

guideline ended with a comma, and was to be understood as "subject to any applicable rules of international law". It was understood that international law would continue to apply in relation to the draft guideline.

98. The text originally proposed by the Special Rapporteur had mentioned "transparency", but the Drafting Committee had decided to address that matter in the commentary. Similarly, as environmental impact assessment was addressed in draft guideline 4, it had elected to delete the second sentence of the draft guideline proposed by the Special Rapporteur, according to which environmental impact assessments were required for such activities, and to address that matter in the commentary.

99. The title of draft guideline 7 was "Intentional large-scale modification of the atmosphere" rather than "Modification of the atmosphere", as previously proposed in the Drafting Committee. The title was intended to signal that the draft guideline addressed only intentional modification of the atmosphere on a large scale.

100. In conclusion, he said that he hoped that the Commission would be in a position to provisionally adopt the draft guidelines and the preambular paragraph as presented.

The meeting rose at 6.10 p.m.

3315th MEETING

Tuesday, 5 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Jus cogens (*continued*) (A/CN.4/689, Part II, sect. H, A/CN.4/693)

[Agenda item 10]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

2. Mr. HASSOUNA said that he wished to thank the Special Rapporteur for his clear, well-structured report, which sought to identify the scope of the topic and the general nature of *jus cogens* norms. While many States had expressed support in the Sixth Committee for the inclusion of the topic "*Jus cogens*" in the agenda of the Commission, others continued to voice reservations. Even among those States supporting its inclusion, there remained differences regarding how to approach the topic and the bases on which to rely. The Special Rapporteur should therefore take that divergence of views into consideration and address the topic with great caution. The Special Rapporteur's ultimate goal would be to clarify the concept of *jus cogens* from an international law perspective, by submitting concrete formulations acceptable to both members of the Commission and members of the Sixth Committee.

3. With regard to determining *jus cogens* norms, he agreed with the Special Rapporteur that there was no need to depart from the Commission's normal method of work, which consisted in considering a variety of materials and sources in an integrated fashion. During the Sixth Committee debate on the topic, some States had held that the consideration of the topic should be based on judicial practice, particularly that of the International Court of Justice, whereas others had suggested that it should also be based on relevant State practice. The two sources were not mutually exclusive. The Commission should consider State practice, jurisprudence, literature and other relevant sources; the proper weight to be attached to those sources would then be determined according to the respective materials under consideration.

4. He supported the fluid and flexible approach to the topic proposed by the Special Rapporteur, which would allow the draft conclusions to be reconsidered in the light of the Commission's determinations on subsequent elements. That did not mean, however, adopting the draft conclusions on a temporary or provisional basis. Reviews should be undertaken only in the interests of coordination and adaptation.

5. Concerning the proposal to provide an illustrative list of norms that currently qualified as *jus cogens*, he would favour doing so indirectly by giving examples of such norms in the commentaries in order to substantiate the draft conclusions. He would prefer postponing a decision on whether to compile those examples in an annex to the conclusions until after the Commission had defined the norms of *jus cogens*. The important thing was to clearly underline that any list of examples, whether in the commentaries or in an annex, would be by no means exhaustive in character.

6. The Special Rapporteur should be commended for his clear description of the historical evolution of the concept of *jus cogens* and for his efforts to outline as concisely as possible the ongoing debates concerning the legal nature of the concept. As the Commission had itself emphasized, *jus cogens* had been the subject of a sizeable volume of attention in the international legal literature, which made the Special Rapporteur's work all the more impressive.

7. With regard to the three draft conclusions proposed by the Special Rapporteur, he noted that, when referring to *jus cogens*, the term "norms" had been used in certain formulations and the term "rules" in others. There should be

some consistency in the use of terms; otherwise, an explanation would be needed. Although, in his introduction to his first report, the Special Rapporteur had proposed replacing "rules" with "norms" in draft conclusion 1, both terms continued to be used in draft conclusion 2, paragraph 2.

8. Consideration should be given to reversing the order of draft conclusions 2 and 3, so as to begin by describing the general nature of *jus cogens* norms before dealing with the modification, derogation and abrogation of rules of international law. Draft conclusion 2, paragraph 1, appeared to go beyond the scope of the topic, since the latter's focus was on *jus cogens* norms, not what rules could be modified, derogated from or abrogated or by what means. The Special Rapporteur should therefore consider deleting the paragraph from the draft conclusions and inserting it in the commentaries, if deemed necessary. Draft conclusion 2 could then be redrafted to read: "Peremptory norms of general international law may only be modified, derogated from or abrogated by rules having the same character."

9. A definition of *jus cogens* should be added to draft conclusion 3. He supported the suggestion that such a definition be based on the one contained in article 53 of the 1969 Vienna Convention, which included all the core elements of *jus cogens*. In that connection, he would further suggest that the Special Rapporteur consider renaming the topic "*Jus cogens* in international law", which would better reflect the purpose of the Commission's work.

10. While the proposed draft conclusions provided a useful starting point for the Commission's discussions on the topic, there were several issues that appeared to need further clarification. The first was the notion of derogation. Draft conclusion 2, paragraph 2, provided that "[p]eremptory norms of international law may only be modified, derogated from or abrogated by rules having the same character". However, the peremptory character of a norm precisely implied that it could not be derogated from by another norm created by some States; if the international community of States as a whole adopted a new peremptory norm, that norm would then modify the existing peremptory norm, but not derogate from it. In that respect, it should also be noted that draft conclusion 3, paragraph 1, which stated that peremptory norms were norms from which no modification was permitted, contradicted draft conclusion 2, paragraph 2, and, more crucially, article 64 of the 1969 Vienna Convention. The Special Rapporteur should further develop the analysis buttressing the current formulation of draft conclusions 2 and 3.

11. A second issue that needed clarifying was the invalidating effect of *jus cogens*. While the Special Rapporteur specified, in draft conclusion 3, paragraph 2, that peremptory norms were hierarchically superior to other norms of international law, the invalidating effect of *jus cogens*, which was set forth in article 53 of the 1969 Vienna Convention and was integrally related to the idea of hierarchy, was not mentioned in the draft conclusions. Although the issue might be dealt with in future reports, reference to it in the present context would be desirable. In any case, the Special Rapporteur should address important questions raised by the nullity of norms that conflicted with *jus cogens*, such as who determined whether a conflicting norm was void and whether norms other than treaty norms could also be found void.

12. A third issue was that of regional *jus cogens*. The Special Rapporteur seemed to assume, in paragraph 68 of his first report, that, since *jus cogens* norms were universally applicable, they did not apply on a regional basis. However, contrary to that assumption, which was also reflected in draft conclusion 3, paragraph 2, the existence of regional *jus cogens* had been recognized in practice. In 1987, the Inter-American Commission on Human Rights had found that, in the member States of the Organization of American States, there was recognized a norm of *jus cogens* that prohibited the execution of children by the State. It followed that the existence of regional *jus cogens* and its application in relation to the universal application of *jus cogens* norms deserved further study, which the Special Rapporteur could undertake in his future reports.

13. In the light of those observations, he agreed with the referral of the three draft conclusions to the Drafting Committee.

14. As to the form of the Commission's product, he supported the Special Rapporteur's view that draft conclusions would be the appropriate format, since they would aim to clarify the state of the law on the basis of current practice regarding *jus cogens*. He also agreed with the Special Rapporteur's proposed road map for dealing with the topic, on the understanding that, in addition to the issues that he intended to address in his future reports, consideration should also be given to the issues raised and suggestions made during both the Commission's and the Sixth Committee's debates.

15. Mr. KITTICHAISAREE said that he would like to thank the Special Rapporteur for his excellent, well-researched first report, in which he analysed the natural law and positivist approaches to explain the sources of *jus cogens* norms, while conceding that State practice in that field was scarce. He himself was not a proponent of either the natural law or the positivist schools of thought. As a pragmatist or realist international lawyer, he would venture to give the following explanations for the emergence of the recognition of *jus cogens* in the Vienna Convention on the Law of Treaties.

16. The Commission's work in the lead-up to the 1969 Vienna Convention had come not long after the Second World War, when atrocities committed by the Nazi regime had still been fresh in the memories of humankind. The invocation of piracy and slave trading as crimes contrary to public order and morals had not only reaffirmed that certain crimes were subject to universal jurisdiction, but had also proved that certain acts were universally proscribed. That had provided a basis for recognizing peremptory norms and the *erga omnes* nature of such norms.

17. Crimes against humanity, war crimes, crimes against peace and what was to become known as genocide had been prosecuted at the Nürnberg trials, at which the International Military Tribunal had pronounced that crimes against international law were committed by men, not by abstract entities, thereby legitimizing, for the first time, the principle of individual criminal responsibility after

several previous efforts had resulted in it being rejected for fear of violating another principle, namely that of legality, or *nullum crimen sine lege*. United Nations General Assembly resolution 95 (I), on the Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, which had been adopted unanimously on 11 December 1946, was evidence of State practice in recognizing that the crimes prosecuted at Nürnberg were universally condemned. In some of the first cases considered by the International Tribunal for the Former Yugoslavia, the Tribunal had cited the resolution as the main basis for holding that, when the crimes under its Statute had been committed, they had already been recognized as crimes under customary international law; hence, there had been no violation of the principle of legality.

18. Therefore, although those crimes were dealt with under separate international conventions, the purpose of those conventions was to ensure their widest possible prosecution in domestic legal systems and to secure international cooperation to deny safe havens to their perpetrators. However, at the international conferences leading up to the adoption of the conventions concerned, universal jurisdiction had not generally been accepted, except in relation to grave breaches of the four 1949 Geneva Conventions for the protection of war victims.

19. Against that background, the task of finding criteria to identify *jus cogens* norms would be an arduous one. However, the Special Rapporteur might, for instance, analyse how the prohibition of torture had become a norm of *jus cogens*, using both the inductive and deductive approaches to establish appropriate criteria for identifying new *jus cogens* norms and for evaluating State practice in support of the existence of such norms. The Special Rapporteur might also look at the possible role played in that respect by general principles of law recognized by civilized nations. For example, child pornography and sexual exploitation of children were crimes under most legal systems. Were they *jus cogens* norms? If not, why not?

20. Although the Commission's work should focus on the process of the identification of *jus cogens* in general and its consequences, he agreed with the idea of having an illustrative list of *jus cogens* norms both in the commentaries and in an annex to the draft conclusions. Provided that it was clearly stated that the list was not exhaustive, he did not believe that it could be interpreted as closed.

21. With respect to draft conclusions 1 and 2, he agreed with the view expressed by Sir Michael at the previous meeting. As to draft conclusion 3, paragraph 2, while the core elements chosen by the Special Rapporteur to define *jus cogens* norms seemed appropriate, there was a need to explain extensively in the commentary the meaning of the expression "fundamental values of the international community". The phrase "hierarchically superior to other norms" should be either modified to deliver the idea of superiority without referring to hierarchy, or explained in the commentary. In particular, the Special Rapporteur should specify how the hierarchical superiority of *jus cogens* in international law differed from hierarchical superiority in national systems and how superiority could be determined when two or more norms were in conflict. Rather than being a requirement for identification, hierarchical superiority was one of the consequences of *jus cogens*. Therefore, although the idea of superiority should be mentioned, he was concerned that addressing it in draft conclusion 3, paragraph 2, might blur the difference between the identification of *jus cogens* and its consequences and thereby risk making its definition circular. While Article 20 of the Covenant of the League of Nations and Article 103 of the Charter of the United Nations, which had been cited in paragraph 28 of the first report, were interesting examples in the current context, it was not clear how the idea of hierarchy might help shed light on the criteria for identifying *jus cogens*.

22. Lastly, the phrase "universally applicable" should be retained and explained in the commentary with reference to the International Court of Justice's advisory opinion on *Reservations to the Convention on Genocide*, according to which principles that might qualify as *jus cogens* had to be recognized as binding on States, even without any conventional obligation, and universal in character. If universality was to be considered a characteristic of *jus cogens* – which he believed to be the case – then the notion of regional *jus cogens* could not be accepted.

23. The Special Rapporteur should also distinguish between the universal recognition that *jus cogens* norms could not be derogated from, on the one hand, and the fact that States might not accept universal jurisdiction over crimes committed on their respective territories or by or against their nationals, on the other.

24. Mr. McRAE said that he wished to congratulate the Special Rapporteur on his first report, which evidenced high-quality research and highlighted many of the preliminary issues faced by the Commission. The description of the historical evolution of the concept of *jus cogens* was very illuminating and had brought to the fore some of the fundamental contradictions and challenges of the topic.

25. The Special Rapporteur had brought a balanced approach to the topic and, in response to views expressed by Member States in the Sixth Committee, had said that he would be cautious in his treatment of it. However, Special Rapporteurs and the Commission as a whole were by their very nature and composition cautious, so he was not sure that the Special Rapporteur's affirmation of caution added anything, methodologically, to the Commission's treatment of the topic. More important was the Special Rapporteur's affirmation that he would base his reports on the material on which the Commission normally relied, namely State practice, jurisprudence and literature, and that he would not introduce new priorities among them for the purposes of the present topic.

26. As the Special Rapporteur indicated in his discussion of the historical evolution of the idea of *jus cogens*, the concept was rooted in a mixture of natural law and positivism. While the origin of *jus cogens* lay in natural law, the methodology for ascertaining whether a rule of *jus cogens* existed was essentially positivist. Although the Special Rapporteur had eschewed a decision on theoretical issues, there was always a theoretical construct behind any choice that was made. In the case of *jus cogens*, a natural law idea was being made to fit into a positivist framework.

27. Member States in the Sixth Committee had encouraged the Special Rapporteur to look for a grounding of *jus cogens* in State practice, thereby evidencing a positivist perspective. What State practice showed was that no State denied the existence of an international law principle of *jus cogens*. When it came to determining whether a norm had the status of *jus cogens*, however, the question remained whether the Commission should apply the same method as it did for identifying customary international law. If it did, it would find either that there was plenty of *opinio juris* and no real evidence of a constant and uniform usage, or that the evidence of what constituted practice was essentially the same material as that which constituted *opinio juris*. That raised the question whether, in accordance with the standards set in the Commission's work on customary international law, it might be easier to identify a *jus cogens* norm than a customary rule of international law. However, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice had found a customary rule of international law relating to the use of force on the basis of what States had said and had ignored the fact that what many States did in practice was contrary to their statements that they regarded the use of force as illegal. The rule identified by the Court had perhaps been a *jus cogens* norm, a point that the Special Rapporteur might elaborate upon in future reports. In any event, the case highlighted the conceptual difficulties that the Special Rapporteur would face in producing draft conclusions on the way in which *jus cogens* rules were to be identified.

28. The grounding of the identification of *jus cogens* norms in the method for identifying customary international law raised further problems, including the relevance of the notion of the persistent objector. While he was sympathetic to the ideas expressed by some members that the persistent objector rule should not apply in the identification of *jus cogens* norms, he was not sure of the justification for doing so. If the methodology for the identification of customary international law was to be applied to the identification of *jus cogens* norms, the question arose as to how the different elements of that methodology should be selected. It was thus up to the Special Rapporteur to find a rationale for excluding the persistent objector rule.

29. Other matters also required clarification. The Special Rapporteur asserted in his draft conclusions that a *jus cogens* norm could be changed through customary international law, but one might well wonder how that could happen. The first instance of State practice deviating from a *jus cogens* norm would automatically be invalid, as would any subsequent practice of the same nature. Moreover, since universal identity of action by States creating instantaneous customary international law was inconceivable, the Special Rapporteur would have to consider whether the only way in which a *jus cogens* norm could be replaced would be through a multilateral treaty with universal adherence. The problem was not specific to the present topic but also inherent in article 53 of the 1969 Vienna Convention. The Special Rapporteur would have to consider such matters in his subsequent reports.

30. Regarding the Special Rapporteur's proposal for a "fluid and flexible approach" that would at times require the reconsideration of certain issues and draft conclusions, he shared the view that it had not been the Commission's practice to proceed in such a manner and that it would not be an efficient use of its time to do so. As the Special Rapporteur was dealing with an evolutionary topic, perhaps he should rethink his plan of work as his research developed and deal later with topics on which more research was needed.

31. He agreed that draft conclusions were the appropriate format for the outcome of the Commission's work. As to whether there should be an illustrative list, there was no doubt that during its treatment of the topic the Commission would indicate what it considered to be *jus cogens* norms. Whether those norms were then collected in an annex, an illustrative list or an indicative list seemed to him to be a matter of form that could be decided on later in the project, when the Commission had a sense of what those norms were.

32. The question of whether the Commission should embark on a further inquiry into other *jus cogens* norms was a more difficult matter. Although such a list would undoubtedly be of great value, the question arose as to whether it would change the nature of the project. As it might involve considerable additional work and a detailed analysis of substantive areas of law, it was perhaps premature to reach any decision at the current juncture. The Commission could return to the matter when its work on the topic had progressed further and there was a better understanding of the range of *jus cogens* norms emerging from its work and what the production of an annex or illustrative list of additional norms would entail.

33. With regard to the three draft conclusions, the question of whether the scope of the project should be dealt with in draft conclusion 1 or form part of an introduction could be left to the Drafting Committee when it considered the overall structure of the outcome of the Commission's work. As to the substance of draft conclusion 1, he looked forward to the Special Rapporteur's response to Mr. Murase's questions about whether, in practice, the Commission's work on the topic was being narrowed down to *jus cogens* in the context of the law of treaties. Focusing on the nature of *jus cogens* norms as hierarchical and superior to other norms while reflecting how they functioned in relation to treaties might not be an appropriate way of handling the role that *jus cogens* norms played elsewhere.

34. He had several concerns regarding draft conclusion 2. First, paragraph 1 did not relate to *jus cogens* norms but was a broad proposition about the extent to which rules of international law might be modified, derogated from or abrogated. Second, the report under consideration did not lay the analytical groundwork for making such a proposition; that could be misleading. He queried how the draft conclusion tied in with article 41 of the 1969 Vienna Convention, which set out a more nuanced position on modification, at least in relation to treaties. Moreover, the draft conclusion, perhaps unintentionally, seemed to allude to the current debate in the World Trade Organization (WTO) about the extent to which two parties to WTO agreements could enter into a bilateral agreement modifying their relations under the Organization. It did not seem that the

implications of draft conclusion 2, paragraph 1, had been fully thought through. Third, he questioned the usefulness of focusing on the exceptional nature of *jus cogens* norms in draft conclusion 2, paragraph 2, particularly at the outset of the treatment of the topic. It was somewhat confusing to treat *jus cogens* norms as if they were at the top of a hierarchy and then say that they were exceptions to the norms lower in the hierarchy. Moreover, it was not clear in what way draft conclusion 2 helped to explain how to identify *jus cogens* norms or their legal consequences.

35. In his view, the Special Rapporteur should rethink draft conclusion 2 and decide whether there was a proposition about *jus cogens* norms worth putting forward in that provision. If there was such a proposition, it should not relate to the modification of, derogation from or abrogation of treaties or customary international law. He endorsed the suggestion that the idea the Special Rapporteur was seeking to convey should be dealt with in the commentaries, where it could be made clearer than it was at present.

36. With regard to draft conclusion 3, he shared the doubts of others as to whether it provided an adequate definition of *jus cogens* norms. By asserting that *jus cogens* norms could not be derogated from, draft conclusion 3, paragraph 1, seemed to contradict draft conclusion 2, paragraph 2, which explained how *jus cogens* norms could be derogated from. Draft conclusion 3 also departed from the definition of *jus cogens* norms set out in article 53 of the 1969 Vienna Convention by adding to derogation, modification and abrogation and taking an absolute position on modification – all that needed further explanation.

37. Draft conclusion 3, paragraph 2, seemed to add qualifications to the definition of *jus cogens* norms that were not sufficiently substantiated in the first report. While the statement that *jus cogens* norms protected fundamental values of the international community might be descriptively correct, its normative significance was not clear. Likewise, it was not clear whether the expression "hierarchically superior" said anything useful about the range of *jus cogens* norms. While he agreed that a definition of *jus cogens* norms was essential to the project, he considered that it could be achieved by amending draft conclusion 3, paragraph 1, and deleting draft conclusion 3, paragraph 2, whose purpose and substance could be explained more fully in the commentaries.

38. In the light of the foregoing, he considered that draft conclusions 1 and 2 should be referred to the Drafting Committee only if they were revised by the Special Rapporteur to reflect the current debate. He was not in favour of referring draft conclusion 2 to the Drafting Committee, unless the consensus of the Commission was otherwise, in which case, the draft conclusion would require major changes that would depend, in part, on how draft conclusion 3 was reworded.

39. In conclusion, he said that the Special Rapporteur had provided an excellent overview of the history of the concept of *jus cogens* norms and of the conceptual and practical issues confronting the Commission. His subsequent reports elaborating on those issues would be a most valuable contribution to the Commission's work.

40. Mr. NOLTE said that the Special Rapporteur's first report provided a solid introduction to the topic and that he shared many of the views it set forth. For example, he agreed that the basis of the work on the topic should be actual State practice, not "untested theories". Almost fifty years after the adoption of articles 53 and 64 of the 1969 Vienna Convention, there was no longer any doubt about the existence of *jus cogens* norms, as the Special Rapporteur had amply demonstrated. Shortly after the Second World War, it had been necessary to establish that international law contained certain basic peremptory norms, such as the prohibition of genocide, of the use of force, or of torture. Such peremptory norms were now established. Today there was a different issue at stake – the difficulty in determining which of the many claims that a particular rule had the character of *jus cogens* were well founded. Less obvious claims were being made than had previously been the case, such as claims by individuals that their right of access to a court was violated by the national implementation of certain Security Council resolutions that established sanctions.

41. In *Al-Dulimi and Montana Management Inc.* v. *Switzerland*, the European Court of Human Rights had recently affirmed that the human right of access to a court was not a *jus cogens* norm. That and other cases suggested that the current challenge was not to establish and expand *jus cogens* norms, but to strike the right balance between ordinary rules of international law that could be modified by regular procedures, on the one hand, and certain exceptional foundational rules that could not be thus modified, on the other. In order to strike that balance, it was necessary to look closely at State and judicial practice, to use the procedures available, such as that under article 66 of the 1969 Vienna Convention, and not merely to postulate morality and justice. It was the right time for the Commission to address the topic with a view to helping States and courts deal with *jus cogens* in practical terms and as a matter of *lex lata*. The Commission should help States and courts find the right balance between not enough and too much *jus cogens*.

42. His preference was not to draw up an illustrative list of *jus cogens* norms, as he was concerned that it would lead to fruitless debate about why certain norms were included instead of others. It would be better to give a few examples in the commentaries that illustrated how *jus cogens* norms could be identified and what legal effects they produced. However, the existence of such norms should not be recognized for their own sake. That approach had the additional advantage of obviating discussion of the difficult question of the theoretical foundations of *jus cogens*. He was not convinced by the Special Rapporteur's proposition, in paragraph 59 of his first report, that it was impossible and unnecessary to resolve the opposition between positivist and natural law approaches to *jus cogens*. In his view, articles 53 and 64 of the 1969 Vienna Convention offered a satisfactory solution by emphasizing the acceptance and recognition of a norm by the international community of States and the possibility of the emergence of new *jus cogens* norms by such acceptance and recognition. Furthermore, he did not consider the rules of the 1969 Vienna Convention, which were positive law, to be, in the Special Rapporteur's words, at odds with the idea of a higher set of norms from which no derogation,

even if by consent or will of States, was permissible, or an expression of *le froid cynicisme positiviste*.[305] Articles 53 and 64 of the 1969 Vienna Convention demonstrated that a positivist approach was not necessarily cold or amoral. An enlightened positivist approach could prevent natural or moralistic approaches to the law that invited those who applied it to project their own preferences thereon.

43. On methodology, he agreed that the topic raised different issues which were interrelated and that the Special Rapporteur should proceed cautiously. However, he was not convinced that this required a "fluid" approach where everything remained provisional. The Special Rapporteur had quite rightly drawn parallels between the present topic and the topics of identification of customary international law and of subsequent agreements and subsequent practice in relation to the interpretation of treaties, all of which raised issues that were difficult to disentangle. Yet the nature of the Commission's work was such that once a draft conclusion was provisionally adopted it was no longer "fluid": any change called for another decision, usually by consensus. He would therefore prefer to defer the adoption of certain aspects of the proposed draft conclusions until their implications were clearer.

44. Regarding the proposed draft conclusions, he endorsed the substance of draft conclusion 1, but suggested that the Drafting Committee might find a way to express it in simpler terms. One possibility could be: "The present draft conclusions concern the identification of norms of *jus cogens* and their legal consequences."

45. He had two difficulties with draft conclusion 2. The first concerned the second part of the first sentence which read "unless such modification, derogation or abrogation is prohibited by the rule in question (*jus dispositivum*)". He did not agree that there was a general rule in international law whereby the parties to a treaty could establish a treaty obligation that contained an immutable prohibition to change that obligation. On the contrary, the parties to a treaty could, in principle, modify any rule that they had established by agreement, including a treaty rule that prohibited modification of the treaty. For example, if the parties to the Charter of the United Nations had added a clause to Article 51 whereby, owing to its inherent nature, the right of self-defence could not be modified, the parties could, after abrogating the clause, amend Article 51. There might well be exceptions, but it was certainly not generally recognized that the parties to a treaty could bind themselves forever simply by proclaiming that a particular treaty rule could not be changed by their own agreement. A rule did not acquire the character of *jus cogens* solely by agreement of the parties to a treaty. That being said, his intent was not to deny the special nature of *jus cogens*, merely to indicate that he found the formulation of draft conclusion 2 too broad. His second difficulty with paragraph 1 of draft conclusion 2 related to the second sentence, which concerned the ways in which a modification, derogation or abrogation could take place. He agreed with the Special Rapporteur that the latter could take place through treaty or custom, but he did not consider that the process of customary international law should be described as one of several possible forms of "agreement". An obligation under customary law could arise even for a State that had not agreed to such a rule.

46. He had several concerns with regard to draft conclusion 3, paragaph 2, the first being that the expression "fundamental values" was too limited. In his first report, the Special Rapporteur developed the expression based on a judgment of the International Court of Justice related to the Convention on the Prevention and Punishment of the Crime of Genocide and on the humanitarian character of certain norms. That dimension of humanitarian rules was certainly one important source for *jus cogens* norms, but *jus cogens* was not limited to norms designed to protect individual human beings. There were also important inter-State rules, such as the prohibition of the use of force, that had the character of *jus cogens*. Such norms were more formal in nature and thus protected humanitarian values more indirectly than fundamental rules of a humanitarian character. He therefore proposed that the expression "the fundamental values" be replaced with "the most fundamental principles".

47. Furthermore, while he agreed that the project should deal only with *jus cogens* rules of a universal character, he did not deem it wise to exclude, at least at the current stage, regional or other forms of *jus cogens*. Since, as the Special Rapporteur had rightly observed, the concept of *jus cogens* originated in domestic law, and *jus cogens* norms were a typical feature of domestic law, there was no reason why such a feature should not be recognized within a limited community of States. In Europe, certain rules were recognized as elements of the European public order, which, together with the principle of the primacy of European Union law, produced effects that were very similar to what was known as *jus cogens* at the universal level. He did not consider that the concept of "norms of *jus cogens*" should be limited to rules which were "universally applicable"; however, he had no objection to the scope of the project being limited to *jus cogens* rules which were universally applicable.

48. His final concern with regard to draft conclusion 3, paragraph 2, related to the expression "hierarchically superior". The concept was not as clear as it appeared because the legal effects of "hierarchically superior" norms could be different. The meaning of "hierarchically superior" was wrapped up with the issue of the legal consequences of *jus cogens* rules, which the Special Rapporteur intended to address at a later stage. He therefore shared the doubts expressed about the advisability of prejudicing the issue at that juncture by introducing the ambiguous term "hierarchically superior".

49. In conclusion, he said that the first report was an excellent point of departure for the Commission's work on the topic.

Protection of the atmosphere (*concluded*) (A/CN.4/689, Part II, sect. A, A/CN.4/692, A/CN.4/L.875)

[Agenda item 8]

Report of the Drafting Committee (*concluded*)

50. The CHAIRPERSON invited the members of the Commission to adopt the titles and texts of draft guidelines

[305] *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/693, para. 53.

3, 4, 5, 6 and 7, together with a preambular paragraph, provisionally adopted by the Drafting Committee on 7, 8, and 9 June 2016, as contained in document A/CN.4/L.875.

Preambular paragraph

51. Mr. KITTICHAISAREE said that during the meetings of the Drafting Committee he had not objected to the inclusion of the preambular paragraph, the wording of which had been drawn from the seventh preambular paragraph of the Convention on the Law of the Non-Navigational Uses of International Watercourses. However, he wished to have it placed on record that, in his view, the Commission was not suggesting or acknowledging that developing countries had a free hand to harm the atmosphere.

The preambular paragraph was adopted.

Draft guideline 3. *Obligation to protect the atmosphere*

52. Mr. KITTICHAISAREE said that, while he had no objection to draft guideline 3, he wished to make it clear that it was his understanding that, as far as developing countries were concerned, their national capacity and the technology at their disposal would have to be taken into account as a factor in assessing their obligation to exercise due diligence.

Draft guideline 3 was adopted.

Draft guideline 4. *Environmental impact assessment*

53. Mr. PARK said that, although as a member of the Drafting Committee he had joined the consensus on draft guideline 4 and was not opposed to its adoption as a whole, he had strong doubts as to whether States had a legal obligation to ensure that an environmental impact assessment was undertaken of proposed activities likely to cause significant adverse impact on atmosphere in terms of atmospheric pollution or atmospheric degradation. He considered that at the current stage there was insufficient State practice relating to environmental impact assessments in that connection. For that reason, he regarded the final part of draft guideline 4 as, purely and simply, *lex ferenda*.

Draft guideline 4 was adopted.

Draft guideline 5. *Sustainable utilization of the atmosphere*

54. Mr. KITTICHAISAREE said that he wished to place on record his view that no State should use "economic development" as an excuse for not protecting the environment. Developing countries should, however, be allowed reasonable grace periods to make the necessary adjustments in order to ensure that their economic development activities would not adversely affect the atmosphere.

Draft guideline 5 was adopted.

Draft guideline 6. *Equitable and reasonable utilization of the atmosphere*

Draft guideline 6 was adopted.

Draft guideline 7. *Intentional large-scale modification of the atmosphere*

55. Mr. PARK said that, as a member of the Drafting Committee, he had joined the consensus on draft guideline 7 and was not opposed to its adoption. The draft guideline had initially been entitled "Geoengineering" and was closely related to climate change. The debate in the plenary had evidenced a divergence of views regarding the guideline, both pro and con. He continued to consider that the content and applicability of the draft guideline were controversial; the relevant technology was still in its infancy, and there was a lack of relevant State practice and *opinio juris* underpinning the guideline. On the latter point, it seemed that the content of the draft guideline had not been arrived at in a manner that corresponded exactly to the Commission's traditional method in that regard. Lastly, it was his understanding that draft guideline 7 and the future set of draft guidelines as a whole should apply to non-military activities. In order to avoid any possible misinterpretation of the draft guidelines, it would be necessary to revisit their scope in the near future.

56. Mr. KAMTO said that, in plenary meetings, most of the members who had spoken on that draft guideline, which had formerly referred to geoengineering, had been opposed to its referral to the Drafting Committee. He was not satisfied with the version produced by the Drafting Committee. The idea that the Commission could formulate a guideline on activities aimed at intentional, large-scale modification of the atmosphere was very worrying and he had serious reservations about it.

57. Mr. FORTEAU said that he had not joined the consensus in the Drafting Committee on the draft guideline, which was not supported by State practice or case law. He was against the draft guideline because, among other things, it seemed to legitimize activities aimed at intentional large-scale modification of the atmosphere. Problems might arise in the future if the draft guideline were interpreted as an endorsement of such activities by the Commission.

58. Mr. KITTICHAISAREE said that, during the drafting of the guideline, following a proposal that he had made, the phrase "and in accordance with existing international law" had been replaced with "…, subject to any applicable rules of international law" as a means of indicating that intentional large-scale modification of the atmosphere would be subject to any applicable rules of international law as might already exist or might emerge in the future. Whether military or non-military activities were covered by that draft guideline would depend on the general scope of the draft guidelines as a whole.

59. Mr. NOLTE said that he fully agreed with Mr. Forteau that the Commission should not appear to encourage efforts to modify the atmosphere intentionally on a large scale. If that draft guideline were adopted, that concern should be addressed in the commentary. On the other hand, he was surprised by and did not share the opposite concern that the draft guideline was unduly restrictive, since its scope was strictly limited and in point of fact it did not prohibit intentional large-scale modification of the atmosphere, but only said that it should be conducted with prudence and caution. If the Commission was to address the issue, such wording was necessary.

60. Ms. JACOBSSON said that she fully supported Mr. Nolte's statement.

61. Mr. KAMTO said that he should perhaps have expressed his objection to, rather than his reservations about, the adoption of draft guideline 7. None of the explanations given by various members and nothing in the report of the Chairperson of the Drafting Committee militated in favour of its adoption. It was not enough to say that the draft guideline did not seek to encourage "[a]ctivities aimed at intentional large-scale modification of the atmosphere". That phrase clearly indicated that the Commission took note of the fact that such activities could exist and that it was endeavouring to define the conditions under which they could be conducted. The draft guideline was therefore unsatisfactory and was apparently based on some treaty provisions relating to the modification of the atmosphere in the context of armed conflict that had been drafted with a view to regulating activities in that area. In conclusion, he said that he was uncomfortable with the guideline.

Draft guideline 7 was adopted.

Draft guideline 8. *International cooperation*

Draft guideline 8 was adopted.

62. The CHAIRPERSON said that he took it that the Commission wished to adopt the report of the Drafting Committee on protection of the atmosphere, as a whole, as contained in document A/CN.4/L.875, subject to a minor editorial amendment.

It was so decided.

The meeting was suspended at 11.40 a.m. and resumed at 12.45 p.m.

Mr. Nolte, First Vice-Chairperson, took the Chair.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

63. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of provisional application of treaties was composed of Mr. Forteau, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Petrič, Mr. Vázquez-Bermúdez, Sir Michael Wood, together with Mr. Gómez Robledo (Special Rapporteur) and Mr. Park, *ex officio*.

The meeting rose at 12.50 p.m.

3316th MEETING

Thursday, 7 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Cooperation with other bodies (*continued*)[**]

[Agenda item 13]

Statement by representatives of the Council of Europe

1. The CHAIRPERSON welcomed the representatives of the Council of Europe, Mr. Rietjens, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, and Ms. Requena, Head of the Public International Law Division and Treaty Office of the Council of Europe Directorate of Legal Advice and Public International Law and Secretary to CAHDI. Noting that the Commission attached great importance to its long-standing cooperation with the Council of Europe and that the visit by representatives of the Council enabled it to keep abreast of developments in areas of common interest, he invited them to take the floor.

2. Mr. RIETJENS (Chairperson of the Committee of Legal Advisers on Public International Law) said that he welcomed the opportunity that he had been given, for the second consecutive year as Chairperson of CAHDI, to inform the Commission of the main achievements and future work of CAHDI. Since the term of office of the Chairperson of CAHDI was limited to two years, the next election would be held at the fifty-second meeting of CAHDI, which would take place on 15 and 16 September 2016 in Brussels. The tradition of inviting representatives of CAHDI to present its work reflected the Commission's interest in the activities of CAHDI, which, since its inception more than 25 years previously, had worked to promote the development of public international law.

3. The conference celebrating the fiftieth meeting of CAHDI had been held on 23 September 2015, on the eve of the meeting. Entitled "The CAHDI contribution to the development of public international law: achievements and future challenges", its purpose had been to take stock of the many contributions that CAHDI had made to the development of international law since its creation in 1991. Held in the presence of most of the former Chairpersons and Vice-Chairpersons of CAHDI, several of whom were current members of the Commission, it had enabled proposals to be formulated concerning the future work of CAHDI. Its proceedings would be published in collaboration with Brill Nijhoff Publishers in September 2016.

4. CAHDI brought together the legal advisers of the Ministries for Foreign Affairs of the 47 member States of the Council of Europe, its 5 observer States and the 4 observer States of CAHDI, as well as numerous international organizations, including the United Nations. Its

[*] Resumed from the 3313th meeting.

[**] Resumed from the 3305th meeting.

varied and enriching composition enabled it to carry out its activities while taking into account trends in international law beyond the Council of Europe. CAHDI was a forum for coordination, but above all for discussion, reflection and advice, and its biannual meetings enabled all participants to share information on topical issues, to exchange experiences and national practices, and to ensure regular monitoring of the items on its agenda. In addition, the level of representation and the commitment of the delegations gave great credibility to its work.

5. He would begin by presenting the activities of CAHDI that contributed to the development of international law in general, followed by those that could contribute more specifically to the Commission's work, and finally those that might have implications for other United Nations entities and other international organizations, such as the European Union.

6. Regarding the first point, CAHDI held very detailed, pragmatic discussions about topical issues that often arose in its members' respective Ministries. For example, there had, for several years, been a legal vacuum with regard to the immunity of State-owned cultural property on loan abroad temporarily, even though "legal vacuum" was not the right term, given that immunity was guaranteed by the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had been adopted in 2004 but had not yet entered into force. Indeed, on numerous occasions, State-owned cultural property on loan had been seized or had been the subject of an attempted seizure at the request of private creditors as a means of enforcing judgments. To address the issue, which arose very frequently in practice, a declaration recognizing the customary nature of the pertinent provisions of the Convention had been elaborated within CAHDI.[306] It was a legal document that, while non-binding, reflected a common understanding of *opinio juris* based on the fundamental rule according to which some types of State-owned property – cultural property on display – enjoyed immunity from all measure of constraint. According to the declaration, State-owned cultural property that was loaned temporarily to another State could not be subjected to any measure of constraint, such as attachment, arrest or execution. To date, the Declaration had been signed by the Ministers for Foreign Affairs of 16 States members of the Council of Europe, the most recent signatory having been Mr. Lavrov, on behalf of the Russian Federation. During CAHDI meetings, several other States had expressed a desire to sign the declaration, and it was to be hoped that a practice would develop to counter the attempted attachment of such property.

7. Since March 2014, CAHDI had been reviewing the Council of Europe conventions and, in 2016, had examined eight conventions and protocols in accordance with a decision made by the Committee of Ministers of the Council of Europe in March 2013. One of the points that CAHDI considered to be important in that regard was that some conventions, such as the European Convention on the abolition of legalisation of documents executed by diplomatic agents or consular officers, should be further promoted. Indeed, the Convention was of great practical value in that, by eliminating all authentication requirements, it made it possible to use foreign documents in the same manner as those issued by national authorities. States that had not yet ratified it had been invited to do so. Other conventions, such as the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, might serve as proof of an international custom and were thus of value and interest in their own right. In that respect, it should be specified that, while some delegations had considered that the Convention had been supplanted by the Rome Statute of the International Criminal Court, several others had stressed that it had retained intrinsic value and could even be evidence of an international custom. A consideration of the European Convention on State Immunity and its Additional Protocol had led CAHDI to conclude that the instruments could be regarded as a source of customary international law and that they were still relevant, although further reflection would be required upon the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

8. CAHDI had also observed that some Council of Europe conventions had fallen into disuse. They included the European Convention on Consular Functions and its two Protocols, which continued to be used sparingly by States, which preferred to have recourse either to the 1963 Vienna Convention on Consular Relations, a better-designed instrument in that regard, or, if necessary, to bilateral agreements. That being said, while CAHDI had examined the impact, effectiveness and implementation of those conventions, it had not expressed an opinion on their possible termination, denunciation or withdrawal, for the simple reason that it was not empowered to do so. Indeed, no committee could decide whether a convention should be terminated. It was the parties to conventions that were the "masters" of them, and it was therefore up to them to decide. Moreover, if a convention was considered obsolete, recommending that it should be widely denounced would be highly problematic from a technical and legal point of view, and not just for the depositary.

9. On a directly related note, at its meeting in September 2016, CAHDI would examine the draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe, prepared by the Treaty Office with the aim of updating the Model Final Clauses established by the Committee of Ministers in February 1980. The updating of the Clauses reflected developments within the Council of Europe and the international community since 1980, particularly in terms of the type of binding legal instruments concluded within the Council of Europe over the last 35 years. Bearing in mind that, since 1980, only three agreements had been concluded, compared to 60 conventions, 28 additional protocols and 24 amending protocols, it had been felt that specific Model Final Clauses for agreements were no longer of great interest. Rather, it now seemed appropriate to distinguish between two kinds of protocol, namely amending protocols and additional protocols. In that respect, given that the use of additional protocols had increased significantly, but that their terminology was not always tailored to their content, it had seemed necessary to develop specific model final clauses for that type of instrument, while

[306] For more information on the Declaration on Jurisdictional Immunities of State Owned Cultural Property, the website of the Council of Europe: www.coe.int.

also drawing the attention of the drafters to the misleading or ambiguous nature of the terminology. The draft model final clauses were designed as a non-binding tool for the Council of Europe committees and expert groups tasked with producing conventions and protocols.

10. Lastly, CAHDI had a mandate to transmit legal opinions to the Committee of Ministers at regular intervals. Thus, it had recently issued an opinion, adopted at its fiftieth meeting, on Recommendation 2069 (2015) of the Parliamentary Assembly of the Council of Europe, entitled "Drones and targeted killings: the need to uphold human rights and international law".[307] It was an issue, as much political as legal, on which the international community had already commented several times. It should therefore be highlighted that there was a broad consensus on the fact that armed drones or, more specifically, armed "unmanned aerial vehicles" were not, in themselves, illegal weapons, but that their use was subject to the rules of international law governing the use of force and the conduct of hostilities, and to international humanitarian law and international human rights law. The international community had, however, expressed different views on the interpretation and application of the provisions pertaining to those areas of law. CAHDI had thus decided that any future consideration of the issue within the Council of Europe should take into account the work of the United Nations and that of the ICRC. It had also emphasized its willingness to examine further the issues raised and to keep the item on its agenda, although it did not believe that the proposal by the Parliamentary Assembly of the Council of Europe to develop guidelines was the best way forward.

11. As to the relationship between CAHDI and the International Law Commission, and to the opportunities for cooperation in the development and codification of international law, the Commission's work was on the agenda of CAHDI meetings and was the subject of productive discussions for all participants. CAHDI had also always had the privilege of welcoming a member of the Commission for an exchange of views on ongoing activities within the Commission, and the previous year had been no exception as Mr. Singh, Chairperson of the sixty-seventh session of the Commission and guest of CAHDI in September 2015, had given a very interesting presentation on the Commission's recent activities. The ensuing exchange of views had been highly appreciated by all members of CAHDI. In addition, CAHDI followed the Commission's work closely and, as far as possible, endeavoured to contribute to it in the context of recurrent discussions on specific topics or of conferences that might be relevant to it.

12. Among the regular topics on the agenda of CAHDI, "law and practice relating to reservations and interpretative declarations concerning international treaties" and "immunities of States and international organizations" were the subject of discussions during which the Commission's work was frequently mentioned. With regard to the first topic, at each of its meetings, CAHDI, in its capacity as a European observatory of reservations to international treaties, analysed a list of reservations and/or declarations that might give rise to objections. It was a model recognized both within and outside the Council of Europe. Moreover, CAHDI examined reservations and declarations to Council of Europe and United Nations conventions. Its observatory role, which it had performed for over 16 years, had proved effective because, on the one hand, it helped States to position themselves in relation to a problematic reservation and to act accordingly, regardless of whether they were members of the Council of Europe, and, on the other, it contributed to the withdrawal of some ambiguous reservations. On the latter point, he noted the re-emergence of a trend that he considered to be very problematic and even worrying, namely that of States subjecting the application of the provisions of a convention to their domestic law, an approach that was prohibited under international law on account of the legal uncertainty that it caused during the implementation of the convention in question by the parties.

13. Concerning immunities, the immunity of State officials was increasingly discussed, even though the CAHDI database focused on the immunities of States and international organizations. To clarify the situation, CAHDI had adopted an opinion on Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe, entitled "Introduction of sanctions against parliamentarians".[308] Its consideration of the topic had led it to recall existing legal texts within the Council of Europe, decisions that had already been made by the Committee of Ministers and the International Law Commission's ongoing work. In that regard, he wished to extend warm thanks to Ms. Escobar Hernández for her valuable insights into the Commission's work on the immunity of State officials from foreign criminal jurisdiction. As to the general matter of the rights of members of the Parliamentary Assembly, it had been recalled that, to date, the legal situation of members travelling in an official capacity to and within the member States of the Council of Europe was governed by the Statute of the Council of Europe and by the General Agreement on Privileges and Immunities of the Council of Europe and its Additional Protocol. The General Agreement already afforded special protection to members of the Parliamentary Assembly, since article 13 recognized their rights when attending an official meeting in a member State, while articles 14 and 15 contained provisions related to the immunities that they enjoyed. Those immunities were also mentioned in article 3 of the Additional Protocol to the General Agreement, which extended them to cover representatives of the Parliamentary Assembly and their substitutes at any time when they were attending, or travelling to and from, meetings of committees and sub-committees of the Parliamentary Assembly. Consequently, the Committee of Ministers had repeatedly called upon the member States to give full effect to the privileges and immunities provided for in the above-mentioned instruments. Moreover, the "blue passport" issued pursuant to the Additional Protocol to the General Agreement since the 1970s would be replaced in 2016 by a Council of Europe *laissez-passer*, which would be issued to members of the Council of Europe institutions (the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe), to judges at

[307] CAHDI, "Meeting report, 50th meeting, Strasbourg, 24–25 September 2015" (CAHDI (2015) 23), appendix III.

[308] CAHDI, "Meeting report, 51st meeting, Strasbourg, 3–4 March 2016" (CAHDI (2016) 16), appendix III.

the European Court of Human Rights and at the Administrative Tribunal, to members of monitoring committees, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Committee of Social Rights, and to Council of Europe staff. Regarding the specific issues raised in Recommendation 2083 (2016), CAHDI had underlined that the International Law Commission was currently examining the topic of immunity of State officials from foreign criminal jurisdiction and had observed, in that regard, that, in the provisionally adopted draft articles, the term "State official" meant "any individual who represents the State or who exercises State functions".[309] Even though the definition included "the legislative … functions performed by the State",[310] CAHDI had noted that the Commission had excluded "persons connected with … international organizations"[311] from the scope of the draft articles. In addition, it had pointed out that the Commission dealt only with the issue of immunity from foreign criminal jurisdiction. It had also considered that the responsibility for imposing restrictive measures on particular individuals, whether they were foreign parliamentarians or not, rested with the States and international organizations that had adopted those measures. It had further noted that, with respect to the restrictive measures of the European Union, the Court of Justice of the European Union provided judicial protection to persons addressed in such measures. As to the restrictive measures adopted by the United Nations, it had been recalled that the procedures for listing and delisting had been improved. Lastly, CAHDI had considered that, if it accepted the Parliamentary Assembly's proposal to carry out a feasibility study on the matter, it would be going beyond its mandate as that field did not fall within its competence.[312]

14. He would conclude his presentation by speaking about some other activities that CAHDI had undertaken since its visit to the Commission the previous year to contribute to the work of other bodies involved in the development of international law. The "external dimension" of CAHDI, so to speak, was illustrated, first and foremost, by its composition. Indeed, the legal advisers of the member and observer States represented in CAHDI participated in several other bodies, some of them in the European Union and all of them in the United Nations. That enabled CAHDI to achieve legal consistency on certain issues, but also to encourage exchanges within the different organizations. CAHDI had a very important role to play in that process of exchanges, in that it served as a vital think tank for the development of international law. In that respect, it was worth mentioning the very interesting discussions that were taking place on the subject of the settlement of disputes of a private character to which an international organization was a party. It had been deemed necessary to debate the matter because the immunity of international organizations very often prevented individuals who had been harmed by the actions of an international organization from successfully claiming compensation before a domestic court. In recent years, that immunity had been increasingly called into question on the grounds that upholding it was incompatible with the right of access to a court. Clearly, the matter exceeded the regional scope of the Council of Europe.

15. In 2016, CAHDI would continue to discuss contemporary issues and to propose relevant solutions, while cooperating with other actors of the international society, since cooperation was key in international law, as evidenced by the very fruitful exchanges that had taken place in March 2016 with Ms. Fernández de Gurmendi, President of the International Criminal Court, and Ms. Marchi-Uhel, Ombudsperson to the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities. At its September meeting, it would have the pleasure of welcoming Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel. It was thus a forum in which member States, non-member States and international organizations held dynamic, detailed discussions on contemporary and diverse questions of international law. The discussions were fruitful and contributed to the development of legal thought and to a better understanding of different views and interpretations of law.

16. The interest that CAHDI took in the Commission's activities could only grow in the future, given the Commission's work on topics that were of particular concern to CAHDI. Thus, CAHDI was looking forward to the continuation of the work carried out on the topics of the immunity of State officials from foreign criminal jurisdiction and of the identification of customary international law. To conclude, he wished to thank the Commission for giving him the opportunity to present to it the recent work of CAHDI. Like his predecessors, he sincerely hoped that the close cooperation between CAHDI and the Commission would continue, and it was worth reiterating that the persons who participated in the work of CAHDI were committed to promoting the role of public international law in international relations.

17. Ms. REQUENA (Head of the Public International Law Division and Treaty Office of the Council of Europe Directorate of Legal Advice and Public International Law and Secretary to the Committee of Legal Advisers on Public International Law) said that she would review the main developments that had taken place within the Council of Europe in the field of international law since the Commission's previous session. The Estonian presidency of the Committee of Ministers would focus on three priorities, namely: the promotion of the Internet Governance Strategy 2016–2019[313] and, in that context, the promotion of the Convention on cybercrime; the Gender Equality Strategy 2014–2017;[314] and the new Council of Europe

[309] See *Yearbook ... 2014*, vol. II (Part Two), pp. 143–146 (draft article 2 (*e*)).

[310] *Ibid*., p. 145 (para. (11) of the commentary to draft article 2 (*e*)).

[311] See *Yearbook ... 2013*, vol. II (Part Two), p. 39 (draft article 1, paragraph 2).

[312] CAHDI, "Meeting report, 51st meeting, Strasbourg, 3–4 March 2016" (see footnote 308 above), paras. 6, 8 and 9.

[313] Council of Europe, "Internet Governance—Council of Europe Strategy 2016–2019: democracy, human rights and the rule of law in the digital world", September 2016. Available from: https://rm.coe.int/16806aafa9.

[314] Council of Europe, "Council of Europe Gender Equality Strategy 2014–2017", February 2014. Available from: https://rm.coe.int/1680590174.

Strategy for the Rights of the Child (2016–2021),[315] which had been launched in April 2016. With regard to recent developments in terms of treaty law, particularly concerning the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and its protocols, it should be noted that, on 29 June 2016, the Secretary General of the Council of Europe had received a new declaration from the Ukrainian authorities under article 15 of the Convention regarding certain territories. The declaration had contained an amended list of localities in the regions of Donetsk and Luhansk where some rights guaranteed by the European Convention on Human Rights had been suspended. The Ukrainian authorities had drawn particular attention to the need to adopt a very cautious approach in determining whether the above-mentioned regions had been under the effective control of Ukraine or of the Russian Federation. Moreover, on 20 January 2016, following a decision of 15 April 2015 in which the Committee of Ministers had expressed concern at the deterioration of the human rights situation in eastern Ukraine and Crimea, the Secretary General had announced that a delegation led by Ambassador Gérard Stoudmann would be sent to Crimea. The delegation had been tasked with examining the situation regarding human rights and the rule of law in the peninsula, which was home to 2.5 million persons whose rights were protected by the Convention.

18. On 24 November 2015, France had informed the Secretary General of the Council of Europe of its decision to derogate from certain rights set out in the European Convention on Human Rights in the light of the state of emergency declared following the terrorist attacks in Paris. On 26 February 2016, the French authorities had notified him that the state of emergency had been extended for a period of three months. On 26 May 2016, they had advised him that the state of emergency had been extended for a further two months. In that notification, the French authorities had drawn attention to the introduction of changes to the system of measures taken under the state of emergency. The law no longer authorized administrative searches in places when there were serious grounds for considering that they were frequented by persons who constituted a threat to public order and safety. The French authorities had also underlined that the measures taken under the state of emergency were subject to judicial and parliamentary review.

19. Regarding the additional protocols to the European Convention, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, which introduced a reference to the principle of subsidiarity and to the doctrine of margin of appreciation, while also reducing to four months the time limit within which an application could be made to the European Court of Human Rights following a final domestic decision, had so far been ratified by 29 States parties to the Convention and signed by 12 others. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which allowed the highest courts of the States parties to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights enshrined in the Convention or in the protocols thereto, had been ratified by 6 States and signed by 10 others. The members of the Commission should also note that, in December 2015, the Secretary General of the Council of Europe had decided to use his powers under article 52 of the European Convention on Human Rights to launch an investigation into the manner in which Azerbaijan ensured that its domestic law guaranteed the effective implementation of all the provisions of the Convention. That prerogative had been exercised on only eight occasions since the entry into force of the Convention. The aim of the investigation was to seek explanations regarding the execution of the judgment of the European Court of Human Rights in the case of *Ilgar Mammadov v. Azerbaijan*. The case concerned several violations of the European Convention on Human Rights suffered by the applicant, a political opposition activist who had been arrested and placed in custody in February 2013 for challenging the authorities' official version of the violent clashes that had taken place in Ismayilli on 23 January 2013. In that context, the Secretary General of the Council of Europe had sent a letter to the competent authorities asking why the interested party remained in detention. It should be noted that the Committee of Ministers, which was tasked with supervising the execution of the judgments of the Court in accordance with article 46 of the Convention, had adopted interim resolutions calling for Mr. Mammadov to be released and for his physical integrity to be protected. The Secretary General had informed the Committee of Ministers that Mr. Mammadov's counsel had brought an appeal before the Supreme Court of Azerbaijan that was still pending.

20. Concerning the case law of the European Court of Human Rights, the Grand Chamber had very recently delivered its judgment in the case of *Al-Dulimi and Montana Management Inc.* v. *Switzerland*. The case concerned the freezing of the Swiss assets of Mr. Al-Dulimi and of the company Montana Management Inc. pursuant to Security Council resolution 1483 (2003) of 22 May 2003. The applicants had argued that their assets had been confiscated in the absence of any procedure compatible with article 6, paragraph 1 of the European Convention on Human Rights, on the right to a fair hearing. In its judgment, the Grand Chamber had found that none of the provisions of resolution 1483 (2003) expressly prohibited the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level to implement the Security Council's decisions. The inclusion of individuals on the lists of persons subject to the sanctions imposed by the Security Council had led to interferences that could be extremely serious for the rights guaranteed by the Convention. In the Court's view, before taking the measures requested, the Swiss authorities had the duty to ensure that the listing had not been arbitrary. The applicants, meanwhile, should have been afforded a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. The very essence of their right of access to a court had thus been impaired and, consequently, article 6, paragraph 1, of the European Convention on Human Rights had been violated.

[315] Council of Europe, "Council of Europe Strategy for the Rights of the Child (2016–2021): children's human rights", March 2016. Available from: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8.

21. Regarding other Council of Europe conventions, the new Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism had been opened for signature on 22 October 2015 in Riga. To date, it had been ratified by 1 State and signed by 29 others. To enter into force, it had to be ratified by six States, including four members of the Council of Europe. The Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events had been opened for signature in Saint-Denis (France) on 3 July 2016. The instrument, which had to be ratified by 3 member States to enter into force, had already been signed by 14 member States. It should also be pointed out that the Protocol amending the European Landscape Convention, which had been adopted on 15 June 2016 at the 1260th meeting of the Ministers' Deputies, would be opened for signature on 1 August 2016. Lastly, the draft revised Council of Europe Convention on Cinematographic Co-production had been adopted by the Committee of Ministers on 29 June 2016 at the 1261st meeting of the Ministers' Deputies.

22. More generally, it should be noted that the Council of Europe Treaty Office was considering an increasing number of requests by non-member States to accede to Council of Europe conventions. Indeed, 161 of the 218 Council of Europe conventions were open to non-member States and, since July 2015, the Office had recorded 15 accessions and 5 signatures by such States. The following countries had acceded to the Convention on Mutual Administrative Assistance in Tax Matters: Barbados, Brazil, China, the Dominican Republic, Israel, Jamaica, Kenya, Mauritius, Nauru, Niue, Saudi Arabia, Senegal, Singapore, Uganda and Uruguay.

23. Lastly, the European Commission for Democracy through Law (Venice Commission) had recently issued opinions concerning amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, and concerning Federal Law No. 129-FZ on Amending Certain Legislative Acts of the Russian Federation (Federal Law on Undesirable Activities of Foreign and International Non-Governmental Organizations). Regarding the European migrant crisis, on 2 March 2016, the Secretary General of the Council of Europe had sent a letter to the Heads of Government of the 47 member States of the Council of Europe calling on them to better ensure the safety and proper treatment of migrant and asylum-seeking children. The letter had been a follow-up to one that he had sent to all member States on 8 September 2015 to remind them of their obligations under the European Convention on Human Rights. In January 2016, the Secretary General of the Council of Europe had appointed Ambassador Tomáš Boček as Special Representative on Migration and Refugees, and had given him a mandate to gather information on the situation of the basic rights of migrants and refugees in Europe and to develop proposals for action. Following a mission to Greece and the former Yugoslav Republic of Macedonia, the Special Representative had, in his report,[316] called for the Council of Europe to mobilize the resources necessary to meet the housing needs of migrants and refugees, and to ensure that they had decent living conditions.

24. Mr. KITTICHAISAREE said that he wished to know whether the theft of virtual currencies (bitcoins, for example) constituted an offence under the Convention on cybercrime. It would also be interesting to know whether CAHDI had initiated discussions on the question of whether there existed, under international law, a right of self-defence against non-State actors such as Islamic State in Iraq and the Levant (ISIL).

25. Mr. VÁZQUEZ-BERMÚDEZ asked whether, in its work on *jus cogens*, CAHDI had examined the possible existence and content of regional *jus cogens*.

26. Sir Michael WOOD asked whether CAHDI planned to take measures to expedite the procedure for declassifying some of its documents.

27. Mr. KAMTO said that, when alluding to the declaration recognizing the customary nature of certain provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Chairperson of CAHDI had stated that CAHDI hoped that a practice would develop to counter attempts to seize State-owned cultural property on display abroad. However, if the practice had not yet developed, could one really speak of a custom? Moreover, if there was a custom, was it a regional European custom or a universal custom that was binding on States that were neither represented in CAHDI nor members of the Council of Europe? As to the relationship between the Rome Statute of the International Criminal Court and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, he observed that the principle of non-applicability of statutory limitations had not been established in the Rome Statute of the International Criminal Court as a principle of customary law, since the matter of whether it was customary in nature had not been addressed at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

28. Mr. GÓMEZ ROBLEDO said that, as he understood it, another negotiation process had begun within the Council of Europe on trafficking in cultural property. He would appreciate a progress report in that regard.

29. Ms. ESCOBAR HERNÁNDEZ, referring to the increase in reservations and declarations aimed at subjecting the application of the provisions of a convention to domestic law, which had been mentioned by the Chairperson of CAHDI, asked whether CAHDI had statistics on the matter. She wished to know the number of such reservations and declarations, and whether they were of a general nature or concerned specific areas or points of law. With regard to the relationship between the settlement of disputes of a private character to which international organizations were parties and the immunity of those organizations, and to the effects of that immunity on the right of access to justice, she wished to know the views of CAHDI on the issue and whether it was carrying out work on the topic.

[316] Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Greece and "the former Yugoslav Republic of Macedonia", 7–11 March 2016, document SG/Inf(2016)18. Available from the website of the Council of Europe: www.coe.int.

30. Ms. JACOBSSON said that, as attempted attachments of State-owned cultural property were increasingly common, the work of CAHDI on the immunity of such property was most welcome and, in that respect, she endorsed the questions asked by Mr. Kamto.

31. Mr. RIETJENS (Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI)), responding to Mr. Kittichaisaree's question about ISIL, said that CAHDI had not discussed the problem, but that several countries represented in CAHDI had sent letters to the President of the Security Council explaining why they felt in a position to invoke the right of collective self-defence against ISIL. The letters had been issued as documents of the Security Council and could be consulted.

32. CAHDI had not discussed the topic of *jus cogens*, but, after Mr. Singh's presentation, questions had been asked about how the Commission viewed the matter, to which Mr. Singh had replied by informing CAHDI about the status of the Commission's work on the topic. As to the possible existence of regional *jus cogens*, the issue had not yet been discussed within CAHDI, but it might be in the future given its importance.

33. In response to Ms. Jacobsson's and Mr. Kamto's question on cultural property, from a strictly legal standpoint, he acknowledged that he had perhaps used the word "practice" somewhat loosely, although Belgian legislation, for instance, already prohibited the attachment of State-owned cultural property on display abroad. The authors of the Declaration on Jurisdictional Immunities of State Owned Cultural Property, which originated from a proposal by Austria and the Czech Republic, acknowledged the existence of an *opinio juris* to the effect that State-owned cultural property could not be attached, the idea being that it was desirable for as many States as possible to endeavour, in practice, to counter the attempted attachment of such property on display abroad, without awaiting the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property. That being said, if there was a custom, CAHDI considered that it could only be universal, for it was hard to see why State-owned cultural property should be exempt from attachment only in the territories of member States of the Council of Europe and not in other regions of the world. In fact, a non-member State of the Council of Europe had already signed the Declaration.

34. Regarding the non-applicability of statutory limitations to crimes against humanity and war crimes, CAHDI had not examined the issue in substance, but had addressed it in the context of a general review of the Council of Europe conventions undertaken pursuant to a decision of the Committee of Ministers. On that occasion, there had been a discussion about the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, and it had been as part of that discussion that some delegations had maintained that the Convention had been supplanted by the Rome Statute of the International Criminal Court, while others had asserted that it had retained intrinsic value and could even be evidence of an international custom.

35. Concerning Ms. Escobar Hernández's question on the rise in the number of reservations and declarations aimed at subjecting the application of the provisions of a convention to domestic law, CAHDI did have data, but had not yet collated and analysed them. It would however be useful to do so, as interesting conclusions could be drawn. Indeed, discussions on objections to reservations increasingly focused on reservations of that kind. They could be of a general nature or directed at a particular article of a treaty, but did not concern specific areas and were not always formulated in the same way. CAHDI would endeavour to collate the data at its disposal in order to have a clearer picture of the issue.

36. As to the status of work on the settlement of disputes of a private character to which an international organization was a party, CAHDI had, on the basis of a document from the Netherlands analysing the matter, sent to its members a questionnaire prepared by that country and intended to attempt to identify trends from the responses received.

37. Ms. REQUENA (Head of the Public International Law Division and Treaty Office of the Council of Europe Directorate of Legal Advice and Public International Law and Secretary to the Committee of Legal Advisers on Public International Law), replying to Mr. Kittichaisaree's question on whether the theft of virtual currencies was covered by the Convention on cybercrime, said that the Convention prohibited the use of the Internet for the purpose of committing acts that were treated in law as criminal offences. Consequently, for the Convention to apply to the theft of virtual currencies, the latter had to be criminalized. As to Mr. Kittichaisaree's second question, concerning ISIL, CAHDI had not discussed the problem, as indicated by its Chairperson, because its mandate was limited to matters of international law affecting States and international organizations. Other Council of Europe bodies were, however, competent to deal with the conduct of non-State actors and, given the possible impact of the activities of ISIL on public international law, it was likely that the Council of Europe would soon be required to tackle the issue.

38. With regard to Sir Michael's question on the declassification of Council of Europe documents, the Council, like any international organization, had its own rules in that respect. Confidential documents, for example those that contained States' replies to a CAHDI questionnaire, could be declassified after a period of 10 years. The next meeting of CAHDI might be a good opportunity for it to ask States whether they were opposed to the declassification of their replies to the questionnaires sent to them. The replies to the questionnaire on special missions, in particular, should be declassified shortly, as CAHDI was preparing a publication on the matter.

39. Regarding Mr. Gómez Robledo's question, it was true that, in response to acts of terrorism targeting cultural property and World Heritage Sites, the Council of Europe had decided to draft a new convention criminalizing not only trafficking in, but also the destruction of, cultural property. Since it was an international agreement, negotiations would take some time, but the Committee on offences relating to cultural property had already held an initial meeting. Further information could be provided to the Commission if it so wished.

40. As to Ms. Escobar Hernández's question on reservations and declarations aimed at subjecting the application of the provisions of a convention to domestic law, there had indeed been an increase in such reservations and declarations, which were mainly of a general nature and were directed, above all, at two conventions, namely the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the Council of Europe and Convention on preventing and combating violence against women and domestic violence, which, as the members of the Commission were aware, showed certain parallels with the Convention on the rights of the child and the Convention on the Elimination of All Forms of Discrimination against Women, respectively.

Jus cogens (*continued*) (A/CN.4/689, Part II, sect. H, A/CN.4/693)

[Agenda item 10]

First report of the Special Rapporteur (*continued*)

41. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

42. Mr. MURPHY, noting that, in chapter II of his first report, the Special Rapporteur advocated a "fluid and flexible approach" and appeared to contemplate asking the Commission to adopt draft conclusions before it was confident that they were correct, said that he did not favour such an approach, and that the Special Rapporteur should thoroughly analyse any issue on which he was asking the Commission to adopt a draft conclusion and should not expect the Commission to return continually to previously adopted draft conclusions. For example, it did not make sense to ask the Commission to declare, in draft conclusion 3, that *jus cogens* norms were "universally applicable", while stating in paragraph 68 of the first report under consideration that such a conclusion was necessarily provisional and would be "the subject of more detailed study in future reports": that was putting the cart before the horse.

43. In paragraph 17 of his first report, the Special Rapporteur asked whether the Commission should draw up an illustrative list of *jus cogens* norms. Like the Special Rapporteur and other members of the Commission, he was against the idea. At the same time, the Special Rapporteur stated, in the same paragraph, that, in the course of its work on the topic, it was inevitable that the Commission would provide examples of *jus cogens* norms "to substantiate its conclusions". That might be the case, but the current approach to the work on the identification of customary international law, under which references to jurisprudence in the commentaries illustrated the methodology without going into the substance of the decisions cited, demonstrated that it was entirely possible to complete the work on a topic by drawing examples of existing practice from a source of law without necessarily endorsing any particular substantive rules established in that source.

44. While he found the historical background in chapter III of the first report interesting, he doubted the relevance of section A and would therefore prefer that it did not appear in the commentary. For example, the fact that, under Roman law, private pacts could not derogate from public law, or that, in most countries, statutory law could not derogate from constitutional law, or that administrative law could not derogate from statutory law, did not tell the Commission much about the position of *jus cogens* in contemporary international law. Hierarchies did, of course, exist in legal systems, but that did not provide much guidance as to the current role of *jus cogens* in international law.

45. Regarding chapter IV, in particular section C, on the core elements of *jus cogens*, he agreed with other members that the three concepts put forward – universality, hierarchical superiority and the fundamental values of the international community – were not supported by a thorough review of State practice, jurisprudence or doctrine. Indeed, he did not recall the International Court of Justice ever referring to "fundamental values" in the context of *jus cogens*, even though a judge might have done so on occasion in a dissenting opinion. The concepts seemed to be unsubstantiated extrapolations of article 53 of the 1969 Vienna Convention.

46. He agreed with the view expressed by the Special Rapporteur in paragraph 73 of his first report that the outcome of the work should take the form of "draft conclusions", but was not convinced of the need to adopt draft conclusions at the current session; the Special Rapporteur might wish, in the light of the debate, to consider revisiting some or all of his proposals in order to conduct a more detailed analysis, as had been done recently in the work on other topics.

47. Turning to the proposed draft conclusions in chapter VI of the first report, he said that he supposed that starting with a provision on the scope of the project was inevitable. Noting that proposed draft conclusion 1 bore some resemblance to draft conclusion 1 from the topic "Identification of customary international law",[317] but that it contained the word "identified" rather than "determined", he invited the Commission to ponder which word was more appropriate. He endorsed the Special Rapporteur's proposal to replace the word "rules" with "norms", which was used in article 53 of the 1969 Vienna Convention, though he generally preferred the former.

48. Like other members of the Commission, he found draft conclusion 2 more problematic. Paragraph 1, which dealt with the ways in which rules of international law could normally be modified, derogated from or abrogated, appeared to serve as a means of setting up paragraph 2 to demonstrate why *jus cogens* was different. However, its wording was very simplistic and did not at all reflect the complexity of the ways in question. He did not think it wise for the Commission to attempt to provide a reductive description of the complex ways in which rules of international law could normally be modified, nor did he think that doing so fell within the scope of the topic.

49. For example, a few States might decide to develop and apply among themselves, by means of a treaty, a rule

[317] Document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session.

that was different to a customary international law rule applicable to all. Should it be considered that the customary international law rule in question had been modified, derogated from or abrogated? The answer was both yes and no: yes, in relation to States parties to the treaty, but no, in relation to non-States parties. The simplistic wording of draft conclusion 2, paragraph 1, did not capture that nuance and was therefore misleading.

50. Draft conclusion 3 contained an extensively revised version of the second sentence of article 53 of the 1969 Vienna Convention. The first paragraph included only some of the elements of that article, and the second paragraph introduced new elements, which were not thoroughly analysed in the first report. Following the example of draft conclusion 1 from the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties",[318] in which the Commission reproduced the key elements of article 31 of the 1969 Vienna Convention, he proposed that the wording of the second sentence of article 53 of the Convention be replicated in draft conclusion 2 so as to provide the reader with a well-known definition of *jus cogens* before exploring new lines of reasoning.

51. While he supported the referral of draft conclusion 1 to the Drafting Committee, he had serious doubts about the validity of draft conclusion 2, which it would be preferable to set aside for the time being. It would also be premature to send draft conclusion 3 to the Drafting Committee, unless it was done with the objective of restoring the definition of *jus cogens* as set out in the 1969 Vienna Convention.

52. Mr. PARK said that he welcomed the considerable analytical work carried out by the Special Rapporteur in preparing his first report, which, through the multiplicity of documents and sources cited, demonstrated the breadth and complexity of the topic. *Jus cogens* implied the existence and development of a concept accepted by the organized international community as a whole. It was certainly one of the most important topics in contemporary international law, but also among the most complex, and the first challenge lay in determining how to approach it and what method to employ. Although nobody denied the existence of *jus cogens*, its nature and legal and political implications were still debated. One of the priorities in studying the topic should thus be to discuss what approach and method to adopt. He would comment on the following six points: terminology; an illustrative list of norms that had achieved the status of *jus cogens*; the theoretical basis for *jus cogens*; the core elements of *jus cogens*; the three draft conclusions proposed by the Special Rapporteur; and future work.

53. With regard to terminology, it would be a good idea to confirm at the outset that the terms "*jus cogens*" and "peremptory norms" were used interchangeably in the first report. Clarification should also be provided as to the meaning of the terms "fundamental", "absolute", "non-derogation" and "non-rejectable", which were not clearly related to the nature of *jus cogens*. The adjective "fundamental", for example, seemed to be used with different meanings depending on whether it was qualifying norms, rules and laws (as in paragraphs 18, 21, 32 and 34 of the first report), or values (as in paragraphs 56 and 63, and in draft conclusion 3, paragraph 2), without any clear explanation being given in that respect. It would be useful to know what was meant by "fundamental" in terms of the nature of *jus cogens*, and what relationship there was between the fundamental norms of international law and the fundamental values of the international community. In the light of those considerations, it might be helpful to insert a "Use of terms" section at the beginning of the project.

54. The Special Rapporteur had sought the opinions of the Commission and Member States on the possibility of developing an illustrative list of norms that had the status of *jus cogens*. Views on the matter differed, including within the Commission. It was true that the idea that *jus cogens* norms could be catalogued in a detailed and exhaustive way was controversial. In his opinion, however, a list of examples of such norms would be of use to States, in that it would help them to identify *jus cogens* norms and to gain a better understanding of the criteria related to the emergence of new peremptory norms. The Special Rapporteur might have to restructure the draft conclusions in order to incorporate those elements.

55. In its 2006 report,[319] the Study Group on the fragmentation of international law cited several examples of *jus cogens* norms that would assist the Commission's work, including the prohibition of the aggressive use of force, the right to self-defence, the prohibition of genocide, the prohibition of torture, the prohibition of crimes against humanity, the prohibition of slavery and the slave trade, and the prohibition of hostilities directed at the civilian population ("basic rules of international humanitarian law"). Bearing in mind its previous work, the Commission was fully justified in delving into the content of *jus cogens* and in compiling an illustrative list that would be used for the codification and progressive development of international law. An analytical study of relevant instruments and jurisprudence could help to prepare it for that next step. In that regard, it might be useful to consult Thomas Weatherall's doctoral thesis, entitled *Jus cogens: International Law and Social Contract*,[320] which contained a non-exhaustive list of *jus cogens* norms and a summary of domestic court decisions on the matter.

56. As reflected in paragraphs 18 to 50 of the first report, there was a divergence of views concerning the theoretical basis for *jus cogens*. Indeed, the idea that *jus cogens* was non-derogable could be associated with natural law theories. By contrast, positivists, for whom will played a key role, considered that the law was a set of man- or State-made rules whose existence could be recognized and content determined without having to rely on a reason stemming from natural law or on any other non-legal institution. The theoretical basis for *jus cogens* could lie in each of those theories, but it was better to allow each legal expert to find his or her own explanation because, as was rightly noted in paragraph 59 of the first report, no single theory had yet adequately explained the uniqueness of *jus cogens*

[318] *Yearbook ... 2013*, vol. II (Part Two), pp. 17–18.

[319] Document A/CN.4/L.682 and Corr.1 and Add.1, available from the Commission's website, documents of the fifty-eighth session (2006). The final text will be reproduced in an addendum to *Yearbook ... 2006*, vol. II (Part One).

[320] T. Weatherall, *Jus cogens: International Law and Social Contract*, Cambridge, Cambridge University Press, 2015.

in international law, and the binding and peremptory force of *jus cogens* was best understood as an interaction between natural law and positivism. There was a need to be pragmatic and to focus on the analysis of State practice, the work of the Commission and jurisprudence.

57. In paragraph 63 of his first report, the Special Rapporteur identified three core elements that characterized *jus cogens* norms: their universal applicability, their superiority and their role in protecting fundamental values of the international community. Regarding the first element, the possible existence of regional *jus cogens* seemed, at first glance, to run counter to article 53 of the 1969 Vienna Convention, which provided that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole". However, it would be wrong, at the initial stage of the work, to dismiss the possibility of regional *jus cogens*, which, both theoretically and practically, could not be excluded altogether, especially if one accepted that the emergence of *jus cogens* was closely related to treaties or to customary international law. The issue warranted further examination.

58. He agreed with the Special Rapporteur that the doctrine of the persistent objector was not applicable to *jus cogens* and believed that any such possibility should be categorically excluded. However, the Commission had accepted that doctrine in the context of customary international law, so it seemed pointless to declare that it was not applicable to *jus cogens* when it formed part of the rules of customary international law, although one might wonder how to determine with certainty whether an emerging rule of customary international law would achieve the status of *jus cogens* in the future.

59. The Special Rapporteur indicated in his first report that public order appeared more suited to explain the quality of the norms, and that public order norms could be explained in terms of either positive or natural law theories. He agreed that the public order approach had some merit, but did not think that it was appropriate in the field of public international law. Historically, it was true that the dualism of *jus cogens* and *jus dispositivum* had been derived from the Roman private law system, and that the private law analogy had played a role in the past. However, that analogy was not always pertinent in international relations: the international legal order had not been formed from a single State's domestic legal system; rather, it was based on diverse cultural, religious, political and economic regimes. The discussion of public order was more relevant to private international law. The Commission might one day examine the so-called "international public order" or the "constitutionalization of the international order", but that discussion would focus on a different legal question.

60. Regarding fundamental values, he supported Mr. Nolte's comments. *Jus cogens* covered two different domains: the protection of human dignity and the protection of State sovereignty. The former focused on the protection of persons in times of war or on protection from grave human rights abuses in times of peace. The latter concerned the traditional Westphalian principles. The scope of the analysis of the *raison d'être* of *jus cogens* should therefore be expanded.

61. Turning to the draft conclusions, he said that he could accept draft conclusion 1, provided that the word "rules" was replaced with "norms", as proposed by the Special Rapporteur. Some members had argued that the Special Rapporteur wrongly limited the scope of the topic to questions related to the law of treaties. In his opinion, it was clear from the first report that the Special Rapporteur was aware that the role of *jus cogens* went beyond the law of treaties. His reasoning was well substantiated, particularly in paragraphs 44 to 49, in which he discussed not only the law of treaties but also State responsibility and the criminal sanctioning of perpetrators of violations, basing himself on the practice of States and international organizations, and on the case law of the International Court of Justice.

62. Moreover, it would perhaps be appropriate to broaden the scope of the topic to include non-State actors, whose role had undeniably grown in recent years. The Commission might need to decide whether non-State actors should also be subjected to peremptory norms of international law, insofar as they were capable of committing large-scale violations of international human rights law. Natural persons could be held responsible for crimes under the Rome Statute of the International Criminal Court. Murder, enslavement, extermination, torture and sexual slavery committed on a widespread and systematic basis by non-State actors could thus fall within the scope of the Statute. In addition, the discussions that had taken place recently in academic circles on the criminal responsibility of legal persons (corporations) in relation to serious human rights violations raised the question of whether the Commission should extend the scope of the research on *jus cogens* to non-traditional fields of international law. For example, as evidenced by the work of Luke Eric Peterson and Kevin R. Gray on bilateral investment treaties, the application of *jus cogens* could be envisaged if there was complicity between investors and host States in the commission of massive human rights abuses.

63. Regarding draft conclusion 2, he considered that the overly general paragraph 1 was superfluous, particularly as the rule of *jus dispositivum* contained therein could be inferred from draft conclusion 3. If necessary, the rule could be explained in the commentary to the draft conclusion. Draft conclusion 2, paragraph 2, was very closely related to draft conclusion 3, paragraph 1, in that both concerned the definition or the legal nature of *jus cogens*. They should therefore be merged into a single draft conclusion entitled "Definition of *jus cogens*". It would also be a good idea, as noted by Sir Michael, to follow the exact wording of article 53 of the 1969 Vienna Convention. The discussion of draft conclusion 3, paragraph 2, should be left for a later stage of work on the topic because the meaning of the expressions "fundamental values", "hierarchically superior" and "universally applicable" required clarification, and because those concepts were related to the effects or consequences of *jus cogens*.

64. As to future work, since the *lex lata* of *jus cogens* was not always clear, he was in favour of devoting the next report to the rules on the identification of norms of *jus cogens* and generally agreed with the approach proposed by the Special Rapporteur. He would, however, like to reiterate two remarks that it might be helpful to bear in mind in future work. First, the Commission had recently

adopted, on first reading, draft conclusions on the identification of customary international law[321] that did not address the issue of *jus cogens*. However, since customary international law could be an element of *jus cogens*, the relationship between the identification of customary international law and *jus cogens* should be clarified. In particular, there should be a discussion of whether the rules set out in the draft conclusions on the identification of customary international law that had been adopted could be applied *mutatis mutandis* to *jus cogens*. While it had been mentioned that the doctrine of the persistent objector was not applicable to *jus cogens* despite being accepted in the field of customary international law, the issue deserved further consideration in the light of the general rules of customary international law.

65. Second, the work on the consequences of *jus cogens* would be closely related to the definition of the scope of the topic. In order to be comprehensive, the study of *jus cogens* should not be confined to the discipline of the 1969 Vienna Convention, even though the concept of *jus cogens* had been conceived in that context; rather, it should cover other areas of relevance to the topic, such as State responsibility, State immunity, questions pertaining to international organizations and to the criminal responsibility of legal persons in international law, and so on. In other words, the study of *jus cogens*, especially its legal consequences, would be much broader and more complex than the Commission had thought unless it had a clear road map to guide its work.

66. Mr. SABOIA said that he wished to congratulate the Special Rapporteur on his excellent first report, whose content, which was clearly structured and based on careful research, gave the Commission a solid foundation for its work on the complex topic of *jus cogens*. The syllabus on the basis of which the topic had been included on the Commission's agenda had been structured around four issues: (*a*) the nature of *jus cogens*; (*b*) requirements for the identification of *jus cogens*; (*c*) an illustrative list of norms; and (*d*) the consequences or effects of *jus cogens*. Given the breadth of those issues, he agreed with Mr. Hassouna and Mr. Murase that the topic would have merited a more ambitious title.

67. According to the Special Rapporteur, the purpose of the report under consideration was twofold: (*a*) to propose an approach to the topic in order to obtain the Commission's views; and (*b*) to give a general overview of conceptual issues relating to *jus cogens*, with the limited, initial aim of identifying the core nature of *jus cogens*.

68. Concerning the methodology to be adopted, he agreed with the Special Rapporteur that the Commission should base its work on the variety of materials and sources at its disposal. He was in favour of the fluid and flexible approach advocated by the Special Rapporteur with regard to the order in which issues were considered, though he shared the doubts expressed by Sir Michael over the application of that approach to the draft conclusions.

69. He was favourable to the idea of an illustrative list of norms that had the status of *jus cogens* and, like Mr. Caflisch, considered that the Commission's work on the topic under discussion would lose much of its value and interest unless the Commission at least attempted to draw up a list. The topic dealt not only with the process by which norms acquired the status of *jus cogens* and the methodology for identifying such norms but also with the nature of *jus cogens*, and an illustrative list could reveal a great deal in that regard. In its previous work, the Commission had already compiled illustrative lists of *jus cogens* norms, including in the commentaries to the draft articles on the responsibility of States for internationally wrongful acts[322] and in the conclusions of the Study Group on the fragmentation of international law.[323]

70. The historical evolution of the concept of *jus cogens* set out in chapter III clearly demonstrated how the notion of non-derogable norms had survived during the early decades of the twentieth century despite the dominance of legal positivism, which was State-focused and disregarded moral and humanistic values. The 1969 Vienna Convention had merely crystallized an idea that had already become generally accepted, namely that there could be treaties whose object was inadmissible under peremptory norms of general international law recognized by the international community and accepted as such by States.

71. The establishment of the United Nations and the work of the International Court of Justice, the International Military Tribunal at Nürnberg and, later, other international courts and numerous international organizations had given shape to the concept of a world public order based on values and had strengthened the international community's commitment to, and work on, human rights.

72. Chapter IV contained an analysis of the legal nature of *jus cogens* that, leaving aside theoretical debates, firmly established, on the basis of the jurisprudence of the International Court of Justice, of other national and international courts, as well as State practice, that *jus cogens* was part of *lex lata*.

73. He had no objection to the draft conclusions, although he shared some of the reservations expressed about the usefulness of draft conclusion 2 in its current form. Draft conclusion 3, paragraph 1, should be rephrased to provide a definition of *jus cogens* and should be inserted after the provision on the scope of the project. Paragraph 2 should be retained, as it incorporated into the definition of the 1969 Vienna Convention the important elements of the fundamental values of the international community, the hierarchical superiority of *jus cogens* norms and their universal acceptance.

The meeting rose at 1.05 p.m.

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[321] See the report of the Drafting Committee on the identification of customary international law (A/CN.4/L.872, available from the Commission's website, documents of the sixty-eighth session). The Commission adopted the draft conclusions on first reading on 2 June 2016 (see the 3309th meeting above, para. 5).

[322] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[323] *Yearbook ... 2006*, vol. II (Part Two), pp. 177 *et seq*., para. 251.

3317th MEETING

Friday, 8 July 2016, at 10.05 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Cooperation with other bodies (*concluded*)

[Agenda item 13]

Statement by the President of the International Court of Justice

1. The CHAIRPERSON welcomed Judge Ronny Abraham, President of the International Court of Justice, and invited him to address the Commission.

2. Judge ABRAHAM (President of the International Court of Justice) said that he welcomed the opportunity to meet with the members of the Commission for a second time, in accordance with a long-established practice, and to present a report on the judicial and other activities of the Court over the past year.

3. In April 2016, in order to celebrate its seventieth anniversary, the Court had held a solemn ceremony and a seminar during which the members of the Court had met with representatives of universities, practitioners and Member States, as well as international judges, to consider the main challenges that the Court was likely to face over the coming years. The presentations and a summary of the debate would be published shortly in the *Journal of International Dispute Settlement*.

4. Over the previous year, three new cases had been brought before the court, and proceedings had resumed in another. The latter case concerned *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, in which the Court, in a judgment on the merits in 2005, had found that each party was under an obligation to the other to make reparations for injury caused by unlawful acts. The judgment had not addressed the nature or amount of reparations due, leaving it to the parties to reach an agreement on the matter, failing which the Court would, at the request of either party, determine the reparations owed. After lengthy but fruitless negotiations that had lasted over 10 years, the Democratic Republic of the Congo had requested the Court to settle the matter. The Court had decided to resume the proceedings and had fixed a time limit for the filing by each party of written pleadings indicating the reparations it considered to be owed to it by the other party. In deciding the case, the Court would no doubt refer to the jurisprudence of other international courts that had experience in the area, but would also need to develop its own jurisprudence.

5. The three new cases concerned proceedings brought by Chile against the Plurinational State of Bolivia with regard to a *Dispute over the Status and Use of the Waters of the Silala*; proceedings instituted by Equatorial Guinea against France with regard to a dispute concerning the immunity from criminal jurisdiction of its Second Vice-President and the legal status of a building in Paris (*Immunities and Criminal Proceedings*); and proceedings brought by the Islamic Republic of Iran against the United States of America (*Certain Iranian Asssets*) with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.[324]

6. The Court had rendered three judgments concerning issues of procedure, jurisdiction and admissibility. In the first of those judgments, which had been delivered in September 2015 and related to the case concerning *Obligation to Negotiate Access to the Pacific Ocean*, the Court had rejected the preliminary objection raised by Chile to the Court's jurisdiction. The case was currently being considered on the merits. The second judgment related to preliminary objections raised by Colombia in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, in which Nicaragua had alleged that Colombia had failed to comply with the Court's 2012 judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* and had violated its maritime zones and sovereign rights in those zones. Following the 2012 judgment, Colombia had denounced the American Treaty on Pacific Settlement (Pact of Bogotá), which had formed the basis of the Court's jurisdiction in the case, and claimed that the denunciation had taken immediate effect, thus rendering the new application by Nicaragua inadmissible because of a lack of jurisdiction *ratione temporis* on the part of the Court. However, Nicaragua had asserted that, in accordance with the provisions of the Pact, the denunciation had taken effect only one year after its notification and that consequently its new application, which had been submitted within that one-year period, was admissible. The Court had agreed with the latter interpretation and had therefore rejected the preliminary objections raised by Colombia. In a further case between Nicaragua and Colombia, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, the Court had rejected the preliminary objections of Colombia to jurisdiction and admissibility. In its judgment, the Court had found that the above-mentioned 2012 judgment could not be considered as having definitively settled the question of the delimitation of the continental shelf between the two States as a matter of *res judicata* and that therefore the application of Nicaragua was admissible.

7. The Court had held hearings in March 2016 in three cases brought by the Marshall Islands against India, Pakistan and the United Kingdom of Great Britain and Northern

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[324] Treaty of Amity, Economic Relations, and Consular Rights, signed at Tehran on 15 August 1955, United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

Ireland, respectively, relating to *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. According to the Marshall Islands, those obligations arose not only from the Treaty on the Non-Proliferation of Nuclear Weapons, to which the United Kingdom was a party, but also from customary international law, and that they thus applied also to India and Pakistan. The respondents had raised preliminary objections to jurisdiction and admissibility, which were currently being considered by the Court.

8. On 31 May 2016, the Court had issued an order on the appointment of independent experts to assist it in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* and who would be tasked with determining the state of the coast in the border region between the two countries. The Court considered that there were certain factual matters relating to the state of the coast that might be relevant for the purpose of settling the dispute submitted to it. There were few precedents for such action; expert reports considered by the Court were generally submitted by the parties concerned and tended to support their respective arguments. Although all experts were deemed to be neutral, there might be a higher presumption of neutrality in the case of those appointed by the Court.

9. On 16 December 2015, the Court had delivered a judgment on the merits in two joined cases – *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* – that were of interest in terms of substantive law, specifically international environmental law. The cases raised several questions relating to a dispute concerning territorial sovereignty over a small area on the border between the two States and to international law on protection from transboundary harm. With respect to territorial sovereignty, the judgment had not produced anything new in terms of substantive international law: the Court had found that Costa Rica had sovereignty over the disputed territory, that Nicaragua had violated the territorial sovereignty of Costa Rica by carrying out activities and establishing a military presence in the disputed territory and that it had the obligation to compensate Costa Rica for damage caused. Regarding international environmental law, the cases had enabled the Court to clarify a number of issues concerning the obligations of States in conducting activities on their own territory that might have a harmful effect on the territory of a neighbouring State. In particular, the Court had drawn a distinction between procedural and substantial obligations, according to which a State might have observed the former but have failed to comply with the latter, or vice versa. Thus, the Court had concluded that Costa Rica had violated its procedural obligation to carry out an environmental impact assessment concerning the construction of a road along the San Juan river, part of the border between the two countries and of which the bed belonged to Nicaragua, but that it had not breached its substantive obligations concerning prevention of transboundary harm. In reaching its conclusions, the Court had considered that the construction of a road by Costa Rica carried a risk of significant transboundary harm and that therefore Costa Rica was under an obligation to evaluate the environmental impact of the project prior to the commencement of the works. However, the Court had found that the work conducted by Costa Rica had not caused harm to either the river bed or other territory of Nicaragua; consequently, it had not violated its substantive obligations.

10. In the cases in question, each State had alleged a breach by the other of its international obligations: Nicaragua had claimed that Costa Rica had violated its obligations by building a road along the border, while Costa Rica had alleged that Nicaragua had done so by carrying out dredging work in the Colorado River. The obligations invoked by the two States did not derive from treaty law; in their submissions, the parties had referred marginally to some legal instruments, but the Court had not considered them relevant. The debates between the parties had primarily concerned non-treaty law. The Court had found that both the procedural obligation to carry out a prior environmental impact assessment and the substantive obligation to prevent significant transboundary harm arose from customary or general international law. Although the Court had already referred to such obligations in the case concerning *Pulp Mills on the River Uruguay*, it had in the present cases confirmed and clarified their content, thus extending its previous jurisprudence and confirming the existence of certain obligations in general international law.

11. With respect to terminology, it might be noted that, in its judgment of 16 December 2015, the Court had referred to obligations resulting from both customary international law and general international law, without drawing any clear distinction between the two. However, it should not be deduced from that language that the Court considered the terms to be synonymous. It might – or might not – be the case that the concepts overlapped to a certain extent, but nothing more than that should be deduced in that respect from the language of the judgment, and any over-interpretation, to which writers were often inclined, should be resisted.

12. In the section of the judgment dealing with the alleged breach of an obligation to notify and consult, the Court had clarified its findings in earlier judgments. Whenever international legal instruments imposed precise notification and consultation obligations on neighbouring States, those treaty provisions of course applied. In the cases in question, however, the Court had had to determine whether, in situations not covered by treaty provisions, a duty of prior notification and consultation existed under general international law. In its relatively cautious reply, the Court had established that the existence of any such obligation was dependent on whether the State planning the activities was under an international obligation to conduct an environmental impact assessment. Its reasoning, which rested on precedent, was that if any activities carried a potential risk of significant transboundary harm, the State contemplating them must carry out a prior environmental impact assessment. If the findings of that assessment confirmed the existence of the aforementioned risk, that State must consult the States where that harm was likely to occur on the requisite steps to forestall or limit it as far as possible. In some instances, which would have to be determined on a case-by-case basis, States might have to cooperate to prevent harm from occurring, since only one of them might have the

necessary information, competence or technical know-how to ascertain what preventive measures were needed. Hence the obligation of prior notification and consultation existed only when, after a case-by-case appraisal, it appeared that cooperation between States was necessary in order to define the appropriate measures to prevent or limit transboundary harm. In the cases in question, the Court had found that the obligation to notify and consult had not been breached.

13. Mr. KITTICHAISAREE, referring to the Court's findings in paragraphs 112 to 114 of its judgment of 17 March 2016 on the preliminary objections in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, asked how the Court intended to proceed in that case, where it would not know whether Nicaragua had any basis for claiming an entitlement to an area beyond 200 nautical miles from its coast and where Colombia was not a party to the United Nations Convention on the Law of the Sea and could not therefore avail itself of the procedure of the Commission on the Limits of the Continental Shelf to establish the outer limits of the Continental Shelf beyond 200 nautical miles.

14. Mr. MURPHY asked whether, in the future, the Court was likely to have more frequent recourse to the services of experts retained by the Court itself because, in the past, it had proved difficult to decide issues by using only experts designated by the parties. Did the Court deem it necessary to obtain the parties' consent to the use of independent experts, or was it willing to call on them even in the face of opposition from the parties? He wondered whether the likelihood of using independent experts was influenced by whether the case had been brought to the Court by a unilateral application or on the basis of a special agreement.

15. Judge ABRAHAM (President of the International Court of Justice) said that the Court's judgment of 17 March 2016 in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* had dealt with jurisdiction and admissibility, not the merits of the case. The main question which the Court had had to decide was whether the *res judicata* authority of its 2012 judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* barred the application by Nicaragua in the case under discussion. The Court had decided that it did not, since in 2012 it had not ruled on delimitation, and that the application by Nicaragua was admissible, notwithstanding the fact that the Commission on the Limits of the Continental Shelf had not produced any recommendations with respect to the claim by Nicaragua to an extended continental shelf. In its 2012 judgment, the Court had ruled that the fact that Colombia was not a party to United Nations Convention on the Law of the Sea did not relieve Nicaragua of its obligations under that Convention, in particular of its obligation to ask the aforementioned Commission for recommendations. The Court had confirmed that finding in its 2016 judgment. The Court would decide how to determine the respective rights of the parties to a continental shelf in the absence of any recommendations from the Commission on the Limits of the Continental Shelf when it examined the merits of the case. Whether both parties, or only one of them, would participate in the proceedings would depend on Colombia because, after the delivery of the Court's judgment in March 2016, the Colombian authorities had issued public statements to the effect that they did not consider that the Court had jurisdiction over the matter and that they did not intend to recognize any of its subsequent decisions in it. While it sometimes happened that States officially expressed their displeasure over the Court ruling that it had jurisdiction to hear a case, notwithstanding the respondent's opinion to the contrary, that did not necessarily signify that the latter would not take part in the subsequent phases of proceedings. The Court had set time limits for the submission of the memorial and counter-memorial and it had received no information indicating that Colombia did not intend to file its counter-memorial, despite the aforementioned statements. The Court could only regard those statements as unfortunate, since no matter how disgruntled a State or counsel for a State might feel after the delivery of a judgment which did not accept the State's pleas, all the States parties to the Statute of the International Court of Justice must comply with its judgments.

16. The appointment of a panel of experts by the Court was not a new departure; in fact, its rules made provision for it. The Court examined the need to appoint experts on a case-by-case basis and, although that step was likely to remain an exception, it could not be ruled out in future cases. It was, however, impossible to predict whether that practice would become more or less common than in the past. It was the Court's prerogative to appoint independent experts if it decided that it was in the interests of the sound administering of justice to do so. While the Court must inform the parties of its intentions in that regard and ascertain their views, their consent was not necessary and it was not bound by any objections they might raise. The likelihood that the Court would consider it necessary to retain independent experts was perhaps slightly greater when a case was brought by a unilateral application.

17. Mr. FORTEAU noted that, even though the Court had clarified the applicable law on compensation in the case concerning *Ahmadou Sadio Diallo*, it would, in the President's opinion, be incumbent upon it to develop its case law on the subject in the resumed proceedings in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. He asked whether it might be useful if the Commission were to undertake a study of that matter in the near future, as proposed in the working paper prepared by the Secretariat on possible topics for consideration in the Commission's long-term programme of work(A/CN.4/679/Add.1).

18. Sir Michael WOOD said that he would give careful consideration to the President's very interesting comments on the terms "customary international law" and "general international law". He had also taken note of the President's injunction not to read things into the Court's judgments which were not said in them. However, it was not only writers, but also practitioners appearing before the Court in subsequent cases, who had to try to understand the reasoning behind an earlier judgment. He wondered what was to be learned about that particular issue

from the separate opinions of Judge Donoghue and Judge *ad hoc* Dugard of December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*. Did the President wish to say anything about the practice and policy of the Court with respect to separate and dissenting opinions?

19. Judge ABRAHAM (President of the International Court of Justice) said that, while the Court had already dealt with requests for compensation in a number of earlier cases, including *Ahmadou Sadio Diallo*, the key issue facing it in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* was the nature and amount of the reparation due, in part for bodily harm and widespread loss of life as a result of crimes committed on a large scale. A study by the International Law Commission of compensation under international law would certainly be very useful since, despite the fact that the Court remained free to establish its own position and was not bound by the latter's recommendations or texts, it always examined the Commission's work with the greatest of interest and it never decided a point of law without giving due consideration to the Commission's opinion on the matter.

20. Sir Michael Wood's question about the interpretation of the Court's decisions and the way in which those decisions could be construed by writers and practitioners was naturally of major concern to States, their agents and their counsel. A decision was what was written down on paper and what could be inferred logically and necessarily therefrom. The inferences that could be logically drawn from the text of a judgment bound the Court, even though the judges might not have realized the implications of a given sentence, since what was implicit was inherent in what was explicit. Logical reasoning was what was called for, not an attempt to guess the potential intentions behind the Court's position; any such attempt was no more than worthless speculation or supposition. In fact what he had just said did not bind the Court, because it was not embodied in one of its decisions; it was simply his own opinion.

21. Separate or dissenting opinions clarified not the position of the Court but that of the judges concerned. They sometimes shed light, *a contrario*, on the Court's position because, if a judge took issue with a decision, that could mean that the Court had espoused the opposite viewpoint. A separate opinion criticizing a judgment might also make it possible to draw a conclusion about what the Court had actually wanted to say in its decision, when the judge had thought it his or her duty to set forth an argument which he or she knew was shared by the majority of judges, but which had not been explicitly expressed in the decision. For those reasons, an *a contrario* interpretation of a judgment based on the critique contained in a separate opinion was a delicate matter, and the greatest caution must therefore be exercised when using those opinions. While they were enlightening as to the thinking of the judge in question in a particular case, they did not necessarily indicate what position he or she would take in a subsequent case, as a judge could change his or her mind. Even though they might take issue with a precedent when it was adopted, judges might consider themselves bound by it and in a subsequent case would cleave to the majority opinion of the Court for the sake of judicial consistency.

22. Mr. PARK enquired about the current state of the trust fund to assist States in the settlement of disputes through the International Court of Justice.

23. Mr. VALENCIA-OSPINA requested that the replies given by the President of the Court to the questions put by members be reflected fully in the record of the Commission's meeting.

24. Judge ABRAHAM (President of the International Court of Justice) said, with regard to the Trust fund to assist States in the settlement of disputes through the International Court of Justice, that he had nothing specific to add to the information available in existing United Nations documents. The Court remained seized of the need to ensure that the fund operated effectively in practice and was sufficiently well financed to allow all States to enjoy access to international justice; the Court itself, however, could do little in that regard.

25. Mr. KAMTO said that the visits to the Commission by the President of the International Court of Justice provided a valuable link between the work of the two bodies. The President's comments had helped to clarify certain matters for the Commission. The Commission must, of course, strive to reflect the Court's rulings closely, but it should be careful not to give the impression that it accorded the same importance to individual or dissenting opinions as to the views of the Court. The President's remarks in that regard were particularly pertinent.

26. He welcomed the Court's May 2016 decision in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* to obtain an expert opinion, which would help to allay some concerns over the methods lately employed by the Court in reaching its decisions. Referring to its ruling of 16 December 2015 in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, he asked whether, in a dispute relating to territorial sovereignty, the Court proceeded differently than it would in a case in which the focus was on State responsibility.

27. Mr. HMOUD said that he would be interested to know how the Court approached jurisprudence from other international courts and tribunals, when their pronouncements on international law matters were inconsistent with the Court's interpretations. He asked what view the President took of claims by some States that the Court's interpretations of the rules of international law in its advisory opinions were not binding and whether, in formulating its judgments, the Court took account of the potential difficulty of implementing them, taking into account that there were instances where parties to the contentious disputes were not implementing the Court's judgments.

28. Judge ABRAHAM (President of the International Court of Justice), in response to Mr. Kamto, said that the question of State responsibility could arise in any case relating to internationally wrongful acts, including violations of territorial sovereignty. There was therefore nothing unusual in the fact that a case concerning territorial sovereignty might give rise to consideration of issues of State responsibility, as it had in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*. In that case, Costa Rica had asked the Court

to declare that Costa Rica had sovereignty over disputed territory claimed by both it and Nicaragua, that Nicaragua had consequently violated its sovereignty by engaging in certain activities on that territory and that Nicaragua was therefore under an obligation to make reparation for the damage caused by its unlawful activities. Accordingly, the Court had had to decide which State had sovereignty over the territory in question and then rule on the issue of international responsibility.

29. In the specific case of disputes concerning maritime delimitation in which the Court established a maritime boundary between States, it did not necessarily follow that any activity carried out in the disputed area before the boundary was drawn constituted an internationally wrongful act. In its 2012 judgment in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, the Court had taken the position that, until it fixed the maritime boundary between the two States, that boundary did not exist and therefore neither State could be said to have been engaged in activities violating the territorial sovereignty of the other. Once the boundary had been fixed, however, any subsequent acts by one State in the other's territorial zone could give rise to international responsibility. Nicaragua had returned to the Court with just such a claim against Colombia; the Court had ruled that it was competent to hear the case and would proceed to consider the merits thereof. If it found that Colombia had violated the sovereign rights of Nicaragua, it would necessarily hold Colombia responsible for internationally wrongful acts. The issue of State responsibility was not separate from other substantive aspects of a case. Although certain reservations had previously been expressed about the dual nature of certain cases involving territorial disputes, he took the view – shared by the Court – that nothing prevented the Court from fixing territorial limits and establishing international responsibility as part of the same proceedings.

30. Turning to Mr. Hmoud's questions, he said that the Court took account of the jurisprudence of other international courts and tribunals and endeavoured to ensure coherence in international law by aligning its rulings with those of other bodies. It had often had cause to quote from the judgments of such bodies. That said, the Court and those other bodies were not bound by one another's rulings and could and did take differing positions on the same issue, intentionally or otherwise. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court had, in 2007, re-examined its 1996 judgment in the light of a ruling by the International Tribunal for the Former Yugoslavia but had not been convinced by that Tribunal's position and had maintained its previous view.

31. With regard to the binding nature of the Court's rulings, he recalled that, while advisory opinions were not binding, judgments were binding, but only between the parties to a case and with respect to that particular case. There was no legal obligation on other States or the parties to a case to consider themselves bound by, or bound to apply, the Court's general pronouncements or reasoning, although they should be given the greatest attention as expressions of the Court's views and the state of international law. For instance, while the judgment given in *Jurisdictional Immunities of the State* that States were immune from the civil jurisdiction of other States, at least with respect to actions taken in exercise of public authority, was relevant to all States and to similar situations, only Germany and Italy were formally bound by it and that only with respect to the specific cases before the Italian courts that were the subject of the proceedings.

32. In the aforementioned case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, Nicaragua had accused Colombia of deliberately ignoring the Court's 2012 ruling that fixed the maritime boundary between the two States. If, in its consideration of the merits, the Court confirmed the alleged actions of Colombia, they would constitute a violation of the sovereign rights of Nicaragua and probably also a violation of the obligation of Colombia to abide by the judgment of the Court. In its preliminary objections, Colombia had raised the issue of whether the Court could itself rule that a State had failed to comply with a previous ruling, arguing that enforcing the Court's judgments was the role of the Security Council by virtue of the Charter of the United Nations. The Court had rejected that argument on the grounds that Nicaragua was not asking the Court to enforce a ruling directly but to establish whether Colombia had violated its sovereign rights in maritime zones, those rights deriving not from the Court's ruling but from the law of the sea. The question of the respective roles of the Court and the Security Council did not therefore form part of the case, although the subject might arise in future cases.

33. Mr. VÁZQUEZ-BERMÚDEZ asked what effect the different legal traditions from which the Court's judges were drawn had upon its workings.

34. Judge ABRAHAM (President of the International Court of Justice) replied that any differences in approach tended to concern procedural matters. Although differences of opinion on matters of substance were to be expected, they rarely reflected divergences in legal background. Moreover, the international law applied by the Court was a common language uniting diverse legal traditions.

35. The CHAIRPERSON expressed appreciation to the President of the International Court of Justice for his informative contribution to the Commission's work.

Mr. Nolte, First Vice-Chairperson, took the Chair.

Jus cogens (*continued*) (A/CN.4/689, Part II, sect. H, A/CN.4/693)

[Agenda item 10]

First report of the Special Rapporteur (*continued*)

36. The CHAIRPERSON invited the Commission to pursue its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

37. Mr. CANDIOTI said that he wished to thank the Special Rapporteur for his clear and well-structured first report, which would serve as a solid basis for the Commission's work on the topic. It was timely for the Commission to

undertake a study to systematize the elements of *jus cogens* norms and the consequences of *jus cogens*. In its previous codification work, the Commission had emphasized the relevance and importance of *jus cogens* within the international legal system, for example in the draft texts that had become common articles 53, 64 and 71 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations ("1986 Vienna Convention") [325] and articles 26, 40 and 41 of the 2001 draft articles on the responsibility of States for internationally wrongful acts.[326]

38. As noted by the Special Rapporteur in his first report, Member States in the Sixth Committee had generally welcomed the Commission's decision to address the topic of *jus cogens* and had been optimistic that the Commission's work would lead to a better understanding of the nature, content and effects of *jus cogens* norms. The topic therefore represented a great challenge and responsibility for the Commission, which could make a significant contribution to the progressive development and codification of international law. He agreed with the Special Rapporteur that the topic should be approached in a flexible and pragmatic manner, with a focus on analysing State and judicial practice and, if necessary, relevant writings and other useful sources.

39. Peremptory law had evolved over time and would continue to do so, but its recognition in the international legal order undoubtedly lay in the decision to include, in the Charter of the United Nations, principles on the protection of values that States recognized as basic and essential in the interests of international peace and security and of respect for fundamental human rights. It should be recalled that the basic norms of international law that had emerged from the Charter of the United Nations had been developed and clarified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which had been adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970.

40. In principle, he supported the proposal to provide an illustrative list of norms that currently qualified as *jus cogens*. It was hard to see how it would be possible to reach conclusions on such norms *in abstracto*, without identifying them appropriately or considering carefully their content and material scope. As Mr. Park had pointed out at the previous meeting, the Commission had already clearly indicated in some of its recent work the main peremptory norms. In the commentaries to articles 26, 40 and 41 of the draft articles on the responsibility of States for internationally wrongful acts adopted in 2001, the Commission had given the following examples of *jus cogens* norms recognized by State practice, international conventions and judicial decisions: the prohibition of aggression, genocide, slavery and the slave trade, racial discrimination and apartheid, crimes against humanity and torture; basic rules of international humanitarian law applicable in armed conflicts; and the obligation to allow and respect the exercise of the right to self-determination.

41. With regard to the title of the topic, the end users of the Commission's work might find the Latin term "*jus cogens*" unfamiliar or unclear when used in isolation. The Commission recognized the importance of ensuring that actors in the international arena could understand its draft texts and other normative proposals, regardless of whether they were experts in international law or, in the case of *jus cogens*, Latin. For that reason, the overuse of Latin terms had until recently come to be frowned upon within the Commission; however, such terms were now being used again fairly frequently. He therefore proposed that the final title of the topic should refer to *jus cogens* norms, using the equivalent term in each of the official languages of the United Nations – "peremptory norms" in English, for example – followed by the Latin term "*jus cogens*" in parentheses. That had been the approach taken by the Commission with regard to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)"; the titles of common articles 53 and 64 of the 1969 and 1986 Vienna Conventions could also serve as precedents.

42. Concerning draft conclusion 1, he had no major objection to the substance, but agreed with previous speakers that it was not so much a conclusion as an introductory clause that described the purpose and scope of the draft conclusions that followed. As Mr. Park had noted, it would be preferable to use a single term to refer to *jus cogens* rules throughout the draft conclusions. His own preference would be to refer to them as "peremptory norms of general international law (*jus cogens*)", in line with the terminology used in previous work of the Commission.

43. The first draft conclusion proper should contain a definition of peremptory norms for the purposes of the conclusions. Such definition should consist of an appropriate combination of the elements set forth in draft conclusion 3 and thus indicate that such norms served to protect the fundamental values of the international community; were universally applicable; were hierarchically superior to other norms of international law; were accepted and recognized as peremptory norms by the international community; and might be modified, derogated from or abrogated only by norms having the same character. Definitions of other terms could be included in the introduction subsequently, if it was considered appropriate.

44. Like other colleagues, he was of the view that draft conclusion 2 could be deleted, since paragraph 1 bore no direct relevance to the topic and paragraph 2 would be superfluous if the fact that peremptory norms could not be modified, derogated from or abrogated was set out in the definition or, alternatively, established and developed in a subsequent draft conclusion.

45. As to future work on the topic, he agreed with the points made by the Special Rapporteur in paragraphs 75 to 77 of his first report. Regarding the form of the Commission's product, he also agreed that draft conclusions were the most appropriate outcome, as with the topics "Identification of customary international law" and "Subsequent

[325] See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 247, 261 and 266 (draft articles 50, 61 and 67).

[326] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

agreements and subsequent practice in relation to the interpretation of treaties". The final document could comprise three parts. The first, introductory part could contain an outline of the topic and a detailed description of the key issues, following the approach adopted in relation to the topics "Fragmentation of international law" and, more recently, "The most-favoured-nation clause". In the second part, the Special Rapporteur could provide a concrete, precise and well-structured set of conclusions, while the third part could be reserved for commentaries on each conclusion similar to those formulated by the Commission when it developed draft articles.

46. Mr. FORTEAU said that he wished to thank the Special Rapporteur for his first report, which provided the Commission with an excellent basis on which to address the topic of *jus cogens*. He would not dwell on the theoretical basis of *jus cogens* or on the opposition between the voluntarist and natural law schools, issues which, in his view, would have barely any impact on the Commission's work. As per its traditional method, the Commission would seek to put down in writing what it saw as arising from contemporary practice and jurisprudence. In so doing, it did not have to come down in favour of one school of thought over another. Contrary to what was stated in the first report, he felt that the theoretical debate could be avoided and that the core elements of *jus cogens* could be deciphered not from that debate but from the Vienna Conventions and the resulting practice and jurisprudence.

47. His reluctance to wade into theoretical debates stemmed also from his belief that experts in international law were not the best qualified to take positions on highly abstract theoretical issues and that any attempt to do so could give rise to misinterpretations. He tended to think that modern experts in international law generally gave erroneous descriptions of the historical development of natural law in legal thought, given that they were not specialists in Roman or medieval law. For instance, the Special Rapporteur repeatedly stated in his first report that natural law was immutable, in other words, that it existed independently of time and space. Legal historians, particularly specialists in ancient and medieval law such as Michel Villey, had shown, however, that natural law evolved and that, unlike divine nature, human nature was not fixed or immutable. In his *Summa Theologica*, Thomas Aquinas, following in the footsteps of Aristotle, had recalled that a distinction should be drawn between general justice, of a divine and moral nature, and particular justice, in other words, natural law, which mirrored social life and any developments in it. To say that natural law was immutable was thus a historical misinterpretation, one that proponents of positivism in the twentieth century had sought to keep alive in order to discredit natural law.

48. By concentrating the debate on technical and legal issues, the Commission would simplify its task. *Jus cogens* and natural law were of the same nature, in that they were legal vehicles that conveyed the fundamental values of a society at a given moment in time. Consequently, he saw no conflict between the natural law and positivist schools when it came to *jus cogens*. In domestic law, "public policy" was not generally the product of will. Its substantive content tended to be determined by a judge on the basis of what he or she considered to be the fundamental values of society at that particular moment. *Jus cogens* was thus fulfilling the classical role of natural law by means of a different legal technique.

49. In public international law, there were currently legal vehicles other than *jus cogens* that conveyed fundamental international values. In that regard, it would have been useful for the Special Rapporteur to address transnational public policy, which was increasingly invoked before and applied by international arbitration tribunals in cases involving foreign investment, particularly since the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes, under the presidency of Judge Guillaume, had issued an arbitral award in the case of *World Duty Free Company Limited* v. *The Republic of Kenya*. Transnational public policy was closely linked to *jus cogens* and deserved further study.

50. There was no doubt that the scope of the topic was not limited to treaty law. The Commission's task was to determine the role and effects of *jus cogens* with regard to all branches of international law. With that in mind, in chapter III of his first report, the Special Rapporteur should have examined the Commission's work on the law of responsibility, which had enriched the debate on *jus cogens*, particularly at the time of the adoption of article 19[327] of the draft articles on State crimes in 1976 and of articles 40 and 41 of the draft articles on the responsibility of States for internationally wrongful acts between 1998 and 2001.

51. He was in favour of establishing an illustrative list of norms that currently qualified as *jus cogens*. The question of the form that such a list would take was of secondary importance and could be decided at a later stage. He was in favour for four reasons. First, the inclusion of a list was part of the syllabus adopted when the topic had been added to the long-term programme of work and, later, to the Commission's agenda. Second, it could not be argued that *jus cogens* was a purely methodological topic in the same way as the identification of customary international law was. *Jus cogens* had been included in the agenda with three main ambitions, namely to clarify the criteria for identifying *jus cogens*, to propose an indicative list of *jus cogens* norms and to determine the legal consequences of those norms. Again, he saw no strong reason to deviate from the syllabus. Third, while it would be impossible to draw up a list of rules of customary law, it would be easy to compile a list of *jus cogens* norms, which were, by their very nature, more limited in number. Fourth, he could not fully understand why concerns were being expressed over the proposal for a list. In 1966 and 2001, the Commission's decision to draw up similar lists had hardly been contested. It would be at the very least surprising for the Commission to refrain from repeating the exercise after having opted to include the topic of *jus cogens* in its agenda.

52. In compiling an illustrative list, the Commission would, as usual, have to be prudent and to include only those norms that had been indisputably recognized as peremptory. If there was any doubt, the Commission would have to refer to practice and jurisprudence in explaining why it was not in a position to state definitively that a

[327] *Yearbook ... 1976*, vol. II (Part Two), p. 95.

particular norm qualified as *jus cogens*. As the Special Rapporteur said in paragraph 11 of his first report, the Commission's aim should be to report on the current state of international law relating to *jus cogens*.

53. It was easier for the Commission to draw up a list than it had been in the past. Over the previous 15 years, international courts had made *jus cogens* more commonplace by referring to it with greater frequency, while at the same time narrowing its scope by refusing to recognize certain norms as *jus cogens* or by refusing to give them the legal effects sought by complainants. Recent examples included the judgment of the European Court of Human Rights in the case of *Al-Dulimi and Montana Management Inc.* v. *Switzerland* and that of the International Court of Justice in *Jurisdictional Immunities of the State*. Under the circumstances, the Commission could usefully draw up an indicative list in a more favourable context than in the past.

54. Before proceeding any further with its work on the topic, the Commission needed to clarify the differences between *jus cogens* and similar legal mechanisms. The Special Rapporteur referred to Article 103 of the Charter of the United Nations only in passing, in paragraph 28 of his first report, without explaining how that provision was similar to, but different from, *jus cogens*. He had likewise been very surprised that the Special Rapporteur made no mention of article 41 of the 1969 Vienna Convention, which limited the cases where States parties to a multilateral treaty could derogate therefrom by means of a bilateral or plurilateral treaty. In some respects, the article followed the same logic as *jus cogens*, and the Special Rapporteur should determine how it differed from article 53 of the 1969 Vienna Convention, in particular by examining the *travaux préparatoires* to the Convention. Such an examination was necessary in order to determine the parameters of *jus cogens* as a mechanism that was distinct from the one established in article 41 of the 1969 Vienna Convention, which, in his view, had not been taken fully into account in draft conclusion 2, paragraph 1.

55. He did not think that the possible existence of regional *jus cogens* could be dismissed out of hand. In-depth research was required before the Commission could take a position on the matter. It was true that article 53 of the 1969 Vienna Convention dealt only with universal *jus cogens*, but that did not preclude the emergence of other forms of peremptory norms. During the United Nations Conference on the Law of Treaties, some delegations had expressed support for the idea of regional *jus cogens*, and, since then, the Inter-American Court of Human Rights and the European Court of Human Rights had developed jurisprudence that echoed the idea. It was therefore an issue that should be taken up in the future.

56. Similarly, he did not see why, as a matter of principle, the persistent objector theory could not be applied to *jus cogens*. In paragraph 67 of his first report, the Special Rapporteur asserted that it was difficult to see how a rule from which no derogation was permitted could apply to only some States, but he was confusing cause and effect. A *jus cogens* norm produced effects only for those States to which it applied. If the persistent objector theory was accepted – which was a question that the Special Rapporteur should study in detail – then *jus cogens* would have no effect for the States concerned. In order to decide whether the persistent objector theory applied to *jus cogens*, there was a need, first of all, to determine how *jus cogens* was formed and, in particular, whether it was based on the consent of all States or rather on a form of majority opinion. He took note of the Special Rapporteur's decision to examine the issue in a subsequent report.

57. He was of the view that the Commission should adhere to its traditional method and reject the approach to the topic proposed by the Special Rapporteur, which would involve reassessing draft conclusions that had already been adopted, as work on the topic progressed. Such an approach would greatly complicate the Commission's task and might make it harder for the Commission to reach a consensus on each of the draft texts.

58. He supported the adoption of an initial draft conclusion on the scope of the conclusions as a whole. In that regard, the Commission still had to agree on the purpose of its work on *jus cogens*. In draft conclusion 1, an explicit reference should be made to the identification of not only the criteria of *jus cogens* but also of the content of *jus cogens*. The Commission should, however, come to a decision on whether or not to include an illustrative list of *jus cogens* norms before looking to adopt draft conclusion 1.

59. Draft conclusion 2 fell outside the scope of the topic, introduced uncertainties and created legal difficulties. The notion of *jus dispositivum*, in particular, was rather obscure. Like Mr. Nolte, he found the suggestion that customary law was a form of agreement highly questionable. Moreover, derogation from a treaty could also take place through the decision of an international organization, which was not an agreement. As a result, draft conclusion 2 did not accurately reflect the current state of international law.

60. In draft conclusion 3, paragraph 1, the Commission should simply repeat, word for word, the text of article 53 of the 1969 Vienna Convention, without in any way modifying it. He was not in favour of adopting draft conclusion 3, paragraph 2, which did not appear to be grounded in practice or jurisprudence and contained legally ambiguous terms. The concepts of "fundamental values" and "hierarchy", in particular, did not appear in the Convention, and including them in the draft conclusions would amount to a legal innovation, which, moreover, was not necessary. Once the Special Rapporteur had provided clarifications in that regard, the Commission would need to determine what other legal effects, if any, flowed from *jus cogens*.

61. In summary, he was in favour of referring draft conclusion 1 to the Drafting Committee, as long as the Commission had reached a clear decision with regard to the purpose of its work on *jus cogens*. He also agreed to the referral of draft conclusion 3, paragraph 1, to the Drafting Committee, provided that it was reworded in line with article 53 of the 1969 Vienna Convention.

The meeting rose at 12.55 p.m.

3318th MEETING

Tuesday, 12 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the environment in relation to armed conflicts[328] (A/CN.4/689, Part II, sect. E,[329] A/CN.4/700,[330] A/CN.4/L.870/Rev.1,[331] A/CN.4/L.876[332])

[Agenda item 7]

Third report of the Special Rapporteur

1. The CHAIRPERSON invited the Special Rapporteur on protection of the environment in relation to armed conflicts to introduce her third report (A/CN.4/700).

2. Ms. JACOBSSON (Special Rapporteur) said that she wished to begin by thanking the Commission's secretariat, which, under the excellent leadership of Mr. Llewellyn, had done its utmost to support and facilitate her work, thereby also benefiting the Commission as a whole. She was particularly grateful for its sound advice, support and encouragement during the preparation of the three reports. Its experience, positive approach, diligence and efforts to ensure the translation and issuance of the third report had been crucial.

3. As the report she was introducing would be her last report to the Commission, which she would leave at the end of the year, she wished to take the opportunity both to look back at what had been achieved and to look ahead. Since the inclusion of the topic on the Commission's programme of work in 2013, she had presented three reports, in 2014, 2015 and 2016, respectively. She had followed the workplan proposed in each of them, making adjustments following consultations in the Commission. The topic had been addressed in "temporal phases". The first report dealt with the law applicable prior to the outbreak of armed conflict,[333] the second with the law applicable during armed conflict[334] and the third mainly with the law applicable in post-conflict situations. Nevertheless, she recalled once again that there were no clear boundaries between those various phases and that the reports should be read together in order to form a clear idea of the work done thus far.

4. In the three reports that she had submitted, she had tried to give an overview of the law applicable before, during and after an armed conflict, in order to close the circle of the three temporal phases. In total, 14 draft principles had been developed, as well as provisions on the scope and purpose of the principles and the use of terms. The proposed principles ranged from preventive measures of a legislative nature to remedial measures.

5. It was her sincere hope that the Commission would decide to appoint a new Special Rapporteur from among its new membership to conclude the examination of the topic. During the years in which she had worked in the area, the interest that it attracted had been growing and had become ever more apparent. As recently as May 2016, the United Nations Environment Assembly had adopted a resolution on protection of the environment in areas affected by armed conflict,[335] stressing the critical importance of protecting the environment at all times and calling on Member States to implement applicable international law. The work of the Commission was mentioned explicitly, and the Executive Director of the United Nations Environment Programme (UNEP) was requested to continue interaction with the Commission. The resolution was the first of its kind since the adoption of the resolutions on protection of the environment in times of armed conflict in the early 1990s. The main difference between the early 1990s and 2016 concerned State practice. In 2016, environmental concerns, whether in times of peace or in times of armed conflict, were mainstream. States, intergovernmental organizations and civil society organizations might disagree as to how best to achieve the goal of environmental protection, but it would be difficult to find a single State that claimed that environmental concerns, including their legal aspects, were irrelevant.

6. Before introducing the third report, she pointed out that the English version, into which the corrections that she had made at a late stage had not been incorporated, as they had into the French and Spanish versions, contained a number of typographical and other errors, which would be corrected in due course. A decision would be taken shortly on whether to do so by issuing a formal corrigendum or simply by sending an e-mail to the members of the Commission. Although she had no knowledge of the other official languages of the United Nations, any errors, including translation errors, in the Arabic, Chinese or Russian versions could of course be brought to her attention. One point should be highlighted, as it might appear

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[328] At its sixty-seventh session (2015), the Commission took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee. See *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

[329] Available from the Commission's website, documents of the sixty-eighth session.

[330] Reproduced in *Yearbook ... 2016*, vol. II (Part One).

[331] Available from the Commission's website, documents of the sixty-eighth session. Document A/CN.4/L.870/Rev.1 reproduces the text of the draft principles provisionally adopted in 2015 (see *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134) and technically revised and renumbered during the present session by the Drafting Committee.

[332] Available from the Commission's website, documents of the sixty-eighth session.

[333] *Yearbook ...2014*, vol. II (Part One), document A/CN.4/674 (preliminary report).

[334] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685 (second report).

[335] United Nations Environment Assembly resolution 2/15 of 27 May 2016 (UNEP/EA.2/Res.15). Available from: www.unep.org/environmentassembly/proceedings-report-resolutions-and-decisions-unea-2.

to be an error, but was not. Paragraph 227 repeated a quotation given in paragraph 224, but the references in the two paragraphs were different. The reason was that, when the United Nations Compensation Commission had dealt with part one of the fourth instalment of "F4" claims, it had referred to its previous work on the second instalment of "F4" claims. The third report thus reflected the work of the Compensation Commission and did not contain an error on that point.

7. As she had done during the preparation of her previous reports, she had continued to consult other entities, such as UNEP, whose support had been crucial. Her discussions with staff of the United Nations Department of Peacekeeping Operations and the United Nations Department of Field Support had also been very fruitful. Representatives of the ICRC had continued to support her work, as had academics and members of NGOs. The pledge made by the Nordic States and national Red Cross societies on the protection of the environment during armed conflicts at the 2011 International Conference of the Red Cross and Red Crescent had culminated in an important report by the International Law and Policy Institute[336] and a meeting of experts held in September 2015, which had been hosted by the Finnish Ministry for Foreign Affairs, among others. In addition, a new international seminar held at United Nations Headquarters in New York in the autumn of 2015, which had been open to all delegations accredited to the United Nations, had brought together speakers and guests with practical experience and theoretical knowledge of the topic. The interest shown by a number of States that were directly affected by remnants of war at sea had been considerable. The Special Rapporteur had also had the opportunity to visit some of the affected regions. Regrettably, and despite efforts to do so, it had been difficult to establish contact and hold consultations with regional bodies and affected States in Africa, the site of many non-international armed conflicts.

8. With regard to the purpose and content of the report under consideration, it should be recalled that the preliminary (first) report provided an introductory overview of the rules and principles applicable to a potential armed conflict (peacetime obligations). The second report identified existing rules of armed conflict that were directly relevant to the protection of the environment in relation to armed conflicts. It contained a proposed "preamble" and draft principles, which had been submitted to the Drafting Committee for consideration. The Drafting Committee had provisionally adopted them with some modifications, which the Commission had noted.

9. The third report followed the plan that she had put forward and was intended primarily to identify rules applicable in post-conflict situations. She had obviously not conducted a comprehensive review of international law in general, but had instead focused on the legal aspects of the environmental consequences of remnants of war and other environmental challenges. The report also contained proposals on post-conflict measures, access to and sharing of information, and post-conflict environmental assessments and reviews. In order to "close the temporal circle", which was one of the aims of the third report, it also dealt with preventive measures, as only one draft principle thus far had been proposed with regard to that phase.

10. The report under consideration thus consisted of three chapters. The first, which gave a general overview and presented recent developments in the area, summarized the consultations held in the Commission the previous year, reflected the views expressed by States in the Sixth Committee in 2015 and contained a review of the responses from States to the Commission's request for information. The second chapter, which dealt with the rules applicable in post-conflict situations, began with general observations on areas of law (peacetime agreements) that were of particular relevance to the topic, focusing in particular on international investment agreements and the rights of indigenous peoples; it also described the practice of States in terms of peace agreements and status-of-forces and status-of-mission agreements. It contained a section on the practice of international organizations, which emphasized the work of UNEP, and a large section on legal cases and judgments, which built on a similar section in the second report.

11. An important, and substantive, section of the third report dealt with access to and sharing of information and the obligation to cooperate. It pertained to all three temporal phases because legal instruments intended to guarantee access to and sharing of information were increasingly important, as they were essential for preventing, mitigating and responding to environmental threats. Particularly important treaties, such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the 1991 Convention on environmental impact assessment in a transboundary context, were considered, and examples of other relevant treaties, such as the Convention on biological diversity, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Minamata Convention on Mercury, were given, as were examples of soft-law instruments, including the texts that had come out of the 2012 United Nations Conference on Sustainable Development. The legal importance of access to environmental information during military operations and peacekeeping missions was also considered. Lastly, the third chapter of the report contained a brief analysis of the three stages of the work done thus far and proposals for the future programme of work.

12. In total, nine additional draft principles were proposed and could be found in annex I to the third report. Draft principle I-1 on implementation and enforcement was intended to cover wider ground than the protection of the environment during an armed conflict between two or more parties. Effective legislative, judicial and other preventive measures should address all three phases (before, during and after an armed conflict). They ranged from legislation reflecting obligations under the law of armed conflict, such as the obligation to ensure that means and methods of warfare were legally evaluated before they were tested or used, to procedural mechanisms allowing cases to be brought before domestic or relevant

[336] International Law and Policy Institute, *Protection of the Environment in Times of Armed Conflict: Report from the Expert Meeting on the Protection of the Environment in times of Armed Conflict, Helsinki, 14–15 September 2015*, available from: ceobs.org/wp-content /uploads/2018/03/20160108-Helsinki-expert-workshop-report-.pdf.

international courts and tribunals. The draft principle was relatively short and general. It would be particularly interesting to hear the views of Commission members with regard to whether the principle should be expanded or whether it was sufficient to refer to further examples in the commentary. Draft principle I-3 on status-of-forces and status-of-mission agreements reflected a new but clear trend among States and international organizations towards addressing environmental challenges in such agreements. Draft principle I-4 on peace operations reflected the fact that States and international organizations such as the United Nations, the African Union, the European Union and NATO increasingly took account of the environmental impacts of such operations and took necessary measures to prevent, mitigate and remediate their negative consequences. The third report amply confirmed that trend.

13. As noted in annex I, part three of the draft principles concerned the principles applicable after an armed conflict. It began with draft principle III-1 on peace agreements. In her third report, the Special Rapporteur noted and described an important development in recent peace agreements, namely the fact that they increasingly regulated environmental issues. Indeed, for her, that development had been an interesting discovery during her research for the third report. Draft principle III-2 on post-conflict environmental assessments and reviews was crucial, as it highlighted the importance of cooperation between States and former parties to an armed conflict. It encouraged cooperation both by the former parties to a conflict (whether or not they were States) and by States that had not been involved in the conflict. The aim was to ensure that environmental assessments and recovery measures could be carried out rather than to identify any particular wrongdoer. Draft principle III-2, paragraph 2, described the steps to be taken at the conclusion of peace operations, such as reviews of their effects. To some extent, such reviews were already conducted, but they varied in quality and scope. The aim was to ensure that mistakes were not repeated and that lessons were learned.

14. Draft principles III-3 and III-4 addressed remnants of war in general and remnants of war at sea in particular. Draft principle III-3 was general in nature and largely reflected obligations under the law of warfare. While it did not go beyond existing law, it emphasized the need to act without delay. Furthermore, it encouraged the conclusion of agreements on technical and material assistance, as well as the undertaking of joint operations. Its aim was essentially to ensure that the threats posed by remnants of war, which were dangerous to humans and the lands on which they lived, were eliminated and that those lands were restored to a normal, safe state. Draft principle III-4 dealt with remnants of war at sea in particular and was intended to reflect the growing concern of States and international organizations with regard to their detrimental effects. Neither draft principle III-3 nor draft principle III-4 was limited to so-called "military" or "explosive" remnants; they were both intended to cover all types of remnants of war that represented a threat to the environment. Military or explosive remnants of war at sea were not explicitly regulated in the context of the law of armed conflict. That was one reason that remnants of war at sea should be governed by a specific principle. The other reason was the difference in legal status between various maritime areas: some came under the sovereignty of the coastal State, others might be subject to the well-defined jurisdiction of that State and others still might lie beyond the exclusive jurisdiction of any coastal State. Remnants of war at sea might be found in areas that were not under the coastal State's jurisdiction or control or, owing to the development of the law of the sea (extended maritime areas), might be within the coastal State's jurisdiction, even if the coastal State had not been a party to the conflict at the time the remnants had been left in the area in question. The coastal State might not even have existed at the time. It followed that international cooperation on areas of common interest was necessary. The issue had increasingly been addressed both at the regional level, as in the case of areas in the Pacific Ocean or the Baltic Sea, and at the international level, for example in the United Nations. The measures taken were described in the third report. Many affected States did not have the resources to survey maritime areas, and other States and international organizations should endeavour to do so and to make the information collected freely available. In order for cooperation to function, access to and sharing of information were crucial. An increasing number of multilateral treaties addressed the issue and established obligations for States to make information available. They were clearly applicable in post-conflict situations and represented an interesting development of law.

15. Part four of the draft principles, which was provisionally entitled "Additional principles", contained only one draft principle, but others would be added, and she would revert to that point later on. Proposed draft principle IV-1, entitled "Rights of indigenous peoples", was intended to reflect and highlight the current legal status and rights of indigenous peoples, as established both in international and regional treaties and in case law. Indigenous peoples and communities were most often negatively affected by armed conflicts, not least as their particularly close connection with the land made them more vulnerable in times of armed conflict and its aftermath, as had been noted by members of the Commission and by representatives of Member States in the Sixth Committee.

16. She recalled that, the previous year, the Drafting Committee had provisionally adopted draft texts relating to part two of the draft principles, namely those applicable during armed conflict.[337] Additionally, one draft principle on the designation of protected zones had been provisionally adopted for inclusion in part one. Entitled "Draft principle I-(x) (Designation of protected zones)", it required States to designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.[338]

17. As a specific comment on the various chapters of the third report, she wished to explain why certain aspects had been omitted and could be considered in a future report. The third report dealt principally with the applicability of peacetime agreements that were particularly relevant in post-conflict situations. She had not found any convincing reason to examine all existing environmental

[337] *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

[338] *Ibid.*

treaties to determine whether they continued to apply in situations of armed conflict, as had been suggested by one Commission member and two representatives of States. The task of analysing all environmental treaties in force, which numbered between 500 and 1,000, would actually prevent the examination of the topic from moving forward, as it would take time and the Commission would probably be unable to agree on whether and to what extent they applied in situations of armed conflict. For that reason, among others, such an analysis had not been done when the Commission had considered the effects of armed conflicts on treaties. It also went without saying that the question of whether environmental treaties were applicable before and after an armed conflict was of little or no concern, as they were applicable.

18. The third report thus focused on a number of conventions of particular relevance to the topic, such as the Convention for the protection of the world cultural and natural heritage, the Convention on of international importance especially as waterfowl habitat, the African Convention on the Conservation of Nature and Natural Resources and the Convention on the Law of the Non-Navigational Uses of International Watercourses. They had been selected not at random, but because the previous work of the Commission, the statements and contributions of States and commentators had identified them as being of particular relevance to pre- or post-conflict situations. In that context, it was also important, in her view, to examine liability conventions that explicitly exempted damage caused by acts of war or armed conflict, contained sovereign immunity clauses or provided for the right to suspend a convention in case of war or other hostilities. She had chosen to examine such conventions even though it could not necessarily be concluded that the application of the conventions *per se* was limited to peacetime. International investment agreements (including bilateral investment treaties) were also considered, as they could serve as examples of "treaties of friendship, commerce and navigation and agreements concerning private rights", one of the categories listed in the annex to the draft articles on the effects of armed conflicts on treaties.[339]

19. The section of the third report entitled "Legal cases and judgments" covered international, regional and, to a lesser extent, national case law. It also covered some international dispute settlement procedures of a legal or semi-legal nature, such as the United Nations Compensation Commission. As she had noted in previous reports, the case law rarely dealt with environmental damage unconnected with damage to natural resources and property. The reason was that environmental claims without any connection to natural resources or property were highly unlikely to be successful. The same was true of claims related to situations of occupation. The case law relating to indigenous peoples' rights was of particular relevance, as it strongly emphasized the connection between their land and their survival, as well as their human rights. It was also interesting to note that courts or entities that considered claims and awarded compensation had recognized the need for baseline data and measurements, which highlighted the importance of information-sharing and cooperation.

20. As it was her last year in the Commission and the end of her term as Special Rapporteur, she would take the opportunity to share some thoughts on what, in her view, should be done to complete the examination of the topic. With regard to occupation, she once again stressed that there was a close connection between the destruction of land and private property rights, which warranted further examination. Her original intention had been to address the issue in the third report, but, as the report already exceeded the recommended length for such documents, it had been difficult to include such an important aspect. As the law of occupation was part of the law of armed conflict, it could be addressed separately, should the Commission and the future Special Rapporteur so wish. The protection of the environment during the various phases of occupation (belligerent and non-belligerent occupation) could be dealt with without repercussions for the work already done by the Commission. In addition, compensation for a breach of the law of occupation could be linked to both a breach of a *jus ad bellum* rule and a breach of a rule connected to the obligation of the occupying Power. There was case law to build on, and some of it was reflected in her reports.

21. She had also intended to address the Martens clause – or the principle of humanity, as it was referred to by some commentators – in her third report, as she was of the view that it had implications that went beyond situations of armed conflict (irrespective of its application) and that its implications for protection of the environment in relation to armed conflicts could be dealt with in a "preamble". However, she had not done so, one reason being that the Martens clause and the principle of humanity were general in nature and therefore also relevant to the analysis of the pre- and post-conflict phases. "Considerations of humanity", which clearly fell within the realm of the Martens clause, were sometimes mentioned by international courts, albeit often in a general manner. The question of whether the Martens clause was identical to the principle of humanity and of relevance to the topic could be explored in future reports. In that regard, the Commission's work on the protection of persons in the event of disasters should be taken into account.

22. The draft principles – those provisionally adopted at the previous session and those proposed during the current year – did not include reference to the settlement of disputes, liability (compensation) or disclaimers, and those issues would have to be considered at the next stage of the Commission's work. With regard to future work, the responsibility and practice of non-State actors and organized armed groups in non-international armed conflicts also warranted consideration. Even though it was extremely difficult to obtain information, it would perhaps be easier for the Commission to investigate now that it had three reports defining the context.

23. It would also be worthwhile to include a few paragraphs in the preamble to introduce the draft principles, and it would make sense to include a clear reference to the Commission's work on the effects of armed conflicts on treaties. There were other aspects that could also sensibly be included in the preamble, but she would not refer to them in her statement. The Commission had yet to decide whether to include a provision on the use of terms. With

[339] *Yearbook ... 2011*, vol. II (Part Two), p. 119.

regard to the outcome of the work, divergent views had been expressed in the Commission and in the Sixth Committee. She wished to reiterate that, should there be a need to continue with enhanced progressive development or codification as a result of the work undertaken, a decision would need to be taken by the Commission, or by States, at a subsequent stage. She strongly encouraged continued consultations with other entities, such as the ICRC, the United Nations, UNEP and the United Nations Educational, Scientific and Cultural Organization (UNESCO), as well as with regional organizations. Their engagement had been considerable and a *sine qua non* for the outcome of the Commission's work. States had also been an important source of information, as they had responded to the Commission's questions concerning the situations in which the rules of international environmental law, including regional and bilateral treaties, had continued to apply during and after an international or non-international armed conflict and had referred to examples of national legislation relevant to the topic and case law in which international or domestic environmental law had been applied. While the information provided by States did not always correspond exactly to the Commission's questions, it had always been valuable.

24. In conclusion, she proposed that the Commission refer the nine draft principles to the Drafting Committee and looked forward to hearing the views and proposals of members on the report under consideration.

25. Mr. MURASE said that, with regard to phase I (Part One of the draft principles), the Commission had already adopted a principle on the designation of protected zones, and the Special Rapporteur was now proposing three further draft principles. He had no objection to draft principle I-1, as it was formulated as an exhortation using the word "should". However, he was puzzled by draft principle I-3 on status-of-forces and status-of-mission agreements. Such agreements usually dealt with the legal issues associated with the military bases and personnel of the stationed forces, such as entry into and exit from the country concerned, tax liabilities, postal services and, most importantly, civil and criminal jurisdiction over members of the stationed forces; they did not concern the conduct of the stationed forces, as was envisaged in the proposed draft principle. The environmental stewardship agreement[340] supplementing the status-of-forces agreement between Japan and the United States of America,[341] referred to in paragraph 161 and the penultimate footnote thereto of the third report, was intended simply to prevent spills and leaks of oil and chemicals from United States bases in Japan, not to regulate the conduct of United States forces in the unlikely event of an armed conflict between Japan and the United States. Status-of-forces and status-of-mission agreements should therefore not be mentioned in draft principle I-3, and, if the provision was to be retained, the words "in their status-of-forces or status-of-mission agreements" in the first sentence should be replaced with "in special agreements".

26. Draft principle I-4 did not present any problems, although it would be advisable to replace the words "to prevent, mitigate and remediate" with the words "to prevent, reduce and control", which were used in the draft guidelines on the protection of the atmosphere.[342]

27. The problems addressed under phase I should be strictly limited to those that fell within the scope of the existing law of armed conflict. In that regard, article 36, "New weapons", of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) offered an example of such a limitation, providing that, in the study, development, acquisition or adoption of a new weapon, means or method of warfare, each State party was under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by the Protocol or by any other rule of international law applicable to the State party. Of course, the Commission did not intend to deal with the question of specific weapons, which was beyond its expertise, but that limitation suggested that its recommendations with regard to phase I might have to be restricted to the acknowledgement that States should carefully test new weapons and prepare adequate military manuals in anticipation of future armed conflicts.

28. With regard to part three of the draft principles, the difficulty of identifying the law applicable to the post-conflict phase (phase III) was well known. While the principles applicable during armed conflict (phase II) were well established in the law of armed conflict, the principles applicable during phase III were sometimes difficult to identify. As the Geneva Conventions for the protection of war victims (Geneva Conventions of 1949) and the 1977 Additional Protocols thereto ceased to apply after the "general close of military operations", environmental treaties and rules were supposed to be fully restored after the conflict, as *lex specialis* ceased to apply.

29. With regard to draft principle III-1, the Special Rapporteur stated, in paragraph 154 of her third report, that provisions on environmental protection were common in agreements that aimed to end non-international armed conflicts, but he was not sure that the principle was also applicable to international armed conflicts, as peace treaties were no longer commonly concluded in such cases, and those that were concluded did not contain provisions on environmental protection. Contemporary State practice showed that belligerent States tended to conclude armistice agreements to end active hostilities. Such agreements did

[340] Agreement between the United States of America and Japan on Cooperation in the Field of Environmental Stewardship relating to the United States Armed Forces in Japan, Supplementary to the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, signed at Washington, D.C., on 28 September 2015, *Treaties and Other International Acts Series*, Washington, D.C., U.S. Government Printing Office, No. 15-928.

[341] Agreement Under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, signed at Washington, D.C., on 19 January 1960, *United States Treaties and Other International Agreements*, Washington, D.C., U.S. Government Printing Office, vol. 11, Part 2 (1961), TIAS No. 4510.

[342] See draft guideline 3 (document A/CN.4/L.875, available from the Commission's website, documents of the sixty-eighth session), adopted at the 3315th meeting on 5 July 2016 (3315th meeting, above, para. 52).

not normally contain provisions on environmental protection. As the difference between non-international armed conflicts and international armed conflicts was striking in that regard, the term "non-international armed conflict" should be used in draft principle III-1 in order to clarify its scope *ratione materiae*.

30. With regard to draft principle III-2, it was unclear at which point in time post-conflict environmental assessments should be conducted. Draft principle III-2, paragraph 2, seemed to apply "at the conclusion of peace operations", but draft principle III-2, paragraph 1, did not specify a particular point in time. If amicable relations had not been restored by a peace agreement or treaty, former belligerent parties could hardly be expected to "cooperate" with each other. After an international armed conflict, as a result of the general close of military operations and the consequent withdrawal of forces, the belligerent parties were unilaterally obliged to protect the environment within each State, as that environment was exclusively under their respective jurisdictions or control. Although the environment could be protected in that manner, tension between former belligerents continued after the conclusion of armistice agreements, and peace treaties were not necessarily concluded immediately after the general close of military operations. Filling that temporal gap was one of the challenges of the Commission's work on the topic.

31. Draft principles III-3 and III-4 on remnants of war and remnants of war at sea, respectively, were good principles for which the Special Rapporteur was to be commended. However, he wondered to whom the first paragraph of draft principle III-3 was addressed, as it was drafted in the passive voice, and it was not clear which party to an international armed conflict had primary responsibility for removing remnants of war. That difficulty had not escaped the Special Rapporteur, who suggested in paragraph 251 of her third report that, in an international armed conflict, a party that had used explosive ordnance often did not have control over the enemy territory after the cessation of hostilities, yet the party with the primary responsibility was required to remove explosive remnants of war in order to apply the principle effectively. In that respect, article 5 of the 1907 Convention VIII relative to the Laying of Automatic Submarine Contact Mines stipulated that, in principle, each party should remove its own mines, and when one party could not remove them, owing to their location, the Convention stipulated that their position must be notified to the other party by the party that had laid them. While draft principle III-3, paragraph 2, required the parties to seek agreement, it did not assign responsibilities, and there was a need to specify clearly which party had primary responsibility for removing the remnants of war. A duty to notify should thus be incorporated into the draft principle.

32. The former parties to an armed conflict did, of course, sometimes cooperate. He was not sure that he understood the opening clause of draft principle III-3, paragraph 2, "At all times necessary", which seemed to him to mean "At all times necessary after the cessation of active hostilities".

33. As for remnants of war, mention should be made of the recent practice of Japan with regard to the chemical weapons abandoned by the Japanese military in the territory of China during the Second World War. In response to a request made by China in 1990, Japan had made efforts to destroy those weapons. In accordance with article I, paragraph 3, of the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Japan had undertaken to destroy them, and it had been agreed that, under the provisions of the Convention, China would provide appropriate cooperation in its capacity as the territorial State. In 1999, the two Governments had signed a memorandum on the destruction of abandoned chemical weapons[343] and, on the basis of that instrument, Japan had conducted investigations and excavation and recovery operations in cooperation with China. The Japanese military had brought the chemical weapons into China in the 1940s, but their removal had not begun until 50 years later. The example showed that, in the absence of amicable relations between former belligerents, the removal of remnants of war was very difficult and could take a long time, whereas draft principle III-3, paragraph 1, provided for their removal "[w]ithout delay after the cessation of active hostilities".

34. As for draft principle III-5, he agreed with the Special Rapporteur's statement in paragraph 134 of her report that "the access to and sharing of information on the territory of a foreign State rests on the consent of that State". Article 5 of The Hague Convention VIII relative to the Laying of Automatic Submarine Contact Mines provided for a duty to notify rather than for access to information. As States were required to take precautionary measures during an armed conflict, it was hardly difficult for parties to an international armed conflict that had laid mines to notify the other parties of their location after the cessation of active hostilities; in that regard, the duty to notify could be considered to derive from "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States", set forth by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (para. 29).

35. The content of the obligation aside, draft principle III-5 on access to and sharing of information should also include a temporal qualification, and he proposed that the words "in relation to armed conflicts" be replaced with "in post-conflict situations", as the hostility between belligerents during an armed conflict prevented them from fulfilling their duty to cooperate. Furthermore, the phrase "in accordance with their obligations under international law", which was a little too open-ended, might be replaced with the words "in accordance with their obligations under draft principles III-3 and III-4 above".

36. Mr. KITTICHAISAREE said that the Special Rapporteur also should have consulted victims of armed conflicts directly to establish whether, on the basis of her third report, the draft principles proposed were sufficiently

[343] For more information on this memorandum, see the website of the Ministry of Foreign Affairs of Japan: www.mofa.go.jp/announce/announce/1999/7/730.html.

practical and inclusive and whether they covered all relevant issues. In paragraphs 219 to 231 of her third report, the Special Rapporteur mentioned the work of the United Nations Compensation Commission set up to compensate victims of the damage caused by the invasion and occupation of Kuwait by Iraq. However, she had not sought the views of the Government of Kuwait, the State that had been the direct victim of the armed attack. Equally, he had expected Mr. Murase to mention the environmental impact of the atomic bombs dropped on Hiroshima and Nagasaki and wished to know whether, in Mr. Murase's view, the draft principles proposed by the Special Rapporteur were adequate to deal with the situation created by the atomic bombings of those two Japanese cities.

37. Mr. MURASE said that the Special Rapporteur was the person to whom the question should be put. In any event, the destruction of Hiroshima and Nagasaki had been extensively discussed and had been the subject of a historic 1963 decision of the District Court of Tokyo in the *Ryuichi Shimoda* et al. v. *The State* case. However, in his view, those examples should not be mentioned in the draft principles.

38. Mr. CANDIOTI said he would be grateful if Mr. Murase would clarify his comment on the use of the word "should" in draft principle I-1.

39. Mr. MURASE said that he had wanted to stress that States did not have an obligation to take the measures referred to in that draft principle.

40. Mr. CANDIOTI, thanking Mr. Murase, said that he wished to make a comment in relation to the Commission's working methods. The Commission seemed to be using the words "principle", "guideline" and "conclusion" interchangeably, but they had very different meanings. For example, a provision that defined the object or scope of application of a draft text could not be referred to as a conclusion or guideline. He feared that the Commission was confusing concepts and terms and believed that the Planning Group should examine the matter.

41. Mr. PARK said that he appreciated the Special Rapporteur's third report, which dealt mainly with the principles applicable in post-conflict situations but also addressed principles relating to prevention and was based on an in-depth analysis of rules of particular relevance, the practice of States and international organizations, and case law. Annex II contained an extensive bibliography, which would be of great use to researchers interested in the topic.

42. He would first make some general comments on the scope of the draft and methodology and would then comment on the nine draft principles proposed by the Special Rapporteur. With regard to scope, he would focus in his comments on four points, namely armed conflict, the environment, stakeholders and specific weapons. He recalled that, while the topic had two main axes, armed conflict and environment, he had at previous sessions attempted in vain to convince the Commission that the scope of the topic should be limited to situations of international armed conflict or, at the very least, that a distinction should be drawn between international armed conflicts and non-international armed conflicts, principally because the stakeholders on whom it was incumbent to protect the environment were different in each case. Of course, both State armed forces and, in the case of non-international armed conflicts, non-State armed groups, were bound to respect the applicable customary rules of international humanitarian law, but it was difficult to urge non-State armed groups to respect or take appropriate measures before, during and after a conflict.

43. Furthermore, the scope of the term "environment" remained vague. At the previous session, he had noted that the discussion should focus on the "natural" environment and not on the "human" environment, which fell within the scope of human rights, and that the exploitation of natural resources was not directly related to the topic. However, the Special Rapporteur maintained that it was "difficult to make a distinction between the protection of the environment as such and the protection of natural objects in the natural environment and natural resources" and referred to a number of cases relating to compensation for pecuniary damage, in particular in paragraphs 194 to 205 of the third report, which gave the impression that the "environment" encompassed the cultural and human environment. He feared that such an approach might obscure the very point of the topic.

44. The stakeholders should also be specified, as the proposed draft principles were addressed not only to States, but also to international organizations and other non-State actors. He was aware that there were three different phases – before, during and after an armed conflict – and that both States and non-State actors should be involved in the protection of the environment during each of those three phases, in particular the prevention and post-conflict phases. Moreover, as the Commission had proposed at its 2015 session that consideration should be given to the issue of how international organizations could contribute to the legal protection of the environment,[344] an examination of their obligations was both necessary and inevitable. Nevertheless, it was important to ensure a certain consistency in the formulation of the principles.

45. With regard to the examination of "specific weapons and the effects of such weapons" on the environment, he asked how far the issue should be taken. As the Special Rapporteur noted in paragraph 41 of her third report, States held divergent views on whether it should be addressed within the scope of the topic. Some States – Israel and the United Kingdom – had recommended its exclusion, whereas others – Austria, the Islamic Republic of Iran, and Mexico – were in favour of its examination and had highlighted the importance of considering the consequences of the use of nuclear weapons, which was why the third report included several paragraphs on compensation claims arising from the nuclear tests conducted by the United States in the Marshall Islands. In her third report, the Special Rapporteur also addressed specific weapons in relation to remnants of war, although the Commission had not yet reached a consensus on whether such weapons and the consequences of their use fell within the scope of the topic.

46. At its sixty-sixth session, the Commission had held a substantial debate on the issue of weapons.

[344] See *Yearbook ... 2015*, vol. II (Part Two), p. 69, para. 163.

In paragraph 13 of her second report, examined at the sixty-seventh session, the Special Rapporteur stated explicitly that chemical and biological weapons would not be addressed as part of the topic. In that regard, he had objected that it might prove impossible to limit the scope of the discussion as proposed, at least for chemical weapons, as the Convention on the prohibition of military or any other hostile use of environmental modification techniques was a clear example of an instrument intended to protect the environment in relation to armed conflicts.

47. With regard to methodology, he wished to revisit some of the legal issues raised in the chapter of the third report devoted to rules of particular relevance applicable in post-conflict situations, namely post-conflict liability, international investment agreements, indigenous peoples, and access to and sharing of information and the obligation to cooperate. With regard to post-conflict liability, he was not sure that he understood the Special Rapporteur's intention, as sovereign immunity and the civil liability of operators were dealt with together, despite having different legal characteristics. In particular, operators such as shipowners or operators of nuclear power stations were victims of armed conflicts; they were not perpetrators who intentionally destroyed the environment.

48. With regard to paragraph 110 of the third report, in which the Special Rapporteur noted that a number of liability conventions explicitly exempted damage caused by acts of war or armed conflict and that the fact that such liability was exempted could not lead to the automatic conclusion that the application of the conventions *per se* was limited to peacetime, he noted that the "exemption clause" contained in almost all liability conventions meant simply that operators were not liable for damage occurring in certain situations, such as armed conflict, civil war or even natural disaster. Nevertheless, *ratione temporis*, those international conventions applied both in peacetime and in wartime.

49. Concerning international investment agreements, the Special Rapporteur stressed that a large number of such agreements contained explicit provisions on environmental protection and that they continued to apply in times of armed conflict. Yet the topic was somewhat different; the crux of the matter was the destruction of the environment by the belligerent parties during an armed conflict. He could not, therefore, see the relevance of investment agreements to the topic, even if some of their provisions might "provide additional incentives for States to protect the environment in peacetime and in times of armed conflict".

50. With regard to the protection of indigenous peoples, the relevant jurisprudence of regional human rights courts on indigenous peoples and their special relationship with the land was analysed in a later part of the third report (paras. 198 to 201) than draft principle IV-1, which was dealt with in paragraphs 121 to 129. In any event, he doubted that the issue was relevant to "armed conflicts".

51. Lastly, whereas the Special Rapporteur presented the sharing of information as an essential aspect of the protection of the environment in times of armed conflict and considered that, like access to information, it was closely linked to the duty to cooperate, in his view the sharing of information in relation to armed conflicts was above all a matter of reciprocity between States. It was also unclear exactly when States were obligated to share information, but he would return to that point later on.

52. Turning to the draft principles, he said that, with regard to draft principle I-1 on the obligation to take preventive measures, the examples of case law given in the explanation of the draft principle did not really substantiate its purpose. Indeed, the cases referred to in paragraphs 187 to 237 dealt primarily with compensation and reparation, including when it had not been awarded, as in *Vietnam Association for Victims of Agent Orange/Dioxin et al.* v. *Dow Chemical Co. et al.* and *Corrie* v. *Caterpillar, Inc.*, for example. To substantiate the draft principle, the Special Rapporteur should refer to cases in which States had been expressly obligated, or encouraged, to take effective measures to enhance the protection of the natural environment in relation to an armed conflict in line with international law or in which a State had been found to have violated international law by failing to put in place domestic preventive measures.

53. With regard to draft principle I-3, the preventive measure for which it provided was necessary, in his view, as it would prevent environmental pollution by military bases. He recalled that he had noted in 2014 that provisions on environmental pollution by United States military bases had been incorporated into the subsidiary agreements of the status-of-forces agreement between the Republic of Korea and the United States[345] in 2001. The two countries had also concluded a memorandum of special understandings on environmental protection. However, it was important not only to encourage States and international organizations to include provisions on environmental regulation and responsibilities in their status-of-forces and status-of-mission agreements, but also to ensure that those provisions and the specific measures for which they provided were compatible with the basic principles of international environmental law. In that regard, to complement the preventive measures, impact assessments, restoration and clean-up measures mentioned in draft principle I-3, he proposed that the "polluter pays" principle, which established that the cost of pollution was to be borne by the polluter, also be mentioned.

54. He did not object to the content of draft principle I-4, but was not convinced that it belonged in Part One on preventive measures, since the draft principle as currently worded dealt with the general obligations of peace operations, which applied not only during the prevention phase, but also during the execution phase and after the conflict. As noted by the Special Rapporteur, the environmental impact of an international peace operation stretched from the planning phase through the entire operational phase and beyond and, owing to the presence of multiple actors, the cumulative effect on a fragile environment could be

[345] Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, signed at Seoul, on 9 July 1966, *Treaties and Other International Acts Series*, vol. 6127, Washington, D.C., U.S. Government Printing Office. The 2001 amendments are available from: www.usfk.mil/Portals/105/Documents/SOFA/A08_Amendments.to.Agreed.Minutes.pdf.

considerable. If the principle was to be considered a responsibility incumbent on peace operations and applicable to all stages of armed conflict, it would be better either to identify the obligation associated with each phase or to include the principle in a section entitled "General obligations".

55. Moving on to the five draft principles in Part Three (Draft principles applicable after an armed conflict), he said that he had no specific comments to make on draft principle III-1 on peace agreements and thanked the Special Rapporteur for the additional information that she had provided on modern peace agreements in relation to non-international armed conflicts. While he had no comments to make on draft principle III-2, he would be in favour of merging draft principles III-3 (Remnants of war) and III-4 (Remnants of war at sea) into a single text. Given the vast range of remnants of war that might be found in the future, it would be preferable to describe the principle rather than to list examples, as proposed in draft principle III-3, paragraph 1. The actors responsible for taking the measures provided for with regard to remnants of war should also be specified. It was not realistic to expect non-State actors that had been involved in a non-international armed conflict to contribute to post-conflict environmental protection and take measures to that end. The responsible actors that should cooperate were States with effective jurisdiction and international organizations.

56. In view of those considerations, he proposed that the principle be framed more broadly, using a slightly modified version of draft principle III-4, paragraph 1, such as: "States and international organizations shall cooperate to ensure that remnants of war do not constitute a danger to the environment and public health."

57. Draft principle III-5 on access to and sharing of information was worded differently from the other draft principles, as it began with the words "In order to enhance the protection of the environment in relation to armed conflicts". That provision raised some questions, in particular with regard to its scope *ratione temporis* and *ratione materiae*.

58. First, the draft principle did not specify when States were to share information. It was included in Part Three, which concerned the principles applicable after an armed conflict, but its wording gave the impression that it also applied to other phases, whereas, in practice, it could not be applied during the conflict. Furthermore, it did not mention the nature or scope of the information to be shared.

59. Second, in paragraph 143, the Special Rapporteur stated that having access to relevant information on the environment was also necessary to justify how a military decision that had been made complied with the obligations under the rule of military necessity. The statement was in fact difficult to understand: was the intention to urge States to take responsibility for damage to the environment once the military operation had ended? If the draft principle was intended also to apply during the armed conflict, as the current wording suggested, one might ask whether it actually could be applied in practice and whether there was sufficient State practice to support the notion that the sharing of information was necessary from the standpoint of the principle of military necessity.

60. Third, he was not convinced that access to and sharing of information concerning the environment in relation to armed conflict could be made obligatory for States. It was difficult to extract such a principle from the analysis of the examples given. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, for example, required States parties to make environmental information available to the public within the framework of national legislation. However, that could not be construed as an obligation on States to make information available to other States. Equally, article 31 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which was referred to in paragraph 148 of the third report, required States to "cooperate in good faith", but also stipulated explicitly that "[n]othing in the present Convention obliges a watercourse State to provide data or information vital to its national defence or security". Moreover, the "sharing of information" depended on the level of reciprocity between States. Lastly, the principle on access to and sharing of information was based on rules applicable in peacetime. In view of those considerations, he proposed that the draft principle be amended to read: "States and international organizations should facilitate access to information and share information in accordance with international law, in order to contribute to the prevention and reparation of damage to the environment after armed conflict."

61. With regard to draft principle IV-1 on the rights of indigenous peoples, he recalled that he had already expressed reservations regarding the need to address the issue as part of the topic. The issue of indigenous peoples, in particular their special relationship with the land, was relevant to the protection of their human rights. The consideration of the issue inevitably widened the scope of the discussion, to the detriment of the core of the topic.

62. To conclude, he wished to make two comments. The first concerned the issue of compensation and/or reparation, as, when reading the third report, he had wondered why the Special Rapporteur had not proposed a draft principle on the subject. As noted in paragraph 265, on the topic of remnants of war at sea, States did not want to address the issue of remnants of war in terms of responsibility. However, in paragraphs 194 to 235 of her third report, the Special Rapporteur referred to a number of cases in which compensation or reparation had been granted and from which common elements could be extracted. Whether the lacuna was intentional or not, he thought that the issue of compensation and reparation during the third (post-conflict) phase should not be excluded from further work. The second comment concerned the future programme of work. In paragraph 269, the Special Rapporteur noted that certain issues – environmental protection during the different phases of occupation, the responsibility of non-State actors and organized armed groups and non-international armed conflicts – warranted further work. He, too, believed that those issues should be examined in greater detail, despite constraints that could exist in that regard. As for environmental protection during the different phases of occupation, it would indeed be useful to study the issue in greater depth, as it would then be possible to identify the responsibilities associated with each phase, which were not clear in the current draft.

For example, draft principle I-4 on peace operations concerned all phases of armed conflict, but had been included in the part that dealt with preventive measures.

The meeting rose at 11.40 a.m.

3319th MEETING

Wednesday, 13 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)

[Agenda item 7]

Third report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of the protection of the environment in relation to armed conflicts (A/CN.4/700).

2. Mr. HMOUD said that he wished to thank the Special Rapporteur for her well-researched, comprehensive third report. The background material that it contained put issues relating to the protection of the environment in the pre-conflict and post-conflict phases into a proper perspective. That would help the Commission and the Drafting Committee to decide whether the draft principles reflected existing international law on the subject, or provided a basis for its development.

3. The Special Rapporteur's task in creating a nexus between the available material and the proposed principles in the pre- and post-conflict phases was not an easy one. Some States and other relevant actors remained uncertain as to which aspects of environmental protection were already subject to international law and which needed further development. Furthermore, there were areas of international law that already regulated certain aspects that might relate indirectly to environmental protection. It was, therefore, important for the Commission to identify the principles that applied, or should apply, to environmental protection before and after a conflict, as well as those that applied throughout all three phases of a conflict.

4. As far as the methodology of the third report was concerned, he agreed that the practice of traditional subjects of international law, including relevant international organizations and agencies, such as UNEP, formed the appropriate basis of principles designed to enhance the protection of the environment in the pre- and post-conflict phases. Liability and responsibility for environmental damage relating to armed conflict – issues that were not dealt with in the current report – should be tackled in the future; at that point, it would be necessary to examine the reports of the United Nations Compensation Commission, along with international and national jurisprudence concerning damage assessment, the causal link between a breach of international law and environmental damage, contributing factors and forms of reparation. In fact, the relationship between certain obligations arising from the draft principles and the determination of responsibility and liability was a key aspect of post-conflict environmental protection, as shown by the numerous references to it in the third report.

5. Another issue that was not addressed in the third report was the protection of the environment during occupation. However, it should be emphasized that the principles of the law of armed conflict and the law on the use of force as they related to environmental protection remained applicable during occupation, even after the cessation of hostilities. For that reason, Part Two of the draft principles also applied to occupation.

6. While the identification of legal principles in environmental treaties that continued to operate during an armed conflict lay outside the scope of the third report, in the future it might be relevant to ascertain which peacetime treaty principles continued to apply in parallel with the law of armed conflict. According to the report, bilateral investment treaties were presumed to continue operating during an armed conflict as they related to private rights. However, the underpinning for environmental protection in relation to armed conflict was more of a public or common interest for the international community, thus not an issue of private rights. Therefore, the content of the environmental protection clauses contained in bilateral investment treaties should be the determining factor in whether the treaty as a whole was presumed to continue to operate.

7. Several aspects of draft principle I-1, on implementation and enforcement, needed to be discussed. The third report did not elaborate on the type of preventive measures which a State should take to enhance the protection of the environment in relation to armed conflict, and most of the case law referred to in paragraphs 187 to 237 had no bearing on the content of that draft principle. It was a moot point whether the draft principle might require States to criminalize damage to the environment in relation to armed conflict in their national legislation, something that would obviously amount to the progressive development of international law. As it stood, the draft principle potentially encompassed a wide range of civilian and administrative preventive measures, examples of which would have to be discussed in future commentaries. It was also important to clarify the phases of the conflict to which the draft principle referred, since the phrase "in relation to armed conflict" gave no indication in that regard. The title of the draft principle, "Implementation and enforcement", was inconsistent with its

content, which dealt with preventive measures. In that connection, it might in fact be worth considering whether there were any joint or collective preventive measures that States should adopt in order to improve environmental protection as it related to armed conflict.

8. Since granting access to and sharing information was a key component of cooperation among members of the international community in the context under consideration, he failed to see why draft principle III-5 should not apply before and during an armed conflict, since information-sharing would help to prevent, mitigate and minimize environmental damage during armed conflict. However, the draft principle would have to be formulated in such a way as to make clear that the information in question related solely to environmental protection and excluded information pertaining to a State's national security or defence. The formulation should be flexible to allow for the fact that the existing rules of customary international law made no provision for an obligation of that nature and that it would be difficult to determine the various types of information that could be shared or to which access might be granted. Furthermore, the draft principle, or the commentary thereto, should give examples of the types of information to be accessed or shared at the various stages of an armed conflict. He welcomed the fact that international organizations were also covered by the draft principle, because they could do much to encourage the enhancement of environmental protection during an armed conflict.

9. Status-of-forces and status-of-mission agreements, the subject of draft principle I-3, usually dealt with the legal status of forces and missions, not with issues such as the use of force, the rules of armed conflict or the protection of the environment during a conflict. Given that peace operations were normally mounted after a conflict, they could promote post-conflict environmental recovery. Draft principle I-4 and the commentary thereto should therefore concentrate on restorative and remedial measures. In the event of peace enforcement operations under Chapter VII of the Charter of the United Nations, the relevant United Nations departments would have to see to it that the requisite measures were taken to protect the environment and mitigate any damage to it. Troop-contributing countries should also ensure that their forces complied with their environmental protection obligations under international law during their participation in peace operations. The reviews provided for in draft principle III-2, paragraph 2, were a complementary aspect of that protection.

10. While he agreed with the essence of draft principle III-1, namely that peace agreements should contain provisions relating to the restoration of the environment damaged by armed conflict, post-conflict environmental protection management, as well as the allocation of responsibilities for such management, was a matter that fell outside the scope of the project. One aspect that the draft principle should include was a provision stipulating that peace agreements should deal with matters relating to criminalization, allocation of responsibility for environmental damage and compensation. As the United Nations and other international and regional organizations were often instrumental in securing peace agreements among parties to a conflict, that draft principle should refer to the key role they could play in facilitating the inclusion of post-conflict environmental protection and restoration clauses in those agreements.

11. Turning to draft principle III-2, he said that, although parties to a conflict were currently under no international legal obligation to conduct post-conflict environmental assessments and reviews, it was important to propose such a measure as a legal policy consideration because damage caused during an armed conflict would have to be assessed at some point for the purposes of environmental restoration and remediation. In fact, there was no reason why such steps could not be taken during a protracted conflict, or when damage required immediate steps to restore the environment.

12. Regarding draft principle III-3, any requirement under existing treaty-based and customary international law that remnants of war must be removed was premised on the fact that they caused harm and suffering to humans and property. For the purposes of the draft principles, it would therefore be necessary to explain how they damaged the environment itself. The draft principle should also stipulate that a party to a conflict should take steps to prevent potential risks to the environment from the presence of remnants of war. The phrase "in accordance with obligations under international law" at the end of the first paragraph of that draft principle should be deleted, as it undermined the binding nature of the provision.

13. In the absence of any international legal rules on the allocation of responsibility for the removal of remnants of war in the marine environment and the remediation of their effects, the draft principles should indeed address that matter in order to ensure that those remnants did not jeopardize the environment. Parties to a conflict might be made individually or jointly responsible for their removal, as their impact on the marine environment affected the whole international community.

14. As to draft principle IV-1, the rights of indigenous peoples fell outside the scope of the topic under consideration. Moreover, the draft principle did not deal specifically with the implications for indigenous peoples of environmental damage from armed conflict.

15. Areas that could be explored in future reports included the extent of the responsibilities of non-State actors and armed groups to protect the environment in the event of armed conflict, liability and responsibility for violations of international law on environmental protection, the effects of the use of certain types of weapons on the environment and determining to which of the three phases of a conflict the various environmental principles applied. The right format for the text at the current stage was draft principles, although the underlying obligations might ultimately warrant giving it the form of a treaty, in which case the possibility of incorporating a dispute settlement clause should be explored. He recommended the referral of the draft principles to the Drafting Committee.

16. He thanked the Special Rapporteur for the tremendous efforts she had made to steer the project over the years.

17. Mr. ŠTURMA said that clarifying which draft principles were of particular relevance to each of the three phases of an armed conflict would give the topic added value.

18. The contents of the third report and the draft principles only partly addressed the rules applicable in the third, post-conflict phase, although that phase was supposed to be the subject of the report under consideration. The structure of chapter II of the report, entitled "Rules of particular relevance applicable in post-conflict situations", was rather complicated, and the order of the draft principles proposed by the Special Rapporteur did not necessarily follow the order in which arguments were presented in that part of the report. Some principles relating to the third phase could have been added, while others that had been included were of lesser relevance. The issues of status-of-forces agreements, peace agreements and remnants of war were particularly important.

19. The outcome of the topic could take the form of draft principles or draft guidelines, but it would be necessary to give some thought to their formulation, as it was not clear why some principles employed the word "shall", while others used "should" or "are encouraged to".

20. The general observations in paragraphs 97 to 99 were complex and not fully reflected in the two draft principles derived therefrom. He agreed with the presumption that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of a treaty; however, that did not mean that all multilateral or bilateral environmental treaties and agreements were relevant to the topic. Some such treaties included explicit provisions on exception or suspension in the event of war, whereas others were, by the nature of their content, unlikely to be affected by military activities or armed conflicts.

21. With regard to draft principle IV-1, while protection of the rights of indigenous peoples was undoubtedly a very important aspect of human rights law, there was nothing in the third report to indicate a connection to the protection of the environment in relation to armed conflicts. Paragraph 2 of the draft principle did not explain how States should protect indigenous peoples during armed conflicts, when international humanitarian law applied as *lex specialis*. Although in an international armed conflict indigenous peoples seemed to enjoy at least the same protection as civilians, in an internal armed conflict their status and protection would depend on whether they were a party to that conflict.

22. He failed to see why draft principle III-5, on access to and sharing of information, should apply only to the post-conflict phase, since certain elements mentioned therein, such as the principle of precaution and military necessity, pertained to earlier phases. Furthermore, he did not know what was meant by "international tort law". Since access to and the sharing of information plainly rested on the consent of States, the word "should" would be more apposite than "shall".

23. In view of the fact that existing law and practice offered only a rather weak basis for draft principle I-4, on peace operations, which contained some far-reaching obligations, he suggested replacing the word "shall" with "should". On the other hand, he supported draft principle III-2, on post-conflict environmental assessments and reviews.

24. He agreed that international jurisprudence on the protection of the environment in relation to armed conflict did exist, even though it was not extensive. That was precisely why it was necessary to select the relevant cases and to draw the appropriate conclusions from them. While the references to the international criminal tribunals seemed unnecessary, some of the cited case law of the Inter-American Court of Human Rights and the European Court of Human Rights was of interest. The examples drawn from the jurisprudence of domestic courts showed the need for the international regulation of remedies for environmental damage. The most important practice was that of the United Nations Compensation Commission and the Eritrea–Ethiopia Claims Commission. However, in his view, the proposed incorporation of "crimes against the environment" into the Rome Statute of the International Criminal Court, mentioned in paragraph 237 of the third report, was unrelated to compensation based on international or civil liability for damage.

25. *In abstracto*, he had nothing against placing draft principle I-1, on implementation and enforcement, in the part dealing with the pre-conflict phase. However, its location there did not follow from the analysis in the third report, which focused on post-conflict measures.

26. The extensive discussion of possible remedial measures or compensation had created a legitimate expectation of finding a draft principle concerning compensation for environmental damage caused during an armed conflict and the settlement of claims in that respect in the post-conflict phase. The multilateral conventions cited in paragraphs 110 to 114 were not helpful, because they were concerned only with the civil liability of operators of certain hazardous activities or ships in peacetime and excluded damage by war or warships. On the other hand, the case law of regional human rights courts and of the two above-mentioned claims commissions could be used for the formulation of a draft principle related to post-conflict remedies or compensation for environmental damage.

27. The section of the third report on remnants of war was highly relevant, although draft principle III-3 did not seem to cover all possible remnants of war, such as vehicle wreckage and stocks of oil or chemicals, which might pose a risk to the environment. It was unrealistic to expect that all remnants of war could be cleared, removed or destroyed "[w]ithout delay after the cessation of hostilities"; it might therefore be more appropriate to employ the word "should" in that connection rather than "shall".

28. In principle he supported the idea expressed in draft principle III-4 on remnants of war at sea. The issue was, however, quite complex and might warrant more in-depth analysis.

29. He recommended that all the draft principles, except draft principle IV-1, be sent to the Drafting Committee. In conclusion, he sincerely thanked the Special Rapporteur for all the work she had done on the topic.

30. Mr. CAFLISCH said that his comments would concern solely the applicability of peacetime agreements to situations of armed conflict and post-conflict situations, an issue that was dealt with in paragraphs 100 to 120 of the third report and that had already been addressed in one of the draft articles on the effects of armed conflicts on treaties, which had been adopted by the Commission in 2011.[346]

31. The 2011 draft articles on effects of armed conflicts on treaties had departed somewhat from the traditional approach to the topic in that they promoted the survival of agreements, other than those of a political nature, by stating in draft article 3 that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties as between States parties to both the treaty and the conflict or as between a State party to the treaty and to the conflict and a State that was not a party to the latter. While that provision could not be considered as establishing a presumption of survival of treaties, it at least did away with the opposite presumption of termination or suspension and made survival a relative probability. Draft article 3 had been supplemented by draft article 6, on factors indicating whether a treaty was susceptible to termination, withdrawal or suspension in the event of an international or non-international armed conflict. The relevant factors were, on the one hand, the nature of the treaty, its subject matter, its object and purpose, its content, the number of parties to it and, on the other hand, the characteristics of the armed conflict, such as its territorial extent, its scale and intensity and, in the case of a non-international armed conflict, the degree of outside involvement. That list was not, however, exhaustive.

32. Article 7 of the draft articles on effects of armed conflicts on treaties referred to the annex to the draft articles, which contained an indicative list of 12 categories of treaties the subject matter of which involved an implication that they would continue in operation, in whole or in part, during armed conflict. Category (*g*) consisted of "treaties relating to the international protection of the environment". Paragraphs (52) to (55) of the commentary to the annex suggested that this category of treaties was very likely to survive, even though there was an absence of continuous, uniform State practice and settled case law in the matter. Paragraph (54) referred to the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. The pleadings in that case had quite clearly indicated that there was no general agreement on the proposition that all environmental treaties applied both in peace and in time of armed conflict, subject to express provisions indicating the contrary. The Court had held that the obligations stemming from those treaties were not intended to impose total restraint during military conflict and that those treaties did not aim to deprive a State of the exercise of its right of self-defence. It had, however, added that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality" (para. 30 of the advisory opinion). The Court had also referred to principle 24 of the Rio Declaration on Environment and Development, which stated that "[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."[347] The commentary to the annex concluded that there was a presumption that environmental treaties did apply in case of armed conflict.

33. Draft article 11 of the 2011 draft articles on effects of armed conflicts on treaties, which had been based on article 44 of the 1969 Vienna Convention, provided for the survival of a treaty if it contained clauses that could be separated from the remainder of the treaty without upsetting its overall balance. Such situations probably arose frequently with respect to treaty provisions related to environmental protection. Moreover, such provisions were also to be found in treaties on the law of armed conflict and international humanitarian law, for example article 35, paragraph 3, and article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), treaties establishing boundaries or regulating the permanent status of territory, multilateral law-making treaties, treaties on navigation and commerce, treaties relating to international watercourses and aquifers and treaties relating to the settlement of disputes by peaceful means.

34. He was grateful to the Special Rapporteur for giving fairly lengthy consideration in her third report to the question of the effects of armed conflicts on environmental protection treaties or treaty clauses. The conclusion that should be drawn from an examination of that issue was that treaties containing environmental protection provisions were relatively stable. The aforementioned question concerned all three phases of a conflict: the pre-conflict phase, when treaties or treaty rules protecting the environment could come into being; the actual conflict, when those rules would continue to apply; and the post-conflict period, when the question of their continued applicability and compensation for damage arose.

35. The Special Rapporteur had been wise not to include any provisions on the subject in the draft principles that she had proposed, since the matter had already been dealt with in the 2011 draft articles on the effects of armed conflicts on treaties. It might be worth considering the insertion of an exhortation to States to conclude agreements on environmental protection or containing clauses to that end in peacetime. It might also be appropriate to suggest that such agreements indicate that they would remain applicable in the event of an armed conflict. In any event, either the preamble or the commentary to the draft principles, or both, should refer to the 2011 draft articles in the event of an armed conflict.

[346] The draft articles on the effects of armed conflict on treaties and the commentaries thereto adopted by the Commission at its sixty-third session are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

[347] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992,* vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

36. Mr. PETER said that he wished to congratulate the Special Rapporteur, not only on her third report, but also on her outstanding and exemplary commitment to her work on the subject of protection of the environment in relation to armed conflicts.

37. The comments made by Mr. Candioti at the previous meeting about the confusing number of different terms – articles, guidelines, regulations, principles, and so on – used to describe the output of the Commission were justified. However, in his view, there was more to it: the Commission had an unwritten tradition of a few people deciding what the outcome of work on a particular topic would be. Areas and topics of crucial importance to all humanity and its survival were downgraded to result only in guidelines, regulations or principles, which, being non-binding, could be tolerated as they did not disturb the status quo. Work on topics of global importance to humanity was hampered in sophisticated ways, mainly through technicalities, discouragement and even manipulation of facts. Articles, which were superior in the eyes of the law and in reality, being likely to become binding instruments, were reserved for uncontroversial, highly academic and less pressing topics. He therefore strongly supported the suggestion that the Commission have rules determining what the outcome of work undertaken by a special rapporteur would be, so as to avoid double standards.

38. As to the report under discussion, he maintained his preference for draft articles intended to serve as a basis for a convention specifically addressing the protection of the environment in situations of armed conflict, as it had been scientifically proven that wars damaged the environment. The topic was no less important than it had been when originally conceived. The international community, which had been prepared to engage in diplomacy and peaceful dispute settlement following the devastation of the two World Wars, had a short memory. States were now more eager to go to war, causing untold damage to the environment and affecting the lives of millions across the globe. The Commission would be failing in its duty to humanity if it closed its eyes to that injustice, which undermined the very development of international law.

39. He welcomed the Special Rapporteur's decision to address the question of environmental protection in the context of international investment. He was, however, concerned that the paragraphs of the third report dealing with that issue referred to a very old system of treaties relating to private investments abroad. While the reference to "treaties of friendship, commerce and navigation" was important for historical purposes, as it recalled the gunboat diplomacy of the nineteenth century, such treaties were no longer directly relevant. For that material to be relevant in terms of the third report, it should be placed in its historical context. Where reference was made in paragraph 118 to the control of environmentally hazardous or toxic chemicals, consideration might be given to mentioning the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. Consideration might also be given to updating the materials available in that area on investment; the resources held by the International Centre for the Settlement of Investment Disputes could prove useful in that regard. It might also be beneficial to survey modern institutions such as the Multilateral Investment Guarantee Agency and programmes like Guaranteed Recovery of Investment Principal, which covered losses arising from wars and conflicts, among other causes, to gauge how the environment was factored into their activities and whether damage to the environment could be insured by such global actors.

40. He disagreed with the position taken by Mr. Park and Mr. Šturma, who considered that it might not be appropriate to address the issue of indigenous peoples in the context of the topic. Indigenous peoples were normally uprooted from, and dispossessed of, their land by armed force; no indigenous people gave up their land for nothing. It was therefore important to discuss the destruction of the environment in that context. In framing draft principle IV-1, on the rights of indigenous peoples, the Special Rapporteur relied on background materials that were too narrow and weak to support such an important theme. While he could understand the various constraints faced by the Special Rapporteur, there had been an overly selective approach to the sources used. Many works had been written on the issue, but they had not been referenced in the third report. Apart from reference to International Labour Organization (ILO) materials on indigenous people, the main focus was Latin America and the inter-American system of human rights developed under the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica". Africa and Asia were completely ignored, save for a brief reference to the Philippines in paragraph 126. However, Africa was home to various indigenous groups including the Barabaig, Hadzabe and Maasai, some of which still lived in a hunting and gathering culture. Seminal works had been produced on them, as well as a highly developed jurisprudence.

41. The African Commission on Human and Peoples' Rights had done much work in that area; it had, for example, issued an advisory opinion[348] on the United Nations Declaration on the Rights of Indigenous Peoples[349] and handled a number of cases on indigenous peoples' rights. Those cases included *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya* (2009), in which the Endorois indigenous people had been successful and the principle of free, prior and informed consent underlined. In that case, it had been emphasized that failing to involve indigenous peoples in decision-making processes and failing to obtain free, prior and informed consent constituted a violation of their right to development under article 22 of the African Charter on Human and Peoples' Rights and other international laws. In her

[348] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana, available from: www.achpr.org/public/Document/file/Any/un_advisory_opinion_idp_eng.pdf.

[349] General Assembly resolution 61/295 of 13 September 2007, annex.

third report, the Special Rapporteur had not done justice to the subject matter before arriving at the draft principle. The failure to fortify arguments in the area of indigenous rights gave people the opportunity to say that the plight of indigenous people in conflict situations was irrelevant, which was not the case.

42. Turning to the draft principles set out in the third report, he expressed support for their content but suggested that their presentation should be simplified by adopting a straightforward, consecutive numbering system, as used in the Special Rapporteur's second report,[350] with subheadings on the principles applicable during armed conflict and those applicable after armed conflict. Thought might be given to reformulating, for stylistic reasons, the opening phrases of both paragraphs of draft principle III-3; however, that might be a matter for the Drafting Committee. While, in principle, he welcomed the brave and innovative inclusion of draft principle IV-1, he stressed that respect for the traditional knowledge and practices of indigenous peoples in relation to their lands and natural environment was not enough. Protection was also needed; paragraph 1 of the draft principle should be reworded accordingly. In paragraph 2 of that draft principle, which dealt with the issue of free, prior and informed consent, the words "that would have a major impact on the lands" should be deleted, as such a proviso opened the door to violations. Debate would centre on whether a particular usage would have a major impact, which was an unnecessary debate that indigenous peoples were likely to lose.

43. The importance of the present and previous reports on the topic could not be underestimated. Protection of the environment was a subject that even those involved in conflict often forgot to discuss or to think about during and after conflicts. Discussions on compensation tended to focus on equipment destroyed and human fatalities rather than on environmental destruction, which could be permanent. Even judges and arbitrators were not sensitive to the issue, sometimes insisting on higher standards of proof and even higher levels of loss in the case of environmental damage, as with the Eritrea–Ethiopia Claims Commission. It was forgotten that damage to the environment could be incremental over time. He therefore congratulated the Special Rapporteur on her work and expressed great regret that, with her membership of the Commission coming to an end, work on the topic might never be completed. It was to be hoped that her efforts would not be wasted and that someone else would take on the burden before the work already done was overtaken by events or by developments in science and law.

44. In conclusion, he recommended that all the draft principles be referred to the Drafting Committee, which, in addition to its usual duties, should streamline them for ease of reading and reference.

The meeting rose at 11.20 a.m.

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[350] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685 (second report).

3320th MEETING

Thursday, 14 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Gilberto Vergne SABOIA (Vice-Chairperson)

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)

[Agenda item 7]

Third report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their consideration of the third report of the Special Rapporteur on protection of the environment in relation to armed conflicts (A/CN.4/700).

2. Mr. KITTICHAISAREE said that he would make some general remarks on the report under consideration before commenting on some of the draft principles proposed therein.

3. First, with regard to the progressive development of customary international law, he recalled that, as the Special Rapporteur noted in paragraph 33 of her third report, some members of the Commission had observed in 2015 that "it should be considered to what extent the final outcome of the work on the topic could constitute progressive development and contribute to the development of *lex ferenda*". He was of the view that the commentary should include an explanation of which draft principles were part of such progressive development. For example, as the Special Rapporteur also noted in paragraph 49 of her third report, for some States and members of the Commission, the prohibition of reprisals was part of customary international law, at least as far as international armed conflicts were concerned. Yet, as noted in paragraph 45 of the report under consideration, several States, including Israel, Singapore, the United Kingdom and the United States, had expressed concern in the Sixth Committee that the draft principles went beyond customary international law on that point. In that regard, he agreed with the comment made by Mr. Candioti at the 3318th meeting on the need for the Commission to decide how it would like its work on the topic to be perceived. He personally would like the Commission to take an ambitious approach to the scope of application of the draft principles in order to protect the environment to the maximum extent possible in case of armed conflict. At the same time, it was crucial that the Special Rapporteur, and the Commission as

a whole, ensure that such protection was based on international law, customary or otherwise. For example, further research was needed to determine whether, in the light of current *opinio juris* and State practice, the word "should" or the word "shall" should be used in draft principle I-1.

4. Second, with regard to the victims of environmental damage caused by armed conflicts, he welcomed the contribution provided by the Federated States of Micronesia, set out in paragraphs 55 to 70 of the third report, which was important insofar as it broadened the group of States providing input to the work of the Commission. The Commission should take account of the viewpoints of those victims in further work on the topic and the development of its draft principles. It would have been desirable in that regard for the Special Rapporteur to have directly consulted victims, for example the Government of Kuwait on the environmental impact of the invasion of that country by Iraq and those who had suffered the consequences of the atomic bombs that had destroyed Hiroshima and Nagasaki.

5. Third, it was stated in paragraph 91 of the third report that Slovenia had ratified all the key instruments of international humanitarian law and the international law of armed conflict. Although it was a minor point, the Commission would recall that, in the 2015 report on the topic by the Chairperson of the Drafting Committee,[351] it had been decided that the expression "law of armed conflict" should be used instead of "international humanitarian law", in light of the broader connotation of the former and to ensure consistency with the terms used in the draft articles on the effects of armed conflicts on treaties adopted by the Commission in 2011,[352] to which the present topic was related. The Commission would, however, also recall that, with regard to the protection of persons in the event of disasters, the Drafting Committee had decided to use the expression "international humanitarian law" instead of "international law of armed conflict", as international humanitarian law concerned the issues raised by that topic more directly, whereas the expression "international law of armed conflict" referred to the law of armed conflict as a whole. Thus, the Commission might wish to reconsider the use of one or other expression, especially as some States, for example Switzerland and the United Kingdom (in paragraphs 85 and 95 of the third report, respectively), used the expression "international humanitarian law" instead of "international law of armed conflict" in their comments.

6. Fourth, in paragraph 110 of her third report, the Special Rapporteur mentioned "liability conventions", which explicitly exempted liability for damage caused by acts of war or armed conflict, and stated that "[t]he fact that such liability is exempted cannot lead to the automatic conclusion that the application of the conventions *per se* [is] limited to peacetime". Yet the relevant provisions of those conventions concerned *force majeure*, unforeseen occurrences and acts of war, which generally excluded the civil liability of actors engaged in the activities covered by those conventions, and they could therefore not be cited as evidence of State practice with regard to the protection of the environment in relation to armed conflicts. Moreover, as the Special Rapporteur noted in paragraph 10 of her third report, work on the topic was based on the assumption that the law of armed conflict was *lex specialis*, and therefore the rules of *lex generalis*, while not excluded *ipso facto*, were deemed not to apply.

7. Fifth, in paragraph 111 of her third report, the Special Rapporteur should have indicated more clearly that sovereign immunity and the other exemption clauses mentioned in that paragraph concerned only the immunity of warships and government ships from enforcement actions by a State other than the flag State. Immunity and impunity were not synonymous in that regard, as the flag State of those ships remained liable for damage that they caused to the environment of another State.

8. Sixth, as for the international investment agreements discussed in paragraphs 115 to 120 of the third report, he agreed with Mr. Park that they were hardly relevant to work on the topic.

9. Seventh, like Mr. Šturma, he was concerned by the Special Rapporteur's reference, in paragraph 149 of her third report, to the unknown notion of "international tort law". Did the Special Rapporteur mean international law on the responsibility of States for internationally wrongful acts, on which the Commission had completed its work in 2001?[353]

10. In paragraph 164 of her third report, the Special Rapporteur mentioned Security Council resolutions concerning specific non-State actors. In his view, it would be advisable to analyse the resolutions of international organizations and State practice concerning the destruction of the environment by non-State actors before, during or even after an armed conflict. One example was Security Council resolution 2199 (2015), which had been adopted on 12 February 2015 under Chapter VII of the Charter of the United Nations and had frequently been cited by UNESCO, though not in the Special Rapporteur's third report, in which, in the paragraphs on cultural heritage, the Security Council:

> 15. *Condemns* the destruction of cultural heritage in Iraq and Syria particularly by [Islamic State in Iraq and the Levant (ISIL)] and [Al-Nusra Front], whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects;
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> 16. *Notes with concern* that ISIL, [Al-Nusra Front] and other individuals, groups, undertakings and entities associated with Al-Qaida, are generating income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archaeological sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks;
>
> 17. *Reaffirms* its decision in paragraph 7 of resolution 1483 (2003) and *decides* that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious

[351] See *Yearbook ... 2015*, vol. I, 3281st meeting, p. 286, para. 8.

[352] The draft articles on the effects of armed conflict on treaties and the commentaries thereto adopted by the Commission at its sixty-third session are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

[353] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011, including by prohibiting cross-border trade in such items, thereby allowing for their eventual safe return to the Iraqi and Syrian people and *calls upon* the United Nations Educational, Scientific, and Cultural Organization, [the International Criminal Police Organization (INTERPOL)], and other international organizations, as appropriate, to assist in the implementation of this paragraph.

11. Eighth, another example was provided by the condemnation of the destruction of items of cultural heritage by ISIL in General Assembly resolution 69/281 of 28 May 2015, entitled "Saving the cultural heritage of Iraq". That resolution, which cited Security Council resolution 2199 (2015), was relevant to the topic under consideration in many respects. First, the General Assembly provided an exhaustive list of the international legal instruments relating to the protection of cultural heritage in relation to armed conflicts. Second, it dealt with many issues that were directly linked to the topic under consideration. For example, it considered that the destruction and looting carried out by ISIL of the cultural heritage of Iraq, the rising incidence of intentional attacks against and threats to the cultural heritage of countries affected by armed conflict and the damage caused to cultural property by indiscriminate attacks and the organized looting of and trafficking in cultural objects were "used as a tactic of war in order to spread terror and hatred, fan conflict and impose violent extremist ideologies". In addition, it stated that the indiscriminate destruction of the cultural heritage of Iraq, including religious sites or objects, was incompatible with international humanitarian law. It also stated that attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, might amount to war crimes, noted that it was important to hold perpetrators to account and required all States to take appropriate action to that end within their jurisdiction in accordance with applicable international law.

12. Ninth, like some of the members who had already taken the floor, he was of the view that the case law referred to by the Special Rapporteur in paragraphs 196 to 212 of her third report, in particular that of regional human rights courts and domestic courts, did not sufficiently substantiate the conclusions that she was trying to reach. Like Mr. Park and Mr. Šturma, he considered that the cases on which the Special Rapporteur based her third report mainly concerned property rights and mostly reflected negative practice with regard to the protection of the environment. Not only was that case law rather discouraging, but, in paragraphs 216 to 218 and in paragraph 224 of her report, the Special Rapporteur also seemed to jump to conclusions without providing adequate explanations and, more generally, without properly explaining the reasoning that had led the courts concerned to reject the majority of the claims for compensation for environmental damage that she cited or how that failure could have been avoided.

13. Tenth, in paragraphs 213 to 218 of her third report, the Special Rapporteur discussed the situation between the Marshall Islands and the United States. That situation could not be used to demonstrate State practice in the era of the sovereign equality of States and in a world in which all human beings were now equal before the law, both international and domestic. It would have been incompatible with most of the provisions of the 1948 Universal Declaration of Human Rights[354] and several of the provisions of the International Covenant on Civil and Political Rights, among other instruments. Moreover, the compensation provided *ex gratia*, or without any legal obligation, by the United States of America to the Federated States of Micronesia for environmental damage caused during the Second World War, which was discussed in paragraph 70 of the third report, should be treated as past history belonging to the time when the citizens of the world were not all treated equally. As the Federated States of Micronesia had rightly stated (see the statement quoted in paragraph 67 of the third report), the flag State of a warship, or the State that owned it, was required to remedy the environmental damage caused by that ship. It was on obligations of that type, which reflected the modern law of responsibility under the United Nations Convention on the Law of the Sea, that the Commission should base its work.

14. With regard to the draft principles proposed by the Special Rapporteur, and draft principle IV-1 on the rights of indigenous peoples first of all, he shared the opinion of the Federated States of Micronesia, as reported in paragraph 57 of the third report, that the link between the protection of the environment and the safeguarding of cultural heritage, in particular the cultural heritage of indigenous peoples, had been demonstrated and should be reflected in the draft principles. Yet, as Mr. Peter had noted at the previous meeting, the Special Rapporteur's treatment of that important issue in paragraphs 121 to 128 of her third report was not sufficiently developed. The Special Rapporteur could have carried out a more detailed analysis of the case law cited in paragraphs 196 to 202 to substantiate draft principle IV-1. For that reason, he did not endorse draft principle IV-1 as it currently stood, his view being that it was not entirely relevant to the topic.

15. The first paragraph of that draft principle was a general recognition of the link between indigenous peoples and their lands and was formulated from a human rights perspective and in conceptual terms that did not explain why it was necessary to address the issue from the perspective of the protection of the environment in relation to armed conflicts.

16. The second paragraph was even more problematic, and it was not clear whether the Special Rapporteur was dealing with preventive measures when she referred to the obligation of States to consult indigenous peoples and seek their consent in connection with the usage of their lands and territories. If that was the case, lands occupied by indigenous peoples could be declared "protected zones" under draft principles I-(x) and II-4, which had been provisionally adopted by the Commission in 2015,[355] namely areas of major cultural importance to be protected against any attack, as long as they did not contain a military objective. Rule 43 of the customary rules of humanitarian law compiled by the ICRC,[356] which concerned the application of general principles on the conduct of hostilities to the natural environment, was also relevant in that regard.

[354] General Assembly resolution 217 (III) A of 10 December 1948.

[355] *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

[356] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, Cambridge, Cambridge University Press, 2005, pp. 143–146.

17. Moreover, draft principle IV-1 did not indicate which State was bound by the obligation referred to in the second paragraph. The absence of any reference to other belligerent States could give the impression that the principle applied only to non-international armed conflicts. In any case, one might ask whether it was realistic to require a State that was a party to an international armed conflict to cooperate with indigenous peoples living in another State and consult them before launching an attack against that other State. Like Mr. Šturma, he was of the view that it should be presumed that, in both international and non-international armed conflicts, indigenous peoples did not participate directly in the hostilities. As part of the civilian population, they should be protected under the relevant rules of international humanitarian law. In that regard, the principle of distinction became particularly fundamental, as it applied equally to the lands of indigenous peoples, as long as they did not contain a military objective.

18. With regard to draft principle III-1 on peace agreements, he was grateful to the Special Rapporteur for her efforts to address the issue, but the proposed draft principle gave rise to two reservations. First, it was necessary to make clear that the parties could not, by means of a peace agreement, exonerate from individual criminal responsibility persons who committed war crimes by causing damage to the environment. The case law of international courts and tribunals, for example the International Tribunal for the Former Yugoslavia in the *Tadić* case and the International Criminal Court in *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, considered that damage could be caused to the environment in the commission of an international crime. In his view, it followed that such an important issue could not be overlooked. Second, it was also essential to provide for remedies for victims in that draft principle.

19. Lastly, he firmly endorsed draft principles III-3 and III-4 on remnants of war and remnants of war at sea, respectively. Nevertheless, he wished to note that, in paragraph 259 of her third report, the Special Rapporteur wrote that it had in the past been "legal and justifiable" to conclude that the law of warfare did not require States to remove chemical weapons or munitions dumped at sea, but she regrettably did not explain how and to what extent current international law, in particular international environmental law and the international law of the sea, might have changed the state of law described in the paragraph.

20. In conclusion, he said that he was in favour of referring to the Drafting Committee all the draft principles in annex I of the third report, apart from draft principle IV-1, which, in his view, should be substantially reworked, and draft principle III-1, which should be reformulated to indicate that individual criminal responsibility was not excluded and that the victims of armed conflicts were entitled to remedies. He stressed that the Commission should maintain the current momentum of work on the topic under consideration and that, as the Special Rapporteur did not intend to seek a new term, it was crucial that the Commission, in its new composition, appoint her replacement as soon as possible in 2017 in order to continue her excellent work.

Mr. Saboia, Second Vice-Chairperson, took the Chair.

21. Mr. HASSOUNA said that the content of the third report clearly demonstrated that the topic under consideration lay at the intersection of various international law regimes in which similar concepts and principles had been established. In her approach to the topic, the Special Rapporteur had succeeded in analysing and coordinating those principles in order to apply them to the three temporal phases of the protection of the environment in relation to armed conflicts. With regard to the information sought by the Commission on the specific issues on which comments from States would be of particular interest, the report indicated that the Commission had received responses from only eight States. By commenting on their national experience in the sphere of the protection of the environment in relation to armed conflicts, those States had certainly contributed to a better understanding of the issues raised by the topic. The responses of Lebanon and the Federated States of Micronesia were particularly illuminating in that regard, and, as few responses had been received, the Commission should reiterate its request in its report on the work of the current session.

22. Furthermore, he commended the Special Rapporteur for having consulted, when preparing her third report, international organizations and bodies, such as the United Nations, UNEP, UNESCO and the ICRC, as well as regional organizations. It was certainly helpful to know the best practices and opinions of organizations that worked at the intersection of such different areas of international law.

23. With regard to terminology, some of the key terms used in the draft principles should be reviewed to ensure their consistency and uniformity. For example, in the English text, the use of the terms "environment" and "natural environment" should be standardized: the former term was used in all the proposed draft principles apart from draft principles I-1 and IV-1.

24. Furthermore, the verb "shall" was used in some draft principles and "should" in others. While the verb "shall" clearly referred to an obligation, the word "should" seemed to denote a preference of the international community. The latter verb had been used in that manner in other draft principles adopted by the Commission, for example the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[357] The Commission had stated in the commentaries to those principles that, while they were "not intended to give rise to legally binding obligations, they demonstrate aspirations and preferences of the international community".[358] The verb "encourage", which appeared in several of the draft principles, was the weakest term that could be used, and it rarely influenced the position of the parties concerned. All those variations in the use of terms should be taken into account in the formulation of the draft principles.

[357] The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67. See also General Assembly resolution 61/36 of 4 December 2006, annex.

[358] *Yearbook ... 2006*, vol. II (Part Two), p. 73 (para. (5) of the commentary to draft principle 3).

25. With regard to the draft principles proposed in the report under consideration, draft principle I-1 seemed too general and too broad. Clarification should be provided regarding the preventive measures required to strengthen the protection of the natural environment in relation to an armed conflict and the temporal phase in which they would be taken.

26. Concerning draft principle I-3, the phrase "are encouraged to" should be replaced with "should", and the term "status-of-forces and status-of-mission agreements" should be replaced with "special agreements", so as not to restrict unnecessarily the types of agreement covered. Also, it should be made clear in the commentary to that principle that the list of preventive measures for which it provided was not exhaustive and consisted of mere examples.

27. As for draft principle I-4, an explanation should be given of why it concerned "organizations" involved in peace operations instead of "international organizations", as was the case in draft principles I-3 and III-2 to III-5. Furthermore, in that context, the word "should" would be preferable to "shall".

28. It would also be preferable, in draft principle III-1 on peace agreements and draft principle III-2 on post-conflict environmental assessments and reviews, to replace the words "are encouraged to" with "should". In addition, draft principle III-2, paragraph 2, should be incorporated into draft principle I-4 to ensure that all issues relating to peace operations were dealt with in the same provision.

29. In draft principle III-3 on remnants of war, the list in the first paragraph should be non-exhaustive, given the multitude of other products and substances – chemicals, waste products, oil and so forth – that could have a devastating effect on the environment. In that connection, it was interesting to note that many of the treaties and international agreements covering remnants of war dealt mainly with mines and other explosive devices, while the example given in the third report of oil leaks from the wrecks of the military ships littering the seabed of the Federated States of Micronesia showed clearly that environmental threats had multiple origins. Moreover, it was noted in the first paragraph that all mines and other devices should be removed after the cessation of active hostilities, but it had not been specified whose obligation it was to remove and destroy those devices. It should thus be explicitly indicated which actors, other than States, were responsible for dealing with remnants of war. The obligation to provide technical and material assistance for the removal of remnants of war, which was set out in draft principle III-3, paragraph 2, was important, but it would benefit from being reformulated in more precise terms.

30. Draft principles III-3 and III-4 could be merged into a single draft principle in which remnants of war on land and remnants of war at sea were each dealt with in a separate paragraph. In draft principle III-4, paragraph 1, the references to public health and to the safety of seafarers could be deleted, as neither notion was directly related to the protection of the natural environment. The type of information that was to be collected in surveys and the actors to whom access to that information should be granted should be specified in the commentary to draft principle III-4, paragraph 2.

31. As for draft principle III-5 on access to and sharing of information, it would be advisable to indicate which actors should be granted access to information and the type of information that should be shared. The time at which information should be shared should also be specified.

32. As it was currently formulated, draft principle IV-1 on the rights of indigenous peoples was much too broad in scope and should be refocused on the need to protect the lands and environment of indigenous peoples. Subject to those comments, he recommended referring all the draft principles to the Drafting Committee.

33. With regard to chapter III of the third report, which covered the Special Rapporteur's final remarks and the future programme of work, he noted that the general conclusions that the Special Rapporteur drew from her three reports,[359] in particular with regard to the legal rules applicable to the protection of the environment in relation to armed conflicts and the role of States and international organizations in the application and development of those rules, were important and could have been developed in greater detail. The new membership of the Commission would decide how to continue work on the topic and which issues should be examined as part of it. In that regard, it would be wise, as the Special Rapporteur recommended, to study the protection of the environment during occupation, the responsibility of non-State actors and organized armed groups and non-international armed conflicts. Other important issues, such as compensation and reparation for damage caused to the environment and the impact of the use of specific weapons on the environment, should also be considered, and the case law of international courts and tribunals would provide a great deal of useful information in that regard.

34. In conclusion, he wished to recall that, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had stated:

> 29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.
>
> 30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. …

Lastly, he congratulated the Special Rapporteur on her excellent work on a topic of major contemporary significance for the world and, more generally, for her great

[359] For the preliminary report, see *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/674; and for the second report, see *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685.

contribution to the work of the Commission over the previous 10 years, and he wished her every success in her future endeavours.

35. Mr. McRAE congratulated the Special Rapporteur on her third report, which contained a wealth of information on the way in which obligations to protect the environment had developed and on their scope of application. In the report, the Special Rapporteur had focused her analysis on post-conflict issues, but she had also dealt with some preventive measures.

36. The challenge posed by the topic was to link the obligations relating to environmental protection to the specific context of each phase of the conflict – before, during and after – in a manner consistent with the international law regulating armed conflict. In one sense, it involved establishing links between areas that had previously not been explicitly linked. In that regard, the Special Rapporteur provided many references to illustrate the way in which concerns for the protection of the environment had come to the fore in areas where such concerns had not been evident in the past. However, it would be advisable for the Special Rapporteur to clarify the link between existing practice or principles and the proposed draft principles in order to make the draft principles more easily understandable and more acceptable to the Commission and to States.

37. With regard to the effects of armed conflicts on treaties, Mr. Caflisch had given a very illuminating analysis of the circumstances in which treaties continued to apply during an armed conflict. That analysis made it possible to understand a very important aspect of the topic, namely that, if environmental treaties continued to apply in times of armed conflict, they could thus continue to impose obligations relating to the environment in the post-conflict period.

38. However, it was not always clear whether all the obligations stemming from a treaty that continued to apply after the onset of a conflict remained in force. The Special Rapporteur took the example of friendship, commerce and navigation treaties, which were considered, at least the dispute settlement provisions thereof, to remain in force in times of armed conflict. She also offered an interesting analysis of how provisions relating to environmental protection had progressively been incorporated into investment treaties, the modern-day equivalent of friendship, commerce and navigation treaties.

39. Nonetheless, would obligations under investment treaties between the parties to an armed conflict continue during the course of that conflict? Historically, armed conflicts had always been an opportunity to detain and expropriate at will. That could not be the case today, but one might nevertheless ask whether provisions relating to environmental protection continued to apply and whether the relevant obligations provided for in an investment treaty could be covered by a security exception. It might be interesting to attempt to answer those questions, but the Commission would then be going beyond the scope of the topic. In his view, the reference to investment agreements served not to illustrate the existence of agreements providing for environmental protection in the event of armed conflict, but to show that the issue of environmental protection was now being incorporated into areas or agreements from which it had previously been absent. As a further demonstration of the increasing prominence of environmental protection, the Special Rapporteur referred to many examples from case law relevant to the protection of the environment in relation to internal armed conflicts rather than international armed conflicts. Of course, those examples could give rise to interesting analogies, but the draft principles proposed by the Special Rapporteur could not apply to internal conflicts, as they presupposed the existence of two parties that could assume obligations or whose conduct could be regulated by the principles in question. The case law analysed by the Special Rapporteur thus offered an interesting perspective, but it did not make it possible to demonstrate that States had obligations in terms of the protection of the environment in case of armed conflict.

40. Some members of the Commission had expressed doubts regarding the proposal to include a draft principle on indigenous peoples among draft principles on the protection of the environment in relation to armed conflicts. Their doubts were perhaps due to the fact that the Special Rapporteur had not explained in sufficient detail why she had made that proposal. When environmental protection measures were taken after a conflict, they were likely to be focused mainly on the land, as that was where remnants of war, namely chemical and other weapons, explosive ordnance and other devices mentioned in draft principle III-3, which polluted and threatened the life and health of persons, were to be found. It was in that context that the interests of indigenous peoples acquired their full importance. The special relationship that indigenous peoples had with the natural environment, in particular the land, was what underpinned their rights. Activities aimed at remedying the effects of armed conflict on the environment – on land and, in some cases, at sea – could lead States to intervene in areas over which indigenous peoples had rights or for the restoration of which their expertise could be utilized. Indigenous peoples could thus be affected directly by the environmental impact of armed conflicts and the measures taken to remedy the damage caused, which was why it was necessary to call on their traditional knowledge, consult them and cooperate with them, as provided for in draft principle IV-1. The rights of indigenous peoples were acquiring greater recognition in international law, and if there was one area in which their rights should be recognized, it was that of the protection of the environment in post-conflict situations. Draft principle IV-1 proposed by the Special Rapporteur was a step in that direction, and he endorsed it, even if he thought that it should be included as a principle applicable in the post-conflict period.

41. Turning to the consideration of the draft principles themselves, Mr. McRae said that he was of the view that they were a set of sensible provisions capable of guiding the actors involved in the protection of the environment in relation to armed conflicts in their conduct. With regard to draft principle I-1, he did not see why the adoption of legislative, administrative and judicial measures should be limited only to prevention, as such measures were surely also necessary in dealing with post-conflict situations.

42. Concerning draft principle I-3, he noted that, while in the past it had not been common to include provisions on environmental protection in status-of-forces agreements, the situation had since changed, as shown by the examples given by the Special Rapporteur in her third report. However, he was of the view that it was not enough, in a provision intended to become a principle, to "encourage" States to include provisions of that type in their status-of-forces agreements and that it was necessary to indicate what they "should" do. The same observation could be made about other draft principles, such as draft principle II-1, and highlighted the point made by Mr. Candioti, who had urged the Commission to take a clear and consistent position with regard to the respective characteristics of draft guidelines, draft principles and draft conclusions, as opposed to draft articles. It was a matter that must be addressed by the Commission in its new composition.

43. The link between draft principles III-3 and III-4 on remnants of war and remnants of war at sea, respectively, should be clarified: it was necessary to know whether draft principle III-3 was a general provision that applied both to remnants of war on land and remnants of war at sea or whether it applied only to the former, in which case its title should be changed. Moreover, the obligations set out were different: draft principle III-3 provided that remnants of war should be removed, whereas nothing of the sort was said in draft principle III-4, which dealt only with the cooperation required to neutralize the threat that remnants of war at sea might pose. Yet there was no doubt that remnants of war at sea, some of which had been underwater for decades and had been polluting the environment with inevitable consequences for public health, should also be removed. In that regard, Mr. Hassouna's proposal to merge the two draft principles could be a solution. Noting the example of a landing craft of the United States whose remnants could still be seen off the island of Betio, in the Pacific, some 50 years after the end of the battle in which it had run aground, he nevertheless wondered whether it was in fact realistic to require States to remove remnants of war "without delay", as provided for in draft principle III-3.

44. Draft principle III-5 called for some clarifications. If the obligation to share information was a perfectly legitimate corollary to the obligation to cooperate, it was excessive to require States to "grant access" to information, without further specification. Governments regulated access to information and made many exceptions in the interests of, for example, State secrecy or national security. The disputes filed with the WTO or investment tribunals showed the difficulties faced by States in that regard. The draft principle should thus be reformulated so as to take due account of those constraints and avoid giving the impression that it was seeking to require States to grant unlimited access to their information.

45. Returning to the draft principle on the rights of indigenous peoples, he reiterated that it should be included among the principles applicable in the post-conflict period and that it should be explicitly linked to the obligation of States to remedy the environmental consequences of armed conflicts. He supported the referral of all the draft principles to the Drafting Committee and hoped that his comments would be taken into account. Lastly, he wished to join his colleagues in paying tribute to Ms. Jacobsson for her remarkable work, both as the Special Rapporteur for the topic under consideration and as a member of the Commission. Whatever the subject under consideration, Ms. Jacobsson had always striven, with determination and civility in equal measure, to promote respect for fundamental principles, such as gender equality, human rights and the protection of the individual, and environmental protection, and to uphold in the Commission such important values as collegiality and the ability to compromise.

46. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to offer his warm congratulations to the Special Rapporteur on her excellent third report in which she undertook, on the basis of a great deal of research and many references to literature, case law and State practice, to determine how, in situations of international and non-international armed conflict, the law on protection of the environment could continue to apply in parallel with the law of armed conflict and how that protection could be strengthened. The report was focused primarily on the identification of rules of particular relevance applicable to post-conflict situations, although it contained a draft principle on preventive measures and another on the rights of indigenous peoples that should be applicable before, during and after a conflict.

47. Rather than entering into a detailed analysis of the methodology used by the Special Rapporteur and the structure of her third report, he would make some general comments before returning to certain points that had been of particular interest to him. Chapter I, section C, dealt with the debate on the second report of the Special Rapporteur that had taken place in the Sixth Committee in 2015. The intensity of those discussions showed the great interest that the topic attracted among States as well as its complexity and the difficulty of defining its scope.

48. Chapter I, section D, which dealt with the responses of States to the request for information on specific issues on which comments would be of particular interest to the Commission, showed that the responses had been relatively numerous, which was unusual, and substantive, and that they had been received from a wide range of States, including Lebanon, the Federated States of Micronesia, the Netherlands, Paraguay, Slovenia, Spain, Switzerland and the United Kingdom. The response from the Federated States of Micronesia was particularly interesting. It explained that it had "a long history of being theatres of war and staging grounds for military activities, particularly in the prelude to and during the Second World War. Wrecks of military ships and aircraft, as well as hulking weaponry and unexploded ordnance, litter the land and sea of the Federated States of Micronesia." It supported the temporal approach used by the Special Rapporteur and noted that the obligations of belligerents under international law in relation to the protection of the environment spanned all three phases addressed in the report. With regard to weapons, it endorsed the preference of the Special Rapporteur not to focus on specific weapons on the understanding that the Commission's consideration of the topic encompassed "any and all types of weapons that may be utilized in an armed conflict". As for the rights of

indigenous peoples, it noted "the need for the Commission to consider the connections between the protection of the environment and the safeguarding of cultural heritage, particularly that of indigenous peoples".

49. Paragraphs 79 to 83 of the third report dealt with the documentation provided by Lebanon on the pollution that the destruction of oil storage tanks at the Jiyeh electric power plant by the Israeli Air Force had caused to its coastline and parts of the coast of the Syrian Arab Republic in 2006. The damage had been estimated at more than US$ 850 million, but no compensation seemed to have been paid by the State responsible.

50. Emphasis should be placed on the information provided by those countries, as it expressed the point of view of victims of armed conflicts. For the inhabitants of the Federated States of Micronesia in particular, who had been witnesses and victims of the destructive power of weapons, both during and before and after conflicts, the study of the topic was an opportunity finally to make their voices heard.

51. At the previous meeting, Mr. Peter had strongly defended the retention of principle IV-1 on the rights of indigenous peoples and made comments on how it could be better formulated. He himself fully endorsed Mr. Peter's position. The relationship between indigenous peoples and the land that they occupied was an integral part of their culture and way of life and made them vulnerable to external interference. Most indigenous peoples, such as the tribes of the Amazon, had lived off the forest, and preserved it, for generations. Mr. Peter was right to note that, while they differed in terms of culture, indigenous peoples existed on most continents. If the third report devoted more attention to the indigenous peoples of Latin America, it was perhaps because the Inter-American Court of Human Rights had ruled on several cases of internal conflict in Central America, Colombia and elsewhere in the region, and its case law was thus extensive. However, efforts should be made to ensure that the provision to be retained encompassed indigenous peoples of all continents and emphasized their special vulnerability to armed conflicts and the often unique role that they played in the preservation of the environment.

52. In her final remarks, the Special Rapporteur concluded from her three reports that there existed a substantial collection of legal rules that enhanced the protection of the environment in relation to armed conflicts, but that the various parts of that collection seemed to work in parallel streams and that there were no existing tools to encourage States, international organizations and other relevant actors to utilize all the rules that were already applicable. She nevertheless noted that there was a clear link between the law applicable before the outbreak of an armed conflict and the law applicable after an armed conflict and that new rules concerning armed conflicts could be developed with a view to protecting the environment. He was thus more optimistic than Mr. Peter and was convinced that, although the members of the Commission all regretted that Ms. Jacobsson would soon leave the Commission, her pioneering work would not be abandoned and would be continued by another member. In conclusion, he recommended that the draft principles be referred to the Drafting Committee and once again thanked Ms. Jacobsson for her outstanding third report and her valuable contribution to the work of the Commission.

53. Mr. FORTEAU said that, first of all, he wished to thank Ms. Jacobsson sincerely for her third report on the protection of the environment in relation to armed conflicts, as the effort that she had made to gather the relevant elements of practice and case law was substantial and commendable. Moreover, the care taken in the compilation of a detailed bibliography, which contained titles in several languages, should also be commended.

54. The third report was very long, probably too long, and contained nine new draft principles, which did not seem reasonable. The Commission's methods of work, which underpinned the quality and authority of its work, required that every draft text examined be accompanied by a detailed analysis of practice, precedent and doctrine, and it would doubtless have been more reasonable in that regard to submit only four or five draft texts at the current session, all the more so because the topic under consideration was a very specialized one, and the proposals made by the Special Rapporteur could not be fully understood without further reading on both the law of armed conflict and environmental law. An excessive number of proposed texts complicated, indeed discouraged, the preliminary reading and analytical work required for any intervention in plenary. More generally, with regard to the recent development of the Commission's methods of work, he stressed that it was already difficult to produce quality work when nine different topics on very diverse and increasingly specialized themes were included on the agenda for a single session of the Commission, as was the case in 2016, and that it became frankly impossible if, for each topic, a large number of draft texts were proposed. It also severely complicated the task of Member States, which had only two months in which to formulate their comments on the Commission's annual report. He had already called for moderation during the first part of the current session, and it seemed to him necessary to do so again. In June 2016, 59 draft texts – guidelines, conclusions or principles – had been adopted by the Commission, and, the previous week, 12 new draft texts had been submitted, which was a rather daunting prospect.

55. He said that he would limit himself to a few general remarks, largely on matters of method, without going into detail on each of the proposed draft principles. With regard to method, it was very difficult, as Mr. Šturma and other members had noted, to understand the bases on which most of the proposed draft principles rested. The Special Rapporteur should have explained, in a pedagogical manner, the elements of practice and of case law substantiating each draft principle. She had done so for some of the draft texts, but regrettably not for all of them, in particular draft principle I-1, about which Mr. Hmoud, Mr. Kittichaisaree and Mr. Šturma had been justifiably critical. It also seemed that the Special Rapporteur had been selective in the elements of practice used, which had doubtless resulted from the fact that the excessive number of draft principles that she was proposing had made it impossible for her to conduct an exhaustive review for each of them. Mr. Peter had made the same point with regard to draft principle IV-1 on indigenous peoples: his comments

also applied to draft principle III-1 on peace agreements, for which only a few examples of agreement, concluded exclusively between a State and a non-State actor, had been analysed. Yet, to determine the state of international law on the issue, it would surely have been necessary to analyse in full the practice of peace agreements, including inter-State agreements. Moreover, the practice set out in paragraphs 167 to 173 of the third report to justify draft principle I-4 on peace operations was very cursory, and additional research was warranted. Once again, every draft text adopted should be based on an exhaustive analysis of the most relevant elements of practice, as the authority of the Commission's work was at stake.

56. Still on the question of method, the Special Rapporteur's very broad definition of the topic left him confused. As other members had noted, several of the draft principles did not really fall within the scope of the topic, in particular draft principle I-3 on status-of-forces and status-of-mission agreements. Mr. Murase had explained clearly why such agreements did not concern armed conflicts directly, but the same went for draft principle IV-1 on the rights of indigenous peoples. Despite his impassioned plea in favour of that draft principle, Mr. Peter had not convinced him that the issue fell within the scope of the topic. One might also wonder whether draft principle I-4 on peace operations fell within the scope of the topic either as, in principle, peace operations put in place by the United Nations were not part as such of armed conflicts, save for the very exceptional cases in which they were given an offensive mandate. Mr. Šturma and other members had also rightly noted that draft principle III-3 concerned weapons more than the environment. At the very least, the draft principle should be brought into line with principle III-4, and its relation to the environment should be mentioned explicitly. Also, as Mr. Hassouna and Mr. Šturma had noted, its scope of application should be expanded to include all remnants of war and not only explosive ordnance, which required further research on the issue. Furthermore, the third report dealt with developments in case law relating to property law, which were not directly linked to the topic.

57. More fundamentally, he had doubts regarding the possibility of transposing purely and simply, without further consideration, environmental law applicable in peacetime to situations of armed conflict. He had taken note of the Special Rapporteur's argument, namely that it was simply impossible to determine whether every treaty relating to environmental law was applicable to armed conflicts. He had also taken note of the statement by Mr. Caflisch, who had recalled the solutions adopted by the Commission in 2011 in the context of its work on the effects of armed conflicts on treaties. However, the issue at stake was not whether all environmental treaties applied to armed conflicts or how their termination or suspension should be decided in case of armed conflict. What was necessary was to determine, not in general, but for every draft principle proposed by the Special Rapporteur, whether the relevant rules of environmental law applicable in peacetime were applicable to armed conflict as they stood. In his view, it was an essential prerequisite to any consideration of the topic. The term "applicable" here had both a formal meaning – did the rules in question apply? – and a more substantive one – was it possible, realistic or reasonable to transpose the application of peacetime rules to armed conflicts, and should they be adapted to that specific situation? To take only one example, it seemed very difficult to transpose the obligation relating to access to and sharing of information as it stood – without any modification – to armed conflicts. From that standpoint, the comments made by Mr. Park on draft principle III-5 seemed perfectly fair and legitimate. In its advisory opinion of 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice had taken a cautious approach on that point. In paragraph 30 of its opinion, the Court did not state that treaties relating to the protection of the environment were applicable in their entirety to armed conflicts, but asked only "whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict". That showed that there could be a middle ground between, on the one hand, the "total" application of those treaties and, on the other, their "total" non-application to situations of armed conflict, and it was that middle ground that the Commission should define in the context of the topic. In his view, that involved examining, for each theme and each draft principle, the extent to and conditions under which the environmental law applicable in peacetime could apply to armed conflicts. The Special Rapporteur made an attempt to do so in paragraphs 100 to 112 of her third report, which was certainly welcome, but insufficient. Furthermore, she did not draw any conclusion from that analysis in her third report, even though it was a priority issue. It should be remembered that those who drafted conventions on the environment had not necessarily had armed conflicts in mind, which was why it was essential to carry out that analysis. That preparatory work remained to be done for some of the draft principles proposed by the Special Rapporteur, in particular draft principles I-1, III-2 and III-5.

58. Thus, at the current stage of work, he was not really in favour of referring all the draft principles to the Drafting Commission, as a selection needed to be made, as several members had noted. Of course, the few general comments that he had made did not detract from the breadth of the Special Rapporteur's work. On the contrary, the wealth and diversity of the perspectives opened up by her third report showed the complexity of the topic and the consequent need for extensive research.

59. Mr. PETRIČ said that he wished to commend the excellent quality of the Special Rapporteur's third report and her presentation of it, as well as all her work on the topic of the protection of the environment in relation to armed conflicts. As the Special Rapporteur had said that she would not be seeking re-election, he also wished to thank her for her contribution to the Commission, her friendly cooperation and her unfailing commitment to the respect and protection of human rights and dignity, the development of humanitarian law and environmental protection over the previous 10 years.

60. Turning to the third report itself, he noted that it was based on very extensive and very useful documentation directly or indirectly linked to the topic of the protection of the environment in relation to armed conflicts. The report also had other particularly interesting elements, notably the bibliography, the summary of the debate held

in the Sixth Committee and, even if they were few and sometimes not germane to the topic, the responses of States to the request for information on the specific issues identified by the Commission as being of particular interest to it. The Special Rapporteur's third report thus provided a firm grounding on which to examine the issues addressed. The approach adopted, which was based on a distinction between the three temporal phases of armed conflict, was particularly useful, and the Special Rapporteur's insistence on the interconnection between several aspects of each of those three phases was especially welcome. That being said, he was of the view that the Commission should continue to concentrate on the issue of the protection of the environment.

61. The report under consideration, the research on which it was based and the draft principles that it contained mainly concerned international armed conflicts. Although he had no particular objection in that regard, he wished to note that the majority of contemporary armed conflicts were internal armed conflicts, a trend that would probably hold true in the future. The Commission could thus not overlook that aspect, as Mr. Park had rightly noted, and, in that context, he shared the views that Mr. Park had expressed in his intervention. With regard to methodology, some of the very extensive documentation on which the third report was based was not relevant to the proposed draft principles. That being said, he fully endorsed the Special Rapporteur's statement, in paragraph 266 of her third report, that "the three reports … indicate that there exists a substantive collection of legal rules that enhances environmental protection in relation to armed conflict". In the context of her work, the Special Rapporteur had consulted the most relevant international organizations, as well as NGOs and some international bodies, which only added to the usefulness and authority of the report and, while a definitive decision had apparently not been made with regard to the form that the outcome of the work would take, it seemed that the development of guidelines was the most appropriate solution.

62. Turning to the proposed draft principles, he said that draft principle I-1 (Implementation and enforcement), the content of which he endorsed, stated clearly that it was the protection of the environment in relation to armed conflicts, including internal armed conflicts, that was at the heart of the Commission's work. With regard to draft principle I-3 (Status-of-forces and status-of-mission agreements), he shared Mr. Murase's views. Those particular instruments, which largely governed matters of civil and criminal jurisdiction in peacetime, were hardly relevant to the protection of the environment in relation to armed conflicts. In any case, if that draft text were to be retained, the word "agreements" should be replaced with the words "special agreements", as they came in various types, in particular during the post-conflict phase. However, it should be added that, with status-of-forces and status-of-mission agreements in relation to environmental law, the Commission was moving in an entirely new direction. In paragraph 161 of her third report, the Special Rapporteur herself acknowledged that those agreements rarely contained environmental clauses. There was thus reason to doubt that international law was sufficiently developed in that regard to justify the inclusion of those agreements within the scope of the topic.

63. With regard to draft principle I-4 (Peace operations), he endorsed Mr. Šturma's proposal to replace the word "shall" with "should", as the obligation in question was an obligation of means rather than an obligation of result. The word "all" should also be deleted, as its meaning remained unclear. That being said, the draft principle was useful and important and was in line with a broader trend under way at the United Nations, in particular the Secretary-General's initiative entitled "Greening the Blue". Incidentally, it should be noted that, in 2011, on the occasion of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict, the Secretary-General had stated that, "[g]iven their critical role in supporting countries emerging from conflict, United Nations peacekeeping operations are well-placed to positively influence how the environment is protected and natural resources are managed".[360]

64. He approved of draft principle III-1 (Peace agreements), even though it did not address the issue of compensation and attribution of responsibilities, which was crucial. However, he understood that it would be addressed at a later stage of the work. If not, the principle would be incomplete and could even cause confusion. In any case, he fully endorsed the Special Rapporteur's argument that States should be encouraged to include environmental aspects in every peace agreement or other agreement for the termination of a conflict (armistice agreements, for example). Draft principle III-2 was also broadly acceptable, even if its temporal aspect was insufficiently clear. Furthermore, the security of personnel tasked with conducting environmental impact studies after a conflict should always be guaranteed, given the imminent dangers that also existed in post-conflict situations. In his view, it should be reflected in one way or another in the draft text.

65. As for draft principles III-3 (Remnants of war) and III-4 (Remnants of war at sea), he could not see why the word "war" had been used in their titles instead of the words "armed conflict". In addition, it should be clearly stated which party was required to remove those remnants. Furthermore, as Mr. Šturma had noted, draft principle III-3, which included several examples of remnants of war, was simultaneously too narrow and too broad. The word "shall" should also be replaced with "should" in those two draft principles. As for specific remnants of war, for example mines, which continued every year to claim thousands of victims around the world, it was important that the parties to an armed conflict be required to keep the documents and maps indicating the location of mines so that, once the conflict had ended, those devices could be removed or destroyed. It should be noted that, regrettably, more than 20 years after the end of hostilities, some regions of Bosnia and Herzegovina and Croatia had still not been demined for want of information on the locations of those devices, and the same was true of other regions in the world. It would thus be preferable not to limit the obligation in question to the post-conflict phase only. In international law, responsibilities relating to remnants of war on land, which largely meant mines, focused mainly on the protection of civilians rather than on the protection of the environment.

[360] See UNEP, *Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations*, Nairobi, 2012, back cover.

66. In draft principle III-5 (Access to and sharing of information), the word "shall" should also be replaced with "should". The wording proposed for that draft principle did not take account of the temporal aspect, which was nevertheless important, as issues of access to and sharing of information were framed very differently in each of the temporal phases of armed conflict.

67. Draft principle IV-1 had given rise to interesting exchanges, and he agreed with several members that it did not fall within the scope of the topic, even if the protection of the rights of indigenous peoples certainly constituted an obligation of international law. No reference was made to armed conflict in that draft principle, and the Special Rapporteur dealt with indigenous peoples only in a general manner in her third report, without establishing the link to armed conflict and without explaining which specific obligations stemmed from international law as far as the environment of those peoples during the conflict or post-conflict phases was concerned. A large part of the content of the third report and the draft principles proposed therein seemed to have more to do with the progressive development of international law than with its codification, and it seemed to go a little too far in some cases. The Drafting Committee would have to decide how far it was possible to go without risk, basing its work on State practice, case law and doctrine in order to develop relevant and clear legal principles, in particular with regard to the draft principle on indigenous peoples. In conclusion, he proposed that all the proposed draft principles be referred to the Drafting Committee.

68. Mr. KOLODKIN said that Ms. Jacobsson's extensive work was extremely important and promising for the future, and he hoped that the next special rapporteur would devote as much effort to the study of the topic and would have as much enthusiasm. He wished to share with the Commission a few remarks on aspects of the topic that, in his view, warranted further consideration and called for a more cautious approach.

69. First, the scope of application and limits of the topic should be further defined. It should be specified whether the draft principles concerned the natural environment, which was his preference, or the environment in general, in which case the concept of human habitat should be brought in, which would complicate the issue considerably. A distinction should also be drawn, for the post-conflict phase in particular, between international armed conflicts and non-international armed conflicts. Indeed, even if the dividing line between the humanitarian law applicable to international conflicts and that applicable to internal conflicts was increasingly blurred, it could not be said that the rules of international law relating to the protection of the environment were applicable in the same way after international and internal conflicts. Yet some of the draft principles relating to post-conflict situations in the third part were formulated without drawing a distinction between the two types of conflict and were addressed to all parties. Neither was he convinced that a sufficiently precise definition had been given of the beginning of the pre-conflict situation, to which the proposed principles applied, and the end of the post-conflict situation. Furthermore, as other members of the Commission had noted, it might be asked whether it was appropriate, in the context of the topic under consideration, to deal with issues such as investment agreements, status-of-forces agreements and the rights of indigenous peoples.

70. With regard to draft principle I-3, he was of the view that, as Mr. Murase, among others, had noted, status-of-forces agreements often bore no relation to armed conflicts, such that they did not fall within the scope of the topic and that the draft principle was not appropriate in the context.

71. With regard to draft principle III-1 on peace agreements, which contained recommendations to be implemented by all parties to international or internal conflicts in post-conflict situations, he doubted that all those parties could be placed on an equal footing without distinction, in particular as peace agreements concluded after internal conflicts governed very specific situations. First, one of the parties might no longer exist. Second, did the fact of addressing the same recommendations on the content of a peace agreement to both the legitimate and illegitimate parties to an internal conflict not confer a certain legitimacy on parties that had none? Third, why was it obligatory for a peace agreement to be signed after an internal armed conflict? Fourth, if an internal armed conflict had no cross-border consequences or consequences with effects *erga omnes*, why should the protection of the environment be subject to international settlement? Given those comments, in his view, either the parties addressed in draft principle III-1 should be limited only to States or the scope of application of the principle should be restricted to the post-conflict stage of international armed conflicts.

72. Draft principle III-2 gave rise to similar remarks, as one might ask whether States were able or willing to launch a very general appeal for cooperation to the former parties to all internal conflicts, even if it concerned only environmental issues, as the scope for that type of cooperation seemed to have to be examined on a case-by-case basis. As for draft principle III-3, paragraph 2, it imposed obligations on all the parties to an armed conflict, whatever its nature, with the result that the comments on draft principles III-1 and III-2 applied *mutatis mutandis*.

73. With regard to the title of draft principle III-3, he noted, to add to the comments made by other members of the Commission, that the priority objective at the end of any armed conflict was to meet basic human needs and that the removal of remnants of war was a basic priority when the objective was to guarantee human security. Given that, to carry out such an operation, the existence of resources had to be taken into account, an unconditional obligation, such as that proposed by the Special Rapporteur, was not necessarily based on general international law or with regard to State practice.

74. As for draft principle III-4, with regard to which Mr. McRae had raised the possibility of including an obligation to remove remnants of war at sea, he was not sure that it would be straightforward to establish such an obligation, and further in-depth research on the matter would be necessary. In any case, in his view, the question of whether it was appropriate to include a provision on responsibility for the presence of remnants of war or the

failure to remove them should be considered with caution. It was notable that, after the Second World War, the Allies had dumped dangerous chemical weapons and chemical agents produced in Germany at the bottom of the sea. As those agents had not been prohibited under international law at the time, and the Allies had disposed of them in their own interests and, in his view, also in the general interest, it might be asked which entity should take responsibility for those acts, the damage caused to the environment or the failure to remove the agents, as it was unclear on what basis a particular country could be held responsible for that damage, not to mention that, according to experts, it was not known whether it would not be more damaging to the environment to remove those products than to leave them in place. In that context, the issue of responsibility could certainly not be decided easily.

75. Draft principle III-5 seemed to concern post-conflict situations, but the opening clause gave the impression that it was an obligation relating to conduct in times of armed conflict, and, as he had said already, it was in his view unrealistic to provide for such an obligation during an armed conflict.

76. In conclusion, although the analysis of the draft principles seemed to him a very delicate exercise, as the boundaries between the points considered were very blurred, he was in favour of referring all the draft principles to the Drafting Committee, apart from draft principles I-3 and IV-1. He thanked Ms. Jacobsson for her hard work and hoped that her report would serve as a source of inspiration for future work on the topic.

The meeting rose at 12.45 p.m.

3321st MEETING

Friday, 15 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Gilberto Vergne SABOIA (Vice-Chairperson)

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Organization of the work of the session (*continued*)[*]

[Agenda item 1]

1. The CHAIRPERSON said that the Bureau had not yet been able to finalize all aspects of the draft programme of work. It would be submitted to the Commission as soon as possible. In the meantime, a plenary meeting would be held at 3 p.m. on Monday, 18 July 2016 to allow the Commission to continue its consideration of the topic of *jus cogens*. The Special Rapporteur on that topic would sum up the discussion the following day, after which the Special Rapporteur on the topic of protection of the environment in relation to armed conflicts would sum up the debate on that topic. Then, if time remained, the Drafting Committee on the topic of *jus cogens* would meet.

Protection of the environment in relation to armed conflicts (*continued*) (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)

[Agenda item 7]

Third report of the Special Rapporteur (*continued*)

2. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on protection of the environment in relation to armed conflicts (A/CN.4/700).

3. Mr. NIEHAUS said that he wished to thank the Special Rapporteur for her excellent third report on a complex topic that was of great relevance to the contemporary world. The report covered a great deal of material and presented a particularly useful analysis of the discussion of the topic in the Sixth Committee.

4. He reiterated the support he had expressed previously for the Special Rapporteur's decision to divide the topic into three phases – before, during and after an armed conflict. However, as other members had commented, it would have been useful for the third report to set out more clearly the rules that applied during each of the three phases. The content and conclusions of the report under consideration, the main focus of which was to identify rules applicable in the third phase, only partially reflected the methodology followed. For the sake of greater clarity, it should have concentrated on the most important aspects of the topic, leaving aside matters of less relevance, such as the international investment agreements covered in paragraphs 115 to 120. The extensive references to the jurisprudence of regional human rights courts in paragraphs 196 to 212 did not seem to form a clear foundation for the conclusions that the Special Rapporteur sought to draw. Rather than facilitating understanding of the topic, the amount of information presented at times obscured it. The more specific a report, the easier it was for the Commission to analyse it and reach a positive outcome. While on the subject of clarity, he wished to endorse Mr. Candioti's call for uniform, coherent and consistent terminology, the absence of which in recent years had generated confusion. Resolving terminological issues should not be the preserve of the Drafting Committee, given the detrimental effects that poor use of terminology could have on the Commission's work.

5. Turning to the draft principles, he expressed support for draft principle I-1 but suggested that it be reformulated to clarify that States had an obligation to take steps to protect the environment in relation to armed conflicts. While he welcomed the inclusion of a reference

[*] Resumed from the 3315th meeting.

to international organizations in draft principle I-3, he agreed with other colleagues that, in the first sentence, the word "encouraged" was not emphatic enough and should be replaced with a more specific legal term. Draft principle I-4 seemed to be a restatement of draft principle I-3; moreover, as Mr. Forteau had pointed out, peace operations did not form part of armed conflicts, except in very exceptional circumstances. He agreed with Mr. Petrič that draft principle III-1 was incomplete, inasmuch as it did not address issues of compensation and responsibility. The word "encouraged" should be replaced in both draft principles III-1 and III-2, for the reasons he had stated previously. As Mr. Hassouna had suggested, draft principles III-3 and III-4 should be merged; he also shared the view that the list of remnants of war currently contained in draft principle III-3, paragraph 1, should not be exhaustive. The issue of access to and sharing of information, covered in draft principle III-5, was of great importance but also great complexity. Further detail was needed in the text to ensure that the draft principle could be applied effectively in practice.

6. Draft principle IV-1, on the rights of indigenous peoples, had given rise to much debate and opposing points of view. Despite his strong support for the rights of indigenous peoples and condemnation of the horrific acts committed against them around the world during the colonial era, he wondered whether the current topic was the appropriate framework in which to address the abuses that indigenous communities had suffered and continued to suffer. The historical responsibility to put an end to such abuses was clear, but, although he found it difficult to say so, draft principle IV-1, as currently formulated, did not fit into the overall structure of the draft principles. He therefore suggested that it should be altered to read: "In the event of armed conflicts, States shall cooperate and consult with indigenous peoples living in their territories, so as to ensure respect at all times for their traditional knowledge and practices in relation to their lands and natural environment, as well as their free, prior and informed consent in connection with usage of their lands and territories that would have a major impact on the lands."

7. With those comments, he expressed support for referring all the draft principles contained in the Special Rapporteur's third report to the Drafting Committee.

8. Sir Michael WOOD said that he wished to thank the Special Rapporteur for her most interesting third report, which reflected a great deal of research. He welcomed the extensive bibliography, which could perhaps be made even more useful by dividing it into sections that corresponded to the various matters covered by the draft principles. He agreed with much of what had already been said in the course of the debate, particularly Mr. Forteau's remarks on methodology. The third report was lengthy and detailed; however, it was not always easy to see which materials had led to which draft principle and which were there just for background.

9. Concerning the scope of the topic, he recalled that in 2015 the Drafting Committee had provisionally adopted a provision stating that the draft principles applied to the protection of the environment before, during or after an armed conflict.[361] That seemed to include both international and non-international armed conflicts, and it was perhaps appropriate that the topic should do so. However, he shared the concern expressed by Mr. Kolodkin that the draft principles made no distinction between the two. It might be too simplistic to try to cover both types of armed conflict without taking into consideration the different rules that might apply and the different actors concerned. A future special rapporteur would need to analyse the matter further.

10. As to the nine draft principles proposed by the Special Rapporteur in her third report, it was important, though not at present particularly easy, to see them together with the draft principles already provisionally adopted by the Drafting Committee in 2015. It would therefore be helpful if the Committee were to have before it a document combining, in the correct order, the texts adopted in 2015 and those referred to it at the current session.

11. As Mr. Park and others had indicated, the Special Rapporteur had not included materials establishing that States must or should adopt the preventive measures envisaged in draft principle I-1. Paragraphs 187 to 238 of the third report contained brief descriptions of a number of cases, but it was difficult to see how draft principle I-1 related to them; he had some doubts therefore as to whether that draft principle should be referred to the Drafting Committee. Moreover, the relationship between that draft principle and the others in Part One was not entirely clear. If draft principles I-2, I-3 and I-4 were forms of application of draft principle I-1, that should be made clear. Like other members, he had serious doubts concerning draft principle I-3, which was explained only briefly in the third report, as it did not seem that status-of-forces and status-of-mission agreements were closely related to armed conflict. In draft principle I-4, the term "peace operations" ought perhaps to be defined for the purposes of the draft principles, or at least explained in the commentary.

12. Concerning draft principle III-1, he agreed with Mr. Forteau that a study of peace agreements between States could provide a basis for a better draft principle, but at present that information was not available to the Commission. Draft principle III-2, being simply a policy statement as Mr. Hmoud had suggested, could be referred to the Drafting Committee. However, some redrafting might be needed in paragraph 2, as the current wording, in particular the reference to "future operations", seemed to suggest that the paragraph belonged to the preventive phase, not the post-conflict phase. The Drafting Committee would need to examine draft principles III-3 and III-4 very carefully, including the relationship between them, their addressees and whether the Commission should try to list remnants of war. He agreed with those who had said that more precision was required in draft principle III-5. As Mr. McRae had observed, States might not be in a position to grant access to information that was kept secret as a matter of national security. Although the draft principle added no new obligations to those already existing in international law, and might therefore be acceptable, it needed to specify to which phase of armed conflict it applied. Its position in Part Three of the draft principles suggested that it applied only in the post-conflict phase.

[361] *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

13. It was far from clear how draft principle IV-1 on the rights of indigenous peoples fit into the topic. Neither the short passage in the third report that touched on it nor the proposed draft principle itself related specifically to armed conflict. As had been said in earlier debates, the current topic was not the place to enter into the general question of the international law applicable to indigenous peoples. If such a draft principle were to be included, it should be based on a more rigorous analysis of specific issues concerning indigenous peoples, armed conflict and the protection of the environment. In the absence of that analysis, he found it hard to take a stance on the draft principle in question. Among other things, it could raise the issue of why the Commission was not providing guidelines on other particularly vulnerable groups that might also be affected by armed conflict.

14. The ambitious future programme of work set out in the concluding paragraphs of the third report showed that much remained to be done to complete a first reading of the draft principles. Covering liability and responsibility for environmental damage in relation to armed conflict, as suggested by some, might make the exercise much more prescriptive. Was there any reason to establish a *lex specialis* with respect to State responsibility? Could it not be assumed that the Commission's draft articles on the responsibility of States for internationally wrongful acts[362] applied in that area, as in most others? In any event, responsibility and liability should be considered, if at all, at the end of the topic when the overall shape of the draft principles had become clear. He agreed that the issue of protection of the environment during occupation, raised by Mr. Hmoud, was important, but it was not clear where it would fit into the overall scheme of the draft principles.

15. He again welcomed the Special Rapporteur's consultations with international and regional organizations and strongly agreed with her about the need for States to continue to provide examples of relevant national legislation and case law.

16. He would be happy for the draft principles to be referred to the Drafting Committee, with the possible exception of draft principles I-1 and IV-1.

17. Mr. WAKO said that he wished to congratulate the Special Rapporteur for presenting her third report within the time frame that she had proposed in her preliminary report in 2014.[363] While he agreed with Mr. Forteau that it would be preferable for the Commission to have before it an average of four or five proposed draft texts in any given report, the Special Rapporteur's decision to put forward nine draft principles in the present report was understandable given the time that she had dedicated to the topic and the fact that she was not seeking re-election. Although the Special Rapporteur had engaged in extensive research and consultations with a wide range of bodies, much more remained to be done in an area that was evolving quickly.

18. Only 40 years previously, in 1976, the Convention on the prohibition of military or any other hostile use of environmental modification techniques had been adopted, followed one year later by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). As recognized by the Special Rapporteur, the provisions of the two instruments, which had been the first to provide expressly for the protection of the environment in armed conflicts, reflected the interests and environmental concerns of the international community at that time.

19. International environmental law had been in its infancy in 1976, but environmental concerns could no longer be disregarded. Although it was not possible to identify evidence of relevant customary international law, there was evidence of a growing awareness and clear ambition on the part of States and international organizations to take environmental considerations into account when planning and conducting military operations in peacetime. The fact that environmental degradation had an impact on the enjoyment of human rights did not necessarily mean that there existed a rule of customary international law establishing an individual human right to a clean environment.

20. Rapid progress was being made, however, with Africa arguably taking the lead. The African Charter on Human and Peoples' Rights provided that all peoples had the right to a general satisfactory environment favourable to their development. In Kenya, the 2010 Constitution established, *inter alia*, that every person had the right to a clean and healthy environment, that the State should eliminate processes and activities that were likely to endanger the environment and that any person or group of persons could apply to a court for redress in relation to violations of the right to a clean and healthy environment, without having to demonstrate that they had *locus standi* in the matter. The Commission was therefore dealing with progressive international law. It was a pity, in that regard, that many Member States were not cooperating by providing information on environmental legislation, measures and policies.

21. The proposed draft principles reflected emerging trends in the area of environmental law. Care should be taken, however, not to address wider environmental issues but to remain within the scope of the topic. The topic was complex in that it dealt with the intersection between the law of armed conflict, environmental law, international human rights law and international humanitarian law. It was therefore tempting to produce draft principles relating to general environmental law rather than environmental law in the context of armed conflict, and to address the law as applied in peacetime rather than the law as applied during or after an armed conflict. One challenge that the Commission faced was to ensure that the draft principles fell within the scope of the topic.

22. There were a number of other challenges related to the draft principles. First, the Special Rapporteur had said in her preliminary report that the third report was likely to contain a limited number of guidelines, conclusions or recommendations. Ultimately, however, she had

[362] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[363] *Yearbook ...2014*, vol. II (Part One), document A/CN.4/674.

formulated draft principles. In that connection, he agreed with Mr. Candioti that the Commission needed to decide on a consistent approach to the use of terms for draft texts.

23. Second, the Commission had agreed at the outset that the working definition of armed conflict would be wider than the one that it had used in other reports in order to encompass situations where an armed conflict took place without the involvement of a State. In that way, it would ensure that non-international armed conflicts were covered. In the proposed draft principles, however, the Special Rapporteur did not appear to have distinguished between international and non-international armed conflicts, or between State and non-State actors. In the introduction to her third report, the Special Rapporteur had stated that, in future reports, it might be worth addressing the responsibility and practice of non-State actors and organized armed groups in international armed conflicts. That raised the question of whether the draft principles would have to be amended once that issue had been addressed, whether consideration of the draft principles should be put on hold until that time and whether the report should be split into two parts, one dealing with international armed conflicts and the other with non-international armed conflicts.

24. Third, he agreed with Mr. Peter that, although the Special Rapporteur had placed draft principle IV-1 against the background of indigenous peoples, their land, the environment and the principle of free, prior and informed consent, that background was too narrow and weak to support such an important theme. He also agreed that the Special Rapporteur's third report had not done justice to the subject matter before arriving at the draft principle – which was probably why several members of the Commission had stated that the draft principle fell outside the scope of the topic – and that there was a wealth of materials available that could have been used to justify the inclusion of a slightly modified version of draft principle IV-1.

25. It was clear from the response of other members to the third report that the topic should remain on the Commission's programme of work. His Christian beliefs underpinned his views of the origin and importance of international human rights and environmental law. In the future, the Commission would be remembered above all else for its contribution to the protection of human rights and the environment. The Commission had to find someone to assume the Special Rapporteur's mandate. That person should be fully committed to the protection of the environment and should regard the completion of the mandate not just as a duty but as a calling.

26. In conclusion, he recommended that all the draft principles be referred to the Drafting Committee, which should also recommend the way forward for dealing with the topic.

Mr. Saboia, Second Vice-Chairperson, took the Chair.

27. Mr. VALENCIA-OSPINA, after thanking the Special Rapporteur for her third report, said that he wished to touch on two main issues, the clarification of which would benefit the Commission's future work. The first was the distinction between the natural environment and the human environment, while the second concerned the temporal delimitation of the second and third phases of the topic, namely during and after armed conflict.

28. With regard to the first issue, the Commission's treatment of the topic during its previous sessions had left the impression that the focus of its work was on the protection of the natural environment, without any consideration being given to the natural environment's pecuniary value or usefulness to humans. In a 2009 report by UNEP entitled *Protecting the Environment During Armed Conflict: an Inventory and Analysis of International Law*,[364] which had ultimately led to the Commission taking up the topic, a distinction was drawn between the environment, which had an intrinsic value, and natural resources, which were in some way useful or exhaustible. In the section of the draft principles on the use of terms that had been discussed by the Commission in 2015, the environment was defined as including "natural resources, both abiotic and biotic",[365] but no reference was made to its usefulness.

29. Surprisingly, the Special Rapporteur's third report focused predominantly on the environment as a useful natural resource, insofar as it was exhaustible and valuable, and on the environment as the "human environment". The shift in focus was noticeable throughout the third report, but particularly in the section devoted to legal cases and judgments, where the Special Rapporteur mainly assessed cases in which the environment was characterized by its economic value. The cases concerned the illegal exploitation of natural resources, individual or collective deprivation of property and the loss of usability of land. The same was true of the Special Rapporteur's analysis of the work of compensation commissions, with the notable exception of the United Nations Compensation Commission, which had awarded compensation for "pure environmental damages".

30. A number of the cases mentioned related to the specific connection between indigenous people and the land they inhabited. The third report contained a section and a proposed draft principle devoted to indigenous people. Although he fully supported the rights of indigenous people, as established in, for example, the United Nations Declaration on the Rights of Indigenous Peoples,[366] he agreed with several previous speakers that the present topic was not the right place to discuss and reiterate those rights, which were founded on human rights considerations and were relevant to the protection of the environment only insofar as the environment might be of value to indigenous people. The third report did not demonstrate any particular relevance of such rights in relation to armed conflict, and draft principle IV-1, on the rights of indigenous peoples, did not go beyond restating rights that had already been established in more directly pertinent international law instruments.

[364] D. Jensen and S. Halle (eds.), *Protecting the Environment during Armed Conflict: an Inventory and Analysis of International Law*, Nairobi, UNEP, 2009.

[365] See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685 (second report on the protection of the environment in relation to armed conflicts), annex I, p. 176.

[366] General Assembly resolution 61/295 of 13 September 2007, annex.

31. The same applied to the issue of access to and sharing of information, as addressed in the third report. The attempt to justify access to information as a human right was not relevant to the focus of the topic, namely environmental protection. Draft principle III-5, which dealt with the issue, provided that "States and international organizations shall grant access to and share information in accordance with their obligations under international law". Such a formulation did not appear to be an example of either codification or the progressive development of international law. On the one hand, no concrete information was given about the nature of the obligations referred to in the draft principle and, on the other, there was no mention of anything novel being elaborated.

32. The third report also seemed to be the wrong place to address demining and the protection of human beings, which bore no apparent connection to the protection of the environment as such. The "human environment", in particular, was already widely protected in international law, both in peacetime and during armed conflict. Examples of that protection included article 1, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights and, in the context of armed conflict, the criminalization of the deliberate destruction of the natural basis of livelihood.

33. The scope of the topic should not be confined to reiterating existing protection for useful parts of the environment. Rather, in line with the Commission's work on the topic during its previous sessions, it should cover the protection of the environment irrespective of its usefulness or economic value. He agreed with the comments submitted by Switzerland, which were summarized in paragraphs 85 to 90 of the third report. In contrast to some other States, Switzerland highlighted the distinction between the protection of objects indispensable to the survival of the civilian population, on the one hand, and the protection of the environment, on the other.

34. As to the temporal delimitation of the second and third phases, he shared the sense of unease expressed by several other members of the Commission. The Special Rapporteur had divided the work on the topic mainly on a temporal basis, distinguishing three phases – before, during and after an armed conflict – but she had left the division between those phases rather open. At the same time, she made the predominantly applicable law dependent on the respective phase. For instance, in relation to the second phase, she based her work on the assumption that during, but only during, an armed conflict, international humanitarian law applied as *lex specialis*. The same could not be true of the other phases, where no armed conflict was present to trigger the application of international humanitarian law.

35. It seemed counterintuitive that the Special Rapporteur had chosen to commence her consideration of the rules of particular relevance applicable in post-conflict situations with an assessment of the Commission's previous work on the effects of armed conflict on treaties. An armed conflict that had ended fell outside the scope of the draft articles adopted in 2011,[367] in which "armed conflict" was taken to mean "a situation in which there was resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups". There was thus a need to distinguish clearly between the temporal phases and to identify the laws applicable to each one.

36. He shared a concern expressed regarding the Special Rapporteur's treatment of peacekeeping missions under a United Nations mandate. The basic principles of United Nations peacekeeping missions fundamentally distinguished them from armed conflict as defined for the purposes of the topic. Such missions did not involve the use of force by States. The inclusion of peacekeeping within the scope of the topic could therefore endanger the viability and usefulness of United Nations peacekeeping efforts as a whole.

37. In conclusion, he supported the referral of the draft principles to the Drafting Committee, with the possible exception of draft principle IV-1 and on the understanding that the main focus of the topic would be on the protection of the environment.

38. Mr. EL-MURTADI SULEIMAN GOUIDER said that the excellent work of the Special Rapporteur, particularly the copious references that she had provided, would serve as a very good basis for the work of whoever took over her role. Given the increasing frequency of non-international conflicts in the world and their impact on the environment, the second, armed conflict phase should be accorded more importance than the other phases. It was, however, impossible to establish frameworks that were completely watertight, and opinions on their application differed, particularly with regard to the protection of indigenous peoples and natural resources.

39. In her third report, the Special Rapporteur examined a series of examples of general international practice with regard to armed conflicts and their consequences since the Stockholm Declaration.[368] However, it had proved difficult to glean information from African States and organizations. The Special Rapporteur had emphasized the need for more contact and consultation in future work and it would be useful if the Commission were to reiterate the call to States to provide more information on their practice.

40. It might be useful for resolutions of the Security Council on protection of the environment and natural resources in armed conflict to recall the negative aspects of specific situations in which the Council had permitted military intervention. The adoption of such decisions had not prevented further conflicts from taking place, and the environment and natural resources had become the silent victims. Despite the existence of national legislation to protect the environment, armed conflict was often accompanied by a weakening of the State apparatus and environmental laws, while those who sought to defend the

[367] The draft articles on the effects of armed conflict on treaties and the commentaries thereto adopted by the Commission at its sixty-third session are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

[368] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

environment were prevented from making their voices heard. Long-term environmental considerations had become secondary to short-term concerns. The challenge to the international community was therefore to demonstrate that the provisions of the law and commitments to protect civilians and the environment could be applied in practice, regardless of short-term political considerations.

41. He hoped that whoever took over from the Special Rapporteur would be able to address certain important points raised in the current report, such as the protection of the environment during occupation and the responsibilities of non-State actors in non-international armed conflicts. There was also a need for more discussion and contact with the relevant organizations and greater efforts to elicit more information about the views and practice of States.

42. The draft principles set out in the annex to the third report would certainly help the Drafting Committee in its work. The interdependence of the different phases of the topic would favour an exhaustive and all-embracing approach to the draft principles. In conclusion, he wished the Special Rapporteur every success in the future.

43. Ms. ESCOBAR HERNÁNDEZ said that she wished to thank the Special Rapporteur for her third report, which addressed the post-conflict phase in a detailed and systematic manner, as well as some aspects of the pre-conflict phase. It provided the Commission with a relatively complete picture of the subject, which was particularly important given that the Commission was approaching the end of the quinquennium and that it would not be able to benefit from the Special Rapporteur's comprehensive understanding of the topic during the next quinquennium. She welcomed the inclusion in the third report of portions devoted to the discussions in both the Commission and the Sixth Committee and to the written contributions by Member States, since they served as a frame of reference for the remainder of the report. Annex II was also worthy of note, as the inclusion of a select bibliography would provide a solid basis for the future work of the Commission and the Special Rapporteur's successor.

44. The system used by the Special Rapporteur to address some of the subjects in the third report was somewhat difficult to follow. That was particularly true of chapter II of the third report, in which reference was made interchangeably to both the pre-conflict and post-conflict phases, even though the section was entitled "Rules of particular relevance applicable in post-conflict situations". However, the Special Rapporteur had helped to clarify some matters in her oral presentation.

45. Although the wealth of practice analysed in the third report was of interest and relevance, elements of practice were at times presented in a somewhat general and abstract way and it was not always easy to draw a direct connection between the practice mentioned and the topic or the draft principle which it served to substantiate. It might be useful, therefore, if the Special Rapporteur were to select the practice most directly relevant to each draft principle for inclusion in the respective commentaries, thus making more explicit the contribution of each element to the specific draft principle concerned.

46. As she had mentioned at the previous session, the use of the term "principle" raised a number of issues with respect to its exact meaning, nature and legal effects. At the current session, the question had arisen in the context of the Commission's methods of work and the need to make a clear distinction between draft articles, draft principles and draft guidelines. In her view, the relationship between the three categories had to be understood in terms of a descending order of prescriptive content. The appropriate term should thus be selected according to the degree of prescriptiveness the Commission wished to attribute to each of its topics. The issue could perhaps be discussed in the next quinquennium under working methods, particularly because of the increasingly varied formats in which topics and titles were presented.

47. As to the draft principles, although she agreed with the content of draft principle I-1, it was necessary to clarify both the content and the ultimate aim of the measures mentioned therein, since it was not clear whether the adjective "preventive" referred to all the measures mentioned – legislative, administrative, judicial and others – or to a specific category thereof. The draft principle should be included in the pre-conflict phase only if the word "preventive" was intended as a general term. If that were not the case, the measures could be included in any of the phases and so should come under an introductory section. Furthermore, the title "Implementation and enforcement" did not bear any relation to the content of the draft article and should be changed, something that the Drafting Committee would be well placed to do.

48. With respect to draft principle I-3, she did not entirely agree with other members of the Commission that it dealt with a subject that was unrelated to the topic at hand, particularly in the light of the examples given in the third report. Although the status-of-forces and status-of-mission agreements mentioned in the draft principle might not directly address situations of armed conflict, the possibility of the addressees of those agreements being involved in a conflict or some form of military engagement that had an impact on the environment could not be ruled out. In any event, the final sentence of the draft principle should be deleted, since the phrase "preventive measures, impact assessments, restoration and clean-up measures" might lead to confusion as to the temporal phase referred to by the draft principle. A description of provisions that could be included in such agreements would be better placed in the commentary.

49. She shared the concern expressed by some members about the inclusion of draft principle I-4 in the section dealing with the pre-conflict phase. Although the substantive content of the text was acceptable as a starting point and in line with recent developments in peacekeeping operations, the express reference to the need to take measures to "prevent, mitigate and remediate the negative environmental consequences" gave the draft principle a cross-cutting, intertemporal dimension. It would therefore be preferable to include it as a general principle applicable to all the phases, perhaps in Part Four.

50. While the idea underlying draft principle III-1 was acceptable, it would be useful to revise the wording of the text to make the scope of the recommendation more

specific, in both substantive and subjective terms. Specifically, the term "encouraged", the generic reference to "armed conflict" without any further qualification and the potential impact of the recommendation on non-State actors involved in a non-international conflict were some points that needed to be taken into account in the revised wording.

51. The second paragraph of draft principle III-2 could be deleted, since the taking into account of environmental considerations in peace operations had already been addressed in draft principle I-4. Both draft principle III-3 and draft principle III-4 were acceptable overall. However, draft principle III-3, paragraph 1, should be amended to indicate the addressees of the obligation set out therein and, in the Spanish version, to use terminology that would be more readily understood by those unfamiliar with the subject.

52. Draft principle III-5 combined two distinct elements – access to information and sharing of information – that ought to be addressed separately. Furthermore, the principle was defined too broadly, as a State or an international organization might have good reason, such as security, for not granting access to or for not sharing certain information. The scope of the draft principle should therefore be modified with that in mind. Lastly, the draft principle was general in nature and could be applied to any of the phases; it would be better placed in Part Four.

53. At the two previous sessions, she had stated that the issue of indigenous peoples should be taken into account in the present topic, since their connection to the land and the preservation of their traditional means of livelihood required special protection of the environment, including in relation to armed conflict, as was recognized, in particular, in articles 29 and 30 of the United Nations Declaration on the Rights of Indigenous Peoples. She was therefore pleased to see the subject addressed in draft principle IV-1. It was appropriate to include the draft principle in a separate part of the project – which, in her opinion, should be entitled "General principles" – since the question of indigenous peoples covered all three phases of the topic. However, she agreed with others that the wording of the draft principle, particularly in paragraph 1, was too general and abstract and failed to clearly establish the connection between indigenous peoples and protection of the environment in relation to armed conflicts. However, paragraph 2 better reflected that connection. In any event, the draft principle could be revised by the Drafting Committee, which could also consider adding a reference to the need for States and international organizations to take account of the special position of indigenous peoples in all projects, studies and plans related to the environment and armed conflict that might affect them. Lastly, in response to the comment by Mr. Peter that the practice considered by the Special Rapporteur was limited to certain regions and did not reflect the fact that indigenous peoples were present in all continents, she was of the view that the material selected by the Special Rapporteur reflected the practice available. However, it would be helpful to include a reference to the global dimension of indigenous issues in the commentaries.

54. She wished to conclude by noting the outstanding contribution that Ms. Jacobsson had made to the work of the Commission in general and as Special Rapporteur on protection of the environment in relation to armed conflicts in particular. She would be sorely missed.

55. Mr. AL-MARRI said that he commended the Special Rapporteur on the excellent work she had done in producing her third report, which brought particular focus to a topic of major concern to the international community as a whole. In her report, the Special Rapporteur had affirmed that environmental issues were a common factor that brought States together, whether in peacetime or during armed conflict. The nine draft principles proposed in the third report, some of which were binding and others optional, had been prepared very thoroughly; they should all be submitted to the Drafting Committee. The draft principles focused on the three temporal phases – before, during and after armed conflict – and dealt, *inter alia*, with the rights of indigenous peoples in relation to armed conflicts. He agreed with the Special Rapporteur that there was no need to refer to the applicability of the conventions under which States had undertaken to protect the environment during armed conflict. He also agreed that the work could be presented in the form of discrete topics within the overall subject of protection of the environment in relation to armed conflicts. The involvement of parties to the conflict should be examined in the light of the law of armed conflict and the law of occupation. The Commission should also examine the means available for dispute settlement and for establishing liability for environmental damage; reference could be made in that context to relevant previous work of the Commission. The Commission should also consider protection of the environment in situations of armed conflict between non-State actors, with particular reference to the situations in Afghanistan, Iraq and the Syrian Arab Republic.

56. Mr. VÁZQUEZ-BERMÚDEZ said that he wished to commend the Special Rapporteur on her well-researched third report, which examined practice, case law, writings and treaties, as well as material from a wide variety of primary sources, including the official websites of States and international organizations. The third report also included a most useful bibliography.

57. He was in favour of giving the topic the broadest possible scope, covering all three phases of armed conflicts, and of basing it on consideration of the international legal system as a whole, rather than on any particular branch of international law, since international humanitarian law, the *lex specialis* in situations of armed conflict, might well overlap with rules drawn from international environmental law, international humanitarian law, international human rights standards and international criminal law. In order to protect the environment in relation to armed conflicts, it was therefore vital to identify which standards and principles of international law applied to the various phases of those conflicts.

58. He agreed with the substance of the nine draft principles proposed by the Special Rapporteur in her third report. Chapter II of the report showed that the Commission's draft articles on the effects of armed conflicts on treaties were of relevance to the topic under consideration, especially draft article 3 establishing the general principle that the existence of an armed conflict did not

ipso facto terminate or suspend the operation of treaties. Furthermore, it made it clear that the annex to the draft articles, which contained an indicative list of categories of treaties that would remain in operation in whole or in part during an armed conflict, expressly included treaties relating to the protection of the environment. The references to the commentaries to those draft articles were also helpful.

59. He agreed with Mr. McRae that, in order to reflect the standard-setting nature of the draft principles, States should not be "encouraged to" engage in a specified form of conduct, but should be told that they must or should do something, the word "should" being more appropriate when the provision in question largely constituted progressive development.

60. He was pleased that the Special Rapporteur had devoted draft principle IV-1 to the rights of indigenous peoples in the context of the protection of the environment in relation to armed conflicts, as that signified recognition that various branches of international law could have areas in common. While protection of the environment was obviously important everywhere, it had to be acknowledged that, as Mr. Saboia had explained, in some parts of the world, indigenous peoples had a special relationship with the environment. The destruction of their land would have grave consequences for the cultural and physical survival of those peoples and their land therefore deserved special protection before, during and after an armed conflict. In that connection, he drew attention to the contents of articles 29 and 30 of the United Nations Declaration on the Rights of Indigenous Peoples and to articles XIX and XXX of the American Declaration on the Rights of Indigenous Peoples,[369] which had been adopted on 15 June 2016 after many years of negotiation. The wording of draft principle IV-1 should be brought more into line with the context of the topic and could echo that of the American Declaration on the Rights of Indigenous Peoples.

61. As far as draft principle I-1 was concerned, the Special Rapporteur had referred to practice and case law in order to underscore how important it was that States adopted national legislation to enhance the protection of the environment in relation to armed conflicts, in conformity with international law. However, like Mr. McRae, he considered that draft principle I-1 should not necessarily be confined to preventive measures, since it was also relevant to the post-conflict phase. Although draft principle I-3 on status-of-forces and status-of-mission agreements was only indirectly related to armed conflicts, there was indeed a growing tendency to incorporate into such agreements provisions on environmental responsibilities that might help to forestall damage to, or promote the restoration of, the environment. Draft principle I-4 on peace operations also reflected the more frequent practice of States and international organizations, such as the United Nations, to take steps to prevent, mitigate and remedy harm to the environment.

[369] Resolution 2888 (XLVI-O/16) of the Organization of American States, reproduced in *Organization of American States General Assembly, Forty-sixth Regular Session, Santo Domingo, Dominican Republic, June 13–15, 2016, Proceedings*, vol. I (OEA/Ser.P/XLVI-O.2).

62. Some redrafting of the draft principles in Part Three was required. In draft principles III-3 and III-4, it would be wise to clarify in what way remnants of war on land and at sea could harm the environment and to provide for cooperation between States and between States and international organizations.

63. He was in favour of referring the nine draft principles to the Drafting Committee for fine-tuning in accordance with the comments and suggestions made during the debates in plenary meetings.

64. In its future programme of work, the Commission should take account of developments in international law stemming from State practice, *opinio juris*, case law and treaties. It should likewise give more in-depth consideration to the protection of the environment during occupation, to the responsibility of State and non-State actors, to non-international armed conflicts and to compensation and reparation. The future Special Rapporteur must continue to consult international organizations such as UNEP, UNESCO and the ICRC.

65. Lastly, he paid tribute to the current Special Rapporteur, whose guidance and leadership had enabled the Commission to forge ahead and to make a substantive and very useful contribution to the progressive development and codification of international law in such an important area.

66. Mr. KAMTO said that the substantial amount of research done by the current Special Rapporteur would undoubtedly prove most useful for the next special rapporteur on the topic. Like Mr. Forteau, Mr. Park and Mr. Šturma, he was, however, puzzled by the apparent extension of the scope of the topic to encompass the protection of the rights of indigenous peoples, investment agreements, the protection of the cultural heritage and the type of weapons used in armed conflicts. The division of the subject matter into three phases of equal importance might be partly responsible for that situation, because no strict temporal limits had been set for the first and last stages. The first phase should be restricted to events which were immediately and closely bound up with the beginning of the armed conflict, otherwise too much attention would be paid to the prevention of environmental damage, which was a quite different matter, possibly warranting separate consideration. Similarly, the third phase should be confined to the direct impact of armed conflicts on the environment. The issue of marine wrecks had already been covered in other legal instruments.

67. Second, the shift from the protection of the environment towards the protection of human rights considerably altered the scope and nature of the rules and principles being formulated. No one was opposed to the protection of indigenous peoples but, for the purposes of the topic under consideration, in draft principle IV-1 the Commission should focus not on their rights but on special protection for their environment.

68. He endorsed the views of earlier speakers who had held that several of the draft principles were unsupported by the reasoning in the third report and that much of the case law cited therein had no bearing on the subject

matter. Draft principle I-1 was not borne out by the analyses in the report and was worded too broadly. He wondered why draft principle I-2 was missing. By not setting out the basis for draft principle I-3, the Special Rapporteur gave the impression that it constituted more a personal wish than a principle deriving from practice or existing international instruments. The same was true of draft principles I-4 and III-1. The latter drew no distinction between international and non-international armed conflicts. In practice, the reference to the "restoration and protection of the environment damaged by the armed conflict" might amount to no more than pious wishes, since it was hard to see what national armed groups who had participated in the conflict could do to implement that provision. Draft principle III-3 was very loosely worded. The first paragraph did not specify who was to carry out the activities in question and it was unrealistic to demand the clearance, removal and destruction of all mines without delay. The second paragraph referred to "the parties" – presumably the parties to the armed conflict, in other words the States parties to an armed conflict – which meant that it excluded non-international armed conflicts, despite the fact that they formed the majority of current armed conflicts.

69. He was in favour of referring the draft principles, apart from draft principles I-1, I-3, I-4, III-1 and III-3, to the Drafting Committee.

70. For 10 years, he had admired the Special Rapporteur's elegance of mind and her tenacity in seeking progress in topics related to women's rights and the rights of certain categories of vulnerable persons. He wished her every success in the future.

71. Mr. CANDIOTI said that he wished to thank the Special Rapporteur for her third report, which contained a detailed account of many aspects of the protection of the environment in relation to armed conflicts, along with a wealth of information on State practice, treaty law, international and municipal case law and *opinio juris*, as well as a very useful bibliography. She had adopted a highly professional approach to what was an extremely difficult subject. She had made a very valuable contribution to the Commission's consideration of the topic and had provided ample material for further urgently needed work by the international community on it. Her three-phase approach had been a wise choice. All the rules and recommendations contained in the draft principles proposed in her third report would promote the development of the topic. He was sure that the Drafting Committee would pay due heed to the various suggestions that had been made with a view to improving their wording.

72. The use of the term "principle" did not diminish the relevance of the Special Rapporteur's proposals. The Commission should, however, ensure that the final form of the provisions was consistent with their content. It should not confuse principles, in other words general basic rules or standards for the codification or progressive development of international law, with recommendations concerning advisable or desirable conduct.

73. The Commission had received a mandate from the General Assembly to codify and progressively develop the law on the protection of the environment in relation to armed conflicts. It should therefore press on with the good work already done in order to fulfil that mandate.

74. Lastly, he paid tribute to the Special Rapporteur's commitment to the rule of law in the international community. He also wished her every success in the future.

The meeting rose at 12.50 p.m.

3322nd MEETING

Monday, 18 July 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Al-Marri, Mr. Caflisch, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

***Jus cogens* (*continued*)[*] (A/CN.4/689, Part II, sect. H, A/CN.4/693)**

[Agenda item 10]

First report of the Special Rapporteur (*continued*)[*]

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

2. Mr. PETRIČ said that he wished to congratulate the Special Rapporteur on his excellent first report and on his oral presentation on *jus cogens*, a topic that was important and stimulating on a theoretical level. The report contained an interesting summary of the main past and contemporary views and conflicting opinions elicited by *jus cogens*, a detailed analysis of the legal nature of the concept and the controversies over its theoretical basis, and three draft conclusions. He endorsed the Special Rapporteur's approach and shared most of the views expressed in his first report. While he agreed that the purpose of the work was to identify *jus cogens* and its effects, not to resolve theoretical debates, he believed that the Commission could not truly understand the role of *jus cogens* in the contemporary international community or expand on the definition of the concept established in articles 53 and 64 of the 1969 Vienna Convention unless it analysed the nature and peremptory character of *jus cogens*, its hierarchical position in international law and various other theoretical aspects. He therefore commended the ambitious approach adopted by the Special Rapporteur, who had not ignored the thorny issue of the theoretical basis of *jus cogens*.

[*] Resumed from the 3317th meeting.

3. By adopting article 53 of the 1969 Vienna Convention, States had accepted that, in terms of concluding treaties, their will was limited by *jus cogens*. However, the Convention did not resolve the question of which norms had the status of *jus cogens* in international law, as it provided only that a *jus cogens* norm was a norm of general international law that was accepted and recognized by the international community of States as a whole as being a norm from which no derogation was permitted. Consequently, the express, general consent of the international community of States seemed to be a *sine qua non* for a norm, legal rule or legal principle to acquire the status of *jus cogens*.

4. He concurred with the Special Rapporteur's analysis and conclusions on the subject of the controversy over the role of consent in the formation of *jus cogens*. It should be added that the consent of the international community of States as a whole referred *ipso facto* to the consent of human society, since one could not exist without the other. He also considered that the Special Rapporteur was right to include the protection of values among the core elements of *jus cogens*. When one considered norms that had, at the current time, undeniably acquired the status of *jus cogens*, such as the prohibition of genocide, the prohibition of the use of force in international relations or the prohibition of torture, slavery or piracy, two elements stood out: such norms enjoyed general recognition that went beyond mere consensus among the community of States, and they protected essential values related to human life and dignity, and to peace and security.

5. Article 53 of the 1969 Vienna Convention provided that no derogation was permitted from a *jus cogens* norm, but that such a norm could be "modified" by a subsequent norm of general international law having the same character. The Special Rapporteur rightly endeavoured to distinguish between modification, derogation and abrogation in relation to *jus cogens* norms, but further explanation in that regard would be welcome. *Jus cogens* norms were stable by nature, since they protected basic values that were slow to change, but that did not mean that they were unchangeable. Like other legal norms, they reflected society and protected the values that were dominant at a given stage in the development of the international community. While slavery, torture and the use of force in international relations had, at one time, been acceptable, they were now prohibited by *jus cogens* norms.

6. As to the first report itself, he believed that the summary of the debate in the Sixth Committee was accurate and confirmed not only the general acceptance by States of the concept of *jus cogens* and, therefore, of the relevance of the topic but also the fact that the scope and content of *jus cogens* remained unclear. The Special Rapporteur paid particular attention to the differing views on whether the Commission should compile an illustrative list of norms that could be considered as *jus cogens*, a matter that also divided the Commission and on which the Special Rapporteur himself did not express an opinion. He was among those who felt that an illustrative list would be useful and even necessary. It was clear that, by general consensus, some norms, such as the prohibition of genocide or torture, were *jus cogens* norms, and there was thus no reason not to list them as such. As was evident from article 53 of the 1969 Vienna Convention, norms that were not accepted and recognized as *jus cogens* by the international community as a whole could not belong to that category. Those norms that were not yet *jus cogens de lege lata* could become *jus cogens de lege ferenda*. Although he was not proposing the establishment of an exhaustive list, the Commission could give some indications regarding existing norms whose *jus cogens* character was undeniable in the commentaries, in footnotes, in a list or in an annex, as it had done with the indicative list of treaties that continued in operation during armed conflict, which was annexed to the draft articles on the effects of armed conflicts on treaties.[370] It would be wrong not to take advantage of the opportunity, especially as the task was by no means impossible. The aim of the Commission was not to decide which norms were *jus cogens* and which were not, but to provide examples of norms that were generally and clearly accepted as *jus cogens* by the international community as a whole and reflected as such in State practice, in case law and in legal writings.

7. He fully agreed with the position set out by the Special Rapporteur in paragraph 11 of his first report, to the effect that the conclusions should reflect contemporary practice and the current state of international law relating to *jus cogens*. He did not, however, see how the Special Rapporteur could achieve that without at least indicating which norms of international law were already *jus cogens*. As to the methodological approach, he fully supported the Special Rapporteur's recommendation that the Commission follow its standard practice of considering the variety of documents and sources at its disposal. Despite being relatively meagre, State practice was the most significant element in determining the existence and content of a *jus cogens* norm, since acceptance and recognition by the international community as a whole was a *conditio sine qua non* for a norm of international law to acquire the status of *jus cogens*. States were expected to accept and recognize a norm as *jus cogens* as soon as it was generally recognized as such and was protecting a basic value, thereby excluding any possibility of derogation by agreement of States.

8. The discussion of the historical evolution of *jus cogens* in the first report was interesting and useful. It showed that the idea of there being peremptory norms, in other words norms from which the parties or, in international law, States, could not derogate at will, was ancient and had survived for centuries. He firmly believed that, in every era, there were norms from which no derogation was possible, either by the will of the legislator or, in the case of international law, by that of States. The existence of, and respect for, those rules and principles were indispensable conditions for the development of human society and for the protection of the rule of law, of security and of people's welfare. While the nature of those basic norms could be disputed, their existence was irrefutable. Defining the criteria and means for determining their content, essentially by analysing State practice, was an important task that the Commission had undertaken by embarking on the study of the topic of *jus cogens*.

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[370] The draft articles on the effects of armed conflict on treaties and the commentaries thereto adopted by the Commission at its sixty-third session are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

9. In paragraphs 28 to 42 of his first report, the Special Rapporteur detailed the process that had led to the inclusion of a provision on *jus cogens* in the 1969 Vienna Convention. He wished to make two remarks in that regard. It was clear from paragraphs 30 and 31 of the report that for Fitzmaurice, Waldock and, later, McNair, *jus cogens* norms included both rules and principles of international law. In fact, the prohibition of the use of force, which was considered to be a *jus cogens* norm, was a basic principle of international law. Since all legal orders contained fundamental principles, it was perhaps wrong to refer to *jus cogens* "rules" or "norms" while excluding the word "principles"; the Special Rapporteur might wish to give the matter some thought. Second, it was also clear from the *travaux préparatoires* of article 53 of the 1969 Vienna Convention that *jus cogens* norms were exceptions. As a result, any list of such norms that the Commission did establish would necessarily be short.

10. Concerning the legal nature of *jus cogens*, he fully endorsed the position expressed by the Special Rapporteur in paragraph 42 of his first report to the effect that the work of the Commission must be based on a sound and practical understanding of the nature of *jus cogens*, which necessitated a study of some of its theoretical bases. He also agreed with the way in which the Special Rapporteur defined the core elements of *jus cogens*, by taking article 53 of the 1969 Vienna Convention as a starting point and adding other elements, including the idea, discussed in paragraphs 70 and 71 of the first report, that *jus cogens* norms served to protect the fundamental values of the international community. That criterion, related to content, and that of consent, in the sense that the norm had to be recognized by the international community of States as a whole, were two essential conditions for a norm to acquire the status of *jus cogens*.

11. Article 53 of the 1969 Vienna Convention unequivocally established that a *jus cogens* norm was a norm of general international law. *A priori*, his response to the questions of whether regional *jus cogens* might exist and whether the persistent objector rule could be applied to *jus cogens* would thus be a categorical "no", but he did not exclude the possibility of considering those questions at a later stage, as envisaged by the Special Rapporteur.

12. As to the form of the outcome of the Commission's work on the topic, draft conclusions did indeed appear to be the most appropriate option. The conclusions and the commentaries thereto should reflect the current law and practice on *jus cogens* norms and contain information on how to determine their existence and content. The three draft conclusions required several changes, which could be made by the Drafting Committee. Draft conclusion 2, in particular, should be reworded, and paragraph 1 thereof should perhaps be moved to the commentaries. Draft conclusion 2, paragraph 2, should be placed after the definition of *jus cogens*, which should reflect the wording of article 53 of the 1969 Vienna Convention and the elements of draft conclusion 3, paragraph 2.

13. Lastly, he endorsed the programme of work, even though it exceeded the scope of article 53 of the 1969 Vienna Convention, which, it should be recalled, had been drafted more than half a century before. He supported the referral of the three draft conclusions to the Drafting Committee and hoped that the text of the draft conclusions on the scope and definition of *jus cogens* norms could be agreed upon at the current session.

14. Mr. VÁZQUEZ-BERMÚDEZ said that he wished to thank the Special Rapporteur for his excellent first report on *jus cogens* which, thanks to the in-depth analysis that it contained and the extensive research on which it was based, provided a solid foundation for the Commission's discussions on that important topic. Regarding the scope of the topic, he recalled that the syllabus provided for the consideration of four main issues: the nature of *jus cogens*; the requirements for the identification of *jus cogens*; an illustrative list of norms that had acquired that status; and the consequences or effects of *jus cogens*. Although it had already examined various issues related to *jus cogens* in its previous work, including on the law of treaties,[371] the responsibility of States for internationally wrongful acts,[372] the fragmentation of international law,[373] the responsibility of international organizations[374] and the Guide to Practice on Reservations to Treaties,[375] the Commission had never before undertaken the study of *jus cogens* as a topic in its own right. It was an opportunity for the Commission to deal with the topic as broadly as possible, without necessarily limiting itself to the four issues in the syllabus. As stated by Mr. Murase and other members of the Commission, the study of the topic must go beyond the scope of the law of treaties and cover the law of the responsibility of both States and international organizations for internationally wrongful acts, which the Special Rapporteur could be expected to address in his report on the consequences or effects of *jus cogens*. Indeed, when a norm was considered as *jus cogens*, the rights and obligations to which it referred were protected to a greater extent than those which stemmed from norms and principles that were not of a peremptory nature, as in the case of the law of the responsibility of States for internationally wrongful acts. *Jus cogens* norms should also be studied in relation to unilateral acts.

15. In the light of those considerations, and given that it had already drawn up lists of examples of *jus cogens* norms in the context of other work, the Commission should *a fortiori* compile one as part of the study of *jus cogens*. The content of specific *jus cogens* norms

[371] The draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966) with commentaries thereto are reproduced in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*, para. 38.

[372] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[373] For the conclusions of the Study Group on the fragmentation of international law, see *Yearbook ... 2006*, vol. II (Part Two), pp. 177 *et seq.*, para. 251.

[374] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

[375] The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq.* See also General Assembly resolution 68/111 of 16 December 2013, annex.

could also be a useful source of information for characterizing *jus cogens* norms in general. The Commission should use all the documents and sources at its disposal, namely treaties, State practice, national and international case law and writings.

16. Over the previous two decades, jurisprudence related to *jus cogens* had developed, including within the International Court of Justice, international criminal tribunals and national and regional courts. The Special Rapporteur referred, in his first report, to numerous examples of judgments – delivered by, among others, the Inter-American Court of Human Rights – in which specific norms had been recognized as *jus cogens* norms, for example the prohibition of enforced disappearance and access to justice in *Goiburú et al.* v. *Paraguay* and the prohibition of crimes against humanity in *Almonacid-Arellano et al.* v. *Chile*. In its advisory opinion OC-18/03 (*Juridical Condition and Rights of Undocumented Migrants*), the Inter-American Court of Human Rights had also asserted that the principle of equality before the law, equal protection before the law and non-discrimination belonged to *jus cogens*, because the whole legal structure of national and international public order rested on it, and it permeated all laws. The wealth of jurisprudence would need to be further analysed as the study of the core elements of *jus cogens* norms progressed.

17. As to the methodology, the Commission should keep to its usual practice of not revisiting approved draft conclusions prior to their adoption on first reading, unless absolutely necessary in order to ensure the consistency of the text as a whole.

18. The chapter of the first report devoted to the historical evolution of the concept of *jus cogens* and to the different legal doctrines that had attempted to explain the foundation for the concept was highly instructive and based on a considerable amount of research, for which the Special Rapporteur should be commended. The report showed that, when the 1969 Vienna Convention had been adopted, the concept of peremptory norms of international law had already been a part of international law. Currently, *jus cogens* was unquestionably an established and essential notion in international law. The emergence of peremptory norms of general international law contributed to the progressive development of an international public order that legally protected the fundamental values and interests of the international community as a whole. The content of the rights and obligations stemming from those norms was of paramount importance for the international community, which therefore recognized them as peremptory norms from which no derogation was permitted.

19. In his analysis of the nature of *jus cogens*, the Special Rapporteur provided some interesting information about the doctrinal debate on the theoretical basis for the peremptory character of *jus cogens*, while pointing out that, for the purposes of the topic, there was no need to resolve the debate. He himself did not, however, agree that customary international law was consent-based, a conclusion that the Special Rapporteur drew from an analysis of the jurisprudence of the International Court of Justice, which, he said, seemed at times to "rely on positivist and consent-based thinking". In particular, he could not go along with the Special Rapporteur when he said, with regard to the Court's judgment in *Questions relating to the Obligation to Prosecute or Extradite*, that the Court had "adopted what might be interpreted as a consent-based approach to the identification of *jus cogens*, at least to the extent that customary international law is seen as consent based", when the Court had in fact held that the prohibition of torture was "grounded in a widespread international practice and on the *opinio juris* of States" (para. 99 of the judgment). Even though, in the judgments cited in paragraph 55 and the antepenultimate footnote to the same paragraph, the Inter-American Court of Human Rights had focused on consent as a basis for the peremptory character of certain norms, that did not mean that consent was indeed the basis for *jus cogens*.

20. It should be recalled that, as the International Court of Justice itself had said, norms of customary international law originated from a general practice accepted as law, in other words a general practice undertaken with a sense of legal right or obligation. They were defined in the same way in the draft conclusions on the identification of customary international law adopted by the Commission on first reading.[376]

21. *Jus cogens* norms were essentially norms of customary international law applicable to all subjects of international law, including States and international organizations. While they could be embodied in treaties, as the prohibition of the use of force was in the Charter of the United Nations, it was through their consolidation or crystallization as norms of customary international law, before or after the adoption of a treaty, that they acquired the character of peremptory norms of general international law. As confirmed by the Commission, a treaty could reflect a rule of customary international law, lead to the crystallization of a customary rule or generate a new rule of customary international law by giving rise to a general practice accepted as law. Rules of customary international law could be contained in treaties that had achieved universal or near-universal ratification, in which case customary rules and treaty rules coexisted.

22. That said, a *jus cogens* norm was not an ordinary norm of customary international law. The existence of a general practice of States accepted as law was not enough; there must be not only a sense of legal right or obligation, but also a sense that the right or obligation had a peremptory character and was non-derogable. In other words, there must be a general practice accompanied by what might be called an *opinio juris cogens*.

23. It should be added that the general principles of law laid down in Article 38 of the Statute of the International Court of Justice were another key source of international law and thus also had the status of general international law. In that regard, the work that the Special Rapporteur planned to carry out to establish whether general principles of law could also be a source of *jus cogens* was of great importance. It would be advisable, in the near future,

[376] See the report of the Drafting Committee on the identification of customary international law (A/CN.4/L.872, available from the Commission's website, documents of the sixty-eighth session). The Commission adopted the draft conclusions on first reading on 2 June 2016 (see the 3309th meeting above, para. 5).

for the Commission to start a different stream of work on the topic of general principles of law as a source of international law, in order to clarify the nature and scope of those principles and the means of determining their content.

24. As to the core elements of *jus cogens*, he broadly agreed with the Special Rapporteur's analysis and hoped that those elements, particularly the non-derogability of *jus cogens* norms and the need for them to be "accepted and recognized by the international community … as a whole", would be examined in greater detail in the next report. Concerning the latter element, he would simply state, like Mr. Caflisch, that "acceptance" and "recognition" were not synonyms of "consent".

25. The rule set forth in article 53 of the 1969 Vienna Convention whereby a *jus cogens* norm could be modified only by a norm having the same character meant that a *jus cogens* norm could be modified only by another *jus cogens* norm, in other words another norm that protected the fundamental values of the international community and brought together all the elements of a peremptory norm of general international law.

26. He fully agreed with Mr. Caflisch that *jus cogens* norms were, by their very nature, incompatible with the doctrine of the persistent objector. It was inconceivable, for instance, that a State could evade the prohibitions of genocide or of crimes against humanity because it had persistently opposed them, since that would be tantamount to allowing it to flout the fundamental values and essential interests of the international community as a whole without facing any legal consequences whatsoever.

27. Moreover, the rules on the responsibility of States and international organizations for internationally wrongful acts provided for particular consequences for violations of *jus cogens* norms, namely that States should not recognize as lawful a situation created by such a breach and should cooperate in putting an end to the violations in question.

28. Regarding the draft conclusions, one might wonder, from reading draft conclusion 1 on the scope of the topic, whether crucial aspects such as the legal nature of *jus cogens* and its content, which were not mentioned explicitly, were included in the study of the topic. He proposed that the text be redrafted to read: "The present draft conclusions concern *jus cogens* rules, their nature and legal consequences, and the way in which these rules are to be identified."

29. As it stood, draft conclusion 2, paragraph 1, was a source of confusion rather than clarification. First, reference was made only to States and not to other subjects of international law, such as international organizations. Second, while the notion of *jus dispositivum*, which was commonly used in domestic law to distinguish between private and public law, could potentially apply to norms of international law modified through treaties, it could not apply to norms of international law modified by new norms of customary international law. Lastly, the proposed wording gave the impression that customary international law was a form of agreement, which was incorrect, as noted by Mr. Nolte. The theory likening customary international law to a tacit agreement, which had held sway until the beginning of the twentieth century, had long since been discounted. Norms of customary international law originated from a general practice accepted as law, in other words a general practice undertaken with a sense of legal right or obligation. As had already been proposed, it might be better to include and clarify the elements contained in draft conclusion 2, paragraph 1, in the commentaries.

30. Once reworded, draft conclusion 2, paragraph 2, could be inserted into draft conclusion 3, in which an attempt was made to define *jus cogens* and to provide elements concerning its legal nature. It would be preferable, in draft conclusion 3, paragraph 1, to reflect the wording of article 53 of the 1969 Vienna Convention. The Commission should consider using the expression "international community as a whole", without referring to States, so as to encompass other subjects of international law, such as international organizations, whose practice could also contribute, in certain circumstances, to the formation of norms of customary international law. It should be noted that the expression was frequently used in the articles, commentaries and other texts adopted by the Commission.

31. Rather than merely reproducing the language of article 53 of the 1969 Vienna Convention, draft conclusion 3 should clarify the legal nature of *jus cogens*. In that respect, paragraph 2 contained two important elements – norms of *jus cogens* protected the fundamental values of the international community as a whole and were hierarchically superior to other norms of international law – that had been explicitly recognized by the Trial Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor* v. *Anto Furundžija* with regard to the prohibition of torture.

32. The Commission had already had the opportunity to express its views on the hierarchical superiority of *jus cogens* norms in 2006, as part of its study on the fragmentation of international law, in the conclusions of which it had stated, with regard to recognized hierarchical relations by the substance of the rules, that a "rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law".[377]

33. Lastly, unlike those members of the Commission who considered that the possibility of regional *jus cogens* should not be excluded, he believed that, while some regional normative frameworks might provide for norms of a peremptory character, generally through treaties, that aspect did not fall within the definition of *jus cogens* itself as an element of general international law and should not be examined for the purposes of the topic, as doing so might overly broaden the scope of the work. Another aspect that should, however, be explored in subsequent reports was the relationship between *jus cogens* norms and *erga omnes* obligations. He supported the referral of draft conclusion 1, draft conclusion 2, paragraph 2, and draft conclusion 3 to the Drafting Committee.

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[377] *Yearbook ... 2006*, vol. II (Part Two), para. 251, pp. 177 *et seq.*, at p. 182, conclusion (32).

34. Mr. KOLODKIN said that the first report on *jus cogens*, which was very interesting and well substantiated, augured well for the success of the Commission's work on what was a particularly complex topic. The Special Rapporteur had taken the right approach by presenting the main theoretical bases for *jus cogens* in his report and by steering clear of the endless disputes over the nature of law in general and of peremptory norms of international law in particular. It was after all unlikely that the members of the Commission, who had differing views on the matter, would be prepared to change their mind during the debate.

35. He agreed with the Special Rapporteur that the outcome of the Commission's work should take the form of conclusions. Indeed, non-binding conclusions would be of great use to practitioners in resolving the issues related to the determination of applicable law with which they inevitably were and would be confronted. In order to make them as useful as possible, the Commission should compile an illustrative list of peremptory norms of international law. When it had had the opportunity to do so some 50 years previously in the context of its work on the law of treaties, it had decided to reject that option. At the time, however, it had just begun to develop rules related to *jus cogens* norms that had only subsequently become an integral part of international law. The 1969 and the 1986 Vienna Conventions had not been in existence, nor had the draft articles on the responsibility of States for internationally wrongful acts, which contained provisions on peremptory norms. There had not yet been any national or international jurisprudence or resolutions of international organizations referring to *jus cogens* norms. The international community had not yet been convinced of the existence of certain fundamental norms from which no derogation was permitted. In the light of those circumstances, should the Commission proceed as if nothing had changed over the previous 50 years and once again decide against compiling an illustrative list of peremptory norms of international law for the benefit of States? It seemed to him that a list would be very helpful and an important step forward, as it would enable domestic courts to substantiate their decisions on the determination of such norms. It must be recognized, however, that there was no consensus on the matter within the Commission, which would need to return to it at a later date.

36. Noting that the first report contained several examples of decisions by national and regional courts in which reference was made to *jus cogens*, he said that he wished to cite a few examples of decisions taken by courts in his region and country of origin. In 2003, the Supreme Court of the Russian Federation had, in a plenary decision, given judges of lower courts guidance on how to apply the universally recognized principles of international law, which, pursuant to the Constitution of the Russian Federation, were an integral part of domestic law. In so doing, it had affirmed that those principles, including universal respect for human rights and the good-faith implementation of international commitments, were fundamental peremptory norms of international law that were recognized by the international community as a whole and from which no derogation was permitted.

37. In a 2003 decision concerning a coal company in the Kuznetsk Basin region, the Court of the Eurasian Economic Community (now the Eurasian Economic Union) had referred to the peremptory character of the principle of *pacta sunt servanda*, emphasizing that any act or deed that ran counter to, or did not comply with, a court decision was null and void. It should also be noted that in 2015 the Constitutional Court of the Russian Federation, in a decision on the constitutionality of a provision of the law on the ratification of the European Convention on Human Rights and its Protocols, had indicated that the principle of the sovereign equality of States, respect for the rights inherent in State sovereignty and the principle of non-interference in the internal affairs of States were peremptory *jus cogens* norms.

38. All those decisions were highly instructive because they reflected the position of judges who had been taught the Soviet and Russian doctrines of international law, the latter of which had drawn heavily on the former. According to that doctrine, and to the judicial practice on which it was based, peremptory norms were, first and foremost, basic principles of international law; a more nuanced approach had since been adopted. In any event, he wished to point out that it had been precisely those views on *jus cogens* norms – on which the positions of the delegations of the Union of Soviet Socialist Republics (USSR) and of the federative Republics of the USSR had largely been based at the time – that had played an important role in the insertion of a provision on *jus cogens* norms in article 53 of the 1969 Vienna Convention. In that regard, he wished to draw members' attention to the fact that in paragraph 40 of the first report the Special Rapporteur stated that the United Nations Conference on the Law of Treaties had adopted a slightly modified version of the Commission's text (article 50 of the draft articles on the law of treaties[378]) as article 53. It was questionable, however, whether that was an accurate description of the differences between the two texts, which some authors had considered to be substantial. It was well known that article 53 had been split into two sentences, the second of which was currently regarded as setting out the definition of *jus cogens* norms, in other words norms accepted and recognized as such by the international community of States as a whole. That was crucial because, in that way, the very concept of the "international community as a whole" was established in law. As underlined by the Commission in paragraph (2) of the commentary to article 64 of its draft articles on the law of treaties between States and international organizations or between international organizations, "what makes a rule of *jus cogens* peremptory is that it is 'accepted and recognized by the international community of States as a whole' as having that effect".[379]

39. As to the scope of the topic, he understood that the Special Rapporteur intended to study the issue of *jus cogens* in international law in general and not only in the context of the law of treaties, which would inevitably lead him to examine, *inter alia*, the relationship between rules of *jus cogens* and rules of customary international law, general principles of law, *erga omnes* obligations, resolutions of international organizations and unilateral acts of

[378] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*, at p. 247.

[379] *Yearbook ... 1982*, vol. II (Part Two), p. 62.

States. In that context, he wished to make some remarks on the concept of derogation, which he felt was important in terms of the characteristics of rules of *jus cogens*. Currently, it was widely believed that one of the main characteristics of peremptory norms was their non-derogability, but it could also be argued that it was impossible to derogate from *erga omnes* obligations because of their nature. Non-derogability was thus a characteristic of both peremptory norms and *erga omnes* norms and obligations. However, peremptory norms differed from other rules of international law in that acts derogating from them were considered null and void, whereas acts derogating from *erga omnes* obligations engaged international responsibility but were not considered null and void – provided, of course, that those *erga omnes* obligations were not also peremptory norms of international law.

40. Generally, rules of international law authorized certain conduct, conferred a right or prescribed an act or deed. Peremptory norms were, above all, prescriptive norms, from which one could imagine there being derogations, but how could one imagine there being derogations from a peremptory norm that authorized certain conduct?

41. It was stated on several occasions in the first report that some aspects of the topic would be dealt with at a later stage. While it would have been preferable to prepare draft texts after examining the main aspects of *jus cogens*, the Special Rapporteur had chosen to propose three; he personally was not opposed in principle to the referral of draft conclusions 1 and 3 to the Drafting Committee. Draft conclusion 3 did, however, require some major changes, and he shared the view that the definition of *jus cogens* norms in paragraph 1 of the draft text should not stray too far from the one set out in article 53 of the 1969 Vienna Convention. In addition, the first sentence of that article, on the nullifying effect of *jus cogens* rules, was closely related to the definition of those rules, even though it was generally considered not to form part of it. In his opinion, its purpose was twofold: to specify the legal effects of peremptory norms and to describe their main characteristics. Admittedly, it concerned the law of treaties, but its focus was on the relationship between peremptory norms and other sources of international law. It would therefore be preferable to include it in the definition proposed in draft conclusion 3, paragraph 1, even though that aspect had not yet been examined. Lastly, he believed that it would be premature to refer draft conclusion 2 to the Drafting Committee and endorsed the criticisms voiced by those members who felt that the provisions of that draft text could appear in a commentary.

42. Mr. ŠTURMA said that he wished to thank the Special Rapporteur for his excellent first report on *jus cogens*, which was, quite rightly, introductory and largely focused on methodological issues and on the historical evolution of the concept of *jus cogens*, which was particularly welcome given the complexity and theoretical nature of the topic. While it was acknowledged that the concept of *jus cogens* fell under positive international law, the criteria for determining the existence and content of *jus cogens* rules remained controversial. The dispute between naturalists and positivists over the nature of *jus cogens* was seemingly endless. While the natural law theory had historically played a key role in promoting the concept, there were now enough new elements in contemporary international law to determine the nature and effects of *jus cogens* in positive law. He agreed with the Special Rapporteur that there was no natural law theory to *jus cogens*, just as there was no positive law theory to *jus cogens*; rather, there were natural law theories and positivist theories that could be reconciled. Martti Koskenniemi, for example, considered that the binding and peremptory force of *jus cogens* was best understood as an interaction between natural law and positivism. In his own view, however, it was the link between the content of *jus cogens* and its form that was essential in that regard, since substantive and formal conditions had to be met in order for a genuine *jus cogens* rule to exist. It was hard to deny that peremptory norms (at least within the meaning of article 53, which was the obligatory starting point for work on the topic) protected the fundamental values of the international community. However, those basic values were not in themselves sufficient to establish that a *jus cogens* rule existed. Modern positivism, unlike natural law, held that there was no direct and immediate connection between those values and peremptory norms, and that the values must be given a legal form ensuing from the consent or practice of States and from *opinio juris*.

43. In other words, *jus cogens* was also a legal technique aimed at preventing the fragmentation of certain international norms, but could not, in his view, be reduced to that alone. It might help to distinguish peremptory norms (such as the prohibition of genocide, torture or the use of force), sometimes called "public order" norms, from the other legal techniques that provided for the binding or non-binding character of other rules, or simply for their priority application. Those other rules might be non-derogable for reasons of public utility or logic, and he recalled, in that connection, the rule of inviolability of diplomatic missions and representatives, which was also set forth in the draft articles on the responsibility of States for internationally wrongful acts, or the principle of *pacta sunt servanda*.

44. He approved of the Special Rapporteur's approach, which involved starting from the definition or general nature of *jus cogens* norms before dealing, in future reports, with the question of the sources of *jus cogens*, the identification of *jus cogens* norms and their effects. Therefore, he did not understand why some members had argued that the scope of the topic was limited to the law of treaties. Given that the 1969 Vienna Convention (specifically articles 53 and 64) had been the first positive-law instrument to recognize the existence of *jus cogens* rules explicitly, the elements contained therein must serve as the starting point for work on the topic. He hoped that, when it examined the consequences of *jus cogens*, the Commission would also address the rules on State responsibility and other branches of international law.

45. He was in favour of compiling an illustrative list of *jus cogens* norms, even though doing so might pose some problems, or, at the very least, of providing examples of such norms in the annex to the draft conclusions, for a variety of methodological and practical reasons. First, it seemed difficult to identify true peremptory norms if the Commission gave no examples of *jus cogens* norms. Second, the general characteristics of, or criteria for, *jus cogens* should be supported by at least some examples

of such norms. Lastly, the necessarily non-exhaustive list would give some theoretical and practical indications and would not prevent the future development of new norms. It would also serve as a warning against the unjustified invocation, by some authors whose approach was based on natural law, of the peremptory character of norms that had not yet actually acquired that status.

46. With regard to draft conclusion 1, on the scope, he agreed that the draft conclusions should concern the way in which *jus cogens* rules were to be identified and the legal consequences flowing from them. He had not formed an opinion on the use of the word "rule" rather than "norm", but while some English-speaking members preferred the former, it was the latter that was used in article 53 of the 1969 Vienna Convention. In any event, the Commission should be consistent and use the same word throughout the draft conclusions, unless there were good reasons to use one or the other.

47. The order of draft conclusions 2 and 3 should be reversed. Indeed, the current draft conclusion 3, on the general nature of *jus cogens* norms, set out a definition, whereas draft conclusion 2 was devoted to one element of the definition of *jus cogens* norms, which, in contrast to *jus dispositivum*, could be derogated from only by a rule having the same character. With regard to harmonizing the wording of the two draft conclusions, the words "modification, derogation or abrogation" departed from the definition in article 53. There was nothing to prevent the adoption of such an approach, provided, however, that further justification was given for the choice. Draft conclusion 3, paragraph 1, which captured the elements contained in article 53, did not pose any particular problem, except that it repeated, in part, what was already said in draft conclusion 2. Judging from the comments made thus far, he believed that draft conclusion 3, paragraph 2, was the most problematic. Although he approved of the three elements contained in the paragraph, which were, in his opinion, particularly important, he believed that they could be moved to another draft conclusion supported by a more detailed analysis. As to the assertion that *jus cogens* norms protected the fundamental values of the international community, he had already expressed his full support, but that aspect could be linked to the consideration of different theories related to non-derogable norms. The issue of hierarchy was equally important, but there was a need to specify the distinctive features of the hierarchy enjoyed by *jus cogens*, which was based on the nullity of treaties that ran counter to a peremptory norm and was thus different from other types of hierarchy in international law, such as the one established by Article 103 of the Charter of the United Nations. Lastly, he supported the final element of paragraph 2, according to which norms of *jus cogens* were universally applicable, but considered that it would be necessary to explore the question of regional *jus cogens* norms, of which one of the most emblematic examples was the European Convention on Human Rights, viewed by the European Court of Human Rights as an instrument of European public order. The issue could be studied from the perspective of the relationship between *jus cogens* and the non-derogation clauses in human rights treaties. The likely conclusion would be that peremptory norms within the meaning of article 53 and of the draft conclusions under consideration must be universally applicable, but such an analysis would have the merit of clearly substantiating that statement. Lastly, he supported the referral of all the proposed draft conclusions to the Drafting Committee.

48. Mr. HMOUD said that he wished to thank the Special Rapporteur for his first report on *jus cogens*. Well written and well researched, it was based on a wealth of material and on a very detailed analysis of the historical development of the concept of *jus cogens*, its doctrinal underpinning and its core elements. The Special Rapporteur clearly indicated how he intended to proceed with and finalize his work. He had adopted a cautious yet flexible approach and had refrained from drawing predetermined conclusions about the content of the final product, which was welcome. It was clear from his introduction of his first report that the outcome of the Commission's work should be a collective effort that reflected the state of the law, State practice and jurisprudence. The topic of identification of *jus cogens* norms and their consequences, while limited in scope, raised a number of difficulties, ranging from the identification of its theoretical bases and position in the international legal architecture to the consideration of legal policy implications and the avoidance of unintended consequences. The Special Rapporteur should therefore be commended, once more, for adopting a cautious and flexible approach, thanks to which the Commission's work would contribute to a better understanding by States and the international community in general of the intricacies of *jus cogens*. The Commission should not seek to create new rules on *jus cogens*. It should also be careful not to open the door to assertions that a particular norm was *jus cogens* if those assertions were motivated by subjective considerations. Without disturbing the current structure of international law, it should take as its starting point the idea that *jus cogens* norms were not ordinary norms, but a very limited exception. In that way, it would avoid the imbalance resulting from an expansive treatment of the topic and from the adoption of rules not based on well-established practice.

49. It was tempting to deconstruct the concept of *jus cogens* in order to clarify its elements and their consequences, but it might be more judicious to describe the legal facts underpinning the concept, as reflected in State practice and in the jurisprudence of international courts and tribunals. In other words, the approach adopted could be more inductive than deductive. Although the Special Rapporteur did not wish to dwell on the theoretical debates concerning *jus cogens*, he deemed it important to describe the theoretical basis for the concept. That was, of course, crucial to gaining a better understanding of the nature of *jus cogens* but, as the Special Rapporteur and other members had stressed, the focus should be on a normative exercise based on the description of the content of *jus cogens* rules, their relationship with other rules of international law and their effects. In that regard, a distinction should be drawn between the pronouncements of international courts and tribunals, as sources for identifying *jus cogens* norms, and the practice by which States recognized *jus cogens* norms and gave them a peremptory character. The former might reveal the existence of a norm, whereas the latter was an element in its creation. That did not mean, of course, that the pronouncements

of international courts and tribunals could not trigger the emergence of a *jus cogens* norm, but it was State practice that determined its form and content. The Special Rapporteur should look more carefully at the sources of State practice and distinguish between the pronouncements and verbal acts of States that were a form of practice and those that reflected an *opinio juris* or a recognition of the peremptory character of a *jus cogens* rule.

50. Within that descriptive approach, there was no reason not to include, within the scope of the topic, a non-exhaustive list of *jus cogens* norms that were currently recognized by the international community. That did not in any way contradict the nature of the work undertaken by the Commission or its purpose, which was to provide guidance on how to identify *jus cogens* norms. In the draft articles on the effects of armed conflicts on treaties, the Commission had specified the criteria for terminating, suspending or withdrawing from treaties, but had also compiled a list of treaties that were presumed, because of their subject matter, to continue in operation during armed conflict. Thus, laying down the criteria for identifying a *jus cogens* norm did not preclude the establishment of an indicative list, and he failed to see how such a list could become closed. It would not be binding on States and other actors and would assist them in applying the criteria set out in the draft conclusions in order to identify *jus cogens* norms. Its legal value would depend on how it was presented by the Commission, which could decide to be less prescriptive by indicating that the list gave examples of *jus cogens* norms drawn from the Commission's work on the topic.

51. The historical evolution of the concept of *jus cogens* showed that the international community now recognized its legal validity. Nevertheless, it should be recalled that the recognition of *jus cogens* essentially stemmed from the adoption of the 1969 Vienna Convention and from article 53 thereof, which raised the question of whether the treatment of the concept of *jus cogens* should focus on its relationship with the law of treaties and with the ability of the State to assume certain treaty obligations. Of course, the issue of *jus cogens* went beyond its relationship with the law of treaties, as it was based on the prohibition of acts that ran counter to it, which had particular consequences. To put the concept into historical perspective, believers in both natural and positive law had considered from the outset that States could not derogate from their *jus cogens* obligations. It was important to decide on the matter so as to understand how *jus cogens* norms were created and the consequences of their existence. If such a norm could be modified or derogated from only by a norm of international law having the same character but, at the same time, any practice contrary to that norm was null and void, how could a subsequent norm be created to replace the existing one? How could the international community, which recognized *jus cogens* norms, withdraw that recognition? Was a universal treaty that modified or derogated from a *jus cogens* norm legally valid? Article 53 of the 1969 Vienna Convention provided a negative answer, but if State practice could not violate an existing norm and universal treaties that contradicted *jus cogens* were null and void, it was impossible to modify or derogate from the norm. Since there were no examples of subsequent *jus cogens* norms replacing previous norms, it was essential to examine the process by which the international community could do so, including through the creation of a new norm by common agreement.

52. The historical evolution of the concept of *jus cogens* raised the question of who determined the fundamental values shared by the international community as a whole. Courts naturally had a role to play in that regard, but it was the international community as a whole that recognized the norm and determined its content. As a result, the project should also deal with the relationship between the existence of fundamental values underlying a *jus cogens* norm and the expression of their existence.

53. Returning to the theoretical basis for the peremptory character of *jus cogens*, he said that neither the natural law approach nor the positivist approach offered a satisfactory explanation of its nature. Natural law held that essential values of the international community existed independently of the will of the State and lay at the root of the hierarchical superiority of *jus cogens*. However, that approach ignored an essential constitutive element of *jus cogens*, namely that it was the common recognition and acceptance by States as a whole that elevated the norm in question to the status of *jus cogens*, and also failed to explain how a norm modifying or derogating from a *jus cogens* norm could be created by the will of the international community of States. By contrast, the positivist school placed emphasis on the role of the consent and will of States in the creation of the norm, but did not explain why, once the norm had been created, its peremptory character did not depend on the will of any State. It was clear from the background material that States and international courts, including the International Court of Justice, had not given an explicit opinion on the basis for *jus cogens* or on its peremptory character. How, then, could that theoretical uncertainty be resolved? An easy solution would be to merge the two doctrines or to adapt the natural-law approach to a positivist framework. While the theoretical basis for *jus cogens* was clearly useful for understanding its nature, it was not essential, for the purposes of the topic, to adopt a particular theoretical approach. The Commission should study the conditions for the creation of *jus cogens* rules, how to identify them and their consequences. It should also clarify the relationship between the will of States to recognize a *jus cogens* rule and the modification of that rule as part of a descriptive approach to the state of the law on *jus cogens*, bearing in mind available practice and jurisprudence without taking a position on either of the theoretical bases for *jus cogens*.

54. Regarding the core elements of *jus cogens* and the draft conclusions as contained in the first report, he wished to make a few comments about paragraph 61 of the report, which described the elements of *jus cogens* set out in article 53 of the 1969 Vienna Convention. He was not sure, first of all, whether those elements were exhaustive or whether, as stated in the report, practice and doctrine revealed other key elements that characterized *jus cogens*. While article 53 of the 1969 Vienna Convention defined *jus cogens* for the purposes of that instrument, he wondered whether it was appropriate, at the current stage of the Commission's work, to include in the draft conclusions a description of the concept that did not necessarily

match the content of article 53. Moreover, although he agreed that *jus cogens* norms were universally applicable, that point would need to be discussed in a future report, in connection with the consequences of such norms. It was against that background that related issues, such as the doctrine of the persistent objector and the possibility of regional *jus cogens*, could be explored. However, stating that *jus cogens* norms were universally applicable without examining the basis for them would be tantamount to prejudging the issue of their consequences, including with regard to the persistent objector and regional *jus cogens*. The same could be said about hierarchical superiority. While it was established that a treaty was or became void if it conflicted with a *jus cogens* norm and that *jus cogens* norms were superior to other norms, it was nevertheless crucial to analyse further the relationship between *jus cogens* norms and other norms of general international law. He also agreed that *jus cogens* norms aimed to protect fundamental values of the international community, such as the prohibition of genocide or torture. That statement, however, did not reveal anything about the content of the fundamental values purportedly being protected. Were there any international constitutional principles that were protected by *jus cogens*? Those issues warranted further analysis and should, in any event, be addressed in the commentaries. Concerning the elements set out in article 53, he wondered whether the "non-derogable" character of *jus cogens* norms was part of their nature or simply a consequence of their belonging to the category of *jus cogens*, it being understood that non-derogability, together with acceptance and recognition by the international community as a whole, should be considered a single element. In addition, assuming that it was a constitutive element of *jus cogens*, the requirement that *jus cogens* could be modified only by a subsequent norm of general international law having the same character should also be included. In the light of those considerations, he agreed to the referral of draft conclusion 1 to the Drafting Committee provided that it addressed the identification of not only *jus cogens* rules but also their elements.

55. Draft conclusions 2 and 3 should be reformulated to reflect the content of article 53 of the 1969 Vienna Convention and to avoid any possible contradiction between draft conclusion 2, paragraph 2, and draft conclusion 3, paragraph 1. Noting, with regard to modification by subsequent norms, that the 1969 Vienna Convention was based on the idea that subsequent norms derogated from earlier norms, he said that he would prefer the Commission not to deviate from the wording of article 53, as doing so might upset the balance of the article and needlessly give the impression that the Commission had undertaken to modify the Convention. Given that the topic under consideration was not about derogation from, or the modification or abrogation of, rules of international law, draft conclusion 2, paragraph 1, should be deleted. The referral of draft conclusion 3, paragraph 2, to the Drafting Committee should be deferred until the superiority and universal applicability of *jus cogens* norms had been studied in greater depth.

56. Ms. JACOBSSON said that she wished to congratulate the Special Rapporteur on his first report on *jus cogens*, which was underpinned by an impressive body of research, and on his thorough and informative introduction of it, complete with welcome modifications to some of the proposed draft conclusions. Although the topic did not lend itself to codification, it was important and should be the subject of a detailed study by the Commission, for the reasons given by the Special Rapporteur in his first report and those put forward during the discussions of the Working Group on the long-term programme of work, which had helped to shape the final syllabus.

57. Starting with some general remarks, she noted that the Special Rapporteur had very skilfully condensed the historical evolution of *jus cogens* into a few pages, thereby providing an essential foundation for the Commission's future work on the topic. It was crucial to place *jus cogens* in its historical context in order to analyse "the state of international law on *jus cogens*" and to provide an authoritative statement of its nature, as that was the aim of the project as described in the syllabus annexed to the report of the Commission on the work of its sixty-sixth session.[380] Work on the topic would present some methodological challenges, such as the apparent paucity of State practice, of which the Special Rapporteur was well aware and to which he had responded in a satisfactory manner in the report and in his introduction of it. He was right to point out, in paragraph 45 of the first report, that what was important for the purposes of the Commission's work was whether *jus cogens* found support in the practice of States and jurisprudence of international and national courts.

58. The Special Rapporteur had asked the members of the Commission whether they felt that it would be appropriate to compile an illustrative list of *jus cogens* norms or whether it would suffice to identify the elements of *jus cogens*. She was highly sceptical about including such a list, for several reasons. Experience showed that, as well as being time-consuming, the establishment of a list, even an indicative or open-ended one, entailed making a final choice as to which elements should or should not be included. One might recall, in that regard, the discussions on the indicative list of treaties the subject matter of which involved an implication that they continued in operation, in whole or in part, during armed conflict, which was annexed to the draft articles on the effects of armed conflicts on treaties. All the norms that might be included in the initial list would have to convince the members of the Commission. Those that were included would be regarded not only as the first generation of *jus cogens* norms but also as hard-core *jus cogens* norms. It would thus be difficult to add new norms – or to modify existing norms, if that was ever considered a possibility for *jus cogens* – on the basis of, for example, convincing jurisprudence to the contrary, so even an illustrative list risked freezing the state of the law. She wished to make it clear, however, that her objections were driven not by a desire to see a never-ending expansion of *jus cogens* norms, but, on the contrary, by a belief that one of the key tasks at hand for the Commission was to ensure that the value of other (non-peremptory) rules of international law was not diluted just because they were not considered to belong to *jus cogens*. The syllabus suggested that the Commission's consideration of the topic could focus on four elements, namely the nature of *jus cogens*, the requirements for the identification of a norm as *jus cogens* (in paragraph 12

[380] See *Yearbook ... 2014*, vol. II (Part Two), annex, p. 173, para. 13.

of the first report, the Special Rapporteur referred to "the requirements for the elevation of a norm to the status of *jus cogens*", which was not the same), the establishment of an illustrative list of norms that had achieved the status of *jus cogens*, and the consequences or effects of *jus cogens*. In paragraphs 12 and 13 of his first report, the Special Rapporteur emphasized the links between the different elements and stated that he intended to adopt a fluid and flexible approach. If that was done – and the Special Rapporteur did indeed appear to have moved in that direction – the focus should be on the requirements for identification. Otherwise, there was a danger that the Commission's work would be centred on the question of which norms could be recognized as belonging to *jus cogens* and not on the constitutive elements of *jus cogens*. Once those elements had been identified, they could be exemplified in the commentaries, which would be far better than having a list. In that respect, she shared Mr. Nolte's concerns about the overeagerness to list certain key legal rules as *jus cogens* rules on the basis of claims that they belonged to that category. In his statement, Mr. Nolte had mentioned the case of *Al-Dulimi and Montana Management Inc.* v. *Switzerland*, in which the European Court of Human Rights had found that the right of access to a court was not – yet – a *jus cogens* norm. In her work as a legal adviser, she had witnessed similar attempts by parties to a particular case to elevate certain rules to the status of *jus cogens*, and that trend could also be seen in the debate on the status of various human rights. She therefore agreed wholeheartedly with Mr. Nolte that the case of *Al-Dulimi and Montana Management Inc.* v. *Switzerland*, among others, demonstrated that currently the challenge was not to establish what norms belonged to *jus cogens* in order simply to add to them, but to find the right balance between, on the one hand, ordinary rules of international law that could be modified through regular procedures and, on the other, certain exceptional, foundational rules that could not. The topic under consideration should not serve as a tool for promoting and expanding *jus cogens*. Rather, the Commission's central task should be to safeguard the rule of law at all levels, whether that involved protecting *jus dispositivum* or taking a restrictive view on what constituted a *jus cogens* norm. *Jus cogens* norms were, and should remain, the exception; otherwise, they would lose their value.

59. While it was important to analyse the historical background to the concept, and stimulating to examine its theoretical underpinnings, the Special Rapporteur was correct in saying, in paragraph 42 of his first report, that the Commission needed to focus on a practical understanding of the nature of *jus cogens*. In that regard, the 1969 Vienna Convention offered a fitting solution to all practical challenges, and taking it as the starting point for the Commission's work would not amount to limiting that work to the law of treaties. On the contrary, it was recognized in article 64 of the Convention, in a manner that was particularly relevant to the topic under consideration, that a new peremptory norm could emerge in parallel with existing treaty law, the effect of which would be that "any existing treaty which is in conflict with that norm becomes void and terminates".

60. Turning to the draft conclusions, she said that, although she supported the idea of having a short and focused draft conclusion on the scope, and welcomed draft conclusion 1, on the condition that the word "rules" was replaced with "norms", the text could be shortened to read: "The present draft conclusions concern how *jus cogens* norms are to be identified, and the legal consequences flowing from them." With regard to draft conclusion 2, she was concerned that devoting a general provision to the modification and abrogation of, and derogation from, rules of international law might be confusing. If (and since) the focus of the Commission's work was on the state of *jus cogens* norms and of international law, it should be assumed that there were other rules of international law that could be modified or abrogated. To embark on an examination of how that modification or abrogation could come about would be to address a different, albeit connected, topic. Draft conclusion 2, paragraph 2, was related to draft conclusion 3, paragraph 1. If the Commission decided that draft conclusion 2, paragraph 1, was not needed, the "exception" issue in draft conclusion 2, paragraph 2, could be set aside, which would be preferable. Draft conclusion 3 was a good starting point for describing what constituted the essence of a peremptory norm. She had doubts, however, as to the advisability of straying from the definition in the 1969 Vienna Convention for several reasons, even though, as stated clearly in article 53, that definition was for the purposes of the Convention. Needless to say, there was always a "risk", when a definition of a norm or concept was included in a treaty, that it would be perceived as general and valid also for purposes outside the context of the treaty. That was true of the definition of crimes against humanity in the Rome Statute of the International Criminal Court, from which the Commission now struggled to deviate. However, a definition sometimes deserved to be recognized outside the scope of the treaty in which it appeared, as was the case of the definition of peremptory norms in the 1969 Vienna Convention, not least because it had long been used by courts. While she supported the inclusion of draft conclusion 3, paragraph 2, its wording should be refined, particularly the expression "hierarchically superior" and the phrase "universally applicable" should be retained, even if the Commission decided that it would also address the possible existence of regional *jus cogens* norms. It would also be better to replace the word "protect" with "reflect". The reference to fundamental values of the international community was essential; what did *jus cogens* norms reflect if not precisely those values, and what would be their purpose otherwise? Those fundamental values were not confined to human rights; they included other norms, such as the prohibition of aggression, whose aim was to preserve the sovereignty and equality of States, and their obligation to settle disputes by peaceful means. She was in favour of referring all the draft conclusions to the Drafting Committee, despite her reservations about the need for draft conclusion 2, which it would, however, be premature to delete at that stage.

61. Before concluding, she wished to make two additional comments about the methodology and the sources. First, the Special Rapporteur should make further use of the Commission's work on the fragmentation of international law; much of the work carried out by the Study Group, in particular on issues such as the hierarchy of norms, the relationship between *jus cogens* norms and *erga omnes* obligations, and the connection between *jus cogens* and State responsibility, should be further

taken into consideration. Although the Commission had devoted a considerable amount of work to the study of the fragmentation of international law, not all of that work was easily accessible, as it had not been published in the traditional sense of the word, and failing to take full advantage of it would be regrettable. Second, the purpose of *jus cogens* norms was often to protect individuals and, given their nature, they should be universal and offer equal protection to men and women. That matter had been addressed by Hilary Charlesworth and Christine Chinkin,[381] who had argued that the human rights principles most frequently designated as *jus cogens* norms were gendered and therefore did not protect men and women equally. For instance, focusing on protection from abuse by State actors left women at a disadvantage, since most cases of violence against women occurred in the private sphere. Other authors such as Philip Alston and Bruno Simma had also dealt with the issue, which the Special Rapporteur and the Commission should take into consideration in their future work on the topic.

62. Mr. SINGH said that he wished to thank the Special Rapporteur for his excellent first report on *jus cogens*, which was the result of in-depth research and contained very rich analyses, and for his oral introduction of it. He was pleased to read that the Special Rapporteur agreed with the words of caution expressed by States in the Sixth Committee and that he intended to ensure that his reports reflected contemporary practice and did not stray into untested theories. Moreover, many States were of the view that the greatest contribution that the Commission could make to the understanding of *jus cogens* concerned the requirements for the elevation of a norm to the status of *jus cogens*. As to the methodological issue of the sequence of the study, he agreed with Sir Michael, Mr. Nolte and other members that the "fluid and flexible approach" proposed by the Special Rapporteur was problematic, because as soon as a draft conclusion was provisionally adopted, it ceased to be "fluid" and its modification would require another decision by the Commission. When certain draft conclusions were closely interconnected, it would be preferable to wait for them to be adopted together, as a full set of provisions. He shared the doubts expressed in the Sixth Committee and by some members of the Commission over the wisdom of establishing an illustrative list, the risk being that other norms of international law would in effect be accorded an inferior status. Although the matter was mentioned in the syllabus, the Special Rapporteur, while stating that the Commission should not refrain from producing such a list only because it might be misinterpreted as being exhaustive, noted in paragraphs 15 and 16 of his first report that there might be different reasons to reconsider the appropriateness of a list. He himself agreed, however, that even if it did not compile an illustrative list, the Commission would need to provide some examples of *jus cogens* norms in order to provide some guidance about what norms constituted *jus cogens*. In other words, as noted in paragraph 17 of the first report, by addressing various elements of the topic, the Commission would need to provide examples in the commentaries to substantiate its conclusions, which meant that it would, even if only indirectly, establish an illustrative list.

[381] See H. Charlesworth and C. Chinkin, "The gender of *jus cogens*", *Human Rights Quarterly*, vol. 15, No. 1 (February 1993), pp. 63–76, at p. 75.

63. In chapter IV, section A, of his first report, the Special Rapporteur convincingly demonstrated, on the basis of State practice and case law, that *jus cogens* was now part of international law. It was on that solid foundation that the Commission's work on the topic was based. As to chapter V, he agreed with the Special Rapporteur that draft conclusions would be the most appropriate outcome of the Commission's work and that the draft conclusions should reflect the current law and practice on *jus cogens* and avoid the theoretical debates that often accompanied discussions on the topic.

64. Turning to the draft conclusions, he said that draft conclusion 1 reflected the object of the work as described in paragraph 11 of the first report, namely "to provide a set of conclusions that reflect the current state of international law relating to *jus cogens*". Like other members, however, he had doubts about the usefulness of draft conclusion 2, since, to the extent that it appeared to be trying to explain how rules of international law were modified, abrogated or derogated from and why *jus cogens* was different in that regard, it did not appear to fall within the scope of the topic. Concerning draft conclusion 3, he agreed with those members who had stated that it would be better to include a definition of *jus cogens* at the start of the draft conclusions than to attempt to explain its "[g]eneral nature", and he also believed that, in defining *jus cogens*, the Commission should follow the wording of the second sentence of article 53 of the 1969 Vienna Convention, without trying to change it or to come up with a new definition. Draft conclusion 3, paragraph 2, was problematic in that it was not clear how describing *jus cogens* norms as "hierarchically superior to other norms of international law" enhanced their peremptory nature or non-derogability, as set out in article 53 of the 1969 Vienna Convention. The matter should be dealt with at a later stage of the work, when the Special Rapporteur addressed the issue of the legal consequences of *jus cogens* rules. It was also unclear what was meant by "fundamental values of the international community" and how they could be identified.

65. Mr. VALENCIA-OSPINA said that he wished to congratulate the Special Rapporteur on his first report on *jus cogens* and recalled that, while it was an important and sensitive topic, it was not being dealt with for the first time by the Commission. It was thanks precisely to the Commission's work on the law of treaties that the concept of *jus cogens* had found its way into positive international law, and the Commission had also made a significant contribution to the identification of *jus cogens* in its work on other topics, in particular the responsibility of States for internationally wrongful acts and the fragmentation of international law. Given the highly controversial nature of the topic, it came as no surprise that there had already been a wide-ranging debate. Without repeating what had already been said, he intended to focus his observations on certain issues that seemed to him to call for an approach different from the one taken by the Special Rapporteur.

66. The question of the extent to which the Commission's work on the topic should be informed by theory was fundamental. It seemed, from paragraphs 11 and 73 of his first report, that the Special Rapporteur was afraid of straying into theoretical considerations and, from paragraph 59,

that he did not want to resolve the theoretical debate on the source of the peremptory character of *jus cogens*, even though he devoted an entire section (section B of chapter IV) of his first report to the issue. He himself did not support that approach, for two main reasons.

67. First, it was essential for the Commission to take a clear position on certain theoretical issues, including the question of whether to revive the not only useful but also central idea of providing a list of *jus cogens* norms, irrespective of the illustrative or indicative character of that list. Two decades previously, the Commission had decided to identify certain norms that had a particularly close link with the concept of State crime as belonging to *jus cogens*, incorporating them into article 19 of the draft articles on State responsibility adopted on first reading.[382] The Special Rapporteur was right to point out, in chapter II of his first report, on methodology, that the theoretical underpinnings of *jus cogens* would have an impact on the definition given to *jus cogens* for the purposes of the Commission's work. Therefore, unlike other members who had spoken earlier, he believed that the Special Rapporteur should not be wary of theory; rather, he should embrace it. When compared to the depth and breadth of the scholarly discourse on *jus cogens*, relevant practice, whether that of States or courts, remained fairly limited. Regarding judicial practice, it should be noted that, for almost 40 years following the adoption of the 1969 Vienna Convention, the International Court of Justice had skilfully eschewed making a clear and firm pronouncement on its conception of *jus cogens*. In its jurisprudence, references to *jus cogens* prior to the 2006 judgment in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* had been merely neutral citations from the pleadings of the parties or from the Commission's draft articles on the law of treaties and the commentaries thereto, as in the case of *Military and Paramilitary Activities in and against Nicaragua*. As a result, the Commission might find itself in a situation where, since even that limited practice was largely shaped by previous theoretical considerations, ignoring the theory would inevitably lead to an incomplete assessment of contemporary *jus cogens*.

68. Second, even though the Special Rapporteur repeatedly stressed his intention not to enter into theoretical debates, he himself agreed with Mr. McRae that important theoretical choices had already been made in the first report. In particular, the understanding of *jus cogens* advanced in the report was firmly grounded in consent, insofar as it largely reproduced the definition contained in article 53 of the 1969 Vienna Convention. It would therefore be advantageous to address that choice openly in the light of its theoretical underpinnings, instead of basing it only on an alleged practice and omitting the theoretical explanation. Furthermore, it became necessary for the Special Rapporteur to explain his choice when he expanded on his uncritical adoption of the approach to *jus cogens* in the Vienna Convention, which reflected the consensus reached by States in the 1950s. It was doubtful that this consensus still represented the approach most conducive to defining peremptory norms in international law, if it ever had. Sir Michael had observed that the Commission had always followed article 53 of the 1969 Vienna Convention when mentioning *jus cogens*, but in all those cases, the references had been incidental, as *jus cogens* had not yet been included in the programme of work as a separate topic. Despite the value that he attached to consistency in the Commission's work, he considered that the previous occasions on which the Commission had dealt with *jus cogens* should not deter it from reviewing its position now that the topic was the very focus of its work.

69. The approach taken by the Special Rapporteur in section C of chapter IV of his first report, on the core elements of *jus cogens*, was also problematic. By taking the requirement of "a norm accepted and recognized by the international community of States as a whole" from article 53 of the 1969 Vienna Convention, the Special Rapporteur included among the core elements of *jus cogens* a criterion for identification centred on consent. However, some of the limitations of a consent-based approach were highlighted in the report itself, in relation to the issue of States" inability to withdraw their consent at a later stage. As indicated in paragraph 53 of the first report, "[e]ven if there were a way to address the question of emergence of peremptory rules through consent – or consensus – it is not clear why those States that have joined in the consensus could not later withdraw their consent, thus damaging the consensus". Ultimately, basing *jus cogens* on State consent failed to provide a plausible explanation of what made a peremptory norm peremptory. Several members of the Commission had established a connection between the core elements of *jus cogens* identified in the report and the concept of customary international law that was being examined in parallel by the Commission. The recurring issue of the treatment of persistent objectors attested to the pertinence of that comparison. According to their reasoning, *jus cogens* could be described as customary law plus non-derogability. The element of consent would thus be similar to *opinio juris*. Nevertheless, viewing *jus cogens* as customary law, albeit a special form of it, appeared to overstretch the traditional concept of customary international law, which required both practice and *opinio juris*, since State practice was lacking or contradictory for many norms considered to be *jus cogens*. In addition, it was debatable whether it was possible in practice 1to achieve the unanimous general consent (*opinio juris*) of all States, or the "international community of States as a whole". It should be borne in mind that article 53 of the 1969 Vienna Convention had not been adopted unanimously at the United Nations Conference on the Law of Treaties and that, of the seven States that had voted against its adoption in plenary, two had yet to become parties to the Convention.

70. If the Commission were, however, to retain the criterion of consent, its decision would need to be substantiated by coherent reasoning. As a final remark on the issue of consent, he said that the Commission should not overlook its parallel debates on topics such as crimes against humanity and the immunity of State officials from foreign criminal jurisdiction. There was undoubtedly a strong link between *jus cogens* norms and human rights norms. The latter frequently suffered from the fact that law-making and law enforcement were in the hands of States, which were also the main, and sometimes by definition the only

[382] *Yearbook ... 1980*, vol. II (Part Two), para. 34, pp. 30 *et seq.*, at p. 32.

perpetrators of human rights violations. The reluctance displayed by States in the debates concerning the Commission's ongoing work on those topics, for example to accept limitations to the immunity of their officials, might foreshadow a similar reluctance to consent to *jus cogens* norms, which could considerably restrict States' actions or give rise to State responsibility. Thus, a consent-based approach, as the lowest common denominator, could prove to be the only feasible way for the Commission to attain the requisite endorsement by States of the outcome of its work on the topic. The Special Rapporteur and the Commission would therefore be well advised to give careful consideration to whether to aim for the most acceptable outcome or the one that the Commission would deem the most coherent, bearing in mind the fundamental role that it had been given with regard to the progressive development of international law.

71. Concerning values as a core element of *jus cogens* norms, the questions arose as to how and by whom those values were supposed to be identified. If that element was meant to add substantially to the definition of *jus cogens*, it seemed counterintuitive to leave its determination entirely in the hands of States, as it might become indistinguishable from the consent of States to certain *jus cogens* norms. In that context, the first report mentioned both the international community and the international law community, which seemed to indicate that the Special Rapporteur did not necessarily see the community in which the values had validity as being identical to the community of all States. Unfortunately, the report provided no clues as to which community was being referred to. The observation that "the primary difficulty remains the question of who determines the content of natural law" made a cameo appearance, and the issue of the identification of values was further complicated by the reference in the report to the civilizing essence or purpose of those values, which connected the topic to the ubiquitous discourse opposing cultural relativism to the universality of international law. The Special Rapporteur's departure from article 53 of the 1969 Vienna Convention in that respect was understandable, but the role of values in the definition and identification of *jus cogens* called for much greater explanation and analysis if it was to contribute to the work on the topic.

72. The first report also focused strongly on the contrast between natural law and positive law, thereby implicitly subsuming value-based approaches under approaches based on natural law. The rebuttal of the latter was based mainly on an aspect said to be specific to natural law, namely its immutability, but the report did not explain the extent to which the same applied to other value-based understandings of *jus cogens*. One could therefore consider natural law to be a possible source of values, but not subsume all value-based approaches under natural law. The distinction between consent- and non-consent-based approaches mentioned in the footnote to paragraph 50 seemed more appropriate.

73. In addition, it might be interesting, in that context, to discuss the relationship between the concepts of *jus cogens* and *erga omnes* obligations, but the Special Rapporteur indicated in paragraph 4 of his first report that he intended to examine that relationship only in the context of the consequences of *jus cogens* norms. Yet *erga omnes* obligations, since their first appearance in an *obiter dictum* in the judgment handed down in the *Barcelona Traction* case, were often understood as protecting basic values and interests common to all, which was why a discussion of that relationship as part of a values-based analysis of *jus cogens* could shed light on the nature of the values thus invoked.

74. Lastly, the question of hierarchy gave rise to three observations. As underlined by several members of the Commission, the hierarchical superiority of *jus cogens* norms was already well established, not to say obvious. The Commission's report on the fragmentation of international law attested to that hierarchical relationship; the lack of firm and clear determinations in most parts of that report was indicative of the Commission's almost unequivocal acceptance of that hierarchy. Second, in a more philosophical vein, the question arose as to whether that hierarchical superiority was inherent to the concept of *jus cogens*, or whether it required an external framework of hierarchies in international law. If the latter was true, there would, third, need to be a reality check: was the number of hierarchical structures in international law and international relations increasing, or was the idea of hierarchically structured international law and international relations – probably inspired by the Westphalian conception of the State – ever more unrealistic? The answers to those questions should help the Commission to determine how much emphasis to place on hierarchy in the context of *jus cogens*.

75. To conclude, he invited the Special Rapporteur to consider theoretical questions and to look outside the narrow frame of article 53 of the 1969 Vienna Convention. As Mr. Murphy had emphasized at a previous meeting, drawing up draft conclusions at that early stage in the Commission's work, before the substantive issues outlined in the first report had been settled, was not the best way to advance the work on that important topic.

76. Ms. ESCOBAR HERNÁNDEZ said that the report under consideration served as an introduction to the topic, as evidenced by the Special Rapporteur's considerations on issues such as the sources to be used, whether it would be appropriate to compile an illustrative list of existing *jus cogens* norms in contemporary international law, the form that the outcome of the work should take and the future programme of work, which was outlined in paragraphs 75 and 76 of the first report.

77. From a normative and structural standpoint, *jus cogens* was of particular significance in contemporary international law. The Commission had addressed it on a number of occasions, particularly in relation to the law of treaties and to international responsibility, two issues that, as noted by other members, including Mr. Murase, would need to be taken into consideration in the work on the topic. Thus, while it was true that the 1969 Vienna Convention was the inevitable starting point for any discussion on *jus cogens*, the Commission could not leave aside the special regime that it had defined for the violation of peremptory norms of international law in not only article 26 but also articles 41, 48 and 50 of the draft articles on the responsibility of States for internationally wrongful acts. Attention should also be paid to the

special interpretative effect of *jus cogens* norms, which the Commission had already examined. Moreover, *jus cogens* contained a significant value dimension, referred to by the Special Rapporteur himself in his first report, that could not be overlooked without modifying the concept and nature of *jus cogens*, and without which it was not possible to understand the role played by peremptory norms in contemporary international law. All those aspects should be taken into account and dealt with jointly in the work on the topic.

78. The first general observation that she wished to make about the report under consideration concerned the disproportionate coverage given to the historical analysis, which comprised one third of the report. The Special Rapporteur's desire for completeness and rigour led him, in his search for the origins of peremptory norms, to go back to Roman law and to the "founding fathers" of international law, but it was a shame in that regard that he had not gone back to the sources of the Spanish school of the sixteenth century, where he would undoubtedly have found precedents that were in some ways closer to the modern concept of *jus cogens*, such as Franciscus de Victoria's definition of *jus gentium* in *Relectio de Indis*[383] as a consensus of the majority of the world (the international community or community of nations), especially in the name of the common good. A theologian and jurist, he had argued that international law was valid not only because of the existence of treaties and consensus among human beings but also because the world was a single political community within which general norms and the norms of nations were valid both in peacetime and in wartime. The complementary position adopted by Francisco Suárez (in his *De Legibus*[384]), Domingo de Soto, Baltasar de Ayala and Alonso de la Veracruz was no less important and, from the standpoint of values, it might be interesting for the Special Rapporteur to analyse the thoughts of Bartolomé de las Casas on the rights of the indigenous inhabitants of the New World. In any event, any historical analysis should be performed in its proper context to avoid transpositions that would be difficult to sustain. That issue should also be borne in mind in the work on the topic.

79. Second, it should be noted that the Special Rapporteur began his work with the laudable intention of not engaging in purely theoretical analyses, since the ultimate goal of the work on the topic had a strong practical dimension that needed to be preserved in order for the outcome to be of use to States and, more generally, to all legal practitioners. Nevertheless, and inevitably, the intricacies of *jus cogens* prompted him to analyse the different doctrinal approaches to gain a better understanding of the legal nature of that category of norms and their basis. He continued along the same lines when analysing the historical dimension as being directly linked to the legal nature of *jus cogens*. That led him to address the "controversy" that opposed naturalists and positivists. Although she could understand the Special Rapporteur's concern in that regard, she believed that the outcome was not sufficiently clear to overcome the problems that the Commission had to face. The matter could not be resolved by opposing natural law and positivism, let alone the primacy of the will of the State and the exclusion thereof. The nature of *jus cogens* could not be anything other than that of a positive norm, because otherwise it could not produce the effects attributed to it by the 1969 Vienna Convention and the draft articles on the responsibility of States for internationally wrongful acts. The issue was not to establish whether or not *jus cogens* norms were norms of positive law – in her view, they definitely were – but to determine how they were formed, what role the will of States played in their formation and why that will, which was vital to that formation even when diluted in a consensus, was relegated to a position of secondary importance once the *jus cogens* norm had emerged and until it was modified by another norm having the same character. That was the real problem that the Commission had to tackle.

80. With regard to the methodological aspects mentioned by the Special Rapporteur in the report under consideration and in his oral introduction, three points were worth commenting on briefly.

81. First, concerning the elements to be borne in mind, there was no reason to stray from the Commission's traditional method of work. Due consideration would therefore need to be given to normative practice, national and international jurisprudence and any other manifestation of State practice. In that respect, she had been surprised to read, in paragraph 10 of the first report, the suggestion that the Commission should consider the topic on the basis of actual State practice rather than solely on the basis of judicial practice. It might be because of the Spanish translation, but that sentence was unfortunate in that it could give the impression that national jurisprudence was less relevant to the work than the other manifestations of State practice to be borne in mind.

82. Second, in terms of the establishment of an illustrative list of norms that were currently considered to belong to *jus cogens*, she completely agreed with those members of the Commission who had argued that such a list would add value to the work on the topic and should thus be included in the draft conclusions. Indeed, what for years had been fuelling the debate on *jus cogens* was not so much the very concept of peremptory norms or their effects as the uncertainty over which norms belonged to that category. It was therefore hard to understand why the Commission would undertake the complex task of defining the core elements of peremptory norms, and of explaining how to identify such norms in practice and their effects in the international order, without indicating which norms it was dealing with. Unlike the Special Rapporteur, she did not think that the topic was of a purely procedural and formal nature, like that of the identification of customary international law; on the contrary, *jus cogens* displayed certain characteristics that made it necessary to examine its substantive dimension and content. Lastly, the Commission had already addressed the topic and, though it had not adopted a list, it had identified certain norms as belonging to *jus cogens* and would therefore expose itself to criticism if, precisely when it was dealing with peremptory norms, it failed to mention those precedents.

[383] F. de Victoria, *De Indis et de Ivre Belli Relectiones being parts of Relectiones Theologicae XII*, in J. B. Scott (ed.), *The Classics of International Law*, Washington, D.C., The Carnegie Institution, 1917.

[384] F. Suárez, *Selections from Three Works: De Legibus, Ac Deo Legislatore, 1612; Defensio Fidei Catholicae, Et Apostolicae Adversus Anglicanae Sectae Errores, 1613; De Triplici Virtute Theologica, Fide, Spe, Et Charitate, 1621*, vol. I, Oxford, Clarendon, 1944.

83. Another issue was that of the form that the list should take. In her view, it was a matter not of deciding whether to draw up a list but of setting criteria for how that should be done; in particular, there was a need to give priority to those norms that, according to practice, were not controversial, and to accept that the list would be necessarily short. While it was true that the list might be regarded as exhaustive or static and that the Commission might be seen as intending to favour certain *jus cogens* norms over others, the Commission could eliminate that risk by conducting an in-depth study of practice and by preparing detailed commentaries to the draft conclusions affected by the list and to the list itself. The Commission could decide where to place the list within the draft conclusions at a later stage.

84. As a final point on methodological issues, she endorsed the principle presented by the Special Rapporteur in paragraph 13 of his first report, according to which the work on the topic should be "fluid and flexible". That approach did, however, require a great deal of caution, because it was important not to allow the work to turn into an open-ended, circular debate that prevented the achievement of reasonable results, and she was thus unable to support the Special Rapporteur's proposal whereby adopted draft conclusions could be reconsidered if the Commission deemed it necessary. The proposal ran counter to the Commission's working methods and would cause a significant number of problems when it came to determining whether a particular draft conclusion should be modified. If the Commission considered it necessary to review draft conclusions that had already been adopted, it could always do so on second reading. In any event, the clearer the programme of work proposed by the Special Rapporteur and the more faithfully it was implemented once it had been adopted, the more stable the draft conclusions would be. The future programme of work proposed in the first report was thus particularly important, but the Special Rapporteur should present a more detailed version of it.

85. Turning to the proposed draft conclusions, she said that draft conclusion 1 defined the scope of the topic, as was customary in the Commission's work and in accordance with the syllabus, in which the Commission had underlined the need to define clearly the scope and limits of the project. While it therefore posed no problem in principle, its content was more questionable. Reference was made simply to "the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them". However, even leaving out the use of the verb *determinar* rather than *identificar* in the Spanish version, the draft conclusion addressed only two of the issues for consideration mentioned in the syllabus, namely the "requirements for the identification" of *jus cogens* norms and the "consequences or effects of *jus cogens*", and omitted the "nature of *jus cogens*" and the establishment of an "illustrative list" of norms having that character.[385] Without wishing to revisit the issue, she felt that the scope of the topic as set out in draft conclusion 1 was very limited and not really in line with the objective specified in the syllabus and in the report of the Special Rapporteur himself, who asserted that the objective was to "clarify the state of the law based on current practice". The draft conclusion should therefore be revised by the Drafting Committee.

86. Draft conclusion 2 was problematic for several reasons. First, paragraph 1 bore no relation to the topic. Although the Special Rapporteur's wish to establish a basis for comparison between *jus cogens* norms and other norms of international law was understandable, paragraph 1 did not serve that purpose and might give rise to doubts and major controversies. The first sentence appeared to focus solely on treaty rules, because it contained the expression "by agreement of States", whereas in the second sentence reference was made to customary international law, which could spark a debate on the very nature of that category of norms and on the role played by the "agreement of States" in their formation. Second, the word "prohibited" seemed to refer to cases in which non-peremptory norms of international law (or, to use the Special Rapporteur's wording, *jus dispositivum*) could not be modified, derogated from or abrogated, which did not seem compatible with what was, precisely, the *jus dispositivum* character of those norms. An analysis of practice would show that the situation was better and more commonly reflected through the use of expressions such as "is not permitted" or "unless otherwise provided". The notion of prohibition appeared to refer to the category of peremptory norms. Third, the general reference to the modification, derogation from or abrogation of a norm of international law through a treaty or through customary international law, without further explanation as to the relationship between the two categories of norms, could be misleading in that it might be interpreted as meaning that a custom could modify, derogate from or abrogate a treaty, which was not the case in international law and was surely not what the Special Rapporteur had had in mind. Moreover, the reference to "other agreement" was inappropriate, especially as it raised the inevitable question of what other agreement that could be, without proposing any kind of answer. Lastly, the report under consideration did not contain any analysis that could serve as a basis for the paragraph in question.

87. Draft conclusion 2, paragraph 2, meanwhile, was directly related to the topic, but its form was problematic. First, it partly duplicated draft conclusion 3, paragraph 1, and should for that reason be incorporated therein. Second, it presented *jus cogens* norms as an "exception". While the use of the term "exception" was understandable given the *jus dispositivum* character of other norms of international law, the term did not strike her as the most appropriate to denote *jus cogens* norms. Indeed, although such norms were extraordinary and limited in number, they could not be considered an "exception" in contemporary international law, particularly since they reflected essential values of the international community and, as a result, played a special role in the normative process and with regard to international responsibility. For those reasons, draft conclusion 2 should be deleted and the content of paragraph 2 thereof incorporated into draft conclusion 3, paragraph 2.

88. Draft conclusion 3 was the real starting point for the consideration of the topic and, as such, should be

[385] See *Yearbook ... 2014*, vol. II (Part Two), annex, p. 173, para. 13.

approached with extreme caution to ensure that it did not mislead, create confusion or prejudge the future development of the draft conclusions. Seen from that perspective, it was both insufficient and excessive. It was insufficient because paragraph 1 reproduced only some of the defining elements of *jus cogens* listed in article 53 of the 1969 Vienna Convention, and with different wording, as the expression "from which no derogation is permitted and which can be modified only" was replaced with "from which no modification, derogation or abrogation is permitted". Although, in his oral introduction, the Special Rapporteur had explained why he was proposing that modification, the reasons given were not convincing or justified by the content of his first report. In addition, the draft conclusion did not reproduce the clause "which can be modified only by a subsequent norm of general international law having the same character". The omission was unjustified, particularly since the two characteristics of *jus cogens* norms were cumulative, as demonstrated by the use of the conjunction "and" in article 53 of the Vienna Convention, and since neither the concept of *jus cogens* nor its legal nature could be understood solely on the basis of just one of them. In short, she considered that draft conclusion 3 should conform to the definition of peremptory norms in the 1969 Vienna Convention, which the Commission had not modified in the work that it had carried out since the adoption of that instrument on peremptory norms of international law, particularly in relation to the responsibility of States for internationally wrongful acts.

89. Draft conclusion 3, paragraph 2, contained very diverse elements that, in her opinion, could not be associated or confused with the elements that defined the nature of *jus cogens* in normative terms. While she agreed with the Special Rapporteur that norms of *jus cogens* protected the fundamental values of the international community, that characteristic was not a normative element of *jus cogens*, but the reason for its existence. Furthermore, she was not sure that the expression "hierarchically superior" properly defined the position that *jus cogens* occupied, in structural terms, in the international order, or the relationship of *jus cogens* with *jus dispositivum*. Lastly, the statement that the norms were "universally applicable" prejudged the outcome of the future debate on whether there existed a "regional *jus cogens*", a matter that, as indicated by the Special Rapporteur himself, would be analysed in a subsequent report. In addition, she believed that the content of draft conclusion 3, paragraph 2, was not justified by the analysis in the first report. The paragraph should be deleted and the elements that it contained should be addressed in separate draft conclusions.

90. In conclusion, she recommended that the draft conclusions presented by the Special Rapporteur be referred to the Drafting Committee, on the understanding that the Committee would analyse them in the light of the observations made in the plenary meetings by all the members of the Commission, including those related to the deletion of draft conclusion 2 and draft conclusion 3, paragraph 2.

The meeting rose at 6.10 p.m.

3323rd MEETING

Tuesday, 19 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice- Chairperson)

Present: Mr. Al-Marri, Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/689, Part II, sect. H,[386] A/CN.4/L.878[387])

[Agenda item 11]

1. The CHAIRPERSON, drawing attention to the revised programme of work for the third week of the second half of the session, which had been distributed to Commission members, said that Mr. Gómez Robledo, the Special Rapporteur on the provisional application of treaties, would introduce his fourth report on the topic on the morning of Wednesday, 20 July 2016. The report would be issued in all six official languages of the United Nations during the course of that day. In the meantime, advance versions of the report in English, French and Spanish had been circulated. He wished to emphasize that commencing a debate on a topic on the basis of advance versions of a report in only some of the official languages was an exceptional procedure, and he was grateful to Commission members for their flexibility in being prepared to proceed on that basis.

2. Mr. GÓMEZ ROBLEDO said that he, too, wished to thank members of the Commission for adapting to the difficult circumstances, of which he hoped there would be no repeat during the next quinquennium. To that end, it was important that the Planning Group saw to it that a very strong message reach the General Assembly recommending that measures be taken to enable the Commission to continue fulfilling its mandate in the future. The current page limits on documents had led to undue pressure being put on the Secretariat.

3. Mr. HMOUD, noting that some language versions of the Special Rapporteur's fifth report on the immunity of State officials from foreign criminal jurisdiction would not be ready until early August 2016, said that consideration by the Commission of reports that had not yet been translated into all the official languages should be regarded as exceptional and should not create a precedent.

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[386] Available from the Commission's website, documents of the sixty-eighth session.

[387] *Idem*.

The Commission should request the Secretariat to draft a document, for consideration at the sixty-ninth session of the Commission, explaining the failure to issue certain language versions of documents in a timely fashion.

4. Mr. KITTICHAISAREE said that the six official languages of the United Nations should be treated equally. It was important for Special Rapporteurs to adhere strictly to the deadlines that the secretariat had set for the submission of documents so as to allow sufficient time for translation. He was concerned that the late issuance of certain language versions placed unfair burdens on the Special Rapporteurs concerned and members of Commission, who at times were forced to use valuable meeting time double-checking translations that had been done in haste.

5. Mr. FORTEAU said that he wished to endorse what had been said regarding the need for accurate, timely translations of documents and regarding the problems the Commission had experienced in that connection over the years. That said, it should be acknowledged that the Commission perhaps bore some responsibility for the situation. It had included nine topics on its agenda for the current session and had not always followed its own 2011 recommendation that the reports of Special Rapporteurs not exceed 50 pages.[388] The Commission might therefore have somewhat overburdened the translation services. He agreed that the Planning Group should address the matter.

6. Mr. MURPHY said that the Commission found itself in a very exceptional situation and that it was not satisfactory for translations to be made available on the first day of the debate on a topic. Commission members needed time not only to read reports but also to analyse sources and conduct research. However, before sending any messages, the Commission should look into whether Special Rapporteurs were meeting the deadlines that had been set for the submission of reports.

7. The CHAIRPERSON said that, time permitting, it would be helpful to schedule a private meeting to discuss deadlines, page limits and other matters pertaining to the submission and consideration of reports. He took it that the Commission wished to adopt the revised programme of work as proposed by the Bureau.

It was so decided.

Jus cogens (*continued*) (A/CN.4/689, Part II, sect. H, A/CN.4/693)

[Agenda item 10]

First report of the Special Rapporteur (*concluded*)

8. The CHAIRPERSON invited the Commission to pursue its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

9. Mr. NIEHAUS said that he wished to thank the Special Rapporteur for his valuable report on a topic that had, for a long time, required further study. The importance that States attached to the subject of *jus cogens* and their interest in it were clear from their widespread approval of the Commission's decision to address the topic and the statements that they had made before the Sixth Committee.

10. Regarding the relationship between the natural law and positivist schools, he agreed with the Special Rapporteur's assertion in paragraph 42 of his first report that the work of the Commission should be based on a sound and practical understanding of the nature of *jus cogens*, which necessitated a study of some of the theoretical bases that had been advanced. While the Special Rapporteur ably avoided trying to provide a solution to the theoretical debate, he did not deny its importance. Personally, he agreed with the view cited in paragraph 59 of the report that *jus cogens* was best understood as an interaction between natural law and positivism.

11. Beginning in paragraph 61 of his first report, the Special Rapporteur correctly stated that article 53 of the 1969 Vienna Convention contained the basic elements of *jus cogens* norms, which were norms of general international law that were recognized by the international community and from which no derogation was permitted. In addition, practice and writings revealed that such norms were universally applicable, were superior to other norms of international law and protected the fundamental values of the international community. He had reservations about the notion of regional *jus cogens*, which in his view was not only inappropriate but even potentially dangerous in that it could lead to thoughts of subregional, multinational or bilateral *jus cogens*, something that was contrary to the essence of *jus cogens*.

12. Given that the fundamental values of the international community were not static and could evolve over time, it was essential to stress that *jus cogens* had the potential to transform the legal order as a whole and, by extension, international society. It was, for example, possible that *jus cogens* norms could emerge, in the not-too-distant future, in relatively new fields such as environmental protection. The transformative potential of *jus cogens* therefore warranted further detailed study.

13. Although the proposal to provide an illustrative list of *jus cogens* norms had met with some criticism and opposition, such a list would be highly desirable as it would help shed light on the characteristics of *jus cogens*. Although such a list did not yet exist, it was possible, on the basis of the elements identified above, to have a fairly clear idea of what it would include. For example, there was no doubt that the prohibition of genocide, torture, racism and apartheid, the right to self-determination and fundamental norms of humanitarian law were part of what should be understood by "*jus cogens*".

14. He agreed with the Special Rapporteur that draft conclusions were the most appropriate format for presenting the Commission's work. The conclusions should reflect current law and practice concerning *jus cogens*; unnecessary theoretical debates should be left aside.

15. Turning to the draft conclusions, he said that, in the Spanish version at least, draft conclusion 1 was confusing and more of a statement of intent than a conclusion. It should therefore be redrafted, as necessary. The text of

[388] See *Yearbook ... 2011*, vol. II (Part Two), p. 176, para. 372 (*b*).

draft conclusion 2, paragraph 1, was acceptable. In draft conclusion 2, paragraph 2, he would prefer the opening phrase to refer to "An exception to the provision contained in the previous paragraph" rather than to "An exception to the rule set forth in paragraph 1". However, he would leave the matter in the hands of the Drafting Committee. He had no objection to draft conclusion 3, which was very clear, appropriate and undoubtedly the most important of the three proposed draft conclusions. In view of its importance and for reasons of logic, he proposed reversing the order of draft conclusions 2 and 3. Provided that his proposed changes were taken into account, he supported the referral of the three draft conclusions to the Drafting Committee.

Mr. Nolte, First Vice-Chairperson, took the Chair.

16. Mr. COMISSÁRIO AFONSO said that the first report was a model piece of scholarship and research and presented a succinct discussion of the many complex issues involved. The statements made by Member States in the Sixth Committee had shown the importance that they attached to the matter. As it was the first time since the adoption of the Vienna Convention on the Law of Treaties in 1969 that the Commission had addressed the subject in depth, care must be taken to ensure that the result could not be interpreted as deviating from that text. In the analysis of the theoretical basis presented in the first report, both the tension between natural law and positivist theories and the conclusion drawn in that respect were of particular interest. As other members of the Commission had said, the two approaches were not contradictory and could both be used to explain the concept of *jus cogens*.

17. He agreed with the Special Rapporteur that the Commission should not depart from its traditional method of work based on State practice, jurisprudence and writings; the particular weight to be accorded to each in the final output would necessarily vary. Although the Commission was divided on the question of the preparation of an illustrative list of *jus cogens* norms, such a list was important and necessary because substance needed to be given to the concept of *jus cogens*, which enjoyed quasi-universal acceptance and was no longer seriously challenged. Since the signing of the 1969 Vienna Convention, the legal structure of the international community had changed enormously and had developed in ways that called for certainty and security in the present international legal order. A global society needed global norms. It would be hard for Member States to understand that the Commission could have engaged in progressive development of *jus cogens* based solely on its definition and other theoretical matters, without mentioning and listing norms with the status of *jus cogens*. As the Special Rapporteur stated in paragraph 73 of his first report, the essential character of the work on the topic should be to clarify the state of the law based on current practice.

18. The implications of the notion of the universal applicability of *jus cogens* norms set out in paragraph 68 of the first report, namely that the doctrine of the persistent objector was not applicable to *jus cogens* and that *jus cogens* norms did not apply on a regional or bilateral basis, perhaps resulted from too close a parallel being drawn between customary international law and *jus cogens*. It was a matter that deserved further consideration in future reports. A careful reading of article 53 of the 1969 Vienna Convention and Article 38, paragraph 1, of the Statute of the International Court of Justice showed that those articles had only two words in common, namely "accepted" and "recognized". While the scope of the Statute of the International Court of Justice was clearly limited to a certain category of States, article 53 of the 1969 Vienna Convention stated that a peremptory norm of general international law was a norm accepted and recognized by the international community of States as a whole. To extract from that text the notion of a regional *jus cogens* would require an enormous academic exercise, which might erode rather than reinforce the Vienna regime and ultimately lead to legal relativism and further fragmentation of international law. Peremptory norms of a regional character were quite acceptable and might well exist, but they did not on that basis qualify as *jus cogens* norms; the latter had, among other things, to be accepted and recognized by the international community as a whole. In order to be so accepted and recognized, the value requiring protection must be not only of a universal character, but also a matter of fundamental human concern. The same reasoning held true, *mutatis mutandis*, with respect to the question of the persistent objector, which, in his opinion, had no place in *jus cogens*.

19. Regarding the final product, he agreed with the Special Rapporteur that draft conclusions were the most appropriate outcome for the Commission's work on the topic. The three draft conclusions proposed in the first report, although not uncontroversial, should all be sent to the Drafting Committee in the light of the comments that followed. Draft conclusion 1 was acceptable in terms of its content; as to its form, the Commission should follow the approach adopted for the topic of protection of the environment in relation to armed conflicts. If it was considered that the provision did not deal with the scope of the topic as such, it would need to be renamed. Draft conclusion 2 was unnecessary; the distinction it sought to draw between *jus cogens* and *jus dispositivum* could be made in the commentary. He agreed with the comments made by Mr. McRae with respect to draft conclusion 2. He endorsed draft conclusion 3, which was of crucial importance. However, with regard to paragraph 1 thereof, the Commission should be cautious in its approach and not depart from article 53 of the 1969 Vienna Convention; if necessary, paragraph 1 should reproduce the text of article 53, with minor adaptations. He supported the main thrust of paragraph 2, which was well founded; in fact, it should stand as a separate draft conclusion.

20. Mr. KAMTO said that he wished to commend the Special Rapporteur on his remarkable first report, in particular chapter III thereof, which presented an overview of the historical evolution of the concept of *jus cogens* and formed a good starting point for discussion of the subject.

21. In contrast to most of the other subjects dealt with by the Commission, the topic of *jus cogens* was purely conceptual; consequently, the theoretical questions that it raised could not be ignored or dealt with in a cursory manner. It was only on the basis of a clear understanding of how a legal norm came to be considered as *jus cogens* that the nature of the latter could be discussed. Despite

what might have been stated in the literature, *jus cogens* was not and could not be a technical norm. Rather, it was a value norm that was enshrined in law; it was not necessarily a moral norm and the sphere of values to which it belonged was of little importance. That was the meta-juridical source of the *jus cogens* norm, not the *instrumentum* of the rule, and it was to that question that the discussion concerning the nature of *jus cogens* sought to find an answer. The *instrumentum* could be either a treaty or custom, while the meta-juridical source could be religious, philosophical, deduced from natural logic or reason, or linked to the emergence of an international public order.

22. The Special Rapporteur was thus no doubt right to consider the two main legal theories of natural law and legal positivism. It was not a matter of re-examining those theories or their component parts, but rather of taking them as a starting point to explain the basis of legal normativity, either to try to identify the origin of *jus cogens*, or to draw out its characteristic features as compared to other, "ordinary", rules of law. On that point, there was a certain lack of clarity regarding the Special Rapporteur's understanding of the concept of "nature", inasmuch as he referred, in paragraph 42 of the first report, to the concept of the "foundations" of *jus cogens*, while, in paragraph 43, he spoke of its "role" beyond the 1969 Vienna Convention. Technically, article 53 of the Convention should certainly form the starting point of the study; however, although that article explained how a norm of general international law became a peremptory norm, it did not explain why such a norm came to have the particular characteristic of rendering void any treaty that conflicted with it. If that question were not addressed, the emergence of *jus cogens* would be limited to cases in which such a norm was provided for in a treaty, where it was a clear expression of the will of the States concerned. However, that would not explain why a customary norm should become *jus cogens*.

23. To establish why only some rules of customary international law or general international law became *jus cogens*, a distinction had to be made between those *jus cogens* rules that arose from treaties and those that emerged from customary international law or general international law. In the former case, a norm became a *jus cogens* norm when it was designated as such by a treaty to which the international community of States as a whole was party. However, a treaty norm that was not designated as *jus cogens* in the treaty concerned could be declared as such on a customary basis by an international court in a dispute submitted to it, as had happened with the rule on the prohibition of torture through the judgment of the International Tribunal for the Former Yugoslavia in the *Prosecutor* v. *Anto Furundžija* case, referred to in paragraph 55 of the first report.

24. A norm of customary law origin could become *jus cogens* on the basis of article 66 of the 1969 Vienna Convention, which allowed the International Court of Justice to decide on the peremptory nature of a norm. However, it could also be argued that a norm of customary international law or general international law was peremptory because it expressed a fundamental value of the international community of States.

25. In his view, the two ideas should be combined. If, as some members had said, non-treaty *jus cogens* should be determined on the basis of practice, it would not be clear why a practice should become a legal rule or, *a fortiori*, *jus cogens*. Even if *opinio juris* were added to the requirement of practice, it would still identify only a customary rule, not a *jus cogens* rule. In the context of the present topic, reference should be made to practice accompanied by *opinio juris* of a peremptory nature, which could perhaps be called *opinio juris cogentis*.

26. With respect to the second theoretical issue, the idea of the superiority of *jus cogens* over other norms of international law, mentioned in paragraph 63 and the following paragraphs of the first report, he agreed with other members that no convincing basis had been provided for such a hierarchy of norms. Such hierarchy was essentially based on the distinction between *jus cogens* and *jus dispositivum*. However, in the classical theory of international law, that distinction was grounded in the origin of norms, not their legal force or scope. He agreed with the statement in paragraph 66 of the first report that States could not escape from *jus cogens* by agreement. However, according to article 53 of the 1969 Vienna Convention, a norm of *jus cogens* could be modified by a new norm of *jus cogens*. If the superiority of *jus cogens* were recognized, it would be tantamount to saying, for example, that it always prevailed over any non-*jus cogens* rule, including in procedural matters. However, such an idea could not be argued in the light of the judgment of the International Court of Justice of 3 February 2006 in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, in which the Court had stated that "the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties" (para. 125 of the judgment).

27. A third theoretical question linked to *jus cogens* as a customary law rule was that of the persistent objector. To accept the idea of persistent objection as a way of evading the application of *jus cogens* would amount to departing from the provisions of article 53 of the 1969 Vienna Convention, which stated that a peremptory norm of general international law was a norm from which no derogation was permitted and which could be modified only by a subsequent norm of general international law having the same character.

28. The provisions of article 53 of the 1969 Vienna Convention also argued against the fourth theoretical question raised, that of the possibility of regional *jus cogens*. The States of a given region could use whatever term they wished to describe the rules they established to impose obligations on one another, without those rules being on the same level as *jus cogens* in the sense of article 53. Most *erga omnes* obligations established at the regional level could indeed be regarded as *jus cogens* by and for the States concerned; however, like any other non-peremptory rule, they would be rendered void if they conflicted with a peremptory norm of general international law and they could not be applied to third party States outside of the region concerned.

29. As to methodological issues, the Special Rapporteur should have begun his study of the topic by clarifying its key terms. Thus, he should have defined the concept of *jus cogens* in relation to *erga omnes* obligations, on the one hand, and intransgressible norms and non-derogable norms, on the other. *Jus cogens* norms were *erga omnes*, as the International Court of Justice understood that expression in its jurisprudence. However, not all *erga omnes* rules were automatically *jus cogens*. It should be explored whether *jus cogens*, intransgressible norms and non-derogable norms were synonyms and, if so, why different terms were used for the same concept.

30. Institutional or jurisdictional mediation was central to explaining the emergence of non-treaty *jus cogens*, as it was the nexus between the meta-juridical basis of *jus cogens* and the mechanism provided for in article 66 of the 1969 Vienna Convention. It was clear from that article that, apart from cases in which *jus cogens* status was conferred by treaty, it was in practice generally for the International Court of Justice to rule whether an alleged peremptory norm was indeed *jus cogens*. The provisions of article 66 clearly translated the awareness of the authors of the Convention that it would be difficult for States to agree on the application or interpretation of a norm alleged to be peremptory. The Court would thus serve as mediator, as it did with respect to determining customary international law. That was, at least for the moment, the best way of determining *jus cogens*. In fact, he was not aware of any treaty-based *jus cogens*, as the examples generally cited came from case law.

31. As to whether to compile a list of *jus cogens* norms or to refer to examples in the commentaries, he had no particular preference. First, such a list could never be exhaustive and so it would be no different from simply providing examples. Second, although the Commission was required to identify the guiding principles or method for determining *jus cogens*, it should not itself seek to identify the norms concerned. Although it had done so in the past – as had been recalled by the International Court of Justice in its judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua* – that had been before the adoption of the 1969 Vienna Convention. He was of the opinion that article 66 of the Convention, together with article 53 thereof, indicated that the determination of such norms was a matter for States within the framework of a treaty and that, outside that framework, in the context of a dispute between States, it was a matter for the International Court of Justice. It would not be advisable for the Commission to take such a step and risk disavowal by the Court.

32. Turning to the draft conclusions, he said that, if all three draft conclusions were to be retained, the order of draft conclusions 2 and 3 should be reversed. However, in his view, not all the draft conclusions should be submitted to the Drafting Committee.

33. Draft conclusion 1 was couched in peremptory terms that were unsupported by the content of the first report and ill-suited to the very notion of a "conclusion". It would be advisable to replace the phrase "The present draft conclusions concern the way in which *jus cogens* rules are to be identified" with "The present draft conclusions concern the manner of identifying *jus cogens* rules …" because the purpose of the draft conclusions was simply to identify the manner of proceeding, not to lay down a legal obligation in that respect.

34. Draft conclusion 2, especially its first paragraph, seemed complicated, obscure and irrelevant, because, in effect, it amounted to saying that *jus cogens* could be modified, derogated from or abrogated, unless otherwise provided by *jus dispositivum*. He wondered what was so special about *jus cogens* in that connection; the same could be said of *jus dispositivum* itself. Since the first paragraph was irrelevant, the second paragraph setting forth a non-existent rule was otiose, as the initial rule to which it was deemed to make an exception was incorrect.

35. Draft conclusion 3, paragraph 1, could be improved by repeating the exact wording of article 53 of the 1969 Vienna Convention and should be entitled "Character of *jus cogens* norms". The second paragraph of that draft conclusion deserved a more thorough examination and should be turned into a separate draft conclusion. While he did not rule out the Special Rapporteur's idea that *jus cogens* norms protected the fundamental values of the international community, that idea must be substantiated theoretically and practically with examples drawn from State practice and case law. The Special Rapporteur had not provided sufficient evidence in his first report.

36. He was in favour of referring draft conclusion 1 and draft conclusion 2, paragraph 1, to the Drafting Committee, but not draft conclusion 2, paragraph 2, and draft conclusion 3, paragraph 2.

37. As far as future work on the topic was concerned, it would be inadvisable to assess the draft conclusions already adopted with a view to enhancing their overall coherence, because that would introduce an element of uncertainty into the outcome of that work which, albeit provisional, would already be in the public domain. Second, the Special Rapporteur should make clear that, in his third report, he would deal with the consequences of *jus cogens* in relation to State responsibility. It would be illogical to broach that aspect of the topic before defining the notion of consequences and examining the legal rules pertaining to it.

38. Lastly, he concurred with a number of other members of the Commission that, since *jus cogens* also existed in municipal law, it would be wise to make the title of the topic more precise and to change it to "international *jus cogens*" or "*jus cogens* in the international legal order".

39. Mr. EL-MURTADI SULEIMAN GOUIDER said that he wished to commend the Special Rapporteur on his excellent first report on a very complex issue and his flexible and cautious approach to it.

40. In chapter II of his first report, the Special Rapporteur discussed the idea of compiling an illustrative list of *jus cogens* rules in the light of the views expressed during debates. There was a risk, however, that some States might regard that list as comprehensive when it was not, or that it might be incomplete. On the other hand, there was nothing to prevent the Commission from clarifying the nature of *jus cogens* rules by providing examples in the commentary.

41. While there might well be many examples of cases where national and international courts had referred to *jus cogens* rules, in order to assuage the concerns of States which had expressed reservations about the inclusion of the topic on the Commission's long-term programme of work, the Commission must follow its usual practice of basing its work on effective State practice.

42. In view of what was said in paragraph 28 of the first report, it would be advisable for the Commission to focus its attention on article 53 of the 1969 Vienna Convention, the rules on *jus cogens* established therein and the *travaux préparatoires* at the 1968–1969 United Nations Conference on the Law of Treaties. The positions adopted by States provided the necessary framework for determining the current nature of *jus cogens*. Since the United Nations Conference on the Law of Treaties, they had accepted the existence of *jus cogens* as an exception to the general rules of international law.

43. None of the theories set out in paragraph 50 and the following paragraphs of the first report fully explained why *jus cogens* was peremptory. As the decisions of courts had not sufficiently clarified that matter, he supported the Special Rapporteur's preference for using international public law as his theoretical basis and for defining *jus cogens* rules as non-derogable rules embodying the fundamental values of the international community.

44. He was in favour of sending all three draft conclusions contained in chapter VI of the first report to the Drafting Committee and he welcomed the flexible approach advocated by the Special Rapporteur in chapter VII on future work.

45. Mr. AL-MARRI congratulated the Special Rapporteur on his furst report and the promising start that he had made on the consideration of an important issue. He said that the three draft conclusions should be referred to the Drafting Committee, as they reflected broad consensus among practitioners and learned writers. The Special Rapporteur had identified the core nature of *jus cogens* and had proposed some practical solutions. The principle of *jus cogens* had been embodied in article 53 of the 1969 Vienna Convention and there was general recognition that it applied to the prohibition of genocide and aggression, as well as to the right of self-determination, *inter alia*.

46. Mr. TLADI (Special Rapporteur), summing up the debate on his first report, said that the robust and rich exchanges of views would ensure that the Commission's work on the topic would be of the highest quality.

47. He had not taken any particular stance on the natural law versus positive law debate in his first report. He did not agree with Mr. Valencia-Ospina's suggestion that the adoption of article 53 of the 1969 Vienna Convention as a point of departure necessarily implied a consent-based approach. The consent/content dichotomy referred to by Mr. Petrič was most interesting. The first element, consent, raised questions about the meaning of the phrase "recognized and accepted by the international community of States as a whole" and would undoubtedly form the subject of future debates in the Commission. He was sympathetic to the view of Mr. Vázquez-Bermúdez and Mr. Caflisch that this phrase did not necessarily indicate a positivist inclination. He disagreed with Mr. Nolte and Mr. Kolodkin that article 53 necessarily resolved the debate and, like Mr. Hmoud, he did not think that it was even essential to resolve that debate. The issue of treaty-based *jus cogens* raised by Mr. Kamto would have to be considered in the second report. Contrary to Mr. Kamto's opinion, resolution of the theoretical debate was not a prerequisite to addressing that question. However, he largely agreed with what Mr. Kamto had said about the approach that should be adopted to the topic.

48. He was open to Mr. Candioti's idea that the title should clearly indicate that the peremptory norms of international law were *jus cogens*. Indeed, draft conclusion 3, paragraph 1, did that, by including the words *jus cogens* in parenthesis after "peremptory norms". There ought not to be any confusion with regard to the phrases "fundamental rules", "fundamental values" and "fundamental principles", which were not used interchangeably. While they might be related, fundamental values were not in and of themselves rules, laws or principles. Rules, principles or laws, fundamental or otherwise, might reflect fundamental values, but that did not mean that fundamental values and fundamental laws, principles or rules were the same thing. That was the reason why draft conclusion 3, paragraph 2, said only that *jus cogens* protected fundamental values.

49. All the members of the Commission had agreed that work on the topic should rest on the material traditionally relied upon by the Commission, namely State practice, judicial decisions and the writings of scholars. Sir Michael and Mr. Valencia-Ospina had questioned whether the current report remained faithful to that approach. In fact, each and every element of the draft conclusions was based on practice. He thanked Mr. Caflisch for drawing attention to a provision of the Swiss Constitution which constituted an important example of practice and Mr. Kolodkin for his references to Russian jurisprudence.

50. It would be unwise for the Commission to base its work on a theoretical debate of *jus cogens* in order to circumvent the problem of the scarcity of practice, an issue raised by Ms. Jacobsson and Mr. Valencia-Ospina. The diversity of opinions meant that relying on theory in the absence of practice would lead to a policy-preference approach, which he had criticized elsewhere. He was grateful to Mr. Hmoud for rightly highlighting the distinction that should be made between the use of international jurisprudence as a subsidiary means of identifying rules and domestic jurisprudence, which not only identified rules, but also constituted practice. The use of the phrase "State and judicial practice" in the first report might have obfuscated that distinction. Paragraph 10 of the report merely described the views on practice expressed in the Sixth Committee and did not imply an opinion on their correctness.

51. The members of the Commission had been divided on the advisability of drawing up an illustrative list. Mr. Comissário Afonso, Mr. Caflisch, Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kolodkin, Mr. Niehaus, Mr. Park, Mr. Petrič, Mr. Saboia and Mr. Šturma had been in favour of producing a list, while

Mr. Kittichaisaree, Ms. Jacobsson, Mr. Murase, Mr. Nolte, Mr. Singh and Sir Michael Wood had been against it. He assured members that any list drawn up by the Commission would be based on State practice and the decisions of international courts and not on the Commission's policy preferences. As Mr. Kolodkin had rightly said, there was a wealth of material that could be included and, as Mr. Caflisch and Mr. Comissário Afonso had indicated, such a list would be most welcome in many quarters.

52. Although the idea of an illustrative list might therefore sound attractive, the question of whether *jus cogens* was a methodological or process-oriented topic was still a matter of concern. He took Mr. Forteau's point that what distinguished the current topic from the methodologically inclined topic of customary international law was that a normative/substantive element had been explicitly included in the syllabus approved by the Commission. That syllabus did not, however, bar the Commission from deciding to proceed in a different direction, as it had sometimes done in the past. On the other hand, Mr. Petrič might have been correct in saying that, even if the Commission decided to compile an illustrative list, it would not have to depart from a process-oriented method, provided it included only universally accepted *jus cogens* norms. The list to which Mr. Park had alluded had been produced not by the Commission but by the Study Group on the fragmentation of international law and, in some respects, it departed from the Commission's own list. There seemed to be agreement within the Commission that some examples of *jus cogens* norms would have to be provided, at least in the commentaries. However, he took Mr. Murphy's point that distilling a list from the commentaries for inclusion in an annex would create difficulties, because the material referred to in the commentaries had been chosen for the purposes of methodology and not because it illustrated the substance of the rules. The wisest course of action would be to follow the suggestion made by Mr. Hassouna, Mr. Koldodkin and Mr. McRae and to postpone a decision until a later stage.

53. Mr. McRae, Mr. Murphy and Sir Michael had raised a methodological objection to what he had termed the "fluidity" of the topic, and Mr. Nolte and Mr. Singh had maintained that, once a draft conclusion had been adopted, it could no longer be treated as fluid. Mr. Hassouna had, however, rightly noted that what the first report meant by a fluid approach was that proposed draft conclusions could be reconsidered, if necessary, in light of the direction chosen by the Commission. Of course, to use the language of Mr. Nolte, that would require a "positive decision". He personally endorsed the view of Mr. Vázquez-Bermúdez that the Commission would certainly not adopt a provision of dubious correctness. Paragraph 68 of the first report did not, as Mr. Murphy had asserted, declare that the conclusion that *jus cogens* norms were universal was provisional and subject to revision. Paragraph 67 of the report stated unequivocally that *jus cogens* norms were universally applicable. What was provisional was the finding that there could be no persistent objectors to *jus cogens* and that there was no such thing as regional *jus cogens*. Since no draft conclusions were proposed on regional *jus cogens* or persistent objectors, it was misleading to imply that paragraph 68 was an example of a fluid approach leading to the provisional adoption of draft conclusions that would have to be revisited once the Commission was confident that they were correct.

54. Even if future reports were to uncover a huge amount of material supporting the notion of regional *jus cogens*, that would not alter the basic premise that *jus cogens* was universally applicable. In that connection, he noted that in the topic "Identification of customary international law", the reference in draft conclusion 16 [15], paragraph 2, to "general practice among the States concerned" did not require the revision of draft conclusion 8 [9], which established that "the relevant practice must be general, meaning that it must be sufficiently widespread and representative".[389] He therefore agreed with Mr. Nolte that the universal character of *jus cogens* did not exclude the possibility of regional *jus cogens* and with Ms. Jacobsson's assumption that, even if the Commission were to deal with regional *jus cogens*, the general rule was that *jus cogens* applied universally. Regional *jus cogens* would form the subject of a detailed study in future reports; it had not been excluded, as Mr. Forteau, Mr. Hassouna, Mr. Nolte, Mr. Park and Sir Michael Wood had thought.

55. Contrary to the assertions of Mr. Forteau, Mr. McRae, Mr. Murphy, Mr. Nolte and Sir Michael, the first report did not suggest that the Commission should adopt conclusions with the intention of reconsidering them and, in any case, the Commission often reconsidered texts which it had adopted. For example, such a review had been proposed with respect to draft conclusion 4, paragraph 3, in the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"[390] and also with respect to draft article 1 in the topic "Immunity of State officials from foreign criminal jurisdiction".[391]

56. Turning to the draft conclusions themselves, he said that draft conclusion 1 had been widely supported, subject to some comments about the text, but draft conclusion 2 had been almost universally criticized. Draft conclusion 3, paragraph 1, had been broadly supported with some suggested amendments, while a few members had criticized draft conclusion 3, paragraph 2.

57. With respect to the text of draft conclusion 1, to the scope of the topic as a whole and to issues of definition, Mr. Murase, supported by Ms. Escobar Hernández, had expressed puzzlement over why the first report limited the scope of the topic only to the law of treaties and did not deal with the meaning and function of *jus cogens* in the context of the law of State responsibility. He agreed with Mr. Murase that the Commission could not ignore the implications of *jus cogens* in the context of State responsibility; indeed, the Commission could not ignore those implications for any area or subject of international law.

[389] See draft conclusions 8 [9] and 16 [15] in the report of the Drafting Committee on the identification of customary international law (A/CN.4/L.872, available from the Commission's website, documents of the sixty-eighth session). The Commission adopted the draft conclusions on first reading on 2 June 2016 (see the 3309th meeting above, para. 5).

[390] See *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/694, paras. 118–122.

[391] See *Yearbook ... 2013*, vol. II (Part Two), p. 39, footnote 237.

The syllabus for the topic,[392] particularly in paragraph 17, expressly included the law of State responsibility, not only as an important source of materials on which the Commission would base its work but also in relation to the effects of *jus cogens* on State responsibility; moreover, the materials referred to in the syllabus and his first report included materials relevant to State responsibility. As Mr. Murase had noted, the case law of the International Court of Justice and other courts on *jus cogens*, including that relied on in the first report, overwhelmingly related to matters other than treaty law. The scope of the topic was certainly broader than just the law of treaties and would also include the law of State responsibility, particularly in relation to consequences.

58. Mr. Murase's statement could be read to suggest that the definition and nature of *jus cogens* differed between areas of law, which was a view he did not share. The Commission had considered *jus cogens* in a number of contexts, including the law on responsibility of States for internationally wrongful acts and on the fragmentation of international law, and not once had such a thing ever been suggested. The implications of *jus cogens* differed but its nature and definition did not. It was therefore unnecessary to identify *jus cogens* for the purposes of treaty law and *jus cogens* for the purposes of the law of State responsibility.

59. Mr. Forteau had expressed surprise that the first report did not address article 41 of the 1969 Vienna Convention, a provision which, in a way, addressed derogation. However, paragraph 4 of the report clearly indicated that issues such as the relationship between *jus cogens* and non-derogation would be addressed in subsequent reports. The same applied to the relationship between *jus cogens* and obligations *erga omnes*, raised by Mr. Kamto, which would be considered as part of the consequences or effects of *jus cogens*.

60. He expressed support for Mr. Nolte's suggested amendment to draft conclusion 1, namely to replace the phrase "concern the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them" with "concern the identification of norms of *jus cogens* and their legal consequences". Mr. Murase had made an alternative proposal; however, unless there was overwhelming support for it, he favoured it less than Mr. Nolte's suggestion, as it implied that the topic was concerned with the existence and content of *jus cogens* rules, which was not the case. He agreed with Mr. McRae that it should be for the Drafting Committee to determine what draft conclusion 1 should be called, but it should base itself on any decision that the Commission might take in relation to the topics of customary international law, protection of the atmosphere and protection of the environment in relation to armed conflicts, so as to ensure a consistent approach. With regard to the French version of draft conclusion 1, he thanked Mr. Kamto for his comments and expressed the hope that the issue could be rectified.

61. The main thrust of the criticism of draft conclusion 2 was that its first paragraph addressed matters that fell outside the scope of the current topic, particularly by looking at how the rules of *jus dispositivum* could be modified, abrogated or derogated from. That concern had been raised by many members, and he had become convinced that there was merit in the criticism and that the draft conclusion strayed too far in addressing issues of a general nature that fell outside the scope of the topic. Trying to summarize such a broad area in one swift draft conclusion meant that important nuances were inevitably lost. The principal reason for proposing the draft conclusion had been to highlight the fact that international law as it currently stood recognized *jus cogens* as an exception to the general rule. He still believed that it was necessary to include that idea and hoped that it could be maintained, but without the current complications of the first paragraph of draft conclusion 2. Perhaps the Drafting Committee could consider incorporating it into draft conclusion 3, paragraph 1. He confessed to some uncertainty regarding Ms. Escobar Hernández's reasoning as to why *jus cogens* was not exceptional. Both Mr. Hmoud and Mr. Al-Murtadi Suleiman Gouider had emphasized its exceptional nature, and paragraphs 65 and 66 of the first report, especially the penultimate footnote to paragraph 65, provided ample authority in that regard.

62. The comments made on draft conclusion 3, paragraph 1, which mainly concerned drafting, were very helpful. In his introductory statement, he had already proposed deleting the additional terms "modification" and "abrogation" and replacing "rules" with "norms", both of which had met with the support of many members. He agreed with Sir Michael's suggestion, supported by Mr. Hassouna and Mr. Kittichaisaree, among others, to bring the paragraph fully into line with article 53 of the 1969 Vienna Convention.

63. The majority of members of the Commission had supported the substance of draft conclusion 3, paragraph 2, and some drafting suggestions had been offered. Some members had expressed doubt not about the content of the paragraph, but rather about the timing of the consideration of the paragraph. Others had expressed opposition to its content. He strongly disagreed with those who had sought to suggest that there was no support for the elements identified therein, either in general or in the first report. Like a number of other members of the Commission, he considered draft conclusion 3, paragraph 2, to be very important. Virtually all members had highlighted the need for the Commission to base its work on practice, but Sir Michael, supported by Mr. McRae and Mr. Forteau, had essentially suggested that the first report paid lip service to that methodological approach and that there was no practice to support the elements contained in draft conclusion 3, paragraph 2.

64. The view that fundamental values were a core characteristic of *jus cogens* was so widely accepted that even a distinguished author who did not share it, Robert Kolb, had acknowledged its predominance. He was therefore surprised that some members of the Commission would wish to question it. As Mr. Petrič had correctly observed, norms that were without doubt *jus cogens* reflected important values, while Mr. Šturma had pointed out that peremptory norms protected the fundamental values of the international community. In its advisory opinion on *Reservations to the Convention on Genocide*, the International

[392] See *Yearbook ... 2014*, vol. II (Part Two), annex, sect. D, pp. 173–174.

Court of Justice had described the basis of the prohibition of genocide as preventing a crime "that shocks the conscience of mankind" and "which is contrary to moral law" (p. 23 of the advisory opinion). According to the Court, the prohibition therefore reflected "the most elementary principles of morality" (*ibid.*). The Court's statement confirmed that the prohibition of genocide, which it had subsequently confirmed several times as a norm of *jus cogens*, reflected fundamental human values. It had been restated several times with approval by the Court, particularly in decisions confirming the *jus cogens* nature of that prohibition, and by a number of other tribunals, including the International Tribunal for the Former Yugoslavia.

65. In response to Mr. Murphy's statement that the Court had never referred to "fundamental values", he referred the Commission to the authorities cited in the second footnote to paragraph 71 of the first report, including the 2007 and 2015 judgments in, respectively, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, in which the Court had described norms of *jus cogens* as those protecting "essential humanitarian values" (paras. 147 and 85, respectively). It was therefore not true to say that the inclusion of fundamental values in the draft conclusion was based on unsubstantiated extrapolations from the 1969 Vienna Convention. In *Prosecutor* v. *Anto Furundžija*, the International Tribunal for the Former Yugoslavia had been more explicit in linking the status of the prohibition of torture as a *jus cogens* norm to "the importance of the values it protects". It had stated: "Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community" (para. 154). Its words had been quoted in several jurisdictions, including by the European Court of Human Rights in *Al-Adsani* v. *the United Kingdom*. In *Michael Domingues* v. *United States*, the Inter-American Commission on Human Rights had stated that norms of *jus cogens* derived their status from fundamental values held by the international community. The cases cited were all mentioned in the first report; moreover, the Commission had approved the persistent objector requirement essentially on the strength of two *obiter dicta* in the *Fisheries case* and in the *Colombian-Peruvian asylum case*, far less than what was referred to in the present instance.

66. Many statements had been made by States expressing the view that *jus cogens* norms protected the fundamental values of the international community. In addition to those of Lebanon and Nigeria, referred to in the first report, there were countless others, particularly in relation to the Commission's work on the law of treaties. During the twenty-fifth session of the General Assembly, under the agenda item on the review of the role of the International Court of Justice, Belgium had noted that the prohibition of the use of force in Article 2, paragraph 4, of the Charter of the United Nations was "so fundamental that it had become a peremptory norm of international law".[393] At the twenty-seventh session, under an item on the review of the Charter of the United Nations, Spain had noted that voting procedures, important though they were, could in no way be equated with fundamental principles, asserting that, while they were part of positive law, they were not peremptory and were therefore not untouchable.[394] During the thirty-first session, commenting on the draft articles on the responsibility of States for internationally wrongful acts, Yugoslavia had described *jus cogens* norms as obligations that were "essential for the protection of fundamental interests of the international community",[395] and Mali had described them as those that "served the fundamental interests of mankind".[396] Greece, during the forty-ninth session, had considered the prosecution of international crimes, which it had said were prohibited by *jus cogens*, to be for the protection of "fundamental interests of humanity".[397]

67. The statement of France to the fifty-first session of the General Assembly, on the Commission's work on the responsibility of States for internationally wrongful acts, was particularly important given that at that stage France had yet to recognize *jus cogens*. Expressing doubt about what had then been article 19 of the draft articles on the responsibility of States for internationally wrongful acts, France had noted that "the concept of an 'international obligation so essential for the protection of fundamental interests of the international community' seemed roughly to correspond to the concept of a 'peremptory norm of general international law' ".[398] While it denied the existence at that time of *jus cogens*, it had clearly linked *jus cogens* to fundamental interests of the international community. The idea that *jus cogens* norms reflected fundamental interests had similarly been advanced by South Africa during the fifty-fifth session, while Germany had referred to "fundamental humanitarian values"[399] and Costa Rica, represented by Mr. Niehaus, had referred to "fundamental interests".[400] At the fifty-sixth session, Portugal had said that: "The concepts of *jus cogens*, obligations *erga omnes* and international crimes of State or serious breaches of obligations under peremptory norms of general international law were based on a common belief in certain fundamental values of international law which, because of their importance to the international community as a whole, deserved to be better protected than others."[401]

68. Similarly, in its application in *Questions relating to the Obligation to Prosecute or Extradite*, Belgium, with Sir Michael Wood as its counsel, had observed that the prohibition of torture was *jus cogens* because of, *inter alia*, the importance that the international community as a whole attached to the suppression of torture.

69. Domestic jurisprudence advancing the same idea was similarly plentiful. In the United Kingdom, the court in *Regina (Al Rawi and Others)* v. *Secretary of State for Foreign and Commonwealth Affairs and Another* had

[393] A/C.6/SR.1210, para. 9.

[394] A/C.6/SR.1380, para. 7.

[395] A/C.6/31/SR.30, para. 43.

[396] *Ibid*., para. 69.

[397] A/C.6/49/SR.17, para. 90.

[398] A/C.6/51/SR.36, para. 26.

[399] A/C.6/55/SR.14, para. 56.

[400] A/C.6/55/SR.17, para. 63.

[401] A/C.6/56/SR.14, para. 66.

stated that the prohibition of torture was a *jus cogens* norm because of the importance of the values it protected. Similarly, the United States Court of Appeals, in *Siderman de Blake* v. *Argentina*, had stated that *jus cogens* norms were derived from values taken to be fundamental by the international community. One possibility that the Drafting Committee might consider was to refer to "fundamental interests", although he retained a preference for "values". Another drafting suggestion, for which he expressed some support, had come from Ms. Jacobsson, who had suggested replacing "protect" with "reflect".

70. Many members had agreed that *jus cogens* norms were superior to the other rules of international law, but a few members had expressed doubt about the reference to hierarchy. Those doubts seemed to stem from two sources: first, that there was no material support for the inclusion of hierarchy; and second, the view that hierarchical superiority, to the extent that *jus cogens* norms had such a quality, was a consequence and should be addressed in that context. He disagreed with both criticisms. The first was particularly curious as the Commission had previously expressly endorsed the hierarchical superiority of *jus cogens*. In paragraph 70 and in the second footnote to paragraph 69, the first report referred to conclusion 32 of the work of the Study Group on the fragmentation of international law, which had recognized that *jus cogens* was an example of a rule of international law that was "superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority".[402]

71. The idea of hierarchical superiority was supported in domestic and international jurisprudence. The United States Court of Appeals, in *Committee of United States Citizens Living in Nicaragua* v. *Reagan*, had referred to *jus cogens* norms as those that enjoyed the highest status in international law, and that had been reiterated in several other Court of Appeals decisions. Many individual opinions in United States Court of Appeals decisions cited *Committee of United States Citizens Living in Nicaragua* v. *Reagan* favourably. Other United States Court of Appeals decisions supporting that conclusion included *Sarei* v. *Rio Tinto, PLC*, which had described *jus cogens* norms as those deserving of the highest status under international law. The same line of reasoning could also be discerned in United States district court rulings: for example, in *Sabbithi* v. *Al Saleh*, the United States District Court for the District of Columbia had defined *jus cogens* norms as those which enjoyed the highest status in international law and which prevailed over both customary international law and treaties.

72. The notion of *jus cogens* being hierarchically superior could also be seen in a number of United Kingdom judgments, including the various opinions in the *Pinochet* case. Lord Browne-Wilkinson, for example, had stated that *jus cogens* enjoyed a higher rank in the international hierarchy than treaty law and even "ordinary" customary international law. Lord Bingham, in *A and others* v. *Secretary of State for the Home Department*, had adopted a similar approach, which had subsequently been followed in several other decisions of the House of Lords. The notion of hierarchical superiority had been supported in many decisions of the Canadian courts, such as the Supreme Court's ruling in *Kazemi Estate* v. *Islamic Republic of Iran* that *jus cogens* norms were a higher form of customary international law, and in those of the domestic courts of Argentina. In *Mazzeo*, *Julio Lilo*, et al., the Supreme Court of Argentina had recognized *jus cogens* as the highest source of international law. Similarly, in the *Simón*, *Julio Héctor y otros s/ privación ilegítima de la libertad* case, that Court had stated that *jus cogens* norms were above not only treaty law, but all international law. Practice, in the form of domestic court decisions recognizing hierarchical superiority, was also available from the Philippines, such as *Bayan Muna* v. *Alberto Romulo and Blas F. Ople*, and Zimbabwe, such as *Mann* v. *Republic of Equatorial Guinea*.

73. Regional courts had also referred to the hierarchical superiority of *jus cogens* courts. The European Court of Human Rights, in *Al-Dulimi and Montana Management Inc.* v. *Switzerland*, had referred to the peremptory effect of the higher-ranking norm of *jus cogens*. In the inter-American system, *Michael Domingues* v. *United States* had referred to *jus cogens* as "a superior order of legal norms" (para. 49).

74. The hierarchically superior character of *jus cogens* was virtually unchallenged, except, it seemed, by some members of the Commission. Portugal, during the fifty-sixth session of the General Assembly, had noted that "*[j]us cogens* focused on the idea of a material hierarchy of norms, the superior norms being non-derogable".[403] At the sixty-eighth session, the Netherlands had stated that "*[j]us cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law".[404] Other statements recognizing the hierarchical superiority of *jus cogens* included those of Cuba during the twenty-second session, Greece during the thirty-fifth session and Slovakia and Cyprus during the fifty-fourth session. In its pleadings before the International Court of Justice in *Jurisdictional Immunities of the State*, Germany had noted that the notion of hierarchical superiority flowing from *jus cogens* was a product of post-Second World War international law.

75. With respect to the second criticism, namely that hierarchical superiority was more a consequence than a characteristic of *jus cogens*, it was not clear why that should be the case, nor why, as suggested by Mr. Murase and others, that hierarchical superiority applied only with respect to treaty law. In the conclusions of the work of the Study Group, the Commission had not limited the description of *jus cogens* as hierarchically superior to its application in the context of treaty law, nor had it suggested that it was a consequence. Moreover, the cases and statements by States previously cited referred in the main to hierarchical superiority in the context of State responsibility.

76. In his view, one of the consequences of hierarchical superiority was invalidity, but hierarchical superiority itself was not a consequence, as could also be seen

[402] *Yearbook ... 2006*, vol. II (Part Two), para. 251, pp. 177 *et seq.*, at p. 182, conclusion (32).

[403] A/C.6/56/SR.14, para. 66.

[404] A/C.6/68/SR.25, para. 101.

from the Commission's conclusions on the work of the Study Group on the fragmentation of international law. Conclusions (32) and (33) described *jus cogens* in terms of, *inter alia*, superiority, while conclusion (41) set out effects, including invalidity.[405] The Commission had not seen hierarchical superiority solely as a consequence.

77. He was surprised by the claim made by some that there was no support for the universal application of *jus cogens*, recalling that he had already referred to the advisory opinion of the International Court of Justice on *Reservations to the Convention on Genocide*, which described genocide, a norm it later confirmed as *jus cogens*, as one having a universal character. The notion of universal application had been affirmed in decisions of other courts, both international and domestic. The United States Court of Appeals, in *Siderman de Blake* v. *Argentina*, had stated that, while customary international law derived solely from the consent of States, the "fundamental and universal norms constituting *jus cogens*" were different, while in *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, the Court had said that *jus cogens* norms were universally binding by their very nature. The Federal Court of Australia had referred to *jus cogens* in terms of universality in *Nulyarimma and Others* v. *Thompson*.

78. As noted by Mr. Vázquez-Bermúdez, the Inter-American Court had, in an advisory opinion, noted that the fundamental principle of equality, which it had deemed *jus cogens*, was applicable to all States. States, too, had routinely referred to the universal character of *jus cogens* in deliberations of the General Assembly. Moreover, in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, the Democratic Republic of the Congo had referred to *jus cogens* as being imposed on all States independent of their acceptance. Belgium, in its application in *Questions relating to the Obligation to Prosecute or Extradite*, had stated that *jus cogens* was "a body of legal rules applicable to all States" (para. 2.3.2.1 of the application). In its application in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Bosnia had stated that *jus cogens* norms were "binding on all States of the World Community" (para. 132). As noted in the report, the United States, in its counter-memorial in *Military and Paramilitary Activities in and against Nicaragua*, had also pointed to the prohibition on the use of force as having *jus cogens* status, *inter alia* owing to the fact that it was a "universal norm" (para. 314). In addition, there were countless individual opinions of judges and many references in the literature, as reflected in the first report. Those elements were ubiquitous in practice, and it would be strange and disconcerting if the Commission were to cast doubt on them.

79. In the light of comments made and the changes he intended to propose to draft conclusion 3, paragraph 1, he would be happy to change the title of draft conclusion 3 to refer to the definition of *jus cogens* norms, rather than their general nature. He recommended that draft conclusion 1 be referred to the Drafting Committee, where no doubt some improvements could be made. He would not propose referral of draft conclusion 2 to the Committee. With regard to draft conclusion 3, he recommended its referral to the Drafting Committee on the understanding that amendments, in particular those seeking that paragraph 1 more closely follow the 1969 Vienna Convention, should be considered by the Commission.

80. Finally, although he did not agree with the criticism directed at his fluid approach, he was willing to adopt the approach that the Commission had followed in its work on the topic of the identification of customary international law, namely that draft conclusions referred to the Drafting Committee should remain in the Drafting Committee until it had finalized a full set of draft conclusions. The Commission could, of course, continue to be appraised of the work of the Commission through interim reports when necessary.

81. Many members of the Commission had commented on the title of the topic: Mr. Hassouna, Mr. Kamto and Mr. Murase, and several others had suggested that it should be changed to "*Jus cogens* in international law". He agreed that, without the qualifier, the title might suggest that the Commission was considering *jus cogens* in its entirety, including *jus cogens* under domestic law. As not all members had expressed their view on the subject, he intended to make a specific proposal in that regard in his next report so that the Commission could take a decision.

82. Mr. FORTEAU said that it would be very helpful if the Special Rapporteur could provide the Drafting Committee with a list of the practice and jurisprudence cited in his summing up, much of which did not appear in the first report.

83. The CHAIRPERSON said that he took it that the Commission wished to refer draft conclusions 1 and 3 to the Drafting Committee, taking into account the recommendations made by the Special Rapporteur and leaving open the question of how to proceed further.

It was so decided.

84. The CHAIRPERSON said that the Drafting Committee on the topic of "*Jus cogens*" would meet that afternoon.

85. Mr. MURASE, expressing surprise that the composition of the Drafting Committee on the topic had been discussed the previous day before the Commission had decided whether to refer any text to it, said that he wished to be included among its members.

86. The CHAIRPERSON invited him and any other interested members to make themselves known to the Chairperson of the Drafting Committee.

87. Mr. SINGH said that he would also like to join the Drafting Committee.

The meeting rose at 12.55 p.m.

[405] See *Yearbook ... 2006*, vol. II (Part Two), pp. 182–183.

3324th MEETING

Wednesday, 20 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the environment in relation to armed conflicts (*continued*)* (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)

[Agenda item 7]

Third report of the Special Rapporteur (*concluded*)*

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on her third report on the protection of the environment in relation to armed conflicts (A/CN.4/700).

2. Ms. JACOBSSON (Special Rapporteur) said that the debate at the current session had been very rich, and she was grateful to the members of the Commission for their constructive statements, which, as she had underlined previously, were one of the two most important elements of the collective work of the Commission, along with the work in the Drafting Committee. As was her usual practice, she would not name the colleagues who had made comments, criticisms or proposed amendments, but she wished to highlight that Mr. Candioti had brought up an essential general issue related to working methods in the Commission, which would have to be addressed.

3. She would begin with a few remarks on the methodology. While the members of the Commission seemed to continue to appreciate the temporal approach used, certain challenges that arose from it had been identified. One concern was that some of the proposed draft principles, including draft principle I-1 to which she would return later, had been placed in a particular temporal group even though they also covered other temporal situations. It was both a practical and a substantive problem. She recalled that it had been the Drafting Committee's decision, and not hers, following the consideration of the second report,[406] to arrange the draft principles – which she had simply numbered from 1 to 5 – on the basis of the different temporal phases covered by the topic. Accordingly, separate parts, modelled on the temporal phases, had been created. She had never been entirely satisfied with that solution, as she realized that difficulties would arise in relation to future work. Her objective in deciding to arrange the work around the three temporal phases of armed conflict had been to facilitate the research and analysis of the topic, as it was so extensive, and not to reproduce that structure in the draft principles themselves. If the division by phases was to be maintained, she would be in favour of the tentatively entitled Part Four ("Additional principles") being replaced with a new part entitled "Principles of general application", to be inserted at the beginning of the text. Another option would be for the Drafting Committee to abandon the idea of arranging the draft principles by temporal phases and go back to a simple numerical order.

4. In response to the various comments made concerning the research underpinning her third report, she noted that in many respects the topic represented a new area of legal development, as reflected in the case law. On the one hand, courts adjudicated on the basis of the cases brought to them and, on the other hand, States and individuals brought cases only if there was a viable chance of success, procedurally and materially. That meant that some cases on the environmental effects stemming from an armed conflict might have been addressed from a different angle than protection of the environment in relation to armed conflicts, which gave the impression that they related to property rights or human rights. She considered that case law to be of relevance to the topic, however, and had thus decided to include it in her third report.

5. The section on treaties that were of particular relevance to the pre-conflict and post-conflict phases had been introduced to meet the concerns of certain colleagues who considered that the previous reports did not contain a sufficiently detailed analysis of the environmental and other relevant treaties applicable during an armed conflict. While certain members of the Commission had expressed doubts as to the appropriateness of having a section on investment agreements, others had welcomed it and even recommended that it be expanded and updated. She was of the firm view that the section was relevant and important, as international investment agreements illustrated the fact that environmental protection was incorporated into the treaties – friendship, commerce and navigation treaties – expressly listed by the Commission as among those that had an implication of continued application during armed conflict in its work on the effects of armed conflicts on treaties.[407]

6. She was puzzled by the comments made by members who considered that certain issues were outside the scope of the topic since they did not relate to the phase during an armed conflict, and recalled that the title of the topic was "Protection of the environment in relation to armed conflicts", and not "Protection of the environment during armed conflicts". Neither the third report nor the draft principles were intended to be limited only to the period of conflict. In fact, it would be a contradiction to write a whole report on the post-conflict phase if the draft principles were intended to be applicable only during the

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* Resumed from the 3321st meeting.

[406] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/685.

[407] The draft articles on the effects of armed conflict on treaties and the commentaries thereto adopted by the Commission at its sixty-third session are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 107 *et seq.*, paras. 100–101. See also General Assembly resolution 66/99 of 9 December 2011, annex.

armed conflict. In that regard, several members of the Commission had suggested that phases I and III (before and after the conflict) be limited to the periods immediately before and immediately after the hostilities, respectively. From a legal perspective, such a division seemed difficult to put into practice, as it implied the existence, in parallel to the law of armed conflicts and peacetime law, of a separate body of law, *jus post bellum*, a concept that, as she had explained in her third report, was the subject of discussions which she had refrained from addressing, as she was not convinced that they reflected the current state of the law. That did not mean that the Commission could not return to that interesting question in the future, but she believed that it would be premature at the current stage and probably not helpful to the progress of the work on the topic. Furthermore, she was convinced that the amendments by the Drafting Committee and the insertion of appropriate explanations in the commentaries would respond to the concerns of those who had requested a clear temporal boundary.

7. Other members of the Commission had rightly argued that some of the proposed draft principles should be drafted in such a way that the connection with protection of the environment was clearer, and the text would be amended accordingly. She would return to some aspects of that issue when she discussed the content of individual draft principles.

8. With regard to the future programme of work, she thanked those members who had carefully read the corresponding section of the third report, in which she had given examples of what might merit being addressed by the future Special Rapporteur for the topic. For those who considered that this section of the report was too short, she stressed that it was deliberately brief, as it would be for her successor to decide how to proceed. Several members of the Commission had raised issues concerning civil and criminal responsibility. She had not addressed those aspects in her third report, as she believed it would be preferable to examine them at a later stage, when the entire set of draft principles had taken shape.

9. Turning to the observations on the draft principles, she noted that some members of the Commission had considered that draft principle I-1 was drafted in overly general terms, and that some clarification of the measures envisaged was required. That draft principle covered all types of legislative, but also administrative, measures that a State needed to take in order to meet its obligations to strengthen the protection of the environment in relation to armed conflicts. As currently worded, it covered, for example, measures to ensure that the weapons review obligation was met, to make the judicial system available for cases related to the protection of the environment in relation to armed conflicts, or to ensure that the measures taken by a State in the context of peace operations met environmental standards. She proposed drawing up an indicative list of measures to include in the draft principle if it was referred to the Drafting Committee.

10. Regarding draft principle I-3, some members of the Commission had questioned the connection between status-of-forces agreements and armed conflict, while others had considered that such agreements clearly came under the scope of the topic. She stressed again that the title of the topic was protection of the environment in relation to armed conflicts, and that marking, reconstruction and prevention measures that might be provided for in status-of-forces agreements in relation to toxic substances were vital elements of such protection. Modern agreements on the status of forces and status of missions marked an important development in the practice of States and international organizations, such as NATO. One interesting example, which she had cited in her second report, was the status-of-forces agreement signed by the Republic of Korea and the United States of America in 1966,[408] to which environmental provisions had been added in 2001. In her view, the proposal to replace "status-of-forces and status-of-mission agreements" with "special agreements" made during the debate on draft principle I-3 was an interesting one that merited further consideration in the Drafting Committee.

11. Concerning draft principle I-4, the members of the Commission seemed to generally support the idea of including a provision on peacekeeping operations, even though some were concerned that portraying peacekeeping in the scope of the topic as a form of engagement in armed conflict could compromise the viability and usefulness of United Nations peacekeeping activities as a whole. In that regard, she recalled that the topic was not confined to situations of armed conflict, but also included pre-conflict and post-conflict phases, and that the Secretary-General himself had acknowledged that international humanitarian law applied to operations conducted during United Nations peacekeeping operations, as evidenced by his 1999 bulletin on the observance by United Nations forces of international humanitarian law,[409] which was mentioned in the second report.

12. Some members had proposed that the aspects related to peacekeepking operations, currently addressed in draft principles I-4 and III-2, be grouped together in a single text. She would support that proposal provided that the Drafting Committee abandoned the idea of arranging the draft principles by temporal phase.

13. With regard to draft principles III-1 and III-2, she would welcome further discussion in the Drafting Committee on the drafting suggestions that had been made. The comments and proposals in relation to draft principles III-3 and III-4 seemed well founded in several respects, given that the members of the Commission had agreed that, as she had pointed out in her third report, remnants of war did not consist only of explosive remnants but also of other hazardous material and objects, and that some remnants were not at all dangerous to the environment or were less dangerous if they remained where they were, as was the case with mustard gas in the Baltic Sea. Critical comments had focused on what had been considered an exhaustive list, the temporal aspect and political realities.

14. Some members had criticized the fact that paragraph 1 of draft principle III-3 provided an exhaustive

[408] Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea (Seoul, 9 July 1966), available from: www.usfk.mil/About/SOFA/.

[409] ST/SGB/1999/13 of 6 August 1999.

list of remnants of war that must be cleared, removed, destroyed or maintained in accordance with obligations under international law, which might limit the effectiveness of the draft principle in the future, in the light of new weapons being continuously developed. However, the wording of the paragraph was based on the law of armed conflict as it currently existed, and the remnants of war listed in it were the same as those mentioned in the corresponding treaties, discussed in paragraphs 247 to 252 of the third report, as well as the second report, and primarily involved hazardous explosive material. The list was not exhaustive and was not intended to be, as was clear from the words "and other devices". She recognized, however, that it might be helpful to reformulate the draft principle to be somewhat broader in scope, given that the ultimate aim was to strengthen the protection of the environment in relation to armed conflict. She therefore welcomed the proposals made in that respect, and would provide the Drafting Committee with a new text to ensure that other types of toxic and hazardous remnants of war were also covered.

15. Some members of the Commission had criticized the fact that it was not specified in draft principles III-3 and III-4 which party was responsible for removing the remnants of war after the cessation of hostilities. She stressed that it was not an omission on her part, but a deliberate choice, as the question of responsibility was primarily regulated by the law of armed conflict, as reflected by the formulation "in accordance with obligations under international law". By way of example, she cited the Additional Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, annexed to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or have indiscriminate effects. Article 3, paragraph 2, of that Convention provided that "each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol", and article 10, paragraph 2, of which stipulated that "High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines, booby-traps and other devices in areas under their control". Article 3, paragraph 2, of the Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects provided that "[a]fter the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control". The reference to "parties to a conflict" denoted that the responsibility for the clearance of remnants of war was not limited to States, but could concern other actors involved in a conflict when it came to remnants of war in areas under their control.

16. As she had highlighted in paragraph 19 of her third report, the issue of responsibility was especially complex when it came to remnants of war at sea, due to the legal and practical issues posed by the nature of the sea. Some members of the Commission had suggested that the responsible actors who were to cooperate with other competent organizations should perhaps be States having effective jurisdiction and control over the areas concerned.

17. It must be borne in mind that the aim of the draft principles was to enhance the protection of the environment in relation to armed conflict to the greatest extent possible. Determining responsibility for the clearance of remnants of war was a multifaceted issue, which was why paragraph 1 of draft principle III-3 had been formulated passively. The law of armed conflict illustrated that such responsibility fell not only on States, but could also fall on non-State actors. The aforementioned instruments seemed to indicate that the party with the primary obligation to clear cluster munitions was the one that had jurisdiction or effective control over the affected areas at the relevant time.

18. At the same time, there were situations in which it was impossible to identify the responsible actor, or in which material that was now considered hazardous remnants of war had been placed or used in a manner that had been legal at the time. Nevertheless, they could still constitute a threat to the environment that needed to be remedied. Examples included leaking military vessels or dumped ammunition, as mentioned in the third report. In that context, it was important to recall that the main purpose was to clear the hazardous remnants, and that was best done through cooperation.

19. Still in connection with remnants of war but also with draft principle III-5, she noted with satisfaction that several members of the Commission had highlighted the importance of access to information, including in the case of Bosnia and Herzegovina and Croatia, where a lack of environmental information and, in particular, information about the placement of mines continued to cause despair. In fact, one of the examples highlighted in the third report was precisely treaties on landmines and cluster munitions, and the obligation to provide information arising from them. The "transparency" section of those treaties also provided that information be given on how the environment had been taken into account and protected throughout the removal process.

20. The use of the expression "Without delay" in draft principle III-3, paragraph 1, had also been criticized, as some members were of the view that formulating the obligation in that way was perhaps unreasonable and onerous. However, the wording was taken from article 10, paragraph 1, of the Additional Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, annexed to the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or have indiscriminate effects, which provided that "[w]ithout delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained".

21. Lastly, some members had considered that the words "At all times necessary", as used in paragraph 2 of draft principle III-3, did not make it clear to which temporal

phase the draft principle applied; since the draft principle appeared in the part entitled "Draft principles applicable after an armed conflict", it was intended to apply after the cessation of hostilities, and thus in the post-conflict phase. However, the point could be clarified in the Drafting Committee and the commentaries.

22. Several valuable comments had been made in relation to draft principle III-5. With respect to the applicable temporal phase, the response would ultimately depend on what decision was taken concerning the structure of the draft principles. If the headings corresponding to the different temporal phases were retained, draft principle III-5 would likely be interpreted as applying to the post-conflict phase. With regard to the duty to cooperate, the connection between sharing of information and cooperation showed the importance of such an exchange of information to the extent possible in post-conflict and recovery measures. It was noteworthy in that context that, while instruments such as the Convention on the Law of the Non-Navigational Uses of International Watercourses allowed for parties to withhold information related to national security, they nonetheless required the parties to cooperate in good faith, including on matters related to such information.

23. She had no difficulty in accepting that there were exceptions for reasons of national security or national defence, as mentioned by certain members, and she had actually given several examples of them in her reports, such as the saving clause in the Convention on the Law of the Non-Navigational Uses of International Watercourses, under which the watercourse State was not obliged to provide data or information vital to national defence or security, but was still obliged to cooperate in good faith. One member of the Commission had pointed out that the sharing of information and granting access to information were two distinct obligations and required different treatment. That point should be considered if draft principle III-5 was sent to the Drafting Committee.

24. With respect to the practice of international organizations, a matter raised by at least one Commission member, she underlined that the Environmental Policy for United Nations Field Missions[410]stipulated that peacekeeping missions must assign an environmental officer with the duty to provide environmental information relevant to their operations and to promote awareness among personnel of environmental issues. The Policy also included a requirement to disseminate and study information on the environment, which would presuppose access to information that could in fact be disseminated.

25. The fact that the United Nations, as an international organization, was required under the aforementioned policy to facilitate the sharing of environmental information demonstrated that the contributions of international organizations could also be crucial in that regard. Another example was the European Union Military Concept on Environmental Protection and Energy Efficiency for EU-led Military Operations,[411] which provided that, due to the many troop-contributing nations and other actors involved, early and close coordination among them and with the host nation was mandatory, and frequent information exchange was essential for the implementation of environmental protection principles and standards in planning for and the conduct of the operation.

26. Draft principle IV-I on the rrights of indigenous peoples was the last draft principle proposed and the one that had garnered the most comments, mainly focused on the lack of connection between the rights of indigenous peoples and armed conflicts. Several members had considered that the issue was a human rights matter that fell outside the scope of the topic. Others, on the contrary, had welcomed the provision, and some had highlighted the need to establish an explicit connection between the rights of indigenous peoples and armed conflicts. In the course of those exchanges, it had been pointed out that, in dealing with the environmental consequences of armed conflict, States might be in direct contact with lands to which indigenous peoples had a particular connection. In her view, the protection of the environment during the post-conflict phase was precisely an area in which the rights of indigenous peoples should be recognized.

27. Before continuing, she wished to recall once again that the topic concerned the protection of the environment "in relation" to armed conflicts and that, as such, the rationale for the topic was to address also areas of international law other than the law of armed conflict, including human rights and environmental law. It would therefore be deplorable if draft principle IV-1 were dismissed solely on the basis that it addressed human rights. Most of the members who had expressed a wish for the establishment of a clearer and stronger connection between the rights of indigenous peoples and the protection of the environment had highlighted an essential point. In her view, the connection must be made clearer in the draft principle itself.

28. The sources mentioned in the third report shed light on the legal instruments and jurisprudence that supported the recognized connection between indigenous peoples and their lands, territories and resources, and the obligation to seek their free, prior and informed consent. Other examples showed that the connection was particularly relevant in the context of armed conflicts. The sources included the United Nations Declaration on the Rights of Indigenous Peoples,[412] which had been adopted relatively recently, in particular articles 29 and 30 thereof. Article 30 provided expressly that military activities should not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. It also provided that States must undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities. More recently, the Special Rapporteur on the rights of indigenous peoples had emphasized that

[410] United Nations, Environmental Policy for UN Field Missions (2009), reviewed on 30 June 2010, Ref. 2009.6.

[411] Council of the European Union, "European Union military concept: Environmental protection and energy efficiency for EU-led military operations", EEAS 01574/12, 13 September 2012, available from: https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013758%202012%20INIT.

[412] General Assembly resolution 61/295 of 13 September 2007, annex.

military activities should not take place in the lands or territories of indigenous peoples unless it was imperative for their security. In such exceptional circumstances, States should undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for such activities. In addition, the Chairperson of the Permanent Forum on Indigenous Issues, Mr. Álvaro Pop, had declared during the Forum's fifteenth session that, because of the rapid pace of globalization and processes to identify new lands to exploit, indigenous peoples were increasingly experiencing armed conflicts and militarization on their lands.[413] There were other examples, but those mentioned showed that there was a link between the protection of the environment of indigenous peoples and armed conflict and that the issue thus did not fall outside the scope of the topic.

29. She therefore proposed that if, as she hoped, the Commission decided to send draft principle IV-1 to the Drafting Committee, she would draft a revised version, taking account of the comments made by the members. The new version would differ from the original in two respects: it would focus on the protection of the environment of indigenous peoples, and not on their rights, and would explain the connection to situations of armed conflict. The temporal aspect of the draft principle would also be made clearer. She hoped that those amendments would meet the concerns of the members, and proposed that all of the draft principles be sent to the Drafting Committee.

30. She thanked the members for their detailed and constructive contributions, both in the plenary and in private consultations, and said that she had been very touched by the kind words addressed to her with respect to her engagement on that and other topics over the past 10 years. She also wished to thank Mr. Candioti and former member Mr. Dugard, without whom the Commission would not have begun work on the topic. They were the ones who had identified the request by UNEP and the ICRC that the Commission address matters relating to the protection of the environment in relation to armed conflicts, and they had been the ones to encourage her to examine whether there was any merit to the proposal. She therefore extended her most sincere thanks to Mr. Candioti, whose advice had always been particularly valuable.

31. She recalled that, at the previous session, the Commission had taken note[414] of the draft introductory provisions and the draft principles provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.870[415] that had been distributed in the meeting room. As could be seen in that document, in the draft principles applicable during an armed conflict (part II), the word "natural" was in square brackets. The reason for that was that, when it had adopted the document, the Commission had not yet decided whether it should use the term "environment" or "natural environment" throughout the text or whether it should use the term "natural environment" only in the draft principles that related to the natural environment during an armed conflict. She referred the members to the statement made by the Chairperson of the Drafting Committee at the previous session,[416] in which he had clearly explained the point. As it did not seem to be the practice of the Commission to adopt a text containing words in square brackets, that aspect needed to be resolved or she would not be able to present the commentaries from the previous session. Since the Commission would have to decide on the use of terms before the conclusion of its work on the topic – and not at the current session, which would be premature – she proposed sending the provisionally adopted text back to the Drafting Committee for technical reasons, in other words to remove the square brackets around the word "natural" in the draft principles contained in part II, and to explain the reasons for doing so in a note, as had been done for previous topics. The Commission could then adopt the draft text provisionally adopted by the Drafting Committee at the previous session. She reiterated that the intention was not to reopen the debate, as it had been agreed that it would be necessary to revisit the question of terminology.

32. The CHAIRPERSON said that he took it that the Commission wished to send draft principles I-1, I-3, I-4 and III-1 to III-5, as well as draft principle IV-1, to the Drafting Committee.

It was so decided.

Provisional application of treaties[417] (A/CN.4/689, Part II, sect. G,[418] A/CN.4/699 and Add.1,[419] A/CN.4/L.877[420])

[Agenda item 5]

Fourth report of the Special Rapporteur

33. The CHAIRPERSON invited Mr. Gómez Robledo, Special Rapporteur on the provisional application of treaties, to introduce his fourth report (A/CN.4/699 and Add.1).

34. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he wished to thank the members for their constructive comments and for the interest they had shown during the debate at the previous session on the topic of provisional application of treaties, which had highlighted the complexity of the topic. The discussions in the Drafting Committee on the draft texts proposed in the third report[421] had been very stimulating and had enriched the debate. In his view, the Drafting Committee's extremely dynamic work was the natural continuation of the debate in the plenary and

[413] United Nations, "Indigenous peoples must be equal participants in peace plans, conflict resolution, Chair says as Permanant Forum opens", press release, 9 May 2016.

[414] See *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

[415] Available from the Commission's website, documents of the sixty-seventh session.

[416] See *Yearbook ... 2015*, vol. I, 3281st meeting, p. 286, para. 7.

[417] At is sixty-seventh session (2015), the Commission had before it the third report of the Special Rapporteur (*Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687) and a memorandum by the Secretariat (*ibid*., document A/CN.4/676).

[418] Available from the Commission's website, documents of the sixty-eighth session.

[419] Reproduced in *Yearbook ... 2016*, vol. II (Part One).

[420] Available from the Commission's website, documents of the sixty-eighth session.

[421] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687.

was very valuable. As was customary, in his introduction of the fourth report, he would give an overview of the work completed, comment on various aspects of the report and outline a road map for future work.

35. The objective of the first report[422] had been to introduce the topic and define a workplan. The second report[423] had essentially focused on the legal effects of provisional application. The third report contained an initial examination of the relationship between provisional application and other provisions of the 1969 Vienna Convention: article 11 (Means of expressing consent to be bound by a treaty), article 18 (Obligation not to defeat the object and purpose of a treaty), article 24 (Entry into force), article 26 ("*Pacta sunt servanda*") and article 27 (Internal law and observance of treaties). It also addressed provisional application in relation to international organizations. In that context, the Commission had relied on a memorandum prepared by the Secretariat concerning the provisional application of treaties and focused on article 25 of the 1986 Vienna Convention .[424] Annexed to the third report was a table setting out specific examples of multilateral treaties with provisions on provisional application, membership of which was open to international organizations. The third report also included a set of six draft guidelines – based on all of the reports and debates up to that point – three of which had been provisionally adopted by the Drafting Committee.[425] In the debate in the Sixth Committee at the seventieth session of the United Nations General Assembly, 35 States and the European Union had made contributions on the topic of provisional application of treaties, which was an increase over the previous year. In addition, 23 States had submitted comments on national practice, which had contributed to systematizing State practice.

36. The fourth report included an addendum containing a list of examples of recent European Union practice on provisional application of agreements with third States. The examples would be very useful when it came to drafting model clauses, the adoption of which had been recommended by many States. He had held two series of informal consultations with State representatives in New York, the first in November 2015 and the second in April 2016. The consultations had proved very useful in explaining in more detail the different aspects of the reports on the provisional application of treaties, and had provided the opportunity to gather very interesting comments from representatives in the Sixth Committee. A seminar had also been held at the Faculty of Law of the National Autonomous University of Mexico in March 2016 and a meeting of experts had been convened by the legal advisor to the Ministry of Foreign Affairs of Mexico in February 2016; both events demonstrated the high level of interest in the topic.

37. In line with the road map agreed on at the previous session based on the comments made by Commission members and representatives in the Sixth Committee, the fourth report focused on two main issues: a continuation of the analysis of the relationship between the provisional application of treaties and other provisions of the 1969 Vienna Convention and the practice of international organizations in relation to the provisional application of treaties. With regard to the analysis of the views expressed by Member States, as of the publication of the third report, the Commission had received submissions from 19 States on their national practice. In 2016, it had received submissions from Australia, the Netherlands, Paraguay and Serbia. None of the submissions received indicated that the provisional application of treaties was prohibited under internal law. In some cases, national legislation provided for the establishment of an internal process to be followed for provisional application to be accepted, but, in general, the issue was not addressed in internal law, which showed that provisional application was an exceptional circumstance. However, there was a growing tendency, already identified at the previous session, towards provisional application of multilateral treaties.

38. Turning to the analysis of the relationship between provisional application and the provisions of the 1969 Vienna Convention that had not been addressed in the third report, he recalled that the primary objective of the exercise was to provide more details on the legal regime governing provisional application by interpreting article 25 of the Convention in the light of other provisions of treaty law. For that reason, he had decided not to include the provisions of the Convention that were not necessarily directly linked to provisional application. As he had already noted in the third report, that was the case with articles 7 to 10, which referred to the requirements surrounding the adoption and authentication of the text of a treaty. Given the flexibility provided under article 25 to agree on the provisional application of a treaty, what mattered when interpreting a specific situation was establishing whether the group of States that could provisionally apply a treaty had "in some other manner so agreed" even though the treaty itself made no reference to provisional application. It would therefore be pointless to examine provisions dealing with formalities that would not necessarily allow for the provisional application of a treaty, even if they were relevant in the event that the States decided to conclude a separate agreement to establish the rights and obligations for provisional application. The same applied to articles 11, 12, 13, 14, 15 and 16, which dealt with means of expressing consent to be bound by a treaty and, by definition, determined the entry into force of the treaty for the States concerned, but which could only be used to agree on provisional application, as had been noted in the third report. Furthermore, since provisional application generally ended upon entry into force of the treaty, although that was not always the case, he had not considered it necessary to spend time on provisions of the Convention that addressed formalities that presupposed compliance with national constitutional requirements related to the entry into force of a treaty.

39. With regard to the reservations regime, he had not found any treaties that provided for the possibility of making reservations as of the date of the decision to provisionally apply a treaty, in full or in part, nor any provisions on provisional application that referred to the possibility of formulating reservations. Nor had he identified any cases in which a State had formulated reservations at the time of deciding to provisionally apply a treaty. The question was

[422] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664.

[423] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675.

[424] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/676.

[425] See *ibid.*, vol. I, 3284th meeting, pp. 304–305, para. 15.

therefore whether, if a treaty made no reference to reservations, a State could still formulate reservations at the time of agreeing with other parties to provisionally apply the treaty in question. In principle, there was nothing to preclude States from doing so, for two reasons: the provisional application of a treaty gave rise to legal effects, and the purpose of a reservation was precisely to exclude or modify the legal effects of certain provisions of the treaty *vis-à-vis* the States making the reservation. In any case, a reservation made in the context of provisional application would be valid only for the period of provisional application and would have to be lodged again once the State expressed its consent to be bound by the treaty. However, it seemed to be a purely hypothetical and theoretical question, since, in practice, a State would simply have to decide to limit its consent to provisional application to the parts of the treaty that were not problematic in order to avoid having to formulate reservations, given the inherent complications involved in doing so.

40. With respect to the regime of invalidity of treaties, and in view of the observations made by Commission members and States, emphasis had been placed on the analysis of article 46 of the 1969 Vienna Convention in the light of article 27. First, it was concluded in the fourth report that the principle according to which a State could not invoke the provisions of its own internal law to justify non-compliance with obligations arising from a treaty was also valid when it came to provisional application. Second, after explaining the scope and content of article 46, he had gone on to examine the fundamental question of the limitation of provisional application on the basis of internal law, which had given rise to arbitral jurisprudence that was not yet firmly established. From the perspective of international law, and regardless of the outcome of the famous *Yukos* case, the possible limitation of provisional application on the basis of internal law would not derive from article 46 of the 1969 Vienna Convention since it was not an element related to the capacity to conclude the treaty in question. The issues involved in that case highlighted the need for greater clarification of the article 25 regime. In the Drafting Committee, it had been pointed out that the issue of clauses limiting provisional application on the basis of internal law should be discussed in the context of the consideration of the draft guidelines he had proposed, and it would therefore be necessary to revisit the issue both in the plenary and in the Drafting Committee.

41. With regard to the termination or suspension of the operation of a treaty as a consequence of its breach, having analysed article 60 of the 1969 Vienna Convention in the report, he recalled that, in order for there to be a breach that activated that provision, there must exist a legal relationship arising from a treaty. Thus, given that the provisional application of a treaty gave rise to legal effects as though the treaty were in force, which in turn generated obligations that must be fulfilled under the principle of *pacta sunt servanda*, it could be concluded that, in the case of provisionally applied treaties, the prerequisite of the existence of an effective obligation was met and that, consequently, the conditions were in place for the suspension or termination of the treaty to be requested, in accordance with the provisions of article 60 of the Convention, on condition that there had been a serious breach of the provisionally applied treaty.

42. With regard to cases of State succession, State responsibility and outbreak of hostilities, reference could be made to the provisions of the 1978 Vienna Convention on succession of States in respect of treaties ("1978 Vienna Convention"), which illustrated the practical utility of the provisional application of treaties in contributing to legal security in situations that were generally associated with political instability within a State and that gave rise to the reconfiguration of its international relations. Given that such issues were governed by the provisions of the Convention, he had not considered it necessary to go beyond what was provided for in that instrument.

43. Turning to chapter III of the fourth report, on the practice of international organizations in relation to provisional application of treaties, he thanked the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat for the specific information it had sent him on its functions and methods of work, which had been very useful in the preparation of his fourth report. With regard to the Secretariat's registration function, to date, 53,453 original treaties had been registered with the United Nations, and that number exceeded 70,000 if subsequent agreements were included. That number did not reflect the total volume of treaties worldwide, since not all States registered their treaties in accordance with Article 102 of the Charter of the United Nations. If, however, all treaties and the formalities to which they gave rise were taken into account, there were more than 250,000 registered items. In other words, an average of 2,400 treaties and treaty formalities were registered with the United Nations every year. Furthermore, 1,349 formalities related to the provisional application of treaties had been registered between 1946 and 2015. In the exercise of the functions entrusted to it under Article 102 of the Charter of the United Nations, the Secretariat had registered a total of 1,733 provisionally applied treaties, classified as being in force, which gave rise to a number of problems. That category of treaties comprised both bilateral treaties and open and closed multilateral treaties. The most interesting and revealing observation gleaned from drawing up the inventory was that the extensive work of registering formalities related to provisional application was based primarily on the regulations on the registration and publication of treaties and international agreements adopted by the General Assembly in 1946,[426] and that the criterion used for registration, in accordance with Article 102 of the Charter of the United Nations, was the *de facto* equation of provisional application with entry into force when the treaty was applied provisionally by common agreement of at least two contracting parties. The Secretariat continued to apply that criterion in the exercise of its registration and publication functions, and it was also reflected in the *Repertory of Practice of United Nations Organs* adopted in 1955[427] and updated in 1966.[428] Furthermore, with regard to the Secretariat's depositary functions, the clauses relating to provisional application and entry into force of treaties contained in instruments deposited with the

[426] General Assembly resolution 97 (I) of 14 December 1946.

[427] *Repertory of Practice of United Nations Organs*, vols. I–V (United Nations publications, Sales Nos.: 1955.V.2 (vol. I); 1955.V.2 (vol. II); 1955.V.2 (vol. III); 1955.V.2 (vol. IV); 1955.V.2 (vol. V); and 1955.V.2 (index)).

[428] *Repertory of Practice of United Nations Organs, Supplement No. 3*, vols. I–IV (United Nations publications, Sales No.: E.72.V.2; E.71.V.2; E.72.V.3; and E.73.V.2.

Secretariat were so diverse that the Treaty Section had created varied search categories to match the possible options, which confused matters even further for those studying the subject. In his view, that state of affairs should prompt the Commission to give some thought to the function of depositary of international treaties, even though that would be a separate topic, examining whether the depositary should be considered a simple administrator of notifications or an actor with the capacity to differentiate between the requests it received from Member States and thus with a greater capacity for legal analysis than might appear at first glance – a hypothesis that States did not seem willing to accept when it came to the United Nations Secretariat. In any case, it was clear from his work that Member States were largely unaware of the activities undertaken by the Secretariat in its registration function and as depositary of treaties when it came to provisional application; the criteria applied by the Secretariat, whether they were considered the right ones or not, derived from a decision by the General Assembly, which should, if it considered it relevant, review them to see whether they did in fact correspond to State practice. It was important to bear in mind that the regulations on the registration of treaties had been adopted prior to the 1969 Vienna Convention and had not been amended since. In that regard, one of the first concrete outcomes of the Commission's work on the topic could be a review of the regulations by the General Assembly to bring them in line with current State practice in relation to the provisional application of treaties. Such a review would also help bring practice in line with the purpose and scope of article 25 of the 1969 Vienna Convention and would then enable the Secretariat to reflect new trends in contemporary practice in that area in the *Treaty Handbook*,[429] the *Final Clauses of Multilateral Treaties: Handbook*[430] and the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*.[431]

44. The fourth report also contained valuable information provided by other international organizations concerning their practice, including the Organization of American States, the European Union, the Council of Europe, NATO and the Economic Community of West African States, and he wished to express his thanks to their legal departments for their contributions. All of the examples given by the various organizations highlighted the importance of provisional application when it came to the commitments undertaken by States at the regional level and its relationship with international organizations, as well as its frequent use in the practice of the law of treaties. Those elements would be very useful when it came to considering the model clauses he would propose at the next session, which would be an element of the guidelines intended to serve as a guide to practice on provisional application.

45. Further to the draft guidelines already presented to the Commission, in his fourth report he proposed a single additional draft guideline, entitled "Internal law and the observation of provisional application of all or part of a treaty", which was based on article 27 of the 1969 Vienna Convention. He recalled that, in his third report, he had proposed a draft guideline 1 which included a limitation clause that referred to the internal law of States. The Commission members had been unanimous in the view that it should not be suggested that international law was subordinate to internal law. That had not been his intention; he had merely wished to respond to the concerns expressed by a number of States that provisional application should take account of the rules of internal law. The Commission, however, like the representatives in the Sixth Committee, had considered that such a provision might weaken, even indirectly, article 27 of the 1969 Vienna Convention, which was why it had been deleted from the revised version of draft guideline 1 that he had referred to the Drafting Committee. The new proposed draft guideline was not intended to reopen the debate, but merely to add to the draft guideline on the legal effects of provisional application while taking account of the fact that the provisions of article 46 of the 1969 Vienna Convention could only be invoked within the limits of the scope of that article, namely capacity to conclude treaties. He was aware that some would argue that the text was not sufficient and that the draft guidelines should make some mention of the possibility that the agreement, in the broad sense, of the States agreeing to provisionally apply a treaty could establish a limitation based on internal law. In the light of the debate on draft guideline 1 at the previous session, however, he did not see the need to do so and believed that the issue could be addressed in the commentaries.

46. In conclusion, he said that he would address in his fifth report the various pending issues, such as the legal effects of the termination of provisional application of treaties that gave rise to rights for individuals, and would submit to the Commission model clauses that would be drafted on the basis of practice and could complement the guidelines by offering States and international organizations useful guidance. The fifth report would also serve as the basis for drafting the commentaries to the draft guidelines that had already been considered by the Commission and, in some cases, adopted by the Drafting Committee.

The meeting rose at 11.35 a.m.

3325th MEETING

Thursday, 21 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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[429] *Treaty Handbook* (United Nations publication, Sales No.: E.02.V.2).

[430] *Final Clauses of Multilateral Treaties: Handbook* (United Nations publication, Sales No.: E.04.V.3).

[431] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7/Rev.1 (United Nations publication, Sales No.: E.94.V.15).

Crimes against humanity (*concluded*)[*] (A/CN.4/689, Part II, sect. C, A/CN.4/690, A/CN.4/698, A/CN.4/L.873 and Add.1)

[Agenda item 9]

Report of the Drafting Committee (*concluded*)[*]

1. Mr. ŠTURMA (Chairperson of the Drafting Committee) introduced the sixth report of the Drafting Committee at the sixty-eighth session of the Commission, on crimes against humanity, as contained in document A/CN.4/L.873/Add.1, which reproduced the text, as provisionally adopted by the Drafting Committee, of an additional paragraph, namely paragraph 7, to be inserted at the end of draft article 5.

2. He recalled that he had introduced an earlier report of the Drafting Committee on the topic (A/CN.4/L.873) during the first part of the session on 9 June 2016.[432] That report contained six draft articles provisionally adopted by the Drafting Committee at the current session, including draft article 5. It had been suggested during the plenary debate that the Special Rapporteur draft a concept paper on the issue of criminal responsibility of legal persons, for use by the Drafting Committee when addressing the six draft articles proposed by the Special Rapporteur in his second report. However, due to a lack of time, the Drafting Committee had not been able to consider the issue. The Commission had subsequently decided to allocate a further meeting to the Drafting Committee to consider the question of the liability of legal persons.

3. A provision on that question had not been included in draft article 5 as initially proposed in the Special Rapporteur's second report (A/CN.4/690). However, the question of the liability of legal persons in the context of crimes against humanity had generated much discussion during the plenary debate. At that time, there had been a divergence of views in the Commission as to the advisability of providing for such liability in the draft articles. It was in the light of that debate that the Special Rapporteur had been requested to draft the concept paper. The paper, which had subsequently been presented to the Drafting Committee, had explored various options to deal with the issue, with a view to taking account of the different points of view expressed in the plenary debate, including: to make no mention of the matter in the draft articles; to insert a "without prejudice" clause, which would be elaborated on in the commentaries; or to develop an entire draft article, potentially modelled on article 26 of the United Nations Convention against Corruption.

4. The Drafting Committee had also had before it a proposal by the Special Rapporteur for a new paragraph 7 in draft article 5, which represented a possible *via media* between the various approaches identified in the concept paper. The formulation of the proposed paragraph 7 was based on the wording of article 3, paragraph 4, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, to which 173 States were currently parties. The paragraph also reflected the core aspects of the corresponding article in the United Nations Convention against Corruption and would be supplemented by an explanation in the commentary indicating that the liability identified in the paragraph was without prejudice to the criminal liability of natural persons provided for elsewhere in the draft article.

5. The same divergent opinions that had been voiced in the plenary discussions had been maintained in the Drafting Committee. The key issues of contention had been whether and, if so, how the liability of legal persons should be reflected in the draft articles. Various drafting options and formulations had been explored, including with the aim of rendering the language of the Special Rapporteur's proposed provision more flexible or, conversely, stricter. Ultimately, a key consideration for the Committee had been that the proposed provision was based on language, accepted by a large part of the international community of States, which had been intentionally drafted flexibly. However, it had not been possible to reconcile the differences of opinion, and paragraph 7, in the formulation proposed by the Special Rapporteur, had been adopted provisionally following an indicative vote.

6. The opening clause of the proposed paragraph, "Subject to the provisions of its national law", was intended to accord to the State considerable discretion as to the measures that would be adopted; the obligation was "[s]ubject to" the State's existing approach to liability of legal persons for criminal offences under its national law. Such flexibility was further supplemented by an indication that a State would only be obligated to take measures where it deemed it appropriate to do so in the context of the offences referred to in draft article 5.

7. The phrase "shall take measures" was intended to signal a clear obligation for States to address the liability of legal persons in the context of crimes against humanity. At the same time, the language of paragraph 7 provided States with considerable flexibility to shape those measures in accordance with its national law. It acknowledged and accommodated the diversity of approaches adopted in national legal systems, including with respect to the definition of legal persons and the possible measures that could be taken against legal persons.

8. The second sentence dealt with the question of the possible measures to be taken. It provided that: "Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative." Once again, the formulation, which was the same as that found in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, was designed to allow maximum flexibility with a view to accommodating different legal traditions, hence the reference to "legal principles of the State". The provision acknowledged the diversity of solutions adopted within national legal systems, and left it for each State to choose from among three options to secure the liability of legal persons, namely criminal, civil or administrative. All of those matters would be further developed in the corresponding commentary.

[*] Resumed from the 3312th meeting.

[432] See the 3312th meeting above.

9. In conclusion, he expressed the hope that the plenary Commission would be in a position to adopt draft paragraph 7 to draft article 5, as presented.

10. Mr. PETER said that he would like to congratulate the Special Rapporteur on the flexibility he had shown. He had supported the drafting of the new paragraph, which could be applied to military contractors, who were becoming increasingly active in armed conflict.

11. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt draft article 5, paragraph 7, as contained in document A/CN.4/L.873/Add.1.

It was so decided.

12. Mr. KITTICHAISAREE said that he wished to place on record his position concerning two points. First, he wished to underline that his understanding of the wording "each State shall" in paragraph 7 of draft article 5 meant that implementation of the article was subject to the provisions of national law. Second, as he had pointed out during the deliberations of the Drafting Committee, the international legal instruments cited in support of the new paragraph mainly concerned the prosecution of legal persons, as those legal persons were the main conduits or channels for the commission of the crimes; hence the *raison d'être* of the international legal instruments in question, such as the International Convention for the Suppression of the Financing of Terrorism, the United Nations Convention against Corruption and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. According to him, paragraph 7 went, to a certain extent, beyond current State practice. However, he had no objection to it, since it might open up the way towards the prosecution of legal persons for crimes against humanity. In that respect, he noted that the reaction of States in the Sixth Committee would be of crucial importance for the Commission to take into account during the second reading of draft article 5, paragraph 7.

13. The CHAIRPERSON said it was his understanding that the Special Rapporteur would prepare the relevant commentary for inclusion in the report of the Commission to the General Assembly on the work of its sixty-eighth session.

Provisional application of treaties (*continued*) (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)

[Agenda item 5]

Fourth report of the Special Rapporteur (*continued*)

14. Mr. MURASE said that he wished to thank the Special Rapporteur for his fourth report on the provisional application of treaties (A/CN.4/699 and Add.1). As the Special Rapporteur had noted, the objective of chapter II of the report was to respond to issues raised in the Sixth Committee; therefore, the analysis contained therein was not necessarily intended to provide a basis for the formulation of new draft guidelines. However, the chapter did not sufficiently clarify the relationship of provisional application to the other provisions of the 1969 Vienna Convention. The lack of clarity in the analysis might stem partly from the inconsistent use of terminology, such as the interchangeable use of the phrases "provisional application" and "a treaty that was provisionally applied", which could give rise to misleading conclusions.

15. In section A, it seemed that the Special Rapporteur was discussing not a reservation to a treaty but rather a reservation to an agreement to apply a treaty provisionally. Although a State might agree to exclude or modify the legal effect of the provisional application of a treaty or unilaterally declare that it would provisionally apply a treaty with certain exclusions or modifications, that did not constitute a reservation to a treaty, as defined in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, since a reservation was, by definition, made to the treaty itself. The section should perhaps instead have addressed whether a reservation to a treaty could exclude or modify the legal effect of a treaty during its provisional application as well as after its entry into force.

16. Section B seemed to be the only section of the fourth report directly relevant to the draft guideline proposed at the current session. The Commission should be cautious in drawing general conclusions or implications from the *Yukos* case, which concerned the interpretation of article 45 of the Energy Charter Treaty, since it should be concerned rather with establishing general guidelines on treaty law in the context of invalidity of treaties. The Special Rapporteur's statement in paragraph 64 of his fourth report, with respect to the above-mentioned case, that "the difference of approaches between an arbitral tribunal and a national court may mean that each assigns different weights to the interests of the investors, on the one hand, and State sovereignty, on the other" was thus overly simplistic. Moreover, the decision of the district court in the Netherlands in the case was not final – a notice of appeal had recently been issued – and similar proceedings were taking place in other countries, so it would be premature to take it as a basis on which to discuss the implications of the issue.

17. In the same section, the Special Rapporteur considered the relevance of article 46 of the 1969 Vienna Convention and its provision that a State could invalidate its consent to be bound by a treaty if that consent was a manifest violation of a rule of its internal law of fundamental importance. However, he had not addressed two important questions, namely whether consent to be bound by a treaty included consent to apply a treaty provisionally or how article 46 could be reconciled with the fact that a State often agreed to the provisional application of a treaty only to the extent that its internal law permitted.

18. In his analysis in section C, the Special Rapporteur provided little analysis of the circumstances under which a violation of a treaty that was provisionally applied amounted to a "material breach" in the sense of article 60 of the 1969 Vienna Convention. In that regard, article 60, paragraph 3, of the Convention provided for circumstances under which a material breach of a treaty occurred after its entry into force. The Special Rapporteur should have asked whether a material breach of treaty that

was provisionally applied could occur under the same circumstances as provided for in that provision. More fundamentally, he did not distinguish between the termination of a treaty as such and the termination of the provisional application of a treaty. The reference to termination in article 60 of the 1969 Vienna Convention concerned, of course, the former, while the latter would be included in the reference in the same provision to the "suspension of the operation of a treaty". As a result, he had failed to address the matter of whether a material breach of a treaty that was provisionally applied entitled parties to invoke the breach as a ground not only for suspending the provisional application of the treaty but also for terminating the treaty itself.

19. With respect to section D, he recalled that article 73 of the 1969 Vienna Convention stated that its provisions would not prejudge any question that might arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States. In his opinion, the scope of that provision extended to a treaty that was provisionally applied. Moreover, drafting guidelines on those issues would go beyond the scope of the present project.

20. Chapter III of the fourth report provided a summary of the practice of international organizations in relation to provisional application of treaties. However, as the Special Rapporteur discussed two very different types of practice, it was unclear what conclusions he was seeking to draw from his analysis. In section A, the Special Rapporteur considered the registration and depositary functions of the United Nations, a subject of doubtful relevance to the present topic. On the other hand, sections B to F, in which the Special Rapporteur referred to practice related to treaties to which regional organizations were parties, were highly relevant. However, the only discernible conclusion was that provisional application was important in treaties involving regional organizations. His own view, stated at the previous session, was that States and international organizations should not be covered in the same set of guidelines. More extensive comparative analysis needed to be conducted on the provisional application of treaties involving only States and those involving international or regional organizations.

21. As to draft guideline 10, which appeared to follow the structure of article 27 of the 1969 Vienna Convention, he regretted the fact that no basis had been provided for it in the Special Rapporteur's fourth report. In his third report,[433] the Special Rapporteur had addressed the relationship of provisional application to article 27, but had not indicated any practice to support his view that, once a treaty was being provisionally applied, internal law might not be invoked as justification for failure to comply with the obligations deriving from provisional application. His concern, therefore, was the relationship of the draft guideline to article 27. As had been discussed at the previous session, States occasionally limited the legal effect of provisional application of a treaty in accordance with their internal law. Applying article 27 to provisional application *mutatis mutandis* might contradict such State practice. More careful analysis of the relationship between provisional application and internal law was required before a draft guideline was formulated on the matter.

22. Regarding future work on the topic, he would welcome an explanation from the Special Rapporteur as to how the proposed model clauses on provisional application would fit in with the draft guidelines.

23. In conclusion, he agreed to the referral of draft guideline 10 to the Drafting Committee, on the understanding that the latter would address his concerns.

24. Mr. NOLTE said that he wished to thank the Special Rapporteur for his rich report, which provided a meticulous account of the topic. The fact that the Special Rapporteur had taken up proposals made by Member States was to be welcomed, but the Commission also needed to integrate all the various aspects of the topic, whether they had been raised by Member States or not, into a cohesive framework.

25. Regarding the section of the fourth report dealing with reservations, he agreed with the statement in paragraph 36 that "nothing would prevent the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty". However, he would even go one step further and say that a State that had formulated a reservation could be presumed to intend that the reservation would apply not only when the treaty entered into force but also to its provisional application. It would be helpful for States if the Commission were to spell out such a presumption, as a matter of guidance.

26. He found the heading "Invalidity of treaties" somewhat confusing, as the section concerned did not so much address that subject as the different aspects of the relationship between a treaty and the internal law of a State. On a more substantive point, paragraph 43 of the fourth report should not ask to what extent the regime set out in article 25 of the 1969 Vienna Convention constituted a sort of subterfuge for failing to comply with the requirements of the internal law of each State. Article 25 was not a subterfuge but rather a way offered by the Convention for States to reconcile respect of their internal legal order and the possible need to adapt their domestic law, on the one hand, with the procedure for being bound by a treaty and, on the other hand, beginning their cooperation under the treaty before it could enter into force. It was of course true that States could not invoke domestic law against their obligations under a treaty; however, that was precisely why they usually gave very careful consideration to the extent of their commitment to provisionally apply a treaty.

27. It was therefore true, but also somewhat misleading, when paragraph 49 of the fourth report emphasized that a very different phenomenon occurred when the treaty expressly referred to the internal law of the negotiating States and subjected the provisional application of the treaty to the condition that it would not constitute a violation of internal law. It was true that, if the treaty itself limited the scope of the provisional application of a treaty to the extent that it did not result in a violation of internal law, the question of invocation of domestic law did not arise. However, paragraph 49 was misleading because in

[433] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687.

such a case the question was no longer one of validity or invalidity of a treaty, or of primacy of treaty law or internal law, but one of treaty interpretation.

28. More precisely, the question of interpretation related to what the treaty said regarding the scope and content of the obligations it established and whether it limited those obligations so that they did not go beyond what was permitted by the internal law of the negotiating States. It was quite clear why States might have a very legitimate interest in limiting the scope of provisional application, pending the final entry into force of the treaty; negotiators clearly needed to ensure that their respective States would be able, under their domestic law, to apply the treaty provisionally. Thus, a clause limiting the scope of provisional application to the extent permitted by internal law had nothing to do with the situation contemplated in article 46 of the 1969 Vienna Convention, namely the invocation of internal law against an existing treaty obligation.

29. The Special Rapporteur elaborated on that question by referring to the example of article 45 of the Energy Charter Treaty, which had been interpreted in different ways in the *Yukos* case: by an arbitral tribunal (*Yukos Universal Limited (Isle of Man)* v. *the Russian Federation*), and subsequently by a Netherlands district court (*The Russian Federation* v. *Veteran Petroleum Limited*, et al). The Commission should be extremely cautious about drawing any general conclusions from that case, or endorsing one or other of the decisions because, as the intricate but conflicting reasoning of the arbitral tribunal and the Netherlands court had shown, the question of provisional application in that case was complicated by the unusual interplay between two different rules on provisional application contained in the aforementioned article of the Treaty. For that reason, it could not simply be said, as the Special Rapporteur did in paragraph 54 of his fourth report, that article 45, paragraph 2 (*a*), of the Energy Charter Treaty "would seem to suggest that, if a signatory State does not submit such a declaration, it is accepting the real possibility of applying the treaty provisionally, as provided for in article 45, paragraph 1". The Netherlands court had provided a very detailed explanation of why paragraphs 1 and 2 of article 45 operated independently of each other. That explanation would have to be studied by the Commission if it wished to adopt a position on the legal issues which had arisen in that case. He did not fully agree with the Special Rapporteur's statement in paragraph 65 of the fourth report that it would be premature to draw any conclusions from the decision by an internal tribunal – the Netherlands court – since the parties affected could appeal the decision. In fact, the Commission regularly quoted or assessed decisions by internal courts that were under appeal, not for their authority as a final resolution of the case, but for the quality of their arguments. In that particular case, the Netherlands court had put forward some weighty arguments, relying on the fact that article 45, paragraph 1, of the Energy Charter Treaty referred not only to the Constitution, but also to other "laws or regulations" of the contracting States as limiting the scope of the provisional application of the Treaty. Neither the arbitral tribunal nor the Netherlands court had been of the opinion that the State concerned could determine whether provisional application would be consistent with its internal law, as paragraph 53 of the fourth report seemed to suggest.

30. While it was unnecessary and inappropriate to adopt a position on the question of the interplay between paragraphs 1 and 2 of article 45 of the Energy Charter Treaty, the Commission should make the general point that it was permissible for parties to the Treaty to limit its provisional application by invoking their internal law.

31. He therefore thought that proposed draft guideline 10 should address the most important concern, namely that of the numerous cases where a treaty clause establishing the obligation provisionally to apply the treaty was itself limited in some way by the domestic law of a signatory State.

32. Chapter III of the fourth report on the practice of international organizations in relation to provisional application of treaties was a mine of information, but he was unsure whether it could be used as the basis for any draft guidelines. The same could be said of paragraphs 88 to 101 on State succession.

33. Sir Michael WOOD, after thanking the Special Rapporteur for his fourth report, said that the Commission could play a useful role in clarifying law and practice with respect to the provisional application of treaties, which was an important aspect of the law of treaties and of considerable practical significance.

34. While chapters II and III of the fourth report contained interesting analysis and information, the Special Rapporteur did not indicate what he would like the Commission to do with them. They could not – with one possible exception – form the basis of a draft guideline. He wondered whether they had been presented simply in order to provide the Commission with background information, or whether they were intended as groundwork for a study and, if so, how such as study would be prepared. It was not easy to comment on those chapters without knowing what the Special Rapporteur's intention had been in drafting them.

35. The aim of chapter II seemed to be to ascertain which provisions of the 1969 Vienna Convention might be relevant to provisional application, if only by analogy. However, the Commission should be cautious about reaching conclusions by analogy. It would be better for that exercise to be accompanied by the provision of examples of State practice, where it existed. That said, he agreed with most of the Special Rapporteur's conclusions in chapter II and he shared Mr. Nolte's views on reservations. The paragraphs devoted to article 60 of the 1969 Vienna Convention and the definition of "material breach" in paragraph 3 (*b*) of that article had been particularly interesting. However, he largely endorsed what Mr. Murase had said with regard to the questions that should have been considered in that part of the report. On the other hand, he disagreed with the Special Rapporteur's conclusion in paragraph 80 of the fourth report that "a trivial violation of a provision that is considered essential may constitute a material breach for the purposes of article 60 of the 1969 Vienna Convention", which seemed to be based on the text of article 60, on the case concerning the *Gabčíkovo–Nagymaros Project* and on a passage in a commentary to article 60 by Bruno Simma and Christian Tams.[434] In that

[434] B. Simma and C. Tams, "Article 60", *in* O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. II, Oxford University Press, 2011, pp. 1351 *et seq.*

connection, he drew attention to the partial award made by the Permanent Court of Arbitration on 30 June 2016 *In the Matter of an Arbitration under the Arbitration Agreement Between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, regarding a territorial and maritime dispute*, in which the Court had considered the meaning of article 60 with some care. The Court had first observed that "Article 60, paragraph 3, subparagraph (*b*) does not refer to the intensity or the gravity of the breach, but instead requires that the provision breached be essential for the accomplishment of the treaty's object and purpose". It had then noted that "in international jurisprudence, very few decisions have undertaken a thorough analysis of Article 60, paragraph 3", and had concluded that it resulted from the text of article 60, paragraph 3 (*b*), and from the jurisprudence established in the advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* and the case concerning *Military and Paramilitary Activities in and against Nicaragua* that "a tribunal having to apply that provision must first determine the object and purpose of the treaty which has been breached. Termination of a treaty due to such a breach under Article 60, paragraph 1, is warranted only if the breach defeats the object and purpose of the treaty" (paras. 215–218 of the partial award).

36. He concurred with the Special Rapporteur and Mr. Murase that it would be premature to draw any conclusions with respect to article 46 of the 1969 Vienna Convention from the decisions of the arbitral tribunal and the Netherlands court in the *Yukos* case, but he fully endorsed the general point made by Mr. Nolte.

37. The paragraphs of the report on State succession were very interesting. Language from the 1978 Vienna Convention might assist the Drafting Committee, since its clauses on provisional application were more detailed than those of the 1969 and 1986 Vienna Conventions.

38. Turning to draft guideline 10, which was curiously entitled "Internal law and the observation of provisional application of all or part of a treaty", he noted that no explanation had been given of the wording chosen for the guideline, which seemed to be connected in part with the discussion of article 46 in the fourth report and with references to internal law in earlier reports. It might also be linked to the discussion of article 27 of the 1969 Vienna Convention in the third report, where the Special Rapporteur asserted that this article "relates to the binding nature of a treaty, which is determined exclusively by international law, meaning that its execution by the parties cannot depend on, or be conditional to, their respective internal laws".[435] The Special Rapporteur seemed to have relied mainly on the 2009 interim award in the *Yukos Universal Limited (Isle of Man)* v. *the Russian Federation* case, but of course, as Mr. Murase had explained, things had moved on since then.

39. The references to article 46 of the 1969 Vienna Convention in the fourth report and in the draft guideline seemed to imply that the provisions of internal law in question were those regarding competence to agree to apply a treaty provisionally. However, in paragraphs 49 to 63 of his fourth report, the Special Rapporteur discussed the situation where internal law might limit or otherwise define the international rights and obligations that flowed from provisional application in cases where the provisional application clause or the agreement itself so provided by referring to internal law, as the Energy Charter Treaty did. Although the pertinence or otherwise of internal law was often the most important and most contentious aspect of provisional application, draft guideline 10 seemed to be written as though internal law was always irrelevant. That or some other guideline, or at least the commentary, should make clear that this was not the case.

40. As for the future programme of work, he would be interested to hear what thoughts the Special Rapporteur might have on the output of the Commission that might emerge from the analysis of the relationship of provisional application to other provisions of the Vienna Convention(s). The suggestion that a recommendation might be made to the Sixth Committee that the Secretariat regulations and manuals on its functions as the registry and depositary of treaties be revised could possibly be considered when the Commission had completed its work on the topic under consideration.

41. In conclusion, he would be happy to see draft guideline 10 referred to the Drafting Committee.

42. Mr. PARK commended the Special Rapporteur on his fourth report and the useful addendum to it. He agreed that the scope of the topic should be expanded to encompass the practice of international organizations as well as that of States. However, care should be taken to ensure that, for the sake of clarity, the draft guidelines did not refer to States and international organizations in the same sentence.

43. With regard to the issue of reservations and provisional application, there were, as far as he knew, no actual instances of reservations being entered as from the time of agreement to the provisional application of a treaty. The question should therefore be addressed from a hypothetical perspective. In that regard, he concurred with the opinion expressed by the Special Rapporteur in paragraphs 33 and 36 of his fourth report.

44. Since the provisional application of a treaty, or part of a treaty, produced the same legal effects between the parties concerned as a treaty that had entered into force, there was no reason why article 19 of the 1969 Vienna Convention and the reservations regime codified in the Convention should not apply during provisional application. Consequently, he agreed with what was said on that subject in paragraph 23 of the fourth report.

45. Once again, as the provisional application of a treaty, or part of a treaty, produced the same legal effects with respect to invalidity as a treaty which had entered into force, logically articles 27 and 46 of the 1969 Vienna Convention should also be pertinent in that case. Since a State had to meet very strict conditions in order to invoke article 46, the question which deserved some consideration

[435] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687, p. 66, para. 60.

was whether, when a treaty was being applied provisionally, article 46, paragraph 2, should be interpreted loosely in order to make it easier for a State to invoke that clause. That question should be examined in the light of State practice. He agreed that the draft guidelines should cover the rules established in the above-mentioned articles 27 and 46. Although he basically supported draft guideline 10 proposed by the Special Rapporteur, he suggested amending its text to read as follows:

> "A State that has consented to apply a treaty or a part of a treaty provisionally may not invoke the provisions of its internal law as justification for its failure to perform a treaty or a part of a treaty which is being applied provisionally. This rule is without prejudice to article 46 of the 1969 Vienna Convention."

46. Since articles 47 to 53 of the 1969 Vienna Convention also came into play *mutatis mutandis* when a treaty was applied provisionally, it would be advisable to adopt a draft guideline on the Convention's general application *mutatis mutandis* in those circumstances.

47. It was necessary to discuss the termination or suspension of the provisional application of treaty as a consequence of a breach thereof, since article 25 of the 1969 Vienna Convention was silent on that matter. Suspension or termination could take the forms contemplated in article 60 of the Convention, but the difficulty in the context of provisional application lay in the notion of a material breach. When only part of a treaty was provisionally applied, both the defaulting State and the State invoking the breach must apply that part of the treaty. If the material breach concerned a part of the treaty that was not applied provisionally, then the situation would be regulated by article 18 of the Convention. It would also be necessary to discuss whether the notion of a material breach should be applied more loosely when a treaty had not entered into force and was being applied provisionally, or whether it applied in the same way as it would if the treaty had already entered into force. As the 1969 Vienna Convention also covered many other forms of termination of the operation of a treaty in articles 54 to 64, it would be essential to consider whether not only article 60, but also articles 61 and 62, were of relevance to provisional application.

48. As issues of State succession were covered sufficiently in the 1978 Vienna Convention, the Commission did not need to discuss them in the context of the present topic.

49. With regard to the practice of international organizations and the work of the United Nations Secretariat, he observed that States used a wide variety of formulas to agree to the provisional application of treaties. As such, it was necessary either to adopt a new guideline, entitled "Use of terms", or to provide definitions in one of the existing guidelines. With respect to the word "unilateral", which appeared in the *Treaty Handbook*[436] prepared by the Treaty Section of the United Nations Office of Legal Affairs and was emphasized in the fourth report, he wondered whether that emphasis related to draft guideline 5. The *Treaty Handbook* was not based on State practice but was intended as a practical guide. Even if provisional application was a unilateral act by a State, the issue needed to be examined carefully and in depth because such unilateral acts were subject to various conditions.

50. While supporting the inclusion of model clauses regarding provisional application in the future programme of work on the topic, he expressed uncertainty about the eventual outcome of research concerning the provisional application of treaties that enshrined the rights of individuals. If the Special Rapporteur intended to cover the areas of taxation, investment and protection of human rights, the legal issues involved would become more complicated. To protect the rights of individuals, a State would certainly insist on a termination clause being fully applied by analogy with the termination of provisional application, which would give rise to a debate concerning the period of notice that might be required before provisional application could be terminated unilaterally. A relevant example was cited in the literature, concerning a dispute between Switzerland and another State concerning the termination of a bilateral taxation treaty that was being applied provisionally. Switzerland had maintained that the principle of good faith imposed an obligation on the other party to respect the six-month notice period for denunciation contained in the treaty, while the other State had argued that provisional application would cease immediately. Bearing in mind the differing views held by States, the issue should be approached with care.

51. Mr. KOLODKIN said that he supported the Special Rapporteur's conclusion, set out in paragraph 46 of his fourth report but already contained in his third report, that article 27 of the 1969 Vienna Convention applied to the provisional application of a treaty, as had been confirmed by the Constitutional Court of the Russian Federation and, in his view, in the *Yukos* and *Kardassopoulos* v. *Georgia* cases, to which a significant part of the fourth report was dedicated. The former case had not yet ended; he awaited further rulings with interest. It was not for the Commission to discuss whether the arbitral tribunal or the Netherlands court was in the right, but he drew attention to the fact that the latter had not invoked article 46 of the 1969 Vienna Convention in its ruling, indicating that it did not see it as part of the law applicable in that instance. The Russian Federation had also not referred to article 46 in support of its arguments. In that regard, he took issue with the Special Rapporteur's statement in paragraph 56 of his fourth report concerning incompatibility between the provisions of a treaty applied provisionally and the constitution of a signatory State: in his view, the Netherlands court had not considered the relationship between the Energy Charter Treaty and the Constitution of the Russian Federation, but that between the Treaty, particularly article 26 thereof, and Russian laws and regulations. That was a vital aspect of the court's ruling. Even in its consideration of Russian constitutional law, particularly the separation of powers and the competence of the executive and legislative authorities in the sphere of treaties and dispute resolution, the Netherlands court had not turned to article 46 of the 1969 Vienna Convention. The issue of the validity of the consent of the Russian Federation to the provisional application of the Treaty had not been examined.

52. In the present context, the rulings of the arbitral tribunal and the Netherlands court in the *Yukos* case were of

[436] *Treaty Handbook* (United Nations publication, Sales No.: E.02.V.2).

interest not in terms of the applicability of article 46 to the provisional application of treaties, but rather in terms of whether the theory that article 27 of the 1969 Vienna Convention applied *mutatis mutandis* to treaties being applied provisionally should be supplemented by the conclusion that the obligations arising from treaties being applied provisionally could be restricted if so provided for in the treaty or an agreement on the provisional application thereof, or by the national legislation of the State applying a treaty provisionally. Draft guideline 10 reproduced article 27 *mutatis mutandis*, but the Special Rapporteur had not appended any additions, reservations or restrictions; however, States agreeing on the provisional application of a treaty could restrict the obligation to apply it such that it would involve only those provisions that were compatible with the internal law of the State in question. In the *Yukos Universal Limited (Isle of Man)* v. *the Russian Federation* case, the Permanent Court of Arbitration had recognized that "parties negotiating a treaty enjoy drafting freedom and could … overcome the 'strong presumption of the separation of international from national law.' Indeed, parties to a treaty are free to agree to any particular regime. This would include a regime where each signatory could modulate (or eliminate) its obligation of provisional application based on consistency of each provision of the treaty in question with its domestic law" (para. 320 of the interim award). Article 45 of the Energy Treaty Charter was intended as a restriction or limitation clause. There existed, therefore, State practice and court decisions demonstrating that States could agree to restrict the obligations arising from a treaty being applied provisionally in line with the limits of internal law. A separate issue, also discussed in the Court's ruling in the *Yukos Universal Limited (Isle of Man)* v. *the Russian Federation* case, was the importance of any such agreement being clearly and unambiguously expressed, although in practice States did not always achieve such clarity and unambiguity, nor was it always the intended outcome of negotiations.

53. He suggested that a paragraph stating that States could agree to restrict the obligations arising from a treaty being applied provisionally in line with the limits of their internal law be added to draft guideline 10 or set out in a separate draft guideline. In that respect, he agreed with what had already been said. He further suggested that draft guideline 10 contain a provision to the effect that States should strive to draft limitation clauses clearly and unambiguously and that similar wording be included in the commentary. He understood that the Special Rapporteur intended to prepare a model limitation clause. With those remarks, he expressed support for referring draft guideline 10 to the Drafting Committee.

54. The Special Rapporteur was not proposing to formulate a draft guideline on the issue of reservations and provisional application, observing that treaty provisions on provisional application made no mention of reservations. In paragraph 33 of his fourth report, he stated: "One conclusion that may be drawn from this analysis is that a State may formulate reservations with respect to a treaty that will be applied provisionally if that treaty expressly so permits and if there are reasons to believe that the entry into force will be delayed for an indefinite period of time." In paragraph 34, he went on to state that "in the absence of proof of any type of practice in this regard, it is unnecessary to make an analysis in the abstract, as has been suggested. As a corollary, no case has been identified in which a State has formulated reservations at the time of deciding to apply a treaty provisionally."

55. He drew attention to the declarations made by Italy, the United States and Japan regarding their provisional application of the Wheat Trade Convention, 1986, all of which referred to the Conventionbeing applied provisionally within the limitations of internal legislation. Although the statements, which were very similar in essence, were couched as limitation clauses, they were also reservations. However, he was not aware that any of the States parties to the Convention had objected to those reservations, despite their general nature, which left other States applying the Convention to guess what effect they would have in practice. Although those reservations were few and applied only to a single instance of provisional application, and their significance was therefore limited, they were nonetheless of interest: they raised the possibility that it might be worth looking further for other such examples and they supported the Special Rapporteur's view, set out in paragraph 36 of his fourth report, that nothing would prevent the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty. That view would hold true unless a treaty or agreement on the provisional application thereof provided otherwise. He again suggested that consideration be given to formulating a draft guideline on reservations and the provisional application of treaties. The examples given and the lack of objections expressed indicated that limitation clauses could exist in various forms.

56. With regard to the succession of States, he expressed the view that the Commission had taken a more nuanced approach to provisional application in its work on the draft articles on succession of States in respect of treaties[437] than in its work on the draft articles on the law of treaties.[438] In particular, it had distinguished between the provisional application of bilateral and multilateral treaties, and also between the provisional application of restricted treaties and other treaties. Issues relating to the provisional application and termination of provisional application of a treaty were resolved depending on the nature of the multilateral treaty in question. The 1978 Vienna Convention mirrored that approach.

57. Such nuances were largely dictated by the fact that the situation involved succession and provisional application of treaties with respect to newly independent States. Perhaps the Commission should give further consideration to whether the details of provisional application depended on the nature of the treaty concerned. Did the nature or content of the treaty have any effect on agreeing to provisional application, on who should be party to such an agreement, or on who should give consent to provisional application? For example, if a multilateral treaty set out only mutual obligations, then it seemed that it would only

[437] The draft articles on succession of States in respect of treaties and the commentaries thereto are reproduced in *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 174 *et seq.*

[438] The draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966) with commentaries thereto are reproduced in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

be possible to apply it provisionally between a State that had only just begun the process of acceding to the treaty and individual parties. In that case, the consent of all parties to the treaty to its provisional application with respect to the acceding State would be needed. If the treaty included *erga omnes* obligations, would the consent of all parties be required for it to apply provisionally? Similarly, would the consent of all parties to a treaty establishing an international organization be required for it to apply provisionally with respect to a State acceding to it?

58. With regard to the termination of provisional application, the 1978 Vienna Convention was interesting for a number of reasons. In its article 29, alongside "notice of its intention not to become a party", it contained the term "reasonable notice of termination". The 1969 Vienna Convention did not provide for the latter. It might be worth looking more closely at the provisions of the 1978 Vienna Convention on provisional application. The draft guidelines already agreed by the Drafting Committee were fairly general in nature, and the Commission's work on the topic might benefit from a more detailed approach.

59. Some treaties, including the Wheat Trade Convention, 1986, had provisions on provisional application that determined the status of a State applying the treaty provisionally as a party or provisional party to the treaty, but others were silent on the matter. Could there be said to be a general rule that a State provisionally applying a treaty that had come into force was a party to that treaty, or should each case be looked at individually? Given its significance in practice, the issue was one that the Special Rapporteur might wish to examine.

The meeting rose at 11.45 a.m.

3326th MEETING

Friday, 22 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Organization of the work of the session (*concluded*)[*]

[Agenda item 1]

1. The CHAIRPERSON said that the Enlarged Bureau had met to consider the programme of work for the remainder of the session. Given that, to date, only the English and Spanish versions of the fifth report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/701) had been issued, several members had expressed concern that the Commission was scheduled to consider the report before it had been translated into all the official languages. Following extensive consultations, it had been agreed that the Special Rapporteur would introduce her fifth report on 25 July 2016, as indicated in the programme of work, and that any member wishing to take the floor on the topic could do so on the understanding that the discussion on the topic would not be concluded nor would the Special Rapporteur summarize the discussion on the topic at the current session. In short, the discussion of the topic would begin during the current session and would continue during the sixty-ninth session in 2017. The CHAIRPERSON said he took it that the Commission wished to adopt the programme of work on that understanding.

It was so decided.

Provisional application of treaties (*continued*) (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)

[Agenda item 5]

Fourth report of the Special Rapporteur (*continued*)

2. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourth report of the Special Rapporteur on the provisional application of treaties (A/CN.4/699 and Add.1).

3. Mr. MURPHY said that he wished to thank the Special Rapporteur for his fourth report on the topic and for his detailed introduction of it at the Commission's 3324th meeting. In chapter II of his report, the Special Rapporteur had examined the relationship of provisional application to the other provisions of the 1969 Vienna Convention. Although that analysis was generally interesting, it was perhaps a bit too focused on the questions that had been raised by a few delegations in the Sixth Committee. Although it was certainly appropriate and important to pay attention to the views of States, the Commission worked best when it approached its topics holistically, engaging in research and analysis pertinent to the project as a whole, rather than trying to address points of interest raised by only a few States. Thus, while the issues addressed in chapter II of the fourth report might have provided answers to those States, for the most part, the analysis it contained did not appear to lead anywhere, and it was not at all clear that the questions asked by those States were actually the ones addressed in the report. For example, paragraph 72 indicated that "a number of delegations" had referred to the importance of addressing the relationship between article 60 of the 1969 Vienna Convention and provisional application. Yet the five States that had purportedly raised that point (Canada, Greece, Ireland, Kazakhstan and Romania) had not actually asked the Commission for an analysis of article 60. Rather, they had been interested in knowing how an agreement to apply a treaty provisionally was terminated or suspended, without ever having expressly claimed that article 60 was relevant when answering that question. On the contrary,

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[*] Resumed from the 3321st meeting.

their comments seemed implicitly to assume that the other parts of the 1969 Vienna Convention, including article 60, were not directly applicable to the provisional application of treaties and that there was or could be a unique regime associated with article 25 of the Convention that governed the termination or suspension of an agreement to apply a treaty provisionally.

4. With regard to chapter II of the fourth report, the substantive analysis it contained was too cursory in its consideration of the rules set forth in the 1969 Vienna Convention, and the Commission should refrain from including such partial analysis in its draft guidelines or commentaries. For example, with regard to the issue of reservations, paragraph 23 of the report described only a portion of the applicable rules, namely article 19 of the Convention, but did not address other important rules that appeared in articles 20 and 23. Moreover, it would have been useful to consider whether article 25 was partly or wholly a self-contained regime within the Convention, as some States seemed to assume. If that regime was wholly self-contained, then other articles of the Convention were not directly relevant to article 25, although they could provide some guidance by analogy. Arguably, the rules on termination or suspension set forth in article 60 had no relevance for article 25 because paragraph 2 of the latter itself set forth the rule on termination. The drafting history of article 25 provided some guidance in that respect. In its 1966 draft articles on the law of treaties,[439] the Commission had opted to omit from what had then been article 22 a provision regarding the termination of the application of a treaty which had been brought into force provisionally, deciding instead to leave the point to be determined by the agreement of the parties and the operation of the rules regarding the termination of treaties.[440] However, the United Nations Conference on the Law of Treaties had chosen to insert a termination provision into that article, which was subsequently contained in article 25, paragraph 2. That suggested that the Commission's approach, which relied on the rules regarding the termination of treaties, was not acceptable to States and that another approach specifically addressing termination in article 25 was preferred. Other proposals for termination to be included in article 25, such as the one to limit the time period of provisional application, had failed. It should be remembered that, although the Commission had wished to refer to the provisional "entry into force" of a treaty, the United Nations Conference on the Law of Treaties had preferred provisional "application", reinforcing the idea that the agreement being described in article 25 was a unique creature. Ultimately, there did not seem to have been any belief expressed at the Conference that the provisions contained in other parts of the Convention relating to termination also governed the termination of an agreement to apply a treaty provisionally. As a practical matter, a State wishing to terminate a bilateral agreement to apply a treaty provisionally did not need to refer to the complicated rules of part V, section 3, of the 1969 Vienna Convention; rather, the State simply notified the other State of its intention not to become a party to the treaty. A more complicated question was whether a State could suspend an agreement to apply a treaty provisionally or whether, if that agreement was a multilateral one, a State could suspend it with respect to one or more of the other States that were parties to it. In his view, it could be argued that article 25 established the exclusive means by which a State could, of its own initiative, end its obligation to apply a treaty provisionally.

5. The discussion of invalidity that began in paragraph 40 of the fourth report was thought-provoking; its particular focus on the relevance of internal law was sensible, and the treatment of the *Yukos* case and the corresponding decision of the Netherlands national court was very timely. Mr. Kolodkin's analysis in that regard had been pertinent and thoughtful; however, he agreed with the Special Rapporteur and other Commission members that it would be best not to attempt to reach any particular conclusions with respect to that case while it was still under way.

6. It was vital to separate out three different scenarios concerning the relationship between internal law and an agreement to apply a treaty provisionally. The first scenario described a situation in which the agreement to provisionally apply a treaty itself made reference to internal law; in such situations, internal law was relevant for understanding the scope of the agreement. That was the issue that had arisen in the *Yukos* case in relation to article 45 of the Energy Charter Treaty, which was cited in paragraph 51 of the Special Rapporteur's fourth report. That scenario had no connection to the issue of whether a State could plead its internal law so as to escape from an international obligation; rather, it concerned the nature of the international obligation itself. The second scenario was one in which an agreement to apply a treaty provisionally was silent with regard to internal law but in which a State sought to argue that its consent to the agreement was invalid, owing to a provision of its internal law regarding competence to conclude international agreements. That scenario was analogous to article 46 of the 1969 Vienna Convention. Of course, the ability of a State to escape from an agreement to apply a treaty provisionally by merely notifying the other parties usually made it unnecessary for the State to invoke its internal law for that purpose. The issue could be relevant, however, if the objective was to establish that the agreement was void *ab initio*, in which case no breach could have occurred for which reparation was due. The third scenario described the situation in which an agreement on provisional application was silent with respect to internal law but in which a State sought to invoke its internal law as justification for its failure to perform its international obligations. That scenario was analogous to article 27 of the 1969 Vienna Convention, which provided that a party to a treaty could not invoke the provisions of its internal law as justification for its failure to perform a treaty. Again, the issue could be relevant if the objective of the State was to establish that no breach of the obligation to apply the treaty provisionally had occurred for which reparation was due.

7. Draft guideline 10, which apparently addressed only the third scenario, given that it was closely modelled on article 27 of the 1969 Vienna Convention, should perhaps address all three scenarios. Since there were many treaty provisions on provisional application that referred

[439] The draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966) with commentaries thereto are reproduced in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

[440] *Ibid.*, p. 210 (para. (4) of the commentary to draft article 22).

to internal law, draft guideline 10 could make it clear that internal law was relevant under the first scenario. Saying as much would not require deciding in what way internal law was relevant; everything depended on the language of the agreement to apply the treaty provisionally. The third scenario was addressed by the first sentence of proposed draft guideline 10 and was unobjectionable. Even if there was not much State practice to support that sentence, it seemed logical that a State should not be allowed to plead its internal law in order to justify a failure to perform any of its international obligations.

8. Chapter III of the fourth report presented an interesting discussion of the practice of various international organizations regarding provisional application. The detailed and extensive research evident in that chapter of the report and in the addendum thereto demonstrated the Special Rapporteur's strong commitment to pursuing as much information as possible on the topic. Although that information was interesting, it was not clear where it was leading or how exactly it would contribute to the future work of the Commission on the topic.

9. The last paragraph of the fourth report indicated the Special Rapporteur's intention to propose some model clauses in a subsequent report. While model clauses could be helpful to States, their real value would lie in the Commission's analysis of their meaning, since that would help States in understanding which clause to select in a particular case. However, it might be a challenge for the Commission to explain the meaning of different model clauses; doing so might run afoul of the meaning already ascribed by States to such clauses in existing treaties. Thus, advancing a model clause based on article 45 of the Energy Charter Treaty and explaining what that clause meant might prove quite problematic, and the same might also be true of other clauses. An alternative – though perhaps less helpful – approach might be for the Commission simply to provide a list of commonly used clauses, without attempting to analyse their meaning.

10. Mr. McRAE thanked the Special Rapporteur for his fourth report, which included a good deal of interesting material and set out a number of matters for the Commission to consider. It was surprising to note, however, that the report had a somewhat episodic character, given that the Special Rapporteur seemed to respond to questions raised in the Sixth Committee rather than following a coherent plan of his own, and he echoed the comments that had been made by Mr. Murphy and Mr. Nolte in that regard.

11. The question of the relationship of the provisions on provisional application to other provisions of the 1969 Vienna Convention was an important one. Although, generally speaking, he did not disagree with many of the conclusions reached by the Special Rapporteur, it was often unclear why or on what basis the he had reached those conclusions. With regard to reservations, for example, the Special Rapporteur had concluded that a State provisionally applying a treaty could make a reservation and that another State could object to that reservation. He himself could agree with those propositions, and other Commission members had indicated their agreement with them as well. The question was why was that the case. The Special Rapporteur had stated that, in his view, nothing would prevent a State from formulating reservations to a treaty as from the time of its agreement to the provisional application of the treaty. But what was the basis for that statement? It seemed that a prior point to be made was that the provisional application of a treaty, although provisional in nature, was nonetheless an application of that treaty. In other words, the parties that applied a treaty were entitled to all of the rights and benefits of the treaty, and if the treaty allowed for the formulation of reservations, then any State that applied the treaty provisionally had the same right to make reservations as any other party to the treaty. Of course, it would be different if the State applying the treaty provisionally was provisionally applying only part of the treaty and if the provisions of the treaty that governed reservations were not contained in that part.

12. Those considerations led to an important point, namely that a State applying a treaty provisionally was in the same position as that of a party to that treaty once the latter had entered into force. Consequently, the question concerning how the rules for provisional application related to other provisions of the 1969 Vienna Convention was, in a sense, a false question. To the extent that the provisions of the Convention applied to a treaty in force, they were automatically applicable to a treaty being applied provisionally in the same way that they would apply if the treaty were in force – the only difference being that the treaty was not yet in force, at least for the States that were applying it provisionally. States that agreed to apply a treaty provisionally could not be subject to specific rules that were different than those applicable to the parties to a treaty, except in the case where article 25 was considered to provide for the establishment of a separate regime. But what would be the basis for such a consideration? One might therefore question the conclusion reached by the Special Rapporteur in paragraph 33 of his fourth report that a State could formulate reservations to a treaty that was to be applied provisionally if doing so was expressly permitted by that treaty and if there were reasons to believe that the latter's entry into force would be delayed for an indefinite period of time. Since a State that was applying a treaty provisionally had the same rights as a State that was a party to that treaty, the normal rules relating to reservations applied, and the question of whether provisional application would last for an indefinite period of time was not really relevant. The same reasoning was valid, in principle, for the other provisions of the 1969 Vienna Convention, which were applicable in the same way to a treaty that was applied provisionally as they were to a treaty that had already entered into force. However, there was one important qualification to that statement, since the scope of the rights of a State that was provisionally applying a treaty, unlike those of a party to that treaty, depended on the terms of the treaty that provided for provisional application or on the separate agreement providing for such application. In other words, whether a State applying a treaty provisionally was permitted to make reservations depended, first, on the terms governing the provisional application of the treaty and, second, on the terms relating to reservations that were set out in the treaty being provisionally applied.

13. On the question of the relevance of internal law to the provisional application of treaties, the discussion in the Special Rapporteur's fourth report was interesting but

did not clarify the matter and, to some extent, even confused it. At first glance, the provisions of the 1969 Vienna Convention on the relevance of a State's internal law to the question of competence to enter into treaties or on the extent to which a State could invoke its internal law in order to justify the non-performance of its obligations seemed to apply to provisional application. Consequently, if the treaty or the agreement permitting provisional application said nothing about the matter, those were the principles that were applicable. On the other hand, if the treaty or agreement established specific rules concerning the relevance of internal law to any aspect of provisional application, then those provisions must apply. That was precisely the situation in *Yukos* to which the Special Rapporteur had devoted some attention in his fourth report and on which other Commission members had focused during the debate. The Energy Charter Treaty had its own rules on provisional application, and article 45 of those rules stipulated that a State could provisionally apply the Treaty to the extent that such application was not inconsistent with its constitution, laws or regulations. In other words, under the Energy Charter Treaty, internal law did have a role to play in provisional application. In a sense, then, the *Yukos* case did not reveal anything about the rules relating to provisional application, since it was an interpretation of how the Energy Charter Treaty provided for provisional application. The divergence of views concerning the relationship between paragraphs 1 and 2 of article 45 of the Treaty was interesting from the perspective of treaty interpretation, but it did not, at least as outlined in the Special Rapporteur's fourth report, shed any light on the law relating to provisional application more generally. Thus, it was unclear why the Special Rapporteur considered that the *Yukos* case reflected the possible existence of a conflict arising out of the incompatibility between the constitution of a State and the provisional application of the Energy Charter Treaty. Since the Treaty provided for the relevance of the constitution of the State concerned, the only conflict was over the interpretation of paragraphs 1 and 2 of article 45.

14. However, it was noteworthy that, among other elements cited in the fourth report, such as the 1978 Convention and the practice of the European Union, the Special Rapporteur's discussion of the *Yukos* case revealed the existence of a considerable body of material on practice with respect to provisional application. Thus, the Drafting Committee had been proceeding to develop guidelines on the meaning and application of the law and practice of the provisional application of treaties on the basis of article 25 of the 1969 Vienna Convention without a full understanding of the ways in which States had been providing for provisional application in their practice. In short, the Commission had been working with only a partial picture of the situation. The Special Rapporteur's fourth report provided an opportunity to examine that practice and to draw some conclusions from it. It would nevertheless be useful to undertake a more exhaustive analysis of the provisions of treaties or agreements that provided for provisional application by examining the following: the circumstances in which provisional application was permitted; the extent to which such provisions merely tracked article 25 of the 1969 Vienna Convention or deviated from it; whether such provisions provided for the provisional application of only part of a treaty, and if so, whether they indicated which part of the treaty was concerned or whether they left that decision up to the State; whether there was some consistency in the types of provisions that could be applied provisionally; and the extent to which such provisions placed limitations on the exercise of rights by a State that applied a treaty provisionally. A comparison of the provisions of agreements providing for provisional application that conditioned such application on internal law, whether constitutional or not, would also be helpful, as it would provide a context for the discussion of the *Yukos* case. Determining whether article 45 of the Energy Charter Treaty was a unique provision or whether a similar provision had been included in other treaties would enable the Commission to situate that case with regard to State practice on provisional application, which was quite different from the question of what the Permanent Court of Arbitration or the District Court of The Hague had said in that case or might say in the future. Ultimately, it was possible that a review of practice could disprove the notion that a State that applied a treaty provisionally was in the same position as a party to the treaty.

15. There was a further issue on which some light might be provided, one that arose out of the Special Rapporteur's discussion of reservations. In his fourth report, the Special Rapporteur had emphasized that, if there appeared to be no State practice involving the provisional application of a treaty to which a State had entered reservations, the reason might be simply that States were not likely to include provisions to which they wished to formulate reservations in the articles of a treaty that they were applying provisionally. That was an interesting insight and suggested that a State that was provisionally applying a treaty could not be equated completely with a State that was a party to a treaty, since the latter could pick and choose between the treaty provisions it wished to apply only by means of formulating reservations. A State that applied a treaty provisionally could, in principle, choose which provisions to apply and could also formulate reservations – so long as the agreement according to which the States concerned permitted provisional application did not prevent them from doing so. At the same time, that issue highlighted the fact that the Commission still did not have an adequate theory about provisional application and its relationship to the full application of a treaty.

16. Although chapter III of the fourth report raised many interesting points, the practice described therein covered a wide variety of questions, and it was unclear exactly what conclusions the Special Rapporteur had drawn from it. The practice of the United Nations Secretary-General in discharging his functions as treaty depositary and in relation to treaty registration, which were set forth in Article 102 of the Charter of the United Nations, was interesting insofar as it related to provisional application; however, statistics provided only partial information, whereas what was needed was an analysis of the nature of those actions, as well as a comparison of the actions of the Secretary-General as depositary with those of other depositaries. As far as model clauses were concerned, experience had shown that it was a delicate task, and one that the Special Rapporteur seemed to underestimate. Finally, with regard to draft guideline 10, he shared the views of Mr. Murphy and the other Commission members who had pointed out

that very little in the fourth report related directly to the draft guideline. Indeed, it was unclear where much of the report was leading in terms of the substantive output of the Commission's work; it had therefore come as a surprise to discover the proposed draft guideline 10 at the end of the report. To the extent that it reiterated – albeit in different terms – article 27 of the 1969 Vienna Convention, its wording was unobjectionable. The same could not be said with regard to its expediency. If, in fact, the content of article 27 was reproduced in the draft guidelines, while other provisions of the Convention were not, that might give the impression that those provisions were not applicable to provisional application. It would no doubt be more appropriate to include in the project a general guideline indicating that, unless they were excluded by the agreement on provisional application, the provisions of the 1969 Vienna Convention – to the extent that they were relevant – were applicable to the provisional application of treaties.

17. In conclusion, although he was not opposed to referring draft guideline 10 to the Drafting Committee, he was of the view that the Commission needed clearer guidance from the Special Rapporteur on the question of the relationship of provisional application to the other provisions of the 1969 Vienna Convention.

18. Mr. KAMTO thanked the Special Rapporteur for his fourth report, which, like its predecessors, was concise, easy to read and dealt with some of the most important questions concerning the topic. He had pointed out at the beginning of the discussion on the topic that the Commission should consider the question of provisional application in terms of how it related to internal law, in particular in the light of article 46 of the 1969 Vienna Convention. He was therefore gratified to note that the Special Rapporteur had devoted special attention to that question in his report and had eventually been persuaded by delegations in the Sixth Committee of the merits of doing so – an approach that had subsequently been endorsed by most Commission members.

19. Generally speaking, he was of the view that the Special Rapporteur and the Commission should first settle the question of whether the provisional application of a treaty or part of a treaty was subject to different rules than those governing a treaty that had entered into force. Failing that, it would be necessary to continue the exercise undertaken by the Special Rapporteur in his fourth and previous reports on the topic, which was to study the relationship between provisional application and all the other provisions of the 1969 Vienna Convention. However, the need for such an exercise was questionable, as it was implicitly based on the false assumption that provisional application could modify the nature of a treaty. In fact, a treaty remained a treaty, irrespective of whether it was applied after its entry into force or whether States agreed to apply it provisionally. The only aspect of provisional application that the Convention clearly excluded from the general law of treaties was that of termination, which was governed by article 25, paragraph 2. In all other respects, a treaty that was applied provisionally was subject to the same rules as a treaty that had entered into force; those rules were applicable to States that had consented to such application, and they produced the same legal effects. Neither the nature, the force or the legal effects of those obligations were modified by their provisional application. For that reason, it was not surprising that States in the Sixth Committee had agreed that the provisional application of a treaty produced legal effects, as was pointed out in paragraph 5 of the Special Rapporteur's fourth report. That did not prevent States that wished to apply a treaty provisionally from freely determining, in that context, the scope of their obligations in relation to the treaty as it would apply when it entered into force.

20. Those considerations were also valid for article 46 of the 1969 Vienna Convention, on the provisions of internal law regarding competence to conclude treaties, which was at the heart of the topic; however, he did not share the Special Rapporteur's views in that regard. At the outset, the statement contained in paragraph 44 of his fourth report to the effect that article 46 entailed the need to determine, prior to agreeing on provisional application, whether doing so would violate a rule of internal law of fundamental importance, thereby providing grounds for the invalidity of the treaty, might just as well apply to a treaty that had entered into force. Furthermore, from the standpoint of the general law of treaties embodied in the 1969 Vienna Convention, there was absolutely no justification for not applying article 46 to a treaty that was being applied provisionally.

21. Paragraphs 45 and 46 of the fourth report, as well as paragraph 47, contained errors of reasoning. First of all, paragraph 45 indicated that it would be neither correct nor reasonable to subject States that agreed to the provisional application of a treaty to a so-called obligation to know their own internal law, since article 46 of the 1969 Vienna Convention referred only to the violation of a provision of internal law regarding the competence to conclude treaties. However, whether the matter concerned a treaty that had entered into force or a treaty that was being applied provisionally, the problem was the same: in most States, it was the Chief Executive who negotiated treaties, and it was the parliament that ratified them whenever the treaties dealt with areas that fell within the scope of its competence. If, under a State's constitution, the provisional application of a treaty or parts of a treaty was subject to parliamentary ratification, the problem went beyond strict application and clearly involved competence to conclude treaties. In that case, the application of article 46 was perfectly justified. Paragraph 45 also indicated that article 27 of the 1969 Vienna Convention made no distinction between the provisions of internal law and stipulated that a party could not invoke the provisions of its internal law as justification for its failure to perform a treaty. Once again, that was a general provision that was applicable both to a treaty that had entered into force and to a treaty that was applied provisionally. Yet, the Special Rapporteur continued to engage in a partial reading of article 27, ignoring its second sentence, which specified that the rule it contained was without prejudice to article 46, which necessarily involved consideration of that article. Instead, he concluded his analysis in paragraph 45 by stating that nothing in article 25 of the 1969 Vienna Convention entailed the obligation for States contemplating provisional application to proceed, as a prerequisite, to a determination concerning the internal law of any of the parties involved on the basis of article 46. In the case concerning the *Land and Maritime*

Boundary between Cameroon and Nigeria, the International Court of Justice had been called upon to examine the conditions governing the application of article 46 of the 1969 Vienna Convention. With regard to the argument of Nigeria, the basis of which was ignorance of the country's constitutional law concerning competence to conclude treaties, after recalling the content of article 46, the Court explained that the rules concerning the authority to sign treaties for a State were constitutional rules of fundamental importance. However, it noted that a limitation of a Head of State's capacity in that respect was not manifest in the sense of article 46, paragraph 2, unless it was at least properly publicized, stating that this was particularly so because Heads of State belonged to the group of persons who, in accordance with article 7, paragraph 2, of the Convention, in virtue of their functions and without having to produce full powers, were considered as representing their State. It was clear that the provisions of articles 27 and 46 constituted an indivisible whole and that the rules of internal law of fundamental importance were part of the law of treaties, since, not only were they mentioned in the 1969 Vienna Convention and could therefore not be ignored, but if their observance was not taken into account in assessing the validity of a treaty, the Court would not have entertained arguments on the basis of article 46 as it had done in the above-mentioned case.

22. Second, he questioned the statement contained in paragraph 47 of the fourth report to the effect that the debate in both the Commission and the General Assembly had made it clear that no reference to internal law under any circumstances should be included in the draft guidelines, so as not to create the false impression that the provisional application regime would be subordinated to the internal law of States. While it was true that several Commission members had seemed to be leaning in that direction, the Special Rapporteur did not specify which States in the Sixth Committee had supported that position. Furthermore, he seemed to defend an erroneous understanding of the reference to internal law in relation to the provisional application of treaties. For example, the Special Rapporteur recalled at the beginning of paragraph 46 of his fourth report that he had concluded his analysis of article 27 of the 1969 Vienna Convention – not that of article 46 thereof – in his third report, indicating that once a treaty was being provisionally applied, "internal law [could] not be invoked as justification for failure to comply with the obligations deriving from provisional application".[441] Yet, it was obvious that, if a State had already provisionally applied a treaty, it would be inappropriate for it to subsequently invoke its internal law as justification for the non-performance of its obligations. Otherwise, article 27 was to be read in conjunction with article 46. Next, as highlighted by the conclusions drawn from *Yukos* and *Kardassopoulos* v. *Georgia*, the Special Rapporteur seemed to equate the way in which reference was made to internal law in article 46 of the 1969 Vienna Convention with the limitations imposed by internal law on the scope of provisional application that the parties were free to conclude. As Mr. Murase had stated during the consideration of the first report on the topic[442] and again at the current session, those cases were rather particular, in that the reference to internal law that they contained was based on article 45 of the Energy Charter Treaty and not on article 46 of the 1969 Vienna Convention on the Law of Treaties. And, whereas the latter referred to a rule of internal law of fundamental importance, the former provided that the parties agreed to apply the Energy Charter Treaty provisionally, insofar as such provisional application was not inconsistent with their constitution, laws and regulations, thereby encompassing practically all the rules of internal law. There was thus no reason to extract a general rule from those cases, since States were free to determine the extent of their obligations and could include in a treaty any provisions that they wanted, within the limits of international law, notably, those stipulating that such provisions could not contravene *jus cogens*. The Special Rapporteur seemed to defend that concept of internal law and to reject the idea of the applicability of article 46 to the provisional application of a treaty. Yet, he himself was of the view that article 46 applied in that case, like it did in the case of a treaty that had entered into force, and could not be excluded by a simple "without prejudice" clause, as was proposed in draft guideline 10. That draft guideline should therefore be recast by dividing it into two paragraphs, one that would reproduce the first sentence of article 27 and the other, based on article 46, that would apply the general law of treaties to the particular situation of provisional application. With those remarks, he was in favour of referring draft guideline 10 to the Drafting Committee.

23. Since the discussion concerning articles 60 and 73 of the 1969 Vienna Convention and the practice of international organizations had not led to the formulation of any draft guidelines, he would reserve his comments on those questions until the Commission's work on the topic had advanced further.

24. Mr. PETRIČ thanked the Special Rapporteur for his fourth report and for his oral presentation of it. The analysis in his report of States' reactions to the Commission's work illustrated their significant interest in the topic, which was not surprising, in view of the potential relevance of the provisional application of treaties to their practice. Given the frequent recourse to provisional application in contemporary international relations, it was important for the Commission's final output on the topic to be solidly based on State practice and not primarily on hypothetical considerations and conclusions. It was also true, however, as had been pointed out by the Special Rapporteur, that in many respects, practice concerning the provisional application of treaties was either meagre – for instance, in terms of the formulation of reservations to provisionally applied treaties – or else controversial – as in the case of the invalidity of treaties, particularly with regard to article 46 of the 1969 Vienna Convention. Although the practice of States was developing steadily, it remained very diverse, as reflected in States' legal and constitutional systems, some of which generally admitted provisional application, whether explicitly or implicitly, while others allowed it only under certain conditions or else prohibited it. That was the reality that limited the possibility of establishing clear guidelines, in spite of the frequent use of provisional application.

[441] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687, p. 67, para. 70.

[442] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664.

25. The limited and heterogeneous nature of State practice was what had led the Special Rapporteur to analyse the relationship between the provisional application of treaties, as provided for in article 25 of the 1969 Vienna Convention, as well as other provisions, including those relating to reservations, the invalidity of treaties (in particular the effect of the provisions of internal law regarding competence to conclude treaties), the termination or suspension of the operation of a treaty as a consequence of its breach and State succession. The Special Rapporteur's analysis, which also addressed the views and requests expressed by States in the Sixth Committee and those expressed by members during the previous debate in the Commission, was persuasive and well substantiated, though in many ways not conclusive. At least at the current stage of the Commission's work, it had not revealed enough substance for the elaboration of draft guidelines and probably would not do so in the future. Yet, even if, in some cases, the Special Rapporteur's conclusions were based more on legal reasoning than on State practice, they were useful and shed light on the important and topical problem of the provisional application of treaties.

26. Concerning the provisional application of multilateral treaties, there were various scenarios that should be analysed more thoroughly. A State could apply a multilateral treaty provisionally when the treaty had already entered into force for other States or when it had not yet entered into force, for example because the required number of ratifications had not yet been reached. In the latter case, the State applying the treaty provisionally might or might not have itself ratified the treaty. The consequences of the various situations envisaged in the fourth report should be analysed in greater detail. It would also be useful to distinguish more clearly between the provisional application of bilateral treaties, the provisional application of multilateral treaties and the provisional application of treaties concluded by international organizations.

27. He agreed with the Special Rapporteur's analysis of the formulation of reservations in the context of provisional application. Since provisional application was based on an agreement, the formulation of reservations should, in principle, be possible, unless reservations were expressly prohibited by the treaty, as was indicated in paragraph 23 of the fourth report. In paragraph 32 of his report, the Special Rapporteur had correctly indicated that provisional application constituted a treaty in all senses of the term, given that it was the result of an agreement, and he had consequently concluded that nothing would prevent a State from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty. However, since the question of reservations was a particularly thorny issue, it would be helpful to develop guidelines to guide the practice of States in that area.

28. As to the relationship between provisional application and the regime of invalidity of treaties, the Special Rapporteur had focused his analysis on article 46 of the 1969 Vienna Convention, which referred to the impact of the provisions of internal law on competence to conclude treaties. In other words, the Special Rapporteur had addressed the possible conflicts between the internal law of a State and the State's provisional application of a treaty. That was the most controversial aspect of the topic, as illustrated by the analysis of the jurisprudence in the *Yukos* case that was cited in the fourth report, which had already been discussed extensively by several Commission members and to which he had nothing more to add. He agreed with the view that, insofar as no final decision had yet been delivered in that case, and although it was likely to set a precedent, the Commission should not draw conclusions from its jurisprudence and should certainly not take a position on its material merits.

29. In general, he wished to stress that the procedural formalities prescribed by internal law, compliance with which was a prerequisite for the entry into force of a treaty for a State, related to substantive issues and were a fundamental aspect of the separation of powers and sovereignty of States, as well as a guarantee of legality and respect for the rule of law in their treaty relations. Thus, the procedural guarantees and limitations set forth in internal law with regard to entering into treaty relations should be respected *mutatis mutandis* when a State agreed to apply a treaty provisionally, because such an agreement also constituted a treaty relationship, and it would hardly be acceptable to States for the constitutional oversight of provisional application to be less stringent than that of ordinary treaty relations. As a result, he had several difficulties with draft guideline 10 in its present form; however, he supported its referral to the Drafting Committee for redrafting in the light of the comments made. In particular, the important substance of article 46 of the 1969 Vienna Convention should not be reduced to a "without prejudice" clause, and he shared the view expressed by Mr. Murase and other Commission members that draft guideline 10 should be based more firmly on research, and in particular, that a comparison should be made of the constitutional provisions of States, since the limitations on provisional application that were contained in internal law seemed to be the central and most controversial aspect of the topic.

30. The importance of that research work would also help to produce model clauses, which could not be made without a clear understanding of the impact of internal law on provisional application. Furthermore, he endorsed the view that, since States must agree to provisional application, they could also establish limits to it on the basis of their internal law. As Mr. Kolodkin had stated, they could abrogate their procedural rules governing the entry into force of treaties by agreeing to the provisional application of a treaty without forfeiting their right to consent to provisional application and to regulate and limit it. In that respect, the experience of Brazil, as had been recounted by Mr. Saboia, offered a telling example of State practice. The analysis that had been proposed by Mr. McRae and Mr. Murphy also deserved further consideration in the Commission's future work on the topic.

31. The Special Rapporteur had provided a very interesting analysis of the problems associated with provisional application in the context of State succession, which had been largely based on articles 27 and 28 of the 1978 Vienna Convention. Those articles established a very precise distinction between multilateral and bilateral treaties and, with regard to multilateral treaties, between the so-called "open" and "closed" multilateral treaties, to which reference was made in article 17, paragraph 3, of the 1978

Vienna Convention and which required the consent of all the parties to the treaty in order for another State to apply the treaty provisionally. Based on additional research and analyses of practice, it would be useful to formulate some guidelines concerning provisional application in the context of succession. To that end, a study of the practice of decolonized States and States that had become independent after 1990 could be very helpful.

32. Finally, in chapter III of his fourth report, which covered the practice of the United Nations and other international organizations on the provisional application of treaties, the Special Rapporteur concluded in paragraph 174 that the provisional application of treaties by international organizations was an important part of the practice of the law of treaties. Although the information contained in that chapter was interesting, the Special Rapporteur's research had regrettably not yielded any draft guidelines or even any personal conclusions. It was to be hoped that the Commission's work on the current topic, which was a difficult one, would lead to the adoption of guidelines, as well as perhaps a number of model clauses.

The meeting rose at 11.25 a.m.

3327th MEETING

Monday, 25 July 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Provisional application of treaties (*continued*) (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)

[Agenda item 5]

Fourth report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the fourth report of the Special Rapporteur on the provisional application of treaties contained in document A/CN.4/699 and Add.1.

2. Mr. FORTEAU said that he largely endorsed the comments made by many earlier speakers, in particular Mr. Kolodkin, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte and Sir Michael, with regard to the methodology followed by the Special Rapporteur and the difficulties which it was causing.

3. As had been noted several times previously, the Special Rapporteur's role was not confined to studying subjects in which States had expressed an interest during debates in the Sixth Committee; it was first and foremost to provide an up-to-date account of practice, case law and writings with respect to each element of the topic. The first essential step was to take stock of the pertinent material – primarily treaty practice in the current case – because an inductive approach was, by definition, essential when codifying international law.

4. In that connection, it was regrettable that, after four years of work on the subject, the Commission was still lacking a detailed survey of treaty practice in relation to provisional application. The examples that had been given were concerned exclusively with the practice of international organizations. The upshot was that the Commission's work on the topic had reached a dead end, especially in the Drafting Committee, because it was impossible to formulate texts that faithfully reflected practice without knowing exactly what that practice was. In 2014, he had emphasized the need for the Commission to gather relevant practice and had pointed out that, rather than waiting for States to provide information on their practice, the Special Rapporteur should seek it out. Three examples would serve to illustrate the serious problems caused by the absence of a preliminary, systematic survey of relevant treaty practice.

5. First, in paragraph 118 of his fourth report, the Special Rapporteur referred to the "diversity of provisional application clauses"; in paragraph 129 he said that "States use a very wide variety of formulas to agree to provisional application of treaties" and in paragraph 132 he even went so far as to say that this practice was "anarchic". In those circumstances, blindly stumbling on with the topic entailed a risk that the Commission would codify rules that gave an imperfect or distorted image of current practice.

6. Second, consideration of the few elements of practice provided by the Special Rapporteur in his fourth report demonstrated the need to consider that practice in more detail before any conclusions could be drawn. As Mr. Kolodkin had explained, the precedent of the 1978 Vienna Convention revealed that the Commission should proceed with caution. That precedent, to which chapter II, section D of the fourth report was devoted, showed that different solutions could apply depending on the nature of the treaty. In that regard, it would have been helpful if, in that section of his report, the Special Rapporteur had presented the origins of the solutions identified in the 1978 Vienna Convention by scrutinizing the Commission's work and the *travaux préparatoires* leading to the Convention, in order to gauge the size of the problems which lay ahead and to see whether it might be necessary to adopt rules with variable geometry in light of the nature of the treaties (bilateral, multilateral, reciprocal, non-reciprocal, standard-setting or an agreement establishing an international organization or an arbitral tribunal). One example that sprang to mind in that context was the provisional application of the arbitration agreement in 2005 in the *Arbitration*

regarding the Iron Rhine Railway. That was not, however the direction in which the Drafting Committee was heading, but perhaps it was on the wrong track.

7. Third, the Special Rapporteur asserted in several places in his fourth report that there was no practice on various aspects of his topic, which had led some members to take note of the absence of such practice. He shared the concerns expressed in that regard by, in particular, Mr. Kolodkin and Mr. Murphy, who had considered that it was questionable to say that there was no evidence of practice concerning the questions dealt with in chapter II of the fourth report without first undertaking in-depth research into those questions. In fact, there seemed to be a certain amount of practice in that area. He would confine himself to two examples.

8. When he discussed the possibility of invoking article 60 of the 1969 Vienna Convention in order to terminate or suspend the provisional application of a treaty the Special Rapporteur did not mention any kind of practice, although there was at least one example which could have been quoted. In 1977, the Legal Bureau of the Canadian Department of External Affairs had rendered an opinion in which it had found that, assuming that the Reciprocal Fisheries Agreement between the Government of Canada and the Government of the United States[443] of 1977 was being applied provisionally and that there had been a material breach of the Agreement by the United States, Canada would be entitled to invoke the breach as a ground for terminating the treaty or suspending its application under article 60 of the 1969 Vienna Convention. In 1984, the International Court of Justice had found in its judgment in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* that the provisional application of the Interim Agreement resulted from the tacit acquiescence of the parties and that it had been suspended. That example showed that there was at least one case involving the suspension of the provisional application of an agreement in which article 60 of the Convention had been invoked.

9. The second set of examples concerned reservations to treaties. He had been astonished to read, in paragraph 26 of the fourth report, that the Commission's Guide to Practice on Reservations to Treaties[444] was silent about the possibility of formulating reservations in the context of the provisional application of a treaty and, in paragraph 34 of the report, that there was an absence of proof of any type of practice in that regard. In fact, the commentary to guideline 2.2.2 made express provision for that possibility, from which it could be inferred that such a reservation was intended to produce legal effects on the provisional application of the treaty, notwithstanding some lingering doubts on that point because, in 1951, in its advisory opinion on *Reservations to the Convention on Genocide*, which had been quoted in the commentary to guideline 2.6.11, the International Court of Justice had said:

> Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.
>
> Until this ratification is made, the objection of a signatory State can therefore not have an immediate legal effect in regard to the reserving State. It would merely express and proclaim the eventual attitude of the signatory State when it becomes a party to the Convention. (pp. 28–29 of the advisory opinion)

10. Contrary to the Special Rapporteur's suggestion in paragraph 27 of his fourth report, practice did exist in the provisional application phase. The declarations made by Italy, Japan, the Republic of Korea and the United States when notifying their provisional application of the Wheat Trade Convention, 1986 could be regarded as genuine reservations seeking to exclude certain effects of the treaty. Another interesting example was that of the International Coffee Agreement, 1962, to which the United States had filed a notification of provisional application accompanied by a reservation which did not appear to have given rise to any objections. While care would naturally have to be taken in drawing any conclusions from that example, it might indicate that, even when a treaty prohibited reservations, that prohibition would not bar the formulation of reservations to its provisional application; however, more thorough research was essential in order to determine what rules would apply under international law to that kind of situation. Furthermore, it would seem that the Union of Soviet Socialist Republics had formulated a reservation, to which the United Kingdom had objected, to the provisional application of the International Natural Rubber Agreement, 1979. The same situation had occurred with respect to the International Cocoa Agreement, 1980. Similarly, France and Germany seemed to have entered reservations to the provisional application of the 1986 International Coffee Agreement. In another example, the European Community had filed a declaration when notifying its provisional application of the International Tropical Timber Agreement, 1994, which was ostensibly an interpretative declaration but which, in fact, might be deemed a reservation. The same might be said of the declarations filed by New Zealand and Switzerland when ratifying and accepting the provisional application of the 2013 Arms Trade Treaty.

11. In short, practice seemed to exist in the areas studied by the Special Rapporteur, and it was vital, in order for progress to be made, that such practice be collected and presented in a systematic manner. In the past, for example, the Secretariat had compiled a study on pertinent practice before the Commission had embarked on the codification of a topic. Of course, the Commission's role was not to codify the whole of treaty-based practice with regard to the provisional application of treaties, but rather to identify residual rules which came into play when a treaty or agreement that allowed provisional application was silent on a given question. For that reason, it might be wise to adopt a general conclusion stating that: "These draft conclusions apply unless the treaty provides otherwise, or it has been otherwise agreed." [*Les présents projets de conclusions s'appliquent à moins que le traité n'en dispose autrement ou qu'il n'en soit autrement convenu.*] The inclusion of such a general clause would avoid having to repeat that clarification in each and every draft conclusion.

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[443] Signed at Washington, D.C. on 24 February 1977, United Nations, *Treaty Series*, vol. 1077, No. 16469, p. 55.

[444] General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq.*

12. The description of the practice of the United Nations as a depositary of treaties had been most useful. However, he disagreed with the Special Rapporteur's view that this practice showed that a treaty could be applied provisionally by just one party. He personally considered that the passages of the *Treaty Handbook*[445] cited in paragraphs 137 and 141 of the fourth report indicated that a State could file a unilateral declaration of provisional application if the treaty in question provided for that possibility. In other words, it constituted practice under article 25 of the 1969 Vienna Convention, but not practice transcending it.

13. He was reluctant to send draft guideline 10 to the Drafting Committee, as he was unsure that the Committee had enough material on practice and case law to decide on its content. It would have been advisable for the Special Rapporteur first to peruse the expert opinions submitted in the *Yukos* case and the corresponding legal writings, in order to clarify the impact of internal law on obligations deriving from the provisional application of a treaty. It seemed surprising to opt for less strict rules on the provisional application of treaties than on their ratification and it was hard to see why it would not be possible for article 46 of the 1969 Vienna Convention to be applied *mutatis mutandis* to a decision to implement a treaty provisionally.

14. At first sight, the idea of model clauses seemed to be a good one, if somewhat premature. Priority must, however, be given to conducting an orderly survey of the pertinent practice, perhaps with the assistance of the Secretariat, before adopting any draft conclusions on the topic.

15. Mr. KAMTO said that it might be appropriate for the Commission to address the fundamental question of whether the bulk of the legal regime deriving from the 1969 Vienna Convention was in fact relevant to treaties that were being applied provisionally. If it was, rules stemming from practice would then be residual rules regulating practical questions which States normally sorted out between themselves and which were not necessarily dealt with in the 1969 Vienna Convention. Many of the cases quoted shed no light on which of the provisions of the Convention were pertinent to treaties that were being applied provisionally.

16. Mr. CANDIOTI said that the Commission must decide what its aims were, what outcome it wished to achieve, what direction it wished to take on the topic and whether it wanted to draft conclusions or guidelines. Guidelines indicated the way forward, whereas conclusions were rather academic and might express recommendations, rules or hopes.

17. Ms. ESCOBAR HERNÁNDEZ said that she wished to thank the Special Rapporteur for his interesting fourth report, which constituted a good basis for the Commission's debate on the topic at the current session. In particular, she commended the efforts of the Special Rapporteur in obtaining information on the practice of international and regional organizations in the area of provisional application via direct contacts. Nevertheless, the selective nature of the study presented in chapter III of his fourth report and the limited number of organizations referred to deserved comment. The exclusion of organizations such as the African Union was puzzling. Analysing the practice of a greater number of organizations would give a wider, more representative view of the topic and might reveal new aspects.

18. It was also noteworthy that the Special Rapporteur dealt differently with the practice of each organization examined, covering three very distinct issues: the depositary and registration functions of an organization with respect to treaties containing provisional application clauses or being applied provisionally; cases in which provisional application clauses had been included in treaties drawn up within an international organization or under the auspices thereof; and the use of provisional application by international organizations in exercise of their own competence to conclude treaties. Although the three levels of analysis were of interest, the approaches cited were not comparable and general conclusions could not therefore be drawn regarding the place that provisional application occupied in the treaty practice of international organizations. However, bearing in mind the importance of provisional application for international organizations, it would be very useful if the Special Rapporteur could add to his study of their practice in his next report, particularly with regard to the third aspect mentioned; that would allow the Commission to consider the possibility of drafting a specific guideline on the matter, which would doubtless enhance the final outcome of its work.

19. That said, the study of the practice of the United Nations was of particular interest, inasmuch as it helped to clarify general concepts of relevance to the topic that could be taken into account by the Commission in relation to the adoption of guidelines. However, she was not in favour of the Commission making the recommendation referred to in paragraph 149 of the fourth report regarding the revision of regulations on registration. Such recommendation was beyond the scope of the topic and, in any event, would require a more comprehensive analysis of practice.

20. With regard to the relationship between provisional application and other aspects of the law of treaties governed by the 1969 Vienna Convention, the Special Rapporteur focused in particular on reservations, invalidity, termination or suspension under article 60 of the Convention and the various circumstances covered by article 73 thereof. In general, she shared his approach to the problem of reservations. If the result of a declaration on provisional application was that the treaty produced effects equivalent to those resulting from its entry into force, it seemed reasonable that a State would not be more obligated by provisional application than if the treaty were actually in force. As such, there were neither logical nor systemic reasons why a State could not make a reservation to a treaty, if the treaty so provided, with respect to provisional application. A separate issue, and one which prompted several questions, was the manner in which such a reservation might be expressed and its nature and effect. Was such a reservation equivalent to a reservation made at the time of signing, albeit with different effects? Did it need to be confirmed when consent was given? What would happen to the effects arising from provisional

[445] *Treaty Handbook* (United Nations publication, Sales No.: E.02.V.2).

application subject to a reservation if that reservation was not confirmed at the point of giving consent? Could the limitations unilaterally set by a State in determining the scope of provisional application of a treaty be understood as a special form of reservation? All those questions were of particular practical interest and it would be useful to explore practice in that area in future reports.

21. The section of the fourth report on invalidity focused exclusively on compatibility between provisional application and internal law, particularly from the point of view of rules of internal law that defined competence and procedures in the area of provisional application. The subject had already been partly covered the previous year. The Special Rapporteur had approached the matter using the example of the *Yukos* and *Kardassopoulos* v. *Georgia* cases, which merited detailed analysis because they had given rise to many questions in practice. However, those cases involved looking at the validity of provisional application from a very specific angle, based on two concurrent points: the Energy Charter Treaty provided for automatic provisional application, and that provisional application could only be excluded if it was inconsistent with the constitution, laws or regulations of one of the signatory States, in which case that State must inform the rest of the signatories by means of the notification provided for in article 45 of the Treaty. Although that scenario was not the most common in practice, it was possible that it could be used as a model for other instruments, and, as such, it was worth examining.

22. However, that example of practice was insufficient as a basis for analysing the various scenarios that could occur in practice with regard to compatibility between the provisional application of a treaty and the rules of internal law concerning a decision to apply a treaty provisionally. In that respect, she did not consider that a decision on provisional application could be subjected to the rules on the validity of consent contained in the 1969 Vienna Convention, as that would render provisional application itself meaningless. Provisional application was often based on the expectation that the constitutional requirements in terms of giving State consent could be met. It could not, however, be interpreted as an acceptance that any declaration on provisional application was, in itself, in line with national rules on treaty ratification. On the contrary, it would be possible for provisional application to be established outside the internal rules governing its use and, as such, any such declaration of provisional application would be invalid from the point of view of internal law. However, their invalidity would have to be resolved by means of the procedures provided for in the national legal system and exclusively on the basis of incompatibility with rules of internal law. That did not, however, mean that such incompatibility between provisional application and internal law was of no relevance internationally, but the external effect would not necessarily be felt in all cases. On the contrary, only if there was an absolute contradiction between a decision to apply a treaty provisionally and a fundamental rule of internal law concerning competence to conclude treaties would it be necessary to examine the invalidity of a declaration on provisional application in terms of international law. However, such circumstances would, by definition, be very exceptional and would need to be considered case by case. It might be useful for the Commission's work if the Special Rapporteur could give more examples of practice in that area in future reports, if they were to be found.

23. With regard to the termination of a treaty on grounds of a serious breach, the Special Rapporteur again equated the effects of a treaty in force with those of a treaty being applied provisionally, concluding that the content of article 60 of the 1969 Vienna Convention applied to provisional application. His analysis was thought-provoking, and she expressed support for the principle, which was based on the existence of a legal relationship among the parties to a given treaty. However, the conclusion set out in paragraph 87 of the fourth report seemed somewhat contrived and difficult to demonstrate in practice, particularly because a State that considered itself to have been affected by a serious violation of a treaty being applied provisionally could relieve itself of the obligations set out therein by the simple expedient of invoking the termination mechanism provided for in article 25 of the 1969 Vienna Convention, which had the great advantage of not being subject to any substantive or procedural condition other than sending a simple formal communication. In practical terms, it was difficult to imagine that a State would prefer to use a much longer, more complicated and more unpredictable mechanism, such as trying to terminate the provisional application of a treaty under article 60 of the 1969 Vienna Convention, which did not operate automatically but was subject to the procedure for declaring the termination of a treaty set out in articles 65 to 68 thereof. Quite apart from the fact that a serious breach of a treaty being applied provisionally could give rise to international responsibility for the perpetrator of the unlawful act, whether the treaty ceased to apply or whether it continued to have an effect.

24. Close reading of the section beginning at paragraph 88 of the fourth report showed that the Special Rapporteur only covered provisional application of treaties in the case of State succession, not the other eventualities covered by article 73 of the 1969 Vienna Convention. His analysis was based on the provisions of the 1978 Vienna Convention, and the interesting discussion in the report reflected very clearly the special nature of the regime that applied to provisional application in the event of succession, doubtless because of the specific characteristics of the phenomenon, particularly in the case of newly independent States. However, the report contained no reference to practice. It would be desirable to see a future report examine such practice, if any existed, as it could shed light on the Commission's work on the topic.

25. The Special Rapporteur had crafted draft guideline 10 on the basis of what was said in both his third report[446] and his fourth report on the subject of provisional application, invalidity and article 46 of the 1969 Vienna Convention. In that context, she expressed full support for the content of the draft guideline, although she shared the view expressed by other members of the Commission concerning the need for some redrafting so as to include an express reference to the circumstances in which provisional application of a treaty was subject to the conditions of internal law of States, either under the treaty itself or under the agreement establishing provisional application.

[446] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687.

In any event, she agreed that the draft guideline should be referred to the Drafting Committee.

26. Finally, with regard to the plan for future work, she welcomed the proposal made in paragraph 182 of the fourth report. Bearing in mind that the composition of the Commission would have changed by the time the Special Rapporteur submitted his next report, she suggested including a general overview of the topic for the benefit of new members.

Mr. Nolte (First Vice-Chairperson) took the Chair.

27. Mr. ŠTURMA said that he wished to thank the Special Rapporteur for his well-documented fourth report on a topic that was of considerable importance in terms of both the theory and practice of international law. Generally speaking, he agreed with the fundamental approach taken by the Special Rapporteur, namely that the provisional application of treaties produced legal effects and was capable of creating certain rights and obligations under international law. It was therefore useful to explore the possible effects that other rules of the law of treaties might have, directly, *mutatis mutandis* or by analogy, on the regime of provisional application. However, the fourth report provided only a cursory analysis of selected rules of the 1969 Vienna Convention; the Commission should address the topic in more depth. Unlike Mr. Murphy, he did not see article 25 of that Convention as a self-contained regime, as it was too cursory for that purpose; rather, he agreed with Mr. Kamto that most issues were still covered by the other rules of the Convention, with the possible exception of article 25, paragraph 2, on the termination of provisional application.

28. With regard to reservations, he shared the view that they should be understood as reservations to certain provisions of a treaty itself, rather than as reservations to any agreement on provisional application. Although reservations, however they were termed, were infrequent in practice, they were possible in principle. It did not make sense for a State to have greater obligations under the provisional application of a treaty than it would when that treaty entered into force. However, there was another issue: declarations by which a State could exclude or limit the provisional application of a treaty. Such acts were not reservations within the meaning of the 1969 Vienna Convention, as they related only to an agreement on provisional application. They only made sense in the case of certain multilateral treaties, provisional application of which was based not on a separate agreement but on a provision of the treaty itself. It was not a matter of reservations but of interpretation of the scope of any agreement on provisional application.

29. The issue of the invalidity of treaties was a key problem that was reflected in draft guideline 10. However, the combination of the irrelevance of internal law as a justification for non-compliance with a treaty being applied provisionally and invalidity based on article 46 of the 1969 Vienna Convention was somewhat problematic and gave rise to confusion, as had been pointed out by several members of the Commission. According to his interpretation, the interplay between international law and internal law could take two or three different forms.

30. First, provisions of internal law might address only the procedure or conditions for a State to express its consent to apply a treaty provisionally, such as in a situation where a State expressed its consent to provisional application in violation or circumvention of its constitutional procedures. In that case, only article 46 of the 1969 Vienna Convention would apply. The criteria of article 46 were strict: consent to provisional application was invalidated only if a violation of internal law was manifest and concerned a rule of fundamental importance. If consent was invalidated, the treaty would not apply provisionally and there would be no legal rights or obligations arising as a result.

31. The second hypothesis concerned the case in which the relevant provisions of a given treaty referred not only to the procedure, but also to domestic laws and regulations, i.e., substantive law. One example was article 60, paragraph 2, of the International Natural Rubber Agreement, 1994, which stated that "a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations". To give full effect to that formulation, it must be assumed that a State might refer not only to its constitutional procedures in relation to consent to provisional application, but also to the content of its domestic laws. That also seemed to be the case of article 45 of the Energy Charter Treaty, which made the extensive discussion of the *Yukos* case irrelevant to the issue of article 46 of the 1969 Vienna Convention and the invalidity of treaties and agreements on provisional application. However, he fully agreed with Mr. Nolte and others that it was a matter of interpretation, specifically of article 45 of the Energy Charter Treaty, and of the scope and limits of provisional application. That hypothesis gave rise to complex issues concerning the legal effect of such consistency or limitation clauses in various treaties and of the notifications that might be required under certain clauses. In his view, article 45 of the Energy Charter Treaty was far from being the only case: there were other multilateral treaties that contained such clauses. The issue therefore deserved analysis and reflection, but in a separate guideline, which was unfortunately still missing.

32. Lastly, if there was no specific provision in a treaty itself or in an agreement providing for provisional application, then other rules of the 1969 Vienna Convention would apply. Under article 27 of the Convention, a State could not invoke its internal law to justify its failure to apply a treaty or part of a treaty provisionally if it had given valid consent to provisional application.

33. Terminating provisional application was different from terminating or suspending a treaty in force. It seemed that article 25, paragraph 2, of the 1969 Vienna Convention provided for a special, more flexible means of termination than Part V, section 3, of that Convention. The procedure set out in article 25, paragraph 2, was also subject to an exception if the treaty in question provided otherwise or if the negotiating States had otherwise agreed, which gave States sufficient flexibility if they wished to establish a particular date, period of time or notice period for the termination of provisional application.

34. With regard to article 60 of the 1969 Vienna Convention, the fourth report discussed whether a material breach of a treaty being applied provisionally could lead to the suspension or termination of a provisional application agreement by the affected State. Unlike other rules of the Convention concerning termination or suspension of treaties, the principle *inadimplenti non est adimplendum* might also be applicable to the termination of provisional application. The reason lay in the different ways in which article 25, paragraph 2, and article 60 operated. Termination under article 25, paragraph 2, ended any effect that the treaty had with respect both to the State making the notification and the States being notified, while, under article 60, paragraph 2 (*b*), a party specially affected by the breach could invoke it as grounds for suspending the provisional application of the treaty only in the relations between itself and the defaulting State. As that hypothesis made it possible for the treaty to continue to apply provisionally between the affected State and other States that had applied it faithfully, it might be advantageous in certain cases.

35. The issues covered in chapter II, section D, of the fourth report were interesting, particularly with regard to the provisional application of treaties in the event of succession of States, but they required further careful analysis and should be reflected in future guidelines. In that context, he agreed with Mr. Petrič that it might be useful to distinguish between bilateral and multilateral treaties.

36. The fourth report provided interesting information on the practice of international organizations in relation to the provisional application of treaties, but he did not see how the analysis thereof related to the content of draft guideline 10. Moreover, the extensive discussion of the *Treaty Handbook*, leading to the conclusion in paragraph 138 of the fourth report that it was possible that third States might decide to apply the treaty unilaterally and provisionally, might contribute to confusion about the role of unilateral acts in relation to the provisional application of treaties. The text seemed to blur the distinction between an independent, unilateral act and an act related to a treaty. The *Treaty Handbook* referred to a unilateral undertaking by a State to apply a treaty provisionally, in accordance with the provisions of that treaty, meaning that the legal basis for the mutual rights and obligations of States arising from provisional application was the treaty itself or an agreement on its provisional application, not a unilateral act.

37. In conclusion, he recommended that draft guideline 10 be referred to the Drafting Committee, where it might benefit from very considerable redrafting.

38. Mr. HMOUD said that he wished to thank the Special Rapporteur for his fourth report, which contained extensive background material, analyses and conclusions that would help the Commission in its work on the topic. The debate within the Commission during the current session demonstrated that the report was stimulating a better understanding of the various aspects of the provisional application of treaties, in particular its relationship to the 1969 Vienna Convention.

39. It was important to determine the direction of the project and to decide the extent to which issues not covered by article 25 of the 1969 Vienna Convention could be tackled, taking into account the divergent treaty practice and the relative flexibility of that article with regard to provisional application. The reports the Special Rapporteur had produced thus far indicated that relevant national and international jurisprudence was limited. Nevertheless, the wealth of treaty practice that existed could shed light on the intentions of States *vis-à-vis* provisional application when concluding treaties. As established in the draft guidelines that had been adopted on a provisional basis by the Drafting Committee, guidance regarding the law and practice on the provisional application of treaties would be provided on the basis of article 25 of the 1969 Vienna Convention and other rules of international law. Given that other such rules could be derived from treaty practice, the Special Rapporteur's treatment of the topic should be less dependent on derivatives from and analogies with the Vienna rules. That was not to say that the Commission should not dwell on the relationship with other rules of the Convention. On the contrary, it should discuss that relationship, but should base its work on an analysis of the various relevant treaties and an interpretation of their provisions as they related to provisional application. Such an approach would enable the Special Rapporteur and the Commission to reach informed conclusions on matters such as the legal effects of provisional application, reservations in the context of provisional application, invalidity of consent and the termination and suspension of treaties. The rules of interpretation under the 1969 Vienna Convention could be applied to the interpretation of relevant treaty rules and to the practice of States and other actors in the implementation of treaties and their provisions on provisional application. The draft guidelines would then be based on that interpretation and an analysis of relevant practice, as opposed to merely a deductive comparison with other rules of the Convention that applied to a full treaty relationship.

40. He nevertheless cautioned against the inclusion of model clauses in the project and echoed the comments made in that regard by Mr. McRae. Such clauses would have to be accompanied by commentaries outlining the Commission's interpretation of them, which might not necessarily align with that of States. There was a wide variety of clauses to which the contracting parties to a treaty resorted in order to reflect their intention regarding its provisional application; it would be difficult and counterproductive to support certain interpretations of the various terms employed in such clauses. As indicated by treaty practice, contracting parties used a range of terminology to provide for provisional application that reflected the flexibility of that regime. An example in that regard was the 2015 International Agreement on Olive Oil and Table Olives, which was mentioned in paragraph 131 of the fourth report. In paragraph 132, the Special Rapporteur expressed the view that the provisions of the Agreement added more confusion to a situation that was already anarchic and that the terms "provisional application", "provisional entry into force" and "definitive entry into force" coexisted in the same article, as if they were equivalent expressions. That example showed that there was a need for it to be studied, together with other examples of provisional application contained in various treaties, in order to determine the meaning attached to such terms and to draw conclusions accordingly.

41. The debates in the Sixth Committee had highlighted the need for the Commission to undertake a comparative study of the legal effects of provisional application and those of entry into force. While it was assumed that provisional application of a treaty by a State could produce binding legal effects, it could not be said that those effects were the same as those emanating from the performance by a State party of its obligations under a treaty. The Commission should study that question and the issue of the responsibility that arose from the non-implementation of treaty provisions by a State that had agreed to apply a treaty provisionally. He noted, in that regard, the definition of provisional application in the *Treaty Handbook*, in which a distinction was made between a treaty that had entered into force and one that had not. In both cases, however, provisional application was described as a unilateral undertaking or act aimed at giving effect to treaty obligations. He wished to make two points in that respect. First, the Commission needed to study the difference between the possible legal effects of the provisional application of a treaty that had entered into force and those of one that had not. Second, a unilateral act of provisional application could not be said to produce the same legal effects as the performance by a State party of its treaty obligations. Moreover, the extent of any legal effects arising from such a unilateral act by a State should vary according to whether other States were reliant upon or affected by that act.

42. Another issue that had been raised in the debates in the Sixth Committee was the relationship between provisional application and the reservations, invalidity and termination and suspension regimes. Although the Special Rapporteur analysed the issue of reservations, he had decided not to produce a draft guideline on the matter. In paragraph 36 of the fourth report, he concluded that, if a treaty was silent about the formulation of reservations, nothing would prevent a State, in principle, from effectively formulating reservations as from the time of its agreement to provisional application. However, that assertion ran counter to article 19 of the 1969 Vienna Convention, which clearly stipulated that the formulation of reservations by a State could take place when signing, ratifying, accepting, approving or acceding to a treaty, but not when agreeing to apply a treaty provisionally. When, in paragraph 37 of the report, the Special Rapporteur stated that his earlier assertion was contingent on whether the provisional application of treaties produced legal effects and whether the purpose of the reservations was to exclude the legal effects of certain provisions, he was confusing two different points. The first was the treaty relationship once the treaty had entered into force for the State formulating a reservation and the second was the formulation of a reservation regarding provisional application by that State. While the first proposition was inconsistent with article 19 of the 1969 Vienna Convention, the second might be possible, for example if, through provisional application, a State sought to prevent certain legal effects from applying to it in its relationship with other States. The Commission could produce a draft guideline on the second issue, but would need to discuss whether "reservation" was the most appropriate term for such an act. In any case, the reservations regime under the 1969 Vienna Convention could not be said to apply *mutatis mutandis* to provisional application.

43. A related issue that was not discussed in the fourth report was that of declarations by States related to provisional application. Interpretative declarations were not dealt with in the 1969 Vienna Convention but were provided for in the Commission's 2011 Guide to Practice on Reservations to Treaties. It would be plausible to examine the possibility of interpretative declarations being made by States that were applying a treaty provisionally. Another issue that could be discussed in future reports was that of declarations by States that did not wish to apply a treaty provisionally, when the treaty either provided for that possibility – as with the Energy Charter Treaty – or was silent on the matter. It was important to examine practice and jurisprudence relating to treaties that did not provide for that possibility and the effects of declarations by States that did not wish to apply a treaty provisionally. It would also be important to discuss the effects of declarations by States that agreed to apply a treaty provisionally provided that such application was subject to their internal laws. Declarations of that kind were not addressed by article 25 of the 1969 Vienna Convention or draft guideline 10 proposed by the Special Rapporteur; it was worth studying treaty practice in that respect. Declarations or reservations made when States expressed consent to be bound by a treaty that made the performance of their obligations thereunder subject to their internal law were considered null and void. Such conditionality with regard to the full application of a treaty in force for a State party would of course be excluded by the Vienna rules and by customary international law. However, it might not be appropriate to reach a similar conclusion concerning the effects of such declarations on provisional application, given that there were treaties and internal laws that made provisional application conditional on its conformity with internal law. In his view, the Commission should study such declarations in the context of provisional application.

44. In his fourth report, the Special Rapporteur discussed the invalidity of consent in relation to provisional application, rather than the invalidity of the treaty itself, and the relevance of the internal law of States to provisional application. The pertinent issue was whether and to what extent articles 27 and 46 of the 1969 Vienna Convention could be applied to the provisional application regime. In that regard, he tended to agree with the analysis of previous speakers, including their comments on the *Yukos* and *Kardassopoulos* v. *Georgia* cases. Several important issues needed to be dealt with in the context of the analysis contained in the fourth report. The first was the treatment of express provisions in a treaty that made its provisional application subject to the internal law of a State. That was the issue in the *Yukos* and *Kardassopoulos* v. *Georgia* cases, which bore no relevance to articles 27 and 46 of the 1969 Vienna Convention, both of which dealt with the invocation of internal law in the absence of express treaty provisions, either to justify a failure to perform treaty obligations, as in the case of article 27, or to invalidate consent to be bound by a treaty, as in article 46. Consequently, draft guideline 10 or a separate draft guideline should provide for that possibility in the light of the *Yukos* and *Kardassopoulos* v. *Georgia* cases and of any treaty practice that existed concerning consistency with internal laws.

45. The second issue was the applicability of article 27 of the 1969 Vienna Convention *mutatis mutandis* to the

provisional application regime. The article dealt with a party to a treaty invoking its internal law as justification for its failure to perform a treaty. Draft guideline 10 applied the same principle by analogy, providing that a State that had consented to undertake obligations by means of the provisional application of all or part of a treaty could not invoke its internal law as justification for non-compliance with such obligations. While that statement was plausible, it was not substantiated in the fourth report or backed up by evidence of treaty practice. As mentioned previously, there were treaties, including the Energy Charter Treaty, that expressly made provisional application contingent on consistency with the internal laws of States. A treaty would not, however, contain a comparable provision making its full application conditional on the internal laws of States. If it did, one would question its legal effects and its very nature as a treaty or inter-State contractual relationship. Moreover, the fact that provisional application was a unilateral undertaking that a State could terminate at any time unless the treaty provided otherwise supported the idea that a distinction had to be drawn between the treatment of internal law under the provisional application regime, on the one hand, and under article 27, on the other. One possible reason for resorting to provisional application was that the State intended to apply the treaty once the requirements of its internal laws for entry into force had been met, including the requirement to ensure that the treaty obligations were consistent with such laws. To say that provisional application of relevant treaty obligations by that State implied that the obligations were consistent with its internal law, thus prohibiting the State from invoking that law, would render the process of giving consent to be bound by a treaty meaningless. In addition, the *Treaty Handbook* provided that, since provisional application was a unilateral act by the State, subject to its internal law, it could terminate the provisional application at any time. In short, he was of the view that there had to be differentiated treatment of the relevance of internal law to the provisional application regime and account had to be taken of whether provisional application produced legal effects upon which other States were reliant. Internal law was more pertinent to the expression of consent to provisional application than to the expression of consent to be bound by a treaty; the application of article 46 by analogy *mutatis mutandis* was not warranted.

46. He found the Special Rapporteur's discussion of the termination or suspension of the operation of a treaty as a consequence of its breach useful, but noted that no draft guideline was proposed regarding the relevance of a breach of a treaty obligation as a result of provisional application. Nonetheless, he wished to make three comments. First, one could not speak of a breach or material breach of a treaty obligation in the context of provisional application, but rather of the non-performance of a treaty obligation. Second, the effects of a material breach under article 60 of the 1969 Vienna Convention in terms of the termination of a treaty were not applicable to a material failure to perform a treaty provisionally. After all, under the provisional application regime, there was no contractual treaty relationship. If a State became a party to a treaty and continued to apply it provisionally, however, article 60 would apply. Third, it might be worth discussing the effects of a material failure by a State to perform a treaty provisionally and to distinguish between a treaty that had entered into force and one that had not. He hoped that the Commission could provide guidance in that regard.

47. Mr. LARABA said that he wished to thank the Special Rapporteur for his concise, high-quality fourth report. He was also grateful to the Special Rapporteur for the attention that he devoted to the debates in the Commission and the Sixth Committee. That approach explained the pragmatism that characterized the report, a pragmatism that was, however, perhaps too pronounced and that posed certain problems. He would refer to those problems when commenting on the future work on the topic.

48. He wished to make two preliminary observations of a general nature. First, it should be noted that the views expressed by States in the Sixth Committee were reflected extensively in the fourth report, to the point that they provided the basis of chapter II. Second, the Special Rapporteur proposed only one new draft guideline; however, the discussion of the issue of reservations could, and perhaps should, also have led to the formulation of a specific proposal.

49. The Special Rapporteur's treatment of reservations in relation to provisional application, which was contained in paragraphs 22 to 39 of the fourth report, could be divided into three parts. In the first, he referred to article 19 of the 1969 Vienna Convention, without explaining why he had limited himself to that article. In the second, he raised the question of whether, given the lack of reference to the matter in either the Convention or the Guide to Practice on Reservations to Treaties, the formulation of reservations was compatible with the regime governing the provisional application of a treaty. In the third, he raised two questions in paragraph 35, to which he responded positively in paragraph 36, stating that nothing would prevent a State, in principle, from effectively formulating reservations as from the time of its agreement to provisional application. It was not until paragraph 38 that the Special Rapporteur referred briefly and implicitly to the other articles of the 1969 Vienna Convention on reservations by mentioning the possibility of objecting to a reservation formulated under the provisional application regime. In view of the analysis of the question undertaken in those paragraphs, the issue of reservations should have been the subject of a draft guideline.

50. With regard to paragraphs 40 to 68 of the fourth report, which concerned the invalidity of treaties, the Special Rapporteur began by listing the relevant articles of the 1969 Vienna Convention and by recalling that, in the Sixth Committee, several delegations had expressed an interest in the relationship that might exist between provisional application and the regime of invalidity of treaties, specifically article 46 of the 1969 Vienna Convention. In fact, even if States had not expressed such an interest, it would have been essential to examine that relationship, which had been touched upon by Mr. Gaja in the 2011 syllabus on the topic.[447]

51. While he agreed with the majority of the comments made by other Commission members with regard to the Special Rapporteur's approach to the topic, he wished to

[447] See *Yearbook ... 2011*, vol. II (Part Two), annex III.

make some brief remarks. First, the Special Rapporteur emphasized that the internal law of many States did not prohibit provisional application; however, the fact that a constitution did not prohibit, or remained silent on, provisional application did not mean that it allowed it. Such a complex issue as that of "internal laws of fundamental importance" – to echo the language of article 46 of the 1969 Vienna Convention – that did not prohibit or remained silent on provisional application required more detailed study than that afforded to it in the fourth report. Second, there was an important, if not striking, contrast between, on the one hand, the repeated requests by States to study and take into account internal law and, on the other, the view expressed by the Special Rapporteur in paragraph 18 of his second report on the topic,[448] in which he had stated that an analysis of domestic law was not relevant to the study of the provisional application of treaties and that the endeavour would take longer than the time available. It was, for the time being, the only issue raised by States to which the Special Rapporteur had not responded favourably. Third, it was somewhat paradoxical that, in his four reports on the topic, particularly his third and fourth reports, the Special Rapporteur devoted substantial attention to the internal laws of States, no doubt because they lay at the heart of articles 27 and 46 of the 1969 Vienna Convention and, by extension, of the topic. In paragraph 9 of his third report, the Special Rapporteur had pointed out that the question of whether to proceed with a comparative study of constitutional law had not been entirely resolved during the discussions in the Sixth Committee, but had not made any further comment or proposals in that regard. As a result, consideration of aspects of the topic relating to internal law remained pending. In the light of his comments and those of other Commission members, he supported the referral of draft guideline 10 to the Drafting Committee.

52. The content of paragraphs 69 to 87 of the fourth report, which were devoted to article 60 of the 1969 Vienna Convention, was at times superfluous and at others repetitive, presenting information that had already been conveyed in the second report on the topic. The lack of reference to relevant practice had led to a fairly succinct discussion of article 60.

53. Regarding chapter III of the fourth report, on the practice of international organizations in relation to the provisional application of treaties, he wished to make two preliminary remarks. First, the six organizations addressed in the chapter received very different and unequal coverage; the United Nations, for example, was discussed at far greater length than the other five organizations. Second, and more importantly, the title of the chapter in the French version of the report was indicative of the approach adopted by the Special Rapporteur: the adjective *accumulée*, in particular, revealed that the Special Rapporteur had opted for a quantitative approach that was far from being the most appropriate. It would have been more interesting if the chapter had contained an in-depth comparative study of provisions on the provisional application of treaties in the practice of international organizations with a view to drawing conclusions of relevance to the topic.

54. As to the practice of the United Nations, the Special Rapporteur described in great detail the registration functions of the Organization and the depositary functions of the Secretary-General. While that discussion was of great interest in that regard, it was not, however, closely related to the provisional application of treaties.

55. With respect to the European Union, the Special Rapporteur underlined the importance of its constant practice in the provisional application of treaties, but also seemed to suggest that the European Union adopted a broad interpretation of article 25, paragraph 2, of the 1969 Vienna Convention, covering situations other than those expressly provided for in that article. The exemplary nature of European Union practice might be questioned because "provisional [seemed] to be an attractive possibility in view of the uncertainty produced by the necessarily different ratification procedures" in the member States, as mentioned in paragraph 159 of the report.

56. According to information gathered by the Special Rapporteur, out of a total of 59 treaties concluded under the auspices of the Economic Community of West African States, 48 provided for provisional application; the wording generally used in that regard was "enter into force provisionally" rather than "provisional application". The conclusion drawn by the Special Rapporteur on the basis of that wording appeared too general and should perhaps have been explored in greater detail.

57. Regarding plans for future work, it would be helpful if the Special Rapporteur could clarify the relationship between the model clauses that he intended to propose and the draft guidelines. As to the proposal to deal with the provisional application of treaties that enshrined rights of individuals – an issue which had been considered in the second report in relation only to certain provisions of the American Convention on Human Rights: "Pact of San José, Costa Rica" and the European Convention on Human Rights – it would be advisable to undertake an in-depth study. Further thought should also be given to the place to be accorded in the topic to the internal law of States, a question that had been raised by several other members of the Commission.

58. In general, it would be useful to revisit some of the ideas originally raised in the 2011 syllabus and the Special Rapporteur's first report.[449] In the syllabus, Mr. Gaja had at the outset focused on the meaning of provisional application, given the absence from the 1969 Vienna Convention of any definition thereof. He had considered that an analysis of State practice and case law should allow the Commission to establish a presumption concerning the meaning of provisional application of a treaty. He had in particular referred to the "preconditions" of provisional application and the question of the relevance of internal law. In his first report, the Special Rapporteur had stated that an analysis of the concept of the provisional application of treaties must begin with the distinction between "provisional application" and "provisional entry into force". In paragraphs 22 and 53 of that report, he had laid out a road map that now seemed to have been forgotten; at times, it appeared as if there was some uncertainty as

[448] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675, p. 154.

[449] *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/664.

to the aim of the reports, including as to which of the provisions of the 1969 Vienna Convention should form the basis of the study.

59. Thus, in introducing his third report, in 2015, the Special Rapporteur had said that the provisions considered therein – articles 11, 18, 24, 26 and 27 of the 1969 Vienna Convention – had been chosen because of their close relationship with provisional application. In his concluding remarks on the debate in 2015, he had indicated his intention to study, in his fourth report, articles 19, 46 and 60. In paragraph 6 of his fourth report, the Special Rapporteur noted that, in the debates in the Sixth Committee, delegations had suggested that he focus on issues relating to the reservations regime and the regime pertaining to suspension, invalidity and termination of a treaty; subsequently, in paragraph 17, he added the issue of succession of States to that list. While the efforts the Special Rapporteur had made to respond to the concerns of the Member States were to be commended, those concerns could not form the entire framework for the report and care should be taken to prevent what might appear to be a surreptitious reorientation of the topic.

60. Mr. HASSOUNA said that the overall purpose of the Commission in taking up the topic had been to enhance understanding of the provisional application mechanism and to provide legal certainty for States opting to resort to that mechanism. The Special Rapporteur's clear and analytical fourth report, which built on the significant progress that had already been achieved in that regard, shed light on the relationship of provisional application to the provisions of the 1969 Vienna Convention, as well as the practice of international organizations. The Special Rapporteur was to be commended on his sustained efforts to collect information on the practice of States and international organizations. However, despite an increase in the number of States providing such information, it was necessary to continue urging States to submit their comments with a view to facilitating the work of the Commission and its Special Rapporteur.

61. He agreed with other members that, as important as it was to respond to the concerns of Member States, the Commission should also develop its own approach, priorities and proposals. On the other hand, he did not share the view of those who claimed that much of the information in the fourth report was irrelevant and of little value to the outcome of the topic; in his opinion, it was useful in setting the context for the issues addressed and enabling them to be better understood. However, the Special Rapporteur should have relied on the wealth of information presented in his fourth report and his detailed analysis thereof to draft specific proposals or guidelines. It was to be hoped that the Special Rapporteur would consider doing so either in future reports or during the examination of his proposals in the Drafting Committee.

62. With regard to the relationship of provisional application to other provisions of the 1969 Vienna Convention, paragraph 23 of the fourth report mainly discussed article 19 of the Convention on the formulation of reservations. However, other relevant rules included in articles 20 to 23 of the Convention would merit future consideration in the context of a broader analysis. Referring to paragraphs 23 and 36 of the fourth report, he said that, while he agreed that, as in the case of provisional application, the reservations regime would be determined, in the first place, by what the treaty stipulated and that nothing would prevent a State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty, it would have been useful if some specific examples of such situations had been provided. As to the conclusion drawn in paragraph 33, namely that a State might formulate reservations with respect to a treaty that would be applied provisionally if there were reasons to believe that its entry into force would be delayed "for an indefinite period of time", he questioned whether the delay had necessarily to be indefinite.

63. On the invalidity of treaties, the fourth report reconfirmed the principle, already included in the third report, that, once a treaty was being applied provisionally, internal law could not be invoked as justification for failure to comply with the obligations deriving from its provisional application. However, the fourth report also referred to a more complex situation when the treaty itself expressly referred to the internal law of the negotiating states and subjected the provisional application of the treaty to the condition that it would not constitute a violation of internal law. As mentioned in the report, such a situation was well illustrated by the *Yukos* and *Kardassopoulos* v. *Georgia* cases, which analysed the provisional application of the Energy Charter Treaty. The analysis given in paragraphs 40 to 68 of the fourth report should have included more examples of the practice of States with regard to their approach to the provisional application of treaties, in particular under their respective constitutions.

64. With regard to the termination or suspension of the operation of a treaty as a consequence of its breach, the Special Rapporteur referred to the principle set forth in the 1969 Vienna Convention that termination by a State of its provisional application of a treaty took place if that State notified the other States between which the treaty was being applied provisionally of its intention not to become a party to the treaty. The fourth report also referred to the principle that a treaty that was applied provisionally could be terminated as a consequence of its material breach. In his view, the Special Rapporteur should have developed those two principles using examples of State practice and considered formulating a new draft guideline on that basis. A further draft guideline could be formulated on the suspension of the provisional application of a treaty that would include a reference to the relationship between breaches of the provisionally applied treaty and its suspension, as well as to the total suspension of the treaty, its suspension with regard to only some other parties to a multilateral treaty and to the suspension of only certain provisions of the treaty being provisionally applied.

65. Regarding State succession, the Special Rapporteur referred to the treatment of provisional application of treaties in cases of succession of States as contained in the 1978 Vienna Convention and further mentioned that the Commission had previously noted that the importance of provisional application in the context of State succession in respect of multilateral treaties was centred on cases involving the establishment of newly independent States. However, the Special Rapporteur should have

complemented that description with specific examples of cases concerning bilateral and multilateral treaties, involving both newly independent and other States. The analysis could have concluded with the formulation of a new guideline on those different cases.

66. With regard to the practice of international organizations, the analysis presented in chapter III of the fourth report was informative and relevant, since it complemented the analogous section in the third report. However, once again, that analysis should have been reflected in a concrete proposal or draft guideline; it was important that the practice of States and that of international organizations be clearly differentiated and not included in the same guidelines. Concerning the role of the United Nations Secretariat with respect to the provisional application of treaties, specifically within the context of its registration functions and the depositary functions of the Secretary-General, he agreed that the 1946 regulations on registration[450] should be revised and brought into line with the current state of practice.

67. Regarding the practice of regional international organizations, he confirmed that the member States of the Economic Community of West African States had increasingly resorted to the inclusion of a clause on provisional application in their treaties, although such practice was somewhat inconsistent. Furthermore, the main item on the agenda of a forum held by the African Union Commission on International Law in Cairo the previous year had been "The challenges of ratification and implementation of treaties in Africa", which was closely related to provisional application of treaties. It would have also been useful to include in the fourth report information on the practice of the members of the African Union, the continent's main regional organization.

68. Draft guideline 10 seemed to have been inspired by article 27 of the 1969 Vienna Convention; however, it did not address cases in which the treaty being provisionally applied made explicit reference to the internal laws of States. The draft guideline should therefore be revised so as to indicate that a State could not invoke the provisions of its internal law as justification for non-compliance with its obligations under the provisional application of a treaty, unless the treaty itself expressly allowed a party to do so. Reference could also be made to the concern expressed by many States that such provisional application must be subject to their constitutional requirements. He would welcome an explanation from the Special Rapporteur of the general context of that draft guideline and its relation to the other proposed guidelines.

69. As to future work on the topic, the Special Rapporteur merely referred to his intention to deal with some pending topics not dealt with in the present report; a more detailed road map would have been welcome, as would an explanation of the nature, scope and formulation of the proposed model clauses.

70. In conclusion, he recommended that the proposed draft guideline be referred to the Drafting Committee. He hoped that the Special Rapporteur would complement that draft guideline with other, related guidelines.

[450] General Assembly resolution 97 (I) of 14 December 1946.

71. Mr. FORTEAU said that it would actually be very easy to find out about State practice with regard to provisional application of treaties, as information was made available online by treaty depositaries. As noted in the fourth report, concerning the United Nations, for instance, from 1946 to 2015, 1,349 provisional application actions had been registered; much could no doubt be learned from examining those applications.

The meeting rose at 5.10 p.m.

3328th MEETING

Tuesday, 26 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction[451] (A/CN.4/689, Part II, sect. F,[452] A/CN.4/701[453])

[Agenda item 3]

Fifth report of the Special Rapporteur

1. The CHAIRPERSON invited the Special Rapporteur to introduce her fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that her fifth report was devoted to a study of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, an issue that had given rise to recurrent debates in the Commission and in the Sixth Committee, in the course of which over the years diverse

[451] At its sixty-fifth session (2013), the Commission provisionally adopted draft articles 1, 3 and 4 and the commentaries thereto (*Yearbook ... 2013*, vol. II (Part Two), pp. 39 *et seq.*, para. 49). At its sixty-sixth session (2014), the Commission provisionally adopted draft article 2 (*e*) and draft article 5 and the commentaries thereto (*Yearbook ... 2014*, vol. II (Part Two), pp. 143 *et seq.*, para. 132). At its sixty-seventh session (2015), the Commission took note of draft article 2 (*f*) and of draft article 6, as provisionally adopted by the Drafting Committee (*Yearbook ... 2015*, vol. II (Part Two), p. 71, para. 176 and footnote 385.

[452] Available from the Commission's website, documents of the sixty-eighth session.

[453] Reproduced in Y*earbook ... 2016*, vol. II (Part One).

and often opposing views had been expressed. As she had indicated at the outset, the issue could not be addressed until the normative elements of the general regime of immunities *ratione personae* and *ratione materiae* had been identified, which had been done at the previous session. The methodology followed in the present report was the same as in the previous reports.[454] While she had based the report principally on an analysis of judicial and treaty practice, as well as on the Commission's previous work, she had also added a section dedicated to an analysis of States' national legislation in order to determine the extent to which it provided for limitations or exceptions to immunity. She had also taken into consideration the information provided by States in response to the questions formulated by the Commission in 2014[455] and 2015.[456] In that regard, she noted that more than 20 written responses had been received in 2015 and 2016[457] and that most delegations that had spoken on the topic in the Sixth Committee had mentioned those questions. She had regrettably not been able to take into account the written comments submitted by the United Kingdom in 2016, as they had reached her after the fifth report had been completed. She thanked the secretariat for having circulated to Commission members all the comments received in 2016, which would allow them to be taken into account in the debate. She was also grateful to the secretariat for publishing on the Commission's website the written comments by States on the various issues under consideration and trusted that it would continue to perform that task, which helped to meet the need for transparency and openness in the Commission's work.

3. The report under consideration consisted of five chapters. The first aimed to describe the current state of the issue of limitations and exceptions to immunity within the context of the Commission's work by identifying in a systemic manner the issues raised during the debates since the inclusion of the topic on the Commission's programme of work in 2007, as well as the various views expressed by Commission members and by States in the Sixth Committee since that date. Chapters II, III and IV constituted the core of the fifth report and served as the basis on which draft article 7, entitled "Crimes in respect of which immunity does not apply", was proposed in chapter IV, while chapter V dealt with the future workplan. Lastly, the fifth report contained three annexes devoted, respectively, to draft articles 1, 2 (*e*), 3, 4 and 5, which had already been provisionally adopted by the Commission (annex I); draft articles 2 (*f*) and 6, which had been provisionally adopted by the Drafting Committee and would be considered at the current session (annex II); and draft article 7, proposed at the current session (annex III).

4. In addition, she would like to make the Commission aware of two points. First, the fifth report formed a whole with the four previous reports and should thus be read in conjunction with them. Thus, draft article 7 took on its full meaning only when read alongside the draft articles that had been provisionally adopted. Second, the English version of the report contained a number of errors and inaccuracies that might lead to a distorted interpretation of ideas and proposals put forward in the original version. For example, in draft article 7, paragraph 1 (ii), the expression "corruption-related crimes" should be replaced with "crimes of corruption". A corrigendum would be issued, which the members of the Commission might wish to take into account in the debate.

5. Turning to general remarks, she recalled first of all the purpose of the fifth report, which, though it might appear obvious, warranted a brief explanation. The aim was to try to discover whether there were situations in which the immunity of State officials from foreign criminal jurisdiction was without effect, even where such immunity was potentially applicable because all normative elements were present and, if the answer were in the affirmative, to identify those situations. That analysis was structured around two elements: the limitations and exceptions to immunity, on the one hand; and the crimes in respect of which immunity did not apply, on the other.

6. The use of the phrase "limitations and exceptions" reflected the various arguments found in practice to support the non-application of immunity. In that regard, she had taken into account in particular the fact that courts that had found that immunity was inapplicable in a given case had, in some instances, done so on the ground that a particular crime could not be considered an official act or an act ostensibly connected with official status, or simply that the act constituting the offence in question was not part of State functions. In other instances, they had denied immunity, taking the view that certain offences gave rise to exceptions to that regime because they violated *jus cogens* norms, internationally recognized human rights or, more generally, the basic legal values and principles of contemporary international law. The same diversity of approaches could be found in the views expressed by Commission members and by States in the Sixth Committee. With regard to the distinction between "limitations" and "exceptions" to immunity from jurisdiction, it should be noted that a limitation was intrinsic to the concept of immunity, or directly linked to it or to some of its normative elements. On the other hand, an exception was extrinsic to immunity and its normative elements, but nevertheless belonged to the international legal system and should for that reason be taken into account in the determination of the applicability of immunity in a specific case. That distinction was theoretical in nature, but also normative, as it had major consequences in terms of the systemic interpretation of immunity, which was why it had been included in the fifth report. However, it had no practical impact in terms of possible effects on immunity, and it could thus be said that, ultimately, whether a given situation involved a limitation or an exception, the effect of those concepts would be the same, namely the non-application of the legal regime of immunity of State officials from foreign criminal jurisdiction. That point was taken into account throughout the fifth report and was reflected in particular in draft article 7, which dealt with crimes in respect of which immunity did not apply, with no distinction being made between limitations and exceptions.

[454] *Yearbook ... 2012*, vol. II (Part One), document A/CN.4/654 (preliminary report); *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/661 (second report); *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673 (third report); and *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/686 (fourth report).

[455] *Yearbook ... 2014*, vol. II (Part Two), p. 19, para. 28.

[456] *Yearbook ... 2015*, vol. II (Part Two), p. 14, para. 29.

[457] Available from the Commission's website, http://legal.un.org/ilc/guide/gfra.shtml, *Analytical Guide*.

7. The second element of the fifth report involved analysing the limitations and exceptions to immunity in a holistic manner, without restricting the analysis to the relationship between the immunity of State officials from foreign criminal jurisdiction and international crimes, for the simple reason that, although international crimes or crimes under international law had been at the centre of the debate on the limitations and exceptions to immunity, the study of practice showed that the issue had also been raised in relation to other offences, such as, for example, corruption and the misappropriation of public funds. Although cases involving those offences were rarer, they were no less important in the eyes of the international community, which viewed them as an issue of serious concern. Furthermore, the issue of immunity from criminal jurisdiction with respect to those offences was beginning to be raised in international courts, as was shown by the proceedings instituted against France before the International Court of Justice by Equatorial Guinea on 13 June 2016 in *Immunities and Criminal Proceedings*. In addition, it was possible to find in practice examples of the non-application of immunity that were based not on the nature of a given offence, but rather on the existence of a criminal act associated with the primacy of the principle of territorial sovereignty applied to the exercise of criminal jurisdiction by the forum State, referred to as the "territorial tort exception". However, that holistic approach did not prevent the issue of international crimes from occupying a central place in the fifth report, as most cases of practice referred to those crimes. Lastly, it should be explained that waiver of immunity was not considered in the fifth as a limitation or an exception. Although it could produce the same effect as a limitation or exception, namely the non-applicability of immunity, that was not due to autonomous general rules, but rather to the mere exercise of the prerogative of the State with respect to which the official concerned enjoyed immunity. The inapplicability of immunity was in that case largely procedural in nature and would as such be analysed in the sixth report.

8. The second point to which she drew the Commission's attention concerned the fact that the issue of limitations and exceptions to immunity could not be addressed in isolation. On the contrary, it acquired its full meaning in the context of the study of immunity that had been conducted in the previous reports, which had highlighted the legal nature of that institution in contemporary international law. Those considerations, which were dealt with in chapter III, section A, of the fifth report, warranted a brief introduction because they had to be taken into account for the issue of limitations and exceptions to be properly analysed. First, the concepts of immunity and jurisdiction were two inextricably linked categories. Immunity could not be understood without the prior existence of a criminal jurisdiction that could be exercised by the forum State. Consequently, immunity was itself an exception to the exercise of jurisdiction by the courts of the forum State. Although immunity and jurisdiction were both undeniably linked to the principle of the sovereign equality of States, albeit differently, the exceptional nature of immunity had to be taken into account when establishing the possible existence of limitations and exceptions. Second, from a strictly formal perspective, immunity was procedural and could have no impact on the criminal responsibility of State officials, hence the principle that immunity was not equivalent to impunity. That being said, under certain circumstances, immunity could result in the absolute impossibility of determining the criminal responsibility of a State official: immunity as a procedural institution and immunity as a form of substantive defence then overlapped. Such effect had to be taken into consideration when analysing limitations and exceptions. Third, the immunity of State officials from foreign criminal jurisdiction was intended to operate within the framework of criminal proceedings whose purpose was to determine, as appropriate, the individual criminal responsibility of the author of certain acts classified as offences. It was thus distinct from State immunity, which was subject to a separate regime, including with regard to the issue of limitations and exceptions to immunity. Fourth, the existence of limitations and exceptions to immunity had to be examined, as such, within the framework of the exercise of criminal jurisdiction by the courts of the forum State. It was thus independent of the manner in which immunity might apply before international criminal courts and tribunals. That separation between types of jurisdiction, which constituted one of the elements that defined the scope of the present topic, prevented the automatic transposition of the rule of the non-applicability of immunity, which currently characterized international courts, to the regime of the immunity of State officials from foreign criminal jurisdiction. At the same time, it prevented the mere existence of international criminal courts and tribunals from being considered as an alternative mechanism for determining the criminal responsibility of State officials, which would make it possible to conclude, ultimately and categorically, that any form of immunity from foreign criminal jurisdiction, whether *ratione personae* or *ratione materiae*, was absolute in nature.

9. The Special Rapporteur said that she would conclude her general comments with some remarks on the importance of the analysis of practice in identifying the limitations and exceptions to immunity and the need to supplement that analysis with a systemic approach to interpretation of immunity and the limitations and exceptions thereto. Indeed, as she had already indicated in her previous reports, the study of practice was the essential basis of the Commission's work on the topic, a methodological principle that she had duly followed in her fifth report.

10. The analysis of practice was particularly important in relation to crimes under international law, as it revealed that, although practice was varied, there was a clear trend towards considering the commission of international crimes as a bar to the application of the immunity of State officials from foreign criminal jurisdiction, either because such crimes were not considered official acts, or because they were considered an exception to immunity owing to their gravity or to fact that they undermined legal values and principles recognized by the international community as a whole. Although national courts had sometimes recognized the immunity of State officials from foreign criminal jurisdiction for international crimes, it should be recalled that those decisions largely concerned immunity *ratione personae* and only very exceptionally immunity *ratione materiae*. The aim of the analysis of practice was to determine whether that practice and its acceptance as

law were sufficient to establish the existence of a rule of customary international law pursuant to which international crimes constituted a limitation or exception to immunity. That analysis was carried out in chapter IV, section A.1, of the fifth report, in the light of the Commission's work on the identification of customary international law, in particular the draft conclusions provisionally adopted at the current session. It could be concluded from that analysis that the commission of international crimes could currently be considered to constitute a limitation or exception to the immunity of State officials from criminal jurisdiction based on a rule of international customary law. Even though there might be doubt as to the existence of sufficient general practice amounting to an international custom, it did not seem possible under any circumstances, in the light of the analysis of practice, to deny that there was a clear trend that reflected an emerging custom.

11. In addition to the indispensable analysis of practice, there was a need to examine limitations and exceptions to immunity from the perspective of international law as a normative system that included, as one of its parts or components, the institution of immunity of State officials from foreign criminal jurisdiction. That aspect, duly taken into consideration in the fifth report, required that immunity be analysed not in insolation, but in relation to the rest of the rules and institutions that made up the system. From that perspective, immunity was an undeniably valuable and necessary institution for ensuring that certain principles and legal values of the international legal order, in particular the principle of the sovereign equality of States, were respected. At the same time, as a component of the system, the immunity of State officials from foreign criminal jurisdiction should be interpreted in a systemic fashion to ensure that this institution did not produce negative effects on, or nullify, other components of the contemporary system of international law. That systemic approach required that other institutions that were also related to the principle of sovereignty, especially the right to exercise jurisdiction, should be taken into account, together with other sectors of the international legal order that enshrined values and principles recognized by the international community as a whole, in particular international human rights law and international criminal law. As international law was a genuine normative system, the development by the Commission of draft articles intended to assist States in the codification and progressive development of international law with respect to a problematic but highly important issue for the international community could not, and should not, have the effect of introducing imbalances into major sectors of the international legal order that had developed over recent decades and that were now among its defining characteristics.

12. It was in accordance with that systemic approach, on which the entire fifth report was based, in particular chapter III, sections A and B, and chapter IV, section A.2, that an analysis was conducted of the relationship between immunity and the main categories of rules of contemporary international law, such as *jus cogens*, the values and principles of international law, and the attribution of a legal dimension to the concepts of impunity and accountability, as well as the principle of combating impunity. The relationship between immunity and the right of access to a court, victims' right to redress and the State's obligation to prosecute certain international crimes were also analysed from a systemic perspective. This should reassure the numerous States and the no less numerous members of the Commission who had insisted on the need to ensure that work on the present topic was compatible with contemporary international law as a whole and did not alter the basic elements of international criminal law as it had developed since the 1990s, in particular with regard to the definition of the principle of individual criminal responsibility for crimes under international law and the need to guarantee the existence of effective mechanisms to combat impunity for crimes that profoundly shocked the conscience of humanity.

13. In the light of those substantive comments, it was necessary to offer some explanations regarding draft article 7 as proposed in the fifth report and submitted to the Commission for consideration. That draft article consisted of three paragraphs setting out the various elements that defined the regime of limitations and exceptions to immunity. She drew to the attention of Commission members the fact that there was an error in the numbering of the subparagraphs of paragraphs 1 and 3, which should read respectively: "(*a*)", "(*b*)" and "(*c*)"; and "(*a*)" and "(*b*)". For the purposes of her introduction, she would refer to the various subparagraphs using the amended identifier.

14. Draft article 7, paragraph 1, defined in general terms the crimes in respect of which immunity did not apply. Its wording was similar to that used by the Commission in its work on State immunity. The expression "does not apply" took into account the fact that divergent views had been expressed as to whether the scenarios mentioned constituted limitations or exceptions, an issue that had still not been resolved. Besides, it reflected perfectly the effect produced by limitations and exceptions to immunity, namely the inapplicability of the regime of immunity in certain cases. In her view, that wording was particularly appropriate in the case of international crimes, as there was considerable debate regarding whether they could be committed in an official capacity or be considered functions of the State, although they were generally considered not to be covered by immunity.

15. Moreover, it had been decided to define the instances in which immunity did not apply by reference to the crimes in respect of which jurisdiction was sought and not, as in the case of the immunity of the State, by reference to the proceedings in which those crimes could be examined, for two reasons. The first was that it was the very nature of the crime that justified the inapplicability of immunity. It should in that regard be recalled that limitations and exceptions to immunity had always been linked to the crimes in respect of which immunity was inapplicable, and that the determinant role of the crime in the context of limitations and exceptions was confirmed both in practice and in the views expressed by Commission members and States during debates. The second reason was that immunity could be invoked in respect of various acts or in proceedings to which the beneficiary of immunity would not necessarily be party, not to mention the fact that the concept of proceedings could itself be interpreted differently for the purposes of the present topic. She had thus opted for what seemed to her a cautious approach, since the Commission had yet to reach a

conclusion with regard to either the concept of jurisdiction or the procedural aspects of immunity, which would be dealt with in the sixth report.

16. The three situations enumerated in draft article 7, paragraph 1, in which immunity did not apply were crimes under international law, corruption and what was referred to as the "territorial tort exception", which covered crimes that caused harm to persons, including death and serious injury, or to property, when such crimes were committed in the territory of the forum State and the State official was present in that territory at the time that they were committed. That categorization was based on the practice analysed in the fifth report. Rather than use the generic term "crimes under international law", she had chosen to list explicitly the various crimes that fell into that category – genocide, crimes against humanity, war crimes, torture and enforced disappearances – as they were the crimes encountered in practice and those whose classification as crimes under international law met with widespread agreement within the international community.

17. Draft article 7, paragraph 2, which defined the scope of the limitations and exceptions, stated that the provisions of draft article 7, paragraph 1, did not apply to the beneficiaries of immunity *ratione personae* – Heads of State, Heads of Government and Ministers for Foreign Affairs – during their term of office. Consequently, the limitations and exceptions to immunity applied only to immunity *ratione materiae*, as defined by the Commission. The exclusion of the aforementioned three categories of State officials was also based on practice, as it had not been possible to find cases in which States had brought criminal proceedings against a Head of State, Head of Government or Minister for Foreign Affairs, even when the latter were suspected or accused of having committed the most atrocious crimes. That State practice had moreover been confirmed by the International Court of Justice, which had granted immunity in cases in which an arrest warrant or summons to appear as a witness had been issued. That was undoubtedly due to the special representative role of the holders of the aforementioned offices in international relations, a role assigned to them directly by the norms of international law, not only by domestic norms. It was for that reason that it was so important to preserve the principle of the sovereign equality of States on which immunity rested. That being said, it should be borne in mind that the inapplicability of limitations and exceptions to Heads of State, Heads of Government and Ministers for Foreign Affairs was strictly limited in time, and that draft article 7, paragraph 1, thus again became applicable as soon their term of office had expired.

18. Lastly, draft article 7, paragraph 3, which took the form of a "without prejudice" clause, dealt with two scenarios in which immunity would be inapplicable owing to the existence of special regimes. The first scenario concerned the situation in which treaties in force between the forum State and the State of the official would render the immunities of State officials non-applicable in the respective criminal courts of the two States. In that scenario, the general rule of immunity would be set aside by the collective will of the States concerned. The second scenario was that in which the forum State had a general obligation to cooperate with an international tribunal exercising criminal jurisdiction. However, that provision could not be interpreted as excluding the applicability of immunity in all cases in which a State was required to cooperate with an international tribunal. In such cases, the applicability of immunity would depend on many factors: the nature and content of the obligation to cooperate; the extent to which the obligation to cooperate was enforceable against the forum State; and the legal relationship between the forum State and the State of the official stemming from that obligation. Those elements would have to be analysed on a case-by-case basis, as it was not possible to draw the *a priori* conclusion that the obligation to cooperate with an international tribunal automatically excluded the possibility of applying any form of immunity to a State official.

19. The two regimes referred to in draft article 7, paragraph 3, were based on examples from practice. The scenario identified in draft article 7, paragraph 3 (*b*), in particular, took into account the complex situation created in South Africa by the application of article 98, paragraph 1, of the Rome Statute of the International Criminal Court, which had eventually been resolved by the refusal of the courts of that country to grant immunity from foreign criminal jurisdiction to State officials.

20. Turning to the future workplan, she said that the report due for submission in 2017 would be dedicated to the procedural aspects of immunity, including issues relating to the invocation and waiver of immunity, the role that might be played by the State of the official in proceedings conducted in the forum State and international legal cooperation in relation to immunity. That report should also contain an analysis of a number of elements linked to the concept of jurisdiction itself, the definition of which was still under consideration in the Drafting Committee. In relation to those issues, it would be necessary in particular to analyse when immunity should apply and the types of act of the forum State that would be affected by immunity. All the issues that she had included in the programme of work in her preliminary report[458] would then have been examined. The Commission would thus be in a position to adopt the draft articles on first reading in 2017 or, at the latest, in 2018, depending on how the study of the subject developed over the forthcoming quinquennium and on the decisions taken by the Commission in its new composition. To conclude, she said that she looked forward with great interest to the views of members, on the understanding that the debate would not be closed at the current session, but would be continued at the following one.

21. Mr. KITTICHAISAREE said that he was not sure that he understood what was meant by "hermeneutical criteria", to which the Special Rapporteur referred in paragraph 175 of her fifth report, or why those criteria had to be used to determine the existence of a limitation or exception to immunity; he would appreciate clarification in that regard. Moreover, in his view, the distinction between the concepts of limitation and exception was not clear, and the Special Rapporteur's explanations on that point would benefit from simplification. Lastly, he would like to know why, as suggested by paragraph 17 of the fifth report, the Special Rapporteur seemed to want to return to the issue of the values of the international community when that issue had already been dealt with in detail in her

[458] See *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654, pp. 50–51, paras. 71–77.

preliminary report and had given rise to concerns on the part of many Commission members.

22. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, although it was not the Commission's practice to allow members to pose questions to the Special Rapporteur immediately after the introduction of a report, she was prepared, on a very exceptional basis, to respond to Mr. Kittichaisaree's questions, as they addressed essential points. With regard to the distinction between the concepts of limitation and exception, she believed that her fifth report contained all the necessary explanations on the matter. The hermeneutical criteria were the criteria of interpretation, and it was necessary to distinguish between limitations and exceptions because the applicable criteria of interpretation were different in each case. With regard to limitations, only the three normative elements of immunity approved by the Commission to date applied, whereas, in the case of exceptions, other criteria could also apply. As for the values of the international community, the treatment of that issue in her preliminary report had not provoked only hostile reactions from members of the Commission, as some members had reacted very positively. While she had no intention of reopening the debate at the current stage of work, the issue was nevertheless an integral part of the study of the topic, as was clear from all the reports that she had submitted to the Commission since the start of her work on immunity, and her fifth report made clear that the values in question were legal values, incorporated into international law, and not only political or sociological values.

23. Mr. MURASE thanked the Special Rapporteur for her fifth report on immunity of State officials from foreign criminal jurisdiction, which was devoted to the exceptions to immunity. The long-awaited report offered new insights that would not fail to give full reassurance to the many Commission members, academics and experts who had criticized the choices that the Commission had made and the content of its work. It was thus important to commend the courage of the Special Rapporteur, who, in draft article 7, paragraph 1, on exceptions to immunity, proposed categorical wording, without reservations and without ambiguity, although he was not convinced by draft article 7, paragraph 2, which provided for exceptions to those exceptions. The Special Rapporteur had drafted her fifth report with great care: as there were two sides to every coin, she had tried to strike a balance between general rules and exceptions to those rules. Thus, there were 72 occurrences of the word "however" in the fifth report, compared to 24 in the second report on crimes against humanity (A/CN.4/690). That was certainly not to say that Mr. Murphy, the Special Rapporteur for that topic, had looked at only one side of the coin, but it gave an idea of the fierce struggle that she had had to wage throughout the drafting of her report.

24. He had already had the opportunity to state, at previous sessions, that a fundamental methodological error had been made from the outset of work in 2011. Members would remember that, following the consideration of the second and third reports presented by Mr. Kolodkin,[459] who had been the Special Rapporteur for the topic at the time, two crucial questions had been raised. The first was which State officials would enjoy immunity and the second was which crimes were to be covered by the draft, the two aspects being of course closely linked. The Commission, which had put those two questions to Member States,[460] had examined the first, but had yet to address the second.

25. If exceptions to the rules set out in draft articles 3 to 6, which had already been adopted by the Commission, had not been introduced, the draft texts would have been in complete contradiction with the wording of article 27, paragraph 1, of the Rome Statute of the International Criminal Court, even though the Statute established a vertical relationship between the International Criminal Court and States parties, and the present project was intended to govern the horizontal relationships among States. In any case, he welcomed the fact that the problem had finally been resolved by the introduction of appropriate exceptions to the rules set out in those draft articles.

26. In paragraph 142 of her fifth report, the Special Rapporteur insisted that the methodological and theoretical aspects of immunity should be examined in the context of international law seen as a normative system. That approach, she reasoned, involved examining immunity not in isolation, but in relation to the other norms and institutions that made up the international legal system. As one of the elements of that system, immunity of State officials from foreign criminal jurisdiction should be interpreted in a systemic manner in order to ensure that it did not produce negative effects on, or nullify, other components of the contemporary system of international law understood as a whole. He fully endorsed that approach and agreed with the Special Rapporteur that, as international law was a genuine normative system, the Commission's development of the draft articles could not and should not have the effect of introducing imbalances in significant sectors of the international legal order that had developed over recent decades and that were now among its defining characteristics. While the effect of the Rome Statute of the International Criminal Court on the Commission's draft articles should not be underestimated, the introduction of exceptions to immunity would thereby restore a welcome and proper balance.

27. In paragraphs 143 to 147 of her fifth report, the Special Rapporteur made necessary clarifications regarding the relationships between the following basic concepts: immunity and jurisdiction; immunity and responsibility; and immunity of the State and immunity of State officials. However, it should not be forgotten that, as indicated in paragraph 150, immunity and responsibility were intrinsically linked and that, other than by departing from practice, the former could not be considered a mere procedural bar, divorced from the latter. He himself had made the same comment at the previous session.

28. The Special Rapporteur was right to note, in paragraphs 156 to 169 of the fifth report, that the invocation of immunity before national courts and the invocation of immunity before international courts were closely linked

[459] *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

[460] *Yearbook ... 2011*, vol. II (Part Two), p. 20, paras. 37–38.

and that those two situations should be examined in a systemic manner. In that context, he welcomed the emerging concept of "positive complementarity", referred to by the Special Rapporteur in paragraph 168 of her fifth report. The Rome Statute of the International Criminal Court, under the principle of complementarity, was clearly intended to ensure respect for the sovereign right of States to prosecute the perpetrators of serious international crimes. It was important that the international rules relating to immunity not hinder the effectiveness of the system of complementarity established by the Statute, which encouraged the active exercise by States of their jurisdiction with regard to those crimes.

29. As the Special Rapporteur noted in paragraphs 170 to 176 of her fifth report, there was no need to make a clear distinction between the concepts of limitation and exception. Consequently, he would use the word "exception" in the rest of his statement, which would deal largely with draft article 7. In draft article 7, paragraph 1, it was stated that immunity did not apply to genocide, crimes against humanity, war crimes, torture and enforced disappearances. He fully endorsed that wording, which was simultaneously clear, categorical and simple; the international crimes mentioned were well established in customary international law. He also agreed that torture and enforced disappearances should be mentioned explicitly because those crimes did not necessarily have the elements required for crimes against humanity.

30. He shared the concerns expressed by the Special Rapporteur with regard to the crime of aggression, which was not covered in the draft article for the reasons given in paragraph 222 of her fifth report. In that regard, it should be noted that, following the Review Conference of the Rome Statute of the International Criminal Court in 2010, it had been stipulated in the fifth understanding of the Amendments on the crime of aggression to the Rome Statute of the International Criminal Court that the Amendments "shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State".[461] However, it would have been preferable to include that crime, for two principal reasons: first, and regardless of that understanding, there was a tendency among States parties to enact legislation to implement these Amendments; and second, it was a crime committed by State officials in the context of their official functions. Indeed, it was stated clearly in the definition of the crime of aggression set out in the above-mentioned Amendments – in article 8 *bis* – that it was a crime committed by "a person in a position effectively to exercise control over or to direct the political or military action of a State". To take that crime into account would highlight the main point of the draft articles, which was to ensure that, even if he or she had committed the acts in an official capacity, the State official did not benefit from immunity.

31. He was not sure that it was appropriate to mention "corruption" in draft article 7, paragraph 1 (*b*) because that offence was, from a criminal perspective, very far removed from the international crimes mentioned in draft article 7, paragraph 1 (*a*). The acceptance of a bribe did not fall within the scope of the exercise by a State official of his or her functions, and it was difficult to imagine that immunity would be invoked for acts of that kind, as it had to be invoked by the State of the official. Nor was he convinced that it was necessary to introduce a territorial tort exception in draft article 7, paragraph 1 (*c*). It had caused many problems in the context of State immunity and, in the context of the immunity of State officials, there was limited practice to substantiate that exception. Furthermore, it had not been established that the issue fell within the scope of the topic, which concerned "foreign criminal jurisdiction". It would thus be better if draft article 7, paragraph 1, read: "Immunity shall not apply in relation to genocide, crimes against humanity, crimes of aggression, war crimes, torture and enforced disappearances."

32. He also had serious concerns regarding draft article 7, paragraph 2, pursuant to which immunity applied to State officials "during their term of office". State officials who perpetrated serious international crimes should never enjoy immunity, either during or after their term of office.

33. Article 27 of the Rome Statute of the International Criminal Court provided that "official capacity… shall in no case exempt a person from criminal responsibility under this Statute" and that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person". In accordance with the principle of complementarity, national courts were required to exercise their criminal jurisdiction even if the crimes had been committed by State officials "during their term of office", at the very least in the case of genocide, crimes against humanity, crimes of aggression and war crimes. In his view, draft article 7 should thus be brought into line with the Statute to the fullest extent possible, which would involve deleting the second paragraph. Furthermore, the draft articles on the scope of immunity *ratione materiae* and the scope of immunity *ratione personae*, on the one hand, and the draft article on exceptions to immunity, on the other, should be clearly linked. He thus proposed inserting in draft article 4 (Scope of immunity *ratione personae*) and in draft article 6 (Scope of immunity *ratione materiae*) an additional paragraph to read: "This is without prejudice to the limitations and exceptions provided for in draft article 7." Lastly, he endorsed the "without prejudice" clauses in draft article 7, paragraph 3, and supported sending the draft text to the Drafting Committee.

Mr. Nolte, First Vice-Chairperson, took the Chair.

34. The CHAIRPERSON, noting that there were no other speakers on the list, proposed that the meeting be adjourned to enable the Drafting Committee on *jus cogens* to meet.

It was so decided.

The meeting rose at 11.15 a.m.

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[461] See *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, Official Records*, International Criminal Court publication, RC/9/11, resolution 6, The crime of agression (RC/Res.6), annex III.

3329th MEETING

Wednesday, 27 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Provisional application of treaties (*continued*)[*] (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)

[Agenda item 5]

Fourth report of the Special Rapporteur (*concluded*)[*]

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his fourth report on the provisional application of treaties (A/CN.4/699 and Add.1).

2. Mr. GÓMEZ ROBLEDO (Special Rapporteur), welcoming the valuable comments and criticisms made during the Commission's debate, said that, since the start of work on the topic, members of the Commission had been largely supportive of the need to consider the extent to which other provisions of the 1969 Vienna Convention were relevant in establishing the full scope and meaning of article 25 thereof. Various Member States had expressed the same view within the Sixth Committee. In both cases, suggestions had been made as to which provisions of the Convention should be examined. His fourth report covered articles 46 and 60 of the Convention in line with one such suggestion. Although some members of the Commission had expressed doubts about the usefulness of the exercise, no one had actually objected the previous year. While the choice of provisions might seem haphazard in the overall context of the topic, all information was welcome when faced with an aspect of the law of treaties about which so little had been known before the Commission had begun its work on the topic. Mr. Hassouna had highlighted the importance of knowing the context in which article 25 of the 1969 Vienna Convention operated, pointing out that the principal aim of the Commission's work was to increase understanding of the provisional application mechanism and provide States and international organizations that had recourse to it with some legal certainty. Given the practical interest of the topic to States, their suggestions were of great importance, and, as Special Rapporteur, he felt duty bound to take them into account.

3. Of course, many provisions of the 1969 Vienna Convention, such as article 53 on *jus cogens*, did not need to be examined closely in seeking to better understand article 25. It was not the aim of the Commission's work, nor had it ever been the focus of the Special Rapporteur, to draft a convention on the provisional application of treaties. Mr. Kolodkin had, however, wondered whether the Commission should produce more detailed guidance, particularly in the area of State succession. He hoped that a fifth report could conclude the topic and suggested that it should focus on article 34 of the 1969 Vienna Convention, which contained the general rule regarding third States.

4. Although some members of the Commission, notably Mr. Kamto, had questioned various aspects of the argumentation and reasoning in the fourth report, in general there had been no objection to the conclusions drawn therein. The Commission was not engaged in progressive development, nor even, arguably, in true codification, but its work should certainly help to clarify the meaning and scope of an aspect of treaty law that had given rise to practice that was confusing and erratic. He did not intend to propose a draft guideline for every provision of the 1969 Vienna Convention that might be considered in future reports, but having a broad view of which provisions of the Convention applied to any given case of provisional application would be useful for States and international organizations when it came to the possibility of applying a treaty provisionally. In that respect, the value of the reports taken together should be borne in mind, without every issue raised therein necessarily needing to be reflected in one or more draft guidelines.

5. Concerning whether article 25 of the 1969 Vienna Convention encapsulated a self-contained regime, which had implications for the scope of the topic, he cautioned against such an approach. The concept of self-contained regimes had been very damaging to the idea of universalism in international law; moreover, accepting such a notion would limit the legal effects that the Commission had already ascribed to article 25 and the consequences thereof. Under article 31 of the Convention, a treaty must be interpreted in the context of the treaty itself, which meant that article 25 of the Convention should be interpreted in the context of the Convention's other provisions. The Commission had recognized that a treaty being applied provisionally produced legal effects as if it were in force; it must next identify the minimum set of rules of general international law that would apply in a specific situation, so as to give guidance to States. Viewing article 25 as a self-contained regime would also suggest that it was a form of *lex specialis*, to which a separate set of rules applied. The legislative history of article 25 did not provide evidence that the States negotiating it had intended that to be the case. It might be worth considering drafting a general guideline clarifying that the 1969 Vienna Convention rules applied to provisional application *mutatis mutandis* as a general framework.

6. The Commission's discussions of reservations demonstrated exactly what linkages there could be between article 25 and other articles of the 1969 Vienna Convention. Paragraph 34 of the fourth report, while indicating that no treaty had yet been seen that provided for the formulation of reservations as from the time of provisional application, nor had provisional application provisions been encountered that referred to the possibility of formulating reservations, did not discount the possibility

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[*] Resumed from the 3327th meeting.

that reservations to a treaty could be formulated in the context of provisional application or that a provisional application agreement could provide for reservations, so long as the treaty did not clearly prohibit them. He reiterated, however, that he had not yet found any such examples and that the issue at hand was reservations to treaties, not to provisional application agreements. Even during the Commission's discussions, no clear-cut case had been identified of a specific provision that dealt with provisional application of a treaty and at the same time provided for reservations to be made. Paragraph (5) of the commentary to guideline 2.2.2 of the Guide to Practice on Reservations to Treaties[462] made no mention of provisional application clauses that allowed for reservations, as was indicated in paragraph 26 of the fourth report, referring as it did to hypothetical cases rather than specific examples.

7. Two of the examples cited by Mr. Forteau did not seem to involve reservations. The Soviet Union was not among the States listed in the depositary notification as having notified provisional application of the Wheat Trade Convention, 1986, although it was given as a State that had submitted a declaration of acceptance of the Convention, which raised the question of whether what was being discussed was actually a reservation made in the context of the provisional application of a treaty. In his view, it might be a matter of a reservation made in the context of the State's expression of its consent to be bound by the Convention. The declaration made by the United States with respect to the International Coffee Agreement, 1962 did not seem to be a reservation but a clause limiting its provisional application. In line with the Constitution of the United States, the clause required the adoption of legislation to implement the Agreement. Nevertheless, he welcomed the examples that Mr. Forteau had provided and would study them in greater detail.

8. Another aspect of the fourth report that had been criticized was the frequent use of analysis by analogy. Since the second report,[463] Mr. Forteau had been saying that the approach taken should be inductive rather than deductive. In the Special Rapporteur's view, however, analogy was often the only way of proceeding given the scarcity of State practice in a number of specific areas, as Mr. Petrič had observed. Although, as indicated in paragraph 116 of the fourth report, the Secretariat of the United Nations had registered 1,733 treaties that provided for provisional application, that did not necessarily mean that States had applied those treaties provisionally or that any case had occurred in which such provisional application had involved reservations, invalidity, termination or suspension on grounds of breach or of State succession.

9. In that connection, there was one aspect of the Secretariat's registry functions to which the Commission seemed not to have given due consideration. Its discussion had proceeded on the assumption that all available practice could be analysed in the light of the legal regime create by article 25 of the 1969 Vienna Convention; however, both the 1946 regulations on registration of treaties[464] and the 1955 *Repertory of Practice of United Nations Organs*[465] predated that Convention, while the *Treaty Handbook*[466] was based on the 1946 regulations. While it was for the General Assembly to update those regulations, the fact that the applicable legal framework was out of date could not be ignored in studying the topic, particularly as it served to perpetuate erratic practices when States looked to it for inspiration in drafting treaties.

10. As to why he had accorded some importance to the practice of international organizations in their registration and depositary roles, he first explained that, when – in the absence of a search tool for external users to access the 1,733 treaties that provided for provisional application – he had approached the Treaty Section for examples of State practice, it had transpired that no such tool existed even for internal users. The Section was to be commended on promptly designing an internal search tool, but the fact remained that external users were unable to search the treaty database using provisional application as a search criterion. It had not been possible to annex a list of relevant treaties to the fourth report as they would all have needed to be checked individually to confirm that they contained provisional application clauses, which was beyond the Special Rapporteur's means. The search criteria mentioned in paragraph 119 of his report were different, as they referred to actions by States associated with provisional application, not with the content of treaties. As the criteria had been defined to reflect references that States made with respect to their actions, they were largely neither systematic nor uniform in practice. In addition, a maximum of 500 search results was displayed.

11. There was clearly a vast number of examples both of treaties that provided for provisional application and of actions by States with respect to those treaties, but the available information was limited and difficult to access, which made it hard to get an overall view of the situation. Given the need for more information on State practice, he suggested that the Commission consider requesting the Secretariat to provide a representative sample of bilateral and multilateral treaties from various regions covering provisional application over a specified period, such as the previous 20 years, which could serve as a basis for studying provisional application clauses and the actions of States with respect to provisional application. International organizations, particularly the United Nations, were a vital repository of information in their role as depositaries and registries, but how that repository was managed could have an effect on State practice insofar as States often sought guidance on treaty matters from those organizations. The omission of the practice of the African Union and other organizations from his fourth report reflected lack of time rather than lack of interest, and he intended to rectify it in his next report by continuing his direct contacts with regional organizations.

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[462] *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, p. 111.

[463] *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/675.

[464] General Assembly resolution 97 (I) of 14 December 1946.

[465] *Repertory of Pratice of United Nations Organs*, vols. I–V (United Nations publications, Sales Nos.: 1955.V.2 (vol. I); 1955.V.2 (vol. II); 1955.V.2 (vol. III); 1955.V.2 (vol. IV); 1955.V.2 (vol. V); and 1955.V.2 (Index)), adopted in 1955; *Repertory of Pratice of United Nations Organs, Supplement No. 3*, vols. I–IV (United Nations publications, Sales No.: E.72.V.2; E.71.V.2; E.72.V.3; and E.73.V.2, updated in 1966.

[466] *Treaty Handbook* (United Nations publication, Sales No.: E.02.V.2).

12. Concerning the final outcome of the Commission's work on the topic, he recalled that it had always been the intention to provide States with something of practical value. He maintained a preference for the current approach of producing guidelines, but that did not preclude the possibility of drafting model clauses, as suggested by various members. He would also take due account of the notes of caution sounded by Mr. Hmoud and Mr. McRae. Draft guideline 10, as he had explained, sought to situate the question of the legal effects of article 25 of the 1969 Vienna Convention in the context of the provisions of article 27, as a general rule, and article 46, as an exception. Article 27 had been covered in his third report.[467] Paragraph 66 of his fourth report highlighted the fact that both articles dealt with two different issues: the fact that a State could not invoke the provisions of its internal law as justification for its failure to meet its international obligations; and the fact that a State could only invoke violation of a provision of its internal law with regard to its competence to conclude treaties if that violation was manifest and concerned a rule of fundamental importance. Those two concepts should be properly reflected in the draft guidelines and he had included them in draft guideline 10 accordingly, in the same order as they appeared in article 27 of the Convention.

13. It was an entirely different matter, as stated in paragraph 49 of the fourth report, for negotiating States to agree on a limitation clause for a treaty to be applied provisionally, based on internal law. In view of States' interest in that aspect of the topic, as evidenced by two recent cases, and the need to clarify the issue, he agreed with those who had expressed support for covering that situation in future draft guidelines. From a didactic point of view, however, it might have been preferable to tackle the three issues – article 27, article 46 and limitation clauses based on internal law – separately. Paragraphs 43 and 44 of his fourth report should be read in the light of the commentary contained in paragraph 57: an overly broad interpretation of article 46, such that every State must review the diversity of internal laws of its contractual partners *a priori*, would obviously not be reasonable.

14. With regard to future work, he welcomed the suggestion made by Ms. Escobar Hernández to include a general overview of work done on the topic to date in the next report, with as many examples of practice as possible, so as to guide new members of the Commission and help to streamline the draft guidelines. He intended to continue producing draft guidelines and commentaries to accompany them. In conclusion, he requested the Commission to refer draft guideline 10 to the Drafting Committee.

15. The CHAIRPERSON said he took it that the Commission wished to refer draft guideline 10 to the Drafting Committee.

It was so decided.

16. Mr. SABOIA asked whether there would be an opportunity for the Commission to discuss the proposal by the Special Rapporteur to request the Secretariat to obtain a representative sample of treaties.

17. Mr. NOLTE asked the Special Rapporteur whether there was a relationship between that proposal and draft guideline 10.

18. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that there was no direct relationship. His proposal was to request the Secretariat to conduct a detailed search of its database of 1,733 treaties that provided for provisional application in order to extract a representative sample that would enable the Commission to determine with greater certainty the state of current practice. It would be necessary to ask the Secretariat because, although the treaties in question were publicly available, the database search tool was not. He would liaise with the Chief of the Treaty Section of the Office of Legal Affairs beforehand to ensure that the proposal could be implemented within existing resources and that it would not put undue pressure on the Section.

19. Mr. LLEWELLYN (Secretary to the Commission) said that the proposal would be brought to the attention of the Treaty Section and that, if it was considered feasible, a request would be drafted by the secretariat in collaboration with the Special Rapporteur for consideration by the Commission prior to the adoption of its annual report.

20. Mr. VALENCIA-OSPINA asked whether the proposed study would involve a cooperative exercise in which the Treaty Section identified treaties and the Codification Division of the Office of Legal Affairs analysed their legal meaning, or whether it would involve only one of them.

21. Mr. LLEWELLYN (Secretary to the Commission) said that it was his understanding that the Treaty Section would be requested to provide the Special Rapporteur with a representative sample of treaties to assist him in the preparation of his next report and that the Codification Division would not be asked to undertake a study.

22. Sir Michael WOOD said that, as he understood it, the proposal would involve an informal request for assistance by the Special Rapporteur rather than a formal request by the Commission.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/689, Part II, sect. F, A/CN.4/701)

[Agenda item 3]

Fifth report of the Special Rapporteur (*continued*)

23. The CHAIRPERSON invited the Commission to adopt the text of draft articles 2 (*f*) and 6, as provisionally adopted by the Drafting Committee at the sixty-seventh session and contained in document A/CN.4/L.865.[468]

Draft article 2 (*f*). *Definitions*

Draft article 2 (f) was adopted.

[467] *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687.

[468] Available from the Commission's website, documents of the sixty-seventh session.

Draft article 6. *Scope of immunity* ratione materiae

24. Mr. CANDIOTI said that, while he did not object to the content of draft article 6, the use of Latin terms such as *ratione materiae* should, in future, be avoided in titles so as to facilitate understanding. On second reading, the Commission should seek to use only the six official languages of the United Nations.

Draft article 6 was adopted.

25. The CHAIRPERSON invited the Commission to pursue its consideration of the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

26. Mr. KITTICHAISAREE said that he wished to thank the Special Rapporteur for her comprehensive, detailed and well-researched report, which dealt with one of the most complex aspects of the topic, namely exceptions to immunity.

27. He would begin with some comments on methodology before turning to the substantive parts of the report. First, the Special Rapporteur should have faithfully followed the analytical process of identification of customary international law summarized in paragraph 183 of the fifth report. Had she done so, it would have been clear whether proposed draft article 7 reflected, in whole or in part, established rules of customary international law (*lex lata*) or progressive development of international law (*lex ferenda*). As pointed out in paragraph 20 (*a*) of the fifth report, several States had indicated that this distinction should be made clear; the distinction was even more important in relation to the different exceptions proposed by the Special Rapporteur in draft article 7.

28. Second, the Special Rapporteur could have used as a starting point the conclusions drawn by the previous Special Rapporteur on the topic, Mr. Kolodkin, which were outlined in paragraph 16 of the fifth report, and determined whether and, if so, how those conclusions were still justifiable in the light of the most recent developments in international law, as analysed in chapter II of the fifth report.

29. Third, because the Special Rapporteur had not taken the approach described, the practice studied in chapter II of the fifth report was subject to varying interpretations. For example, the jurisprudence of the International Court of Justice and the European Court of Human Rights, cited by the Special Rapporteur in paragraphs 61 to 95, dealt only with State immunity *stricto sensu* with respect to civil jurisdiction and might not sufficiently support the conclusions made by the Special Rapporteur in paragraph 95. While the judgments in question might not provide an adequate basis for confirming that the immunity of State officials from foreign criminal jurisdiction was of an absolute nature or without exceptions, they might not provide evidence of the existence of such exceptions, either. Moreover, the practice of the International Criminal Court and other international criminal tribunals with respect to immunity *ratione materiae* might not necessarily be helpful in determining whether customary international law recognized the existence of exceptions to such immunity before national criminal courts. In other words, it might not be possible to draw an analogy between the two jurisdictions, because the principle of *par in parem non habet jurisdictionem*, from which immunity was derived, did not apply when a State official was tried before an international court.

30. As to the jurisprudence of the International Tribunal for the Former Yugoslavia mentioned in paragraphs 98 and 99 of the fifth report, paragraph 41 of the Tribunal's judgment in *Prosecutor* v. *Blaškić*, cited by the Special Rapporteur to support the existence of exceptions to immunity with respect to international crimes, came from a part of the judgment analysing whether international tribunals could direct binding orders to State officials. Moreover, as the Special Rapporteur recognized in paragraph 99 of her report, the exception seemed to be limited to the exercise of jurisdiction by the Tribunal, as supported by its subsequent jurisprudence, and did not cover cases brought before domestic courts. The same was true in the case of the Special Court for Sierra Leone, cited by the Special Rapporteur in paragraph 100. The Appeals Chamber of that Court recognized that immunity had no relevance, but only before international criminal tribunals. The same reasoning was applicable to the exception recognized before the International Criminal Court, to which reference was made in paragraph 107 of the fifth report.

31. The case of *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, which was before the International Criminal Court and which was studied in chapters II and III of the fifth report, deserved closer attention, in particular with regard to the cooperation of domestic courts with the International Criminal Court, which was addressed in paragraph 108 and the following paragraphs. There were some elements that needed to be clarified. For the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, the obligation to cooperate stemmed from relevant resolutions of the Security Council acting under Chapter VII of the Charter of the United Nations. Pursuant to Article 103 of the Charter of the United Nations, that obligation would prevail over any other kind of international legal obligation that Member States might have, such as respect for the immunity of State officials. While, in the case of those two tribunals, the obligation to cooperate was binding on all Member States of the United Nations under the vertical model of cooperation provided for by their respective statutes, the obligation to cooperate under the Rome Statute of the International Criminal Court was a treaty obligation binding only on States parties to the Statute. Some of the conditions for cooperation by States parties were set out in article 98, paragraph 1, of the Statute, to which reference was made several times in the fifth report. By virtue of that provision, the International Criminal Court "may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State unless the Court can first obtain the cooperation of that third State for the waiver of the immunity". The provision tried to reconcile the obligations of States parties under the Rome Statute of

the International Criminal Court with their other obligations under international law in relation to third States that were not parties to the Statute. The Special Rapporteur jumped to the conclusion, in paragraph 105 of her fifth report, that there had been a so-called "implicit" waiver of immunity by the Security Council in the case of *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, without carefully analysing whether article 98, paragraph 1, of the Rome Statute of the International Criminal Court in fact recognized that a waiver of immunity had to come from the State of the official who had committed the crime and which was not a party to the Statute and could not, as such, be inferred from a Security Council resolution with respect to the International Criminal Court, as might have been the case for the *ad hoc* tribunals created under Chapter VII of the Charter of the United Nations for the reasons that he had explained. While he believed that Mr. Al Bashir should be put to trial in order to ensure that justice was done, the Special Rapporteur should have made clear in the fifth report the basis for a waiver of immunity in his case.

32. The Special Rapporteur had taken a long and winding road to arrive at draft article 7, devoting many pages to theoretical discussions, albeit of a legal nature. After reading chapter III of the fifth report and listening to the Special Rapporteur's oral introduction and answers to his questions at the previous meeting, he still did not find her explanations and underlying rationale for the use of the terms "limitations" and "exceptions" fully satisfactory.

33. The journey taken by the Special Rapporteur in the fifth report could be likened to the one taken by Dante Alighieri in his *Divine Comedy*, which was divided into three parts: hell, purgatory and paradise. The first part of the journey, hell, consisted of the commission of crimes by State officials that led to grave human suffering. The second part, purgatory, involved the criminal prosecution of those officials, with remediation and soul-searching on all sides. In the second phase, procedural bars and exceptions to immunity might come into play. Paradise was the climax, when the protagonists fully realized the "values and legal principles" of the international community mentioned in paragraphs 17 and 190 to 217 of the fifth report, which prevailed over the procedural bars raised in purgatory and allowed the victims to obtain redress. He could only wish that the Special Rapporteur had arrived at paradise by strictly following the process of identification of customary international law summarized in paragraph 183 of the report.

34. He appreciated the balance that the Special Rapporteur was trying to strike between the stability of international relations and sovereign equality, on the one hand, and the need to provide redress for victims of acts committed by State officials, on the other. As the Special Rapporteur herself recognized in paragraph 214 of her fifth report, the right to reparation did not constitute in and of itself an autonomous legal basis for an exception to the immunity of State officials from foreign criminal jurisdiction. Consequently, the conclusion that there existed a limitation or exception to immunity should reflect customary international law, be supported by a normative source of some sort or, as a last resort, be labelled as progressive development of international law.

35. Turning to the substantive aspects of the fifth report, he noted that, with respect to *ultra vires* acts, the Special Rapporteur suggested in paragraph 121 that, with regard to immunity *ratione materiae*, it could be concluded that the majority trend was to accept the existence of certain limitations and exceptions because the crimes in question could not be regarded as acts performed in an official capacity, since they went beyond or did not correspond to the ordinary functions of the State. He agreed that the attribution of *ultra vires* acts committed by State officials to a State for the purpose of State responsibility was different from the issue of *ultra vires* acts that did not entitle the official concerned to functional immunity.

36. Proposed draft article 7, paragraph 1 (*a*), included a list of crimes to which immunity should not apply: crimes of genocide, crimes against humanity, war crimes, torture and enforced disappearances. As she noted in paragraph 219 of her fifth report, the Special Rapporteur had drawn up the list on the basis of conduct that could be considered to constitute an "international crime". The crime of apartheid was also mentioned in that paragraph, but had not been included in the draft article, without any explanation for the omission. In paragraph 222, the Special Rapporteur explained why she had excluded the crime of aggression from the list; however, not all the reasons given were well founded. He supported Mr. Murase's opinion on that point for several reasons: although, as the Special Rapporteur had mentioned, the Commission's 1996 draft code of crimes against the peace and security of mankind[469] did not include aggression as a crime for which States parties were obliged to exercise national criminal jurisdiction, given the possible political implications for the stability of relations between States, the situation had changed since the Commission's adoption of the draft code. Referring to the Commission's commentary to article 8 of the draft code, he said that the presumptions that had been made at that time were no longer valid in many respects, especially since the adoption of the Amendments on the crime of aggression to the Rome Statute of the International Criminal Court in Kampala in 2010. Once the International Criminal Court exercised jurisdiction over the crime of aggression, it was not required, in the event of a deadlock in the Security Council, to await final determination by that body that an act of aggression had taken place. Furthermore, States that had accepted these Amendments were likely to criminalize the crime of aggression under their domestic criminal law, as they had done in relation to the other crimes under the Rome Statute of the International Criminal Court. The incorporation of the crime of aggression into the Statute in 2010 had not altered the complementarity mechanism. States had thus not objected to the possibility, albeit within a framework of narrow jurisdictional conditions, of the domestic courts of States parties exercising jurisdiction over the crime of aggression when committed by their nationals. The Commission could not rule out the possibility that a State might pursue domestic criminal prosecution of persons responsible for committing an act of aggression against it, as objectively determined. Assessment by an objective body such as an independent international inquiry sanctioned by the United Nations

[469] *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

or an objective credible report such as the *Report of the Iraq Inquiry*[470] of 6 July 2016, which aimed to assess the policy of the United Kingdom on the Iraq war from 2001 to 2009, could be used to help substantiate a charge of aggression by individuals.

37. The Special Rapporteur also referred to the lack of national criminal legislation addressing the crime, as well as the absence of cases of State practice. However, as she recognized in paragraph 224 of the fifth report, the national case law that had given rise to the limitation or exception analysed with respect to international crimes had been derived primarily from a large number of torture cases. If the lack of jurisprudence with respect to other international crimes had not been decisive to their inclusion in the exceptions given under draft article 7, paragraph 1 (*a*), the same should be true for the crime of aggression.

38. There had been attempts to prosecute individuals for aggression. For example, in Thailand, a criminal prosecution had been brought against the Prime Minister who had declared war against the Allies during the Second World War. The charge of being a war criminal, or warmonger, had been dismissed in that particular instance because the conduct had not been criminalized at the time it had taken place, and a prosecution would therefore have violated the principles of legality and non-retroactivity of criminal law.

39. He agreed with Mr. Murase that the crime of aggression was a leadership crime that could only be committed by a person in a position effectively to exercise control over or to direct the political or military action of a State. That meant that an act of waging war was, more often than not, carried out by persons with governmental authority; hence, as it was committed in the exercise of official functions, its perpetrators would normally be entitled to immunity *ratione materiae* lasting permanently, even when they were no longer in office. Aggression usually led to other grave crimes of international law, including crimes against humanity, war crimes, and even genocide. In the future, when the International Criminal Court exercised jurisdiction over the crime of aggression or when criminal prosecution of a person accused of aggression was undertaken in a domestic court of a State which had been a victim of aggression, the accused would be likely to invoke immunity from foreign criminal jurisdiction. It was therefore essential that the crime be included in the list of exceptions to immunity *ratione materiae* in draft article 7. Otherwise, such an act would always fall within the category of official acts and, as such, would be covered by immunity *ratione materiae*.

40. Lastly, he reminded the Commission that the question of immunity of private contractors was still pending.

41. Mr. HMOUD said that the question concerning the crime of aggression and determination thereof by the Security Council raised by Mr. Kittichaisaree was extremely important. He asked how, in the context of the articles under discussion, a national court would determine that an act of aggression had been committed and then deal with the question of immunity, where the Security Council had not done so. In the case of the Rome Statute of the International Criminal Court, that issue had been discussed and resolved in Kampala.

42. Mr. KITTICHAISAREE said that, currently, a person for whom the International Criminal Court had issued an arrest warrant for a crime of aggression might invoke immunity. If, as a result of political deadlock in the Security Council, that body was not able to determine whether an act of aggression had taken place, a national court could make use of reports from credible sources, such as international inquiries set up by the United Nations, that clearly indicated that an act of aggression had taken place, and then issue its own arrest warrant. There was, however, no certainty that such action was justifiable under international law, as the State would be exercising its own domestic criminal jurisdiction; other States that agreed that the State in question had been a victim of aggression might cooperate with it. In theory, therefore, two parallel prosecutions might be brought for a crime of aggression, one through the International Criminal Court and the other through the domestic courts.

43. Mr. SABOIA said that he shared the concern of Mr. Kittichaisaree that the crime of aggression could be the source of many terrible offences. However, Mr. Kittichaisaree had also seemed to contradict his own criticism of the methodology used by the Special Rapporteur concerning the issue of exceptions: while he had pointed out that the obligation to cooperate with the International Criminal Court was binding only on States parties to the Rome Statute of the International Criminal Court because it was not customary international law as such, the same could be said of the crime of aggression under the Statute.

44. The implicit conclusion that the Special Rapporteur had drawn concerning the willingness of the Security Council to refer the situation in Sudan to the International Criminal Court would be meaningless if the whole competence of the Court were not included, notably the obligation to cooperate with the Court in the surrender of the indicted individual or alleged offender. He therefore suggested that the Commission might consider including a "without prejudice" clause referring to the development of international criminal law with regard to the crime of aggression.

45. Mr. MURPHY said that one concern that had been discussed at the Conference of the Rome Statute of the International Criminal Court in Kampala in the context of national prosecutions of perpetrators of acts of aggression was the possibility that, whenever armed conflict occurred between two States, each State would consider the other to be the aggressor, would find what it viewed as credible sources to back up its position and then might pursue indictments in its own national courts of the other State's leaders, particularly if a statute providing for such action existed. It had been considered that such a situation might not be conducive to bringing a negotiated end to the armed conflict. To a large extent, that had been the reasoning behind the fifth understanding regarding the Amendments to the Rome Statute of the International Criminal Court reached at Kampala, which stated that "the amendments shall not be interpreted as creating the right or

[470] Iraq Inquiry, *The Report of the Iraq Inquiry, Report of a Committee of privy counsellors*, July 2016. Available from: www.gov.uk/government/publications/the-report-of-the-iraq-inquiry.

obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State".[471]

46. Mr. GÓMEZ ROBLEDO said that the very interesting issue raised by Mr. Kittichaisaree and the comments thereto made by various members of the Commission raised the question of whether the Security Council was recognized as having a monopoly on determining whether a crime of aggression had occurred and if that capacity could be seen as taking precedence over the law of national courts. Although the above-mentioned Amendments were likely to enter into force in the near future, they would be far from universally applicable; it would therefore be useful to include the crime of aggression in proposed draft article 7.

47. Mr. KITTICHAISAREE, responding to the comments made by Mr. Murphy and Mr. Saboia, said that he had not in fact stated that the arguments he had raised concerning article 98, paragraph 1, of the Rome Statute of the International Criminal Court were correct; rather, he had wished to say that, instead of simply referring to the assertion that there had been an implicit waiver of immunity by the Security Council in the case of *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, the Special Rapporteur should have also considered the contrary arguments and rebutted them. He had taken good note of the point raised by Mr. Murphy; however, what he had said with respect to the prosecution in national courts of perpetrators of the crime of aggression could equally well apply to other crimes such as the crime of genocide or accusations of torture of a State's own citizens. The draft articles prepared by the Special Rapporteur might, at some point, become a convention or take on another long-lasting form, by which time the practice of prosecuting persons accused of the crime of aggression on the basis of credible evidence might have become accepted by the international community of States.

The meeting rose at 11.40 a.m.

3330th MEETING

Thursday, 28 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/689, Part II, sect. F, A/CN.4/701)

[Agenda item 3]

Fifth report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

2. Mr. SABOIA said that he wished to thank the Special Rapporteur for her fifth report on the immunity of State officials from foreign criminal jurisdiction. The report, which was supported by extensive research and reflected a balanced approach, was itself an important contribution to the understanding of a particularly complex area of contemporary international law. It was consistent with previous reports, including those submitted by the first Special Rapporteur on the topic, Mr. Kolodkin.[472] It was also commendable that the Special Rapporteur included in her report an overview of arguments, criticisms, opinions and judicial practice that diverged from her own points of view, thus demonstrated her impartiality and objectivity. In 2012, when introducing her preliminary report, the Special Rapporteur had defined the purpose of the Commission's work on the topic in the following manner: "to understand and help lay a firm foundation for a system of immunity of State officials from foreign criminal jurisdiction that could be incorporated seamlessly into contemporary international law, thereby ensuring that such immunity did not conflict unnecessarily with other principles and values of the international community that were also in the process of incorporation into international law". That starting point provided a solid basis from which to address the complex issues covered by the present report, namely the limitations or exceptions to such immunity, without precluding the consideration of all the legal and other aspects that related to the topic. Furthermore, as Mr. Murase had pointed out in his statement, the Special Rapporteur's emphasis on the normative aspects of the issues discussed in the fifth report, in particular the study of international law from a systemic viewpoint, was very important in terms of preserving coherence and balance among the principles and values underlying the two aspects of the topic: on the one hand, the immunity of State officials from foreign criminal jurisdiction, and on the other, the sovereign right of a State to exercise its jurisdiction when immunity did not apply, the values recognized by the international community as a whole and the need to ensure that the invocation of immunity did not lead to impunity or undermine the progress made in recent decades in the field of international criminal law.

3. The fifth report comprised over 54,000 words and 346 footnotes, which referred to a large number of international instruments, examples of national and

[471] See *Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010, Official Records*, International Criminal Court publication, RC/9/11, resolution 6, The crime of agression (RC/Res.6), annex III.

[472] Reports of Mr. Kolodkin: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

international case law, national laws, resolutions of international organizations and works of scholarly literature. He would not address them in detail but would restrict his comments to the aspects he considered particularly important. Generally speaking, he approved of the methodological approach and main thrust of the fifth report. He also approved of the wording of draft article 7 (Crimes in respect of which immunity does not apply) and was in favour of referring it to the Drafting Committee.

4. In chapter I, section B, of her fifth report, the Special Rapporteur provided an account of the prior consideration by the Commission of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. In paragraph 19, she provided a summary – which was at once fair, impartial and objective – of the Commission's discussions to date on that subject in plenary meetings and in the Drafting Committee. In paragraph 20, she also summarized the views expressed by delegations during the discussions on the topic held in the Sixth Committee and the written contributions submitted by States. Although he had not participated in those discussions, he had no doubt that her summary accurately reflected the views expressed; they revealed that a significant number of States from different regions supported the idea of studying questions relating to exceptions to immunity from jurisdiction, in particular immunity *ratione materiae*, especially as they related to international crimes.

5. Chapter II presented a study of practice, including treaty practice. Paragraphs 26 to 31 of the fifth report highlighted interesting aspects of the United Nations Convention on Jurisdictional Immunities of States and Their Property. Even though that Convention was not directly relevant to the Commission's work on the topic, some of its provisions were pertinent, as illustrated in the report. First, article 12 of the Convention, which dealt with personal injuries and damage to property, provided for a so-called "territorial tort exception", which prohibited the invocation of immunity from jurisdiction in order to prevent a court from exercising its jurisdiction in a proceeding that related to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property. Second, it was noteworthy that this rule was also enshrined in other conventions, such as the Vienna Convention on Consular Relations, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and the European Convention on State Immunity. The inclusion of the "territorial tort exception" in draft article 7 therefore appeared to be sufficiently supported by practice.

6. He also wished to highlight the interesting analysis set out in paragraphs 32 to 35 of the fifth report concerning international human rights treaties that contained provisions on individual criminal responsibility that were relevant for the purposes of the current topic. The Special Rapporteur also analysed the Rome Statute of the International Criminal Court and the international conventions on corruption, in terms of how they applied to State officials. Also useful was the analysis set forth in paragraph 33 concerning the various ways in which those treaties provided for the attribution of an act to a State official. On the basis of that analysis, the Special Rapporteur had drawn the conclusion that the commission of a crime of genocide, apartheid, torture or enforced disappearance could constitute *prima facie* an exception to immunity from criminal jurisdiction. He would refrain from commenting in depth on the review of national legislative practice described in paragraphs 42 to 59 of the fifth report, since, as the Special Rapporteur had indicated, the jurisdictional immunity of the State or of its officials was not explicitly regulated in most States. As a result, national courts generally relied directly on international consular or treaty law and often received recommendations from the Ministry of Foreign Affairs or the Attorney General's Office. However, some national laws, such as those cited in paragraphs 44 and 45, contained provisions that, for the most part, related to the "territorial tort exception". The Special Rapporteur's reference to sponsors of terrorism in paragraph 48 was also thought-provoking.

7. Paragraph 50 referred to the adoption of Organic Act No. 16/2015 of Spain, which established separate regimes for State officials who enjoyed immunity *ratione personae* and those who enjoyed immunity *ratione materiae*. With regard to the second type of regime, the Act expressly stipulated that persons accused of the crime of genocide, war crimes, the crime of enforced disappearance or crimes against humanity, were precluded from invoking immunity. Although few in number, those examples demonstrated the existence of a practice characterized by the recognition of the preclusion of immunity *ratione materiae* with respect to certain crimes, in particular international crimes committed by an official of a foreign State.

8. The discussion of national judicial practice in section D of chapter II of the fifth report referred to many additional elements that were indicative of a widespread practice by States. In paragraphs 109 to 122, with the help of numerous footnotes, the Special Rapporteur analysed a large number of important decisions that had been handed down by the domestic courts of various countries and concluded that practically all of those courts had recognized that there were no limitations or exceptions to immunity *ratione personae*. Conversely, with regard to immunity *ratione materiae*, the prevailing trend was to recognize limitations in cases involving the commission of serious crimes or when the acts in question contravened a norm of *jus cogens*, ran contrary to the values of the international community as a whole or could not be characterized as acts performed in an official capacity.

9. Lastly, in paragraph 122, the Special Rapporteur referred to the judgment of the Constitutional Court of Italy of 22 October 2014 on questions arising from the incorporation into the Italian legal system of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*. As indicated in the fifth report, although that case involved State immunity *stricto sensu*, it was nevertheless germane to the present topic, and in that regard, it should be recalled that immunity could not be considered as an acceptable sacrifice of inviolable rights when, as in the case referred to in the report, no other effective recourse for gaining access to the courts and obtaining effective judicial protection was available.

10. Chapter II, section E, of the fifth report presented a review of the previous work of the Commission, from which the Special Rapporteur had extracted a large number of relevant examples of both *opinio juris* and international practice in relation to the non-applicability of the immunity from jurisdiction of State officials who could reasonably be suspected of having committed acts constituting international crimes.

11. In the context of international relations, the purpose of immunity from jurisdiction was to protect the sovereign equality of States and to ensure that their officials could perform official acts without any interference that was incompatible with their status, as well as, in the case of senior officials who were protected by immunity *ratione personae*, acts performed in a private capacity during the time that they were in office. In his own view, immunity from jurisdiction should be examined in the light of the sovereign right of the forum State to exercise its jurisdiction. That prerogative, which was inherent in State sovereignty, constituted the general rule, to which immunity from jurisdiction put up a procedural bar. Thus, given that immunity was an exception to a general rule, it should be interpreted narrowly.

12. With regard to the previous work of the Commission, which the Special Rapporteur had examined thoroughly and carefully, he wished to draw attention to the most prominent examples, namely the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[473] and the 1996 draft code of crimes against the peace and security of mankind.[474] Note should be taken of the Special Rapporteur's observations in paragraph 126 of the fifth report concerning the Commission's commentaries to the aforementioned Principles. First, international law could impose duties and liabilities on individuals directly, without the need for intermediation. That commentary confirmed what the Special Rapporteur stated in her report on the subject of the dual responsibility of the State, meaning the international responsibility of the State and the criminal responsibility of the individual, for the commission of international crimes. Second, international law had supremacy over domestic law, given that, as noted by the Nürnberg Tribunal, "individuals have international duties which transcend the national obligations of obedience".[475]

13. Mention should also be made of the points raised in paragraph 127 of the fifth report, in which the Special Rapporteur indicated that the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal were essentially substantive in nature; thus, the text that had been adopted by the Commission did not specifically refer to immunity. The Tribunal had expressly addressed that issue in several of its decisions, which were reflected by the Commission in its commentary to article 7 of the draft code of crimes against the peace and security of mankind, in which the Commission stated that "the principle of international law which protects State representatives in certain circumstances does not apply to acts which constitute crimes under international law. Thus, an individual cannot invoke his official position to avoid responsibility for such an act."[476]

14. In relation to the discussion concerning the draft code of crimes against the peace and security of mankind that appeared in paragraphs 128 to 133 of the fifth report, in particular in paragraphs 131 and 132, while it was true that the Commission had indicated that judicial proceedings before an international criminal court would be the quintessential example of appropriate judicial proceedings in which an individual could not invoke any immunity based on his or her official position, the Commission had nevertheless considered that national courts were expected to play an important role in the implementation of the draft code and that States should enact any procedural or substantive measures that might be necessary to enable them to effectively exercise jurisdiction, which, according to the Special Rapporteur, included the obligation to adopt provisions that ruled out the applicability of immunity under the terms defined in the draft code. The list of crimes defined in the draft code as international crimes, which appeared in paragraph 133 of the fifth report, included the crime of aggression – a point that had given rise to a mini-debate at the Commission's 3329th meeting.

15. He had nothing to add to that part of the Special Rapporteur's analysis that was based on the articles on the responsibility of States for internationally wrongful acts,[477] since the Special Rapporteur herself had recognized that, although those articles did not directly address the question of immunity from jurisdiction, the commentaries to those articles did contain a number of elements that could help to situate crimes under international law more appropriately in the international legal system and could therefore be useful for the present study. References to the establishment of the primacy of peremptory norms, the affirmation of the existence of obligations towards the international community as a whole and the identification of the most serious crimes under international law as breaches of peremptory norms were particularly important.

16. With regard to the primacy of peremptory norms and the relationship between peremptory norms and non-peremptory norms, the Commission considered that the primacy of the former was evident whenever there was a conflict between two primary norms and also held true whenever there was a conflict between primary and secondary norms. As a result, it indicated that, with respect to rules precluding wrongfulness, the application of secondary rules did not authorize or excuse any derogation from a peremptory norm of general international law. The Commission also indicated that, on the subject of the relationship between peremptory norms and obligations

[473] *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[474] *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

[475] *Official Records of the General Assembly, Fifth Session, Supplement No. 12* (A/1316), para. 102.

[476] *Yearbook ... 1996*, vol. II (Part Two), p. 27 (para. (6) of the commentary to draft article 7).

[477] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

towards the international community as a whole, the latter arose from the former; in other words, those obligations arose from substantive rules of conduct that prohibited what had come to be seen as intolerable because of the threat it posed to the survival of States and their peoples and the most basic human values.

17. Equally important were the observations described in paragraph 139 of the fifth report concerning the special nature of obligations towards the international community as a whole and the effects of those obligations, in particular the assertion based on article 48 of the articles on the responsibility of States for internationally wrongful acts to the effect that any State was entitled to invoke the responsibility of another State if the obligation breached was owed to the international community as a whole, and the possibility referred to by the Special Rapporteur of establishing a different legal regime for the immunity of State officials from foreign criminal jurisdiction.

18. In the interest of time, he would refrain from commenting on chapter III of the fifth report and would proceed to chapter IV, which dealt with instances in which immunity did not apply. In it, the Special Rapporteur referred to the question of whether there was a customary norm whereby international crimes were considered an exception to the immunity of State officials from foreign criminal jurisdiction. After having examined the required elements for determining the existence of an international custom, based on the Commission's work on the identification of customary international law and the draft conclusions that the Drafting Committee had provisionally adopted on that topic,[478] and after having reviewed the counterarguments that had emerged from practice, she had answered that question in the affirmative. While he agreed with the principle underlying the Special Rapporteur's conclusion, he pointed out that it was the immunity of States and not of State officials, to which the Special Rapporteur referred to in paragraph 189 of her fifth report, and he would therefore appreciate clarification in that regard.

19. Leaving aside the question of custom, the Special Rapporteur then proceeded to an analysis of the systemic categorization of international crimes as an exception to immunity, to which Mr. Murase had referred in his statement. Beginning with paragraph 190, she examined the issue of the protection of the values of the international community as a whole, *jus cogens* and the fight against impunity. Her analysis of the question of whether the fight against impunity for international crimes was a legal value, not just a sociological value, was particularly interesting, and she was right to respond to that question in the affirmative by referring to the gradual transformation of sociological values into legal norms. That transformation had been the result of the development of international law since the end of the Second World War, with the incorporation into international human rights law and international humanitarian law of a set of legal obligations relating to rights that were inherent in human dignity and that were applicable both in times of war and in times of peace. The Special Rapporteur had also examined the gradual evolution of accountability, one important step of which had been the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels,[479] by virtue of which States had undertaken commitments, which were listed in the footnote to paragraph 195 of the fifth report.

20. Based on her consideration of the possible effects of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*, the Special Rapporteur concluded that the reasoning of the Court could not be applied automatically and in all respects to the relationship between the immunity of State officials from foreign criminal jurisdiction and *jus cogens* norms. He fully agreed with that position, as well as with the statement made in paragraph 217 of the fifth report that the arguments analysed in the report made it clear that there were sufficient grounds in contemporary international law to conclude that the commission of international crimes could constitute a limitation or exception to the immunity of State officials from foreign criminal jurisdiction.

21. He also agreed with the wording proposed by the Special Rapporteur in draft article 7, paragraph 2, which indicated that exceptions to immunity did not apply to persons who enjoyed immunity *ratione personae* during their term of office, for the reasons set out in the fifth report. The possibility of referring to other crimes of international concern, such as piracy, human trafficking, slavery and various forms of discrimination, which were traditionally covered by customary or treaty provisions that related to universal jurisdiction, could perhaps be discussed in the Drafting Committee at an appropriate time.

22. He was also in favour of including in the list of crimes with respect to which immunity did not apply, that of corruption, even if he believed that it might perhaps be necessary to specify its various forms, since corruption had indeed become a threat to both the economic and social development of States and peoples and the rule of law, and often led to the commission of other particularly serious offences. Lastly, he agreed with the Special Rapporteur that her next report should deal with the procedural aspects of immunity, including guarantees relating to the right to a fair trial.

23. Mr. CANDIOTI said that the fifth report of the Special Rapporteur represented a decisive step forward in the Commission's work on the topic. He fully endorsed the comments made by Mr. Saboia, especially his proposal to add the crimes that were traditionally subject to universal jurisdiction to the list of crimes with respect to which immunity did not apply. Modern forms of piracy were a topical issue that merited consideration by the Commission. At a time when the world was experiencing an extremely grave crisis in which the fundamental rules of the international legal order were being seriously flouted, it was essential that the Commission's message to the international community on the question of immunity should reaffirm the importance of the rule of law and the need to fight in order to protect it.

[478] See the report of the Drafting Committee on the identification of customary international law (A/CN.4/L.872, available from the Commission's website, documents of the sixty-eighth session). The Commission adopted the draft conclusions on first reading on 2 June 2016 (see the 3309th meeting above, para. 5).

[479] General Assembly resolution 67/1 of 24 September 2012.

24. Mr. HUANG said that, by addressing the issue of exceptions to immunity, the deliberations on the topic had entered a complex and delicate phase. As pointed out by the Special Rapporteur, limitations and exceptions to immunity were undoubtedly one of the central issues to be considered by the Commission in its work on the topic and also constituted a very politically sensitive issue, which, consequently, must be dealt with prudently. When the Sixth Committee of the General Assembly had discussed the Commission's report on the work of its sixty-seventh session,[480] some States had expressed concern at the proposition that serious international crimes constituted an exception to the immunity of State officials from foreign criminal jurisdiction, pointing out that customary international law did not support such an exception and that there was a lack of political will to develop one. Within the Commission, there were greatly divergent views on that issue. In his second report in 2010, the former Special Rapporteur, Mr. Kolodkin, had conducted an in-depth analysis of relevant existing rules of international law and had concluded that, in contemporary international law there was no customary norm (apart from the exception concerning acts committed in the territory of the forum State by a foreign official who had been present in the territory of the State without the State's express consent for the official to discharge his or her official functions) or trend towards the establishment of such a norm. He had added that further restrictions on immunity, even those with a *de lege ferenda* value, were not desirable, since they could impair the stability of international relations without having an effect on efforts to combat impunity. In his own view, that conclusion of the former Special Rapporteur had laid a solid foundation for the Commission's consideration of exceptions to immunity. Unless there had been important breakthroughs in international practice since 2010, it was imperative to adhere to the principle of the immunity of State officials from foreign criminal jurisdiction. Exceptions to that principle must be supported by international practice and should not be propagated at will.

25. However, on that key issue, it had to be said that, since her fourth report in 2015, the Special Rapporteur had gradually deviated from the right direction and had shifted the focus from the codification of *lex lata* to the development of *lex ferenda*, thus causing a loss of balance and a departure from the systematic, ordered and structural working method that the Special Rapporteur had herself proposed and that had been approved by the Commission. She had not given due attention to the principle of the immunity of State officials that was recognized in the norms of customary international law, the decisions of the International Court of Justice and national judicial practice. She had not adopted a careful and balanced attitude towards the progressive development of *lex ferenda*, in that she had attempted to restrict the application of the principle of immunity through an increase in the number of exceptions to immunity, as a way of resolving the so-called issue of impunity. That had been reflected in her proposed draft article 7, which not only listed as exceptions to immunity from foreign criminal jurisdiction the serious international crimes that were enumerated in the Rome Statute of the International Criminal Court, such as genocide, crimes against humanity and war crimes, but also violations of human rights such as torture and enforced disappearance, crimes of corruption and even crimes under ordinary law that were committed in specific circumstances with harm to persons and loss of property, thus to a considerable extent negating the immunity of State officials from foreign criminal jurisdiction. Furthermore, there was confusion surrounding basic concepts, such as international and domestic crimes; criminal and civil jurisdiction; universal, international, domestic and third-State jurisdiction; as well as State immunity, the immunity of State officials and diplomatic immunity. In his own view, the rules proposed in draft article 7 lacked a practical basis. They not only departed from the direction that the Commission had set for its consideration of the topic but were also unlikely to obtain support from the majority of the members of the international community. The consideration of the current topic should focus on codification instead of the development of new rules of international law.

26. The question as to whether there were exceptions to the immunity of State officials from foreign criminal jurisdiction and the scope thereof had always been controversial. In her fourth report, which she had introduced in 2015, the Special Rapporteur had indicated that it was widely accepted that serious international crimes, violations of *jus cogens*, *ultra vires* acts, *acta jure gestionis*, official acts for private gain and other acts could constitute exceptions to immunity. In her fifth report, which she had introduced at the current session, the Special Rapporteur had, with a view to eliminating impunity and protecting human rights, considerably expanded the rules on exceptions to the immunity of State officials. Putting aside for a moment the question of whether that development corresponded to State practice, if numerous exceptions to immunity were allowed, they would inevitably have a serious impact on the principle of sovereign equality.

27. The immunity of State officials from foreign criminal jurisdiction was rooted in State immunity. State immunity was not a privilege or a benefit that one State afforded another, but a basic right based on the principle of sovereign equality and that of *par in parem non habet imperium*. At present, there was no basis for claiming that the norms of *jus cogens* or the rules prohibiting international crimes should prevail over the basic rights of States, let alone over the principle of sovereign equality. Given the lack of State practice and *opinio juris*, the ill-considered establishment of exceptions to immunity would subordinate the principle of sovereign equality to other rules and would gradually erode that cornerstone of international relations. At the same time, exceptions to immunity were likely to undermine the principle of non-intervention in the internal affairs of States. At present, when power politics and hegemonism were prevalent, such situations arose all the more frequently when the prosecuted officials were from small and weak States. The elimination of impunity and the protection of human rights could easily serve as pretexts for prosecuting a Head of State or high-ranking official of a country that was accused of human rights violations. Powerful countries might go so far as to use that situation as blackmail to interfere in the internal affairs of the country concerned or even to push for regime change.

[480] *Yearbook ... 2015*, vol. II (Part Two).

28. The abusive exercise of universal jurisdiction in recent years had also caused concern among the international community. For example, some Western countries frequently invoked universal jurisdiction in order to prosecute and even issue arrest warrants against African leaders and senior government officials, while some anti-government organizations and individuals frequently initiated abusive litigation to that end in the courts of Western countries. The inappropriate development of exceptions to immunity would facilitate the abusive exercise of universal jurisdiction. The Sixth Committee of the General Assembly had started discussing the scope and applicability of universal jurisdiction in 2009, and most States supported the view that the application of universal jurisdiction should respect the rules of international law that recognized immunity. Some Western countries had also started to amend their domestic legislation in order to restrict the application of universal jurisdiction and to preclude certain types of proceedings against senior foreign officials. The amendment of the Statute of the African Court of Justice and Human Rights in 2014 reflected the concerns of African States in that regard. That trend was a reflection of a will to protect the international law of immunity. An increase in the number of exceptions to immunity would not only fundamentally negate the value of the principle of immunity, but would also open the door to abusive prosecution for political ends. Such exceptions would not help to prevent the commission of crimes or to protect human rights but would instead undermine the stability of inter-State relations and international justice.

29. The Special Rapporteur had emphasized the issue of impunity many times in her fifth report; however, in his own view, that issue was not necessarily linked to immunity from jurisdiction. The purpose of adhering to the principle of immunity was not to absolve State officials who were suspected of having committed crimes from criminal punishment, and the recognition of the immunity of certain State officials from foreign criminal jurisdiction was not the cause of impunity. Immunity from jurisdiction was clearly a procedural rule and did not relieve State officials from their substantive responsibilities; it did not lead to the commission of international crimes, nor did it facilitate impunity. In his previous statement, he had pointed out that there were many causes of impunity, and most of them were political in nature. Measures to eliminate impunity should start at the political level, instead of attempting to negate, remove or restrict the long-established international law principle of the immunity of State officials from foreign criminal jurisdiction. In fact, the international community had already adopted some measures to eliminate impunity, for example those enumerated by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, which included the following: the prosecution of the State official by the national courts of his or her country of origin; the waiver of immunity; the prosecution of the State official following the conclusion of his or her term of office; and the prosecution of the State official before an international criminal court. Immunity was no more the main culprit of impunity than it was an accomplice in criminal acts. The fight against impunity should therefore not be invoked as grounds for restricting immunity.

30. He wished to make some comments on the exceptions to immunity that had been referred to in the fifth report. In order to determine whether serious international crimes such as genocide, crimes against humanity, war crimes or violations of *jus cogens* constituted exceptions to the immunity of State officials from foreign criminal jurisdiction, it was necessary to examine recent State practice and the decisions of the International Court of Justice, such as those handed down in the *Arrest Warrant of 11 April 2000* case and in the *Jurisdictional Immunities of the State* case. Generally speaking, there was an insufficient legal basis and not enough State practice to consider serious international criminal acts or violations of *jus cogens* to be exceptions to such immunity, and there were insufficient grounds for proclaiming the existence of a general trend towards the development of such exceptions.

31. First, as mentioned above, immunity fell under procedural rules, as had been confirmed by the International Court of Justice in the cases referred to previously. In the *Arrest Warrant of 11 April 2000* case, the Court stated the following: "Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law" (para. 60 of the judgment). In *Jurisdictional Immunities of the State*, the Court reaffirmed that "the law of immunity is essentially procedural in nature … . It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful" (para. 58 of the judgment). The Court further indicated that State immunity and norms of *jus cogens* were different categories of international law and that a violation of a norm of *jus cogens* did not necessarily entail a deprivation of State immunity: "A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application" (para. 95 of the judgment). Although that case dealt with State immunity and not the immunity of State officials, there was no theoretical or logical distinction between those two kinds of immunity in terms of their procedural nature and their relationship to *jus cogens*. The right to immunity of a State official had nothing to do with the legality of the act itself. The rules of immunity and those of substantive law (including *jus cogens*) belonged to two different categories, and the applicability of the rules of immunity should not be negated merely on the basis of a violation of substantive law.

32. In international law, due process guarantees were of unique value. Due process guarantees, international justice and the fight against impunity complemented each other and should not be lightly discarded. At present, the international community had made genocide, crimes against humanity and war crimes serious international crimes, and was trying to establish universal jurisdiction. However, it was still difficult to conclude that the rules of international law that prohibited serious international crimes had generated the corresponding procedural rules that would take precedence over the rules relating to immunity. The same clear legal hierarchy that existed in domestic law did not

exist in international law. In short, substantive justice should not be exercised at the expense of procedural justice, which was a prerequisite for the rule of law.

33. Second, the applicability of immunity was determined by criteria relating to immunity itself and was not affected by the legality of the act involved. Some took the view that the commission of serious international crimes could not be considered as official acts in the context of representing a State. Nevertheless, an act was considered to be official if it was performed in an official capacity, and its legality did not affect its "official nature". In fact, widespread atrocities were usually committed by the State apparatus through resources at its disposal and as part of a regime policy. From that perspective, such crimes could not be based on anything other than an act performed in an official capacity. It was also worth noting that genocide, crimes against humanity, war crimes and other serious international crimes were highly political, without a clear definition or scope, and it was difficult to separate such crimes from ordinary crimes and then go on to determine the applicability of immunity. If immunity was linked to the severity of the offence, it would result in a paradoxical situation in which, in order to determine procedural issues, such as those related to its jurisdiction and to immunity, a court would first have to hear the merits of the case it was trying. In *Jurisdictional Immunities of the State*, the International Court of Justice had pointed to that set of contradictions when, with reference to immunity from jurisdiction, it observed the following:

> It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim (para. 82 of the judgment).

34. Third, international conventions on the prevention and punishment of certain serious international crimes, which required States to extend their jurisdiction or to investigate, arrest, extradite and engage in other forms of cooperation, did not affect the immunity of State officials from foreign criminal jurisdiction under customary international law. In the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had stated the following:

> [a]lthough various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions (para. 59 of the judgment).

The Court furthermore found that "these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts" (para. 58 of the judgment). The Special Rapporteur mentioned in paragraph 33 of her fifth report that international conventions concerning the prevention and punishment of serious crimes, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the Convention against torture and other cruel, inhuman or degrading treatment or punishment, provided for the criminal responsibility of the authors of those crimes, and on that basis, concluded that those crimes constituted exceptions to immunity. That analogy gave rise to the question whether all international conventions that contained clauses on criminal responsibility should serve as the legal basis for exceptions to immunity. Obviously, such a conclusion was hard to substantiate and lacked legal foundation.

35. Fourth, since a treaty did not create either obligations or rights with regard to a third State without its consent, the inapplicability of or exceptions to immunity agreed upon by States in the provisions of a treaty, as in the case of the Rome Statute of the International Criminal Court, applied only to States parties or in the circumstances stipulated in the treaty. Those provisions could not be used to demonstrate the applicability before a national court of rules of customary international law on the immunity of State officials from foreign criminal jurisdiction, nor could they be used to demonstrate the development of rules recognizing such immunity before a national court. The immunity of State officials from the jurisdiction of international criminal judicial institutions and from that of foreign domestic courts represented two parallel lines that never met. In fact, the analysis of judicial practice pointed to two opposing trends: the domestic courts showed a greater penchant for maintaining traditional immunity rules, while international criminal judicial institutions tended towards limiting immunities. He did not subscribe to the idea that the provisions of the Rome Statute of the International Criminal Court on the immunity of State officials should be reproduced in their entirety, since that would run counter to the position adopted by the Commission in the past and would confuse the relationship between international and domestic criminal jurisdiction. Article 27 of the Statute established the principle of the irrelevance of official capacity, on the basis of which the government officials of a State party did not enjoy procedural immunity from the jurisdiction of the International Criminal Court. That provision had often been cited as strong evidence of exceptions to the immunity of State officials. However, it did not apply to officials of States that had not acceded to the Statute, not to mention the fact that the jurisdiction of the Court was merely complementary to that of domestic courts. Article 98 of the Statute provided, in addition, that the Court could not proceed with a request for the surrender of a person that would require the requested State to act inconsistently with its obligations under international law with respect to the immunity of the State or the diplomatic immunity of a person, unless the Court first obtained the cooperation of that third State for waiving such immunity. That also showed that the rules relating to immunity that were applicable before the International Criminal Court did not affect those applicable before national courts. Even so, in practice, the interpretation of the articles of the Rome Statute of the International Criminal Court on the immunity of State officials had given rise to widespread controversy. The failure of South Africa to comply with an arrest warrant issued by the International Criminal Court against Sudanese President Omar Hassan Ahmad Al

Bashir was a good example of that. At the request of South Africa, the Assembly of State Parties to the Rome Statute of the International Criminal Court, at its fourteenth session held in November 2015, had deliberated on the relationship between relevant articles of the Statute relating to the immunity of State officials and the application of those articles. South Africa had observed that, although article 27 of the Statute provided that immunities or special procedural rules that might attach to the official capacity of a person, whether under national or international law, did not bar the Court from exercising its jurisdiction over such an official in the event that this official had committed a serious international crime, South Africa would itself violate international law and its obligation under the Constitutive Act of the African Union if it honoured the arrest warrant of the International Criminal Court. Based on its right under article 97 of the Statute, South Africa had then requested consultation with the Court, but the Court had declined that request. Rather than dropping its request for South Africa to execute the arrest warrant under article 98, the Court, through its own verdict, demanded the execution of its warrant by South Africa, which presented South Africa with a dilemma of conflicting obligations. The Supreme Court of Appeal of South Africa, to which the case had been referred, had reached the verdict that South Africa should execute the arrest warrant, basing its decision on the Statute, to which South Africa was a party, rather than on its interpretation of the rules of international law governing the immunity of State officials.[481] However, the Government of South Africa had not approved of that decision. Consequently, that case could not serve as an example of State practice for the purposes of illustrating an exception to the immunity of State officials in the Special Rapporteur's fifth report. On the contrary, it demonstrated the advisability of proceeding more cautiously on the subject of the immunity of State officials.

36. With regard to whether serious international criminal offences or acts that violated *jus cogens* constituted exceptions to the immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur cited dissenting opinions that were attached to the relevant judgments of the International Court of Justice, as well as civil cases before certain national courts or international judicial institutions, such as the European Court of Human Rights. However, those examples lacked relevance; they were visibly biased and were hardly convincing, since the dissenting opinions of the judges of the Court were not actual judgments, and the civil cases decided by the European Court of Human Rights or the national courts had no relevance to the immunity of State officials. In view of the above, State officials suspected of serious international crimes or violations of *jus cogens* did not lose their entitlement to immunity from foreign criminal jurisdiction, since, at present, no rule of customary international law to the contrary had been identified.

37. On the question of whether an exception to the immunity of State officials from foreign criminal jurisdiction applied to the commission of a tort that resulted in the death or injury of a person, or in the damage to or loss of property, in the territory of the forum State, according to the Special Rapporteur, such would be the case if the offences had occurred in the territory of the forum State and the State official had been present in the territory of that State at the time of their commission. In order to illustrate her point, the Special Rapporteur had mainly relied on provisions contained in conventions on diplomatic, consular and State immunity, as well as those contained in domestic legislation. For instance, article 43, paragraph 2, of the Vienna Convention on Consular Relations provided that exceptions to immunity from jurisdiction in the courts of the receiving State applied to consular officials with respect to a civil action brought by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft. Putting aside differences in the type of immunity granted to diplomats, consular officials and other State officials, the Commission had decided many years previously that, in the course of its consideration of the present topic, it would not deal with the immunity of diplomatic and consular officials, which was the province of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. In addition, although article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property provided that a State could not invoke immunity from jurisdiction before a court of another State in a proceeding which related to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, when the act in question occurred in the territory of the forum State, that exception was expressly confined to pecuniary compensation in civil litigation. In the 13 States that had special legislation on State immunity, including the Australia, the Russian Federation, United Kingdom, the United States, and other States, the exceptions in the cases mentioned were also confined to civil litigation, and the same was true of many of the national judicial practices cited by the Special Rapporteur.

38. Jurisdictional immunity comprised both civil and criminal jurisdictional immunity, which were not identical in nature. With regard to State immunity, exceptions were valid only with respect to immunity from civil jurisdiction, since no State recognized any exception to State immunity from criminal jurisdiction. Yet, the Special Rapporteur had, by analogy, applied exceptions to the immunity of the State from civil jurisdiction and exceptions to the immunity of consular officials from civil jurisdiction to the immunity of State officials from criminal jurisdiction. She had thus confused the two concepts of immunity – from civil and from criminal jurisdiction – when, in fact, there was no convincing justification for "territorial tort exceptions" to the immunity of State officials from foreign criminal jurisdiction.

39. The Special Rapporteur had also, in an effort to substantiate her reasoning, mentioned a conclusion that had been reached by the former Special Rapporteur, Mr. Kolodkin, in his second report on the topic, who had stated that an exception to immunity *ratione materiae* could be applied in the case in which certain offences had been committed in the territory of the forum State when the acts in question had been committed in the territory of the forum State by a foreign official who had been present in the territory of that State without the State's express consent for that official to discharge his or her official functions. He himself agreed in principle with that exception, which had also been widely accepted by

[481] See *Minister of Justice and Constitutional Development and Others* v. *Southern Africa Litigation Centre and Others*.

States. The question was whether the exception allowed by Mr. Kolodkin differed from the "territorial tort exception", as the latter was described by the current Special Rapporteur. The former Special Rapporteur's reasoning emphasized the fact that the discharge of official functions in the territory of the forum State without its consent seriously jeopardized the State's sovereignty, which gave it the right not to recognize the official nature of the act in question and to treat that conduct as an exception to immunity *ratione materiae*. In other words, that exception could not be used to justify the "territorial tort exception", which was what the Special Rapporteur had done.

40. As to the question of whether crimes of corruption constituted an exception to the immunity of State officials from foreign criminal jurisdiction, he recalled that corruption was an offence associated with the exercise of duties, the perpetrators of which were government officials who possessed varying degrees of public authority. Corruption eroded social justice and equity, and jeopardized the image and credibility of the Government and its economic development. It was a social disease that should be eradicated. In the globalized era, corruption had grown worldwide. It was imperative to strengthen international cooperation among States in fighting corruption through such measures as refusing to provide a safe haven for the ill-gotten gains of corrupt officials; extraditing or returning corrupt officials who had fled from their country of origin; and strengthening supervision at immigration checkpoints and the exchange of information and cooperation between law enforcement agencies. However, the question of corruption as an exception to immunity from foreign criminal jurisdiction was entirely different. At its sixty-seventh session, the Commission had discussed the normative elements of immunity *ratione materiae* and had concluded that State officials enjoyed immunity with respect to the acts that they performed in an official capacity, given that "acts performed in an official capacity" meant any act performed by a State official in the exercise of State authority. In order to determine whether an act of corruption was likely to give rise to an exception to immunity, it was necessary, first and foremost, to determine whether the act in question constituted an act performed in an official capacity. Numerous acts of corruption committed by officials were closely associated with personal activities whose aim was to seek individual enrichment rather than to protect the sovereign interest of the State. They therefore, by nature, had nothing to do with the performance of State or Government authority. Consequently, those acts in and of themselves did not fall within the scope of immunity *ratione materiae*. Despite the fact that certain acts of corruption were committed by State officials in their official capacity, there was, to date, no judicial practice that recognized such corrupt acts as exceptions to immunity. Article 30 of the United Nations Convention against Corruption stipulated that each State party was required to take such measures as might be necessary to establish or maintain an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention. In other words, that article affirmed the immunity of State officials with respect to certain acts of corruption. In fact, the fight against corruption had little to do with the topic under discussion. Corrupt public officials were prosecuted at the national level. If the suspect was abroad, he or she was subject to extradition or repatriation or was persuaded to return to his or her home country for the purposes of prosecution, and when he or she was prosecuted in a foreign country, mutual legal assistance could be provided, and the State concerned could waive the immunity enjoyed by the official. It was therefore not necessary to include corruption among the offences that gave rise to an exception to immunity.

41. In paragraphs 170 to 176 of her fifth report, the Special Rapporteur introduced the distinct concepts of exceptions and limitations with a view to clarifying the situations in which immunity was not applicable. The difference between the two concepts was that limitations were derived from the normative aspects of immunity, while exceptions were derived from aspects that were external to it. However, at the end of the report, when describing situations in which immunity did not apply, the Special Rapporteur had not drawn any distinction between the two. In his own view, therefore, it was not necessary to introduce the concept of limitations. The cases in which immunity *ratione materiae* was not applicable in terms of its normative elements should be determined in the context of analysing the scope of application of that type of immunity, when the Commission defined the scope of the acts to which the immunity described in draft article 6, as adopted by the Commission at its sixty-seventh session, was applicable. For their part, the cases in which immunity was not applicable, as described in the Special Rapporteur's fifth report, corresponded to simple exceptions to immunity.

42. In view of the foregoing, the proposed draft articles required further refinement, and he did not recommend referring them to the Drafting Committee.

43. Mr. KITTICHAISAREE recalled that, as part of the Commission's consideration of the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the Special Rapporteur for that topic had proposed a draft article providing that the obligation to prosecute or extradite arose automatically from the commission of an international crime that violated a norm of *jus cogens*. That proposal had elicited strong negative reactions from States in the Sixth Committee. The issue that had arisen in the context of the current topic was similar; it concerned whether the commission of an international crime deprived a State official of immunity. The problem was not so much to determine whether that statement was correct as it was to assess whether the approach taken to it was appropriate. When referring to the comments and observations of States in the Sixth Committee in her fifth report, the Special Rapporteur had failed to mention the position of Malaysia, which had apparently proposed a two-step approach that was quite pertinent. In order to enable States to make informed decisions, it was advisable to determine, first of all, which provisions in the set of draft articles fell into the category of customary international law and subsequently to determine which ones the Commission considered to fall into the category of progressive development.

The meeting rose at 11.40 a.m.

3331st MEETING

Friday, 29 July 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/689, Part II, sect. F, A/CN.4/701)

[Agenda item 3]

Fifth report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

2. Mr. ŠTURMA, after thanking the Special Rapporteur for her fifth report, said that, as the Commission's consideration of the topic would resume at its sixty-ninth session, his comments were of a preliminary nature and intended to help the Special Rapporteur in the preparation of her next report.

3. The fifth report contained many references to State practice, national and international jurisprudence and legal writings, which, although not all directly related to the Special Rapporteur's conclusions or to proposed draft article 7, could at least shed light on the issue of limitations and exceptions to the immunity of State officials.

4. In terms of methodology, a distinction should be drawn between exceptions to immunity before international criminal courts, on the one hand, and exceptions to immunity from foreign criminal jurisdiction, on the other. Similarly, there was no direct link between civil actions and criminal prosecutions in the context of immunity and its limitations. In both cases, however, a similar trend was developing. As indicated by the European Court of Human Rights in the case of *Jones and Others* v. *the United Kingdom*, there seemed to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture" (para. 213 of the judgment). The European Court, national courts and other bodies were eagerly awaiting the results of the Commission's work on the topic, which made the fifth report all the more important.

5. It was useful to distinguish between a limitation and an exception to immunity. The former related to acts performed by State officials in a private capacity, while the latter related to official acts that were not covered by immunity in that they constituted serious crimes of concern to the international community as a whole.

6. Turning to draft article 7, paragraph 1 (*a*), he agreed with the inclusion of genocide, crimes against humanity and war crimes in the list of crimes with respect to which immunity did not apply. Although the crimes of torture and enforced disappearance could be subsumed under the broader category of crimes against humanity, the existence of multilateral treaties specific to them justified their addition to the list. He would, however, be opposed to the inclusion of the crime of aggression for a number of reasons. First, the crime was closely bound up with and dependent on the actions of a State, which meant that there would be direct implications for the sovereignty and immunity of that State. Second, while the Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, reached at Kampala, included a definition of the crime, the Court did not yet have jurisdiction over it. Third, neither the draft code of crimes against the peace and security of mankind[482] nor the fifth understanding regarding these Amendments permitted exceptions to the immunity of State officials from foreign criminal jurisdiction.

7. As to draft article 7, paragraph 1 (*b*), corruption-related crimes appeared to be more of a limitation to immunity *ratione materiae* than an exception. In case law, the crimes of embezzlement and corruption were mostly viewed as private acts and, as such, did not fall within the scope of immunity *ratione materiae*. With regard to treaties, it was true that article 16, paragraph 2, of the United Nations Convention against Corruption established a duty to punish crimes involving foreign public officials. Moreover, pursuant to article 30, paragraph 2, of the Convention, each State party was obliged to take such measures as might be necessary to establish an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials and the possibility of investigating, prosecuting and adjudicating offences established in accordance with the Convention. However, that provision referred to immunities under national, rather than international, law. It might also be asked whether other transnational offences that were the subject of multilateral treaties, such as human trafficking and drug trafficking, should appear in the list of crimes with respect to which immunity did not apply. Consequently, the inclusion of draft article 7, paragraph 1 (*b*), should be reviewed.

8. Article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property and article 43, paragraph 2 (*b*), of the Vienna Convention on Consular Relations, which formed the main basis for draft article 7, paragraph 1 (*c*), referred to civil, rather than criminal, jurisdiction. Nevertheless, there was at least some evidence of relevant State practice, for example the *Khurts Bat* case. In its decision in that case, the High Court of Justice of England and Wales had cited the *"Rainbow*

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[482] *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

Warrior" case and the second report on immunity by Mr. Kolodkin,[483] the Special Rapporteur at the time. There was thus an opportunity for the Commission to contribute to the progressive development of international law.

9. The content of draft article 7, paragraph 2, was appropriate and supported by State practice and the jurisprudence of the International Court of Justice. He could understand concerns that the existence of exceptions to the immunity of State officials might create the potential for abuse; it would therefore be a good idea if procedural rules and safeguards were addressed in the Special Rapporteur's next report. He expressed the hope that, at its sixty-ninth session, the Commission would be able to adopt draft articles that struck the right balance between exceptions and procedural rules.

Mr. Nolte, First Vice-Chairperson, took the Chair.

10. Mr. SINGH said that he wished to thank the Special Rapporteur for her detailed report, which considered State practice as reflected in treaties and national legislations, decisions of the International Court of Justice, the European Court of Human Rights, international criminal courts and national courts. There was, however, plenty of very useful material on the matters raised in the fifth report that the Special Rapporteur mentioned but did not consider in any great detail, including the three reports by the previous Special Rapporteur on the topic,[484] the memorandum by the Secretariat,[485] the two Special Rapporteurs' introductions to their reports in plenary and the debates within both the Commission and the Sixth Committee. As acknowledged by the Special Rapporteur herself, the fifth report should be read in the light of other relevant material.

11. In chapter I, section B, of her fifth report, the Special Rapporteur summarized in a somewhat one-sided manner the Commission's prior consideration of exceptions to the immunity of State officials and, in particular, the reports of the previous Special Rapporteur, without indicating that there had been considerable disagreement within the Commission about important elements of those reports.

12. Chapter II, in which the Special Rapporteur dealt with a range of practice without having a clear and specific aim, was followed, in subsequent chapters, by a discussion of methodological and conceptual questions and of cases in which immunity did not apply, which took the reader back to an analysis of State practice. It would have been more helpful if the Special Rapporteur had consolidated her analyses of relevant State practice in relation to each specific exception proposed in one chapter, rather than scattered throughout the fifth report. It would also have been useful if the Special Rapporteur had explained her reasoning in greater detail, especially when she reached conclusions that differed from those of the previous Special Rapporteur in his second report on the topic.

13. The Special Rapporteur, after explaining the theoretical distinction, as she saw it, between "limitations" and "exceptions", stated that the distinction was hardly found in practice, that it was not necessary to maintain it for the purposes of the draft articles and that both limitations and exceptions fell under the umbrella term "non-applicability" of immunity. He was not sure that this was the right approach. The Special Rapporteur's argument was that States used the two terms equivocally and that some conventions did not distinguish between them, in particular the United Nations Convention on Jurisdictional Immunities of States and Their Property. While it was true that Part III of that Convention was entitled "Proceedings in which State immunity cannot be invoked", it should be noted that the Convention dealt only with civil and commercial matters, and reflected State practice in that States could not claim immunity from the jurisdiction of the courts of other States with respect to their commercial acts.

14. The Special Rapporteur emphasized the issue of impunity many times in her fifth report. As pointed out by Mr. Huang at the previous meeting, that issue had been discussed thoroughly by the Commission and it was clear that there was no link with the current topic, which dealt only with the immunity of State officials from foreign criminal jurisdiction and in no way affected the jurisdiction of the International Criminal Court with respect to serious crimes under the Rome Statute of the International Criminal Court or that of other international tribunals under their respective constitutive instruments. Moreover, immunity from the criminal jurisdiction of a foreign State did not absolve State officials who were suspected of crimes. As noted by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, such officials could be subjected to measures, such as domestic prosecution, a waiver of immunity, prosecution after the end of their term of office and prosecution by international criminal courts and tribunals.

15. With regard to draft article 7, paragraph 1 (*a*), the Special Rapporteur claimed, in paragraphs 181 to 189 of her fifth report, that the non-applicability of immunity to the so-called core crimes of genocide, crimes against humanity, war crimes, torture and enforced disappearances reflected an existing rule of customary international law, or that there was at least a majority trend towards such a rule. He could not accept that conclusion. The practice relied on showed no general practice establishing such an exception to immunity, nor was there anything like adequate evidence of acceptance of such an exception as law (*opinio juris*). He agreed with the conclusions drawn by the previous Special Rapporteur in his second report, namely that there was no customary norm – or trend toward the establishment of such a norm – in contemporary international law that made it possible to assert that there were exceptions to immunity, apart from the exception concerning harm caused directly in the forum State when that State had not consented to the performance of an act or to the presence of a foreign official in its

[483] *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631.

[484] Reports of Mr. Kolodkin: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report); *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report); and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

[485] Document A/CN.4/596 and Corr.1, available from the Commission's website, documents of the sixtieth session (2008). The final text will be reproduced in an addendum to *Yearbook ... 2008*, vol. II (Part One).

territory; and that restrictions on immunity, even *de lege ferenda*, were not desirable, since they could impair the stability of international relations. The previous Special Rapporteur had also questioned the effect of such exceptions on efforts to combat impunity.

16. The Special Rapporteur appeared to claim that certain exceptions to immunity *ratione materiae* in treaty-based rules were already customary international law. There was, however, no evidence of a general practice or of *opinio juris* to that effect. The analysis in paragraphs 181 to 189 of the fifth report was far-fetched, in terms of both the methodology used and the supposed evidence relied upon.

17. The Special Rapporteur set out her arguments for the existence of a customary norm that recognized international crimes as a limitation or exception to immunity in paragraph 184 of the fifth report. She claimed that, despite the diversity of positions taken by national courts, there was a trend in favour of the exception. In his view, even if there was a trend, it did not constitute a general practice. Furthermore, the claim was hard to reconcile with paragraph 220 of the report, in which the Special Rapporteur stated that there were very few national court decisions in which immunity had been withheld in connection with the commission of any of the established international crimes.

18. The Special Rapporteur also maintained that national laws had gradually included the exception. Yet, in paragraphs 42 and 44 of her fifth report, she said that the immunity of State officials had not been a matter of explicit regulation in most States. The only relevant legislation that she cited was that of Spain and, perhaps, that of Belgium and the Netherlands. However, the implementing legislation of States parties to the Rome Statute of the International Criminal Court, which was usually enacted only for the purposes of the Statute, was not relevant to the topic at hand.

19. The Special Rapporteur also seemed to suggest that the conclusion of treaties criminalizing specific conduct and providing for individual criminal responsibility was also relevant State practice for the present topic. That was not the case. In the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had stated that "although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law" (para. 59 of the judgment).

20. In paragraph 67 of her fifth report, the Special Rapporteur suggested that the conclusions of the Court in the *Arrest Warrant of 11 April 2000* case had limited scope, but sought to attach far greater weight to remarks made in the separate and dissenting opinions. In that regard, it was necessary to bear in mind the note of caution sounded by the President of the Court, Judge Abraham, during his visit to the Commission during the present session when he had stated that separate or dissenting opinions clarified not the position of the Court but that of the judges concerned and did not necessarily indicate what position a judge would take in a subsequent case, and that, even if judges took issue with a precedent when it was adopted, they might consider themselves bound by it and, in a subsequent case, adopt the majority opinion of the Court for the sake of judicial consistency.[486]

21. Additionally, in paragraphs 185 and 186 of her fifth report, the Special Rapporteur addressed the "critical arguments" of publicists with respect to the existence of a rule of customary international law on the non-applicability of immunity to certain crimes. While she claimed to have carried out a "nuanced" assessment of those arguments, it was hard to tell to what extent that was true, since there were no references to relevant materials in her analysis.

22. In paragraphs 187 to 189 of her fifth report, the Special Rapporteur stated that the decisions of the International Court of Justice and the European Court of Human Rights, which were usually cited as authorities, referred directly to State immunity and, when they referred to the immunity of State officials from foreign criminal jurisdiction, they had limited scope – especially those of the International Court of Justice – since they concerned immunity *ratione personae* exclusively. She considered that the decisions of national courts, domestic norms and other types of statements by States were limited in number and that their content was sometimes not fully consistent or uniform; however, she still considered that they were of greater value and concluded that it did not seem possible under any circumstances to deny the existence of a clear trend that would reflect an emerging custom. In her view, therefore, the commission of international crimes might indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international customary law.

23. The Special Rapporteur sought to support her proposed exception by adding a section on what she termed the "systemic" foundation for that exception. The fact that she had found it necessary to carry out such an analysis, and the language that she used in paragraph 190 of her fifth report, suggested that she was not entirely convinced of the existence of a rule of customary international law, despite her assertions earlier in the report.

24. With regard to draft article 7, paragraph 1 (*b*), he saw no reason for singling out crimes of corruption as a limitation or exception to immunity from foreign criminal jurisdiction. The Special Rapporteur seemed to consider that corruption was generally a limitation to immunity; however, since it was not always easy to distinguish official acts from private acts and corruption, it could also be considered to be an exception to immunity. If crimes of corruption were considered a limitation to immunity, it was not clear why that type of act was not covered by draft article 6, paragraph 1.[487] If, on the other hand, they were to be treated as an exception, it would be necessary to identify the basis for such an exception, whether under

[486] See the 3317th meeting above, para. 21.

[487] See document A/CN.4/L.865, available from the Commission's website, documents of the sixty-seventh session. Draft article 6 was adopted at the 3329th meeting, on 27 July 2016 (see the 3329th meeting above, para. 24).

customary international law or a treaty, or at least to provide convincing arguments for proposing a new treaty-based exception.

25. In any event, none of the conventions cited by the Special Rapporteur which treated corruption as a separate offence supported the idea that related crimes should be considered either as a limitation or as an exception to the rules on immunity. Rather, those conventions suggested that such crimes should be prosecuted by the injured State and that, if the trial was held abroad, a waiver by the injured State was necessary.

26. Regarding the practice of domestic courts, the Special Rapporteur's analysis was incorrect and one-sided. A closer examination of the court cases cited as examples of cases in which domestic courts had generally rejected the immunities of State officials when faced with charges of corruption showed that they did not support the Special Rapporteur's views. Moreover, the *Marcos and Marcos* v. *Federal Department of Police* case, in which a Swiss court had upheld immunity, was merely mentioned in a footnote.

27. With respect to draft article 7, paragraph 1 (*c*), he said that before considering a possible territorial exception, the Commission would need to further analyse a few issues. There seemed to be general agreement that, when a foreign official allegedly committed a serious crime in the territory of a State, and that State had not consented to the activity that had led to the crime or, more generally, to the presence of that foreign official in its territory, the foreign official was not entitled to immunity. Such had been the approach of Mr. Kolodkin, and of the English Divisional court in the *Khurts Bat* case.

28. The proposed draft article was, however, silent with regard to military activities, which were generally considered to fall outside the scope of the territorial crime exception. Without clear evidence of State practice in a different direction, it would be unwise to adopt a provision that was drafted in absolute terms and that would encompass all kinds of activities carried out by State officials on the territory of the forum State. Particularly relevant in that regard was the case concerning *Jurisdictional Immunities of the State*, in which the International Court of Justice had found that State immunity for *acta jure imperii* continued to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces, even if the relevant acts took place on the territory of the forum State. While the Court had expressly stated that its findings were without prejudice to the issue of immunity of State officials from criminal jurisdiction, the reasoning in the judgment was particularly relevant for the Commission's work. While the Special Rapporteur seemed to be of the same view, the analysis in her fifth report was not reflected in the proposed draft article.

29. Draft article 7, paragraph 2, in making clear that any exceptions did not apply to persons enjoying immunity *ratione personae* for as long as they enjoyed such immunity, reflected existing practice and should not be controversial. However, in view of his comments, he did not support referring the proposed draft article 7 to the Drafting Committee.

30. Mr. TLADI, referring to the statement made by Mr. Singh, said that the so-called "implementing legislation" of States parties to the Rome Statute of the International Criminal Court need not be considered irrelevant: for instance, the implementing laws of South Africa did not apply only to proceedings before the International Criminal Court, as evidenced by a recent important case, in which the Constitutional Court had ultimately found that the South African authorities had an obligation to investigate alleged cases of torture taking place in Zimbabwe – a case that was not being considered by the International Criminal Court. It was therefore important to consider with some caution the question of practice emanating from or relating to the Rome Statute of the International Criminal Court. Such practice might well be relevant, but a close examination of the circumstances was needed; its relevance was, in any event, diminished by virtue of the fact that it was in application of a particular treaty.

31. Another reason for taking a cautious approach to practice relating to the Rome Statute of the International Criminal Court was that the Pre-Trial Chambers of the International Criminal Court had themselves been somewhat inconsistent in their interpretation of article 98, paragraph 1, of the Statute and its relationship to its article 27. The Commission should therefore refrain from making definitive statements about the rules relating to the immunities flowing from that particular relationship.

32. Specifically with regard to the South African cases mentioned at the previous meeting, it was interesting to note that the executive and the courts had not agreed on whether exceptions to immunity *ratione personae* existed under customary international law. While the courts had found that there were exceptions under domestic law, they had, clearly to their regret, found none under international law.

33. Mr. MURPHY said that, in implementing the Rome Statute of the International Criminal Court, some countries, for instance, South Africa, went beyond what was required under the Statute. However, as indicated in the Special Rapporteur's fifth report, the non-applicability of immunity was mentioned in the implementing laws of many other countries mainly for the purpose of ensuring cooperation with the International Criminal Court. Therefore, he had understood Mr. Singh to be emphasizing that the Commission should simply be cautious about asserting that implementing laws were building the case for any particular trend.

34. Mr. KAMTO said that he was in favour of the Commission's adopting a cautious approach to the topic of immunities. He also strongly supported Mr. Kolodkin's second report on the topic and, in that connection, regretted the overly bold statement by the Special Rapporteur in her fifth report that described the Commission members who maintained that there were no exceptions to immunity as forming a minority. He agreed with the observation that it was unwise to consider, as the Special Rapporteur did in her fifth report, separate or dissenting opinions of individual judges of the International Court of Justice on the same footing as Court decisions. Furthermore, it was important to carefully consider whether

immunities were a procedural rule for immunity *ratione personae* only, as the Special Rapporteur attempted to demonstrate in her report, or if they could also apply to immunity *ratione materiae*.

35. He did not support the arguments opposing the inclusion of the crime of aggression in the list of crimes in relation to which immunity did not apply. It was not logical that crimes against humanity and war crimes should be considered as belonging in that list, but that the crime of aggression should not, even though it was the clear cause of the other two crimes. Furthermore, if the Commission decided to exclude the crime of aggression, it would send an unfortunate signal to the international community, given that States had been struggling for years precisely to include it, most notably at the Review Conference of the Rome Statute of the International Criminal Court, held in Kampala in 2010. It was difficult to understand that a Head of State could be accused of having committed a war crime or a crime against humanity but that his or her immunity could not be limited or excluded by virtue of the fact that he had committed an act of aggression.

36. He supported Mr. Šturma's observations regarding crimes of corruption. If corruption was to be considered as a limitation or exception to immunity, it was difficult not to consider other types of organized transnational crimes, such as trafficking in persons, in a similar manner. Corruption, of course, was a serious matter and should not be ignored; however, not all serious crimes could be addressed in the same manner. If the Commission was to admit to the existence of exceptions to the application of immunity *ratione materiae*, it would need to decide in relation to which crimes exceptions might be applicable. At present, no crimes beyond those listed in article 5 of the Rome Statute of the International Criminal Court appeared to fit such a description.

37. It was important that the Commission, in its work on the topic, not make relations between States more difficult. If the Commission stated that there were exceptions without clearly identifying and defining the exceptions, States might be motivated to invoke exceptions to immunity to prosecute Heads of another State present on their territory simply when it was to their advantage; chaos could thus be created by more powerful nations that chose to use such exceptions to their benefit, and even between States that were on an equal footing.

38. Mr. SABOIA said that he supported the statements made by Mr. Kamto regarding the crime of aggression. Even though he had previously said that the time was not yet ripe to incorporate corruption in the list of crimes in relation to which immunity could not be invoked, he agreed that the subject required more in-depth discussion.

39. Mr. CANDIOTI said that Mr. Singh's criticisms of the Special Rapporteur's fifth report seemed to be based solely on the alleged lack of any customary rules to justify the existence of crimes for which immunity from foreign criminal jurisdiction could not be invoked. In response to Mr. Kamto's statement, he said that the Commission's mandate was progressive development first and then codification. In its work, the Commission had always combined the two.

40. Mr. HMOUD said that he wished to commend the Special Rapporteur on her well-balanced report on an issue which had both legal and political consequences, namely exceptions and limitations to the immunity of State officials from foreign criminal jurisdiction. As the fifth report rested on a thorough and comprehensive analysis of extensive State practice and jurisprudence on that matter, it would assist States and other relevant actors to implement a well-defined immunity regime that took account of the various legitimate interests at stake. In view of the length and detail of the report, his comments were only of a preliminary nature.

41. It was clear from the Charter of the United Nations that principles of international law such as the protection of fundamental human rights, the sovereign equality of States, justice and compliance with the obligations arising from international law, including non-aggression and respect for territorial integrity, were not mutually exclusive but complementary, and they should always be applied and interpreted in such a way as to ensure their fullest possible realization. Since the end of the 1940s, those core principles and the peaceful settlement of disputes had contributed significantly to a reduction of international tensions and had thereby helped to avoid wars. The same could be said of endeavours to fight impunity and consolidate the rule of international criminal law and criminal justice. Accountability should not be regarded as interference in the internal affairs of a State, a violation of its sovereignty or a means of flouting the will of its people. On the contrary, impunity and the lack of justice fed global tension and undermined the core legal principles underpinning inter-State relations.

42. The Commission's approach to the topic under consideration therefore had to arrive at a balance of a wide range of legitimate interests, a balance which the Special Rapporteur had achieved in her fifth report. While a State had the right to protect its sovereignty, to exercise jurisdiction within the limits of international law and not to be made subject to the jurisdiction of another State, international law did not give it complete freedom to prevent the exercise of jurisdiction by another State when the latter had a legitimate interest to do so. In civil matters, international law had replaced the concept of the absolute immunity of the State with that of restrictive immunity in commercial cases, tort and labour and employment disputes. That development had been reflected in the United Nations Convention on the Jurisdictional Immunities of States and Their Property and in the judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case, which had likewise differentiated acts *jure imperii* from acts *jure gestionis*. A State did not commit a crime, although it would bear civil responsibility for the violation of certain norms by its officials, who could incur criminal responsibility. Criminalizing the official was not synonymous with criminalizing the State. That difference had already been recognized by the International Military Tribunal at Nürnberg when it had found that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[488] The estab-

[488] International Military Tribunal, *Trial of the Major War Criminals, Nuremberg, 14 November 1945–1 October 1946*, vol. 22, Nürnberg (1949), p. 466.

lishment of international criminal courts and tribunals had been made possible by distinguishing between State and individual responsibility and between State and individual immunity.

43. There was, however, a worrying trend towards questioning the legitimacy of the international justice system. Obviously, political interests still persisted in the world, and spurious arguments using the injustices that did occur as a pretext for weakening international criminal justice, or which posited the immunity of State officials in an effort to promote their impunity, were again gathering steam. As a matter of legal policy, the interest of the international community as a whole in protecting itself from the commission of the most serious crimes and from violations of *jus cogens* had to be preserved. Consideration therefore had to be given to preserving legitimate interests, including that of fully upholding the obligation of national and international courts to cooperate. For that reason, the Commission's aim should be ultimately to arrive at a balance between the rights of States and the rights of individuals while at the same time giving effect to *jus cogens* norms.

44. In at least two cases turning on the criminal responsibility and immunity of officials, the International Court of Justice could have declared that the only type of immunity which existed under international law was State immunity, but it had not done so. State officials had immunity *ratione personae* and immunity *ratione materiae* from foreign criminal jurisdiction. He agreed with the Special Rapporteur that under customary international law there did not appear to be any limitations or exceptions to the immunity *ratione personae* of the troika, because a State would be unable to function and its sovereignty would be undermined if another State could exercise criminal jurisdiction over its Head of State, Head of Government or Minister for Foreign Affairs. Even if any of those persons had committed an act violating *jus cogens*, they should have immunity from foreign criminal jurisdiction as long as they were in office, and redress should be sought by other means, possibly including international prosecution.

45. While a State should be able to exercise its legitimate jurisdiction within the confines of customary international law over foreign officials who had committed a crime, notwithstanding their immunity *ratione materiae*, procedural guarantees should be in place to prevent their sham or politically motivated prosecution. Draft article 6, on the scope of immunity *ratione materiae*, reflected the customary rule that a State official enjoyed immunity from foreign criminal jurisdiction only with respect to acts performed in the exercise of State authority. However, it was not always clear when an act was "performed in an official capacity". Practice had shown that this rule was difficult to implement, that the position of States and their courts diverged on that issue and that State officials could not be granted immunity for all acts performed in an official capacity. Furthermore, that rule required the forum State and its courts to determine the scope of the official capacity of the person in question for the purpose of exercising its jurisdiction. The commentaries to that draft article should therefore assist a forum State making that determination on the basis of objective criteria, in accordance with the relevant procedure.

46. In the past, forum courts had exercised jurisdiction over acts that could be deemed to have been performed in an official capacity when those acts specially affected the forum State. A crime committed in a forum State that injured persons, or outside its territory that harmed its nationals or its national interests, could be said to fall into that category; hence they were crimes to which immunity *ratione materiae* did not apply, but again procedural guarantees should be put in place to avoid politically motivated prosecution. He therefore agreed with the Special Rapporteur on the inclusion of the "territorial tort exception" in draft article 7, although he would prefer not to use that term, which had a civil law connotation, whereas the draft articles dealt with the exercise of criminal jurisdiction.

47. Immunity *ratione materiae* should not apply to corruption, irrespective of whether the act in question was committed in an official capacity.

48. Turning to international crimes and violations of *jus cogens* norms, he drew attention to the fact that, in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had not addressed the distinction between immunity *ratione personae* and immunity *ratione materiae*. Its judgment in that case should not therefore be read as establishing a customary law right to immunity *ratione materiae* against the exercise of criminal jurisdiction for all violations of *jus cogens* norms by any foreign official. On the other hand, if a State's right to exercise its sovereign functions would be impaired by the forum State's exercise of jurisdiction over the other State's official, its legitimate interests should, under certain conditions, be protected against the exercise of that jurisdiction over its official even when that person had violated a *jus cogens* norm. One of those conditions was indeed the existence of an alternative forum where the official could be prosecuted. However, since the implementation of the substantive rules of *jus cogens* took precedence over the implementation of the rules on the immunity *ratione materiae* of foreign officials, the latter rules must be disregarded in instances where they would result in impunity for violations of *jus cogens* norms. Moreover, in such instances it was well established in customary international law that the official capacity of the perpetrator was irrelevant with regard to both individual criminal responsibility and immunity.

49. The Special Rapporteur had demonstrated in the fifth report that there were sufficient grounds in international law to include in the Commission's draft articles exceptions and limitations to immunity *ratione materiae* when international crimes or violations of *jus cogens* had occurred. At the same time, the necessary guarantees had to be provided to ensure that the State of the official was not subjected to the unlawful exercise of jurisdiction by the forum State through sham or politically motivated prosecution. The sovereign functions of the official's State should not be impaired and must be taken into account when deciding whether to grant immunity. At the same time, the effective implementation of *jus cogens* norms should be the ultimate goal when weighing up legitimate interests.

50. He agreed that, in draft article 7, genocide, crimes against humanity, war crimes, torture and enforced disappearances should be listed among the crimes to which immunity did not apply, since they were crimes of concern to the international community as a whole. He concurred with Mr. Kittichaisaree and Mr. Murase that aggression should also be included, because it involved a violation of *jus cogens* norms. Because an act of aggression, by a State, and the crime of aggression, by an individual, were two separate matters, the draft articles should contain a without prejudice clause in order not to undermine the authority of United Nations organs. He was also in favour of including the crime of apartheid, since it was a violation of a peremptory norm of international law.

51. In conclusion, he recommended sending draft article 7 to the Drafting Committee.

52. Mr. McRAE said that he wished to congratulate the Special Rapporteur on her well-researched fifth report, which constituted a commendable effort to bridge differences of opinion within the Commission on the question of exceptions to immunity. She had suggested a thoughtful approach to the scope of offences to which exceptions to immunity would apply and to the persons who enjoyed immunity without exception, namely those who had immunity *ratione pesonae*. In doing so, she had said quite frankly that what she proposed was not existing international law, but that she was identifying a trend and inviting the Commission to play a role in continuing that trend. She was not suggesting that the Commission subscribe to the view of those who considered that, since State practice amounting to customary international law did not endorse exceptions to immunity, neither should the Commission.

53. The Special Rapporteur recognized that granting or denying immunity to foreign State officials charged with serious international crimes could have an impact on States' ability to conduct international affairs without harassment. The questions which he asked himself in that connection were whether exceptions to immunity could have implications for the drive to avoid impunity, whether there was any evidence that the relatively few cases where foreign officials had been charged with serious offences had actually impeded the conduct of international affairs and what kind of procedural guarantees would make exceptions to immunity more plausible when foreign State officials were being prosecuted.

54. He wondered whether the future Commission would use only what States had agreed to as a touchstone for its work. Would it see its primary role as that of identifying *lex lata* or would it regard the progressive development of international law as *lex ferenda* as an integral part of its role and not separate from and less important than codification? Would it embrace the developing trend identified by the Special Rapporteur or would it seek to halt it? He would watch with interest to see on which side of history the new Commission would want to be.

55. Mr. PETRIČ said that he fully agreed with Mr. McRae that the Commission should display more vision. The position that only the troika could enjoy immunity from foreign criminal jurisdiction had been based on what had been deemed to be international practice in the form of a decision adopted many years earlier by the International Court of Justice with many dissenting opinions, but it ignored the reality of the modern world where ministers of defence or of finance could have more functions than the Minister for Foreign Affairs.

56. Mr. KITTICHAISAREE asked the Special Rapporteur if she intended to submit a sixth report in 2017.

57. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in 2017, she intended to submit a sixth report on procedural aspects and procedural guarantees of the rights of State officials subject to foreign criminal jurisdiction, for it might be advantageous for the Commission to consider those questions in parallel with the exceptions and limitations to the immunity of State officials from such jurisdiction.

The meeting rose at 11.40 a.m.

3332nd MEETING

Tuesday, 2 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session

Chapter IV. *Protection of persons in the event of disasters* (A/CN.4/L.882 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to adopt the part of chapter IV of the draft report contained in document A/CN.4/L.882, paragraph by paragraph.

2. Mr. TLADI said that, in order for his silence not to be interpreted as a sign of approval, he wished to make clear that he would not participate in the adoption of the chapter of the Commission's report devoted to the protection of persons in the event of disasters because he strongly disagreed with the general direction in which the Commission had decided to take its work on the topic, in particular with regard to the rights and duties of States, a direction that he felt was inconsistent with existing international law.

3. Mr. MURPHY said that, like Mr. Tladi, he believed that several provisions of the draft related to rights, obligations and duties were not sufficiently substantiated by treaty or State practice. It was regrettable that the Commission had not been able to specify, in the

commentaries, the aspects of the topic with regard to which it was engaging in progressive development, but he hoped that the discussion would enable improvements to be made to those commentaries.

4. Mr. SABOIA said that several members of the Commission, including Mr. McRae, had indicated during the discussions that it was very difficult, if not impossible, to determine which provisions represented progressive development and which represented codification. The work on the topic of the protection of persons in the event of disasters was the most important of the current quinquennium, and, if the Commission now tried to draw such a distinction, it might compromise the successful completion of that work. In any event, it would ultimately be States that decided the status of the text adopted by the Commission when they came to examine the outcome of the work on the topic.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

5. The CHAIRPERSON said that paragraph 7 would be duly completed once the Commission had adopted the commentaries to the draft articles.

Paragraph 8

Paragraph 8 was adopted.

C. Recommendation of the Commission

Paragraph 9

D. Tribute to the Special Rapporteur

Paragraph 10

6. The CHAIRPERSON suggested leaving sections C and D in abeyance and returning to them once the whole of chapter IV had been considered.

It was so decided.

E. Text of the draft articles on the protection of persons in the event of disasters

1. Text of the draft articles

Paragraph 11

7. Mr. FORTEAU said that, as he had already pointed out to the Special Rapporteur, it seemed that, in the French version, the text of the draft articles reproduced in paragraph 11 did not match the final version as contained in document A/CN.4/L.882/Add.1. He would inform the secretariat of the changes to be made to the French text, and recommended that the consistency of the English and Spanish versions with the final text also be checked.

Paragraph 11 was adopted on the understanding that the text of the draft articles would be brought into line with the final version of the draft adopted by the Commission.

8. The CHAIRPERSON invited the members of the Commission to adopt the part of chapter IV of the draft report contained in document A/CN.4/L.882/Add.1, paragraph by paragraph.

2. Text of the draft articles and commentaries thereto

Commentary to the draft preamble

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

9. Mr. MURPHY, noting that the third preambular paragraph, to which paragraph (4) referred, did not contain the word "obligation", proposed deleting the words "the obligation for" after the verb "reiterates" and recasting the end of the sentence to read: "and reiterates that the rights of those persons must be respected …".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

10. Sir Michael WOOD proposed that, in the second sentence, the words "and the primary role of the affected State", which derived from the last preambular paragraph, be added after "The reference to sovereignty".

Paragraph (6), as amended, was adopted.

The commentary to the draft preamble, as amended, was adopted.

Commentary to draft article 1 (Scope)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

11. Mr. MURPHY said that the structure of the first sentence was ambiguous, and proposed that it should be clarified by inserting the words "and the rights and obligations of" before "third States".

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

12. Sir Michael WOOD said that the expression "in the arena of the disaster" in the first sentence was not very

clear and should be replaced with the phrase "in the area directly affected by the disaster".

13. Mr. HMOUD said that reference was not being made only to the activities conducted in the directly affected area but, more broadly, to the activities conducted in the territory where the disaster occurred. Sir Michael's proposal should be modified accordingly.

It was so decided.

14. Mr. MURPHY said that, in the fourth sentence, the words "of those of", which appeared after "within the territorial boundaries of a single State, or", should be replaced with "within". The start of the fifth sentence could also be redrafted to read: "States have obligations, in accordance with international law, with respect to the persons present in their territory …".

15. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, far from improving the text, the proposal made it unclear. Since the subject of the draft was precisely the protection of persons in the event of disasters, he did not see why it was necessary to delete the reference to the duty of States to protect.

16. Mr. NOLTE, supporting the Special Rapporteur, said that he saw no need to reword the sentence, in which the Commission simply reiterated the basic duty of States, imposed on them by human rights instruments and customary international law, to protect the persons in their territory or under their jurisdiction.

17. Mr. PETRIČ, Ms. JACOBSSON and Mr. HMOUD supported Mr. Nolte.

18. Mr. MURPHY said that, on the contrary, the sentence as currently worded laid down a general obligation of States that was not backed up by any treaty and went far beyond the obligation to respect and protect the rights of persons under human rights instruments. The reformulation that he had proposed was therefore justified and should be accepted.

19. Mr. KITTICHAISAREE proposed that, to address Mr. Murphy's concern, the words "In the event of disasters" be added at the beginning of the sentence, with the rest left unchanged.

20. Mr. NOLTE said that the duty set out in the sentence disputed by Mr. Murphy could not be interpreted as requiring States to protect individuals in all circumstances from all conceivable danger or harm and that it referred implicitly to the protection of human rights. The inclusion of the words "the human rights of" before "all persons present in their territory", though unnecessary, could be a way of satisfying Mr. Murphy.

21. Mr. MURPHY said that it was not mentioned anywhere else in the draft articles or in the commentaries that States had a general obligation to protect all persons present in their territory or in a territory under their jurisdiction or control, and that it was therefore important to contextualize the statement in paragraph (5). The proposals made by Mr. Kittichaisaree and Mr. Nolte sought to achieve that and thus struck him as acceptable.

22. Sir Michael WOOD, noting that both Mr. Nolte and the Special Rapporteur had used the word "duty" rather than "obligation" in their respective statements, proposed replacing the latter with the former in the sentence in question.

23. Mr. VALENCIA-OSPINA (Special Rapporteur) said that there were separate articles devoted to human dignity and human rights, and that there was thus no reason to address those issues in the paragraph in question, the sole purpose of which was to recall that disasters knew no borders and, consequently, to reaffirm that States had an obligation to protect all persons present in their territory or in a territory under their jurisdiction or control. Throughout its work, the Commission had strived to avoid giving the impression that it was drafting a new human rights instrument. If it limited the obligation to protect the protection of human rights alone, as advocated by Mr. Murphy, it would be going against its original intention and introducing a restriction contrary to article 5 of the draft, which provided that persons affected by disasters were entitled not only to the protection of their human rights but also to respect for those rights. As to Mr. Kittichaisaree's proposal to insert the words "In the event of disasters" at the beginning of the fifth sentence, he himself remained convinced that the addition was unnecessary and that States were under a general obligation to protect the persons present in their territory or in a territory under their jurisdiction or control, but he would defer to the decision of the Commission in that regard. He supported Sir Michael's proposal to replace the word "obligation" with "duty".

24. Mr. NOLTE reiterated his view that the duty to protect was a basic duty of the State and that the wording proposed in paragraph (5) should not be controversial. While he saw no great harm in referring to the protection of the human rights of persons rather than to the protection of persons themselves, it was his understanding that any change to that effect was opposed by the Special Rapporteur, whose assessment he respected.

25. Mr. MURPHY said that there was no basis for stating that States had a general obligation – or even a general duty – to protect individuals, and that such a statement could give rise to abusive interpretations. However, since Mr. Nolte had withdrawn his proposal and he himself appeared to be the only member defending that point of view, he would leave it for the Chairperson to close the debate as he saw fit.

26. The CHAIRPERSON said that he wished to thank the members who had participated in the discussion for their efforts to arrive at a consensus. The fifth sentence of paragraph (5) would be redrafted to read: "In the event of disasters, States have the duty to protect all persons present in their territory …". The amendment to the first sentence proposed by Mr. Hmoud and the minor editorial change in the fourth sentence of the English version proposed by Mr. Murphy would also be introduced in the text.

Paragraph (5), as amended, was adopted.

The commentary to draft article 1, as amended, was adopted.

Commentary to article 2 (Purpose)

Paragraph (1)

27. Sir Michael WOOD proposed the deletion of paragraph (1), which seemed superfluous.

It was so decided.

Paragraph (2)

28. Sir Michael WOOD said that, to take account of the deletion of paragraph (1), the words "The provision" at the start of the first sentence of paragraph (2) should be replaced with "Draft article 2" and all the paragraphs should be renumbered.

Paragraph (2), as amended, was adopted.

Paragraph (3)

29. Sir Michael WOOD, noting that draft article 15 was not the only one that dealt with the issue of what made a response "adequate" or "effective", proposed that the sixth sentence be modified to state that the issue was the subject of other provisions of the draft articles, including draft article 15.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

30. Sir Michael WOOD said that several draft articles other than those mentioned in the last sentence of the paragraph also addressed the issue of the obligations of States. He therefore proposed to amend the sentence to indicate that those obligations were considered in other draft articles or, simply, to delete the sentence altogether.

31. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it would be preferable to retain the sentence, but to recast it in more general terms to state that other provisions of the draft articles were specifically devoted to the issue of the obligations of States.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

32. Mr. FORTEAU said that he was surprised to read, in the second sentence, that the term "persons concerned" had been inserted "so as to further qualify the scope of the draft articles", given that, according to the commentary to draft article 1, that scope was vast. The word "further" should thus be removed.

33. Mr. MURPHY, noting that the fifth sentence did not introduce a contrast to what went before, proposed replacing the word "instead" with "indeed".

Paragraph (8), as amended, was adopted.

Paragraph (9)

34. Sir Michael WOOD said that he was not sure what was meant by the expression "active connotation" in the first sentence. He also wished to know what justification there was for the inclusion, in that sentence, of the word "fully", which did not appear in draft article 5, especially as it was in quotation marks.

35. Mr. VALENCIA-OSPINA (Special Rapporteur) said that those words were, indeed, not the most felicitous, and proposed their deletion.

36. Mr. KITTICHAISAREE, noting that "formula" and "connotation" were not legal terms, proposed amending the first sentence to read: "The proviso 'with full respect for their rights' aims to ensure that the rights in question are respected and protected …".

37. Sir Michael WOOD said that the phrase "with full respect for their rights" was more than a proviso; it was an important element of draft article 2. Consequently, he proposed rewording the start of Mr. Kittichaisaree's proposal to read: "The reference to 'full respect for their rights'…".

Mr. Kittichaisaree's proposal, as amended by Sir Michael Wood, was accepted.

Paragraph (9), as amended, was adopted.

The commentary to draft article 2, as amended, was adopted.

Commentary to article 3 (Use of terms)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

38. Sir Michael WOOD proposed inserting the word "serious" before "disruption" in the last sentence.

39. Mr. FORTEAU proposed to clarify that it was the disruption of the "functioning" of society, not the disruption of society itself.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Paragraph (4) was adopted, subject to minor drafting changes in the English version.

Paragraph (5)

40. Sir Michael WOOD said that it was unwise, in the penultimate sentence, to cite "the widespread loss of life" as an example of an event that did not seriously disrupt the functioning of society. It would be preferable to refer, instead, to "large-scale material damage".

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

41. Mr. HMOUD proposed that, in the first sentence, the word "forced" be replaced with "mass", because the expression "forced displacement" did not have the same meaning as "mass displacement".

42. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed simply to delete the word "forced", without replacing it with "mass", to avoid duplication with the term "on a wide scale" at the end of the sentence.

It was so decided.

43. Mr. FORTEAU asked what was meant by the term "social capital" in the third sentence, because, in French, *capital social* denoted the capital invested in a company.

44. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it referred to the rights and benefits that people enjoyed as part of a group, and of which they were deprived in the event of mass displacement.

45. Mr. NOLTE said that, in his opinion, the expression "social capital" covered not only the relationship of solidarity among members of a community but also their economic relations, which was why he believed that it should be kept in the draft.

46. Mr. PETRIČ said that, for people who had lived under a communist regime, the expression instantly called to mind Marxist theories, which was clearly not the Special Rapporteur's intention.

47. Mr. VÁZQUEZ-BERMÚDEZ said that, in the light of those remarks, the term "social fabric" should be used instead.

It was so decided.

Paragraph (8), as amended, was adopted, subject to minor drafting changes.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

48. Mr. NOLTE said that the last sentence was too long and should be divided into two, with a full stop after the words "such disruption" and the word "so" replaced with "This means" at the start of the new sentence.

49. Sir Michael WOOD said that he did not quite understand the second sentence, which was also very long. If the Commission were to retain it, however, he would prefer to replace the past participle "anticipated" with "indicated". Moreover, the third sentence was worded too strongly. A situation of armed conflict was very much a disaster, although it was not considered as such "for the purposes of the draft articles", a point that should be made clear by inserting that expression at the end of the sentence.

50. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, admittedly, the wording of the third sentence did not convey very felicitously the idea that certain events that might lead to a disruption of the functioning of society were not covered by the draft articles, and he was in favour of the addition proposed by Sir Michael. While the second sentence of the paragraph was indeed very long, it contained criteria – namely the purpose of the draft articles and the existence of other applicable rules of international law – for determining whether an event was or was not covered by the draft articles. That said, there was nothing to prevent the word "anticipated" from being replaced with a more appropriate term.

Paragraph (10), as amended by Mr. Nolte and Sir Michael Wood, was adopted.

Paragraphs (11) to (13)

Paragraphs (11) to (13) were adopted.

Paragraph (14)

51. Sir Michael WOOD said that he doubted the usefulness of the paragraph as a whole, but in particular the third and fourth sentences, in which it was explained, in order to cover the scenario in draft article 10, paragraph 1, that subparagraph (*b*) of draft article 3 referred to both the territory of the State affected by a disaster and the territory under its jurisdiction or control. However, those two categories of territory were mentioned in the text of draft article 10 itself.

52. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it was, in his view, essential to specify in the commentary that the Commission was addressing not only territory in the traditional sense of the term but also any territory over which the State exercised jurisdiction or control. That clarification was all the more relevant because, in the context of another topic under discussion at the current session, the Commission had decided to mention only the State's jurisdiction, not its control. The Commission's choices were justified in both cases, but that should be explained, as the Commission did in the third and fourth sentences of the paragraph, which would therefore leave a void if the decision were made to delete them. The same applied to the reference to the source of inspiration for the phrase "in whose territory, or in territory under whose jurisdiction or control". That said, it was true that the term "scenario" was perhaps not the best for conveying the idea that he wished to express.

53. Mr. NOLTE said that, to reconcile Sir Michael's point with the Special Rapporteur's intention, which he deemed equally valid, the third and fourth sentences of the paragraph should be merged and recast to read: "Accordingly, the scenario in draft article 10, paragraph 1, in which an affected State has the duty to ensure protection, is not only covered by the reference to 'territory' but also includes scenarios where a State may exercise *de jure* jurisdiction …".

54. Sir Michael WOOD said that, although the proposal would improve the wording of the paragraph, it was still obscure, and the use of the term "scenario" to refer to draft article 10, paragraph 1, was odd, to say the least. In his view, the best solution would be to remove the third and fourth sentences.

55. Mr. MURPHY said that he, too, would prefer to delete the third sentence, because his impression was that the Special Rapporteur wished to address both the State's territory itself and any territory under its jurisdiction or *de facto* control. The confusion noted initially by Sir Michael was probably due to the reference to draft article 10, paragraph 1. The deletion was all the more desirable since, far from being limited to draft article 10, references to territory were made in several other draft articles, including draft article 16.

56. Mr. MURASE said that the fourth sentence of the paragraph should be retained as the long discussions that the Commission had held some years previously on the subject of the *de jure* jurisdiction and *de facto* control of the State should be reflected in the commentary.

57. Mr. KITTICHAISAREE said that he agreed that the simplest solution would be to delete the third sentence.

58. Mr. FORTEAU said that the difficulty with that sentence stemmed from the fact that it had been adopted on first reading at a time when draft article 10 dealt merely with sovereignty, without specifying in which kind of territory its provisions applied. Since every possibility was now covered in draft article 10, the third sentence had lost its relevance. The confusion to which it gave rise was therefore attributable to the redrafting that had taken place between the first and second readings.

59. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the wording of the commentary in question, like that of many others, was derived from the draft commentaries adopted on first reading. It was true that, as a reference to territory under the State's jurisdiction or control had been added throughout the draft articles, there was no longer any need to single out draft article 10. The third sentence could thus be removed and the fourth modified so that it dealt with "other scenarios" and followed on from the second sentence: "In most cases that would accord with control exercised …, which does not necessarily exclude other scenarios, where …". The term "scenarios" could also be replaced with "hypotheses", "possibilities" or any other term that expressed the same idea, and the rest of the paragraph could be left as it stood.

60. Sir Michael WOOD said that previous comments, particularly those of Mr. Forteau, had enabled him to grasp the source of the problem, and he was grateful to the speakers in question for that clarification. He supported the Special Rapporteur's proposal and considered the term "scenario" to be appropriate, given the context.

61. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, if the Commission decided to delete the third sentence, the paragraph would read: "The key feature in disaster response or disaster risk reduction is State control. In most cases that would accord with control exercised by the State upon whose territory the disaster occurs. However, this does not necessarily exclude other scenarios, where a State may exercise *de jure* jurisdiction …".

Paragraph (14), as amended, was adopted.

Paragraphs (15) to (18)

Paragraphs (15) to (18) were adopted.

Paragraph (19)

62. Mr. MURPHY proposed to redraft the start of the last sentence to read: "This reference is without prejudice to the differing legal status of these actors …".

Paragraph (19), as amended, was adopted.

Paragraph (20)

63. Mr. MURPHY said that, in the first line, the reference should be to draft article 7, not 17.

64. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it was a misprint and that the reference should indeed be to 7 rather than 17.

65. Mr. NOLTE proposed the deletion of the word "primarily".

Paragraph (20), as amended, was adopted.

Paragraph (21)

66. Sir Michael WOOD said that, in the first sentence, the quotation marks should end after the word "actors".

Paragraph (21), as amended, was adopted.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were adopted.

Paragraph (24)

67. Sir Michael WOOD said that, in the first sentence, the phrase "which draws inspiration from the commentary to draft article 14" should be removed, since that commentary was of no relevance. Besides, it would be strange for the Commission to draw inspiration from a commentary when drafting a provision.

Paragraph (24), as amended, was adopted.

Paragraphs (25) and (26)

Paragraphs (25) and (26) were adopted.

Paragraph (27)

68. Mr. NOLTE said that, in the fourth sentence, the words "are to" should be replaced with "should", because the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")[489] did not impose obligations. It was his understanding that the Special Rapporteur accepted that amendment.

69. Mr. MURPHY said that the sentence did not belong in the commentary to a definition, as it did not clarify that definition at all. Consequently, it should be either deleted or moved to the commentary to another draft article. If the Commission decided to retain it, the wording of the Oslo Guidelines should be used and the start of the sentence redrafted to read: "In accordance with the Oslo Guidelines, foreign military or civil defence assets should be requested only …".

[489] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

70. Sir Michael WOOD said that he also believed that the sentence was out of place in the commentary in question. He therefore proposed to delete it and to add a footnote reference to the Oslo Guidelines. If the Commission chose to retain it, his proposal would be to replace the words "In accordance with" with "According to".

71. Mr. NOLTE, supported by Mr. SABOIA, said that the sentence should be retained in the commentary to draft article 8 or to draft article 11. The Special Rapporteur could perhaps reflect on the matter.

72. Mr. PETRIČ said that he agreed with the comments made by Mr. Nolte and Mr. Murphy.

73. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the members of the Commission would recall that, in his eighth report (A/CN.4/697), he had recommended conforming to the wording of the Oslo Guidelines on that point in the text of the definition itself, in response to a very concrete proposal by a State or an international organization concerning the text adopted on first reading. There had been a debate on the issue in plenary, during which Mr. Murphy had made the same – justified – observation, but the Drafting Committee had decided to include that reference not in the text of draft article 3 but in the commentary to a draft article. As to which one, several proposals had been made in the Drafting Committee, but none had concerned draft articles 8 or 11. He himself had recommended putting that reference in the commentary to the latter draft article, but had not been supported, which was why it appeared in the commentary under consideration. He still believed that it should be inserted in the commentary to the draft article that laid down the duty of the affected State to seek external assistance, namely draft article 11, especially if the Commission accepted Mr. Murphy's proposal, which he supported.

74. Mr. FORTEAU said that, as he recalled, the Drafting Committee had agreed that the issue should be dealt with in the commentary to draft article 15, not to draft article 11. Perhaps the Chairperson of the Drafting Committee remembered?

75. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that, if his memory served him right – after all, the Drafting Committee had worked on nine topics – the Committee had been of the view that the reference to the Oslo Guidelines would be better placed in the commentary to draft article 15.

76. The CHAIRPERSON said he took it that the Commission wished to move the fourth sentence of paragraph (27) of the commentary to draft article 3, as amended by Mr. Murphy and Mr. Nolte, to the commentary to draft article 11 or to draft article 15, and to leave it to the Special Rapporteur to decide which one in consultation with any interested members.

Paragraph (27), as amended, was adopted.

Paragraph (28)

77. Mr. WAKO said that the words "which enjoy" should be replaced with "who have".

Paragraph (28), as amended, was adopted.

Paragraph (29)

78. Mr. MURPHY, in reference to the second sentence of paragraph (29), said that the Commission had decided not to retain the expression "acting on behalf of" in order to avoid any implication about responsibility, not in order to avoid the applicability of the rules on attribution with regard to either the affected State or the assisting State. A more neutral formulation would thus be preferable, and his proposal would be to replace the words "the applicability of" with "any implication with respect to". The end of that sentence, which was rather long, suggested that it was the affected State that was responsible under international law, which was not always true. He therefore proposed that, after the word "organizations", the sentence be redrafted to read: "given the primary role of the affected State in accordance with draft article 10, paragraph 2." The Commission would thereby avoid giving a view on responsibility one way or the other.

79. Mr. NOLTE said that he understood Mr. Murphy's intention, but wondered whether his proposal went too far, because it might give the impression that the sending State was no longer responsible for its personnel. Naturally, the rules on responsibility remained applicable, and that should be made clear, but he shared Mr. Murphy's concern that the phrase "so as to avoid the applicability of the rules of international law on the attribution of conduct to States or international organizations" might be misunderstood. The Commission should not imply that it believed that the rules applied, but it should not appear to exclude their application, either, as States that continued to direct and control their personnel should not be able to shirk their responsibility.

80. Mr. FORTEAU said that Mr. Murphy's proposal was along the right lines and that Mr. Nolte's concerns were legitimate. He therefore proposed to recast the first part of the second sentence of paragraph (29) to read: "The Commission decided against making a reference to 'acting on behalf of' so as to avoid adopting any position on the practical application of the rules of international law on the attribution". At the end of that sentence, it would be better to follow the wording of article 10, paragraph 2, which covered not only the direction and control of assistance but also its coordination and supervision, particularly since the applicability of the rules on attribution could differ depending on whether one was dealing with, for example, the control of relief activities or just their supervision. The four terms used in article 10, paragraph 2, namely direction, control, coordination and supervision, should be reflected.

81. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he agreed with Mr. Forteau, but that, for the sake of conciseness, rather than mentioning the four terms in question, it would suffice to accept Mr. Murphy's proposal and to refer to the role of the affected State "in accordance with draft article 10, paragraph 2". The issue of responsibility was very delicate not only legally but also politically, and he was thus in favour of Mr. Murphy's proposal, which avoided giving the impression that the Commission was taking a position in that regard.

82. The CHAIRPERSON said he took it that the Special Rapporteur, Mr. Murphy and Mr. Forteau would consult

one another with a view to finalizing the text of the second sentence of paragraph (29).

It was so decided.

Paragraph (30)

Paragraph (30) was adopted.

Paragraph (31)

83. Mr. NOLTE said that, when reading the definition of the term "equipment and goods", he had been surprised to note that software was not mentioned. He therefore proposed inserting the words "physical and electronic" before "tools" in the first sentence of paragraph (31).

Paragraph (31), as amended, as adopted.

The meeting rose at 1 p.m.

3333rd MEETING

Wednesday, 3 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter IV. *Protection of persons in the event of disasters* (*continued*) (A/CN.4/L.882 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.882/Add.1, specifically paragraph (29) of the commentary to draft article 3 (*f*), which had been left in abeyance.

E. Text of the draft articles on the protection of persons in the event of disasters (*continued*)

2. Text of the draft articles with commentaries thereto (*continued*)

Commentary to draft article 3 (Use of terms) (*concluded*)

Paragraph (29) (*concluded*)

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had redrafted the second sentence on the basis of written proposals made by Mr. Forteau and Mr. Murphy. The resultant wording read: "The Commission decided against making a reference to 'acting on behalf of' in order not to prejudge any question of the application of the rules of international law on the attribution of conduct to States or international organizations, given the primary role of the affected State, as provided for in draft article 10, paragraph 2." The intention in redrafting the sentence had been to avoid using the word "applicability".

3. Mr. FORTEAU suggested replacing "of the application of" by "related to the application of".

It was so decided.

4. Sir Michael WOOD said that the wording after "international organizations" was unnecessary and perhaps somewhat questionable; it should simply be deleted.

5. Mr. PARK said that either the final part of the sentence should be deleted as suggested by Sir Michael or the words "and draft article 15, paragraph 1 (*a*)" should be inserted at the end of the sentence, since that subparagraph referred to privileges and immunities.

6. Mr. SABOIA supported the proposal to delete the final part of the sentence.

7. Mr. MURPHY said that he would be prepared to accept either the proposal read out by the Special Rapporteur or the one just made by Sir Michael.

8. Mr. McRAE requested an explanation of the reasoning behind the proposal to replace "applicability" with "application". The latter term assumed that international law applied, whereas the former made no such assumption.

9. Mr. SABOIA said that he agreed with those comments on the term "applicability" and endorsed the proposal by the Special Rapporteur, as amended by Mr. Forteau.

10. Mr. VALENCIA-OSPINA (Special Rapporteur) said that in draft article 10, paragraph 2, the role of the affected State was characterized by four prerogatives, of which only two, direction and control, were part of the rules of international law on the attribution of conduct to States, as described in article 8 of the articles on the responsibility of States for internationally wrongful acts.[490] He would, however, be prepared to agree to the omission of the final part of the sentence, after "international organizations", as had been proposed by Sir Michael.

11. Sir Michael WOOD said that in the light of the discussion, he was prepared to go along with the text as put forward by the Special Rapporteur and amended by Mr. Forteau.

Paragraph (29) was adopted as proposed by the Special Rapporteur and as amended by Mr. Forteau.

The commentary to draft article 3, as a whole, as amended, was adopted.

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[490] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

Commentary to draft article 4 (Human dignity)

Paragraph (1)

12. Mr. MURPHY said that it would be useful to explain the paragraph's drafting history by indicating in the final sentence that many of the sources for the draft article on human dignity that were cited in paragraph (2) came from preambular clauses to treaties. He therefore proposed inserting the following words at the beginning of the final sentence: "Although general references to human dignity are often contained in preambular clauses to human rights treaties, the Commission considered".

13. Sir Michael WOOD, referring to the second sentence, said that the point could be made more strongly by omitting the words "The Commission recognizes" and stating simply: "Human dignity is a core principle that informs and underpins international human rights law."

That amendment was adopted.

14. Mr. NOLTE, supported by Mr. KAMTO, said that he did not agree with Mr. Murphy's proposal, as it might suggest to the reader that the fact that human dignity was mentioned in preambular paragraphs made it less important than hard law.

15. Mr. McRAE said that Mr. Murphy's proposal contradicted the amendment proposed by Sir Michael and which had just been adopted.

16. Mr. KITTICHAISAREE suggested that Mr. Murphy's proposal was an attempt to reflect the discussions in the plenary meeting: perhaps it could simply be worded differently.

17. Mr. SABOIA said that the wording of commentaries should not be used to reflect what had been said in the debates; a commentary was an explanation and an interpretation of the texts drafted by the Commission.

18. Mr. MURPHY said that, although he considered his proposal useful, he was prepared to withdraw it, since it was not supported by the other members of the Commission.

19. Sir Michael WOOD said that there were many occurrences throughout the commentary of the phrase "the Commission recognizes" or similar wording; they could well be omitted, to avoid repetition and to give the text greater force. The secretariat could work with the Special Rapporteur to that end.

20. Mr. TLADI said that while it was possible for the secretariat and the Special Rapporteur to remove such repetitions in the present text, such an approach should not be adopted universally, because it could have substantive implications.

Paragraph (1), as amended, was adopted.

Paragraph (2)

21. Sir Michael WOOD said that, if the list of treaties was intended to be exhaustive, it should include the Convention on the Rights of Persons with Disabilities, article 3 of which mentioned respect for inherent dignity.

That amendment was adopted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

22. Mr. KAMTO said that, to eliminate an apparent contradiction, he proposed replacing the part of the second sentence that read: "While such a reference is appropriate in the context of States, the matter is less clear with 'other assisting actors', where different legal approaches exist" with "It could be considered that it applies only to States, but not necessarily to 'other assisting actors', given that different legal approaches exist" [*On pourrait considérer qu'il s'adresse uniquement aux États, et pas nécessairement aux « autres acteurs prêtant assistance », étant donné qu'il existe différentes approches juridiques*] and deleting "Nonetheless" [*néanmoins*] in the subsequent sentence, as the intention was actually to reinforce the meaning of the previous sentence.

23. Mr. SABOIA said that, as he understood it, Mr. Kamto's proposal did not mean that the need to respect human dignity was not applicable to non-State actors: that would be an incorrect message to send, especially as State functions were frequently delegated to non-State actors.

24. Mr. KAMTO said that Mr. Saboia had correctly summarized his intention in proposing the amendment.

25. Mr. PETRIČ, referring to the suggestion made earlier by Sir Michael that excessive occurrences of the phrase "The Commission recognizes", or similar, should be removed from the text by the Secretariat in consultation with the Special Rapporteur, said that so doing in paragraph (5) would have significant implications; the suggestion was therefore not acceptable as a general measure.

26. Mr. VALENCIA-OSPINA (Special Rapporteur), supported by Mr. HMOUD, asked to see a written version of Mr. Kamto's proposal.

27. The CHAIRPERSON said that adoption of the paragraph would be deferred until a written version of the text was made available.

Paragraph (6)

28. Mr. MURPHY proposed that the fourth sentence should be made less prescriptive through the replacement of the word "requires" with "may require".

29. Mr. NOLTE proposed the replacement, in the final sentence, of the word "should" with "shall".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft article 4, as a whole, as amended, was adopted.

Commentary to draft article 5 (Human rights)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

30. Sir Michael WOOD, referring to the first sentence, proposed that the words "reflected in" be replaced with "those in"; the words "as well as assertions of" deleted; and a full stop inserted after "customary international law". The second and third sentences should be combined to read: "Best practices for the protection of human rights included in non-binding texts at the international level, including, *inter alia*, the Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, as well as the Guiding Principles on Internal Displacement, serve to contextualize the application of existing human rights obligations to the specific situation of disasters."

Paragraph (2), as thus amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

31. Sir Michael WOOD said that the paragraph was superfluous and should be deleted.

Paragraph (4) was deleted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

32. Mr. MURPHY suggested that the paragraph be streamlined through the deletion of the phrase "applicable rights for the simple reason that it was not possible to consider" and the replacement of the words "out of concern" with "was concerned".

Paragraph (6), as amended, was adopted.

Paragraph (7)

33. Mr. MURPHY said that the first sentence made an important point – that the International Covenant on Civil and Political Rights had been used as a model for the Commission's draft article 5, on human rights – but that point needed to be made more clearly. He therefore proposed that the first sentence read: "Nonetheless, it is contemplated that a potentially applicable right is the right to life, as recognized in draft article 6, paragraph 1, of the International Covenant on Civil and Political Rights, if a State is arbitrarily refusing to adopt positive measures to prevent or respond to disasters that cause a loss of life."

34. Mr. NOLTE, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), proposed that in Mr. Murphy's amendment, the words "potentially applicable" be replaced with "particularly relevant" and that the term "arbitrarily" be deleted.

Mr. Murphy's amendment, as further amended by Mr. Nolte, was adopted.

35. Mr. KITTICHAISAREE pointed out that the word "draft" before the phrase "article 6, paragraph 1, of the International Covenant on Civil and Political Rights" should be deleted, since that instrument was no longer in draft form.

That amendment was adopted.

36. Mr. KITTICHAISAREE said he would prefer the phrase "a loss of life" to read "losses of life" to indicate that it was not merely one loss of life that was meant.

37. Mr. MURPHY, supported by Mr. SABOIA, said that the best solution would be to delete the word "a" before "loss of life".

It was so decided.

38. Sir Michael WOOD suggested that the words "Nonetheless, it is contemplated that" be deleted.

That amendment was adopted.

Paragraph (7), as amended, was adopted.

Paragraph (8)

39. Mr. NOLTE said that in the first sentence, the word "open" should be inserted after "question" and in the second sentence, the term "latitude" should be replaced with "discretion".

40. Mr. MURPHY said that in the second sentence, the phrase "extent of the impact" should be replaced with "severity".

41. Mr. KAMTO said that in the third sentence, it would be better to refer simply to "rights", rather than "substantive" rights.

With those amendments, paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft article 5, as a whole, as amended, was adopted.

Commentary to draft article 6 (Humanitarian principles)

Paragraph (1)

42. Sir Michael WOOD proposed that the second sentence, which was somewhat unwieldy, be replaced by the following: "The humanitarian principles covered by the article underlie disaster relief assistance." The third sentence should be replaced with "The draft article recognizes the significance of these principles to the provision of disaster relief assistance."

43. Mr. MURPHY suggested that the second sentence simply be deleted, together with the first words in the third sentence ("On this basis"). The rest of the paragraph would remain unchanged, save for the amendment to the third sentence just proposed by Sir Michael.

Paragraph (1), as thus amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

44. Sir Michael WOOD proposed that the final part of the fourth sentence, starting with "elementary considerations of humanity", be amended to cite in full the famous dictum of the International Court of Justice in the *Corfu Channel* case. It would thus read: "among general and well-recognized principles are 'elementary considerations of humanity, even more exacting in peace than in war' ".

Paragraph (3), as amended, was adopted.

Paragraph (4)

45. Sir Michael WOOD, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), proposed that in the first sentence, the phrase "the Commission considers that" be deleted. The second and third sentences should be combined to read: "In the context of humanitarian assistance, the principle of neutrality requires that the provision of assistance be independent of any given political, religious, ethnic or ideological context." The final sentence should be deleted.

46. Ms. JACOBSSON proposed that in the first sentence, the phrase "the context of an armed conflict" be replaced with "the law of armed conflict".

With those amendments, paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

47. Mr. MURPHY proposed that, for the sake of consistency with an amendment made earlier by Sir Michael, the word "disability" be inserted at the end of the second sentence and a reference to the Convention on the Rights of Persons with Disabilities added to the footnote.

Paragraph (6), as amended, was adopted.

Paragraph (7)

48. Sir Michael WOOD suggested that in the first sentence, the phrase "The Commission noted" be deleted. In the third sentence, "The Commission considered" should be deleted and the words "to encompass" replaced with "encompasses". In the fifth sentence, the words "adopted by the Commission" should be replaced with "used".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

49. Mr. NOLTE, referring to the third sentence, which said that women and girls were "more likely" to suffer the effects of disasters, said that in many traditional societies, men were expected to allow women and girls to flee to safety in the event of wars and disasters. For that reason, boys and men could also be disproportionately affected by disasters. He would therefore prefer to replace the phrase "more likely to be" with the adverb "often".

50. Mr. MURPHY endorsed that proposal and suggested that, in the same sentence, the phrase "exposed to risks" be followed by the word "including". In the second sentence, a comma should be inserted after the word "contexts" and in the final sentence, "gender approach" should read "gender-based approach".

51. Mr. FORTEAU suggested that in the first sentence, the word "frequently" be inserted between the words "disasters" and "affect". The French version of the entire paragraph needed to be reviewed and harmonized with the English version.

Paragraph (9), as amended, was adopted.

The commentary to draft article 6, as a whole, as amended, was adopted.

Commentary to draft article 7 (Duty to cooperate)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

52. Mr. MURPHY said that, in the first sentence, it might be advisable to replace the word "law" with the phrase "obligations that have been undertaken by States". In the final sentence, after the reference to the Convention on the Rights of Persons with Disabilities, the phrase "is, *inter alia*, applicable" should be replaced with "reaffirms existing international obligations in relation to persons with disabilities", in order to better capture the sense of article 11 of the Convention.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

53. Sir Michael WOOD said that it would be preferable, in the first sentence, for "of a sovereign State" to read "of the affected State" and for the phrase "within the limits of international law" to be deleted, to bring the wording into line with that of draft article 10, paragraph 2.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

54. Mr. MURPHY proposed the deletion of the phrase "It was understood, however, that" at the beginning of the third sentence.

55. Sir Michael WOOD suggested that in the second sentence, the word “establishes” be replaced with “reflects”. He proposed the deletion of the fourth sentence, since the duty to cooperate was not always necessarily reciprocal. He queried the accuracy of the final sentence, because the phrase “as appropriate” in draft article 7 seemed to qualify both the level of cooperation and the actors with whom it should take place.

56. Mr. NOLTE endorsed the point that the duty to cooperate was not always reciprocal. Moreover, the draft article referred solely to the duty of States to cooperate, not to such a duty on the part of international organizations. He therefore supported Sir Michael’s proposal to delete the fourth sentence.

57. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he agreed with the proposals to replace “establishes” with “reflects” and to delete the fourth sentence and the beginning of the third sentence. In response to Sir Michael’s final remark, he said that the phrase “as appropriate” in draft article 7 did not qualify the level of the cooperation or imply that there had to be cooperation at a certain level; it referred to the various actors with which the State could cooperate.

Paragraph (6) was adopted with the amendments accepted by the Special Rapporteur.

Paragraph (7)

58. Sir Michael WOOD suggested the deletion of the words “and among” in the first sentence, as the draft article did not deal with cooperation among assisting actors; it dealt with cooperation among States and of States with assisting actors.

59. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed to that amendment.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to draft article 7, as a whole, as amended, was adopted.

Commentary to draft article 8 (Forms of cooperation in the response to disasters)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

60. Mr. MURPHY said that the first sentence was so long and complicated that it would be wise to end it with the words “transboundary aquifers”; to delete the word “which”; and to begin a new sentence, starting “That paragraph explains”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

61. Mr. MURPHY said that in the final sentence, “technological transfer” should read “technology transfer”. The phrase “covering, among others, satellite imagery” should be transposed to follow the words “information sharing”.

62. Mr. KITTICHAISAREE, supported by Mr. FORTEAU and Mr. SABOIA, asserted that the amendment proposed by Mr. Murphy completely changed the meaning of the sentence.

63. The CHAIRPERSON suggested that the paragraph be left in abeyance to permit a suitable formulation to be found.

It was so decided.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Commentary to draft article 9 (Reduction of the risk of disasters)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

64. Sir Michael WOOD questioned the need for the first sentence and suggested its deletion. In the second sentence, he would prefer the words “State sovereignty” to read “sovereign equality”. He took it that the third sentence was stating the well-known distinction between the negative obligation not to kill and the positive obligation to prevent killing. It might therefore be wise to reword it.

65. Mr. MURPHY said that it was not immediately obvious what bearing the second sentence had on States’ duty to reduce the risk of disaster. He assumed that what the sentence was trying to say was that, while the Commission accepted the fundamental principle of State sovereignty, the latter resulted in an obligation to take certain action to reduce disaster risk. In that sentence, it might be wise to replace the words “States’ obligation” with the phrase “the obligations undertaken by States”. The third sentence should be simplified to read, “Protection entails a positive obligation on States to take the necessary and appropriate measures to prevent death and other harm from impending disasters.” That wording established a link with the fourth sentence, which mentioned two cases that had been concerned with the duty to take preventive measures. In the final sentence, the word “inspiration” should be inserted after the word “draws”.

66. Mr. NOLTE, supported by Mr. SABOIA, drew attention to the fact that the text of paragraph (4) of the commentary had already been adopted on first reading. Only minor modifications should be made to it now.

67. Mr. MURPHY said that in their reactions to paragraph (4) as adopted on first reading, Governments had expressed the view that the phrase “no matter the source of the threat”, in the third sentence, was a totally inaccurate description of the decisions in the two cases cited in the fourth sentence. The statement in the fourth sentence

that "This is confirmed by the decisions of international tribunals" was patently wrong.

68. The CHAIRPERSON suggested that the Commission suspend the discussion of paragraph (4) until a new text could be prepared.

It was so decided.

Paragraph (5)

69. Mr. NOLTE proposed that, in the second sentence, the phrase "Many States have concluded" be replaced with "States and international organizations have adopted".

70. Sir Michael WOOD proposed the deletion, in the second sentence, of the words "the Fourth Asian Ministerial Conference on Disaster Risk Reduction (2010), leading to" and the inclusion of a footnote referring to that Conference, which did not belong in a list of multilateral instruments.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (12)

Paragraphs (6) to (12) were adopted.

Paragraph (13)

71. Sir Michael WOOD suggested replacing the word "qualifier" with "word".

Paragraph (13), as amended, was adopted.

Paragraph (14)

72. Sir Michael WOOD proposed the deletion of the second sentence.

73. Mr. VALENCIA-OSPINA (Special Rapporteur) suggested that instead, the word "Since" and the words "singling them out in the text of paragraph 1 could have led to a lack of clarity" be deleted.

With those amendments, paragraph (14) was adopted.

Paragraph (15)

74. Mr. MURPHY said that the phrase "hazard's characteristics" in the first sentence was awkward; he suggested replacing it with the words "potential hazards".

75. Mr. SABOIA said that it was worth retaining the word "characteristics" in relation to hazards, because the measures that States were to take during the pre-disaster phase depended on the nature or characteristics of the risk concerned.

76. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed the replacement of the expression "hazard's characteristics" with the phrase "the characteristics of hazards".

Paragraph (15), as amended by the Special Rapporteur, was adopted.

Paragraph (16)

77. Sir Michael WOOD proposed reformulating the first sentence to read: "The *Terminology on Disaster Risk Reduction* prepared by the United Nations Office for Disaster Risk Reduction in 2009 illustrates the meaning of each of the three terms used, prevention, mitigation and preparedness:". In the final sentence, the word "refined" should be deleted.

78. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the final sentence was simply intended to recall that the *Terminology on Disaster Risk Reduction* might be subject to further refinement by the General Assembly.

79. Mr. McRAE proposed the replacement of the words "refined interpretation" with the word "refinements".

80. Mr. FORTEAU suggested that, in the French version of the text, the words *d'une interprétation plus poussée* might be replaced with *d'amenagements et de précisions*.

Paragraph (16), as thus amended, was adopted.

Paragraphs (17) to (23)

Paragraphs (17) to (23) were adopted.

Commentary to draft article 10 (Role of the affected State)

Paragraph (1)

81. Mr. MURPHY said it was unclear why the phrase "in accordance with international law" should be included in the third sentence, which referred to paragraph 1 of the draft article, but not in the fourth sentence, which referred to paragraph 2. He therefore proposed that the phrase be deleted.

82. Mr. NOLTE said that paragraph 1 referred to a duty, which was legal in nature, and paragraph 2, to a role, which was not. He was concerned that deleting the phrase "in accordance with international law" would take away the emphasis on the legal nature of the provision contained in paragraph 1 of the draft article.

83. Mr. HMOUD, endorsing Mr. Murphy's proposal, said that, if the Commission retained the phrase "in accordance with international law" in the commentary, that would give the impression that the duty referred to in draft article 10, paragraph 1, was circumscribed by international law as it currently stood. However, the intention, during the Commission's discussions over the past few years, had been for the provision to generate a new duty.

84. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no objection to the proposal to delete the phrase "in accordance with international law" in the third sentence, as the meaning was clear enough without it.

With those comments, paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

85. Mr. FORTEAU, supported by Mr. NOLTE, proposed the deletion of the final sentence, which was confusing.

86. Mr. MURPHY said that, contrary to what was stated in the first sentence of paragraph (3), draft article 10, paragraph 1, did not recognize that the State's duty to ensure protection stemmed from its sovereignty. He proposed recasting the first sentence to read: "The duty held by an affected State to ensure the protection of persons and the provision of disaster relief assistance in its territory, as recognized in paragraph 1, stems from its sovereignty."

87. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no objection to the amendments proposed by Mr. Forteau and Mr. Murphy.

Paragraph (3), as amended, was adopted.

Paragraph (4)

88. Mr. FORTEAU proposed the insertion, in the first sentence, of the words "among others" [*en particulier*] next to the words "Judge Álvarez": the conception of a bond between sovereign rights and concomitant duties upon a State had not been expressed by Judge Álvarez alone.

Paragraph (4), as amended, was adopted.

Paragraph (5)

89. Mr. MURPHY, supported by Mr. PETRIČ, said that, in the final sentence, the words "given its use as a term of art elsewhere within and beyond the Commission's work" might be viewed as characterizing the term "responsibility" in a way that was not helpful; he therefore proposed their deletion.

90. Mr. NOLTE, echoing Mr. Murphy's concern, suggested that the final sentence simply be deleted. In the first sentence, he proposed the deletion of the words "which benefits from the principle of non-intervention", as affected States did not benefit from that principle with respect to every territory that was covered under draft article 10.

91. Ms. JACOBSSON agreed with Mr. Nolte's proposal to delete the final sentence, since it simply explained a term that the Commission had chosen not to use.

92. Mr. KITTICHAISAREE said that he endorsed Mr. Nolte's proposal concerning the first sentence. As to the second and third sentences, he proposed merging them into one, to read: "The Commission determined that the term 'duty' was more appropriate than that of 'responsibility', which has been used with different meanings within and beyond the Commission's work."

93. Mr. McRAE said that he did not agree with the deletion of the entire phrase "given its use as a term of art elsewhere within and beyond the Commission's work" and suggested instead that it be replaced by "given its use elsewhere". The sentence then explained why the use of the term "responsibility" could give rise to confusion.

94. Mr. KAMTO said that he could accept the proposals by Mr. McRae and Mr. Murphy but did not agree with Mr. Kittichaisaree's proposal. The second and third sentences were both needed in order to explain what meaning the Commission gave to the term "duty" in draft article 10, given that it was used to refer to an obligation in other draft articles of the text. In many provisions of the project, the words "duty" and "obligation" had both been translated into French using the word *obligation*, thereby failing to reflect the distinction made between the two terms in English.

95. Mr. SABOIA said that the amendments proposed by Mr. Kittichaisaree and Mr. McRae were an attempt to convey a subtle message: the notion of responsibility was implicit in the use of the term "duty" in draft article 10. Mr. McRae's proposal perhaps best reflected the very cautious approach the Commission wished to take.

96. Mr. MURASE endorsed Mr. McRae's proposal and further proposed to place a footnote after the word "elsewhere" to refer to principle 21 of the Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"),[491] which provided that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States. He recalled that the translation of the word "responsibility" as *devoir* in the French version of the Stockholm Declaration had elicited a lengthy debate in the Commission on the distinction between the terms "duty" and "responsibility" and which of the two was the most appropriate for use in draft article 10.

97. Mr. FORTEAU said he supported the amendment proposed by Mr. Kittichaisaree.

98. The CHAIRPERSON suggested that paragraph (5) be left in abeyance until the next meeting.

It was so decided.

The meeting rose at 1.10 p.m.

3334th MEETING

Wednesday, 3 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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[491] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter IV. *Protection of persons in the event of disasters* (*continued*) (A/CN.4/L.882 and Add.1)

1. The CHAIRPERSON invited the members of the Commission to continue with the adoption of the part of chapter IV of the report contained in document A/CN.4/L.882/Add.1, paragraph by paragraph, starting with paragraph (4) of the commentary to draft article 9, and paragraph (5) of the commentary to draft article 10, which had been left in abeyance at the previous meeting. The secretariat had prepared a new version of those texts, taking account of the proposals made by the members (document without a symbol distributed in the meeting room, in English only).

E. Text of the draft articles on the protection of persons in the event of disasters (*continued*)

2. Text of the draft articles with commentaries thereto (*continued*)

Commentary to draft article 9 (Reduction of the risk of disasters) (*concluded*)

Paragraph (4) (*concluded*)

2. The CHAIRPERSON, summarizing the amendments put forward at the previous meeting, said that it had been proposed to delete the first sentence, to replace the words "States' obligation" with "the obligations undertaken by States" in the second sentence, to revise the third sentence to read: "Protection entails a positive obligation on States to take the necessary and appropriate measures to prevent harm from impending disasters", and to add the word "inspiration" after the word "draws" in the final sentence.

Paragraph (4), as amended, was adopted.

The commentary to draft article 9, as amended, was adopted.

Commentary to draft article 10 (Role of the affected State) (*concluded*)

Paragraph (5) (*concluded*)

3. The CHAIRPERSON said that it had been proposed to delete the words "which benefits from the principle of non-intervention" in the first sentence and to merge the second and third sentences to read: "The Commission determined that the term 'duty' was more appropriate than that of 'responsibility', which could give rise to confusion given its use elsewhere."

4. Mr. FORTEAU said that he supported the new formulation, but proposed replacing the word "elsewhere" with "in other contexts".

The proposal was adopted.

5. Mr. MURASE recalled that the controversy surrounding the use of "duty" or "responsibility" stemmed from principle 21 of the Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration")[492] and proposed that, in order to make it clear that the word "responsibility" in that context did not equate to a "responsibility to protect", a footnote should be added with a reference to the Declaration.

6. Mr. PETRIČ said that, in that sentence, the term "responsibility" was not problematic, as it was clear that it did not refer to the responsibility to protect. In the English version, the word "confusion" should be replaced with something else, and he would leave it to the English-speaking members of the Commission to come up with a more appropriate solution.

7. Mr. WAKO said that he did not see why the Commission had to choose between the terms "duty" and "responsibility", since according to a dictionary definition they were almost synonymous. The former had a broader meaning than the latter, which it encompassed, and that could perhaps be mentioned in the sentence to justify the Commission's preference for that term.

8. Sir Michael WOOD proposed replacing the word "determined" with "considered" in the English version and replacing "give rise to confusion" with "be misunderstood". While he understood why Mr. Murase had proposed inserting a footnote referring to principle 21 of the Stockholm Declaration, the content of that principle was not the reason for the Commission's decision to use the term "duty".

9. Mr. ŠTURMA and Mr. FORTEAU said that they would be in favour of deleting the last sentence. If the Commission decided to retain it, however, the sentence should be amended in line with Sir Michael Wood's proposal.

10. Mr. NOLTE said that he did not recall the Commission having mentioned the Stockholm Declaration in that context. In his view, Sir Michael Wood's proposal would suffice and need not be accompanied by a footnote.

11. The CHAIRPERSON said he took it that the majority of Commission members were in favour of keeping the last sentence, subject to the amendments proposed by Mr. Forteau and Sir Michael Wood. If he heard no objection, he would take it that the members wished to adopt paragraph (5), as a whole, as amended.

Paragraph (5), as amended, was adopted.

Paragraph (6)

12. Mr. FORTEAU proposed inserting the word "too" before "restrictive" in the final sentence, in order to make a clearer logical link between that sentence and the previous one.

13. Mr. PARK proposed amending the end of the final sentence to read: "… States that preferred to take a more limited role in disaster response coordination because, for example, they faced a situation of limited resources".

14. Sir Michael WOOD said that, in the penultimate sentence, it would be preferable to replace the words "margin of appreciation", which was a term of art in the field of human rights, with the word "flexibility".

[492] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

15. Mr. NOLTE said that, while he supported Sir Michael's proposal, he believed that the word "some" should be added before "flexibility".

Paragraph (6), as amended, was adopted.

Paragraph (7)

16. Sir Michael WOOD proposed replacing "the Government of a State" with "the State" in the first sentence, as it was possible that it could be another body that was best placed to determine the gravity of an emergency situation and not the Government.

Paragraph (7), as amended, was adopted.

Paragraph (8)

17. Sir Michael WOOD said that, in his view, the second sentence should be made more assertive by deleting the introductory phrase "The Commission considered that" and replacing the word "construction" with "language" in the English version. The sentence would thus read: "The Tampere Convention formula is gaining general currency in the field of disaster relief assistance and represents more contemporary language." In the third sentence, the word "final" should be deleted.

18. Mr. PETRIČ, referring to the second sentence of the English version, proposed replacing the word "currency", whose meaning might be unclear to non-native English speakers, with the word "acceptance".

The proposals were adopted.

19. Sir Michael WOOD proposed deleting the last part of the third sentence, starting with the words "in accordance with international law". Those words limited the control exercised by the State, whereas the State might have many other grounds on which it wished to control the manner in which relief operations were carried out and which were not limited to the need to verify their compliance with international law.

20. Mr. VALENCIA-OSPINA (Special Rapporteur) said that if those words were deleted, the next sentence would no longer make sense, as the word "thus" referred back to them. He would therefore be in favour of retaining that part of the sentence.

21. Mr. SABOIA said that the reference to international law should be maintained, as the manner in which a State exercised its right to control activities carried out by an assisting actor and, in general, all activities in its territory, must be in accordance with international law.

22. Mr. MURPHY said that the previous speakers' comments showed the ambiguity of the third sentence: it was not clear whether the phrase "in accordance with international law" referred to the way in which the State exercised control over relief operations or to the manner in which such operations were to be carried out. In order to remove that ambiguity, he proposed amending the sentence to read: "The formula reflects the position that a State exercises control over the manner in which relief operations are carried out, which shall be done in accordance with international law, including the present draft articles."

The proposal was adopted.

23. After a discussion on the amendments to be made to the last sentence, taking account of Mr. Murphy's proposal, in which Mr. KITTICHAISAREE, Mr. SABOIA, Mr. HMOUD, Mr. VALENCIA-OSPINA (Special Rapporteur) and Mr. WAKO took part, Mr. FORTEAU proposed amending the beginning of the sentence to read: "Such control exercised over them by an affected State cannot amount to undue interference …".

The proposal was adopted.

24. The CHAIRPERSON asked the secretariat to prepare a draft, taking account of all the proposed amendments that had been accepted, and to circulate it to the Commission members.

The new version of paragraph (8) of the commentary to draft article 10, prepared by the secretariat taking account of the proposed amendments, was distributed to the members (document without a symbol distributed in the meeting room, in English only).

25. Mr. MURPHY said that the revised draft of paragraph (8) read well, but in the last sentence of the English version, the word "cannot" should be replaced with "shall not" and "legitimate" with "lawful".

26. Mr. NOLTE said that replacing "cannot" with "shall not" would change the meaning of the sentence, making it more prescriptive. Since the commentaries were not intended to set out legal rules, it would be preferable to preserve "cannot". Nor was he in favour of replacing "legitimate" with "lawful", as the situations covered were those in which an assisting actor indicated that a particular course of action was the most appropriate, not simply that its activities were lawful. If the proposed substitution were made, the Commission would be suggesting that, once the affected State concluded that the activities carried out were inappropriate, the control it had exercised could never be classed as undue interference.

27. Sir Michael WOOD proposed deleting "a" before "more" in the second sentence of the English version and said that he would prefer to replace "cannot" with "does not" in the last sentence, as that would make it clearer but avoid making it overly prescriptive.

28. Mr. MURPHY said that both "shall not" and "cannot" were extremely prescriptive. Since what the Commission was, in fact, trying to say was that States should not engage in undue interference, it would be preferable to express it as such and use "should not". The reason he considered the word "lawful" more appropriate was that, as was recalled in the preceding sentence, relief operations should be in accordance with international law. The use of that word would not deprive the affected State of its margin of appreciation, since nothing prevented it from interfering in lawful activities if, for some reason, they did not seem appropriate in a particular situation. He would therefore be in favour of using "should not" and maintained his proposal concerning "lawful", as "legitimate" seemed overly vague and unclear.

29. Mr. KITTICHAISAREE said that he supported Mr. Murphy's proposal concerning "should not" but would rather replace "legitimate" with "such" or "the aforesaid".

30. Mr. NOLTE said that, in his view, using "should not" would completely change the meaning of the sentence, which was intended to protect the affected State that was exercising control in accordance with international law against accusations of undue interference in the activities of assisting actors. No such accusations could be made, because the affected State's actions were justified. He therefore supported the proposal made by Sir Michael. With regard to the word "legitimate", while unlawful activities were also illegitimate, the affected State could nonetheless argue that it was exercising control in accordance with international law in order to respond to the claims of certain actors or to the pressure they might bring to bear on the grounds that their activities were legitimate.

31. Mr. McRAE said that he agreed with Mr. Nolte and Sir Michael that "does not" was the correct formulation. It could not be said that an act that complied with international law "should not" amount to undue interference, since that would suggest that it could, which would be strange. A similar problem would arise with the use of "shall not". It would therefore be best to make the sentence simply descriptive.

32. Mr. PARK said that he agreed that using "should not" would completely change the meaning of the sentence and would therefore prefer to keep "cannot".

33. Mr. VALENCIA-OSPINA (Special Rapporteur) said that, in order to take account of the different views expressed and to avoid making the sentence overly prescriptive, he would propose amending it to read: "Such control by an affected State is not to be regarded as undue interference …". In that way, the emphasis would be placed on the assessment that would be made of the exercise of such control.

34. Mr. MURPHY said that he supported the Special Rapporteur's very good proposal. Since the emphasis was not on the fact that the control exercised by the State was not regarded as due interference, the word "legitimate" could be deleted, so that the sentence would read: "Such control by an affected State is not to be regarded as undue interference with the activities of an assisting actor."

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft article 10, as amended, was adopted.

Commentary to draft article 11 (Duty of the affected State to seek external assistance)

Paragraph (1)

35. Mr. PARK said that article 11 was an essential part of the entire set of draft articles, as was paragraph (1) of the commentary to draft article 11, which gave a general overview of the content of the provision. However, in the penultimate sentence, there was no reference to the disagreement between certain members of the Commission concerning the idea expressed in the article, although in his view such a reference was essential. Whereas the version of the commentary adopted on first reading had indicated that "[t]he existence of the duty to seek assistance as set out in draft article 13 [10] was supported by a majority of the members of the Commission, but opposed by others, since in the view of those members, international law as it currently stands does not recognize such a duty",[493] the new version suggested that there had been unanimity in the Commission on the matter and also made reference to customary international law. He therefore considered that it would be more appropriate to reinstate the previous version.

36. Mr. KAMTO, responding to Mr. Park, said that it was standard practice not to mention differences of opinion within the Commission when a text was considered on second reading, as they had already been reflected during its consideration on first reading. Although it had been clearly stated in the Drafting Committee that the term "duty" should be translated in French by *devoir* rather than *obligation*, that had not been done, and the oversight should be corrected. Furthermore, in the fifth sentence, it was wrongly stated that the draft article affirmed the central position of obligations owed by any State towards persons within its borders. In fact, the draft article focused less on the obligations owed by States to such persons than on the obligation of States to seek assistance. The sentence should therefore read: "The draft article affirms the [fundamental] obligation of the affected State to do its utmost to provide assistance to persons within its borders", as it went without saying that the reason the State sought external assistance was in order to provide assistance. Similarly, in the penultimate sentence, since it was not cooperation itself but rather seeking such cooperation that was appropriate and required, the word "seeking" should be added before "such cooperation", which in fact could be replaced with "such assistance".

37. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he supported the proposals made by Mr. Kamto, subject to their translation into English. He was astonished by the comments of Mr. Park, who was going to be presenting the Commission's work to the Sixth Committee in his capacity as Rapporteur.

38. Mr. NOLTE, responding to Mr. Park, said that the sentence he had quoted was from a version of the draft article that had not included the word "manifestly", so the duty mentioned therein had been formulated more broadly. Since the scope of the duty had been reduced in an attempt to persuade the members of the Commission who had been doubtful about the customary nature of the duty, it was not necessary to revisit the choice that had been made as the result of a compromise.

39. Mr. SABOIA said that he agreed with Mr. Kamto and the Special Rapporteur about the nature of the second

[493] *Yearbook ... 2014*, vol. II (Part Two), p. 80 (para. (1) of the commentary to draft article 13 [10]).

reading, as well as with Mr. Nolte's response. In his view, the paragraph in question described the progression from the duty to protect from an internal point of view to the stage where the disaster had taken on such proportions that international assistance was necessary. He agreed with the Special Rapporteur's decision with respect to Mr. Kamto's proposals.

40. Sir Michael WOOD said that, in general, paragraph (1) was lengthy and repetitive, and his preference would be to limit it to the first two sentences. Taking into account Mr. Kamto's proposal with regard to the penultimate sentence, the English version would read: "The Commission considers that where an affected State's national capacity is manifestly exceeded, seeking assistance is both appropriate and required." Since that formulation did not mention any legal obligation, it would perhaps be acceptable to Mr. Park. The last sentence of the paragraph should be deleted, as it was reproduced at the beginning of paragraph (4). As for the rest, he did not consider it particularly helpful to place the duty to seek assistance in the context of other articles, namely 7 and 10, in order to justify it somehow, and he therefore believed that those references should be deleted. The same applied to the fifth sentence, which was problematic. However, if the Commission did decide to keep it, in the English version the words "within its borders" would have to be replaced with "within such territory" in order to ensure consistency with the previous sentence.

The proposal by Sir Michael Wood concerning the deletion of the last sentence of the paragraph was adopted.

41. Mr. TLADI, referring to the problem raised by Mr. Park, said that, while it was true that divergences of opinion among Commission members concerning substantive issues were not brought up when a text was being considered on second reading, that did not mean that they had been resolved.

42. Mr. PARK said that he had expressed his views as a member of the Commission and not in his capacity as Rapporteur. Although he was aware of the distinction between consideration of a text on first as opposed to second reading, he had nonetheless considered it necessary to give his opinion.

43. Mr. MURPHY said that he would like to know Mr. Kamto's position concerning the comment by Sir Michael to the effect that the use of the expression "within its borders" in the fifth sentence seemed to limit the scope of the obligation to the territory of the State, whereas the affected State had been defined as a State that was the victim of a disaster not just within its borders but also in territory under its jurisdiction or control. In other words, if the Commission amended the fifth sentence as proposed by Mr. Kamto, it would also have to change the end of the sentence and specify the scope of the concept of territory.

44. Mr. KAMTO said that his comments had been on a different point and he did not have a defined position in that regard.

45. Mr. MURPHY proposed replacing the words "within its borders" with "within its territory" and adding "or territory under its jurisdiction or control" in the English version of the fifth sentence.

The proposal was adopted.

Paragraph (1) was adopted with the amendments put forward by Mr. Kamto, Mr. Murphy and Sir Michael Wood.

Paragraph (2)

46. Mr. FORTEAU, supported by Mr. HMOUD and Mr. WISNUMURTI, said that the phrase "regardless of the opinion it may hold on the matter" at the end of the second sentence was incompatible with paragraph (8) of the commentary, in which it was recalled that the State's assessment must be carried out in good faith, something which imposed certain limitations but also provided for some flexibility. As there was no point in going into detail on those matters at the current stage, it would be preferable to delete that part of the sentence.

47. Mr. NOLTE said that, in order to simplify the third sentence, the words "are considered to overwhelm" should be replaced with "overwhelm". Regarding Mr. Forteau's proposal, while it was true that the phrase "regardless of the opinion it may hold on the matter" was very strong language, the point being made was important. Perhaps that clause could be replaced with "a standard which is to be determined objectively" so as to indicate that it was not a purely subjective assessment.

48. Mr. MURPHY said that he agreed with Mr. Nolte's proposal concerning the third sentence. While he also supported Mr. Forteau's proposal, if the second sentence were to be shortened as proposed, it would simply be repeating the first sentence without adding anything, and it should therefore be deleted.

49. Mr. FORTEAU said that he supported that proposal.

50. Sir Michael WOOD said that, in addition, he would be in favour of deleting the last sentence, as it merely stated the obvious.

51. Mr. KITTICHAISAREE said that he supported that proposal but that by inverting the second and third sentences, the logical sequence of the paragraph would be restored.

52. Mr. MURPHY said that he remained convinced that the second and third sentences were redundant and that, if the Commission decided to retain the second and transpose it as proposed by Mr. Kittichaisaree, the word "obligation" would have to be replaced with "duty". In addition, the expression "manifestly cannot cope by itself with the disaster" seemed to express a slightly different idea from "the national response capacity of an affected State is manifestly exceeded", the latter being preferable.

53. Mr. SABOIA said that he generally agreed with the proposals that had been made, but would welcome clarification of Mr. Nolte's proposal on the objective determination of a standard by which an affected State could be considered not to be able to cope by itself with the disaster.

54. Mr. PETRIČ said that the only sentence that was really problematic was the third, which simply stated the obvious. That sentence should therefore also be deleted, which would mean that little of the original paragraph would remain.

55. Mr. FORTEAU proposed that the Commission should take an even more radical approach, keeping only the first sentence of paragraph (2) and moving it to paragraph (3), which provided important clarification on the cases in which a State's capacity could be considered to be manifestly exceeded.

The proposal by Mr. Forteau was adopted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

56. Sir Michael WOOD proposed simplifying the first sentence to read: "The words 'to the extent that' clarify that the national response capacity of an affected State may not always be sufficient or insufficient in absolute terms."

Paragraph (3), as amended, was adopted.

Paragraph (4)

57. Sir Michael WOOD said that, for the sake of consistency, the words "an affected State considers" in the second sentence should be deleted. The end of the sentence would thus read: "… where the resources of the State are inadequate to meet protection needs".

58. Mr. MURPHY said that the terms "right to food" and "right to the supply of water" in the third sentence did not correspond to the standard language used to refer to those rights, namely the "right to adequate food" and the "right to safe drinking water", respectively, and should therefore be amended accordingly. In the following sentence, he proposed replacing the word "held" with "said" in the English version, as it was more neutral, and using the language of general comment No. 6 of the Human Rights Committee,[494] cited in parentheses, so the end of the sentence would read: "… a State's duty in the fulfilment of the right to life extends beyond mere respect to encompass a duty to protect the right by adopting positive measures".

Paragraph (4), as amended, was adopted.

Paragraph (5)

59. Sir Michael WOOD said that the penultimate sentence, which was identical to a sentence in paragraph (3) of the commentary to draft article 6 that the Commission had amended at a previous meeting, should be amended in the same way.

Paragraph (5) was adopted subject to the necessary amendments in the penultimate sentence.

[494] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V.

Paragraph (6)

60. Sir Michael WOOD proposed that, in the English version of the sentence after the second indented quotation, the word "implicit" should be deleted and the words "affected States" should be replaced with "the affected State" and "engage in" with "have recourse to".

Paragraph (6) was adopted, with those amendments to the English version.

Paragraph (7)

61. Mr. VALENCIA-OSPINA (Special Rapporteur) recalled that, when the Commission had considered paragraph (27) of the commentary to draft article 3, on the definition of the term "relief personnel", it had decided that the reference to the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")[495] did not belong there and should be moved to the commentary to draft article 15, draft article 8 or draft article 11.[496] Mr. Murphy had submitted wording proposed for insertion in the commentary to draft article 11. Many States and international organizations had expressly requested that a reference to the Oslo Guidelines be included in the commentary to draft article 3 as an element of the definition of the term "relief personnel," and he remained convinced that the reference made sense only in that context. However, as the Commission had taken another position, and having carefully reread the commentaries to draft articles 8, 11 and 15, he had concluded that the only other place where reference to the Oslo Guidelines could reasonably be made was paragraph (7) of the commentary to draft article 11, where they were already mentioned. The Commission must therefore address two points: the draft text proposed by Mr. Murphy, and where it should be inserted. The text in question read: "In accordance with the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines"), foreign military and civil defence assets should be requested only as a last resort, where there is no comparable civilian alternative to meet a critical humanitarian need (footnote: Guideline 5)". With regard to where it should be placed, he proposed inserting it after the first sentence of paragraph (7).

62. Mr. FORTEAU said that he agreed with the Special Rapporteur that the reference to the Oslo Guidelines would be more appropriate in the commentary to draft article 3, in which humanitarian personnel were mentioned for the first time.

63. Sir Michael WOOD said that it would be preferable not to include the new text but, if the Commission wished to insert it in the paragraph under consideration, it should be careful not to suggest that the idea expressed in guideline 5 of the Oslo Guidelines, namely that civilian assistance was better than military assistance, was a principle. To that end, it should simply include a citation with the exact wording of guideline 5, preceded by an introductory formula such as "The Oslo Guidelines provide that …".

[495] United Nations, OCHA, Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, Revision 1.1, November 2007.

[496] See, above, the 3332nd meeting, para. 76.

64. Mr. HMOUD said that he endorsed Sir Michael's position, but if the citation were included, it should not be in the commentary itself but in a footnote.

65. Mr. PETRIČ said that he agreed with Sir Michael that the Oslo Guidelines established a hierarchy between civilian and military assistance in favour of the former, which, in practice, could work to the detriment of victims, since the most important thing was not the nature of the assistance, civilian or military, but rather its effectiveness.

66. Mr. SABOIA said that, in his view, it was not for the Commission to tell States what kind of assistance they should seek. In addition, it seemed that the guideline in question covered cases in which post-disaster assistance operations might be used as a pretext to interfere in the internal affairs of a country, but that had no bearing on the topic at hand.

67. Mr. KAMTO pointed out that the Oslo Guidelines were mentioned in the commentary to draft draft article 6. They were cited there merely as a document that had helped in drafting the commentaries, and not as setting out rules that the Commission was endorsing.

68. Mr. VÁZQUEZ-BERMÚDEZ said that, since a not insignificant number of States had requested that a reference to the Oslo Guidelines should be included, it was important to mention them, either in paragraph (7) of the commentary to draft article 11 in accordance with Sir Michael's proposal, or in a footnote, as proposed by Mr. Hmoud.

69. Mr. WISNUMURTI said that he had strong reservations concerning the provisions of the Oslo Guidelines, on which the text read out by the Special Rapporteur was based, as they did not reflect the real situation on the ground. His country, Indonesia, had been hit by many disasters, and in such cases the priority was always to coordinate the actions of military and civilian organizations in order to provide the most effective assistance possible. It was for the affected State to decide, based on the circumstances and its needs, what role each actor should play.

70. Mr. NOLTE said that he agreed with Mr. Wisnumurti and Sir Michael ; the wording of the Oslo Guidelines should not be taken out of context and should therefore not be included in the commentary to draft article 11.

71. Mr. FORTEAU said that, like Mr. Nolte, he was of the view that the text in question should not be separated from the instrument to which it belonged. The Oslo Guidelines dealt with the use of military forces to provide assistance in the event of disasters and, as such, were a relevant source for the purposes of the topic. It was therefore appropriate to refer to them, for example in a footnote, which could read: "Concerning the use of military forces for the purposes of disaster assistance, see the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief ("Oslo Guidelines")."

72. Mr. McRAE said that the Commission could not omit a reference to the Oslo Guidelines, as that would give the impression that it had not even considered them. The Commission could perhaps refer to the Guidelines in a footnote, but not in the terms proposed by Mr. Forteau, which suggested that the Commission was incorporating the Guidelines. It should note that it had taken account of the Guidelines, but it must take a position with respect to the hierarchy they established between military and civilian assistance, with which several members clearly did not agree.

73. Ms. JACOBSSON said that she shared the views expressed by Mr. Petrič and Mr. Wisnumurti and, like Mr. McRae, considered that the Commission could not simply make reference to the Oslo Guidelines, even in a footnote, without commenting on their content.

74. Mr. MURPHY said that the Commission did not need to refer to the Oslo Guidelines in the commentary to draft article 11 in order to show that it had taken them into consideration, since they were already mentioned in the second footnote to paragraph (24) of the commentary to article 3. The issue was whether a reference to the Guidelines was necessary in the context of draft article 11.

75. Sir Michael WOOD said that he remained convinced that the reference to the Oslo Guidelines did not add anything in the context of article 11. If, however, the Commission decided to mention them in a footnote, it could perhaps begin: "The Oslo Guidelines contain the following:". That would be followed by the quotation of the relevant provision and a sentence recalling that it must be read in the context of the Guidelines as a whole.

76. Mr. NOLTE said that, when he had spoken of the need to read the provision in question in context, he had not meant in the context of the Guidelines as a whole, but rather of guideline 5, from which the sentence was taken, but which was not particularly clear when read in full. The Commission could simply add a neutral footnote, as proposed by Mr. Forteau, in which it would quote guideline 5 in full, without further commentary.

77. Mr. VALENCIA-OSPINA (Special Rapporteur) said that it was clear from the discussion that the majority of Commission members were opposed to including in the commentary to draft article 11 the wording proposed by Mr. Murphy based on paragraph 5 of the Oslo Guidelines. He would not go against the majority, but recalled that a reference to that particular provision had been proposed for inclusion in response to an express request made by many States, which he was duty-bound to reflect in his capacity as Special Rapporteur. If the Commission did not cite the text of the provision itself, it could perhaps keep a reference to guideline 5 by inserting what was currently the second footnote to paragraph (27) of the commentary to draft article 3 at the end of the second sentence that paragraph.

The proposal was adopted.

Paragraph (7) was adopted.

Paragraph (8)

78. Mr. FORTEAU, referring to the 2008 judgment by the International Court of Justice in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* case, proposed adding the words "in principle"

after "in the best position" in the first sentence, placing a full stop after "its national response capacity", and amending the second sentence to read: "Having said this, this assessment must be carried out in good faith", in order to recognize that the assessment could not be purely objective but that, regardless of States' room for manoeuvre in that area, the principle of good faith still applied.

79. Mr. NOLTE said that this principle was undoubtedly an objective standard and the assessment could therefore not be considered not to be objective since it must be carried out in good faith. The issue was to what extent the margin of appreciation of an affected State could be limited by an objective criterion such as the obligation of good faith.

Paragraph (8) was adopted with the amendments put forward by Mr. Forteau.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

80. Sir Michael WOOD proposed deleting the words "the Commission does not encourage" and replacing "to seek assistance" with "should not seek assistance" in the first sentence.

With that amendment, and with a minor drafting change to the English version, paragraph (10) was adopted.

The commentary to draft article 11, as amended, was adopted.

The meeting rose at 6 p.m.

3335th MEETING

Thursday, 4 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter IV. *Protection of persons in the event of disasters* (*concluded*) (A/CN.4/L.882 and Add.1)

1. The CHAIRPERSON invited the Commission to pursue its consideration of chapter IV of the draft report and to resume its discussion of the portion contained in document A/CN.4/L.882/Add.1.

E. Text of the draft articles on the protection of persons in the event of disasters (*concluded*)

2. Text of the draft articles with commentaries thereto (*concluded*)

Commentary to draft article 12 (Offers of external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Mr. FORTEAU proposed that, in the final sentence, the word "fundamental" [*fondamental*] be deleted, in order to better reflect the language of the preamble. Furthermore, the phrase "in accordance with draft article 13" [*comme l'indique le projet d'article 13*] should be replaced with the phrase "in accordance with the conditions set forth in draft article 13" [*dans les conditions énoncées dans le projet d'article 13*]. Lastly, the phrase, in the French text, *et sur lequel repose l'ensemble du projet d'articles* was not entirely accurate and it might therefore be preferable to delete it.

3. Mr. KAMTO said that he supported the drafting changes proposed by Mr. Forteau, with the exception of the deletion of the word "fundamental". The principle of sovereignty was generally recognized as just that – fundamental – and there was no reason to delete the word.

4. Mr. SABOIA said that he supported the statement made by Mr. Kamto in favour of retaining the word "fundamental". As for the proposed deletion, in the French text, of the phrase *et sur lequel repose l'ensemble du projet d'articles*, he suggested that the issue was a translation-related one, as there was no problem with the same phrase in the original English text, which read: "which informs the whole set of draft articles".

5. Mr. EL-MURTADI SULEIMAN GOUIDER said that he, too, would prefer to retain the word "fundamental", the addition of which was in no way contrary to the draft articles.

6. Sir Michael WOOD said that he supported all the amendments proposed by Mr. Forteau. In order to reflect the balanced language of the preamble, he proposed further amending the beginning of the final sentence to read: "In line with the principle of the sovereignty of States, stressed in the preamble, and the corresponding primary role of the affected State". Assuming those amendments were acceptable to the Commission, the phrase "which informs the whole set of draft articles" could be retained, as both the principle of sovereignty and the primary role of the affected State would be understood as informing the whole set of draft articles.

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no problem with Mr. Forteau's proposal to add a reference in the final sentence to the conditions under which a State might or might not accept offers of assistance. He agreed with the amendments to the final sentence proposed by Sir Michael and with the retention of

the phrase "which informs the whole set of draft articles". As for the deletion of the word "fundamental", he found it puzzling that, after ten years of stressing the importance of the principle of sovereignty and its corollary of non-intervention, the Commission seemed prepared to strike it from paragraph (2). Nevertheless, he would not stand in the way of consensus and would accept the deletion of that word if the majority of members decided on that course of action.

8. Mr. FORTEAU said that he had proposed deleting the word "fundamental" with a view to better reflecting the language contained in the preamble and the Drafting Committee's discussion of the matter. He supported the further amendments proposed by Sir Michael.

9. The CHAIRPERSON suggested that, based on the proposals made by Commission members, the fourth sentence of paragraph (2) should read: "In line with the principle of the sovereignty of States and the corresponding primary role of the affected State, stressed in the preamble and which inform the whole set of draft articles, an affected State may accept in whole or in part, or not accept, offers of assistance from States or non-State actors in accordance with the conditions set forth in draft article 13." In the French text, the corresponding sentence would read: *Conformément au principe de souveraineté des Etats et au rôle principal de l'Etat touché par une catastrophe, mis en relief dans le préambule et qui informent l'ensemble du projet d'articles, un Etat touché demeure libre d'accepter en totalité ou en partie, ou de ne pas accepter, les offres d'assistance émanant d'Etats ou d'acteurs non étatiques, dans les conditions énoncées dans le projet d'article 13*.

It was so decided.

10. Mr. MURPHY proposed deleting, in the English version of the amended final sentence, the word "corresponding", which did not appear either in the preamble or in the French text of that sentence.

It was so decided.

11. Mr. KITTICHAISAREE proposed that the first three words of the English version of the amended final sentence, "In line with", be replaced with the words "In conformity with".

It was so decided.

12. Mr. FORTEAU suggested that, in the French text, the phrase *et qui informent l'ensemble du projet d'articles* be replaced with the phrase *et qui sous-tendent l'ensemble du projet d'articles*.

It was so decided.

13. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph (2), as amended.

Paragraph (2), as amended, was adopted.

14. Mr. SABOIA said that by striking out the word "fundamental" in the final sentence of paragraph (2) the Commission should not be understood as implying that the principle of sovereignty was not fundamental.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

15. Sir Michael WOOD proposed that the first sentence of paragraph (5) be amended to read: "Non-governmental organizations or entities may be well placed, because of their nature, location and expertise, to provide assistance in response to a particular disaster."

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

16. Mr. KAMTO proposed that, in the French text, the unusual word *myriade* contained in the second indent of paragraph (8) be replaced with a more readily understandable word such as *multiplicité*. In the third indent, the word *qualifiées* was unclear; timeliness could not be said to qualify an obligation; rather, it should reinforce the obligation. He therefore proposed replacing the word *qualifiées* with the words *renforcées*. The last sentence seemed incorrect: the word "due" should not be understood to refer to the substance of a request, but should instead refer to the effective, or careful, consideration of a request. He therefore proposed replacing the words *la teneur de la demande* with the words *l'effectivité de l'examen de la demande*. The sentence might be further clarified by a fifth sentence that would read: *Il signifie que le destinataire doit examiner la teneur de la demande avant d'y donner réponse*.

17. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he did not oppose the changes proposed by Mr. Kamto. However, he was not in favour of adding a fifth, explanatory sentence.

18. Mr. MURPHY, supporting the changes to the French text proposed by Mr. Kamto, suggested that, in the English version, the word "constellation", in the first indent, be replaced with the word "various"; that the words "are qualified by", in the second indent, be replaced with the word "contain"; and that the words "the substance of the request", in the final sentence of the third indent, be replaced with the phrase "giving the request careful consideration".

It was so decided.

19. Sir Michael WOOD proposed that the two indents under paragraph (8) become paragraphs (9) and (10), respectively.

With those amendments, paragraph (8) was adopted.

The commentary to draft article 12, as a whole, as amended, was adopted.

Commentary to draft article 13 (Consent of the affected State to external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

20. Mr. MURPHY, observing that there seemed to be a disconnect between the statement in draft article 13, paragraph 1, that the provision of external assistance required the consent of the affected State and certain parts of the commentary concerning situations in which there was no functioning Government, suggested that it might be prudent to add the following sentence at the end of paragraph (2): "In the exceptional circumstance of the collapse of the Government of the affected State, consent may not be possible and therefore not required."

21. Mr. HMOUD said that the issue raised by Mr. Murphy was a very sensitive matter and that he could not agree with his suggestion. The issue was already sufficiently covered by paragraph (2) and draft article 18.

22. Mr. KITTICHAISAREE expressed support for Mr. Hmoud's comments. The current situation in the Syrian Arab Republic gave some indication of the complexity and sensitivity of the issue.

23. Mr. NOLTE said that Mr. Murphy had raised a very important issue that the Commission should have debated thoroughly but it had not done so. It could not be resolved by the addition of a single sentence to the commentary during the adoption of the report and should not be taken up at that stage.

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

24. Mr. MURPHY suggested that, in the third sentence, the words "measures to ensure the enjoyment of this right" be changed to "measures to protect this right", in line with the wording of the Human Rights Committee's general comment No. 6[497] referred to in the second footnote to the paragraph. He also suggested that, in the fourth sentence, the words "a violation of the right to life" be altered to "a violation of the State's obligation not to arbitrarily deprive persons of life".

25. Mr. NOLTE said that, while Mr. Murphy's second suggestion reflected the wording of part of article 6 of the International Covenant on Civil and Political Rights, there was no need for the right to life always to be formulated as an obligation. In the present context, such wording would invite speculation as to the circumstances in which a State might be able to deprive persons of life if such deprivation was not portrayed as arbitrary. The Commission should not send the wrong signal.

[497] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V.

26. Mr. SABOIA said that he shared some of Mr. Nolte's concerns and that he was completely opposed to the second amendment proposed by Mr. Murphy, which would distort the meaning of the sentence in question.

27. Ms. ESCOBAR HERNÁNDEZ said that the paragraph did not refer to circumstances in which it would be considered that a State had the right to deprive a person of life non-arbitrarily, but to the general recognition of the right to life and protection thereof as a State responsibility in the context of natural disasters. Regardless of her views on the death penalty – which she opposed – she could not support Mr. Murphy's second proposed amendment.

28. Mr. MURPHY said that his proposal had nothing to do with the death penalty. It was simply intended to bring the wording of the paragraph into line with that of the International Covenant on Civil and Political Rights. Another option would be to insert the words "the State's obligation with respect to" between "violation of" and "the right to life", which would avoid using the word "arbitrarily".

29. Mr. NOLTE said that it was not always necessary to couch a right in terms of an obligation, even if that was the wording of the provision establishing the right. Referring to rights and the violation of those rights was normal and appropriate usage.

30. Mr. KITTICHAISAREE said that he was not satisfied with Mr. Murphy's suggestions, which might be misunderstood. Instead, he proposed that paragraph 5 of the Human Rights Committee's general comment No. 6, quoted in the second footnote to the paragraph, be moved in its entirety to the body of the text, leaving the footnote to provide just the reference, which would avoid any need for the Commission to interpret the Committee's words. He therefore proposed that the third sentence of paragraph (4) be altered to read: "The Human Rights Committee has clarified in relation to the right to life, as embodied in article 6 of the International Covenant on Civil and Political Rights, that the expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."

31. Mr. WAKO said that, if paragraph (4) were to be amended at all, it should be with a view to emphasizing the non-derogable nature of the right to life under the International Covenant on Civil and Political Rights, even in a state of emergency declared in relation to a disaster. The focus should be on strengthening the State's duty to protect life.

32. Mr. McRAE, expressing support for Mr. Wako's comments, said that Mr. Murphy's proposal to alter the wording "a violation of the right to life" did not seem to enjoy support and was creating complications; however, his suggested amendment to the third sentence of paragraph (4) was acceptable.

33. The CHAIRPERSON asked whether the Commission agreed to amend the third sentence of paragraph (4) as suggested by Mr. Murphy but to leave the rest of the paragraph unchanged.

34. Mr. MURPHY said that, while he could go along with that approach, he found some of the rationales adduced unfortunate.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

35. Mr. PARK said that he supported the substance of the paragraph, but wondered whether it might be more appropriately placed in the commentary to draft article 18.

36. Sir Michael WOOD suggested that the word "binding" be deleted from the first sentence of the paragraph because Security Council resolution 688 (1991) of 5 April 1991, referred to in the first footnote to the paragraph, had not in fact been a resolution under Chapter VII of the Charter of the United Nations; indeed, there had been much debate as to whether that resolution was binding. He considered the placement of the paragraph to be appropriate because the latter was connected to the question of consent; it served as a reminder that the Security Council could very occasionally take measures that overrode the need for consent.

37. Mr. HMOUD said that the deliberations of the Security Council on resolutions 2139 (2014) of 22 February 2014 and 2165 (2014) of 14 July 2014 had been guided by the work of the Commission on the issue of the arbitrary withholding of consent; as such, the paragraph was in the correct place.

Paragraph (6), as amended by Sir Michael Wood, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

38. Mr. FORTEAU suggested that reference should be made in the footnote to paragraph 145 of the judgment of the International Court of Justice of 4 June 2008 in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, which dealt specifically with the issue of the exercise of discretion and the obligation of good faith.

39. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed to that suggestion.

With that amendment to the footnote, paragraph (10) was adopted.

Paragraph (11)

40. Sir Michael WOOD suggested that paragraph (11) be moved to the commentary on draft article 17, which covered the termination of external assistance at any time.

41. Mr. FORTEAU said that draft article 13 covered consent and the arbitrary withholding thereof; draft article 17, on the other hand, did not include any provision on withdrawing consent arbitrarily. It would therefore be better to retain the paragraph in its current location.

42. Sir Michael WOOD said that paragraph (11) included a specific example of a situation in which the words "at any time" were not intended to legitimize any arbitrary withdrawal of consent. It was therefore relevant to draft article 17.

43. The CHAIRPERSON suggested that the Commission should adopt the text of the paragraph on the understanding that it might subsequently be moved to the commentary to another draft article.

On that understanding, paragraph (11) was adopted.

Paragraph (12)

44. Sir Michael WOOD suggested that paragraph (12) be placed immediately after paragraph (8) and the remaining paragraphs in the commentary to draft article 13 renumbered accordingly.

It was so decided.

Paragraph (12) was adopted.

Paragraph (13)

45. Mr. KITTICHAISAREE suggested that, in the first sentence, the words "to give the maximum flexibility to affected States" be changed to read: "to give a certain degree of flexibility to affected States".

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

The commentary to draft article 13, as a whole, as amended, was adopted.

Commentary to draft article 14 (Conditions on the provision of external assistance)

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

The commentary to draft article 14 was adopted.

Commentary to draft article 15 (Facilitation of external assistance)

Paragraph (1)

46. Sir Michael WOOD suggested that, for the sake of accuracy, the beginning of the second sentence, which currently read "Its purpose is to ensure that national law accommodates the provision …", be replaced with "This includes ensuring that national law accommodates the provision …"

Paragraph (1), as amended, was adopted.

Paragraph (2)

47. Mr. NOLTE suggested that, in the fourth sentence, the term "non-legal" be changed to "non-prohibited", so as to avoid it being interpreted as "illegal".

48. Mr. ŠTURMA said that he shared Mr. Nolte's concern about the term "non-legal", but suggested that, in the current context, it would be more appropriate to replace it with "non-legislative".

49. Sir Michael WOOD suggested that the term "non-legal" might simply be deleted.

50. Mr. NOLTE said that the point of draft article 15 was to make clear that not every practical measure that might be efficient was permissible or recommended. If the context were removed, that point would be lost. He would defer to the opinion of the Special Rapporteur on that question.

51. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he agreed with Mr. Nolte's remarks. Practical measures must be taken within national laws, but some such measures were not necessarily either expressly reflected or prohibited in legislation or administrative rulings. Mr. Nolte's suggested amendment would embrace that concept while maintaining the emphasis on the need to comply with internal law.

52. Mr. SABOIA suggested that the words "to the extent that they are not explicitly prohibited" could be added at the end of the fourth sentence.

53. Sir Michael WOOD said that he supported Mr. Saboia's approach but was not in favour of using the word "explicitly". He suggested that the fourth sentence be reformulated to read: "It can also extend to practical measures designed to facilitate external assistance, provided that they are not prohibited by national law."

Paragraph (2), as amended by Sir Michael Wood, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

54. Sir Michael WOOD said that, in the second sentence, the word "accommodated" should be altered to "facilitated".

Paragraph (4), as amended, was adopted.

Paragraph (5)

55. Mr. KITTICHAISAREE proposed a minor editorial amendment to the English version of the text.

Paragraph (5), as amended, was adopted.

Paragraph (6)

56. Mr. KITTICHAISAREE suggested that the word "physically" should be deleted from the second sentence, as information was increasingly provided in electronic form. He further suggested that, in the same sentence, the words "including their translation into other languages" be inserted between "ease of access to such laws" and "without creating the burden on the affected State". That would reflect the balance achieved in the Commission's previous debates on the need to provide translations of internal laws into English or French for use by international agencies.

57. Sir Michael WOOD said that it would indeed be a burden for a State to have to arrange for such translations, particularly when it was already affected by a disaster. He suggested including the words "where necessary" or "where appropriate" after "including" in order to allay that concern.

58. Mr. VALENCIA-OSPINA (Special Rapporteur) agreed with Sir Michael. It was not his intention to add to the burden of an affected State by imposing the provision of translations as a condition of assistance.

Paragraph (6), as amended by Mr. Kittichaisaree and Sir Michael Wood, was adopted.

The commentary to draft article 15, as a whole, as amended, was adopted.

Commentary to draft article 16 (Protection of relief personnel, equipment and goods)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

59. Sir Michael WOOD said that the references in paragraphs (4) and (5) to an obligation of result and an obligation of conduct should be omitted, particularly as the Commission had decided not to include such language in its draft articles on the responsibility of States for internationally wrongful acts.[498] The second sentence of paragraph (4) would need to be redrafted accordingly.

60. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed that the second sentence of paragraph (4) be modified to read: "In this case, the duty imposed on the affected State is not to cause harm to the personnel, equipment and goods involved in external assistance through acts carried out by its organs."

Paragraph (4), as amended, was adopted.

Paragraph (5)

61. Sir Michael WOOD said that, in general, the paragraph downplayed too much the obligation of the affected State to protect its population. He proposed deleting the second sentence, in which mention was made of an obligation of conduct. The fifth sentence should be strengthened; it should be recast to read: "It requires the State to act in a diligent manner in seeking to avoid the harmful events that may be caused by non-State actors."

Paragraph (5), as amended, was adopted.

[498] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

Paragraph (6)

62. Sir Michael WOOD said that, in the second sentence, which was very long, the word "situations" should be replaced with "situation". At the beginning of the third sentence, the word "Likewise" should be replaced with "The same applies to".

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

63. Sir Michael WOOD proposed that, in the last sentence, the words "are generally" be replaced with "may be".

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were adopted.

The commentary to draft article 16, as a whole, as amended, was adopted.

Commentary to draft article 17 (Termination of external assistance)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

64. Sir Michael WOOD said that, in the last sentence, he would prefer to delete the words "and bringing to an end the legal regime under which the assistance was being provided".

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

65. Mr. NOLTE proposed that, in the second sentence of paragraph 5, "parties" be replaced with "actors", which was the word normally used by the Commission.

It was so decided.

66. Sir Michael WOOD proposed that paragraph (11) of the commentary to draft article 13, which the Commission had adopted on the understanding that it might be moved, be placed after paragraph (5). The subsequent paragraphs should be renumbered accordingly.

It was so decided.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) was adopted.

The commentary to draft article 17, as a whole, as amended, was adopted.

Commentary to draft article 18 (Relationship to other rules of international law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

67. Mr. FORTEAU said that the first two sentences, in which reference was made, either implicitly or explicitly, to the *lex specialis* principle, were contradicted by the third sentence, which set aside that principle. As he understood it, draft article 18, paragraph 1, was not limited to the *lex specialis* principle, but was a "without prejudice" clause regarding all rules of international law applicable to disasters. If that was the case, the wording of paragraph 2 should be reviewed.

68. Mr. NOLTE said that he shared Mr. Forteau's concern. The contradiction resulted from the fact that, on first reading, draft article 18 had referred to the *lex specialis* principle. Bearing in mind the subsequent changes to the draft article, remaining references to that principle should be removed from the commentary.

69. After a discussion in which Mr. NOLTE and Mr. VALENCIA-OSPINA (Special Rapporteur) took part, Mr. FORTEAU proposed that the first two sentences be merged into one, to read: "The reference to 'other rules' in the title aims at safeguarding the continued application of the dense web of existing obligations regarding matters covered by the present draft articles."

70. Mr. ŠTURMA said that the formulation "other applicable rules of international law" was contained in paragraph 1 of draft article 18, not paragraph 2, as stated in the final sentence. That sentence should be amended accordingly.

71. Sir Michael WOOD proposed deleting the words "of the dense web".

Paragraph (2) was adopted with those amendments.

Paragraph (3)

72. Mr. FORTEAU proposed that the words "in particular", set off by commas, be inserted after "include" at the start of the second sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

73. Mr. NOLTE proposed that, in the last sentence, the phrase "as a reflection of the *lex specialis* principle" be deleted.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

74. Mr. KITTICHAISAREE said that he wished to propose amending paragraph (9) to read:

"In such situations, the rules of international humanitarian law shall be given precedence over those contained in the present draft articles, which would continue to apply 'to the extent' that legal issues raised by a disaster would not be covered by the rules of international humanitarian law. The present draft articles would thus contribute to filling possible legal gaps in the protection of persons affected by disasters occurring during an armed conflict while still maintaining, for situations regulated by both the draft articles and international humanitarian law, the precedence of international humanitarian law. In particular, the present draft articles are not to be interpreted as representing an obstacle to the ability of humanitarian organizations to conduct, in times of armed conflict (be it international or non-international, even when occurring concomitantly with disasters), their humanitarian activities in a principled manner in accordance with the mandate assigned to them by international humanitarian law."

75. Sir Michael WOOD said that the expressions "shall be given precedence over", in the first sentence, and "the precedence of international humanitarian law", in the second sentence, did not strike him as common legal expressions. In the first sentence, he proposed replacing the words "would not be covered by" with "are not covered by". The parentheses in the last sentence should be closed after the word "non-international". It was not clear what was meant by the words "in a principled manner" in the final sentence; he therefore suggested that they should be deleted.

76. Ms. JACOBSSON said that she endorsed the comments made by Sir Michael. Given that some principles of international humanitarian law, such as the principle of humanity or the Martens clause, did not give any guidance on what to do in specific situations, the expression "shall be given precedence" might not be the most appropriate; perhaps a better alternative could be found. She supported the deletion of the phrase "in a principled manner".

77. Mr. PETRIČ proposed deleting the word "possible" before the words "legal gaps" in the second sentence, as it introduced an unnecessary hypothetical element.

78. Mr. KITTICHAISAREE said that the wording referred to by Sir Michael and Ms. Jacobsson in fact appeared in the original text. He suggested that the expression "shall be given precedence over" might be replaced with "shall be applied as *lex specialis*".

79. Mr. HMOUD said that, although he could go along with the wording proposed by Mr. Kittichaisaree, he suggested that the phrase "shall be given precedence" could be replaced with "shall prevail". He agreed with others that the words "in a principled manner" should be deleted.

80. Mr. SABOIA said that he was also in favour of deleting the word "possible" from the second sentence, the words "in a principled manner" from the last sentence and the reference to "precedence over". It would be acceptable to state that both the draft articles and international humanitarian law applied, as it was understood that in an armed conflict the latter would apply without prejudice to the application of the law on disaster situations and that *lex specialis* did not override the other parts of international law entirely. He was not in favour of replacing "shall be given precedence over" with "shall prevail", as it suggested absolute precedence and did not properly reflect the intended meaning.

81. Mr. VALENCIA-OSPINA (Special Rapporteur) said that Mr. Kittichaisaree's proposal to introduce a reference to *lex specialis* in paragraph (9) would undermine what had just been agreed with respect to paragraph (2). An effort should be made to find an alternative formulation.

82. Mr. NOLTE recalled that there had originally been a reference to *lex specialis* in the text of draft article 18, paragraph 1, that had been adopted on first reading, but that it had subsequently been removed. The objections to referring to *lex specialis* applied only to the commentary to draft article 18, paragraph 1, and not necessarily to paragraph 2, with respect to which it was appropriate to refer to *lex specialis*.

83. Mr. FORTEAU said that he supported Mr. Nolte's position. The formulation "to the extent that" in draft article 18, paragraph 2, had been drawn from article 55 of the 2001 draft articles on the responsibility of States for internationally wrongful acts, which dealt with the principle of *lex specialis*. The use of that expression in paragraph 2 thus covered the principle of *lex specialis*.

84. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Sir Michael that, in the first sentence, the words "would not be covered by" should be replaced with "are not covered by".

85. Mr. KITTICHAISAREE said that, taking into account the comments made by other members, the proposed text would read:

"In such situations, the rules of international humanitarian law shall be applied as *lex specialis*, whereas the other rules contained in the present draft articles would continue to apply 'to the extent' that legal issues raised by a disaster are not covered by the rules of international humanitarian law. The present draft articles would thus contribute to filling legal gaps in the protection of persons affected by disasters during an armed conflict, while international humanitarian law shall prevail in situations regulated by both the draft articles and international humanitarian law. In particular, the present draft articles are not to be interpreted as representing an obstacle to the ability of humanitarian organizations to conduct, in times of armed conflict (be it international or non-international), even when occurring concomitantly with disasters, their humanitarian activities in accordance with the mandate assigned to them by international humanitarian law."

86. Mr. HMOUD proposed deleting the word "other" before "rules" in the first sentence.

Paragraph (9), as amended, was adopted.

The commentary to draft article 18, as a whole, as amended, was adopted.

Section E, as amended, was adopted.

87. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of the report contained in document A/CN.4/L.882, with specific regard to paragraphs 9 and 10, whose adoption had been left in abeyance.

C. Recommendation of the Commission (*concluded*)*

Paragraph 9 (*concluded*)*

88. Mr. LLEWELLYN (Secretary to the Commission) said that the suggested recommendation, which had been circulated to the members, read: "At its 3335th meeting, on 4 August 2016, the Commission decided, in accordance with article 23 of its statute, to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters."

Paragraph 9 was adopted.

Section C was adopted.

D. Tribute to the Special Rapporteur (*concluded*)*

Paragraph 10 (*concluded*)*

Paragraph 10 was adopted by acclamation.

Section D was adopted.

Chapter IV of the draft report of the Commission, as a whole, as amended, was adopted.

89. Mr. VALENCIA-OSPINA (Special Rapporteur) thanked the members of the Commission for their generous tribute and the support they had extended to him over the course of his work on the topic. Through the collective efforts of all the members, the Commission had succeeded in producing a final outcome of which it could legitimately feel proud, on a topic of the utmost contemporary relevance. The Commission had now completed its work and it was for the General Assembly to take the decision it deemed appropriate based on the Commission's recommendation. It had been an honour and a source of great satisfaction to have been entrusted with the task of serving as Special Rapporteur, a task he could not have accomplished without the cooperation of current and previous members of the Commission and the secretariat, as well as the many students from around the world who had volunteered their time to contribute to the project. It was gratifying to see that the topic had aroused a great deal of interest in international academic circles.

90. Mr. WAKO said that he wished to express his appreciation for the work of the Special Rapporteur, whose experience, diplomacy and drafting skills had ensured the success of the project. He was confident that, in years to come, protection of persons in the event of disasters would be remembered as one of the most important topics dealt with by the Commission.

Chapter VI. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (A/CN.4/L.884 and Add. 1–2)

91. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, chapter VI of the draft report, beginning with the text contained in document A/CN.4/L.884.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

92. Mr. MURPHY said that the footnotes should be reviewed by the Secretariat in order to ensure consistency. At the end of the second sentence, he proposed adding the word "the" before the last instance of "subsequent agreements".

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 7

93. Mr. MURPHY said that, in the first sentence, the word "treaty" should be inserted before "bodies". In the final sentence, the word "proposing" should perhaps be replaced with "proposed".

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraphs 9 to 11

94. The CHAIRPERSON suggested that the adoption of paragraphs 9 to 11 be deferred.

It was so decided.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading

1. Text of the draft conclusions

Paragraph 12

Paragraph 12 was adopted.

95. The CHAIRPERSON invited the Commission to consider the portion of chapter VI contained in document A/CN.4/L.884/Add.1.

96. Mr. NOLTE (Special Rapporteur) recalled that he had circulated a note intended to facilitate preparations for the adoption of chapter VI of the report on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. Document A/CN.4/L.884/Add.1 consisted almost entirely of the text of the commentaries which the Commission had already adopted in 2013, 2014 and 2015. The note drew attention to all the proposed substantive changes from the

* Resumed from the 3332nd meeting.

texts which the Commission had already adopted. The first main change was the insertion of subheadings, relating to a particular paragraph or sentence within a paragraph, in order to improve the readability of the text. The second set of changes concerned references to decisions of domestic courts. Following proposals made during the debate on the fourth report (A/CN.4/694) and the withdrawal of the proposal to have a separate draft conclusion on the use of subsequent agreements and subsequent practice by domestic courts, he had added a few new paragraphs and footnotes, specific details of which were provided in the note he had circulated, with references to decisions of domestic courts. Document A/CN.4/L.884/Add.2 contained the draft conclusions adopted at the current session together with the commentaries that had not yet been considered.

The meeting rose at 1 p.m.

3336th MEETING

Thursday, 4 August 2016, at 3 p.m.

Chairperson: Mr. Gilberto Vergne SABOIA (Vice-Chairperson)

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter VI. ***Subsequent agreements and subsequent practice in relation to the interpretation of treaties*** **(*continued*) (A/CN.4/L.884 and Add.1–2)**

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI of the draft report contained in document A/CN.4/L.884/Add.1, paragraph by paragraph.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*continued*)

2. Text of the draft conclusions with commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Introduction

Paragraph (1)

2. Mr. MURPHY asked whether the introductory paragraph would be inserted before the text of draft conclusion 2 [1] or whether it was rather a general introduction to the draft conclusions that would appear before draft conclusion 1, which was currently in document A/CN.4/L.884/Add.2. He also wondered whether it was really necessary.

3. Mr. NOLTE (Special Rapporteur) said that paragraph (1) would in principle precede draft conclusion 1. The second sentence was an important one, but the idea expressed in it could be found elsewhere in the draft commentaries. He would not insist on retaining the paragraph if there were compelling reasons for its deletion.

4. Mr. MURPHY said that one compelling reason might be that it would be difficult to justify having an introductory paragraph, most of which was reproduced in the commentary to draft conclusion 1, appear before a draft conclusion that itself was introductory in nature.

5. Mr. TLADI said that the idea expressed in the second sentence of the paragraph could be found in paragraph (4) of the commentary to draft conclusion 2 as well as to some extent in paragraph (1) of that conclusion. He therefore agreed that paragraph (1) should be deleted.

Paragraph (1) was deleted.

Commentary to draft conclusion 2 [1] (General rule and means of treaty interpretation)

Paragraph (1)

Paragraph (1) was adopted.

6. Mr. MURPHY noted that the Special Rapporteur had inserted subheadings among the paragraphs of the commentary that subdivided it based on the sentences, paragraphs or subparagraphs of the draft conclusions. Those subheadings, beginning with the first one, seemed questionable and should be reviewed.

7. Sir Michael WOOD, supported by Mr. KAMTO and Mr. PARK, said that it might be sufficient simply to indicate the number of the sentence, paragraph or subparagraph to which the commentary referred and to delete the subheadings.

8. Mr. NOLTE (Special Rapporteur) said that, while he would not be opposed to the deletion of the letters preceding the subheadings, he would prefer the Commission to review the text of the subheadings themselves, which he believed made the text more readable.

9. Mr. ŠTURMA said that, given the complexity of the topic, the subheadings seemed useful.

10. The CHAIRPERSON suggested that the Commission should consider each subheading before considering the paragraphs themselves.

It was so decided.

Paragraph 1, first sentence—general rule of interpretation and interrelationship between articles 31 and 32

11. Mr. MURPHY said that the first part of the subheading should be deleted; the second part should be retained,

however, because the topic was indeed both the general rule and the complementary rule of interpretation.

The subheading, as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

12. Mr. NOLTE (Special Rapporteur) said that Sir Michael had suggested that, in the second sentence of the paragraph, the quotation from article 32 of the 1969 Vienna Convention should reproduce the entire relevant text in order to avoid any ambiguity. The second part of the sentence would therefore read: “to which recourse may be had in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 leaves the meaning of the treaty or its terms ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable”.

Paragraph (3), as amended, was adopted.

Paragraph 1, second sentence—the Vienna Convention rules on interpretation as customary international law

13. Mr. MURPHY said that the word “as” should be replaced with “and” in order to avoid giving the impression that the Commission was of the opinion that the relevant provisions of the 1969 Vienna Convention were all part of customary international law.

The subheading, as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph 2—article 31, paragraph 1, as part of a single integrated rule

14. Mr. MURPHY wondered whether the subheading reflected the content of the draft conclusion or the commentary. It should reflect the draft conclusion; he therefore suggested that the subheading read: “Paragraph 2—rule contained in article 31, paragraph 1”.

15. Sir Michael WOOD said that article 31 as a whole was generally considered to constitute the general rule for the interpretation of treaties. Paragraph 1 of that article alone could not therefore be described as constituting a rule.

16. Mr. NOLTE (Special Rapporteur) said that, in order to not delay the Commission’s work, the subheading could simply refer to the paragraph in question.

17. Mr. KAMTO said that, while he appreciated the Special Rapporteur’s efforts to provide subheadings, he was afraid that this approach simply led to problems, especially since it seemed to be neither systematic nor coherent, as demonstrated by the Special Rapporteur’s willingness to drop the wording of the current subheading.

18. The CHAIRPERSON said that, while he had taken note of Mr. Kamto’s comments, he took it that the Commission wished to adopt the current subheading.

The subheading, as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph 3—article 31, paragraph 3, as an integral part of the general rule of interpretation

19. Mr. MURPHY said that only the reference to the paragraph should be retained, so that the subheading would read: “Paragraph 3—article 31, paragraph 3”.

20. Mr. McRAE said that members should consult with the Special Rapporteur to agree on a standard for subheadings that the Commission could adopt easily.

21. The CHAIRPERSON said that, in view of the objections being raised to the subheadings, it would indeed be preferable, with the agreement of the Special Rapporteur, to suspend consideration of them so as not to unduly delay the discussion.

22. Mr. TLADI said that, while he agreed with the Chairperson, he was concerned that the subheadings might influence the content of the adopted paragraphs and therefore could not be considered separately.

Consideration of the subheadings was suspended.

Paragraphs (8) to (16)

Paragraphs (8) to (16) were adopted.

Commentary to draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

23. Mr. TLADI said that the word “ordinary” should be deleted from the second sentence because the meaning of the text of a treaty should simultaneously capture the ordinary meaning of the terms used in the treaty, the context of the treaty, its objects and purposes, in particular if, as the Special Rapporteur had said, the Commission wished to remain true to the meaning of article 31 of the 1969 Vienna Convention, which referred to all those aspects.

24. Mr. MURASE said that the sentence would be meaningless without the word “ordinary”.

25. Mr. FORTEAU said that he agreed with Mr. Tladi’s proposal: while the “ordinary meaning” was indeed a means of interpretation, as underlined by the Special Rapporteur, article 31 referred to the ordinary meaning of “the terms” and not “the text”. The meaning of the latter was the end result of the interpretation process as a whole described in article 31.

26. Mr. ŠTURMA, echoing Mr. Murase’s remark, suggested that the words “the text” be replaced with “the terms” in order to make the sentence’s meaning clear.

27. Mr. NOLTE (Special Rapporteur) said that he agreed with that proposal because the end of the sentence indicated that it was one of a number of means of interpretation.

28. Mr. FORTEAU said that proposal would not be consistent with the quotation that followed, which stated that the text of the treaty included the ordinary meaning of the terms, the context of the treaty, its objects and purposes. It would be simpler to delete the phrase "the ordinary meaning of" so that the sentence would read: "Analysing the text of a treaty, in particular, is also such a means."

29. Mr. NOLTE (Special Rapporteur) said that it would be more expedient to delete the second sentence, which would not affect the meaning of the paragraph.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (13)

Paragraphs (3) to (13) were adopted.

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

Paragraph (12)

30. Mr. NOLTE (Special Rapporteur) said that Sir Michael had drawn his attention to an important judicial decision that it would be worth mentioning; he therefore proposed amending the footnote to the paragraph, the last sentence of which was in any case not relevant. The current text of the footnote should be deleted and replaced with: "A common act may consist of an exchange of letters between the parties on a particular matter. See High Court of the Republic of Singapore: *Government of the Lao People's Democratic Republic* v. *Sanum Investments Ltd.*, [2015] SGHC 15, available from: www.italaw.com/sites/default/files/case-documents/italaw4107.pdf, pp. 25–27, paras. 70–78."

Paragraph (12), as amended, was adopted.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

Paragraph (15)

31. Mr. MURPHY said that, in order to make the paragraph more readable, the second sentence should be split into two separate sentences. The first new sentence would end with the words "the interpretation of the Joint Declaration"; the second would begin with the words "As evidence, the party pointed to a booklet that stated that it was compiled …". The beginning of the last sentence should likewise be amended to read "The Court did not find that it established the purpose of the booklet …".

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (34)

Paragraphs (16) to (34) were adopted.

Paragraph (35)

32. Mr. MURPHY said that one of the two occurrences of the word "clearly" should be deleted from the last sentence.

Paragraph (35), as amended, was adopted.

Paragraphs (36) and (37)

Paragraphs (36) and (37) were adopted.

Commentary to draft conclusion 5 (Attribution of subsequent practice)

Paragraphs (1) to (22)

33. Mr. KAMTO pointed out that the draft contained a subheading marked (*a*) but there was no subheading (*b*) later in the text. The text needed editing.

34. Mr. NOLTE (Special Rapporteur) thanked Mr. Kamto and said that he would make the necessary correction.

Paragraphs (1) to (22) were adopted.

Commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice)

Paragraphs (1) to (22)

Paragraphs (1) to (22) were adopted.

Paragraph (23)

35. Mr. TLADI said that the second sentence should read: "A parallel conduct by parties may suffice."

Paragraph (23), as amended, was adopted.

Paragraphs (24) and (25)

Paragraphs (24) and (25) were adopted.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation)

Paragraphs (1) to (17)

Paragraphs (1) to (17) were adopted.

Paragraph (18)

36. Mr. MURPHY said that, in the first sentence of the English text, the word "both" should be deleted. Furthermore, at the end of the third sentence, the phrase "but exclusively by the passenger's state of health" should be deleted, because that circumstance had been upheld in only one case, *Air France* v. *Saks*.

Paragraph (18), as amended, was adopted.

Paragraph (19)

Paragraph (19) was adopted.

Paragraph (20)

37. Mr. MURPHY said that, in the second sentence of the English text, the words "selectively to invoke" should be replaced with "selective invocation of".

Paragraph (20), as amended, was adopted.

Paragraphs (21) to (38)

Paragraphs (21) to (38) were adopted.

Commentary to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time)

Paragraphs (1) to (20)

Paragraphs (1) to (20) were adopted.

Commentary draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

38. Mr. MURPHY expressed surprise that paragraph (3) dealt only with specificity, while paragraph 1 of draft conclusion 9 [8] dealt with both clarity and specificity. He therefore proposed the insertion of a new paragraph (3) following the current paragraph (2) to deal with the concept of clarity and which would use much the same language as the current paragraph (3): "The interpretative weight of subsequent agreements or practice in relation to other means of interpretation often depends on the clarity of the agreement, in particular practice clearly establishing a consistent view among the parties as to interpretation of the treaty concerned".

39. Mr. NOLTE (Special Rapporteur) said that he was not sure that it was necessary to address the notion of clarity in a new paragraph with language modelled on the first sentence of paragraph (3). He proposed, in response to Mr. Murphy's concern, that the phrase "their clarity and" be inserted before "their specificity" in the first sentence of paragraph (3).

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (14)

Paragraphs (4) to (14) were adopted.

Commentary to draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

40. Mr. MURPHY said that, in the first sentence, the words "of the parties" should be replaced with "of all the parties".

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

41. Mr. TLADI said that, in the first sentence, the statement "equivocal conduct by one or more parties will normally prevent the identification of an agreement" was not really supported by the quoted excerpt from the *Beagle Channel* case, which did not deal with equivocal conduct as such but rather the possible permanent effect that such conduct might have on the identification of an agreement. The paragraph should therefore be amended accordingly.

42. Mr. NOLTE (Special Rapporteur) said that the Court of Arbitration decision was not limited to the temporal dimension described by Mr. Tladi. It also dealt with the issue of ambiguity and the latter's effects on determination of whether an agreement existed. That aspect might be made clearer, but there was no need to amend the first sentence.

43. Mr. MURPHY said that, at the end of the first sentence, the words "so" and "that it precludes the identification of an agreement" should be deleted.

44. Mr. NOLTE (Special Rapporteur) said that he did not entirely agree with that proposal but would not oppose it if it was acceptable to Mr. Tladi.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (21)

Paragraphs (6) to (21) were adopted.

Paragraph (22)

45. Mr. MURPHY said that, in the second sentence, the word "provided" should be replaced with "provides". The end of the last sentence should be rewritten to read: "whose rules preclude using the practice of the parties, and their silence, from being used for the purpose of interpretation".

Paragraph (22), as amended, was adopted.

Paragraphs (23) to (25)

Paragraphs (23) to (25) were adopted.

46. The CHAIRPERSON suggested that the meeting be suspended to allow the Special Rapporteur and interested members to continue the discussion on the subheadings, which had been suspended.

The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.

47. The CHAIRPERSON said that no definitive decision relating to the subheadings had been reached during the suspension. The Commission would revisit that issue at a later meeting.

Commentary to draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties)

Paragraphs (1) to (23)

Paragraphs (1) to (23) were adopted.

Paragraph (24)

48. Mr. MURPHY said that the phrase "even if the decision is by consensus" should be inserted at the end of the first sentence.

49. Mr. NOLTE (Special Rapporteur) said that he did not think the amendment necessary; the issue of consensus was analysed in detail later in the commentary. The amendment might affect the even-handed tone of the sentence and add a negative connotation.

50. The CHAIRPERSON, speaking as a member of the Commission, said that he was likewise reluctant to accept Mr. Murphy's amendment, which might be construed as implying that decisions taken by consensus did not have the same weight as others.

51. Mr. TLADI said that he had no strong opinion about whether to include the amendment proposed by Mr. Murphy, but it was true that, as confirmed by the Commission's own experience, decisions taken by consensus did not reflect the agreement of all the parties.

52. Mr. MURPHY said that his amendment added nothing that could not already be found in the draft conclusion. There was for example very similar wording at the end of paragraph 3; he simply wished to specify that aspect in paragraph (24). Since the first sentence was rather long, he suggested dividing it into two sentences: a full stop should be inserted following the words "implementing the treaty". In the new following sentence, the word "which" should be replaced with "Those decisions" and the phrase "even if the decision is by consensus", preceded by a comma, would be inserted following "treaty interpretation".

53. Mr. NOLTE (Special Rapporteur) said that he was still not convinced that the amendments were necessary but he would not oppose them.

54. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the paragraph as amended by Mr. Murphy.

Paragraph (24), as amended, was adopted.

Paragraph (25)

Paragraph (25) was adopted.

Paragraph (26)

55. Mr. MURPHY said that the penultimate sentence, which referred to the International Court of Justice decision in the case concerning *Whaling in the Antarctic*, did not accurately reflect the language of the decision. He said that, in that sentence, the words "In still other cases" should be replaced with "In such cases", the words "a legal" should be replaced with "an" and the quotation "'under an obligation to give due regard'" should be replaced with "should give due regard".

56. Mr. NOLTE (Special Rapporteur) proposed that adoption of the paragraph be suspended to allow him time to review the actual wording of the decision.

It was so decided.

Paragraphs (27) to (38)

Paragraphs (27) to (38) were adopted.

Commentary to draft conclusion 12 [11] (Constituent instruments of international organizations)

Paragraphs (1) to (31)

Paragraphs (1) to (31) were adopted.

Paragraph (32)

57. Mr. MURPHY said that the third footnote to the paragraph should be deleted. There were a number of issues that the Commission would revisit on second reading and there was no reason to specifically mention the current one.

58. Mr. NOLTE (Special Rapporteur) said that it was not his intention to note all the issues the Commission might revisit on second reading but he had considered it helpful to include the footnote in question because it dealt with a topic on which members had diverging views, which he believed should be noted.

59. Sir Michael WOOD said that in principle all topics dealt with during first reading could be taken up again during second reading. The footnote was therefore superfluous and should be deleted.

60. Mr. CAFLISCH said that it was worthwhile for the Commission to indicate from time to time that it was undecided about certain topics. The footnote should be retained.

61. The CHAIRPERSON suggested that members accept the opinion of the Special Rapporteur and adopt the paragraph as drafted.

Paragraph (32) was adopted.

Paragraphs (33) to (42)

Paragraphs (33) to (42) were adopted.

62. The CHAIRPERSON said that, since the Commission had yet to take a decision on the subheadings, the draft as a whole would be adopted at a later meeting. He invited members to consider the portion of chapter VI of the draft report contained in document A/CN.4/L.884/Add.2, paragraph by paragraph.

63. Mr. NOLTE (Special Rapporteur) said that he had done his best to accurately reflect the discussions and decisions of the Drafting Committee, in particular with regard to the commentary to paragraph 4 of draft conclusion 13 [12], which described the differing views that had led the Commission to include a "without prejudice" clause in the paragraph.

Commentary to draft conclusion 1 [1a] (Introduction)

Paragraph (1)

64. Sir Michael WOOD said that, in the first sentence, the word "clarifying" should be replaced with "explaining".

65. Mr. NOLTE (Special Rapporteur) agreed.

66. Mr. PARK said that, in the third sentence, the word "ordering" was ambiguous and should be deleted.

67. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with that proposal. The meaning of "elucidating relevant authorities" in the same sentence was not clear to him.

68. Mr. NOLTE (Special Rapporteur) said that the sentence reflected the process for preparing the draft conclusions, which entailed collecting relevant sources considered to be authorities, which were then categorized and organized in a coherent manner so that they were mutually explanatory. He had no objection to the deletion of the word "ordering" but wished to retain the rest of the sentence.

It was so decided.

Paragraph (2)

69. Sir Michael WOOD said that, in the first sentence, the words "as a whole" were superfluous and should be deleted.

It was so decided.

Paragraph (3)

70. Sir Michael WOOD said that, in the second sentence, the words "but also" should be replaced with "as well as". He did not understand why, in the third sentence, the interpretation of domestic law of States was included as an issue not addressed in the draft conclusions. The reader might think that the interpretation by domestic courts of international instruments incorporated into their domestic legal framework was outside the scope of the draft conclusions, which was not the Commission's intention. Lastly, he suggested that the final sentence, which bore no relation to the rest of the paragraph, could be deleted.

71. Mr. FORTEAU said that he agreed with the proposal to delete the final sentence. In addition, the third sentence should be amended by replacing the phrase "the interpretation of secondary rules of an international organization" with "the interpretation of the rules adopted by international organizations (secondary rules)".

72. Mr. TLADI, Mr. MURPHY and Mr. PARK agreed that the final sentence should be deleted.

73. Mr. NOLTE (Special Rapporteur) said that he accepted the first amendment suggested by Sir Michael and also agreed that the reference to the interpretation of domestic law of States should be deleted from the third sentence. He did not agree, however, that the final sentence should be deleted; it was linked to the third and opened new avenues for reflection by drawing the reader's attention to other sources of international law applicable to the parties to a treaty.

74. Mr. CAFLISCH, Mr. ŠTURMA and Mr. McRAE agreed that the final sentence should be retained.

75. Mr. FORTEAU said that, if the fourth sentence were retained, then article 31, paragraph 2 (*c*), of the 1969 Vienna Convention should also be cited.

76. At the request of Mr. NOLTE (Special Rapporteur), the CHAIRPERSON said that the adoption of the paragraph should be suspended to allow the Special Rapporteur to consult the Commission members.

Commentary to conclusion 13 [12] (Pronouncements of expert treaty bodies)

Paragraph (1)

77. Sir Michael WOOD said that, at the beginning of the second sentence, the word "Important" should be deleted; he would also like to add the Committee on the Rights of Persons with Disabilities to the list of treaty bodies in that sentence. He suggested that the phrase "Other significant expert treaty bodies include" be deleted from the beginning of the final sentence and replaced with "One can also note".

78. Mr. FORTEAU said that there was an error in the first sentence of paragraph 3 of draft conclusion 13 [12]: the word "and" should be replaced with "or".

79. The CHAIRPERSON said that paragraph 3 of draft conclusion 13 [12] had already been adopted; the latter amendment was an editing change.

80. Ms. ESCOBAR HERNÁNDEZ said that it was a question of the substance of the sentence, not an editing change.

81. Mr. KAMTO agreed that it did affect the meaning and Mr. Forteau had been right to raise the matter. From a procedural point of view, however, he wondered whether the Commission could reopen consideration of a text adopted in plenary. With regard to the first sentence of paragraph (1) of the commentary, in the French text, he wondered whether *surveiller* was the appropriate word; he suggested that *chargés de surveiller ou de favoriser … la bonne application* be replaced with *chargés de veiller … à la bonne application*. He added that the word *favoriser* could be deleted as it was implied by *veiller à*.

82. Mr. NOLTE (Special Rapporteur) said that he did not see a problem with the English text, which referred to "monitoring" and "contributing". In response to Mr. Forteau, he requested that adoption of the paragraph be suspended so that he could consult the members. He accepted the amendments proposed by Sir Michael.

83. The CHAIRPERSON said that the Commission had taken note of the proposals and comments made and would continue its consideration of the draft report at its next meeting.

The meeting rose at 6.10 p.m.

3337th MEETING

Friday, 5 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson,

Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of the environment in relation to armed conflicts (*continued*)[*] (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)

[Agenda item 7]

Report of the Drafting Committee

1. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the seventh report of the Drafting Committee, which concerned the topic "Protection of the environment in relation to armed conflicts", drew attention to document A/CN.4/L.870/Rev.1, which reproduced the text of the draft introductory provisions and draft principles of which the Commission took note in 2015[499] and further technically revised by the Drafting Committee at the current session.

2. He wished to pay a tribute to the Special Rapporteur, Ms. Jacobsson, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee, and to thank the members of the Drafting Committee, for their valuable contributions to a successful outcome, and the secretariat, for its invaluable assistance.

3. Since the Drafting Committee had provisionally adopted draft principle 6 on protection of the environment of indigenous peoples, draft principles 8, 9, 10, 11 and 12 were to be renumbered 9, 10, 11, 12 and 13.

4. The main issue addressed by the Drafting Committee in performing the technical revision of the texts had pertained to the use of square brackets around the word "natural" in several of the draft principles. The square brackets had been included in order to indicate that the Drafting Committee had yet to decide whether the term "environment" or "natural environment" should be used throughout the text, or whether "natural environment" should be used only when the principle related to the "natural environment" during armed conflict, the term that was used in the law of armed conflict. Further information on the discussion of the issue could be found in the statement made by the Chairperson of the Drafting Committee in 2015.[500]

5. The Drafting Committee had decided to remove the square brackets in the text and to indicate in a footnote that the issue of terminology, which had substantive implications, would have to be revisited in the future. The footnote read: "Whether the term 'environment' or 'natural environment' is preferable for all or some of these draft principles will be revisited at a later stage."

6. Furthermore, having noticed some inconsistencies in the text, the Drafting Committee had decided to delete the word "Draft" in the heading of Part Two and to insert the word "natural" before "environment" in the title of draft principle 9. The latter adjustment was not intended to prejudice future discussions on which term would ultimately be used in the draft principles.

7. The Drafting Committee had also observed that the title of Part One had originally been "Preventive measures," and therefore did not correspond to the content of the section, which would now include not only draft principles dealing with preventive measures but also those having a broader temporal scope. The Drafting Committee had therefore found it appropriate to change the title of Part One from "Preventive measures" to "General principles". For reasons of consistency, it had decided to entitle the first two introductory provisions "Scope" and "Purpose".

8. The Drafting Committee had also completed the consideration of the other draft principles referred to it at the current session; they would be presented at a later meeting. He hoped that the Commission will be able to adopt the draft principles on the protection of the environment as contained in document A/CN.4/L.870/Rev.1.

9. The CHAIRPERSON invited the members of the Commission to adopt the text of the draft principles provisionally adopted by the Commission in 2015, as technically revised and renumbered by the Drafting Committee.

Introduction

Draft principles 1 and 2

Draft principles 1 and 2 were adopted.

Part One. General principles

Draft principle 5

Draft principle 5 was adopted.

Part Two. Principles applicable during armed conflict

Draft principles 8 to 10

Draft principles 8 to 10 were adopted.

Draft principle 11

10. Mr. MURPHY said that draft principle 11 had given rise to some degree of disagreement. Some members had thought it should be worded to indicate that attacks against the natural environment by way of reprisals "should be", not "are", prohibited. The reason was that many States had not joined the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) or had filed a reservation or declaration thereon. In his own view, it was doubtful that a prohibition against reprisals existed under customary international law.

11. Mr. PARK and Sir Michael WOOD supported the statement made by Mr. Murphy.

12. Mr. SABOIA said that the prohibition of reprisals in relation to the natural environment was in line with the

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[*] Resumed from the 3324th meeting.

[499] See *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65, para. 134.

[500] See *ibid.*, vol. I, 3281st meeting, pp. 285–288, paras. 1–17.

fact that reprisals in general were subject to a number of restrictions and rules under international law.

13. Mr. HMOUD endorsed that viewpoint. The prohibition of reprisals was part of existing international law and was consonant with the overall objective served by the draft principles, particularly draft principle 4, which called on States to take active measures to protect the environment.

14. Mr. KITTICHAISAREE said that he agreed with Mr. Murphy's comments and hoped that, in the commentary to the draft principle, it would be made clear that, while the overall objective of the draft principles was to encourage States to prohibit attacks against the natural environment using reprisals, the main reason for the diverging opinions was that the prohibition of reprisals should not be applicable to non-international armed conflict.

15. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Mr. Hmoud and Mr. Saboia that the draft principle correctly reflected the current state of international law.

16. Mr. KAMTO supported the position outlined by Mr. Saboia and others: reprisals were not permissible under contemporary international law. Whereas self-defence was part of normal military operations during armed conflict, reprisals were deemed to be an outdated institution that predated the prohibition of the use of force.

17. Ms. ESCOBAR HERNÁNDEZ and Mr. FORTEAU said that they fully supported the position taken by Mr. Saboia and others.

18. Ms. JACOBSSON (Special Rapporteur) said that in the commentary, she intended to refer to the diverging views on reprisals. She recalled that 174 States had become parties to the Additional Protocol I, with only one State having entered a reservation.

With those comments, draft principle 11 was adopted.

Draft principle 12

Draft principle 12 was adopted.

The text of the draft principles, as technically revised and renumbered by the Drafting Committee and as contained in document A/CN.4/L.870/Rev.1, was adopted.

19. The CHAIRPERSON warmly congratulated the Special Rapporteur on the excellent outcome of the Commission's collective work on the topic.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter VI. ***Subsequent agreements and subsequent practice in relation to the interpretation of treaties*** **(continued) (A/CN.4/L.884 and Add.1–2)**

20. The CHAIRPERSON invited the members of the Commission to return to their consideration of the portion of Chapter VI contained in document A/CN.4/L.884/Add.1.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*continued*)

2. Text of the draft conclusions with commentaries thereto (*continued*)

21. Mr. NOLTE (Special Rapporteur) said that he had worked with Mr. Murphy to develop some amendments to ensure that the subheadings properly summarized the content of each subsection.

22. Mr. KAMTO said that since the Commission had little time to deal with such non-substantive matters, they should be left to the Secretariat.

23. Sir Michael WOOD, supported by Mr. McRAE, said that trying to summarize the content of each subsection would be difficult, and it would be better to defer any consideration of the matter until a written proposal could be prepared.

It was so decided.

Commentary to draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties) (*continued*)

Paragraph (26) (*concluded*)

24. Mr. NOLTE (Special Rapporteur) said that, in consultation with Mr. Murphy, he had drafted the following amendment to the fourth sentence: the phrase "they may produce a legal effect" should read "they may also produce an effect", the words "which then puts the parties" should be deleted, and the words in quotation marks, "'under an obligation to give due regard'", should be replaced with "'and the parties thus should give due regard'".

Paragraph (26), as amended, was adopted.

25. The CHAIRPERSON invited the members of the Commission to return to their consideration of the portion of chapter VI contained in document A/CN.4/L.884/Add.2.

Commentary to draft conclusion 1 [1a] (Introduction) (*continued*)

Paragraphs (2) and (3) (*concluded*)

26. Mr. NOLTE (Special Rapporteur) said that, after consulting a number of colleagues, he proposed that the final two sentences in paragraph (3) be moved to paragraph (2), because they related to a matter that was the subject of paragraph (2). They would then read: "The draft conclusions also do not address the interpretation of rules adopted by an international organization, the identification of customary international law or general principles of law. This is without prejudice to the other means of interpretation under article 31, including paragraph 3 (*c*), of the 1969 Vienna Convention according to which the interpretation of a treaty shall take into account any relevant rules of international law applicable in the relations between the parties." The reformulated version met Mr. Forteau's concern that the reference should not be to article 31, paragraph 3 (*c*), alone, but should encompass all other means of interpretation. It also made it clearer that, although the draft conclusions did not address the identification of customary international law and other

sources of law, those sources should be taken into account for the purpose of interpreting treaties within the context of article 31, paragraph 3 (*c*).

Paragraphs (2) and (3), as amended, were adopted.

Document A/CN.4/L.884

1. Text of the draft conclusions (*concluded*)[*]

Draft conclusion 13 [12] (*Pronouncements of expert treaty bodies*)

Paragraph 3

27. Mr. MURPHY recalled that, during the debate the previous day, it had been agreed that in the first sentence of draft conclusion 13 [12], paragraph 3, the words "subsequent agreement and subsequent practice" should be amended to read "subsequent agreement or subsequent practice".

28. Mr. NOLTE (Special Rapporteur) said that he was prepared to accept, on an exceptional basis, the amendment of the wording of draft conclusion 13 [12], paragraph 3, as proposed by Mr. Murphy.

The amendment to draft conclusion 13 [12], paragraph 3, was adopted.

Document A/CN.4/L.884/Add.2

2. Text of the draft conclusions and commentaries thereto (*continued*)

Commentary to draft conclusion 13 [12] (Pronouncements of expert treaty bodies) (*continued*)

Paragraph (1) (*concluded*)

29. Mr. NOLTE (Special Rapporteur) recalled that Sir Michael had proposed the inclusion of a reference to the Committee on the Rights of Persons with Disabilities in the list of committees established under human rights treaties. He therefore proposed to insert it after the reference to the Committee on the Elimination of Discrimination against Women and to add a footnote indicating the relevant article of the Convention on the Rights of Persons with Disabilities providing for the establishment of that Committee.

30. Mr. MURPHY said that as he understood it, the word "Important" would be deleted in the second sentence. It might be more appropriate to place the fourth footnote to the paragraph at the end of the first sentence. The footnotes would then require renumbering.

31. Mr. KAMTO said that in the French version of the text, the phrase *sont chargés de surveiller ou de favoriser* should read *sont chargés de veiller ou de contribuer*.

32. Ms. ESCOBAR HERNÁNDEZ said that the text would be improved by the inclusion of a reference to the Committee on the Rights of the Child in view of the General Assembly's recognition of the increasingly important role being played by that committee.

33. Mr. NOLTE (Special Rapporteur) agreed to the inclusion of the aforementioned reference, the deletion of the word "Important" and the renumbering of the footnotes. He further suggested the deletion of the word "significant" in the third sentence.

Paragraph (1), as thus amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

34. Mr. FORTEAU queried the explanation in the third sentence of why the organs of international organizations had been excluded from the scope of draft conclusion 13 [12]. He suggested that a more convincing reason should be given than the fact that "the present draft articles are focused on elucidating the rules of interpretation of the Vienna Convention".

35. Mr. MURPHY, referring to the final sentence, said he was worried that the inference to be drawn might be that, in some situations, the draft conclusions would apply to the pronouncements of expert bodies that were organs of international organizations. He would prefer to delete the sentence.

36. Mr. PARK endorsed that remark.

37. Sir Michael WOOD proposed the deletion of the bracketed words in the second sentence "the members of which may or may not be free from governmental instruction". He was in favour of retaining the final sentence, subject to the replacement of "draft conclusions" with "draft conclusion". The phrase "in substance and *mutatis mutandis*" could be deleted.

38. Mr. SABOIA said that he regretted that some important organs of international organizations comprising independent experts, such as the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization, had not been mentioned at that point. He therefore strongly backed Sir Michael's proposal.

39. Mr. VÁZQUEZ-BERMÚDEZ said that the final sentence of paragraph (4) was useful. While it did not belabour the issue, it made it clear that draft conclusion 13 [12] could apply to the pronouncements of expert bodies that were organs of international organizations. He supported the deletion of "*mutatis mutandis*".

40. Mr. NOLTE (Special Rapporteur) said that he accepted Sir Michael's proposal to delete the text in parentheses in the second sentence, and, in the final sentence, to replace the words "draft conclusions" with "draft conclusion" and to delete the phrase "in substance and *mutatis mutandis*". He would prefer to retain the remainder of the final sentence for the reasons given by Mr. Saboia and Mr. Vázquez-Bermúdez. In response to Mr. Forteau, he proposed two solutions: the first would consist in deleting the final part of the third sentence, as from the word "since"; the other possibility would be to complete the sentence with the phrase "since the present draft conclusions are not focused on the relevance of international organizations for the interpretation of treaties".

[*] Resumed from the 3335th meeting.

41. Mr. FORTEAU suggested that an alternative solution might consist in combining the third and fourth sentences to read: "The decision to limit the scope of draft conclusion 13 [12] to expert treaty monitoring organs was taken because they are competent with respect to a particular treaty and the primary purpose of this draft conclusion is to clarify the rules applicable to the interpretation of treaties.".

42. Mr. NOLTE (Special Rapporteur) said that the wording proposed by Mr. Forteau presupposed a decision that had not been taken and it was not the moment to define the scope of the draft conclusions.

43. Mr. MURPHY said that, if the final sentence were retained, the Commission should make it quite clear throughout the paragraph that it was talking about expert treaty bodies that were organs of international organizations, and that it thought that an expert body such as the Air Navigation Commission of the International Civil Aviation Organization could *mutatis mutandis* fall within the scope of draft conclusion 13 [12]. The conclusion had been crafted with a particular type of body in mind. He was therefore bothered that the Commission was implying that the whole set of draft conclusions could apply to the organs of all international organizations.

44. Mr. KAMTO said that the simplest answer would be to delete the third sentence, since any attempt to reformulate it would reopen the debate which the Special Rapporteur wished to avoid. Neither Mr. Forteau's proposal nor that of the Special Rapporteur solved the problem. If the sentence was truncated in the manner proposed by the Special Rapporteur, the reader would still not understand the formal reasons. If the sentence were deleted, however, the paragraph would read well.

45. Mr. NOLTE (Special Rapporteur) said that he accepted Mr. Kamto's proposal. Paragraph (4) was the only place in the commentary where the term "expert body" had been used to distinguish between the Committee of Experts on the Application of Conventions and Recommendations and human rights treaty bodies.

46. Mr. HMOUD said that he was in favour of deleting the final sentence and of retaining the reference to "draft conclusions" in the previous sentence.

47. Sir Michael WOOD said that it might be best to recast the first sentence, through the insertion of the word "similar", so that it read: "Draft conclusion 13 also does not apply to similar bodies that are organs of an international organization." That would make it clear that the paragraph referred to bodies that were similar to treaty bodies but were not organs of an international organization. The final sentence could be made clearer by the replacement of the phrase "the present draft conclusions may apply, in substance and *mutatis mutandis*, to pronouncements of expert bodies" with "the substance of the present draft conclusion may apply *mutatis mutandis* to pronouncements of expert bodies".

48. Mr. SABOIA concurred with Sir Michael's proposals. He suggested the insertion of the adjective "independent" before "expert bodies" in the final sentence.

49. Mr. VÁZQUEZ-BERMÚDEZ supported the idea of talking about "similar" bodies that were part of an international organization. Experts might serve in their personal capacity, but an expert body itself was nonetheless an organ of an international organization.

50. The CHAIRPERSON said that he took it that the Commission wished to request the Special Rapporteur to recast the paragraph and to resubmit it to the Commission later in the meeting.

It was so decided.

Paragraph (5)

51. Sir Michael WOOD suggested that, in the second sentence, the phrase "there are also certain borderline cases" should read "there may also be borderline cases".

Paragraph (5), as amended, was adopted.

Paragraph (6)

52. Mr. KAMTO suggested the removal of the parentheses in the first sentence.

Paragraph (6) was adopted with that editorial correction.

Paragraph (7)

53. Sir Michael WOOD noted that no mention was made, in the third sentence, of article 33 of the 1969 Vienna Convention, although articles 31 and 32 were cited. In order to remedy that omission, he suggested that the phrase "rules on treaty interpretation according to articles 31 and 32 of the Vienna Convention" could be amended to read "rules on treaty interpretation set forth in the Vienna Convention".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

54. Mr. KAMTO, supported by Mr. MURPHY, said that for the sake of clarity, a new third sentence should be added, because the quotation at the end of the paragraph did not confirm the thesis contained in the first sentence, but rather set out the position of the Human Rights Committee. The new sentence could read, "The proposition of the Human Rights Committee was:".

55. Mr. HMOUD suggested the deletion of the phrase "in and of itself" in the first sentence, because it created doubts as to whether, in some circumstances, the pronouncement of an expert treaty body might indeed constitute subsequent practice under article 31, paragraph 3 (*b*), of the 1969 Vienna Convention. In the same sentence, he proposed the insertion of the words "of the parties" between the words "subsequent practice" and "that establishes the agreement".

56. Mr. NOLTE (Special Rapporteur) agreed to insert the sentence "The proposition of the Human Rights

Committee was:" before the quotation, as proposed by Mr. Kamto and Mr. Murphy. The purpose of the phrase "in and of itself" was to distinguish the pronouncement itself and its possible legal effect from the legal effect that a pronouncement might produce together with, and in interaction with, the subsequent practice of the parties. It could be replaced with "as such". He could likewise agree to Mr. Hmoud's proposal to insert the words "of the parties" after "subsequent agreement" in the first sentence.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

57. Mr. FORTEAU said that paragraphs 11 and 13 of general comment No. 33 of the Human Rights Committee,[501] cited in paragraph (10), contained strong assertions. Given the uncertainty of the extent to which those assertions had been accepted by the international community, it might be wiser to delete them and retain only the first sentence of paragraph (10).

58. Mr. SABOIA said that the International Court of Justice had referred to the general comments of treaty bodies as containing elements of an authoritative expression of how certain provisions of human rights treaties were to be understood. Citing the two paragraphs of general comment No. 33 helped to shed light on the matter, and he was in favour of retaining both in the commentary.

59. Sir Michael WOOD suggested that it might be appropriate to cite only paragraph 11 of general comment No. 33, which contained the essence of the Human Rights Committee's reasoning on the reversal of its original proposition.

60. Mr. NOLTE (Special Rapporteur) said that he was willing to accept Sir Michael's proposal in order to achieve consensus.

61. Mr. KAMTO said that, by including the quotations, the Commission was not taking a position, it was merely citing a document that already existed. In his view, the Commission's only options were to cite both paragraphs or not to cite either of them.

62. Mr. FORTEAU said that the purpose of paragraphs (9) to (11) of the commentary was to explain that the Human Rights Committee had initially stated in draft general comment No. 33 that its own general body of jurisprudence constituted subsequent practice, but that it had ultimately withdrawn that statement in the final version of the general comment. Seen from that perspective, both quotations that appeared in paragraph (10) were irrelevant. In particular, by retaining the quotation of paragraph 13 of the general comment, the Commission appeared to be endorsing the Human Rights Committee's position, which could be seen as contradicting the Commission's later reference to the International Court of Justice and the slightly different weight the Court gave to the Committee's jurisprudence.

63. Mr. KAMTO said that he supported the deletion of the two quotations, but not because the Commission disagreed with the Human Rights Committee's position that its Views represented an authoritative determination. That statement appeared in the final version of draft comment No. 33, and had received the approval of States parties to the International Covenant on Civil and Political Rights.

64. Mr. SABOIA said he agreed with Mr. Kamto's arguments on the substance and with the various speakers who favoured the deletion of the two quotations in paragraph (10).

65. Mr. NOLTE (Special Rapporteur) said he could accept Mr. Forteau's proposal to delete the two quotations but suggested that they should be included instead in the second footnote to the paragraph.

It was so decided.

66. Mr. MURPHY suggested that it might be useful to combine paragraphs (10) and (11), which were related, rather than to have two one-sentence paragraphs.

67. Mr. HMOUD proposed, in paragraph (11), to replace the phrase "in and of themselves" with "as such".

68. Mr. NOLTE (Special Rapporteur) agreed with Mr. Hmoud's proposal.

That proposal was adopted.

69. Mr. KAMTO, supported by Mr. SABOIA, proposed that, in paragraph (11), the word "incident" be replaced with "example".

70. Mr. NOLTE (Special Rapporteur) suggested that the word "incident" simply be deleted.

It was so decided.

71. Mr. NOLTE (Special Rapporteur) proposed that the merger of paragraphs (10) and (11) read: "When this proposition was criticized by some States,[footnote] the Committee did not pursue its proposal and adopted its general comment No. 33 without a reference to article 31, paragraph 3 (*b*).[footnote] This confirms that pronouncements of expert treaty bodies cannot, as such, constitute subsequent practice under article 31, paragraph 3 (*b*)."

Paragraphs (10) and (11), as thus amended, were adopted.

Paragraph (12)

72. Sir Michael WOOD suggested that, in the second sentence, the word "many" before "authors" be replaced by "a number of", as he doubted that there were many authors who had recognized the possibility referred to in paragraph (12).

73. Mr. KAMTO proposed that, in the second sentence, the words "by the Commission" be transposed with the words "by States" and that the words "but also" [*mais aussi*] be inserted before the words "by the International Law Association".

[501] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 40*, vol. I (A/64/40 (Vol. I)), annex V.

74. Mr. NOLTE (Special Rapporteur) said he agreed with the idea of making a distinction between the Commission and States on the one hand and the International Law Association and the authors on the other, and also with the proposal to list States first; however, he rejected the proposal for the insertion of the words "but also", suggesting instead the insertion of the words "and also". He could not agree with Sir Michael's proposal, as he was absolutely certain that a majority of authors supported the possibility referred to in the second sentence.

75. Following a discussion in which Sir Michael WOOD, Mr. SABOIA, Mr. MURPHY, Mr. CANDIOTI and Mr. McRAE took part, Mr. NOLTE (Special Rapporteur) suggested the replacement of the word "many" with "a significant number".

It was so decided.

76. Mr. FORTEAU suggested that, in the second footnote to the paragraph, the words "for example" be inserted after "See".

77. Mr. NOLTE (Special Rapporteur) said that he supported that proposal and that the second sentence of paragraph (12) should be reformulated to read: "This possibility has been recognized by States, by the Commission and also by the International Law Association and by a significant number of authors."

It was so decided.

Paragraph (12), as amended and with the amendment to the footnote in question, was adopted.

Paragraph (13)

78. Mr. KAMTO proposed that, in the first sentence of the French version, the word *envisageable* be replaced with *atteignable*.

Paragraph (13) was adopted with that amendment to the French text.

Paragraph (14)

79. Mr. FORTEAU proposed that, in the first sentence, the expression "in connection with" be replaced with the words "which is reflected in", so as to maintain consistency with the use of the word "reflect" in the final sentence.

80. Mr. PARK pointed out that in the final sentence, a logical contradiction was introduced in the clause beginning "and hence would reflect …". That clause referred back to General Assembly resolutions, whereas the footnote to the sentence referred to the conferences of States Parties that were covered in draft conclusion 11 [10]. Paragraph 1 of draft conclusion 11 [10] stated: "A conference of States parties, under these draft conclusions, is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization." The last clause of paragraph 1 thus contradicted the assertion made in the final sentence of paragraph (14).

81. Mr. NOLTE (Special Rapporteur) said that, in its work on the topic of the identification of customary international law, the Commission had considered the resolutions of international organizations not only as acts by the organs of an international organization but also as reflecting the views of States. The same could apply in the current topic.

82. Mr. PARK said that he had doubts as to whether the two topics could be assimilated in that manner, and his concerns about the final sentence were not allayed.

83. Mr. NOLTE (Special Rapporteur) explained that he had referred to the topic of identification of customary international law to illustrate a more general point, namely that, in the General Assembly, States acted as members of an organ of an international organization but they also acted in their own capacity as States when making certain statements or expressing their views.

84. Mr. MURPHY proposed that, in the final sentence, which was somewhat ambiguous, the words "in substance of" be replaced with "by" and the words "of the interpretation that is contained in the pronouncement" be added after the word "parties". The clause would then read: "if the consensus constituted the acceptance by all the parties of the interpretation that is contained in the pronouncement".

85. Mr. NOLTE (Special Rapporteur) said that he could accept the proposals made by Mr. Forteau and Mr. Murphy.

Paragraph (14), as amended by Mr. Forteau and Mr. Murphy, was adopted.

Paragraph (15)

86. Mr. MURPHY suggested that, in the first sentence, the word "human" be inserted before the word "right". In the second sentence, the phrase "the right to water" should be replaced with "the human right to safe drinking water". In the final sentence, the words "actually implies" should be replaced with "constituted".

87. Mr. KAMTO, referring to the final sentence, said that when a consensus was reached on a resolution, that might simply mean that certain States had abstained from taking a contrary position in order to facilitate the consensus, not necessarily that all parties had acquiesced to the language contained in the resolution.

88. Sir Michael WOOD said that Mr. Kamto's point might stem from a problem of translation, since the word used in the English version was "acceptance", while that used in French was *acquiescement*, the closest equivalent of which in English was "acquiescence".

89. The CHAIRPERSON suggested that the Special Rapporteur confer with Mr. Kamto in order to find a solution to the problem.

Paragraph (15) was adopted, subject to the requisite editorial adjustments by the Special Rapporteur.

Paragraphs (16) to (19)

Paragraphs (16) to (19) were adopted.

Paragraph (20)

90. Mr. FORTEAU said that the last footnote to the paragraph did not appear to be relevant to paragraph (20).

91. Mr. NOLTE (Special Rapporteur) said that he would check the content of the material quoted in the footnote.

Paragraph (20) was left in abeyance.

Paragraph (21)

Paragraph (21) was adopted.

Paragraphs (22) to (36)

92. Mr. MURPHY said that, in his view, the section of the commentary relating to paragraph 4 of draft conclusion 13 [12] – a "without prejudice" clause providing that the draft conclusion was without prejudice to the contribution that a pronouncement of an expert treaty body might make to the interpretation of a treaty – was excessively long. While it was appropriate to explain briefly that clause, it was not necessary to go into depth about the contributions of expert treaty bodies. There had been a rather extensive debate in the plenary, in which differing views had been expressed about the significance of treaty body pronouncements in relation to the topic, and the extremely lengthy commentary on that point might not necessarily be agreeable to all members. He wondered whether it might be possible simply to keep paragraph (21) as a basic explanation of the "without prejudice" clause and to delete paragraphs (22) to (36). Those interested in further analysis could always consult the Special Rapporteur's report.

93. Mr. NOLTE (Special Rapporteur) said that he disagreed with Mr. Murphy about the content of the plenary debate. The debate had been about whether the pronouncements of expert treaty bodies came under the scope of the topic, and it had been decided to adopt a "without prejudice" clause in order to leave the question open. It had been a compromise on his part not to insist on dealing with that aspect as being unquestionably part of the topic. The commentary served to explain the two main views expressed, which should be made known to States and, if need be, addressed on second reading.

94. Mr. FORTEAU said that, bearing in mind the position he had adopted in the plenary debate, he tended to agree with Mr. Murphy's somewhat radical proposal. He recalled that it had been made clear in the statement of the Chairperson of the Drafting Committee that, in draft conclusion 13 [12], paragraph 4, the Commission was not taking a position on the independent effect that the pronouncements of treaty bodies could have. However, it seemed that several of pages of commentary had been devoted to describing the possible effects of such pronouncements. It might be possible to find some middle ground, perhaps by deleting paragraphs (24) to (28), which went into too much detail on the doctrinal debates on the value of pronouncements of treaty bodies, while maintaining paragraphs (21) to (23), which recalled in general terms the weight that the pronouncements of treaty bodies could have, and paragraphs (29) onwards, which were useful in that they explained the debate in the Commission.

95. Sir Michael WOOD said that he shared Mr. Forteau's concern that the commentary was disproportionately long for a "without prejudice" clause. It was reasonable to explain that the Commission had discussed whether the issue of treaty body pronouncements fell within scope of topic. However, it was not necessary to discuss the substance of the issue at length. In his view, something along the lines of Mr. Forteau's proposal would accurately reflect the decision that had been taken to have a "without prejudice" clause.

96. Mr. SABOIA said that he supported the Special Rapporteur's position: the "without prejudice" clause represented an agreement not to take a definitive decision on the issue, as noted in paragraph (35) of the commentary, which stated that, ultimately, the Commission had decided to limit itself, for the time being, to formulating a "without prejudice" clause in paragraph 4 of draft conclusion 13 [12]. He agreed with others that perhaps only a selection of the paragraphs needed to be retained, but such a selection would have to be made in agreement with the Special Rapporteur.

97. Mr. PARK said that he agreed with the Special Rapporteur's reasoning, as paragraphs (21) to (36) provided an in-depth account of the debate in the plenary. He would therefore be in favour of keeping the commentary as it was, but would not object to shortening it somewhat, within reason.

98. Mr. ŠTURMA said that he supported the views of Mr. Park and Mr. Saboia. If the commentary were to be shortened, it should be for the Special Rapporteur to make the relevant proposal to the Commission; it was not appropriate to make such decisions on the spot.

99. The CHAIRPERSON said that, in his view, the proposed methodology of simply cutting out parts of the commentary was somewhat disturbing, but the Commission should allow itself to be guided by the Special Rapporteur on how best to proceed.

100. Mr. NOLTE (Special Rapporteur) said that, if given some time, he would be prepared to look at the commentary to paragraph 4 with a view to identifying possible cuts.

101. Mr. MURPHY said that he would be happy to go along with the Special Rapporteur's proposal to try to find some middle ground. In preparing a revised draft, however, the Special Rapporteur must address the problem that in paragraph (36), a clear position was taken as to the weight that should be given to the pronouncements of treaty bodies, which was precisely what the Commission had decided not to do.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were adopted.

Paragraphs (24) and (25)

102. Mr. FORTEAU said that paragraphs (24) and (25) addressed an issue, namely the permissibility of reservations, which was unrelated to that covered in paragraph 4 of draft conclusion 13 [12]. He therefore believed that paragraphs (24) and (25) should be deleted.

103. Mr. NOLTE (Special Rapporteur) said that he did not agree with Mr. Forteau's reasoning; however, he would not insist on keeping the two paragraphs in the commentary.

104. Mr. MURPHY said that, in his view, the reason for deleting them was that they were simply not germane to the topic. It was disproportionate to allocate so much commentary to an extensive analysis of something that was not actually addressed in the draft conclusion itself.

105. Mr. SABOIA said that he supported the Special Rapporteur's position.

106. After a discussion in which Mr. FORTEAU, Mr. HMOUD, Mr. MURPHY, Mr. NOLTE and Mr. TLADI took part, the CHAIRPERSON suggested that the remaining paragraphs be held in abeyance while the Special Rapporteur drafted a revised version of paragraphs (24) to (36) of the commentary, taking into account the points made by several members.

It was so decided.

107. Mr. FORTEAU stressed that it was not a question of merely rearranging the paragraphs of the commentary; the issue was that, as the paragraphs were currently drafted, the Commission was taking a position on the effects of the pronouncements of treaty bodies. It was thus a substantive problem.

108. Mr. NOLTE (Special Rapporteur) said that he would endeavour to take account of the views expressed, but that the Commission should not try to go back on its previous decision on the reasons for adopting a "without prejudice" clause.

109. The CHAIRPERSON said that the Commission would be able to discuss all of the substantive issues involved once it had a new draft of paragraphs (24) to (36) of the commentary.

The meeting rose at 1 p.m.

3338th MEETING

Friday, 5 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter VI. ***Subsequent agreements and subsequent practice in relation to the interpretation of treaties*** **(*continued*) (A/CN.4/L.884 and Add.1–2)**

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*continued*)

2. Text of the draft conclusions with commentaries thereto (*continued*)

1. The CHAIRPERSON recalled that, at the previous meeting, during the consideration and adoption of chapter VI of the Commission's draft report, some members had been unable, because of time constraints, to contribute to the mini-debate that had taken place on the commentary to paragraph 4 of draft conclusion 13 [12]. He invited those members to take the floor.

Commentary to draft conclusion 13 [12] (Pronouncements of expert treaty bodies) (*continued*) [A/CN.4/L.884/Add.2]

Paragraph 4 (*continued*)

2. Mr. PARK said that, when the Special Rapporteur came to draft an abridged version of the commentary to paragraph 4 of draft conclusion 13 [12], he should preserve the content of paragraphs (23), (26) and (28) of document A/CN.4/L.884/Add.2, on regional human rights courts, domestic courts and doctrine, respectively.

Chapter V. ***Identification of customary international law*** **(A/CN.4/L.883 and Add.1)**

3. The CHAIRPERSON invited the members of the Commission to consider and adopt chapter V of the draft report contained in documents A/CN.4/L.883 and A/CN.4/L.883/Add.1, paragraph by paragraph.

Document A/CN.4/L.883

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Paragraphs 10 to 12

4. The CHAIRPERSON said that paragraphs 10 to 12 had to be completed and would thus be adopted at a later stage.

C. Text of the draft conclusions on identification of customary international law adopted by the Commission on first reading

1. Text of the draft conclusions

Paragraph 13

Paragraph 13 was adopted.

Document A/CN.4/L.883/Add.1

2. Text of the draft conclusions and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

5. The CHAIRPERSON invited the Special Rapporteur to introduce the draft commentaries.

6. Sir Michael WOOD (Special Rapporteur) said that the draft commentaries were relatively short, in part because it would be desirable for their intended audience, which included persons who were not experts in international law, judges who were often very busy and private lawyers, to be able to read them in their entirety. On a related note, that very morning, the High Court of England had issued a judgment in which it had cited several of the draft conclusions adopted by the Drafting Committee. He was grateful to Mr. Vázquez-Bermúdez for chairing the Working Group on the topic; its work had been very useful to him and its observations had helped him to revise the draft commentaries.

General commentary

Paragraph (1)

7. Mr. NOLTE said that the words "Read together with the commentaries" at the beginning of the second sentence of paragraph (1) were unusual and might give the impression that the Commission wished to attach particular importance to the commentaries to the draft conclusions on the topic, giving them a status that was different from that accorded to the commentaries to the draft conclusions or articles on other topics. He therefore proposed that they be deleted.

8. Sir Michael WOOD (Special Rapporteur) said that he was reluctant to accept the deletion of those words. He recalled that the Commission had held a long discussion about how to ensure that readers of the conclusions also looked at the commentaries, because the two formed a whole. Given that the target audience of the draft conclusions included persons who were not experts in international law, it should be stated as clearly as possible that the draft conclusions needed to be read alongside the commentaries. That did not mean that the commentaries had a status different from that of the commentaries to the draft articles or conclusions on other topics.

9. Mr. NOLTE said that what Sir Michael had just said to justify that particular reference in the paragraph under consideration was also true of the commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which the Commission had indicated were addressed not only to States but also to domestic courts and to anyone who was called upon to interpret treaties. If that was the criterion, it should be possible to insert the words in question in the commentary to those draft conclusions.

10. Mr. MURASE said that he was not sure what was meant by the words "identify" and "identification". Did they imply the interpretation and application of the relevant rules, or an intellectual exercise aimed at determining the existence and content of such rules? The Commission should at least explain what it meant by "identification" and "identify" in a footnote.

11. Mr. PARK said that he agreed with Mr. Murase's comment and asked whether the words "identification" and "determination" could be used interchangeably. Moreover, the phrase "as well as that of customary international law in general" at the end of paragraph (1) had been hotly debated within the Working Group, with some members arguing that its meaning was not very clear, and he doubted whether it ought to be retained.

12. Mr. MURPHY, in reference to the point made by Mr. Murase and Mr. Park, said that he wished to draw the Commission's attention to paragraph (2) of the commentary to draft conclusion 1, the third sentence of which read: "The terms 'identify' and 'determine' are used interchangeably in the draft conclusions and commentaries." The words "Read together with the commentaries" were useful, particularly in the context of draft conclusions rather than articles. He would have no objection to including those words in the commentary to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. In addition, for formal reasons, he proposed replacing the words "This is a matter that" with "This matter" at the start of the third sentence of the paragraph under consideration.

13. Mr. PETRIČ said that the words "Read together with the commentaries" were perhaps superfluous, since all the texts adopted by the Commission had to be read together with the commentaries thereto, but he was not opposed to retaining them. The words could indeed be included in the commentaries to the texts adopted by the Commission on all its topics. It might be possible to find a better formulation so as not to give the impression that the Commission was attaching particular importance to the commentaries in question. As to the meaning of the words "determine" and "identify", the second sentence of paragraph (1) clearly stated that it was a question of determining "the existence (or non-existence) of rules of customary international law, and their content"; a footnote was therefore unnecessary.

14. Mr. McRAE, supported by Mr. VÁZQUEZ-BERMÚDEZ, said that the words "Read together with the commentaries" could appear in the commentaries to all the texts that the Commission adopted, as the members unanimously agreed that those texts must always be read alongside the commentaries thereto. For that reason, he supported Mr. Nolte's proposal to insert those words in the commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

15. Ms. ESCOBAR HERNÁNDEZ said that she endorsed the arguments in favour of keeping the words "Read together with the commentaries" in the second sentence of paragraph (1). On the other hand, and unless it was a translation issue, the words "as well as that of

customary international law in general", which appeared at the end of the paragraph and suggested that the Commission's aim was to promote the credibility of customary international law in general, should be deleted.

16. Mr. NOLTE said that his understanding was that the members of the Commission agreed that the expression "Read together with the commentaries" could be inserted in the commentaries to the texts adopted by the Commission on other topics, and he would like that to be noted.

17. Mr. KAMTO said that it was a matter of principle concerning the Commission's practice. While it was obvious that draft texts must always be read together with commentaries, the Commission did not usually say so, and when it did, as in the current case, it might give the impression that the commentaries in question were of particular importance or had a status different from that of the commentaries adopted on other topics.

18. Mr. MURASE said that the sentence quoted by Mr. Murphy on the subject of the terms "identify" and "determine" had not escaped his attention, but saying that terms were interchangeable was not the same as defining them, and he believed that the lack of a definition could be problematic with regard to, for example, draft conclusion 15, on the persistent objector rule. He therefore wished to reiterate his proposal for the terms in question to be defined in a footnote.

19. Sir Michael WOOD (Special Rapporteur) said that the words "Read together with the commentaries" were useful, and he therefore proposed to retain them if the majority of members did not object, on the understanding that the same wording could be inserted in the commentaries to other draft texts.

20. As to the point made by Mr. Murase and Mr. Park, he considered that, if the draft conclusions and the commentaries were read as a whole, it was clear enough what was meant by identification. There had been a debate over the term when the title of the topic had been changed; the word "determination" was used in Article 38 of the Statute of the International Court of Justice and, in paragraph (2) of the commentary to draft conclusion 1, it was clearly stated that the terms "identification" and "determination" were interchangeable. Regarding interpretation, if it was possible to speak of interpreting customary international law, determining the existence or non-existence of a rule and its detailed content could amount to interpretation. If the lack of a definition posed a problem with regard to the commentary to draft conclusion 15, the Commission would solve that problem when it came to examine that commentary and could revert to the paragraph currently under consideration, if necessary.

21. Regarding the comment made by Ms. Escobar Hernández, the intention in the final sentence of paragraph (1) was precisely to say that a sound approach to the identification of rules of customary international law gave credibility not only to the particular decision but also to customary international law in general, the point being that the latter was often attacked, by certain authors in particular, as being uncertain, vague or unclear. He nonetheless agreed that, by expressing itself in that way, the Commission might appear presumptuous, and therefore proposed that those words be deleted.

It was so decided.

22. Mr. MURPHY said that the word "decision", which now came at the end of the last sentence of paragraph (1), was confusing, and proposed that it be replaced with "determination".

It was so decided.

23. Mr. KAMTO proposed that, to address the various concerns expressed with regard to the beginning of the second sentence of paragraph (1), that part of the French text read *Lus conjointement avec les commentaires, comme il se doit pour les travaux de la Commission, ils visent à* ("Read together with the commentaries, as should be the case with the work of the Commission, they seek to").

24. Sir Michael WOOD (Special Rapporteur) said that the addition was not very elegant in English.

25. Mr. NOLTE proposed that the words *comme il se doit pour les travaux de la Commission* be translated as "as it is usually the case with the work of the Commission".

26. Mr. McRAE said that it would be better to use the expression "as is always the case", since the word "usually" created doubt.

27. Sir Michael WOOD (Special Rapporteur) proposed that the second sentence of paragraph (1) be split into two sentences, which would read: "They seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. They are to be read together with the commentaries, as is always the case with the work of the Commission."

It was so decided.

Paragraph (2)

28. Mr. MURASE said that it was important to underline the binding nature of international law and, to that end, proposed that the words "precisely because it is binding on all States" be added at the end of the first sentence.

29. Mr. PARK said that the word "decentralized", which was used in the second sentence to describe the international legal system, should be deleted because it gave the negative impression that the system was fragmented. In the same sentence, it would also be desirable to replace the adjective "dynamic" with "efficient".

30. Mr. MURPHY said that it could not be asserted that customary international law was binding on all States because regional customary law, to cite just one example, was not. He therefore proposed that the addition put forward by Mr. Murase be reformulated to read "which is binding upon States". Moreover, the words "and intercourse" were not particularly felicitous and should be deleted.

31. Mr. VÁZQUEZ-BERMÚDEZ said that, since customary international law was "an important source of public

international law", it was obviously binding and there was no need to emphasize the point. While Mr. Murphy had rightly noted that customary international law could not be said to be binding on all States because of the existence of regional or particular rules of customary international law, the solution that he proposed was not appropriate, either, as States were not the only subjects of international law to be bound by customary international law.

32. Mr. KITTICHAISAREE said that it would be unwise to mention the binding character of customary international law in paragraph (2), given that the matter was clearly explained further on in the commentary.

33. Sir Michael WOOD (Special Rapporteur) said that, in the light of the comments made, a number of changes should be introduced: the words "a decentralized international legal system" should be replaced with "the international legal system"; the word "effective" should be used instead of "dynamic"; and the words "and intercourse" should be deleted. As to Mr. Murase's proposal concerning the binding character of customary international law, the matter was duly addressed in the commentary to the draft conclusion on the persistent objector rule, and it was thus not necessary or appropriate to mention it in the general commentary.

Paragraph (2), as amended, was adopted.

Paragraph (3)

34. Mr. TLADI proposed that, in the last sentence, the words "customary process" be replaced with "process for the identification of customary international law".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The general commentary, as amended, was adopted.

Part One. Introduction

Introductory paragraph

The introductory paragraph to Part One was adopted.

Commentary to draft conclusion 1 (Scope)

Paragraph (1)

35. Mr. VÁZQUEZ-BERMÚDEZ said that, in the second sentence, the adjective "legal" should be deleted because, although it was evident that the identification of rules of customary international law required a legal analysis, it would be wrong to speak of a legal methodology.

36. Mr. FORTEAU, noting that the two-element approach to determining the existence of a customary rule was very much a legal rule, proposed a compromise solution that would read "[draft conclusion 1] sets out the methodology and rules to be followed when undertaking that exercise".

37. Mr. HMOUD said that he supported Mr. Forteau's proposal.

38. Sir Michael WOOD (Special Rapporteur) said that the adjective "legal" was superfluous and should be deleted. While he found Mr. Forteau's proposal interesting, he would prefer to avoid the term "rules", as it could prove controversial in the context of the draft conclusions, which, as had been recalled from the outset of the Commission's work on the topic, should not be overly prescriptive.

39. Mr. FORTEAU said that, on the contrary, the term "rules" was perfectly consistent with the content of the draft conclusions, some of which were undeniably prescriptive in character. In addition, practice and *opinio juris* were legal rules. If the term "rules" was not retained, the adjective "legal" would have to be kept to reflect the fact that the draft conclusions were not simply a practical guide to the identification of customary international law but also contained a set of legal requirements. An amendment should be made to the French text, in which the word "methodology" had been incorrectly translated as *moyens* rather than *méthode*.

40. Mr. NOLTE said that he was also in favour of retaining the adjective "legal", since the sole purpose of the work on the topic under consideration was to define the methodology and legal rules to be followed when identifying customary international law.

41. Mr. KAMTO said that legal methodology, which could be, *inter alia*, analytical or exegetical, should not be confused with methodology in general. The matter in hand was one of methodology, namely how to determine the existence and content of a customary rule. That methodology could, of course, involve the implementation of legal rules – in the case in question, that of the existence of a practice accepted as law – but was not in itself of a legal nature. The simplest solution would thus be to delete the adjective "legal", as proposed by the Special Rapporteur.

42. Mr. PETRIČ said that, while the draft conclusions had to be read together with the commentaries, the opposite was also true. Insofar as draft conclusion 1 did not provide any details of the methodology by which the existence and content of rules of customary international law were to be determined, it was important to indicate somehow in the commentary that the methodology involved the application of legal rules, in order to avoid leaving the door open to pure speculation.

43. Mr. McRAE said that the original formulation was entirely correct and that there was no need to get into a debate over whether the draft conclusions laid down rules or not. He therefore proposed that the current wording be retained, with a slight change to the end of the sentence, which would read "… that is, the legal methodology for undertaking that exercise".

Paragraph (1), as amended, was adopted.

Paragraph (2)

44. Mr. MURPHY said that the third sentence bore no relation to the rest of the paragraph, which dealt with the different terms used to denote customary international law, and should be moved to the beginning of

paragraph (3). He also proposed that, in the last sentence, the words "of law" be inserted after "principles" in order to express more clearly the idea that, as demonstrated by the examples provided in the second footnote to the paragraph, the concepts of rules of customary international law and principles of law were sometimes confused.

45. Mr. MURASE said that he supported Mr. Murphy's proposal to move the third sentence to the following paragraph of the commentary and that, in addition to the words "determine" and "identify", the sentence should contain a reference to the verb "ascertain", which also appeared in other draft conclusions.

46. Ms. ESCOBAR HERNÁNDEZ said that the last sentence should be deleted, as the comparison that it drew between rules of customary international law and principles did not correspond to the definition of the categories of norms of international law.

47. Mr. ŠTURMA said that, although he also had reservations about the last sentence, he did not feel that there was a need to delete it as the word "sometimes" showed that it was not a categorical assertion. He proposed that the words "of international law" be added after "principles", rather than "of law", as proposed by Mr. Murphy, to avoid any risk of confusion with general principles of law.

48. Sir Michael WOOD (Special Rapporteur) said that he agreed with the proposal to move the third sentence to the beginning of paragraph (3). Subject to the necessary verifications in the text as a whole, he would prefer not to mention the verb "ascertain" in the sentence, as proposed by Mr. Murase, because, unlike "identify" and "determine", it was used not in the sense of identifying rules of customary international law but of verifying the existence of a general practice or *opinio juris*. He recalled that the last sentence had been included in order to take into account the concern expressed by Mr. Petrič, who had wanted it to be clearly stated that, when the Commission spoke of "rules", it could also be referring to principles. For that reason, it would be better to keep the sentence, with the words "of customary international law" added after "principles" to avoid any ambiguity about the type of principle in question.

49. Mr. FORTEAU said that the addition should not be made unless it had been ascertained that the jurisprudence cited in the second footnote to the paragraph did indeed refer to principles of customary international law, which he doubted.

50. Mr. NOLTE said that the sentence in question did not contain a substantive provision; rather, it provided a simple terminological clarification, which was that, for the purposes of the topic, the term "rules" could also cover principles. There was thus no need to modify it.

51. Mr. MURPHY said that it would be useful to add the words "of law" after "principles" to reflect the fact that, sometimes, reference was made to principles of law or of international law when talking about rules of customary international law, as was clear from the jurisprudence cited in the footnote in question.

52. Mr. NOLTE said that Mr. Murphy's proposal was acceptable to him inasmuch as it did not reduce the scope of the term "principles" to any particular category.

53. Sir Michael WOOD (Special Rapporteur) said that he would be happy to retain the current wording, but did not object to the addition proposed by Mr. Murphy.

54. Mr. VÁZQUEZ-BERMÚDEZ said that, since the aim was precisely not to distinguish among different categories of principles, the current formulation, in which only the word "principles" was in quotation marks, was the most suitable.

55. Mr. NOLTE proposed that, to reconcile the Special Rapporteur's decision with the point made by Mr. Vázquez-Bermúdez, the words "of law" be placed in parentheses, outside the quotation marks.

56. Mr. MURPHY said that he saw no need for parentheses, but, if Mr. Vázquez-Bermúdez insisted, he would not object.

57. Sir Michael WOOD (Special Rapporteur), summarizing the accepted amendments to paragraph (2), said that the third sentence would be moved to the beginning of paragraph (3) and the words "of law" would be inserted in parentheses after "principles".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with the above-mentioned amendment, namely the insertion of the third sentence of paragraph (2).

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

58. Mr. TLADI said that, in the fourth sentence, the final clause, after the words *jus cogens*, should be deleted, as its content raised numerous issues other than that of the *erga omnes* nature of certain rules.

59. Mr. FORTEAU said that, if the clause was retained, the word "rules" should be replaced with "obligations".

60. Mr. NOLTE said that he supported Mr. Tladi's proposal, but would prefer to end the fourth sentence after the words "distinct issues or questions".

61. Mr. VÁZQUEZ-BERMÚDEZ said that, in the last sentence, the words "a matter governed by domestic law" should be deleted, as they might create confusion.

62. Sir Michael WOOD (Special Rapporteur) said that he supported the proposals made by Mr. Forteau and Mr. Vázquez-Bermúdez. As to the proposals put forward by Mr. Nolte and Mr. Tladi, it would be preferable to delete the phrase "the identification of which raises distinct issues", so that the fourth sentence would read: "Third, the draft conclusions are without prejudice to questions of hierarchy among rules of international law,

including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations."

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 1, as amended, was adopted.

Part Two. Basic approach

Introductory paragraph

The introductory paragraph to Part Two was adopted.

Commentary to draft conclusion 2 (Two constituent elements)

Paragraph (1)

63. Mr. MURPHY said that the words "and, in certain cases, international organizations", which appeared in parentheses in the second sentence, could be deleted because, in paragraph (3) of the commentary to draft conclusion 4, the Special Rapporteur clarified that "[r]eferences in the draft conclusions and commentaries to the practice of States should … be read as including, in those cases where it is relevant, the practice of international organizations". The same applied to the first set of parentheses – "and/or international organizations, where applicable" – in the penultimate sentence of paragraph (2). The end of the first sentence of the first footnote to the paragraph, in which it was indicated that "the Latin term [*opinio juris*] has been retained … because it may be thought to capture the nature of this subjective element of customary international law as a matter of legal opinion rather than consent", could also be deleted, since it might be a source of confusion for the reader.

64. Mr. NOLTE said that the footnote in question dealt with a very important issue, namely the reason for the Commission's decision to place the term *opinio juris* alongside the phrase "accepted as law". It was important to dispel any misunderstanding about the notion of acceptance and to point out clearly that it referred to a legal conviction that a general practice constituted a rule of customary international law. It was regrettable that such an important issue had been relegated to a footnote, and the phrase "as a matter of legal opinion rather than consent", which Mr. Murphy wished to delete, was in fact essential. In order to emphasize that point further, the two elements of the explanation should be inverted, as the second (the primacy of legal opinion over consent) was more important than the first (the prevalence in legal discourse). Lastly, he did not agree that the expression *opinio juris sive necessitatis* was not regarded as significantly different from *opinio juris*, as stated in the second sentence of the footnote, which it would be best to delete in order to avoid sparking an overly broad debate.

65. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. Nolte's comments and proposals.

66. Mr. McRAE said that he also supported those comments and that it should be made clear that it was a question of acceptance, not consent. He would, however, prefer not to alter the order in which the elements of the explanation appeared and, in order to highlight the second element, he proposed that the sentence be modified with the addition of the words "not just" and "but also", respectively, before the first and before the second "because".

67. Mr. MURPHY said that he was in favour of Mr. Nolte's proposal to invert the two elements of the explanation. He doubted, however, that consent could be entirely disassociated from acceptance. In his view, when a State accepted that a given practice was legally binding, it consented to the recognition of the practice as such.

68. Mr. FORTEAU, referring to the French text, proposed that, to clarify that point, the end of the first sentence of the first footnote to the paragraph, after the words *d'autre part* ("and"), should be redrafted to read *parce qu'elle caractérise mieux la nature particulière de cet élément subjectif qui constitue une conviction juridique et non un consentement formel* ("because it may capture better the particular nature of this subjective element as referring to legal conviction and not to formal consent").

69. Mr. HMOUD said that he agreed with that proposal and noted that, in the Arabic version, the term *opinio juris* had been translated strangely; the Arabic, Chinese and Russian versions of the draft should be reviewed to ensure that the translations into those languages were satisfactory.

70. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. Forteau's proposal. The word "formal" should, however, be deleted, to avoid giving the impression that there were informal kinds of consent.

71. Mr. KAMTO said that he recognized the importance of clarifying the concept of *opinio juris*, but account should be taken of the fact that it appeared in parentheses and was intended simply to specify the meaning of the expression "accepted as law". In his opinion, it was, above all, the notion of acceptance that should be explained in the commentary.

The meeting was suspended at 4.50 p.m. to allow the Special Rapporteur to consult with interested members with a view to developing a modified version of the text under consideration; it resumed at 5.10 p.m.

72. Sir Michael WOOD (Special Rapporteur) read out the first sentence of the first footnote to the paragraph, which he had amended to reflect members' proposals: "The Latin term has been retained alongside 'acceptance as law' not only because of its prevalence in legal discourse, including the synonymous use of the terms in the jurisprudence of the International Court of Justice, but also because it may capture better the particular nature of this subjective element of customary international law as referring to legal conviction rather than formal consent."

73. Mr. NOLTE said that he was in favour of the new wording.

74. Mr. VÁZQUEZ-BERMÚDEZ said that he also supported the new version of the footnote, but remained convinced that the word "formal" should be deleted, because the reader might think that the description of consent as formal meant that it had to be expressed through the deposit of an instrument of ratification.

75. Mr. HMOUD said that the word "formal" should be included in the sentence as an element of the comparison being made.

76. Mr. FORTEAU said that he agreed with that remark and, in reference to the French text, proposed that, to address the concern expressed by Mr. Vázquez-Bermúdez, the words *plutôt qu'* ("rather than") at the end of the new version of the footnote be replaced with *et non* ("and not to"), which placed the emphasis on legal conviction.

77. Sir Michael WOOD (Special Rapporteur) said that he was in favour of that proposal and that, in the English version, the words "rather than" would be replaced with "and not to".

78. Mr. SABOIA asked whether the proposal to delete the second sentence of the footnote in question, which he supported, had been accepted.

79. Sir Michael WOOD (Special Rapporteur) said that, although he attached importance to that sentence, he was willing to comply with the wish expressed by Mr. Nolte and Mr. Saboia. He also accepted Mr. Murphy's proposal to delete the references to international organizations that appeared in parentheses in paragraphs (1) and (2).

Paragraph (1), as amended, was adopted.

Paragraph (2)

80. Mr. VÁZQUEZ-BERMÚDEZ proposed that, at the end of the last sentence, the words "accompanied by *opinio juris*" be added in parentheses after "accepted as law".

81. Sir Michael WOOD (Special Rapporteur) said that he agreed with that proposal and that he had not mentioned *opinio juris* systematically after each occurrence of the expression "accepted as law" in order to avoid making the text unwieldy. As requested by Mr. Murphy, the reference to international organizations would be deleted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

82. Mr. MURPHY said that, in the first sentence, the word "sometimes" should be replaced with "often". Indeed, it seemed to him that the two-element approach was often referred to as inductive and only sometimes as deductive. He would also prefer to delete the last part of the last sentence ("or when considering possible rules of customary international law forming part of an 'indivisible regime'") and to move the text of the second footnote to the paragraph to the first footnote to the paragraph, to which it clearly related. That language did not reflect all the stages of the reasoning adopted by the International Court of Justice in its judgment in *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. In that judgment, the Court had noted that, when two general rules of a customary nature were linked by a third rule, the connection created between them by the third rule rendered that rule customary, too, with the result that the three rules formed an indivisible regime.

83. Mr. NOLTE said that there was no reference in the paragraph to an important type of deductive approach that he had mentioned during the consideration of the fourth report (A/CN.4/695 and Add.1) and that consisted in taking into account general principles of law or principles of international law when identifying customary international law. In his view, that gap should be filled.

84. Mr. MURASE said that he was not sure that it was necessary to introduce the notion of "general principles of law" or "principles of international law" in the context of deductive approaches. For example, in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, which could be cited in a footnote, the Court had taken a deductive, not inductive, approach.

85. Sir Michael WOOD (Special Rapporteur) said that he did not think it appropriate to replace the word "sometimes" with "often" in the first line of paragraph (5), since, overall, only a handful of authors had qualified the two-element approach as "inductive" or "deductive". Nevertheless, he had no objection to that modification if the Commission shared Mr. Murphy's view.

86. With regard to deleting the last part of the last sentence ("or when considering possible rules of customary international law forming part of an 'indivisible regime'"), he had inserted those words at the suggestion of one of the members. The idea had been to refer to a case such as the one addressed in article 121 of the United Nations Convention on the Law of the Sea, which was a good example of a deductive approach. Indeed, it had been deduced that paragraph 3 of article 121, on rocks, was a rule of customary law because paragraphs 1 and 2 of that article, which was entitled "Regime of islands", had already been part of customary law. He would therefore prefer to retain those words, but was not opposed to deleting them, if the members as a whole so wished, or to moving the reference to *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* to the first footnote to the paragraph.

87. The relationship between customary international law and "general principles of law", which were mentioned in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, should be the subject of a separate topic. The aim of Mr. Nolte's proposal was to introduce the concept of "principles of international law", not "general principles of law", but it seemed somewhat risky to say that rules of customary international law could be established on the basis of principles of international law by means of deductive reasoning. The following sentence dealt with a relatively similar deductive approach – illustrated by *Pulp Mills on the River Uruguay* – that consisted in establishing specific rules of customary international law on the basis of more general rules of customary international law, but Mr. Nolte's proposal went even further. He himself was very reluctant, at that stage, to introduce a concept that was linked to a thorny theoretical issue. He would prefer to keep the text of paragraph (5) as it was, only with the word "often" in place of "sometimes" in the first sentence. He did not think that it would be appropriate to cite *Delimitation of*

the Maritime Boundary in the Gulf of Maine Area, either, as proposed by Mr. Murase.

88. Mr. NOLTE said that the question of the extent to which general principles of law or principles of international law must or should be taken into account for the purposes of identifying customary international law lay at the heart of the topic and was a crucial element not addressed in the commentaries.

89. Mr. MURPHY said that, in any event, the expression "in particular" left the door open to other types of deductive approach. The words that he wished to delete in the last sentence of paragraph (5) suggested that, once it had been established that rule A and rule B were part of customary international law, it could be concluded that they formed an indivisible regime and that rule C, which was also part of that indivisible regime, must, by extension, also be part of customary international law. However, that had not been the approach taken by the International Court of Justice in the case cited. The Court had, in fact, considered that rules A and B were both part of customary international law; that rule C, by its very nature, established a link between the two; and that, consequently, rule C must also be part of customary international law. The Court had concluded, based on that reasoning, that the three provisions formed an indivisible regime. The question was at what stage such provisions could be deemed to form an indivisible regime. In the case at hand, the Courts reasoning was better illustrated by the deductive approach referred to in the second sentence of paragraph (5). While it was true that the last part of the sentence referred to article 121 of the United Nations Convention on the Law of the Sea, he believed that, from a methodological point of view, it was slightly misleading.

90. Mr. FORTEAU said that he would prefer to retain the end of paragraph (5), but to delete the term "customary", in line with Mr. Murphy's analysis of the reasoning of the International Court of Justice.

91. Mr. MURPHY said that it would indeed be helpful to remove the word "customary", but, to be truly accurate, it would be necessary to say "or when concluding that possible rules of international law form part of an 'indivisible regime'". Indeed, it was not the idea that the rules in question formed part of an indivisible regime that had enabled the Court to conclude that a rule of customary international law existed. If the Commission wished to retain that part of the sentence, the wording should be changed in the manner that he had indicated.

Mr. Murphy's last proposal was accepted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

92. Mr. VÁZQUEZ-BERMÚDEZ proposed that the words "accompanied by *opinio juris*" be added in parentheses after "accepted as law" at the end of the paragraph.

Paragraph (6), as amended, was adopted.

The commentary to draft conclusion 2, as amended, was adopted.

Commentary to draft conclusion 3 (Assessment of evidence for the two constituent elements)

Paragraph (1)

93. Mr. MURPHY asked whether it was useful to keep the word "dynamic" in the last sentence.

94. Mr. NOLTE said that he would prefer to retain the word "dynamic", but the words "dynamic nature of custom" should be replaced with "dynamic nature of customary international law".

95. Mr. SABOIA said that he shared Mr. Nolte's view with regard to the word "dynamic". Customary international law was fundamentally dynamic and flexible. The law of the sea, for instance, had evolved in the space of just a few decades.

Paragraph (1), as amended by Mr. Nolte, was adopted.

Paragraph (2)

96. Mr. PARK said that the word "all" appeared four times. The expression "any and all", which made the wording of the sentence somewhat cumbersome, should be replaced with "any". Similarly, the word "all" should be removed from the phrase "in the light of all relevant circumstances".

97. Sir Michael WOOD (Special Rapporteur) said that the word "all" emphasized the importance of the paragraph. Removing it from the expression "any and all" would weaken the sentence considerably. It could, however, be replaced with the word "the" in the phrase "in the light of all relevant circumstances".

Paragraph (2), as amended, was adopted.

Paragraph (3)

98. Mr. FORTEAU said that, without context, the last quotation in the first footnote to the paragraph could give the impression that only territorial sovereignty and the sovereign equality of States had to be taken into account for the purposes of identifying customary international law, and his preference would be to delete it. He would also like to see the words *compte tenu du contexte* ("taking into account the context") added at the end of the penultimate sentence of the paragraph, given that certain forms of evidence were of particular significance not in and of themselves, but taking into account the context.

99. Sir Michael WOOD (Special Rapporteur) said that he was not opposed to deleting that quotation. He was not convinced that it would be useful to modify the end of the penultimate sentence, but did not object to that, either. He proposed that the additional phrase read "depending on the context".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

100. Mr. FORTEAU said that the logical sequence of the part of the paragraph that followed the quotation was unclear. It would be advisable to oppose, or at least contrast, the first and second sentences.

101. Mr. MURPHY said that he shared Mr. Forteau's view, and proposed the deletion of the word "Likewise", which came immediately after the quotation.

102. Sir Michael WOOD (Special Rapporteur) said that, while he did not object to deleting the word "likewise", he was not in favour of Mr. Forteau's proposal, as the two sentences were not in opposition to each other; rather, they both illustrated how practice should be taken into account in general.

Paragraph (5), as amended, was adopted subject to a minor drafting change in the French text.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

103. Mr. NOLTE, supported by Mr. VÁZQUEZ-BERMÚDEZ, said that, in the second sentence of paragraph (8), the expression "in some cases" suggested that the scenario in question was very exceptional; it should be replaced with "sometimes".

104. Mr. PETRIČ said that the word "sometimes" did not in any way improve the wording of the sentence. He proposed the word "occasionally".

105. Mr. FORTEAU, in reference to the French version, proposed that the middle part of the second sentence be redrafted to read *il n'exclut pas la possibilité que le même matériau soit utilisé* ("the paragraph does not exclude the possibility that the same material may be used").

106. Mr. McRAE, supported by Mr. SABOIA, said that there was no point in modifying the sentence in that way, because if the phrase "in some cases" was simply deleted, the fact that it was a possibility was implicit.

Paragraph (8), as amended by Mr. McRae, was adopted.

Paragraph (9)

107. Mr. MURPHY said that, in the first part of the sentence, it would be preferable to replace the words "the occurrences of practice are" with "the existence of a general practice is", to delete the phrase "when seeking to establish whether a general practice exists" and to keep what followed up to the semicolon, which should be replaced with a full stop. The first word of the second sentence would then begin with a capital letter.

The meeting rose at 6.05 p.m.

3339th MEETING

Monday, 8 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter V. *Identification of customary international law* (*continued*) (A/CN.4/L.883 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.883/Add.1.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*continued*)

2. Text of the draft conclusions with commentaries thereto (*continued*)

Commentary to draft conclusion 3 (Assessment of evidence for the two constituent elements) (*concluded*)

Paragraph (9) (*concluded*)

2. Mr. MURPHY recalled the proposals he had made at the Commission's previous meeting: the words "the occurrences of practice are" should be changed to "the existence of a general practice is"; the words "when seeking to establish whether a general practice exists" should be deleted; and the paragraph should be split into two sentences, with the first sentence ending after "is not mandatory".

3. Sir Michael WOOD (Special Rapporteur) welcomed those suggestions. In reply to a question from Mr. SABOIA, he said that the rest of the paragraph would remain unchanged.

Paragraph (9), as amended, was adopted.

The commentary to draft conclusion 3, as amended, was adopted.

Part Three. A general practice

Introductory paragraph

4. Mr. VÁZQUEZ-BERMÚDEZ suggested that, in the second set of parentheses, the words "acceptance as law" be changed to *opinio juris*.

5. Sir Michael WOOD (Special Rapporteur) said that he was not in favour of that suggestion. It was his

understanding that it had been agreed to limit the use of the Latin term *opinio juris*, which already occurred once in the introductory text.

The introductory paragraph to Part Three was adopted.

Commentary to draft conclusion 4 (Requirement of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

6. Mr. ŠTURMA suggested that a reference to the Commission's work on subsequent agreements and subsequent practice in relation to the interpretation of treaties be added to the first footnote to the paragraph.

With that amendment to the footnote, paragraph (2) was adopted.

Paragraph (3)

7. Mr. NOLTE said that, at the end of the penultimate sentence, an additional footnote should be inserted, referring to the definition of "international organization" that was contained in the draft articles on the responsibility of international organizations.[502]

8. Sir Michael WOOD (Special Rapporteur) said that he would prefer not to add such a footnote. It had been deliberately decided not to include a definition of "international organization" in the text; moreover, the way in which the term was used in the sentence in question did not correspond exactly to the definition given in the draft articles on the responsibility of international organizations. He hoped that the fact that those draft articles were brought to the reader's attention in the first footnote to the following paragraph, albeit for a different purpose, would be sufficient.

Paragraph (3) was adopted.

Paragraph (4)

9. Mr. TLADI suggested that the opening phrase of the second sentence would be clearer if it read: "They are entities established and empowered by States and/or international organizations".

10. Mr. MURPHY suggested that, in the final sentence, the word "participation" be altered to "practice" and the words "when accompanied by acceptance as law" be changed to "when accepted by the international organization as law".

11. Mr. PARK suggested an editorial amendment to further reduce the number of parentheses used in the paragraph, which he considered excessive.

12. Sir Michael WOOD (Special Rapporteur) said that Mr. Tladi's suggested change would confuse the issue rather than clarifying it. Although possible, it was rare for an international organization to be party to a treaty establishing a different international organization; the sentence as drafted captured the current reality.

13. Mr. TLADI said that his suggested wording had been intended to include instances in which international organizations were established by States alone. He was not convinced by the sentence as drafted.

14. Sir Michael WOOD (Special Rapporteur) reiterated his preference for leaving the sentence as it stood.

15. Mr. MURPHY suggested that changing the phrase in question to read "They are entities established and empowered by States (or international organizations)" might be acceptable as a compromise.

16. Mr. FORTEAU said that, in the second sentence, it was not necessary to specify who established and empowered international organizations. The words "by States (or by States and/or international organizations)" could therefore be deleted. Mr. Murphy's proposed amendment to the third sentence would make it too restrictive. The practice of international organizations did not only contribute to custom when accepted by the international organizations themselves, but also when accepted as law by States.

17. Mr. NOLTE questioned the logic of the final sentence: it implied that the practice of international organizations must be accompanied by acceptance as law in order to count as practice, which was at odds with the very essence of the two-element approach applied to the identification of customary international law in the case of State practice. He suggested that the phrase "when accompanied by acceptance as law (*opinio juris*)" be deleted altogether.

18. Sir Michael WOOD (Special Rapporteur) acknowledged Mr. Nolte's point but considered that it might be accommodated by changing the first part of the final sentence, taking into account Mr. Murphy's suggestion to alter "participation" to "practice", to read: "Their practice in international relations may also count as practice that, when accompanied by acceptance as international law (*opinio juris*), gives rise …".

19. Mr. SABOIA expressed support for Mr. Forteau's comments. The Commission should avoid taking too narrow an approach to the contribution of international organizations to international law, which was becoming ever more important.

20. Mr. TLADI said that he too endorsed Mr. Forteau's suggestion, which seemed to offer the most straightforward basis for reaching agreement on the paragraph.

21. Sir Michael WOOD (Special Rapporteur) said that, unless there was any substantive objection, he would prefer to retain the words which Mr. Forteau had suggested deleting. Although a partial definition of international organizations was included in paragraph (3), it was concerned with how international organizations were established, not who they were established by. It was important to consider the relationship between States and international organizations in discussing the practice of the latter.

[502] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

22. Mr. MURPHY observed that his suggested change to the final sentence did not seem to have been taken up. He considered it an important alteration that should be made. The matter at hand was not the practice of States operating through an international organization but the practice of the international organization itself, as was made clear in paragraph (3). It must be clear that the Commission was referring to the *opinio juris* of international organizations, as one of the two elements needed to form customary international law.

23. Sir Michael WOOD (Special Rapporteur) said that Mr. Forteau had raised an interesting issue that required considerable thought and had not yet been dealt with satisfactorily. The wording "accompanied by acceptance as law" would favour Mr. Murphy's view while allowing for others; he suggested that it be adopted but given careful examination on second reading.

24. Mr. HMOUD said that, as the Commission had yet to discuss the question of the nature of acceptance and who could give it, it might be preferable to adopt the paragraph as it currently stood.

25. The CHAIRPERSON said that he took it that the Commission agreed to leave the paragraph unchanged apart from the editorial amendment suggested by Mr. Park, the alteration of "participation" to "practice" and the alternative wording for the final sentence suggested by Sir Michael.

Paragraph (4), as thus amended, was adopted.

Paragraph (5)

26. Mr. FORTEAU said that, in the final sentence, the word "sometimes" diminished the role of exclusive competences within the European Union and suggested that it should be changed to "in certain areas of competence" [*dans certains domaines de compétence*]. He further observed that, in the same sentence, the word "possibly" left open the question of whether the practice discussed existed for other international organizations.

27. Mr. NOLTE, expressing support for Mr. Forteau's remarks, suggested that the phrase "This sometimes happens in the case of the European Union" be altered to read: "This is the case for certain competences of the European Union". The word "possibly" should be deleted.

28. Sir Michael WOOD (Special Rapporteur) agreed with the thrust of the amendments proposed. He suggested adopting Mr. Nolte's proposed wording and deleting the rest of the sentence.

29. Mr. McRAE said that, unless the Commission had specific examples of other international organizations in which the same situation pertained, it would be better to follow Sir Michael's suggestion of deleting the rest of the sentence.

30. The CHAIRPERSON said that he took it that the Commission agreed to alter the sentence in question to read: "This is the case for certain competences of the European Union."

Paragraph (5), as thus amended, was adopted.

Paragraph (6)

31. Mr. NOLTE said that he was not sure that the final sentence was accurate. States often set up organs that were composed of individuals serving in their personal capacity and that nevertheless exercised similar powers to those of States. For example, the Iraq Inquiry conducted by the United Kingdom, which had involved a number of independent experts, had been considered to be a State activity. Moreover, courts themselves were composed of individuals who were not under instruction from the State. Therefore, he proposed deleting the final sentence, as it seemed difficult to find any acts of international organizations that in one way or another were not also acts of States.

32. Mr. MURPHY proposed replacing, in the final sentence, the words "powers exercised by" with the words "acts of". As for the clause within parentheses, the Iraq Inquiry was not likely to be referred to as part of the practice of the United Kingdom that contributed to customary international law. Such individual expert groups were generally viewed as separate from the State so as to give them greater credibility in scrutinizing State acts. The clause within parentheses seemed acceptable, as it indicated that there could be exceptions to that rule. With regard to the second sentence, the Commission had discussed the secretariats of international organizations as possible examples but had not identified any specific precedents in case law or in statements made by Governments or international organizations themselves. Therefore, he proposed replacing the words "For example" with the phrase "While there are no specific precedents in this regard".

33. Mr. PARK, recalling the Commission's discussion, during the first part of its session, of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", said that he wondered whether paragraph 3 of draft conclusion 13 [12] (Pronouncements of expert treaty bodies) under that topic was contradictory to the final sentence of paragraph (6) currently under discussion. Indeed, the former stated that the pronouncements of expert treaty bodies could give rise to subsequent practice, whereas the latter seemed to indicate that the acts of such bodies were unlikely to be relevant practice. Although the draft conclusions related to different topics, confusion might still ensue as to the relevance for State practice of the acts of organs composed of individuals serving in their personal capacity.

34. Mr. SABOIA said that he supported the proposal to delete the final sentence. In addition to treaty bodies, an important example of international organizations whose acts were likely to be considered relevant practice was the Committee of Experts on the Application of Conventions and Recommendations, which, although an organ of the ILO, was clearly independent, and whose practice must be considered relevant as it influenced States' implementation of conventions of that Organization.

35. Mr. FORTEAU said that he was in favour of deleting, in the final sentence, the clause in parentheses. There were many States in which independent organizations established by the administrative authorities had a public role. As to the second sentence of the paragraph, it was too early in the Commission's work on the topic for it to

state whether there were precedents in case law or otherwise; he would therefore prefer to maintain the sentence as drafted.

36. Mr. NOLTE said that he supported Mr. Forteau's statement with regard to the second sentence. The word "might" was sufficiently cautious language. He also could agree to deleting, in the last sentence, only the phrase in parentheses. The Iraq Inquiry was perhaps not the most fitting example in the current context; however, if the report of that Inquiry[503] had included a statement that clearly violated the rights of a particular State, it would necessarily have been attributable to the United Kingdom, which had set up the Inquiry.

37. Ms. JACOBSSON asked whether, in introducing the Iraq Inquiry, Mr. Nolte had meant to refer to it as a practice of States.

38. Mr. NOLTE said that, rather than focusing on a single example, he would prefer to speak more generally: if a State set up an independent body of experts and asked them to issue a report and that report stated false information about another State that would give rise to damage, that act would be attributable to the State that had set up the body. Therefore, the State could not exonerate itself of such acts, even if it was not a State organ, in the narrow definition of the word, that had performed them.

39. Ms. JACOBSSON said that in her country, and likely in the other Nordic countries also, such bodies were often set up by the State. Their acts were not, however, considered attributable to the State, at least not until the State officially endorsed them.

40. Mr. TLADI said that the paragraph under discussion was about international organizations, not about bodies set up by States. He supported maintaining the last sentence as currently drafted.

41. Mr. HMOUD said that he also supported maintaining the final sentence as drafted and as discussed within the Working Group.

42. Sir Michael WOOD (Special Rapporteur) suggested deleting, in the second sentence, the words "For example", and replacing, in the final sentence, the words "is usually" with the words "may be".

43. Mr. SABOIA said that, as the Special Rapporteur's proposal did not change the substance of the final sentence, he remained in favour of its deletion. He agreed, however, with the deletion of the words "For example" in the second sentence.

44. Mr. FORTEAU, supported by Mr. NOLTE and Mr. PARK, said that he opposed the Special Rapporteur's proposed amendments to the last sentence, as they did not seem in line with paragraph (2) of the commentary to draft conclusion 5. The definition therein of what constituted State practice was quite broad and should extend to the acts of independent administrative authorities that were composed of experts but that had a governmental role. He therefore proposed that either the phrase in parentheses in the last sentence or the entire last sentence be deleted.

45. The CHAIRPERSON said that he took it that the Commission wished to adopt the paragraph with the proposed deletion of the entire last sentence and, in the second sentence, of the words "For example".

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraphs (9) and (10)

46. Sir Michael WOOD (Special Rapporteur) introduced a revised version of paragraphs (9) and (10), in which he proposed that the word "Similarly" in the penultimate sentence of paragraph (10) be replaced with the words "For example" and that this sentence, together with the last sentence of paragraph (10) and the corresponding footnote, be moved to the end of paragraph (9). In the first sentence of paragraph (10), the words "For example, the" should be deleted, so that the paragraph would begin with the words "Official statements", and the words "may likewise" should be inserted before the words "play an important role". In the second sentence, the word "thus" should be inserted between the words "may" and "contribute".

47. Mr. MURPHY said that he supported the Special Rapporteur's revisions. In addition, he proposed replacing, in the second sentence of paragraph (9), the phrase "As such, such conduct" with the phrase "As such, their conduct".

Paragraphs (9) and (10), as amended, were adopted.

The commentary to draft conclusion 4, as amended, was adopted.

Commentary to draft conclusion 5 (Conduct of the State as State practice)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

48. Mr. MURPHY proposed replacing, in the final sentence, the phrase "other subjects of international law established by States (namely, international organizations)" with the words "international organizations". More generally, the rationale for drawing a distinction between the joint action of several States and that of other subjects of international law established by States was not clear. If both were considered relevant practice, then perhaps the distinction was not necessary and the last sentence could simply be deleted.

49. Mr. SABOIA said that he was opposed to deleting the last sentence, which made a useful point in emphasizing the importance of international organizations when acting in support of or jointly with States.

[503] Iraq Inquiry, *The Report of the Iraq Inquiry, Report of a Committee of privy counsellors*, July 2016. Available from: www.gov.uk/government/publications/the-report-of-the-iraq-inquiry.

50. Sir Michael WOOD (Special Rapporteur) said that he, too, would prefer to maintain the final sentence, with the amendments proposed by Mr. Murphy to the phrase beginning with the words “other subjects”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft conclusion 5, as amended, was adopted.

Commentary to draft conclusion 6 (Forms of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

51. Mr. MURPHY proposed that, in the second sentence, the word “sometimes” be inserted immediately before the words “may count as practice”.

52. Mr. TLADI said that it was not clear on what legal authority verbal conduct could be said to only sometimes count as practice. Noting also that the word “sometimes” did not appear in draft conclusion 6, he said that he would prefer the second sentence to remain as drafted.

53. Mr. McRAE said that he also did not support the insertion of the word “sometimes”, since it did not seem to add anything to the sentence.

54. Mr. MURPHY said that adding the word “sometimes” would reduce the ambiguity of the word “may”. However, he would not insist on the amendment.

55. Ms. JACOBSSON said that she would like clarification of the phrase “verbal conduct (both written and oral)”.

56. Sir Michael WOOD (Special Rapporteur) said that he was not in favour of inserting the word “sometimes” in the second sentence. The point of the phrase for which clarification had been requested was to indicate that verbal, not just physical, conduct could constitute practice. He proposed, for the sake of greater clarity, replacing the words “both written and oral” with the words “whether written or oral”.

57. Ms. JACOBSSON said that she supported the proposed amendment to the phrase contained in parentheses.

58. Mr. FORTEAU proposed replacing the words “verbal conduct” with the words “conduct consisting of declarations”.

59. Mr. TLADI said that, while he did not object to any of the proposed amendments to the wording “verbal conduct”, there was nothing incorrect about the phrase as originally drafted.

60. Sir Michael WOOD (Special Rapporteur) said that the word “verbal” was defined as consisting or composed of words and that its use in paragraph (2) reflected the language of draft conclusion 6, paragraph 1, in which reference was made to “physical and verbal acts”. Therefore, he would prefer to maintain the reference to “verbal conduct”, with the amended phrase “(whether written or oral)” following it.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to draft conclusion 6, as amended, was adopted.

Commentary to draft conclusion 7 (Assessing a State’s practice)

Paragraph (1)

61. Mr. TLADI said that, in the first sentence, the phrase “the position of that State”, whose meaning was not clear in that context, should be replaced with the words “its practice”.

62. Sir Michael WOOD (Special Rapporteur) said that, in his view, the current formulation accurately conveyed the idea that the Commission wished to express; repeating the word “practice” might make the sentence somewhat circular. However, he had no strong objection to the proposal.

63. Mr. MURPHY said that, although he was happy with the current language, one solution might be to recast the first sentence to read: “Draft conclusion 7 concerns the assessment of the practice of a particular State when assessing the existence of a general practice (which is the subject of draft conclusion 8).”

64. Sir Michael WOOD (Special Rapporteur) said that the wording proposed by Mr. Murphy would not adequately convey the notion of assessing the practice of the particular State as part of assessing whether there was a general practice. He would therefore prefer to retain the original formulation of the sentence.

Paragraph (1) was adopted.

Paragraph (2)

65. Mr. MURPHY suggested that, in the second sentence, the words “that is, include” should be replaced with “including”.

Paragraph (2) was adopted with that amendment.

Paragraph (3)

66. Mr. MURPHY said that, in the interests of readability, the first sentence should be divided into two and reformulated. The first sentence should end after the words “during an armed conflict”; the new second sentence should read: “Yet a different position was adopted before the Special Supreme Court by the Government of Greece when refusing to enforce the Hellenic Supreme Court’s judgment and in defending this position before the European Court of Human Rights, and was adopted by the Hellenic Supreme Court itself in a later decision.”

67. Sir Michael WOOD (Special Rapporteur) said that he could agree to split the first sentence into two by placing a full stop after the phrase "during an armed conflict". As to the new second sentence, he was not in favour of all the changes proposed by Mr. Murphy because, among other things, it was the Special Supreme Court that had adopted a different position, not the Government of Greece. He proposed that the new sentence read: "Yet a different position was adopted by the Special Supreme Court; by the Government of Greece when refusing to enforce the Hellenic Supreme Court's judgment, and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision."

Paragraph (3), as amended by Mr. Murphy and further amended by the Special Rapporteur, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

68. Sir Michael WOOD (Special Rapporteur) said that the final sentence should be split into two by placing a full stop after the words "the practice of the higher organ". The new penultimate sentence should read: "In this vein, for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ." The second new sentence would retain the original wording.

Paragraph (5), as amended by the Special Rapporteur, was adopted.

The commentary to draft conclusion 7, as amended, was adopted.

Commentary to draft conclusion 8 (The practice must be general)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

69. Mr. MURPHY suggested that, for ease of understanding, the final sentence be reworded to read: "In each case, however, the practice should be of such a character as to make it possible to discern a constant and uniform usage."

Paragraph (2), as amended, was adopted.

Paragraph (3)

70. Mr. MURPHY said that the quotations from the two cases referred to in the second footnote to the paragraph – *Kaunda and Others* v. *President of the Republic of South Africa and Others* and the German Federal Constitutional Court case concerning *2 BvR 1506/03* – did not seem to be directly supporting the proposition contained in the text, namely that universal participation in a particular practice was not required. If those cases were cited in other contexts, consideration might be given to deleting the footnote.

71. Mr. NOLTE said that he was not in favour of deleting the footnote in its entirety because the German Federal Constitutional Court case provided clear support for the view that practice was not required to be uniform in order for it to be considered general practice.

72. Sir Michael WOOD (Special Rapporteur) said that he tended to agree with Mr. Murphy that the quotation from the *Kaunda* case did not support the proposition in the paragraph, although it was an interesting quotation that could be used elsewhere in the commentary. Like Mr. Nolte, he preferred to retain the quotation from the *2 BvR 1506/03* case, since it did substantiate the content of the commentary. He therefore proposed that the reference to the former case be deleted from the second footnote to the paragraph.

Paragraph (3) was adopted with that amendment to its second footnote.

Paragraph (4)

73. Mr. NOLTE said that, for the sake of accuracy, the words "some rules" in the final sentence should be amended to read "many rules".

74. Mr. PARK said that the current wording was surprising inasmuch as, during the discussions in the Working Group on the identification of customary international law, the Special Rapporteur had in fact proposed the wording "many rules". In any event, in his view, the final sentence bore no logical relationship to the substance of the paragraph, which dealt with specially affected States. He therefore proposed its deletion.

75. Mr. TLADI said that he was not comfortable with the paragraph in its current formulation and wished to propose a number of amendments, which had been discussed with the Special Rapporteur. In particular, he proposed that the first sentence be recast to read: "In assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule, have participated in the relevant activity." As to the final sentence, he was not in favour of its deletion, as proposed by Mr. Park. However, he was strongly opposed to the use of the words "some rules" in the opening phrase of that sentence; his preference would be to reword that phrase to read "In relation to most rules".

76. Mr. VÁZQUEZ-BERMÚDEZ said that he could go along with Mr. Tladi's proposed amendment to the first sentence. With respect to the final sentence, he agreed with other colleagues regarding the need to amend the phrase "some rules". He was in favour of using the words "many rules", in line with the proposal made by the Special Rapporteur in the Working Group.

77. Sir Michael WOOD (Special Rapporteur) said that, in general, he agreed with Mr. Tladi's proposed amendment to the first sentence; however, he suggested that the final word of his proposal, "activity", be replaced with "practice". As to the final sentence, he proposed recasting it to read: "In many cases, all or virtually all States will be equally concerned."

78. Mr. HMOUD said that, in the final sentence, he would prefer to retain the words "directly concerned", since a comparison was being drawn with specially affected States. It was not clear what was meant by "equally" in that context.

79. Sir Michael WOOD (Special Rapporteur) said that the point of the word "equally" was to suggest that, in many cases, there would not be any specially affected States.

80. Mr. TLADI said that, while he understood the issue raised by Mr. Hmoud, he saw no problem with the word "equally".

81. Mr. McRAE said that he was not sure that there was any need to indicate the extent to which States were concerned by the rules in question. He therefore suggested that the last phrase of the final sentence could read: "all or virtually all States will be concerned".

82. Mr. NOLTE said that a qualifier of some kind, whether "directly concerned" or "equally concerned", was needed in order to stand in opposition to the idea of "specially affected" States. He personally favoured the phrase "equally concerned".

83. Mr. MURPHY said that, in view of the number of suggested amendments, it would be helpful if the proposed new version of the paragraph could be circulated to the Commission in written form.

84. The CHAIRPERSON proposed that the meeting be suspended in order to allow the Special Rapporteur time to draft a new version of the paragraph.

The meeting was suspended from 11.50 a.m. to 12.10 p.m.

Paragraph 4 (*concluded*)

85. The CHAIRPERSON invited the Commission to adopt the Special Rapporteur's proposed new version of paragraph (4), which had been circulated to members and read:

> "In assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule, have participated in the practice. It would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of coastal States and major shipping States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made. In many cases, all or virtually all States will be equally concerned."

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

86. Mr. VÁZQUEZ-BERMÚDEZ said that, in the first sentence, the phrase "virtually uniform" should be replaced with "consistent" in order to bring the wording into line with the language of paragraphs (5) and (7).

Paragraph (6), as amended, was adopted.

Paragraph (7)

87. Mr. MURPHY said that the first footnote to the paragraph, which contained a number of examples of possible divergence from an alleged customary rule, might not be helpful in the light of the overall objective of the commentary to draft conclusion 8. He therefore proposed the deletion of that footnote.

88. Sir Michael WOOD (Special Rapporteur) said that he would have no problem with deleting the footnote in question.

Paragraph (7) was adopted, with the deletion of its first footnote .

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to draft conclusion, as amended, was adopted.

Part Four. Accepted as law (*opinio juris*)

Introductory paragraph

The introductory paragraph to Part Four was adopted.

Commentary to draft conclusion 9 (Requirement of acceptance as law (*opinio juris*))

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

89. Mr. NOLTE said that the parentheses around the second sentence should be deleted and that the sentence should begin with the word "However".

Paragraph (4), as amended, was adopted.

Paragraph (5)

90. Mr. VÁZQUEZ-BERMÚDEZ said that in the first sentence the expression *opinio juris* in parentheses should be added after the phrase "acceptance as law".

91. Sir Michael WOOD (Special Rapporteur) suggested that, in the second footnote to the paragraph, the phrase "expressive of" be replaced with "accompanied by" in order to ensure consistency with the terminology used elsewhere.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to draft conclusion 9, as amended, was adopted.

Commentary to draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*))

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft conclusion 10 was adopted.

Part Five. Significance of certain materials for the identification of customary international law

Introductory paragraphs

92. Mr. MURPHY proposed that, in the third sentence of the second paragraph, the order of the expressions "codification" and "progressive development" be reversed for the sake of consistency with the Commission's statute. In the final sentence, he suggested that the phrase "and sources cited" be inserted after the word "reached".

93. Mr. NOLTE said that, while he was not opposed to analysing the value of the output of the Commission for the purpose of identifying customary international law, he was concerned that giving particular prominence to that output by referring to it in the introductory text to Part Five was likely to attract criticism. The paragraph in question might perhaps be moved.

94. Sir Michael WOOD (Special Rapporteur) said that he agreed with Mr. Murphy that, in the third sentence of the second paragraph, the phrase "the codification and progressive development of international law" should be recast to read: "the progressive development of international law and its codification". He did not, however, consider it appropriate to insert a reference to sources in the last sentence, not least because, in the third sentence, mention was made of the Commission's consideration of extensive surveys of State practice, which seemed to cover the point.

95. In response to Mr. Nolte, he recalled that there had been a long debate within both the Working Group on the identification of customary international law and the Commission on how to refer to the Commission's output. Several members had called for the matter to be addressed in a draft conclusion, whereas others had argued that such an approach would give the Commission too much prominence. He had proposed that the matter be dealt with in draft conclusion 14 on teachings, but had encountered strong opposition on the basis that the Commission's work differed from teachings. After careful consideration, it had been decided that the introductory text to Part Five would be the most suitable location. Although it was true that the Commission's output was mentioned near the start of Part Five, it did not form part of a draft conclusion and was addressed only briefly in the commentaries, despite the fact that, in his view, it carried greater weight than teachings. If the placement of the paragraph drew an adverse reaction from States, the Commission could review it on second reading.

96. Mr. TLADI said that the Special Rapporteur had sought to take into account the two opposing views expressed during the debate on how to refer to the Commission's output and that, consequently, he was not sure what more could be done.

97. As to the last sentence of the second paragraph, he agreed with Mr. Murphy that reference should be made to sources. The third sentence did not sufficiently cover the issue in that it highlighted why the Commission's output was of particular importance, rather than the fact that relevant State practice should be borne in mind when attaching weight to the Commission's determinations.

98. Mr. SABOIA said that he agreed with the proposed redrafting of the third sentence of the second paragraph. The paragraph as a whole was important, carefully worded and not self-laudatory. He was open to the modification of the last sentence proposed by Mr. Murphy and Mr. Tladi.

99. Mr. FORTEAU proposed that, to reflect the comments that had been made with regard to the second paragraph, it should be stated in the first sentence that the Commission had not considered it appropriate to devote a separate draft conclusion to its output.

100. Mr. NOLTE proposed that the second paragraph of the introductory text be moved to paragraph (6) of the commentary to draft conclusion 14. The first sentence of paragraph (6) would be amended to read: "The output of the International Law Commission, while sometimes included among 'teachings', is of a different character. It carries particular weight." The remainder of paragraph (6) would be constituted by the second paragraph of the introductory text, minus the latter's first sentence, which would be deleted.

101. Ms. ESCOBAR HERNÁNDEZ said that she was happy with the current wording of the second paragraph, which reflected the debate that had taken place within the Working Group on how to refer to the Commission's output. The addition proposed by Mr. Forteau, while unnecessary, was acceptable if it helped resolve the issue raised by Mr. Nolte. She could not, however, accept Mr. Nolte's proposal to move the second paragraph to paragraph (6) of the commentary to draft conclusion 14.

102. Mr. HMOUD said that, as he understood it, the Working Group had agreed to refer to the Commission's output in the introduction to Part Five. The Commission should stick to that agreement, particularly as its output could not be assimilated to teachings.

103. Mr. MURPHY said that he agreed with Mr. Nolte that the Commission's output was given too much prominence. Decisions of the International Court of Justice, for instance, were not mentioned until draft conclusion 13. His preference would be to move the paragraph in question to the commentary to draft conclusion 14, as proposed by Mr. Nolte, with the addition of a phrase explaining that the Commission's output differed from teachings. He did not support Mr. Forteau's proposed rewording of the first sentence, which would shift the focus towards the Commission's internal deliberations.

104. His problem with the last sentence of the second paragraph was that the weight given to the Commission's determinations should depend on more than just the stage reached in its work and States' reception of its output.

105. Mr. VÁZQUEZ-BERMÚDEZ said that the second paragraph as it stood succinctly reflected the debate that had taken place within the Working Group. He did not consider, therefore, that any changes to the last sentence were necessary. To respond to the concern expressed by Mr. Murphy and Mr. Tladi, however, the words *inter alia*, set off by commas, could be inserted after "depends".

106. Sir Michael WOOD (Special Rapporteur) said that the first sentence could be redrafted to read: "The Commission decided not to include, at this stage, a separate conclusion on the output of the International Law Commission. Such output does, however, merit special consideration in the present context." As to the last sentence, he proposed the following wording: "The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output."

The introductory paragraphs to Part Five, as amended, was adopted.

Commentary to draft conclusion 11 (Treaties)

Paragraph (1)

107. Mr. NOLTE proposed that, in the second sentence, the words "under customary international law" be added after "as a form of practice", since the current formulation could give rise to the misunderstanding that it related to subsequent practice in the application of treaties.

108. Sir Michael WOOD (Special Rapporteur) said that no misunderstanding was possible. The draft conclusions related to the identification of customary international law and it was perfectly clear that the Commission was not referring to practice in other contexts. It would not be correct, in any case, to refer to "practice under customary international law".

Paragraph (1) was adopted.

Paragraph (2)

109. Mr. MURPHY said that, in the third sentence, the words "existence and" were rendered superfluous by the second half of the sentence and should be deleted. He also proposed that the last sentence of the first footnote to the paragraph, which was somewhat awkward, be redrafted to read: "Article 38 of the 1969 Vienna Convention refers to the possibility of 'a rule set forth in a treaty … becoming binding upon a third State as a customary rule of international law, recognized as such'."

110. Sir Michael WOOD (Special Rapporteur) said that he agreed with the amendment to that footnote. The language of the third sentence, however, was consistent with that used in the rest of the document and should be left unchanged.

111. Mr. NOLTE proposed that, in the second sentence, the word "implementation" be replaced with "application", in line with the language of the Vienna Convention on the Law of Treaties.

Paragraph (2), as amended, was adopted.

Paragraph (3)

112. Mr. MURPHY said that, in the first sentence, the word "sometimes" should be inserted between the words "near-universal acceptance" and "may be seen" in order to avoid any ambiguity. Referring to the first footnote to the paragraph, he asked whether it was in fact the case that, in *Prosecutor* v. *Sam Hinga Norman*, the Special Court for Sierra Leone had, in its judgment, referred to the "huge acceptance, the highest acceptance of all international conventions" (para. 19) as indicating that the provisions of the Convention on the rights of the child had come to reflect customary international law. He wondered whether that was not overstating what the Court had said and whether it would not be better, in any case, to replace "the provisions" with "certain provisions".

113. Mr. SABOIA said that he could not accept the inclusion of the word "sometimes".

114. Sir Michael WOOD (Special Rapporteur) said that he, too, was not in favour of inserting the word "sometimes". He would respond to Mr. Murphy's question concerning the citation in the *Prosecutor* v. *Sam Hinga Norman* case after checking the terms of the judgment in question.

Paragraph (3) was left in abeyance.

Paragraph (4)

115. Mr. NOLTE proposed that, for the sake of clarity and to echo the language of the 1969 Vienna Convention, the last sentence be redrafted to read: "It is important that States can be shown to engage in the practice not (solely) by virtue of the treaty obligation ('in the application of the treaty'), but out of a conviction that the rule embodied in the treaty is or has become customary international law."

116. Sir Michael WOOD (Special Rapporteur) said that the addition proposed by Mr. Nolte introduced a complexity of thought that he would prefer to avoid. Moreover, he was not sure that "in the application of the treaty" meant the same as "by virtue of the treaty obligation".

117. Mr. NOLTE said that "in the application of the treaty" was the standard terminology, whereas "by virtue of the treaty obligation" was not. Orthodoxy suggested that the sentence be clarified in the manner that he had proposed.

118. Sir Michael WOOD (Special Rapporteur) said that the issue could be resolved by replacing the words "by virtue" with "because".

Paragraph (4), as amended, was adopted.

The meeting rose at 1 p.m.

3340th MEETING

Monday, 8 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson,

Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter V. *Identification of customary international law* (*concluded*) (A/CN.4/L.883 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration, paragraph by paragraph, of the portion of chapter V of the draft report contained in document A/CN.4/L.883/Add.1. He proposed beginning with the first footnote to paragraph (3) of the commentary to draft conclusion 11, the adoption of which had been left in abeyance.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*concluded*)

2. Text of the draft conclusions with commentaries thereto (*concluded*)

Commentary to draft conclusion 11 (Treaties) (*concluded*)

Paragraph (3) (*concluded*)

2. Sir Michael WOOD (Special Rapporteur) said that, upon verification, the judgment rendered by the Special Court for Sierra Leone in *Prosecutor* v. *Sam Hinga Norman*, which was cited in the first footnote to the paragraph, confirmed that the proposals made by Mr. Murphy at the previous meeting were well founded. The footnote should therefore be amended by replacing the reference to paragraphs 18 to 20 with a reference to paragraphs 17 to 20 and, in the text in parentheses, by inserting the word "relevant" before "provisions" and by replacing the words "have come" with "had come".

3. Mr. SABOIA asked about the status of ratification of the Convention on the rights of the child and whether the judgment in question indicated explicitly that the "relevant" provisions of the Convention reflected customary international law.

4. Sir Michael WOOD (Special Rapporteur) said that, in the judgment in question, which it had rendered in 1996, the Special Court for Sierra Leone indicated that the Convention on the rights of the child had at that time been ratified by 193 States. The Court went on to note that the Convention was the most widely accepted of all international conventions and concluded that its provisions had become rules of customary international law almost from the moment of its entry into force. Since it was clear from the judgment, when read as a whole, that the Convention had been considered only from the perspective of the obligation not to recruit children into the armed forces, which was set out in article 38 of the Convention, an article cited explicitly by the Court, it would be going too far to say that the conclusion reached by the Court applied to all the provisions of the Convention, hence the inclusion of the adjective "relevant" before the word "provisions".

5. Mr. SABOIA said that he would not object to the proposed amendments, although his reading of the judgment in question differed from the Special Rapporteur's, which, in his view, was overly restrictive.

Paragraph (3), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

The commentary to draft conclusion 11, as a whole, as amended, was adopted.

Commentary to draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

6. Mr. NOLTE proposed deleting, in the first sentence, the words "States within", because it was not States but rather international organizations, as subjects of international law, that adopted the resolutions, decisions and other acts referred to in paragraph (2).

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

7. Mr. MURPHY proposed that, in the final sentence, the words "along with general statements and explanations of positions", set off by commas, be inserted after the word "consensus".

Paragraph (5), as amended, was adopted.

Paragraph (6)

8. Mr. MURPHY said that the statement in the third footnote to the paragraph that the formulation "*Affirm[ed]* that genocide is a crime under international law" in General Assembly resolution 96 (I) of 11 December 1946 "suggests that the paragraph is declaratory of existing customary international law" went too far; he proposed nuancing it by replacing the word "suggests" with "may suggest".

9. Mr. KITTICHAISAREE said that General Assembly resolution 96 (I) recognized genocide as a crime under international law and reflected the will to develop a convention to prevent and suppress genocide. He thus saw no reason to amend the footnote in the manner proposed by Mr. Murphy.

10. Sir Michael WOOD (Special Rapporteur), concurring with Mr. Kittichaisaree, said that the word "suggests" was already very weak and that he would have preferred a more assertive verb such as "indicates". Consequently, he considered that the current formulation should constitute a compromise acceptable to Mr. Murphy.

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

11. Mr. MURPHY said that, whereas draft conclusion 12, paragraph 3, stressed that a provision in a resolution adopted by an international organization could reflect a rule of customary international law, paragraph (8) of the commentary, which was supposed to explain that provision, referred to the resolution as a whole. That inconsistency should be remedied.

12. Sir Michael WOOD (Special Rapporteur) agreed with Mr. Murphy that the commentary should be brought into line with draft conclusion 12, paragraph 3, and, to that end, proposed that the words "provisions of" be inserted before "resolutions" in the first sentence and that the final sentence begin with the words "A provision of a resolution" instead of "A resolution".

Paragraph (8), as amended, was adopted.

The commentary to draft conclusion 12, as amended, was adopted.

Commentary to draft conclusion 13 (Decisions of courts and tribunals)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

13. Mr. NOLTE said that the structure of the first sentence should be clarified, as the word "those" could refer to "decisions", "courts and tribunals" or "questions". In addition, the words "and other courts" should be inserted at the end of the second sentence, as the value of decisions on issues of international law depended not only on the reaction of States, but also on the reaction of courts other than those that had rendered them.

14. Sir Michael WOOD (Special Rapporteur) said that the word "those" in the first sentence referred to "decisions" and that the word "decisions" should perhaps be repeated in order to avoid confusion. He endorsed Mr. Nolte's proposed addition to the second sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

15. Mr. FORTEAU said that it was strange that the definition of the term "decisions" in the first sentence did not contain a reference to judgments; he therefore proposed that the word "judgments" be inserted at the beginning of the list of examples.

16. Sir Michael WOOD (Special Rapporteur) endorsed the proposal. The sentence would thus read: "… the term 'decisions' includes judgments and advisory opinions, as well as orders …"

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

17. Mr. FORTEAU said that the words "and are less likely to reflect a particular national interest" in the third sentence gave the impression that the independence of national courts was being questioned and that those words should be deleted.

18. Mr. NOLTE said that he did not interpret that phrase in the same way as Mr. Forteau; in his view, there was no reason for it to be deleted.

19. Ms. ESCOBAR HERNÁNDEZ said that an option might be to replace the word "interest" with "perspective".

20. Mr. FORTEAU said that he would not insist on the deletion of the phrase, although he was not sure that he understood what a national "perspective" would be.

21. Mr. SABOIA said that, unlike the word "interest", which had strong connotations, the word "perspective", proposed by Ms. Escobar Hernández, did not suggest that the Commission was questioning the independence of national courts and was thus a good solution.

22. Mr. McRAE said that replacing the word "interest" with "perspective" would change the meaning of the sentence; it was for the Special Rapporteur to decide which was the more apposite word.

23. Sir Michael WOOD (Special Rapporteur) said that the word "perspective" conveyed the idea that he was seeking to express more clearly than the word "interest", as it was true that, when a national court had to decide on a rule of international law, it should not take national interests into account in the sense that it should not be biased, but nothing prevented it from adopting a national perspective. He therefore agreed with the proposal to replace the word "interest" with "perspective".

Paragraph (7), as amended, was adopted.

The commentary to draft conclusion 13, as amended, was adopted.

Commentary to draft conclusion 14 (Teachings)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

24. Mr. NOLTE, noting that the function of teachings was not limited to compiling State practice, proposed replacing, in the second sentence, the words "in systematically compiling State practice" with "in collecting and assessing State practice" and deleting the words "and synthesizing it".

Paragraph (2), as amended, was adopted.

Paragraph (3)

25. Mr. NOLTE proposed the deletion, in the first sentence, of the word "markedly", which was unnecessary, since it was noted later in the paragraph that teachings could differ "greatly" in quality.

Paragraph (3), as amended, was adopted.

Paragraph (4)

26. Mr. NOLTE said that, while it was certainly important to consult sources that were as representative as possible, care should be taken not to discourage the use of teachings as a subsidiary means for the determination of rules of customary international law by suggesting that teachings could be invoked only if they were representative of all regions of the world because it would be simply impossible to satisfy such a condition. He thus proposed deleting the last sentence.

27. Mr. TLADI said that Mr. Nolte's concern was groundless because the last sentence did not set out a requirement to take into account the writings of all regions, as was shown by the words "so far as possible". He was therefore opposed to the proposed deletion.

28. Mr. VÁZQUEZ-BERMÚDEZ, Mr. SABOIA, Mr. HMOUD and Mr. WAKO supported Mr. Tladi.

29. Mr. NOLTE said that his proposal was intended only to ensure that the use of teachings was not discouraged, but, as several Commission members seemed convinced that the sentence in question posed no risk in that regard, he would not insist on its deletion.

Paragraph (4) was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

30. Mr. VÁZQUEZ-BERMÚDEZ said that, as the second introductory paragraph of Part Five already set out in detail the reasons why the Commission's work carried particular weight, paragraph 6 was superfluous and should therefore be deleted.

Paragraph (6) was deleted.

The commentary to draft conclusion 14, as amended, was adopted.

Part Six. Persistent objector

Introductory paragraph

31. Mr. NOLTE proposed replacing, in the first sentence, the words "may be exempt" with "is exempt", since that sentence reflected the persistent objector rule as set out in draft conclusion 15, paragraph 1, which stated that a rule of customary international law to which a State had persistently objected while that rule was in the process of formation was "not opposable to the State concerned".

32. Mr. PARK said that he had concerns about the term "rule", as used in the expression "persistent objector rule". He considered that the Commission should adopt a more measured approach and that it would be preferable to speak simply of "persistent objector", for three reasons: first, because Part Six was entitled simply "Persistent objector"; second, because, for some jurists, it was not a rule, but rather a doctrine; and, lastly, because Commission members held divergent views on the matter. If it was decided that the term "rule" should be retained, he would like it to be noted in the summary record that he deemed it preferable to speak of "persistent objector".

33. Mr. PETRIČ said that he shared Mr. Park's view and that he too would like his position to be noted in the summary record.

34. Mr. SABOIA said that he endorsed Mr. Park's proposal on the very controversial issue under consideration. It would indeed be better to delete the introductory text in its entirety.

35. Mr. MURASE said that he had reservations regarding the second sentence of the introductory text. The "persistent objector rule" was not a question of the identification of customary international law, but a question of its application, a fact that should be made clear.

36. Mr. ŠTURMA said that he shared the concerns expressed by Mr. Park and Mr. Petrič and proposed replacing the word "rule" with "doctrine" or "concept".

37. Ms. JACOBSSON said that she shared the views expressed by Mr. Park and Mr. Saboia, among others. She had serious concerns about the introductory text, which should be deleted.

38. Mr. KITTICHAISAREE proposed that the first sentence be reformulated to read: "Part Six comprises a single draft conclusion, which concerns the situation in which a State has persistently opposed an emerging rule of customary international law."

39. Mr. McRAE said that he endorsed the proposals made by Mr. Kittichaisaree and Mr. Šturma. He proposed replacing, in the first sentence, the word "rule" with the word "concept" and deleting the words that followed.

40. Sir Michael WOOD (Special Rapporteur) said that he agreed that it was not necessary to include so much detail in the introductory text, but believed that, for the sake of consistency, there should be an introductory text. He proposed that the first sentence be reformulated to read: "Part Six comprises a single draft conclusion, on the persistent objector." The rest of the paragraph should be deleted.

The introductory paragraph to Part Six, as amended, was adopted.

Commentary to draft conclusion 15 (Persistent objector)

Paragraph (1)

41. Mr. MURASE said that, in the penultimate sentence, the words "will not be bound by it" should be replaced

with "will not be applicable to it". In addition, he proposed inserting a sentence that would read: "This is not a question of identification of customary international law, but of its application; nonetheless, the Commission considered it appropriate to refer to the concept."

42. Mr. VÁZQUEZ-BERMÚDEZ said that, like Mr. Murase, he considered that the word "bound" did not belong in the draft conclusion. He proposed replacing the words "will not be bound by it" with "that rule is not opposable to it" to reflect the language used in draft conclusion 15, paragraph 1.

43. Mr. PETRIČ said that he agreed with Mr. Vázquez-Bermúdez. In addition, he proposed deleting the last sentence of the paragraph.

44. The CHAIRPERSON said that the last sentence was a synthesis of the whole paragraph.

45. Mr. SABOIA proposed that either the last sentence should be deleted or the word "rule" should be replaced with "concept". Furthermore, consideration should be given to Mr. Murase's proposal to insert a sentence explaining that it was not a question of the identification of customary international law.

46. Mr. NOLTE said that the meaning of the word "opposable" should be explained to the reader. If a rule was not opposable to a State, that of course meant that it was not applicable to that State, but that did not preclude the rule from actually existing. It was thus a question of the scope of application *ratione personae*. Regarding the term "rule", persistent objection did not stop being a rule simply because the Commission did not describe it as one. Draft conclusion 15 clearly set out a rule. He thus had no objection to retaining the current wording of the paragraph. It could be reformulated to some extent in the light of the various proposals that had been made, but there was no reason to reopen a substantive debate on the matter.

47. The CHAIRPERSON said that he shared Mr. Nolte's view.

48. Mr. PARK recalled that it had been decided to delete, in the introductory text, the term "rule"; the same should be done in the last sentence of paragraph (1).

49. Mr. MURPHY said that he had no objection to leaving the text as it currently stood. However, he noted that, if the proposal by Mr. Vázquez-Bermúdez were implemented, it would be necessary to reformulate the second sentence of the paragraph by replacing the words "a State that" with "when a State". With regard to Mr. Murase's comments, he agreed that persistent objection was not strictly a matter of the identification of customary international law. While he was not convinced that it was necessary to include a statement to that effect, he was not opposed to the idea. As for the last sentence, if it was decided that it should be retained, the word "commonly" should be replaced with "sometimes", the word "rule" should be placed within quotation marks and the words "or 'doctrine'" should be inserted after that word.

50. Mr. NOLTE said that persistent objection was clearly a question of the identification of customary international law, as it involved the identification of the scope of application of rules. He was not convinced that the addition proposed by Mr. Murase should be included.

51. Mr. TLADI said that, like Mr. Nolte, he considered that, as it was worded, draft conclusion 15 set out a rule. The debate on the question indicated that there had been no agreement in the plenary as to whether that rule was well grounded in practice; he noted that it was not indicated in the commentary, as was often done on first reading, that the issue gave rise to differences of opinion among Commission members.

52. Sir Michael WOOD (Special Rapporteur) said that he endorsed the proposal by Mr. Vázquez-Bermúdez to reformulate the second sentence of paragraph (1) to speak of non-opposability, provided that the additions proposed by Mr. Murphy were also included. With regard to the last sentence, he would prefer to replace the word "commonly" with "often" rather than with "sometimes", but he was not opposed to that last term. He also endorsed Mr. Murphy's proposal to refer to a "'rule' or 'doctrine'". The point raised by Mr. Murase was relevant, but he considered that persistent objection was certainly part of the identification of customary international law, insofar as it was linked to the identification of the scope of application of the rules of customary international law. For that reason, he would prefer that the proposed final sentence be amended to read: "This is not just a question of identification of rules of customary international law, but relates in particular to their scope *ratione personae*."

53. Mr. McRAE proposed inserting a sentence at the end of the paragraph that would read: "This is commonly referred to as the persistent objector 'rule' or 'doctrine' and not infrequently arises in connection with the identification of rules of customary international law."

54. Mr. NOLTE noted that the placement within quotation marks of the word "rule", rather than the entire expression "persistent objector rule", would suggest that it was not a rule.

55. Mr. PETRIČ said that, if the last sentence of the paragraph had a pedagogical function, a footnote should be inserted in which two or three jurists who characterized persistent objection as a rule were cited.

56. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Mr. Murphy's reformulation of the last sentence and that he endorsed Mr. McRae's proposal. He considered that it was better to place only the term "rule" in quotation marks so as to take account of differences of opinion on the matter.

Paragraph (1), as amended by Mr. McRae, Mr. Murphy and Mr. Vázquez-Bermúdez, was adopted.

Paragraph (2)

57. Mr. KITTICHAISAREE proposed that, in the second sentence, the words "and may facilitate the development of customary international law" be deleted; however, the second footnote to the paragraph should be retained.

58. Mr. MURPHY said that the intention was to express the idea that the existence of such a concept allowed for an interaction among States that could help develop a rule of law, so as to prevent a situation where some States might decide to opt out of such a rule. In the second footnote to the paragraph, the word "possibility" should be replaced with "ability".

59. Mr. VÁZQUEZ-BERMÚDEZ said that it would be better to delete the second sentence. The question of the nature of customary international law was not part of the present topic and would require more in-depth analysis. Moreover, the footnote in question did not support the second part of the sentence, to which it was attached, and risked causing confusion.

60. Mr. PARK proposed replacing, at the beginning of the first sentence of the paragraph and in the second sentence, the word "rule" with "'rule' or 'doctrine'".

61. Mr. SABOIA said that he agreed with Mr. Vázquez-Bermúdez that it would be preferable to delete the entire second sentence.

62. Sir Michael WOOD (Special Rapporteur) proposed replacing, in the first sentence, the words "the persistent objector rule" with "the persistent objector". He had no objection to the deletion of the second sentence, but it would be useful to retain the content of the second footnote to the paragraph, which could be inserted at the end of the first footnote to paragraph (3). The word "possibility" would be replaced with "ability", as Mr. Murphy had proposed, and the rest of the wording, including the word "rule", would be retained as it appeared in the sentence.

63. Mr. MURPHY said that, if the second sentence were deleted, it would be possible to merge the two remaining sentences into one by inserting a comma followed by the conjunction "and" and deleting the expression "in any event".

It was so decided.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (9)

Paragraphs (3) to (9) were adopted.

Paragraph (10)

64. Mr. VÁZQUEZ-BERMÚDEZ proposed adding the words "or obligations *erga omnes*" after "of *jus cogens*", as it had been decided to exclude obligations *erga omnes* from the scope of the draft conclusions.

65. Mr. NOLTE said that he was not sure that it had been decided to exclude all aspects of *erga omnes* obligations from the scope of the draft conclusions. A significant number of rules of customary international law could in fact give rise to *erga omnes* obligations, and it would desirable to take those obligations into account.

66. Mr. VÁZQUEZ-BERMÚDEZ said that the issue of *erga omnes* obligations would be dealt with in the context of the topic "*Jus cogens*" and that there was no reason to examine it as part of the present topic.

67. Mr. TLADI said that the exclusion of *erga omnes* obligations was mentioned in paragraph (5) of the commentary to draft conclusion 1. Like Mr. Nolte, he believed that *erga omnes* obligations should not be excluded from the scope of the draft conclusion, but it had been decided otherwise.

68. Mr. MURPHY said that he saw no reason to repeat what had already been stated in paragraph (5) of the commentary to draft conclusion 1. Paragraph (10) should therefore be deleted.

69. Mr. TLADI said that he opposed the deletion of the paragraph.

70. Mr. SABOIA said that the paragraph clearly belonged in the draft commentary, since it would be very serious if a *jus cogens* rule could be put in jeopardy because of the opposition of a few persistent objectors.

71. Mr. HMOUD said that he questioned the appropriateness of mentioning *erga omnes* obligations in the paragraph, since, although they constituted an aspect of *jus cogens*, they were distinct from it in that they principally concerned the effects of those obligations on States.

72. Mr. ŠTURMA proposed that, to address the concerns expressed by some Commission members, a full stop be inserted after the words "*jus cogens*" and that the rest of the sentence be deleted.

73. The CHAIRPERSON said that he took it that the Commission endorsed that proposal.

Paragraph (10), as amended, was adopted.

The commentary to draft conclusion 15, as amended, was adopted.

Part Seven. Particular customary international law

Introductory paragraph

74. Mr. VÁZQUEZ-BERMÚDEZ said that, following a proposal made by Mr. Murase at a previous meeting, he had drafted a sentence that he proposed for insertion after the first sentence, and he had amended the second sentence, such that the whole text would read: "While (general) customary international law is binding on all States, particular customary international law applies among a limited number of States. Even though rules of particular customary international law are not all that frequently encountered …".

75. Mr. MURPHY said that he endorsed the proposal, but he did not see the need to place the word "general" in parentheses, as he seemed to recall that the Commission had already used the expression "general customary international law" in the past.

76. Sir Michael WOOD (Special Rapporteur) said that he, too, endorsed the proposal by Mr. Vázquez-Bermúdez,

but he proposed that it be slightly modified by the addition of the words "rules of" between the words "binding on all States" and "particular customary international law". He doubted that the Commission had already used the expression "general customary international law", unlike the International Law Association, which placed the word "general" in parentheses. In any event, the idea of generality was already expressed in the sentence, since it was noted that customary international law was binding on all States.

77. Mr. HMOUD said that the word "general" was redundant in the sentence and could be deleted.

78. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed that the word was not essential and he had no objection to its deletion.

79. Mr. McRAE proposed deleting the words "all that", which seemed unnecessary, before the word "frequently".

80. Sir Michael WOOD (Special Rapporteur) noted that, later in the document, in paragraph (3) of the commentary to draft conclusion 16, a distinction was made between general customary international law and particular customary international law. He thus saw no reason to remove the word "general" from the introductory text and considered that it should be retained, although without parentheses. He noted further that the words "are binding on all States" should be read in the light of the previous draft conclusions and recalled that there could be exceptions to that rule. To ensure that it was clear to Commission members which amendments had been accepted, he would read Mr. Vázquez-Bermúdez's proposal, as amended orally: "While rules of general customary international law are binding on all States, rules of particular customary international law apply among a limited number of States. Even though they are not frequently encountered …"

The introductory paragraph to Part Seven, as amended, was adopted.

Commentary to draft conclusion 16 (Particular customary international law)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

81. Mr. MURPHY proposed that, in the penultimate sentence, the word "alone" be added after the word "them" to reflect more clearly that the acceptance of the rule as law held true only for the States concerned.

82. Following an exchange of views in which Mr. VÁZQUEZ-BERMÚDEZ, Mr. NOLTE and Mr. MURPHY took part, Sir Michael WOOD (Special Rapporteur) proposed replacing "them" with "themselves".

Paragraph (7), as amended, was adopted.

The commentary to draft conclusion 16, as amended, was adopted.

83. The CHAIRPERSON invited the Commission to return to paragraph (1) of the section entitled "Identification of customary international law – General commentary", concerning which a proposed amendment had been drawn up by the Special Rapporteur (document without a symbol, circulated at the meeting, in English only).

General commentary (*concluded*)*

Paragraph (1) (*concluded*)*

84. Sir Michael WOOD (Special Rapporteur) said that the amendment consisted of the insertion at the end of the first sentence of a footnote that would read: "As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries."

Paragraph (1), as amended, was adopted.

The general commentary, as amended, was adopted.

Section C, as amended, was adopted.

Document A/CN.4/L.883

B. Consideration of the topic at the present session (*concluded*)*

Paragraphs 10 to 12 (*concluded*)*

85. The CHAIRPERSON invited the Commission to adopt paragraphs 10 to 12, which were yet to be completed, and proposed that the first sentence of each paragraph begin: "At its 3340th meeting, on 8 August 2016, the Commission …". If he heard no objection, he would take it that the Commission wished to adopt the paragraphs with those amendments.

It was so decided.

Section B, as amended, was adopted.

Chapter V of the draft report of the Commission, as a whole, as amended, was adopted.

86. The CHAIRPERSON congratulated the Special Rapporteur on his excellent work and thanked all the Commission members for their contributions to the debates.

87. Sir Michael WOOD (Special Rapporteur) said that he was particularly pleased with the very cooperative way in which Commission members had worked on the topic; the establishment of a Working Group had been very useful and had helped him to improve the quality of the draft commentaries.

Chapter VI. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (*continued*) (A/CN.4/L.884 and Add.1–2)

88. The CHAIRPERSON invited the Commission to adopt the proposed amendments (document without a symbol, circulated at the meeting, in English only) to the headings contained in the draft commentary contained in documents A/CN.4/L.884/Add.1–2. The document, which he would read out, also contained, for the sake

* Resumed from the 3338th meeting.

of clarity and completeness, the amendments adopted at the 3336th meeting, as well as the headings whose titles remained unchanged.

Document A/CN.4/L.884/Add.1

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*continued*)*

2. Text of the draft conclusions and commentaries thereto (*continued*)*

Commentary to draft conclusion 2 [1] (General rule and means of treaty interpretation) (*concluded*)**

Paragraph 1, first sentence—relationship between articles 31 and 32

Paragraph 1, second sentence—the Vienna Convention rules on interpretation and customary international law

Paragraph 2—article 31, paragraph 1

Paragraph 3—article 31, paragraph 3

Paragraph 4—other subsequent practice under article 32

Paragraph 5—"a single combined operation"

The headings were adopted.

The commentary to draft conclusion 2 [1], as amended, was adopted.

Commentary to draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation) (*concluded*)**

All the headings were deleted.

The commentary to draft conclusion 3 [2], as amended, was adopted.

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice) (*concluded*)**

General aspects

Paragraph 1—definition of "subsequent agreement" under article 31, paragraph 3 (*a*)

Paragraph 2—definition of subsequent practice under article 31, paragraph 3 (*b*)

Paragraph 3—"other" subsequent practice

The headings were adopted.

The commentary to draft conclusion 4, as amended, was adopted.

Commentary to draft conclusion 5 (Attribution of subsequent practice) (*concluded*)**

Paragraph 1—conduct constituting subsequent practice

A new heading was inserted before paragraph (9): "Paragraph 2—conduct non constituting subsequent practice".

The headings were adopted.

The commentary to draft conclusion 5, as amended, was adopted.

Commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice) (*concluded*)**

Paragraph 1, first sentence—the term "regarding the interpretation"

Paragraph 1, second sentence—temporary non-application of a treaty or *modus vivendi*

Paragraph 2—variety of forms

Paragraph 3—identification of subsequent practice under article 32

The headings were adopted.

The commentary to draft conclusion 6, as amended, was adopted.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) (*concluded*)**

Paragraph 1, first sentence—clarification of the meaning of a treaty

Paragraph 1, second sentence—narrowing or widening or otherwise determining the range of possible interpretation

Paragraph 2—other subsequent practice under article 32

Paragraph 3—interpretation versus modification or amendment

The headings were adopted.

The commentary to draft conclusion 7, as amended, was adopted.

Commentary to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time) (*concluded*)**

All the headings were deleted.

The commentary to draft conclusion 8 [3], as amended, was adopted.

Commentary to draft *conclusion 9 [8]* (Weight of subsequent agreements and subsequent practice as a means of interpretation) (*concluded*)**

Paragraph 1—weight: clarity, specificity and other factors

Paragraph 2—weight: repetition of a practice

Paragraph 3—weight of other subsequent practice under article 32

The headings were adopted.

The commentary to draft conclusion 9 [8], as amended, was adopted.

Commentary to draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty) (*concluded*)**

Paragraph 1, first sentence—"common understanding"

Paragraph 1, second sentence—possible legal effects of agreement under article 31, paragraph 3 (*a*) and (*b*)

Paragraph 2—forms of participation in subsequent practice

The headings were adopted.

The commentary to draft conclusion 10 [9], as amended, was adopted.

* Resumed from the 3338th meeting.

** Resumed from the 3336th meeting.

Commentary to draft conclusion 11 [10] (Decisions adopted within the framework of a Conference of States Parties) (*concluded*)***

Paragraph 1—definition of conferences of States parties

Paragraph 2, first sentence—legal effect of decisions

Paragraph 2, second sentence—decisions as possibly embodying a subsequent agreement or subsequent practice

Paragraph 2, third sentence—decisions as possibly providing a range of practical options

Paragraph 2 as a whole

Paragraph 3—an agreement regarding the interpretation of the treaty

The headings were adopted.

The commentary to draft conclusion 11 [10], as amended, was adopted.

Commentary to draft conclusion 12 [11] (Constituent instruments of international organizations) (*concluded*)**

General aspects

Paragraph 1—applicability of articles 31 and 32

The heading "Paragraph 1, second sentence—relevance of subsequent agreements and subsequent practice as means for the interpretation of constituent instruments of international organizations" was deleted.

Paragraph 2—subsequent agreements and subsequent practice as "arising from" or "being expressed in" the reaction of member States

The practice of an international organization itself

Paragraph 4—without prejudice to the "rules of the organization"

The headings were adopted.

The commentary to draft conclusion 12 [11], as amended, was adopted.

Document A/CN.4/L.884/Add.2

Commentary to draft conclusion 13 [12] (Pronouncements of expert treaty bodies) (*continued*)*

Paragraph 1—definition of the term "expert treaty body"

Paragraph 2—primacy of the rules of the treaty

Paragraph 3, first sentence—"may give rise to, or refer to, a subsequent agreement or a subsequent practice"

Paragraph 3, second sentence—presumption against silence as constituting acceptance

Paragraph 4—without prejudice to other contribution

The headings were adopted.

89. The CHAIRPERSON invited the Commission to resume its consideration of the paragraphs of document A/CN.4/L.884/Add.2 whose adoption had been left in abeyance.

Commentary to draft conclusion 1 [1a] (Introduction) (*concluded*)***

Paragraph (1) (*concluded*)**

90. Mr. NOLTE (Special Rapporteur) proposed inserting, at the end of the first sentence, the same footnote as that added by Sir Michael to document A/CN.4/L.883/Add.1, which the Commission had just adopted, namely: "As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries."[504]

Paragraph (1), as amended, was adopted.

The commentary to draft conclusion 1 [1a], as amended, was adopted.

Commentary to draft conclusion 13 [12] (Pronouncements of expert treaty bodies) (*continued*)

Paragraph (20) (*concluded*)***

91. Mr. NOLTE (Special Rapporteur) said that, in consultation with Mr. Forteau, he had expanded the quotation in parentheses in the final footnote to the paragraph to read: "States parties cannot simply ignore them [individual communications], but have to consider them in good faith (*bona fide*) … not to react at all … would appear to amount to a violation."

Paragraph (20), as amended, was adopted.

92. Mr. NOLTE (Special Rapporteur) recalled that the draft commentaries had been adopted up to paragraph (23) and that, in paragraph (24) and subsequent paragraphs, he had tried to reflect faithfully the divergent opinions that had been expressed with regard to whether the pronouncements of expert treaty bodies constituted subsequent practice. He was not prepared to accept the deletion of that last part of the draft commentary, which seemed to be the wish of some Commission members, but he was prepared to shorten the text and, to that end, to delete some paragraphs and to group others together. In particular, paragraphs (23) and (26) could be merged into a single paragraph, as Mr. Murphy had proposed at a previous meeting, since they dealt with the case law of regional and domestic courts. He thus invited members first to consider those two paragraphs, then paragraphs (24) and (25), which could also be merged into a single paragraph.

93. Mr. HMOUD said that the Commission should consider the text proposed by the Special Rapporteur in its overall context and should not focus on and adopt each point individually. The consideration of certain aspects that were not part of the topic, in particular the issue of reservations, posed a problem, as Mr. Forteau and other Commission members had already noted. He would thus like the Special Rapporteur to explain clearly how he intended to arrange the paragraphs as a whole.

94. Mr. NOLTE (Special Rapporteur) said that the only reason for proposing to merge paragraphs (24) and (25) was that they related to the Commission, whereas paragraphs (23) and (26) both dealt with courts.

95. Mr. SABOIA said that he had no objection to the Special Rapporteur's proposal concerning paragraphs (23) and (26).

96. The CHAIRPERSON, recalling that paragraph (23) had already been adopted, invited the Commission to consider paragraph (26).

* Resumed from the 3338th meeting.

** Resumed from the 3336th meeting.

*** Resumed from the 3337th meeting.

[504] See paragraph 84 above.

Paragraph (26) (*concluded*)***

97. Sir Michael WOOD said that the second sentence, which suggested, as a result of the penultimate footnote to the paragraph, that the House of Lords considered in general that the pronouncements of treaty bodies had no value, did not seem necessary and should be deleted.

98. Mr. SABOIA said that he endorsed Sir Michael's proposal.

Paragraph (26), as amended, was adopted and inserted into paragraph (23).

Paragraphs (24) and (25) (*concluded*)***

99. Mr. NOLTE (Special Rapporteur) proposed shortening and merging paragraphs (24) and (25) so as to respond to the concern expressed by Mr. Forteau, for whom the quotations from the Guide to Practice on Reservations to Treaties[505] concerned the validity of reservations. He thus proposed inserting the words "commentary to the" before "Guide" in the first sentence of paragraph (24), replacing the full stop in the first sentence with a comma and deleting all the text from the second sentence of paragraph (24) up to "which is what is evoked by the expression 'shall give consideration' in the first part of the guideline" in the first sentence of paragraph (25). Paragraphs (24) and (25), as amended, would constitute a new paragraph (24), which would come after the new paragraph (23), as adopted.

100. Mr. MURPHY said that, if Commission members wished to retain the quotations in paragraphs (24) and (25), it would perhaps be wiser to rework those paragraphs, keeping only the first sentence of paragraph (24) and moving the rest, namely the quotation from guideline 3.2.3 and the commentary thereto, to a footnote. That first sentence could be added at the end of the new paragraph (23), which would then mention regional human rights courts, domestic courts and the Guide to Practice on Reservations to Treaties.

101. Mr. NOLTE (Special Rapporteur) said that he endorsed Mr. Murphy's proposal, which seemed to him a good compromise. He proposed not reproducing in the footnote that would be at the end of the new paragraph the entirety of the guideline and the commentary thereto, but only the passage beginning "Of course".

Paragraphs (24) and (25), as amended and merged into a single paragraph, were adopted.

Paragraphs (27) and (28) (*concluded*)***

Paragraphs (27) and (28) were deleted.

Paragraphs (29) to (35) (*continued*)***

102. Mr. NOLTE (Special Rapporteur) said that paragraphs (29) to (35), which were closely linked, were essential, since they explained how the Commission had come to draft a "without prejudice" clause. He proposed adopting them as they stood, since they had already been cut, but said that he was prepared, if Commission members so wished, to delete the second sentence of paragraph (30), which began with the phrase "As a form of practice", as well as the first sentence of paragraph (31), and to merge those two paragraphs into one. There would then be a first paragraph setting out the position of Commission members who thought that the pronouncements of expert treaty bodies were part of the topic, a second paragraph putting forward the opposite position and three further paragraphs setting out the Commission's conclusions on that point.

103. Sir Michael WOOD, noting that international and domestic courts were criticized rather unfairly in paragraph (29), said that he would prefer it if the Commission limited itself to noting that there were divergent views on the question.

104. Mr. MURPHY said that he agreed with Sir Michael's point of view. The paragraphs under consideration gave the impression that the Commission was seeking to set out the various points of view of its members and that the question, left open, would be resolved only on second reading, once the reactions of States were known. Yet the "without prejudice" clause was not intended to leave open the question for a subsequent decision, but to indicate that the pronouncements of expert treaty bodies were relevant in some contexts, even if they did not constitute subsequent agreements and practice under article 31, paragraph 3, of the 1969 Vienna Convention.

105. Mr. SABOIA said that he, too, agreed with Sir Michael's point of view. He proposed replacing the expression "have not clearly explained the relevance of pronouncements" in paragraph (29) with "have not determined in a definitive manner the relevance of pronouncements". He also proposed moving the last sentence of paragraph (29), which concerned the Commission, to the beginning of paragraph (30).

106. Mr. NOLTE (Special Rapporteur) said that, on first reading, it was appropriate to describe the various points of view and to leave States to react to them as they saw fit. He invited Commission members to adopt the rest of the text with that in mind.

107. Mr. HMOUD said that he would like the paragraphs under consideration to be formulated so as to reflect the fact that the practice that was accepted was practice under article 32 of the 1969 Vienna Convention.

The meeting rose at 6.10 p.m.

3341st MEETING

Tuesday, 9 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi,

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[505] The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq.* See also General Assembly resolution 68/111 of 16 December 2013, annex.

Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter VI. *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* (*concluded*) (A/CN.4/L.884 and Add.1–2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI contained in document A/CN.4/L.884.

B. Consideration of the topic at the present session (*concluded*)[*]

Paragraphs 9 to 11 (*concluded*)[*]

Paragraphs 9 to 11 were adopted on the understanding that missing details would be filled in by the Secretariat.

Section B, as amended, was adopted.

2. The CHAIRPERSON invited the Commission to resume its discussion of the portion of chapter VI contained in document A/CN.4/L.884/Add.2.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission on first reading (*concluded*)

2. Text of the draft conclusions and commentaries thereto (*concluded*)

Commentary to draft conclusion 13 [12] (Pronouncements of expert treaty bodies) (*continued*)

Paragraph (29) (*concluded*)

3. Mr. NOLTE (Special Rapporteur) said that, following consultations with interested Commission members, he proposed that the text of the paragraph be reformulated to read: "Court decisions have not always fully explained the relevance of pronouncements by expert treaty bodies for the purpose of the interpretation of a treaty, be it in terms of the rules of interpretation under the 1969 Vienna Convention or otherwise.[footnote] The Commission has considered the following alternatives."

Paragraph (29), as amended, was adopted.

Paragraphs (30) to (33)

4. Mr. NOLTE (Special Rapporteur) suggested merging elements of paragraphs (30), (31) and (33) into a reformulated paragraph (30). Accordingly, the first sentence of paragraph (30) would be retained, along with its footnote; the second sentence would be deleted; the third sentence would be retained, as would its footnote; and the final sentence would be transposed to the footnote to the previous sentence. The reformulated paragraph would continue with the final sentence of paragraph (31), along with its footnote. It would then continue with the text of paragraph (33), amended to read: "These members consider that draft conclusion 12 [11], paragraph 3, could help to resolve the question.[footnote] The practice of both an international organization in the application of its own instrument and a pronouncement of an expert treaty body have in common that, while they are both not practice of a party to the treaty, they are nevertheless conduct mandated by the treaty the purpose of which is to contribute to the treaty's proper application."

Paragraphs (30) to (33) were adopted with those amendments.

Paragraphs (34) and (35) (*concluded*)

5. Mr. NOLTE (Special Rapporteur) suggested that the text of paragraph (34) be transposed to a footnote, the marker for which would appear at the end of paragraph (35).

Paragraphs (34) and (35) were adopted on that understanding.

Paragraph (36) (*concluded*)[**]

6. Mr. NOLTE (Special Rapporteur) pointed out that in paragraph (36), the Commission supported the conclusion of the International Court of Justice with regard to the interpretative value of a series of pronouncements by an expert treaty body irrespective of whether those pronouncements constituted a form of practice within the scope of the topic.

7. Mr. MURPHY recalled that reference had already been made to the Court's conclusion in paragraph (22) of the commentary. Given the indication in paragraph (35) that the Commission would take up the matter again on second reading, it seemed unwise to discuss the merits of the issue in paragraph (36).

8. Mr. SABOIA said that paragraph (36) was useful because it made a general affirmation on the basis of the judgments of the International Court of Justice; its deletion might convey the impression that the Commission took a more restrictive view of the relevance of those pronouncements than did the Court.

9. Sir Michael WOOD said that he was in favour of deleting paragraph (36), since paragraph (35) contained the main point that the Commission wished to make at the end of the commentary to draft conclusion 13 [12]. The appropriate place to refer to the findings of the International Court of Justice was in paragraph (22). He therefore proposed the inclusion of some elements of paragraph (36) in paragraph (22).

10. Mr. NOLTE (Special Rapporteur) proposed simply deleting paragraph (36).

It was so decided.

Paragraph (36) was deleted.

The commentary to draft conclusion 13 [12], as a whole, as amended, was adopted.

Section C of chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

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[*] Resumed from the 3335th meeting.

[**] Resumed from the 3337th meeting.

Chapter VII. *Crimes against humanity* (A/CN.4/885 and Add.1–2)

11. The CHAIRPERSON invited the Commission to consider chapter VII of its draft report, beginning with the text contained in document A/CN.4/L.885.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Paragraph 7

Paragraph 7 was adopted, subject to its completion by the Secretariat.

Section B was adopted.

C. Text of the draft articles on crimes against humanity provisionally adopted so far by the Commission

1. Text of the draft articles

Paragraph 8

12. Mr. MURPHY (Special Rapporteur) said that in the text of draft articles 1 to 10, draft article 5, paragraph 7, had inadvertently been omitted.

On the understanding that the omission would be rectified, paragraph 8 was adopted.

13. The CHAIRPERSON invited the Commission to consider the portion of chapter VII contained in documents A/CN.4/L.885/Add.1–2.

2. Text of the draft articles with commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

Document A/CN.4/L.885/Add.1

Commentary to draft article 5 (Criminalization under national law)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

14. Mr. TLADI, referring to the first sentence and the footnote thereto, pointed out that throughout the document, there were inconsistencies in the spelling of the place name “Nürnberg”.

15. The CHAIRPERSON said that the Secretariat would ensure that the requisite changes were made to the text.

Paragraph (2) was adopted on that understanding.

Paragraph (3)

16. Mr. NOLTE proposed the insertion of “, including” after the word “conduct” in the final sentence.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

17. Mr. NOLTE suggested that, in the second sentence, the word “unique” be replaced with the word “specific”.

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were adopted.

Paragraph (11)

18. Mr. MURPHY (Special Rapporteur) suggested inserting the word “Third” at the beginning of the first sentence.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

19. Mr. NOLTE proposed that, in the first sentence, the word “allied” before “concepts” be replaced with the word “related”.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

20. Mr. NOLTE proposed the replacement of the word “shape” with the words “spell out” in the second sentence.

21. Sir Michael WOOD suggested that in the same sentence, the word “contours” be replaced with the word “details”.

With those amendments, paragraph (15) was adopted.

Paragraph (16)

Paragraph (16) was adopted.

Paragraph (17)

22. Mr. TLADI suggested the insertion of a footnote to the second sentence that would indicate the specific judgments to which reference was being made.

23. Mr. MURPHY (Special Rapporteur) said that he would find appropriate examples of relevant judgments or an authoritative treatise for inclusion in a new footnote.

Paragraph (17) was adopted on that understanding.

Paragraph (18)

Paragraph (18) was adopted.

Paragraph (19)

24. Mr. NOLTE proposed the deletion of the word "theory" in the third sentence.

Paragraph (19), as amended, was adopted.

Paragraphs (20) to (23)

Paragraphs (20) to (23) were adopted.

Paragraph (24)

25. Mr. PARK said he was not convinced of the need to retain paragraph (24), which did not discuss the subject of superior orders, despite its placement under that subheading in the commentary.

26. Mr. MURPHY (Special Rapporteur) said that, although paragraph (24) was, in fact, not essential, it reflected the Commission's acknowledgement that all jurisdictions had different grounds for excluding responsibility for crimes against humanity. It stood in contrast to the idea that most jurisdictions that addressed crimes against humanity provided that perpetrators of such crimes could not invoke as a defence the fact that they were ordered by a superior to commit an offence.

Paragraph (24) was adopted.

Paragraph (25)

Paragraph (25) was adopted.

Paragraph (26)

27. Mr. NOLTE suggested the replacement of the word "exception" with the word "defence" in the first sentence.

Paragraph (26), as amended, was adopted.

Paragraphs (27) to (34)

Paragraphs (27) to (34) were adopted.

Paragraph (35)

28. Mr. NOLTE suggested that, in the fifth sentence, the words "International Law" be deleted.

Paragraph (35), as amended, was adopted.

Document A/CN.4/L.885/Add.2

Paragraphs (36) to (44)

Paragraphs (36) to (44) were adopted.

Paragraph (45)

29. Mr. VÁZQUEZ-BERMÚDEZ said that paragraph (45) was intended to explain the expression "where appropriate" in the first sentence of draft article 5, paragraph 7, which provided that "[s]ubject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article". The first sentence of paragraph (45) appeared to give a very restrictive interpretation of the expression "where appropriate" with its use of the phrase "obligated only to take measures". In his view the word "only", and perhaps the paragraph in its entirety, should be deleted.

30. Mr. MURPHY (Special Rapporteur) said that he understood Mr. Vázquez-Bermúdez's concern that the paragraph perhaps gave too much latitude to States. The example in the second sentence covered a situation in which a State might have included the concept of attempted crime in its national law, but the imposition of liability for attempted crime on a legal person was not possible. That was a problem that had actually arisen in the context of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, under which legal persons could not be held liable for attempted crimes. He had thought it a good example of what might be meant by "where appropriate". While he would not object to deleting the word "only" in the first sentence, he wished to retain the second sentence.

31. Mr. VÁZQUEZ-BERMÚDEZ said that, although he was not entirely convinced, he would not object to the adoption of the paragraph.

32. Mr. KAMTO said that he shared the concerns expressed by Mr. Vázquez-Bermúdez, some of which would be addressed by deleting the word "only". However, the rest of the paragraph merely diluted what was stated in the draft article and did not really explain the expression "where appropriate". In fact, the second sentence seemed to be a negation of the very text it was intended to elucidate. If the Commission was going to say that it was for the State to decide whether to impose liability on legal persons, then there seemed little point in even having a provision on the subject. He would have serious reservations about the adoption of paragraph (45) as currently drafted.

33. The CHAIRPERSON, speaking as a member of the Commission, said that he also had doubts about the second sentence.

34. Ms. ESCOBAR HERNÁNDEZ said that she agreed with Mr. Kamto and Mr. Vázquez-Bermúdez. In her view, the second sentence should be deleted, as it referred to attempted crimes, which were not covered in the draft article itself. She agreed that the word "only" should be deleted.

35. Sir Michael WOOD said that he understood the concerns being expressed by other members and wondered whether they might be allayed if the second sentence were deleted and the first sentence were divided into two, to read: "Second, each State is obliged to take measures to establish the liability of legal persons 'where appropriate'. Even if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the context of crimes against humanity." The purpose of the proposed changes was to simplify the sentence and shift the emphasis to make it clear that there was an obligation upon States.

36. Mr. SABOIA said that Sir Michael's proposal seemed to be the opposite of what had actually been discussed in relation to legal persons. Several members had argued that it was precisely in the context of the commission of crimes against humanity that the possibility of imposing criminal liability on legal persons needed to be envisaged, because some legal persons, in certain regions, had in the past been involved in the commission of grave crimes against humanity. It was simply because some States did not impose liability on legal persons under their legal systems that the words "where appropriate" were used in draft article 5, paragraph 7. As paragraph (45) was now worded, it might give the impression that the liability of legal persons could be considered inappropriate *per se* in the context of crimes against humanity. If it was possible to correct that wrong impression, he would not oppose the adoption of paragraph (45) but, as it stood, he would rather delete it.

37. Mr. PARK said that he also had reservations concerning the appropriateness of paragraph (45). Nevertheless, he thought that paragraph (45) could be understood as applying to transitional justice.

38. Mr. NOLTE said that he did not have the impression that Sir Michael's proposal misrepresented the discussion of "where appropriate". While the rest of the commentary dealt with the positive obligation to establish some form of liability, the words "where appropriate" were intended to explain that States were entitled to deem the imposition of liability inappropriate in certain situations.

39. Mr. McRAE said that the extent to which the words "where appropriate" entitled States to decide whether to fulfil an obligation was not clear at all. The second sentence reinforced the idea that States could reach their own decisions about fulfilling obligations. Paragraph (45) should either be deleted or amended as proposed by Sir Michael.

40. Mr. KAMTO said that if the Commission wanted States to comply with an obligation, it must specify under what conditions they must do so and clarify when it was "appropriate". The Commission had adopted the draft article following a long discussion, and it should not now undermine it with inappropriate commentary. The simplest solution would be to delete the paragraph and review the issue on second reading, based on comments from States. If it was considered necessary to adopt the paragraph, the first part of the first sentence, up to "where appropriate", could be retained.

41. Mr. PETRIČ said that the issue had already been discussed at length in the plenary and in the Drafting Committee, and there had been a fairly even split between members who wanted the criminal responsibility of legal persons to be addressed and those who did not. It would be quite unacceptable to ignore the issue, which had been resolved by introducing the words "as appropriate" in draft article 5, paragraph 7. He could accept paragraph (45) with the deletion of the second sentence and of the word "only" in the first.

42. Mr. KITTICHAISAREE recalled that he had been opposed to the inclusion of the words "where appropriate", but now that they had been included, their meaning had to be explained in the commentary. He recommended that the Commission suspend its discussion and that the Special Rapporteur take a look at various conventions against international terrorism, which provided that it was appropriate to prosecute legal persons for terrorist crimes in States whose legal systems allowed the criminal prosecution of legal persons for other serious offences.

43. Sir Michael WOOD proposed that, in order to reconcile the diverging views, paragraphs (45) and (46) be combined by moving his version of the first sentence of paragraph (45) – "Second, each State is obliged to take measures to establish the liability of legal persons, 'where appropriate' " – to the beginning of paragraph (46).

Paragraph (45), as amended by Sir Michael Wood, was adopted.

Paragraph (46)

Paragraph (46) was adopted.

The commentary to draft article 5, as a whole, as amended, was adopted.

Document A/CN.4/L.885/Add.1

Commentary to draft article 6 (Establishment of national jurisdiction)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

44. Mr. NOLTE suggested, in the second sentence, the deletion of the word "also", as it was not immediately clear to which idea that word referred.

Paragraph (7), as amended, was adopted.

Paragraph (8)

45. Mr. NOLTE proposed that, in the final sentence, the words "impose an obligation", which he found to be rather strong, be replaced with the words "provide for an obligation".

46. Mr. PARK said that the final sentence might give the impression that the Commission was attempting to prevent States from providing for the establishment of jurisdiction over an offence when the alleged offender was not present in their territory. He therefore proposed its deletion.

47. Mr. MURPHY (Special Rapporteur) said that, although the sentence was not essential, it was intended to emphasize that draft article 6, paragraph 2, did not address the case of offenders who were not present in the territory of the State. His preference would be to retain it.

48. Sir Michael WOOD said that he found the final sentence to be useful and was in favour of retaining it, but he suggested that its wording should be softened by replacing the words "impose an obligation on the State" with the words "require the State".

49. Mr. KITTICHAISAREE said he would prefer to delete the final sentence, because it was unnecessary and if it was retained, that might arrest the progressive development of international law.

Paragraph (8) was adopted, with the deletion of the final sentence.

Paragraph (9)

Paragraph (9) was adopted.

Paragraphs (10) and (11)

50. Mr. KAMTO questioned the relevance of the quotation that appeared in paragraph (10), because it related to multilateral treaties addressing crimes, whereas draft article 6, paragraph 3, referred specifically to the exercise of criminal jurisdiction established by States in accordance with their national law. He therefore proposed the deletion of the quotation.

51. Mr. SABOIA said that, on the contrary, he found the quotation to be a good addition to the text and was of the view that it should be retained.

52. Mr. MURPHY (Special Rapporteur) said that it would be regrettable to delete the quotation contained in paragraph (10), as it was an important joint separate opinion that had been given some attention within the international community. Its second sentence, in particular, made a useful point. Perhaps Mr. Kamto's concern was that the quotation did not seem to be in the proper place in the commentary. Although paragraph (9) referred to draft article 6, paragraph 3, his intention had been for paragraphs (10) and (11) to refer to draft article 6 as a whole. There were two options for rectifying that problem. One would be to insert a clause to show that paragraph (10) did not refer exclusively to draft article 6, paragraph 3; the other would be to transpose the text of paragraphs (10) and (11) to precede paragraph (5) so as to place them in the part of the commentary that addressed draft article 6 generally.

53. Mr. KAMTO said that the Special Rapporteur's second idea, that of transposing the paragraphs, made sense and he could go along with it.

54. Ms. ESCOBAR HERNÁNDEZ said that she, too, preferred the second option, as it would better address Mr. Kamto's concern.

55. Sir Michael WOOD said that he was in favour of transposing paragraph (10) to precede paragraph (5). Paragraph (11), on the other hand, should stay where it was, because it followed a description of the three types of jurisdiction and fit well at the end of the commentary to draft article 6.

56. Mr. MURPHY (Special Rapporteur) agreed with Sir Michael's proposal.

Paragraphs (10) and (11) were adopted on the understanding that paragraph (10) would be transposed to precede paragraph (5).

The commentary to draft article 6, as a whole, as amended, was adopted.

Commentary to draft article 7 (Investigation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 7 was adopted.

Commentary to draft article 8 (Preliminary measures when an alleged offender is present)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

57. Mr. NOLTE suggested that the words "calls upon" in the first sentence be altered to read "requires" in order to reflect the binding language of the provision under discussion.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

58. Mr. NOLTE proposed an editorial amendment to the English version of the text.

Paragraph (5), as amended, was adopted.

The commentary to draft article 8, as amended, was adopted.

Commentary to draft article 9 (Aut dedere aut judicare)

Paragraph (1)

59. Mr. KAMTO suggested that the third sentence state that the principle of *aut dedere aut judicare* was not a rule of customary international law.

60. Mr. KITTICHAISAREE emphasized the sensitive nature of such a suggestion, given that some States maintained precisely the opposite view, and that the judges of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite* had been divided on the issue. The Working Group on crimes against humanity had deliberately avoided making a clear statement either way so as not to block the future development of international law in that area, and he expressed the strong view that the Commission should follow suit in the present commentary.

61. Mr. KAMTO observed that saying that something was not a rule of customary international law at present would not preclude it from becoming one in future, but said that he would not press the point.

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

62. Mr. NOLTE said that, in the third sentence, the word "imposed" was superfluous and should be deleted.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

63. Mr. NOLTE suggested that the words "in recent years, especially", in the second sentence, be deleted. Draft article 9 required States to prosecute alleged offenders unless they were extradited or surrendered to another State or competent international criminal tribunal, but the wording of the last sentence of paragraph (6) framed domestic prosecution as a choice. That did not hold true for those States that already recognized the principle of *aut dedere aut judicare* as a rule of customary international law. He suggested that the last sentence be amended to read: "A State that is not bound under international law to send a person to an international criminal tribunal must submit the matter to prosecution by its own authorities."

64. Mr. SABOIA expressed support for Mr. Nolte's comments.

65. Mr. MURPHY (Special Rapporteur), accepting Mr. Nolte's first suggestion, said that the last sentence of paragraph (6) was intended to clarify the final clause of the penultimate sentence. He suggested the following alternative wording to address Mr. Nolte's concern: "A State that is not bound under international law to send a person to an international criminal tribunal can choose not to do so, but then must submit the matter to prosecution by its own authorities."

66. Sir Michael WOOD said that, even as amended, the sentence still presented only two options. There was a third: extradition.

67. Mr. MURPHY (Special Rapporteur) acknowledged that point and suggested the following wording instead: "A State that is not bound under international law to send a person to an international criminal tribunal can choose not to do so, but then must either extradite the person or submit the matter to prosecution by its own authorities."

68. Mr. KAMTO said that the wording "must either extradite" was problematic, as it implied that an obligation to extradite was being established in the commentary, something that certainly could not be the case. Extradition was usually covered by specific treaties between States, and a request for extradition must be made by a State.

69. Mr. SABOIA said that the situation was clear: if a State had accepted the jurisdiction of an international criminal tribunal, then it was bound by international law; otherwise, it could either extradite to a country with which it had an extradition regime or submit the matter to its own authorities. The three options were set out in the last wording suggested by the Special Rapporteur.

70. Mr. KITTICHAISAREE said that examples such as that of the Extraordinary African Chambers within the Senegalese judicial system, which was not an international criminal tribunal as such, but a special tribunal within the legal system of Senegal, should be covered in the commentary.

71. Sir Michael WOOD said that it had been an instance of prosecution within a State and it did not need to be mentioned. The last version of the sentence suggested by the Special Rapporteur reflected draft article 9 perfectly.

72. Mr. KAMTO said it was true that the sentence as amended by the Special Rapporteur reflected the provisions of draft article 9; nevertheless, it should be clarified by separating out the various options. What would happen if no State requested the extradition of an alleged offender? If a State was not a party to the statute of an international criminal tribunal, did the obligation to extradite or prosecute still apply?

73. Mr. MURPHY (Special Rapporteur) said that the essential point was that draft article 9 applied even if a State was not bound by the statute of any international criminal tribunal. He suggested either that the words "under draft article 9" be inserted to make that clear, or that the sentence be deleted altogether.

74. Mr. KAMTO reiterated his suggestion that the sentence be amended to specify that extradition had to be requested specifically by a State.

75. Mr. MURPHY (Special Rapporteur) said that it seemed simplest to delete the sentence in question.

76. The CHAIRPERSON said he took it that the Commission agreed to amend the second sentence of the paragraph as suggested by Mr. Nolte and to delete the last sentence entirely.

Paragraph (6), as thus amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft article 9, as amended, was adopted.

Commentary to draft article 10 (Fair treatment of the alleged offender)

Paragraph (1)

77. Sir Michael WOOD suggested that the words "and full protection of his or her rights" be added to the end of the first sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

78. Mr. Nolte suggested that the words "contain within their national law" in the first sentence be changed to "provide within their national law for".

Paragraph (2), as amended, was adopted.

Paragraph (3)

79. Mr. NOLTE suggested that, in the first sentence of the paragraph, the words "Such protections" be altered to "The most important of such protections", to reflect the fact that some more mundane protections in national law were not dealt with in international law. He also suggested that, in the third sentence, the words "replicate with some specificity" be changed to "specify" so as to avoid any suggestion that the standards in question were reproduced automatically in instruments establishing standards for an international court or tribunal.

80. Mr. MURPHY (Special Rapporteur), accepting Mr. Nolte's second amendment, said that he agreed with the purpose of the first but that it might be clearer to alter the beginning of the paragraph to read: "Important protections are also now well recognized …". He hoped that would allow the Commission to avoid going into what the most important protections at national level might be.

81. Mr. SABOIA supported the amendments suggested by Mr. Nolte, as reworded by Mr. Murphy.

Paragraph (3), as thus amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

82. Mr. NOLTE suggested that the second sentence be broken into two, with the first one ending with "the national legal systems of States". The second could then begin: "At the international level, they are set out in global human rights treaties …".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

83. Mr. NOLTE suggested that, in the first sentence, the words "elaborated" be changed to "spelled out" and, in the second sentence, the word "replicate" be replaced with "go into".

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

84. Mr. TLADI proposed an editorial amendment to the English version of the text.

Paragraph (10), as amended, was adopted.

The commentary to draft article 10, as amended, was adopted.

Section C, as amended, was adopted.

Chapter VII of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter VIII. *Protection of the atmosphere* (A/CN.4/L.886 and Add.1)

85. The CHAIRPERSON invited the Commission to consider the portion of chapter VIII of the draft report contained in document A/CN.4/L.886.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 3

86. Mr. MURPHY, referring to the footnotes to the paragraph, said that it was unusual for the original proposals made by a Special Rapporteur to be cited in footnotes. Generally, the Commission did not include such references once it had finished its work on the proposals. He feared that it might be confusing for the reader to be presented with both the original proposals and the final drafts. He wondered whether the Special Rapporteur had had a particular reason for including the former. If not, his preference would be to delete them in order to be consistent with the Commission's usual practice.

87. Mr. MURASE (Special Rapporteur) said that the footnotes followed the same format as that of the report on the previous session.

88. Mr. LLEWELLYN (Secretary to the Commission) said that the original proposals that had appeared in a report by a Special Rapporteur and had been adopted by the Drafting Committee in a different form were not normally included in footnotes to the Commission's report to the General Assembly.

89. Mr. MURASE (Special Rapporteur) said that the Commission's practice had not been uniform, and on some occasions the Special Rapporteur's original proposals had been reproduced. He believed that it would be helpful in the present instance to include the original proposals to show how the Commission had arrived at the draft guidelines.

90. Sir Michael WOOD recalled that the outcome of the discussion at the previous session on what should be included in the footnotes had not been very clear. It was useful to reproduce the Special Rapporteur's original proposals in footnotes if the content of the debate was also being reproduced in the report, so that the debate could be understood in the light of the proposals, but not if the debate was not being reproduced *in extenso*. He would propose checking the precedents and returning to the issue at a later stage.

91. Mr. NOLTE said that a precedent could be found in footnote 17 to chapter V of the report on the previous session.[506] In line with that precedent, a reference to the fact that the Commission had provisionally adopted draft guidelines and commentary should be added to the footnotes to paragraph 3.

[506] *Yearbook ... 2015*, vol. II (Part Two), p. 17, footnote 17.

92. The CHAIRPERSON said that he took it that the Commission wished to follow the approach proposed by Mr. Nolte.

It was so decided.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 8

Paragraphs 4 to 8 were adopted.

Paragraph 9

Paragraph 9 was left in abeyance.

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission

1. Text of the draft guidelines, together with preambular paragraphs

93. Mr. MURPHY pointed out that the Commission had not yet approved the footnotes, which indicated where the commentaries to the preamble and the individual draft guidelines could be found. As the inclusion of footnotes of that nature was not the Commission's normal practice, he requested the consideration of each individual footnote.

94. Mr. ŠTURMA concurred with Mr. Murphy.

95. The CHAIRPERSON suggested that the Commission defer further consideration of document A/CN.4/L.886 until the secretariat had had time to check the normal practice regarding footnotes that pointed to the location of commentary to draft texts.

It was so decided.

96. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter VIII of the report contained in document A/CN.4/L.886/Add.1.

2. Text of the draft guidelines, together with a preambular paragraph, and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

Commentary to the preamble

Paragraph (1)

97. Mr. NOLTE, supported by Mr. MURPHY, said that paragraph (1) was in the wrong place: it referred to equity, which formed the subject of draft guideline 6. Paragraphs (2) and (4) fully explained the thinking behind the preamble. He therefore proposed that paragraph (1) be moved to the commentary to draft guideline 6.

98. Sir Michael WOOD agreed with Mr. Nolte that paragraph (1) should be moved to the commentary to draft guideline 6. In fact, paragraph (4) was all that was needed by way of a commentary to the preamble, and it should become the first paragraph of the commentary.

99. Mr. TLADI said that the second sentence of paragraph (1) was rather ambiguous: it was unclear whether "which often warrants" referred to equality or equity. In the third sentence, the word "probably" could be deleted, because the phrase "One of the first attempts" was sufficient indication that this sentence was not meant to be a definitive statement.

100. Mr. MURASE (Special Rapporteur) said that the commentary was structured in such a way that it went from the general to the specific. Paragraph (1) should come first, as it introduced the notion of intra-generational equity. In the second sentence, the phrase starting "which often warrants" could be deleted, as could the word "probably" in the third sentence. In the last footnote to the paragraph, a reference to a resolution of the United Nations Conference on Trade and Development (UNCTAD) needed to be included. At the end of the paragraph, he suggested the addition of the phrase "as reflected in article 23 of the Commission's 1978 draft articles on most-favoured-nation clauses".

101. Mr. SABOIA said that paragraph (1) was valuable because it outlined the genesis of the principle of equity, which had also been recognized in the General Agreement on Tariffs and Trade (GATT).

102. Mr. McRAE said that the problem in paragraph (1) was that it did not clearly demonstrate the link between the idea of equity and the special situation of developing countries. If that link were made clear at the outset, the paragraph would be in the right place. The differential labour standards of the ILO, the Generalized System of Preferences of UNCTAD and the GATT provisions to which Mr. Saboia had referred had been designed to address the special situation and needs of developing countries, but they had not explicitly mentioned equity. The paragraph should therefore start with a sentence along the lines of "Addressing the special situation and needs of developing countries was based on notions of equity that were developed at …".

103. Mr. KITTICHAISAREE, supported by Mr. SABOIA and Mr. NOLTE, agreed with Mr. McRae and suggested that the second half of the first sentence should read "in relation to the need to take into consideration the special situation and needs of developing countries" and that the whole of the second sentence should be deleted.

104. Mr. MURPHY said that if the second sentence was deleted, then the first two footnotes should also be deleted, as paragraph (1) would no longer refer to intra-generational and intergenerational equity.

105. Mr. MURASE (Special Rapporteur) agreed to the deletion of the second sentence and therefore of the first two footnotes.

106. Mr. VÁZQUEZ-BERMÚDEZ concurred with those members who wanted to insert a reference to the special situation and needs of developing countries. The need for intra-generational equity in order to offset States' different levels of development had been discussed during meetings in plenary session. For that reason, it was important to mention intra-generational equity in that part of the commentary.

107. Mr. MURASE (Special Rapporteur) said that his third report (A/CN.4/692) had discussed both aspects of equity, and the commentary harked back to the debate in plenary meetings and in the Drafting Committee.

108. Sir Michael WOOD suggested the deletion of the words "of equity" in the third sentence.

109. Mr. PETRIČ said that he was firmly in favour of the idea of paying attention to the special situation and needs of developing countries, which formed the subject of the preamble. However, paragraph (1) spoke of intra-generational equity and intergenerational equity and referred to the first annual meeting of the International Labour Organization, held at Washington, D.C. in 1919, at which local industrial conditions, not equity or developing countries, had been discussed. As it stood, paragraph (1) was therefore going too far, although in a spirit of cooperation he would not oppose its adoption.

110. Mr. MURASE (Special Rapporteur) said that he had explained the relevance of the Washington meeting to the notion of equity in his third report. Taking into account all the amendments proposed, he said that a revised version of paragraph (1) might read:

> "The fourth preambular paragraph has been inserted in relation to considerations of equity, in particular regarding the special situation and needs of developing countries. One of the first attempts to incorporate such a principle was the first annual meeting of the International Labour Organization in Washington, D.C., in 1919, at which delegations from Africa and Asia succeeded in ensuring the adoption of differential labour standards. Another example is the Generalized System of Preferences elaborated under the United Nations Conference on Trade and Development in the 1970s, as reflected in article 23 of the Commission's 1978 draft articles on most-favoured-nation clauses."

The revised version of paragraph (1) was adopted.

Paragraph (2)

111. Mr. TLADI suggested that two additional instruments which contained the idea that developing countries deserved special consideration in the context of environmental protection should be included in paragraph (2). He proposed the insertion of a sentence at the end of the paragraph which would read: "The principle is similarly reflected in article 3 of the United Nations Framework Convention on Climate Change and article 2 of the Paris Agreement under the United Nations Framework Convention on Climate Change". It could be followed by the first sentence of paragraph (4).

112. Sir Michael WOOD, referring to the third sentence, said that the quotation of Principle 6 of the Rio Declaration on Environment and Development[507] should be corrected: it highlighted "[t]he special situation and needs of developing countries", not the "special needs of developing countries".

113. Mr. MURPHY said that there seemed to be a disconnect between the third sentence, which referred to Principle 7 of the Rio Declaration on Environment and Development, and paragraph (3). The simplest solution might be to delete the reference to Principle 7.

114. Mr. MURASE (Special Rapporteur) agreed to the correction of the quotation of Principle 6, the deletion of the reference to Principle 7 and the insertion proposed by Mr. Tladi.

115. Sir Michael WOOD said that, like Mr. Tladi, he thought that the first sentence of paragraph (4) should be transposed to paragraph (2).

116. Mr. MURASE (Special Rapporteur) said that he would prefer to keep paragraph (4) as it stood.

117. The CHAIRPERSON suggested that the Commission should pursue its discussion of paragraph (2) at the next meeting.

It was so decided.

The meeting rose at 1.05 p.m.

3342nd MEETING

Tuesday, 9 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

***Jus cogens* (*concluded*)[*] (A/CN.4/689, Part II, sect. H, A/CN.4/693)**

[Agenda item 10]

Report of the Drafting Committee

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the interim report of the Drafting Committee on the topic "*Jus cogens*".

2. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the eighth report of the Drafting Committee for the sixty-eighth session of the Commission, said that, following the referral to the Drafting Committee of draft conclusions 1 and 3 on 19 July 2016,[508] the Com-

[507] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992*, vol. I: *Resolutions adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution I, annex I.

[*] Resumed from the 3323rd meeting.

[508] See the 3323rd meeting, above, para. 83.

mittee had held three meetings on the topic, on 19, 22 and 26 July 2016, respectively. It should be recalled that, while summing up the plenary debate on the topic at the current session, the Special Rapporteur had recommended that the draft conclusions remain before the Drafting Committee pending the submission of further proposals in that regard. The purpose of his statement was therefore simply to inform the Commission of the progress made thus far by the Drafting Committee.

3. The Drafting Committee had proceeded on the basis of the proposals made by the Special Rapporteur in his first report (A/CN.4/693) and had provisionally adopted a text for draft conclusion 1. It had then considered the Special Rapporteur's proposal for draft conclusion 3, which had been renumbered as 2, and had provisionally adopted a text for paragraph 1 of that draft conclusion. It had, however, been unable to conclude its consideration of paragraph 2 of the Special Rapporteur's proposal owing to a lack of time.

4. The Drafting Committee had also examined proposals to change the title of the topic as a whole, and various options had been considered. One of the Committee's concerns had been that the title should follow the Commission's established practice regarding the use of Latin. The Committee had, however, been aware that the question was for the plenary Commission to decide, and it should be recalled that the Special Rapporteur had indicated his intention to consider the issue of the title of the topic in his next report and, possibly, to make a recommendation in that regard.

5. Draft conclusion 1 dealt with the scope of the draft conclusions being developed by the Commission and read: "The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*)". The Drafting Committee had worked on the basis of the proposal put forward by the Special Rapporteur in his first report. The opening phrase, "The present draft conclusions concern", was the Commission's standard formulation for provisions on scope.

6. The Drafting Committee had settled on the term "identification", which was used in the title adopted for the topic "Identification of customary international law". There had been a proposal to replace the word "identification" with "determination", but the Committee had decided not to accept it, on the grounds that the term "determination" implied the existence of an authoritative determination of the norms in question. It also considered that the term "identification" was more appropriate because it suggested an element of deduction.

7. The words "legal effects" had replaced "legal consequences", as the Drafting Committee was of the view that the concept of "legal effects" had a broader scope and conveyed the idea that the norms in question produced specific legal effects. Other proposals included referring to the "nature" of *jus cogens* and to its "existence and content". The proposals had not, however, garnered sufficient support within the Committee, which took the view that the process of identification was broad and necessarily involved an assessment of the nature and content of *jus cogens*. It was thereby understood that the draft conclusions would cover both the identification of *jus cogens*, which was based on the law of treaties, and its legal effects, which had to be ascertained outside the law of treaties, including in the law on the responsibility of States for internationally wrongful acts. The Drafting Committee had also simplified the text initially proposed by the Special Rapporteur by replacing the words "flowing from" with "of".

8. The Drafting Committee had also considered a proposal to state simply that "[t]he present draft conclusions concern peremptory norms of general international law (*jus cogens*)", which would not have limited the scope of the draft conclusions. However, it had preferred to specify what the draft conclusions set out to do. At the same time, it was understood that the wording of the draft conclusion meant that the scope of the project was broad.

9. The Drafting Committee had also considered the reference to *jus cogens* itself. Aside from the issue of the title of the topic as a whole, the matter had also been raised in connection with draft conclusion 1. The Drafting Committee had settled on the formulation found in the 1969 Vienna Convention, namely "peremptory norm[s] of general international law (*jus cogens*)". There had been a proposal to place the reference to "(*jus cogens*)" after the words "peremptory norms", rather than after the phrase "peremptory norms of general international law", but the Drafting Committee had decided that such a deviation from the wording of the 1969 Vienna Convention and from the Commission's own past practice, most recently in its work on reservations to treaties, would be difficult to justify.

10. Although the draft conclusion had been adopted with the adjective "general", the use of the term was without prejudice to the possibility of the existence of regional *jus cogens*, an issue to be considered by the Special Rapporteur in a future report. Another suggestion, which had not been adopted, had been to place the adjective "general" in square brackets. Following a proposal made by the Special Rapporteur during the introduction of his first report in the plenary, the Drafting Committee had also replaced the word "rules" with "norms", which was the term used in the 1969 Vienna Convention.

11. The title of the draft conclusion, "Scope", had been proposed by the Special Rapporteur and was the term that tended to be used in similar provisions adopted by the Commission on other topics.

12. The Drafting Committee had then considered the text proposed by the Special Rapporteur in his first report for draft conclusion 3, which it had ultimately renumbered as 2, paragraph 1 of which read: "1. A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

13. With regard to paragraph 1, the Drafting Committee had decided, on the basis of suggestions made in the plenary, to reformulate the provision in order to track the language of the second sentence of article 53 of the 1969

Vienna Convention. It considered that, at that early stage of the work on the topic, the adoption of a definition of *jus cogens* that differed from the one found in the Convention would be difficult to justify.

14. Earlier versions had begun with the words "International law recognizes that" and "For the purposes of the present draft conclusions", but had not found favour with the Drafting Committee.

15. The main issue discussed had been whether the Drafting Committee could modify the language of the 1969 Vienna Convention, in particular by deleting the words "of States" in the formula "international community of States as a whole", as proposed by some members. In their view, including the words "of States" did not accord with the approach recently taken by the Commission in its work on other topics, which also took into account the practice of international organizations and other actors. Another concern had been that the words "of States" were based on a conception of the international community that had prevailed at the time of the United Nations Conference on the Law of Treaties but no longer reflected reality.

16. However, the Drafting Committee had not accepted that proposal, on the grounds that reconceiving the idea of "international community" would represent a significant departure from the 1969 Vienna Convention and from the Commission's previous work on *jus cogens*, including prior understandings on the language employed in the context of *jus cogens* and in connection with *erga omnes* obligations. The prevailing view of the Drafting Committee had been that the Commission's approach to the issue had not changed since the 1960s and that the meaning given to the phrase "international community of States as a whole" at the 1969 United Nations Conference on the Law of Treaties still applied. Furthermore, as the topic under consideration concerned a source of international law, acceptance and recognition by States remained central to the concept of *jus cogens*. The Drafting Committee thus considered that the deletion of the words "of States" was inadvisable, especially since the work was at an early stage and the Special Rapporteur had not carried out the in-depth research and analysis that would have enabled the plenary Commission to offer clear guidance on the matter.

17. A further possibility considered by the Drafting Committee had been to address the modification of a peremptory norm by a subsequent norm of general international law having the same character, as contemplated in article 53, in a separate draft conclusion. The Drafting Committee had decided against doing so, however, as that was a key element of the definition in the 1969 Vienna Convention and was also accepted under customary international law.

18. The Special Rapporteur's proposal included a paragraph 2 containing descriptive elements of *jus cogens* and indicating its purpose. Owing to a lack of time, the Drafting Committee had been able to have only an initial exchange of views on the paragraph. At the following session, it would consider, among other options, the possibility of turning paragraph 2, or a new version thereof, into one or more separate draft conclusions. For the record, it should be noted that paragraph 1 had been accepted by some members on the understanding that the content of paragraph 2 would appear in the draft conclusions in some form.

19. As the draft conclusion had not been finalized, the Drafting Committee had not been able to adopt a title, and would do so at the following session.

20. Before concluding his report, he wished to pay tribute to the Special Rapporteur, Mr. Dire Tladi, whose knowledge of the topic, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also wished to thank the members of the Committee for their active participation in, and helpful contribution to, the work undertaken at the current session. He also thanked the secretariat for its valuable assistance and said that the text of the Drafting Committee's report would be posted on the Commission's website.

Protection of the environment in relation to armed conflicts (*concluded*)[*] (A/CN.4/689, Part II, sect. E, A/CN.4/700, A/CN.4/L.870/Rev.1, A/CN.4/L.876)

[Agenda item 7]

Report of the Drafting Committee (*concluded*)[*]

21. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the interim report of the Drafting Committee on the topic "Protection of the environment in relation to armed conflicts".

22. Mr. ŠTURMA (Chairperson of the Drafting Committee), introducing the ninth report of the Drafting Committee for the sixty-eighth session of the Commission, said that it was the Committee's second report on the topic of the protection of the environment in relation to armed conflicts (A/CN.4/L.876) and contained the text of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, which had been provisionally adopted by the Drafting Committee at the current session. It should be recalled that draft principles 1, 2, 5, 8, 9, 10, 11 and 12, which had been technically revised by the Drafting Committee during the current session (A/CN.4/L.870/Rev.1), had been adopted by the Commission at its 3337th meeting, held on 5 August 2016.

23. He wished to pay tribute to the Special Rapporteur, Ms. Marie G. Jacobsson, whose mastery of the topic, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Committee, who had participated actively in its work, and the secretariat, for the invaluable assistance that it had provided.

24. Before introducing the draft principles, he wished to draw members' attention to the fact that they had been renumbered in accordance with the numbering system decided upon for the draft principles that had been adopted previously. Draft principle 4, which the Special Rapporteur had initially proposed as draft principle I-1 entitled "Implementation and enforcement", had been

[*] Resumed from the 3337th meeting.

placed in Part One, entitled "General principles", with the title "Measures to enhance the protection of the environment". Originally consisting of one paragraph, it had been divided into two in order to better reflect the fact that its provisions did not have the same normative status. Its purpose was to ensure that States took effective measures to enhance the protection of the environment in relation to armed conflicts. It had intentionally been drafted in general terms to cover a wide range of legislative, policy-oriented and other measures.

25. Paragraph 1 of draft principle 4 read: "States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict". It served to remind States that they needed to take measures to enhance the protection of the environment in relation to armed conflict in order to fulfil their international obligations. Since the reference was to measures that States were obliged to take in any event, the use of the modal verb "shall" had been deemed appropriate, while the words "all necessary steps", which were unclear, had been deleted. To clarify the scope of paragraph 1, the term "pursuant to their obligations" had been inserted in the first line to emphasize the need for States to comply with their obligations, rather than the need to ensure that the measures to be taken were in conformity with international law, as indicated by the original wording. Lastly, the Drafting Committee had decided that the words "take effective … measures" better reflected the content of States' obligations under international law than the words "take … steps to adopt".

26. Paragraph 2 read: "In addition, States should take further measures, as appropriate, to enhance the protection of the environment in relation to armed conflict". The aim was to encourage States to take additional measures, even if they were under no legal obligation to do so. Such measures might include, for example, legislating beyond their obligations or developing programmes, guidelines or codes of practice intended to enhance the protection of the environment in relation to armed conflict. Since the paragraph was less prescriptive than paragraph 1, the word "should" was used.

27. It had been recognized that the measures contemplated in the draft principle were not limited to preventive measures to be adopted in the pre-conflict phase, but were equally relevant to the other phases covered by the topic, namely the phases during and after an armed conflict. Consequently, the word "preventive" had been deleted. The adjective "natural" had been deleted, as the expression "natural environment" was used only in the draft principles that were applicable during an armed conflict. That decision was, however, without prejudice to possible future discussions on whether it would be preferable to speak of "environment" or "natural environment" in all or some of the draft principles. The various measures provided for in the paragraph, and their respective normative status, would be explained in the commentary.

28. Like draft principle 4, draft principle 6, which had formerly been draft principle IV-1, on the rights of indigenous peoples, appeared in Part One, on general principles. It was entitled "Protection of the environment of indigenous peoples" and comprised two paragraphs, as originally proposed by the Special Rapporteur. Paragraph 1 read: "States should take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit." As indicated by the Special Rapporteur in her third report (A/CN.4/700), the special relationship between indigenous peoples and the natural environment had been recognized, protected and upheld in State practice and international jurisprudence, and in instruments such as the ILO Convention (No. 169) concerning indigenous and tribal peoples in independent countries and the United Nations Declaration on the Rights of Indigenous Peoples.[509] The purpose of paragraph 1 was to recall that measures of protection ought to be taken by States in the event of an armed conflict. Since such protection was not temporally limited and applied generally in the event of an armed conflict, the Drafting Committee had considered it appropriate to place the draft principle under part one, on general principles. Existing instruments defined the scope of application *ratione loci* of that protection in different ways. Moreover, the rights of indigenous peoples over certain lands or territories might be subject to different legal regimes in different States. The Drafting Committee had chosen to follow the wording of article 7 of the Convention, which referred to the environment of the territories that indigenous peoples inhabited, on the understanding that the terminological differences that existed in that regard would be explained in the commentary.

29. Paragraph 2 read: "After an armed conflict that has adversely affected the environment of the territories that indigenous peoples inhabit, States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures." Its purpose was to facilitate the adoption of remedial measures in the event that an armed conflict adversely affected the environment of the territories that indigenous peoples inhabited. In such instances, States were to engage in effective consultations and cooperation with the indigenous peoples concerned. The Special Rapporteur had underlined those two dimensions in her original text. At her suggestion, the Drafting Committee had added, in paragraph 2, a reference to the fact that such consultations and cooperation should be undertaken through appropriate procedures and, in particular, through indigenous peoples' own representative institutions. That clarification had been made to acknowledge the fact that the procedures for consultation and cooperation, and the modes of representation of indigenous peoples, varied from one State to another.

30. Draft principle 7, formerly draft principle I-3 entitled "Status-of-forces and status-of-mission agreements", had also been placed in Part One, on general principles. It read: "States and international organizations should, as appropriate, include provisions on environmental protection in agreements concerning the presence of military forces in relation to armed conflict. Such provisions may include preventive measures, impact assessments, restoration and clean-up measures."

[509] General Assembly resolution 61/295 of 13 September 2007, annex.

31. The draft principle reflected an emerging trend whereby provisions on environmental protection were included in agreements concerning the presence of military forces concluded by States and international organizations with host States. In the Special Rapporteur's original proposal, the issue had been addressed in the specific context of status-of-forces and status-of-mission agreements. Provisions on environmental protection could, of course, be found in such agreements, but that was not usually the case, since the agreements in question did not address the conduct of forces and did not all concern situations of armed conflict. The Drafting Committee had therefore decided to recast the provision in more general terms and to refer instead to "agreements concerning the presence of military forces in relation to armed conflict", which encompassed agreements whose specific designation and purpose could vary, and that might, in some circumstances, include status-of-forces and status-of-mission agreements. The words "in relation to armed conflict" had been added to emphasize the direct link between the agreements and situations of armed conflict, and to make clear that the draft principle did not cover all military activities. Furthermore, given the urgency with which agreements of that kind were sometimes concluded, the Drafting Committee considered that some flexibility was needed, and accordingly had added the words "as appropriate", which reflected both the specific situations in which such agreements were concluded and the fact that environmental protection provisions could be more relevant in some circumstances than in others. While recognizing that the draft principle did not correspond to any specific international obligation, the Drafting Committee nevertheless wanted to signal the desirability of including such provisions in the agreements concluded by States and international organizations. For the sake of consistency, the term "should", which appeared in other draft principles, had been used. For clarity, the words "environmental regulations and responsibilities", which had been included in the original proposal, had been changed to "environmental protection", which should be understood as encompassing measures related to both regulations and responsibilities. The second sentence, which remained as originally proposed, described the measures that the environmental protection provisions could address. The commentary, which would cite other examples, would specify that the list was not exhaustive. Lastly, in light of the changes made to the text of the draft principle, the title had been changed to "Agreements concerning the presence of military forces in relation to armed conflict".

32. Draft principle 8, formerly draft principle I-4, concerned peace operations and had been placed in Part One, on general principles. It read: "States and international organizations involved in peace operations in relation to armed conflict shall consider the impact of such operations on the environment and take appropriate measures to prevent, mitigate and remediate the negative environmental consequences thereof." The provision reflected the growing recognition, on the part of States and international organizations, of the need to consider the impact of peace operations on the environment and to take measures to prevent, mitigate and remediate any negative consequences. It focused on activities that could negatively affect the environment during a peace operation undertaken in relation to an armed conflict.

33. Given that there was no definition of the term "peace operations" and that the term was used by the United Nations to denote all sorts of operations, it had been recognized that such operations were to be understood from an equally broad perspective in the context of the draft principle, and were not all directly linked to an armed conflict. Consequently, the Drafting Committee had inserted the words "in relation to armed conflict" after "peace operations". Several proposals had been made with the aim of specifying that the draft principle related to multilateral operations, but, since the general understanding of "peace operations" was that they concerned operations of that kind, the Drafting Committee had not seen fit to mention it expressly in the draft principle. The commentary would elaborate on the different kinds of operations encompassed by the term.

34. The modal verb "shall", which appeared in the text originally proposed by the Special Rapporteur, had been retained, in light of the vast practice that existed in that field, in particular within the United Nations. However, as that practice was based mainly on general policy considerations and did not reflect any existing legal obligation, the Drafting Committee had deemed it appropriate to make the provision less prescriptive by opting for the verb "consider". In addition, it had replaced the term "all necessary measures" with "appropriate measures" to reflect the fact that most of the practice related to the need to consider the impact of peace operations on the environment, rather than the need to take measures to prevent, mitigate and remediate the negative environmental consequences of those operations. It would be clarified in the commentary that the measures in question would depend on the context of the operation, in particular whether they related to the phase before, during or after a conflict. It would also be indicated that, in line with the Drafting Committee's understanding, the draft principle, by referring to preventive measures, also encompassed the reviews undertaken of concluded operations for the purposes of determining the negative environmental consequences that they might have had and of preventing future operations from having similar consequences. The word "international" had been added before "organizations" for the sake of consistency with the other draft principles. The title of the draft principle had been kept as "Peace operations", as originally proposed.

35. Draft principle 14, which the Special Rapporteur had initially proposed under the title "Draft principle III-1—Peace agreements", had been placed in Part Three of the draft principles, entitled "Principles applicable after an armed conflict". It had originally consisted of only one paragraph; the Drafting Committee had decided to add a second one on the facilitating role of various actors in peace processes to reflect the views expressed in the plenary debate. The purpose of the draft principle was to demonstrate that environmental considerations were being taken into consideration to a greater extent in the context of contemporary peace processes, including through the regulation of environmental matters in peace agreements.

36. Paragraph 1 provided that "[p]arties to an armed conflict should, as part of the peace process, including where appropriate in peace agreements, address matters relating to the restoration and protection of the

environment damaged by the conflict". The formulation highlighted the purpose of the draft principle, namely to address the peace process as a whole instead of focusing on peace agreements, as originally proposed. It had been acknowledged that not every armed conflict resulted in a peace agreement and that the successful completion of a peace process involved several steps and the adoption of various instruments. The conclusion of peace agreements, which might take place several years after the cessation of hostilities, if at all, represented only one aspect of the process. For that reason, and to avoid any temporal lacunae, the expression "as part of the peace process" had been employed. It had also been decided to add the phrase "including where appropriate in peace agreements", in order not to lose sight of the importance of peace agreements in that context. The expression "where appropriate" signalled that, depending on the circumstances, if a peace agreement was concluded, it should address environmental considerations.

37. The term "parties" indicated that the draft principle addressed not only States parties to an armed conflict but also non-State actors. Moreover, the draft principles covered both international and non-international armed conflicts.

38. The Drafting Committee considered it important to strengthen the normative value of the obligation, while also recognizing that it did not correspond to any existing legal obligation. The words "are encouraged" had thus been replaced with "should", which had also made it possible to harmonize the text with the other draft principles, as had the addition of the term "armed" before "conflict" to clarify the scope of the draft principle. Finally, the Drafting Committee considered that, in the last phrase, "address" would be a more appropriate verb than "settle", which had originally been proposed and might be understood to include dispute settlement, a topic which the draft principle was not intended to cover.

39. During the plenary debate, several members had proposed that the draft principle emphasize the need to include, in peace agreements, questions concerning the allocation of responsibility and the payment of compensation for damage caused to the environment. However, it had also been underlined that the appropriateness of dealing with such questions in a peace process depended heavily on the circumstances surrounding the conflict. Since the questions of responsibility and compensation might be relevant for several draft principles, it had been decided that they could be considered separately, once the Commission had agreed on all the draft principles. The commentary would nevertheless clarify the matter and specify that the draft principle was without prejudice to the allocation of responsibility and questions of compensation.

40. Paragraph 2 established that "[r]elevant international organizations should, where appropriate, play a facilitating role in this regard". The aim was to reflect the important role that international organizations could play in facilitating a peace process and ensuring that environmental considerations were taken into account. The Drafting Committee had decided to refer to "[r]elevant international organizations" to signal, in particular, that not all organizations were suited to playing that role. In addition, the expression "where appropriate" indicated that the involvement of international organizations was not always required, or even wanted, by the parties.

41. Finally, "Peace agreements", the title that had originally been proposed for draft principle 14, had been replaced with "Peace processes" to reflect the broad scope of application of the draft principle.

42. Draft principle 15, which the Special Rapporteur had initially proposed under the title "Draft principle III-2—Post-conflict environmental assessments and reviews", had also been placed in Part Three of the draft principles, entitled "Principles applicable after an armed conflict". It had consisted of two paragraphs, but the Drafting Committee had decided to retain only one, as it considered that the elements mentioned in the second paragraph, which concerned reviews of the impact of peace operations conducted for the purpose of preventing any negative environmental consequences in the context of future operations, pertained to draft principle 8 on peace operations, which had already been adopted.

43. Draft principle 15 read: "Cooperation among relevant actors, including international organizations, is encouraged with respect to post-armed conflict environmental assessments and remedial measures." It was the result of substantial changes that had been made to take into account the concerns expressed during the plenary debate and to ensure greater clarity. Its purpose was to encourage relevant actors to cooperate in order to ensure that, in post-conflict situations, environmental assessments could be carried out and remedial measures could be taken.

44. The concerns raised during the plenary debate with regard to the stakeholders referred to in the draft principle had been reiterated in the Drafting Committee. While it had been recognized that the aim of the draft principle was to cover both State and non-State actors, the expression "States and former parties" in the original version of the draft principle had not seemed clear and had raised a temporal problem. In order to address those concerns while maintaining a broad scope, the Drafting Committee had decided to use the passive voice and to replace the expression "States and former parties" with "[r]elevant actors", which indicated that a wide range of actors, including international organizations and non-State actors, had a role to play with regard to environmental assessments and remedial measures. The words "are encouraged", as proposed by the Special Rapporteur, were considered appropriate given the scarcity of practice in that field, and had thus been retained.

45. Some concerns had been raised that "environmental assessments" might be confused with "environmental impact assessments", which were to be undertaken as preventive measures, but it had been acknowledged that the term used in the original version of the draft principle was a term of art and could be retained. The commentary would clarify the distinction between the two concepts and explain the exact meaning of the term "environmental assessments" in the context of the draft principle. In order to align the text with the other draft principles, in particular draft principle 2, the Drafting Committee had

decided to replace the word "recovery" with "remedial". Lastly, the title of draft principle 15 had been modified slightly from the original version to take into account the modifications made in the body of the text, and had become "Post-armed conflict environmental assessments and remedial measures".

46. The Special Rapporteur had initially proposed that draft principle 16 be entitled "Draft principle III-3 – Remnants of war" and should be placed in the part dealing with the post-conflict phase. The Drafting Committee had worked on the basis of a revised proposal by the Special Rapporteur that had sought to take into account comments made during the plenary debate. While the original title proposed by the Special Rapporteur had been retained, the draft principle as provisionally adopted contained three paragraphs.

47. Paragraph 1 read: "After an armed conflict, parties to the conflict shall seek to remove or render harmless toxic and hazardous remnants of war under their jurisdiction or control that are causing or risk causing damage to the environment. Such measures shall be taken subject to the applicable rules of international law."

48. The original version had included the expression "Without delay after the cessation of active hostilities", which had been problematic. The Drafting Committee had decided to retain the clearer expression "After an armed conflict", which had appeared in the revised version of the draft principle.

49. In its current form, paragraph 1 defined the scope of application *ratione personae* of the draft principle as being the "parties to the conflict", unlike the original text, which had not spelled out explicitly to whom the obligation was addressed.

50. The obligation set out in paragraph 1 ("seek to remove or render harmless toxic and hazardous remnants of war") was cast in more general terms than the original proposal, paragraph 1 of which now formed part of paragraph 3. Given that the second sentence provided that such measures should be taken "subject to the applicable rules of international law", it had been decided that the commentary would clarify the meaning of the phrases "toxic and hazardous remnants of war" and "remove or render harmless" in the context of those applicable rules. The Drafting Committee considered that the verb "seek", which denoted an obligation of conduct, was preferable to the verb "attempt", which had been used in the revised proposal and gave the impression that the obligation was optional.

51. The Drafting Committee had also discussed the meaning to be given to the expression "under their jurisdiction or control". The reference was intended to cover areas that were under the *de jure* and *de facto* control of the parties. The draft principle was formulated in general terms to cover all remnants of war, whether on land or at sea.

52. Paragraph 2 had barely been changed. It read: "The parties shall also endeavour to reach agreement, among themselves and, where appropriate, with other States and with international organizations, on technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations to remove or render harmless such toxic and hazardous remnants of war."

53. The Drafting Committee had decided to remove the expression "At all times necessary", which it had deemed not useful and liable to give rise to confusion regarding the three phases covered by the topic. The obligation to "endeavour to reach agreement … on the provision of technical and material assistance" had been tempered by the removal of the words "the provision of" to allow a certain degree of flexibility with regard to the various arrangements that might arise.

54. Paragraph 3 contained some elements from paragraph 1 as originally proposed by the Special Rapporteur and formed a "without prejudice" clause. It read: "Paragraphs 1 and 2 are without prejudice to any rights or obligations under international law to clear, remove, destroy or maintain minefields, mined areas, mines, booby-traps, explosive ordnance and other devices." It meant that existing obligations under the various legal regimes would continue to prevail.

55. The Drafting Committee had decided to delete the expression "without delay after the cessation of active hostilities", which had appeared in the revised proposal, as it had legal implications regarding the termination of hostilities and complicated the work of the parties.

56. Draft principle 17, formerly draft principle III-4, entitled "Remnants of war at sea", had been placed in the part dealing with the principles applicable after an armed conflict. While its title had not changed, it had originally comprised two paragraphs, the second of which had been deleted on the understanding that the issues raised therein would be addressed in the context of access to and sharing of information, as proposed by the Special Rapporteur. Accordingly, it read: "States and relevant international organizations should cooperate to ensure that remnants of war at sea do not constitute a danger to the environment."

57. While draft principle 16 concerned remnants of war, draft principle 17 dealt more specifically with remnants of war at sea, including their long-lasting effects on marine environments. It applied to "States and relevant international organizations". The Drafting Committee had wondered whether it should mention the "parties to the conflict", as in draft principle 16, but had decided not to do so on the grounds that, in that particular case, the parties to the conflict might no longer exist, or the affected area might belong to, or fall under the jurisdiction of, a State that had not been a party to the conflict when it had taken place. The draft principle therefore needed to apply more generally to "States". The Drafting Committee had also discussed whether, as in draft principle 16, the scope of application should be limited to remnants of war "under [the] jurisdiction or control" of States. Given the nature of the regime under the law of the sea, it had not seen fit to do so.

58. Since the draft principle dealt with very specific issues, the Drafting Committee had decided to limit its scope of application to "relevant" international organizations. It had also elected to use the word "should", which

was less prescriptive, given that practice in the area in question was not yet firmly established. The reference to "at sea" had been added in the text of the draft principle for the sake of clarity. Moreover, the Drafting Committee had decided to delete the phrase "public health or the safety of seafarers" to limit the scope of the draft principle to the topic under consideration, it being understood that the effects of remnants of war on public health and the safety of seafarers would be addressed in the commentary.

59. Draft principle 18, formerly draft principle III-5 entitled "Access to and sharing of information", now comprised two paragraphs, as the Drafting Committee had adopted an additional paragraph proposed by the Special Rapporteur in light of the plenary debate, and was retitled "Sharing and granting access to information".

60. Although it was closely linked to the duty to cooperate, it was worded in such a way as to focus on sharing and granting access to information. It had been reformulated in order to apply more explicitly to the post-conflict phase, with the temporal scope being highlighted through the reference to "remedial measures", which were to be taken "after an armed conflict".

61. Different points of view had been expressed within the Drafting Committee regarding the subjects of the obligation set out in draft principle 18. After considering the appropriateness of referring exclusively to the parties to the conflict, the Drafting Committee had decided it was preferable to refer generally to States, as States that were not parties to a conflict might have information useful for the taking of remedial measures that could be provided to other States or to international organizations. Moreover, remedial measures could be taken long after the end of a conflict. The members of the Drafting Committee were also of the opinion that the obligation set out in the draft principle applied only to States, and that non-State actors that might be parties to an armed conflict were excluded from the scope of paragraph 1. They had also decided to retain the reference to international organizations, which had already appeared in the original wording, and to add the qualifier "relevant". International organizations commonly played a role in armed conflicts, notably through peacekeeping operations, and might provide information to facilitate the taking of remedial measures.

62. States or international organizations could share such information or grant access to it. While the term "share" referred to the direct exchange of information among States and international organizations, the words "grant access" essentially denoted the act of allowing individuals to access such information. The expression "in accordance with their obligations under international law" referred to treaties setting out obligations that were relevant in the context of the protection of the environment in relation to armed conflicts. Those obligations, including the duty to keep a record of the placement of landmines, might be important for the purpose of taking remedial measures after an armed conflict.

63. Paragraph 2 contained a new provision proposed by the Special Rapporteur in light of the plenary debate. Inspired by previous work of the Commission, in particular on the topics "Law of the non-navigational uses of international watercourses"[510] and "Shared natural resources (law of transboundary aquifers)",[511] it provided for an exception to the obligation set out in paragraph 1. That exception, which applied to situations in which the information in question was vital to the national defence or security of the State or international organization concerned, was not unqualified. Indeed, the second sentence limited its scope by providing that, within the limits necessary for the protection of such information, States and international organizations should do their utmost to cooperate in good faith with a view to providing as much information as possible under the circumstances.

64. To conclude, he noted that, at that stage, the Commission was not being requested to take a decision on the draft principles, which had been presented to it for information purposes only. It was the wish of the Drafting Committee that the Commission provisionally adopt the draft principles at a later stage, once the relevant commentaries had been submitted to it.

65. The CHAIRPERSON thanked the Chairperson of the Drafting Committee and said he took it that the Commission wished to take note of the draft principles on the protection of the environment in relation to armed conflicts (A/CN.4/L.876).

It was so decided.

66. Mr. KAMTO asked how the Commission intended to pursue its consideration of the topic after the departure of the Special Rapporteur, who would leave office at the end of the current session. Were there any plans to reopen the debate on the draft principles, and would the new special rapporteur prepare the commentary to the draft principles as they stood or contribute his or her own perspective?

67. Ms. JACOBSSON (Special Rapporteur) said that it would be for the newly elected membership of the Commission to decide how to proceed. She had, however, drawn up a set of informal draft commentaries that she would send to the secretariat to facilitate the work of the new special rapporteur.

68. Mr. CANDIOTI said that he wished to congratulate the Chairperson of the Drafting Committee, the Drafting Committee itself and the Special Rapporteur on their work. He noted that draft principle 3 was missing from document A/CN.4/L.870/Rev.1, with ellipsis points marking the spot where it should be. Did that mean that the draft principle had not yet been formulated?

69. It was explained in a footnote that the ellipses denoted that the insertion of another draft principle in that place was anticipated. The footnote should be more specific, in particular by indicating that the draft principle, which had not yet been formulated, would concern the use of terms.

[510] The draft articles on the law of the non-navigational uses of international watercourses adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222.

[511] The draft articles on the law of transboundary aquifers adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54. See also General Assembly resolution 63/124 of 11 December 2008, annex.

70. Mr. LLEWELLYN (Secretary to the Commission) said that the draft principle had not been referred to the Drafting Committee, which was why there was no mention of either a draft principle 3 or the use of terms.

71. Ms. JACOBSSON (Special Rapporteur) said that she had asked that the draft principle on the use of terms should not be referred to the Drafting Committee. The Commission was to revisit the issue at a later stage, as indicated by the Chairperson of the Drafting Committee in his previous report.

72. Mr. CANDIOTI said that he wished to draw attention to the numbering of the draft principles, which no longer appeared to follow a logical sequence when a draft principle was not referred to the Drafting Committee. The text in question jumped from draft principle 2 to draft principle 4. He doubted whether it was advisable to proceed in that manner. During the consideration of the topic "*Jus cogens*", a decision had been taken not to refer draft conclusion 2 to the Drafting Committee, and draft conclusion 3 had then become draft conclusion 2. Perhaps the Commission should systematically take that approach.

73. Ms. JACOBSSON (Special Rapporteur) said that she understood Mr. Candioti's point of view. However, given that the paragraphs had already been renumbered twice, she would be very reluctant to renumber them yet again. She would prefer to leave the issue to the discretion of her successor.

74. Mr. TLADI said that he did not think that the Commission could decide on the matter at that stage, since the draft principles were still before the Drafting Committee. It would be preferable for the Drafting Committee to return to the issue at the following session, when it considered the draft principles.

75. Ms. JACOBSSON (Special Rapporteur) said that draft principle 3 had not been referred to the Drafting Committee. It would be for the newly elected membership of the Commission to decide whether it wished to include a draft principle on definitions or the use of terms. It would therefore be preferable not to make any changes for the time being.

76. The CHAIRPERSON asked how the informal draft commentaries prepared by the Special Rapporteur would be submitted to the newly elected membership of the Commission.

77. Ms. JACOBSSON (Special Rapporteur) said that she planned to send the draft commentaries to the secretariat. It would not be an official document, but merely food for thought, which the newly elected membership of the Commission and the new special rapporteur would be free to take into account or to discard. She nevertheless hoped that it would prove useful.

78. Mr. CANDIOTI said that the outcome of the work carried out by Ms. Jacobsson and the Drafting Committee should be included, at least in a footnote, in the Commission's annual report.

Provisional application of treaties (*concluded*)[*] (A/CN.4/689, Part II, sect. G, A/CN.4/699 and Add.1, A/CN.4/L.877)

[Agenda item 5]

Report of the Drafting Committee

79. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the interim report of the Drafting Committee on the topic "Provisional application of treaties".

80. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that the Committee had held eight meetings on the topic "Provisional application of treaties", on 5, 11, 12, 13, 26 and 27 July 2016, with the primary focus being to complete the consideration of the draft guidelines referred to the Drafting Committee in 2015. At the Commission's 2015 session, the Chairperson of the Drafting Committee, Mr. Mathias Forteau, had introduced draft guidelines 1 to 3 as provisionally adopted by the Drafting Committee.[512]

81. At the current session, a further five draft guidelines had been provisionally adopted by the Drafting Committee. The entire set of draft guidelines, namely draft guidelines 1 to 3, provisionally adopted in 2015, and draft guidelines 4, 6, 7, 8 and 9, provisionally adopted at the current session, appeared in the report of the Drafting Committee (A/CN.4/L.877).

82. The Drafting Committee had decided to defer its consideration of draft guideline 5 to the following session. The Special Rapporteur had proposed a new version of that text which dealt with the possibility of provisionally applying a treaty by means of a unilateral declaration.

83. Draft guideline 4, entitled "Form", concerned the forms of agreement on the basis of which a treaty, or part of a treaty, could be provisionally applied, other than when the treaty itself so provided. Accordingly, it expanded on the phrase "in some other manner it has been so agreed" at the end of draft guideline 3, which was drawn from article 25, paragraph 1 (*b*), of the 1969 Vienna Convention. Two categories were envisaged. Under the first subparagraph, provisional application could take place by means of a "separate agreement", while the second subparagraph established that provisional application could take place through "any other means or arrangements", of which some examples were provided. After considering the possibility of incorporating the content of the draft guideline into a second paragraph of draft guideline 3 or into the commentary, the Drafting Committee had decided to retain a separate draft guideline.

84. That provision had started out as the draft guideline 2 proposed by the Special Rapporteur in his third report[513] and considered by the Commission at its sixty-

[*] Resumed from the 3329th meeting.

[512] See *Yearbook ... 2015*, vol. I, 3284th meeting, pp. 304–306, paras. 14–27.

[513] See *ibid.*, vol. II (Part One), document A/CN.4/687, p. 73, para. 131.

seventh session, held in 2015. The Drafting Committee had worked on the basis of a series of revisions proposed by the Special Rapporteur at Committee meetings during the previous and current sessions, taking into account the views expressed in the Commission's debates in 2015 and the suggestions made by Committee members. The Committee had focused on aligning the proposed text with the provisions adopted provisionally in 2015, particularly draft guideline 3, in order to minimize any overlap, and with the wording of article 25 of the 1969 Vienna Convention. The opening phrase "In addition to the case where the treaty so provides" was a direct reference to the wording of draft guideline 3, while the phrase "the treaty so provides" tracked the language of article 25 of the Convention.

85. Subparagraph (*a*) envisaged the scenario of provisional application by means of an agreement separate from the treaty itself. The word "agreement" referred to an instrument, including in the form of a treaty, which was distinct from the underlying agreement, expressing the mutual consent of the parties to apply the treaty provisionally. The Drafting Committee had preferred the word "agreement", which it had deemed more flexible and comprehensive than the word "instrument".

86. Subparagraph (*b*) envisaged the possibility that provisional application could also be agreed through "means or arrangements" other than a separate instrument, which broadened the range of possibilities for reaching an agreement to apply a treaty provisionally and confirmed the inherent flexibility of provisional application. By way of illustration, the second part of the subparagraph gave two examples drawn from recent practice: a resolution adopted by an international organization or at an intergovernmental conference. Other examples would be cited in the commentary, and might include declarations by States.

87. Draft guideline 6, which was entitled "Commencement of provisional application" and dealt with the temporal aspect of provisional application, was based on the draft guideline 3 proposed by the Special Rapporteur in his third report.[514] The Drafting Committee had worked on the basis of a revised proposal by the Special Rapporteur, which took into account the various proposals made during the plenary debate in 2015, and which the Drafting Committee had subsequently refined and modelled on article 24, paragraph 1, of the 1969 Vienna Convention, on entry into force.

88. The first part of the sentence made it plain that throughout the draft guidelines, provisional application concerned a treaty or a part of a treaty, unless otherwise stipulated.

89. The second part of the sentence had two components. The first was the expression "pending its entry into force", which had been added in order to align the text with that of draft guideline 3, thereby referring to the understanding reached in 2015 that the words "entry into force" denoted both the entry into force of the treaty and entry into force for the State. The Drafting Committee had preferred that solution, which, it thought, offered greater clarity than leaving the matter to the general rule in draft guideline 3 and including a separate draft guideline on the scope *ratione personae* of the draft guidelines specifying between which entities, States or international organizations a treaty could be provisionally applied.

90. The second component referred not only to States but also to international organizations, in keeping with the Drafting Committee's position that the draft guidelines should encompass both treaties between States and international organizations, and treaties between international organizations. The deliberately general wording "between" States or international organizations was meant to cover a variety of possible scenarios, including, for example, provisional application between a State for which the treaty had entered into force and another State or an international organization for which the treaty had not entered into force.

91. The phrase "takes effect on such date, and in accordance with such conditions and procedures" addressed the triggering of provisional application. After considering the use of the verb "commences", the Drafting Committee had decided to align the text with that of the 1969 Vienna Convention, which, in article 68, used the term "takes effect". It referred to the legal effect in relation to the State that elected to apply the treaty provisionally. An earlier version of the draft guideline had expressly mentioned the various modes of expressing consent to be bound by a treaty, along the lines of article 11 of the Convention. The Committee, judging that this would make the text cumbersome, had preferred to revert to the simpler structure of article 24, paragraph 1, of the Convention, on the understanding that the provision no longer dealt only with the temporal aspect of provisional application but also covered, in part, the legal effects of that application, without prejudice to the adoption of a further provision on the legal effects of provisional application as draft guideline 7.

92. The phrase "as the treaty provides or as are otherwise agreed" made clear that the agreement to apply a treaty provisionally was based on an underlying treaty or a separate agreement to permit provisional application, and, accordingly, was subject to the conditions and procedures established in that treaty or separate agreement.

93. The origins of draft guideline 7, entitled "Legal effects of provisional application", lay in the draft guideline 4 proposed by the Special Rapporteur in his third report.[515] The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur that included a number of additional paragraphs covering several aspects raised in the plenary debate in 2015, but had ultimately decided to adopt a provision comprising a single paragraph, after reflecting on the two types of "legal effects" that might be envisaged: the legal effects of the agreement to apply the treaty provisionally and the substantive legal effects of the treaty being applied provisionally. Its view was that the "legal effects" dealt with by the draft guideline should be limited to those stemming from the substantive obligations arising from the treaty or the part of the treaty that was being applied provisionally.

[514] *Ibid.*

[515] *Ibid.*

A treaty that was being applied provisionally would be deemed to bind the parties applying it provisionally as soon as the provisional application commenced. Accordingly, the draft guideline did not refer to the legal effects of the agreement on provisional application.

94. The basic rule set out in the first part of the draft guideline was that the provisional application of a treaty or a part thereof produced the same legal effects as if the treaty were in force between the States or international organizations concerned. Accordingly, that was the presumption that must be made when, as was frequently the case, a treaty or separate agreement was silent on the legal effects of provisional application.

95. That idea was, however, qualified by the concluding phrase "unless the treaty provides otherwise or it is otherwise agreed", which confirmed that this basic rule was not absolute and was subject to the treaty or separate agreement, which might provide otherwise. The Drafting Committee felt that the provision as a whole reflected existing State practice.

96. The formulation of the draft guideline had then been aligned with that of the draft guidelines adopted previously and with the 1969 Vienna Convention. The opening phrase "The provisional application of a treaty or a part of a treaty" echoed the wording at the beginning of draft guideline 6. The verb "produces", which already appeared in guideline 2.6.13 of the Guide to Practice on Reservations to Treaties,[516] had been preferred to "creates", the term initially chosen. Similarly, a decision had been taken to replace the expression "rights and duties" with "legal effects", given that rights and obligations were not always created and that it all depended on the treaty. The Drafting Committee had also decided against a proposal to specify that the draft guideline concerned legal effects "under international law", deeming it unnecessary on the ground that, as was customary, the Commission's work dealt exclusively with international law.

97. The Drafting Committee had also decided not to replace the adjective "same", to qualify the legal effects, with the term "full", which appeared in the relevant case law, out of concern that the latter term was less clear in the context of the draft guidelines. The phrase "as if the treaty were in force", which was central to the draft guideline, alluded to the effects that the treaty would produce if it were in force for the State or international organization in question. The phrase "between the States or international organizations concerned" had been inserted in order to align the provision with draft guideline 6. The concluding phrase, "unless the treaty provides otherwise or it is otherwise agreed", set out the condition on which the general rule was based.

98. In response to a proposal made in the plenary debate in 2015, the Special Rapporteur had proposed the addition of a paragraph to the draft guideline to clarify that the provisional application of a treaty could not result in the modification of its content. However, the Drafting Committee was of the view that the comprehensive new wording adopted in 2016 was a sufficient safeguard in that respect and that it was implicit in the draft guideline that the act of applying the treaty provisionally did not affect the rights and obligations of other States. The draft guideline should not, however, be understood as limiting the freedom of States to amend or modify the treaty.

99. As indicated by its title, "Responsibility for breach", draft guideline 8 dealt with the question of responsibility for the breach of an obligation arising under a treaty or a part of a treaty that was being applied provisionally. The Drafting Committee had again proceeded on the basis of a text proposed by the Special Rapporteur, which had itself been based on the revised version of draft guideline 6 as presented in the third report.[517] The new text proposed by the Special Rapporteur had taken into account several proposals made during the plenary debate in 2015 and comprised two paragraphs, the first dealing with the consequences of the breach of an obligation to apply a treaty provisionally, and the second with the termination or suspension of a treaty as a consequence of a breach.

100. The Drafting Committee had first considered whether it was necessary to have a provision on responsibility, since the 1969 Vienna Convention did not contain such a clause. The prevailing view had been that the scope of the draft guidelines was not necessarily limited to that of the Convention and that it was therefore useful to devote a draft guideline to a key legal consequence of the provisional application of a treaty.

101. The Drafting Committee had focused on the content of the first paragraph and, as it had done with draft guideline 7, had reoriented it to deal with the breach of an obligation arising under a treaty or a part thereof that was being applied provisionally, as opposed to the breach of an agreement to apply the treaty provisionally. The agreement or arrangement to apply the treaty provisionally was not covered by draft guideline 8, but was regulated by the general regime of the law of treaties, as would be explained in the commentary.

102. The Drafting Committee had rejected a proposal to insert the opening phrase "Unless the treaty otherwise provides or the negotiating States have otherwise agreed", which appeared in some of the draft guidelines adopted at the current session, for fear that it might have unintended consequences for the law of international responsibility.

103. The Drafting Committee had also considered the advisability of referring to an obligation arising under "part of" a treaty, since the view had been expressed that, by definition, such an obligation arose under the treaty itself. However, the Committee had decided to retain the reference in order to make it clear that, when a part of a treaty was applied provisionally, only that part was susceptible to a breach within the meaning of the draft guideline.

104. The wording of the draft guideline had been aligned with the text of the 2001 articles on the responsibility of

[516] See *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 167–169.

[517] See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687, p. 73, para. 131.

States for internationally wrongful acts.[518] For example, the phrase "obligation arising under" and the verb "entails" had been drawn from the 2001 articles, while the concluding phrase "in accordance with the applicable rules of international law" was a reference to, *inter alia*, those articles. There had been a proposal, in that regard, to refer to the responsibility of "a State", thereby drawing a distinction between States and international organizations, based on the recognition that the 1986 Vienna Convention had not been as widely accepted as the 1969 Vienna Convention. However, the Drafting Committee had decided to leave the matter open and to allow it to be regulated by "the applicable rules of international law".

105. As to the second paragraph proposed by the Special Rapporteur, on the termination or suspension of a treaty as a consequence of its breach, the Drafting Committee's preliminary view had been that the matter was distinct from the question of responsibility and should be dealt with on its own, possibly in a separate draft guideline, on the basis of a further report by the Special Rapporteur on other methods by which provisional application could be terminated. It had thus deferred its decision until the following session. It had also deemed it more logical to place the draft guideline, which had initially followed what had become draft guideline 9, after draft guideline 7 on legal effects.

106. For draft guideline 9, entitled "Termination upon notification of intention not to become a party", the Drafting Committee had worked on the basis of a revised proposal by the Special Rapporteur that had drawn on draft guideline 5 proposed in the third report.[519] The various proposals by the Special Rapporteur had envisaged the termination of provisional application in two scenarios: when the treaty entered into force for the State concerned and when the intention not to become a party to the treaty was communicated to the other parties concerned. The Drafting Committee had decided to narrow the scope of the draft guideline to the latter scenario by tracking the wording of article 25, paragraph 2, of the 1969 Vienna Convention, but with an additional reference to international organizations and to the provisional application of a part of a treaty.

107. Regarding the termination of provisional application by means of the entry into force of the treaty itself, the Drafting Committee had noted that this eventuality was implicitly covered in draft guideline 6 through the phrase "pending its entry into force". The complexity of the problem stemmed from the need to capture the multitude of legal arrangements that might exist between the State or international organization provisionally applying the treaty for which the latter had entered into force and other States or international organizations that were provisionally applying the treaty, a situation that was not provided for in article 25, paragraph 2, of the 1986 Vienna Convention. One solution could have been to introduce, in the *chapeau* of the draft guideline, the phrase "pending its entry into force between the States or international organizations concerned", which was found in draft guideline 6. Another proposal had been to indicate in the commentary that, in accordance with draft guideline 6, provisional application continued until the treaty entered into force for the State applying it provisionally in relation to the other States applying it provisionally.

108. The Drafting Committee had therefore considered whether it was best to include an express provision in the draft guideline or to explain in the commentary that this eventuality was implicitly covered. In the end, it had opted for the latter solution, not least because of the difficulty of capturing the various legal relations that might exist and be affected, in one way or another, by the entry into force of the treaty for one of the States or international organizations applying it provisionally. A mere statement that provisional application was "terminated" by entry into force would not fully capture all the possible outcomes in such situations.

109. After considering various solutions, including the possibility of dealing with the question in a separate paragraph, the Drafting Committee had settled on a text that tracked the wording of article 25, paragraph 2, of the 1986 Vienna Convention. That decision was, however, without prejudice to the possibility that the Commission might consider other methods for the termination of provisional application based on a corresponding study of the practice of States and international organizations by the Special Rapporteur, particularly bearing in mind that article 29 of the 1978 Vienna Convention envisaged a number of grounds for the termination of provisional application.

110. The Drafting Committee also indicated which States or international organizations should be notified of the intention to terminate with the phrase "notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally".

111. In addition, the Committee had decided against the adoption of a proposal to insert a safeguard clause on unilateral termination, which would have reproduced *mutatis mutandis* article 56, paragraph 2, of the 1986 Vienna Convention concerning unilateral denunciation, because it did not wish to undermine the flexibility offered by article 25 of the Convention.

112. In conclusion, he recommended that the Commission take note of the draft guidelines on the provisional application of treaties as set out in document A/CN.4/L.877, on the understanding that they would be referred back to the Drafting Committee at the following session so that it could consider the ones that it had been unable to consider at the current session – namely draft guideline 5, the outstanding issue with regard to draft guideline 8 and draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty, which had been proposed in the fourth report of the Special Rapporteur (A/CN.4/699) and referred to it on 27 July, but which it had not had time to finish considering – together with any further draft guidelines that might be referred to it at the following session. The Commission should be in a position, at its sixty-ninth session, to adopt the draft guidelines and a full set of commentaries.

[518] The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[519] See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/687, p. 73, para. 131.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter VIII. *Protection of the atmosphere* (*continued*) (A/CN.4/L.886 and Add.1)

113. The CHAIRPERSON invited the Commission to resume its consideration of the part of chapter VIII of the draft report contained in document A/CN.4/L.886/Add.1, paragraph by paragraph.

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (*continued*)

2. Text of the draft guidelines, together with a preambular paragraph, and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session (*continued*)

Commentary to the preamble (*concluded*)

Paragraph (2) (*concluded*)

114. Mr. MURASE (Special Rapporteur) read out a new version of the third sentence of paragraph (2), the text of which had been distributed to the members (non-symbol document distributed in the meeting room, in English only), which he had drawn up in light of the proposals made at a previous meeting. It read: "Principle 6 of the Rio Declaration on Environment and Development highlights 'the special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable'. The principle is similarly reflected in article 3 of the 1992 United Nations Framework Convention on Climate Change and article 2 of the 2015 Paris Agreement under the United Nations Framework Convention on Climate Change."

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was deleted.

Paragraph (4)

115. Mr. MURASE (Special Rapporteur) said that paragraph (4) and the following paragraphs would be renumbered in the final version of the draft text.

116. Mr. TLADI said that the last sentence of the paragraph should be deleted, as it no longer belonged in the draft text following the deletion of paragraph (3).

Paragraph (4), as amended, was adopted.

The commentary to the preamble, as amended, was adopted.

Commentary to guideline 3 (Obligation to protect the atmosphere)

Paragraph (1)

117. Sir Michael WOOD, in response to a comment by Mr. Murphy, proposed that the words "whole scheme of the" in the first sentence be replaced with "present" and that "relate analogously" in the third sentence be replaced with "seek to apply".

118. Mr. KITTICHAISAREE, noting that four draft guidelines were mentioned in the paragraph, asked which of them were meant by the reference to "These three draft guidelines" in the third sentence.

119. Mr. MURASE (Special Rapporteur) said that the words referred to draft guidelines 4, 5 and 6, which were mentioned in the second sentence.

120. Mr. CANDIOTI said that, to remove the ambiguity noted by Mr. Kittichaisaree, the full stop between the second and third sentences should be replaced with a semicolon.

Paragraph (1), as amended, was adopted.

Paragraph (2)

121. Sir Michael WOOD proposed that the words "seemingly broad scope of the" and "specifically" in the first sentence be deleted.

122. Mr. TLADI proposed that the word "channelling" in the penultimate sentence be replaced with "which reflected".

123. Mr. MURPHY asked for clarification from the Special Rapporteur regarding the phrase "while differentiating the kinds of obligations pertaining to each" in the first sentence.

124. Mr. MURASE (Special Rapporteur) said that the obligations laid down in the conventions dealing with atmospheric pollution and atmospheric degradation, respectively, were slightly different, and that the purpose of the phrase in question was to underline that point.

125. Sir Michael WOOD said that, to convey that idea more clearly, the verbs "prevent, reduce or control" in draft guideline 3 should be incorporated into the sentence, which should be amended to read: "The draft guideline seeks to delimit the obligation to protect the atmosphere to preventing, reducing and controlling atmospheric pollution and atmospheric degradation, thus differentiating the kinds of obligations pertaining to each."

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

126. Mr. PARK said that he doubted whether the second sentence faithfully and objectively reflected the debates within the Commission, and recalled that consideration of the issue of *erga omnes* obligations was still pending, as the Chairperson of the Drafting Committee had said when he had presented his report. He also had doubts as to the advisability of referring to the responsibility of States for internationally wrongful acts in that paragraph. For those reasons, it would be preferable to retain only the first sentence.

127. Following an exchange of views in which Mr. KITTICHAISAREE, Mr. MURPHY, Mr. NOLTE and Mr. SABOIA took part, Sir Michael WOOD proposed that the full stop at the end of the first sentence be replaced with a comma, that the start of the second sentence up to

the words "*erga omnes*" be deleted and that the end of that sentence be shortened and recast to read: "in the sense of article 48 of the articles on the responsibility of States for internationally wrongful acts, a matter on which there are different views". A new footnote could be inserted at the end of the sentence, to which the reference to the work cited in the last sentence of the footnote to the paragraph could be moved.

128. Mr. MURPHY said that the authors cited in that part of the above-mentioned footnote might not necessarily hold diverging views on the issue of State responsibility, and that this point should be checked before the footnote was inserted.

129. Mr. MURASE (Special Rapporteur) said that he supported Sir Michael's proposed amendment. As to the footnote in question, the draft text already contained enough references to sources and there was no need for the reference cited in the last sentence, which he would prefer to delete.

Paragraph (4), as amended, was adopted.

Paragraph (5)

130. Mr. TLADI proposed that the second and seventh sentences be aligned with the wording of the draft guideline by replacing the word "ensure" in both sentences with "take appropriate measures to ensure". He noted that the word "actual" was used before "adverse effects" in the fifth sentence, while the word "significant" appeared in the rest of the paragraph, and in paragraph (3), which had just been adopted, the adjective "deleterious" was employed. It would be wise to harmonize the text in order to remove those inconsistencies.

131. Mr. NOLTE proposed that, in the third sentence, the words "in which case" be replaced with "since".

132. The CHAIRPERSON suggested that the Commission adopt the paragraph with the changes proposed by Mr. Nolte and Mr. Tladi, on the understanding that the Special Rapporteur would subsequently harmonize the text in light of Mr. Tladi's remarks.

Paragraph (6)

133. Mr. NOLTE proposed that the words "that could" in the first sentence be replaced with "to".

134. Sir Michael WOOD, noting that the aim of the paragraph was to comment on and explain the phrase "prevent, reduce or control", said that the reference to the Paris Agreement under the United Nations Framework Convention on Climate Change, though interesting in itself, did not belong in the paragraph, and that the last sentence should be deleted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

135. Mr. TLADI said that the case mentioned in the antepenultimate footnote to the paragraph should be cited more faithfully by replacing the word "becom[ing]" with "has now become". He would leave it to the Special Rapporteur to adapt the text on the basis of that remark.

136. Mr. PARK asked what was meant by the pronoun "it" in the fourth sentence, and said that he was not sure whether the cases cited in the third to fifth footnotes to the paragraph really illustrated its content.

137. Mr. NOLTE proposed the deletion of the word "the" before "international courts and tribunals" in the fourth sentence. He failed to see the connection between the content of the paragraph and the Paris Agreement under the United Nations Framework Convention on Climate Change, to which reference was made from the fifth sentence onward.

138. Sir Michael WOOD said that, if the last three sentences of the paragraph, concerning the Paris Agreement under the United Nations Framework Convention on Climate Change, were retained, it would be necessary to review and amend them by placing the passages of the Agreement that were quoted verbatim between quotation marks and altering the wording accordingly.

139. Mr. MURASE (Special Rapporteur) said that the pronoun "it" referred to the expression "the basis of this obligation" in the previous sentence and that, in order to dispel any ambiguity, those words could be repeated in the fourth sentence. All the cases cited in the footnotes mentioned by Mr. Park dealt with the basis of the obligation to prevent significant adverse effects.

140. Mr. MURPHY said that the alternative wording proposed by the Special Rapporteur did not solve the problem, since the second part of the fourth sentence, beginning with the words "the obligation nonetheless may not be deemed fully established", concerned the application of the obligation, not its basis. Moreover, like Mr. Nolte, he did not see the connection between the Paris Agreement under the United Nations Framework Convention on Climate Change and the subject matter of the paragraph, and would prefer to delete the last three sentences.

141. The CHAIRPERSON suggested that the adoption of the paragraph be suspended to enable the Special Rapporteur to draft a new text reflecting the comments and proposals that had been made. The Commission would adopt the new version and the remaining paragraphs of the draft text at a subsequent meeting.

The meeting rose at 6.05 p.m.

3343rd MEETING

Wednesday, 10 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter VIII. *Protection of the atmosphere* (*concluded*) (A/CN.4/L.886 and Add.1)

1. The CHAIRPERSON invited the Commission to pursue its consideration of chapter VIII of the draft report and to resume its discussion of the portion contained in document A/CN.4/L.886/Add.1.

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (*continued*)

2. Text of the draft guidelines, together with a preambular paragraph, and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session (*concluded*)

Commentary to draft guideline 3 (Obligation to protect the atmosphere) (*continued*)

Paragraph (7) (*concluded*)

2. The CHAIRPERSON recalled that the adoption of paragraph (7) had been deferred pending some redrafting. He invited the Special Rapporteur to introduce his proposed amendments.

3. Mr. MURASE (Special Rapporteur) proposed that, beginning with the third sentence of the paragraph, the text read:

> "However, the existence of this obligation is still somewhat unsettled for global atmospheric degradation. International courts and tribunals have stated, for instance, that '[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment … of areas beyond national control is now part of the corpus of international law',[footnote] that the Court attaches great significance to respect for the environment 'not only for States but also for the whole of mankind',[footnote] and that the 'duty to prevent, or at least mitigate, [significant harm to the environment] … has now become a principle of general international law'.[footnote] At the same time, these pronouncements may not be deemed as fully supporting, though coming close to, the recognition that the obligation to prevent, reduce or control atmospheric degradation exists under customary international law. Nonetheless, such obligations are found in relevant conventions. In this context, it should be noted that the Paris Agreement under the United Nations Framework Convention on Climate Change, acknowledging in the preamble that 'climate change is a common concern of humankind', states that Parties 'should … respect, promote and consider their respective obligations on human rights, …'.[footnote] The preamble also noted 'the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity …'.[footnote]"

4. The final two footnotes to the paragraph had been replaced with specific references to the eleventh and thirteenth preambular paragraphs, respectively, of the Paris Agreement under the United Nations Framework Convention on Climate Change.

5. Mr. PETRIČ proposed that a footnote be added with specific references to the "relevant conventions" mentioned at the end of the fourth sentence of the revised text. Furthermore, the text went too far in deducing an obligation from the use of the verb "should" in the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change; language along the lines of "Nonetheless, such a view is indicated" would be preferable.

6. Mr. KITTICHAISAREE proposed deleting the third sentence of the revised text, which was confusing. He supported the insertion of a footnote containing references to relevant conventions. He furthermore proposed inserting the word "mainly" between the words "found" and "in relevant conventions" in the fourth sentence.

7. Mr. MURPHY said that he did not support the deletion of the third sentence of the revised text, as doing so would undermine the logic of the fourth sentence. However, the third sentence might be improved through the deletion of the words "though coming close to". There seemed to be disagreement within the Commission about the application of the *sic utere tuo ut alienum non laedas* principle in that context; it was sufficient to state that "these pronouncements may not be deemed as fully supporting". As to the penultimate sentence, the reference to human rights seemed out of place in the current context. He therefore proposed that, in the final two sentences, the following words be deleted: "that Parties 'should … respect, promote and consider their respective obligations on human rights, …'.[footnote] The preamble also noted".

8. Mr. NOLTE supported the proposals to include a footnote referring to relevant conventions and to remove the reference to the phrase from the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change relating to human rights. He had no strong views about the phrase "though coming close to".

9. Mr. PARK said that he fully supported Mr. Murphy's views regarding the third sentence of the revised text, including the proposed deletion of the phrase "though coming close to". In addition, he proposed inserting, in that sentence, the word "global" before the words "atmospheric degradation".

10. Mr. NOLTE said that, if the phrase "though coming close to" were to be deleted, then an additional phrase, to read "some members consider that", should be inserted after the words "At the same time" in order to show that there was a difference of opinion within the Commission.

11. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. Nolte's amendment to the third sentence of the revised text. He did not see the need to insert the word "global" before the words "atmospheric degradation", as the latter was already defined as global in the draft guidelines.

12. Mr. SABOIA said that he too supported the amendment proposed by Mr. Nolte regarding the third sentence.

13. Sir Michael WOOD said that it would be preferable to identify the courts and tribunals to which the quotations in the second sentence of the proposed text related. He therefore proposed replacing the phrase "International

courts and tribunals have stated" with the phrase "The International Court of Justice has stated" and the phrase "that the Court attaches great significance" with the phrase "and has attached great significance". The second sentence would thus end just before the phrase "and that the 'duty to prevent, or at least mitigate…'" and the next sentence would begin with "The arbitral tribunal in the *Arbitration regarding the Iron Rhine Railway* has referred to the duty to prevent, or at least mitigate".

14. Mr. MURPHY proposed that, instead of the words "some members consider that", the words "the views of members diverged as to whether" be inserted, following the words "At the same time" in the third sentence of the revised text; accordingly, the subsequent phrase "these pronouncements may not be" should be replaced with the phrase "these pronouncements may be".

15. Mr. KITTICHAISAREE said that he supported the amendments proposed by Sir Michael. However, he was concerned about the suggestion that the sentence beginning with the words "At the same time" be maintained. Making clear that there was a divergence of opinion within the Commission would not contribute positively to the development of international customary law in that context. He remained in favour of deleting the sentence and replacing the word "Nonetheless" at the beginning of the following sentence with the words "In any case".

16. Mr. TLADI said that he supported Mr. Murphy's amendments to the beginning of the third sentence of the revised text. He also agreed with Sir Michael's proposed amendments but suggested replacing his proposed phrase "has referred to the duty" with the phrase "has declared that the duty".

17. Mr. MURASE (Special Rapporteur) said that he supported the amendments proposed by Sir Michael, with the further amendment proposed by Mr. Tladi; the insertion of the phrase proposed by Mr. Murphy regarding the members' divergence of views; the insertion of the word "global" before the words "atmospheric degradation"; the insertion of a footnote containing a reference to relevant conventions; and Mr. Murphy's proposed amendments to the last two sentences of the paragraph. He further proposed replacing, in the fourth sentence of the revised text, the phrase "such obligations are" with the phrase "such obligation is".

Paragraph (7), as amended, was adopted.

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

18. Mr. MURPHY said that, in the last sentence of paragraph (1), the words "It may be noted" should be replaced with the words "In a separate opinion, Judge Owada noted".

19. Mr. TLADI said that, given that paragraph (1) identified those cases in which environmental impact assessments had been recognized by the International Court of Justice, it might be advisable to move the references to other Court rulings from paragraph (4) to paragraph (1). He therefore proposed deleting, in the fifth sentence of paragraph (4), the reference to the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, since it was already referred to in paragraph (1), and moving that revised fifth sentence, together with the last sentence of paragraph (4), to the end of paragraph (1).

20. Sir Michael WOOD said that he supported the proposed amendments to paragraphs (1) and (4). In addition, he proposed replacing, in the last sentence of the original paragraph (4), the verb "singled out" with the verb "listed", and the words "Advisory Opinion on Activities in the Seabed Areas" with "advisory opinion on *Responsibilities and Obligations of States sponsoring persons and entities with respect to Activities in the Area*".

21. Mr. MURPHY said that he would like clarification as to whether it was the fifth or, rather, the sixth, sentence of paragraph (4) that should be moved to paragraph (1).

22. Mr. TLADI said that it seemed preferable to maintain the sixth sentence of paragraph (4) in that paragraph, rather than moving it to paragraph (1), as it pertained to the threshold for triggering an environmental impact assessment, and therefore went beyond mere recognition of the principle.

23. Mr. MURPHY said that in that case, the words "in several judgments", in the fifth sentence of paragraph (4), should be replaced with the words "two other judgments", and a footnote with a reference to the *Gabčíkovo–Nagymaros Project* case should be added.

Paragraph (1), as amended, was adopted.

Paragraph (2)

24. Mr. TLADI proposed replacing, in the last sentence of paragraph (2), the phrase "What is crucial for the State would be to put in place" with the phrase "What is required is that the State puts in place".

Paragraph (2), as amended, was adopted.

Paragraph (3)

25. Sir Michael WOOD proposed deleting, in the first sentence of paragraph (3), the words "with respect to" and inserting the word "of". The last sentence of the paragraph was unclear. He therefore proposed replacing it with a sentence reading: "Since environmental threats have no respect for borders, States may wish jointly to take decisions concerning environmental impact assessments and this is not precluded."

26. Mr. TLADI said that, while he was not opposed to Sir Michael's proposed amendment to the last sentence, he would prefer wording along the lines of "Since environmental threats have no respect for borders, it is not precluded that States jointly take decisions concerning environmental impact assessments."

27. Mr. NOLTE said that, if the phrase "as part of global environmental governance" were to be maintained in the last sentence of the paragraph, he would propose replacing it with the phrase "as part of their global environmental

responsibility". Furthermore, he would prefer to use a more positive formulation than "it is not precluded that States", for example "States are encouraged".

28. Mr. PARK said that he preferred the language proposed by Sir Michael regarding the last sentence of the paragraph.

29. Sir Michael WOOD said that he, too, was not in favour of the formulation "States are encouraged" because jointly conducting environmental impact assessments could sometimes prove more complicated than doing so individually.

30. Mr. TLADI said that he agreed that States should be encouraged to conduct environmental impact assessments jointly, but did not believe that such encouragement was necessary in the commentary, which merely served to explain the draft guidelines.

31. Mr. MURASE (Special Rapporteur) said that, in the first sentence, the words "the obligation with respect to States" should be amended to read "the obligation of States" and that the last sentence should be amended to read "Since environmental threats have no respect for borders, it is not precluded that States, as part of global environmental responsibility, conduct environmental impact assessments jointly."

Paragraph (3), as amended, was adopted.

Paragraph (4)

32. Mr. TLADI said that, in the third sentence, the phrase "article 17 of the Rio Declaration on Environment and Development" should be changed to "principle 17 of the Rio Declaration on Environment and Development".

It was so decided.

33. Mr. MURPHY suggested that paragraph (4) might be combined with paragraph (5) because both referred to the threshold for triggering an environmental impact assessment.

Paragraph (4), as amended, was adopted.

Paragraph (5)

34. Mr. NOLTE, referring to the end of the second sentence, said that what constituted "significant" could not be a purely factual determination and that it must have some measure of legal interpretation or assessment. He therefore proposed inserting the words "to a large extent" between "remains" and "a factual determination".

35. Sir Michael WOOD proposed that, in line with the wording used in the footnote to the paragraph, the word "remains" be replaced with "requires" before "a factual determination". In his view, the fact that the topic covered both atmospheric pollution and atmospheric degradation had no bearing on the need for a factual determination. He therefore suggested that the second sentence be further simplified to read: "The impact of the potential harm must be 'significant'; what constitutes 'significant' requires a factual determination." Regarding the first sentence, he suggested that the words "or transitory" be deleted, since, in its current wording, the sentence suggested that the guideline did not cover an activity that had a major, but transitory, impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

36. Mr. MURASE (Special Rapporteur) said that he agreed with the proposals to replace "remains" with "requires" and to delete "or transitory". However, it was important to retain, in the second sentence, the reference to the fact that the topic covered both atmospheric pollution and atmospheric degradation, since environmental impact assessments were required for projects likely to have an impact in terms of atmospheric degradation.

37. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in order to reconcile the views of Sir Michael and the Special Rapporteur, the second sentence be amended to read: "The impact of the potential harm must be 'significant' for both atmospheric pollution and atmospheric degradation. What constitutes 'significant' requires a factual determination."

Paragraph (5), as amended by Sir Michael Wood and further amended by Mr. Vázquez-Bermúdez, was adopted.

Paragraph (6)

38. Mr. MURPHY proposed that, in the second sentence, the words "projects intended to have" be replaced with "projects which are likely to have" and that the word "adverse" should be inserted before "effects". He further proposed deleting the parenthetical reference to geoengineering activities in that sentence because, although the term had not been defined, such activities were generally considered with a view to improving the atmosphere, and to the extent that there were adverse effects, they would potentially be on the lithosphere and marine environment. In the third sentence, the words "are likely to" should be replaced with "may", and the words "widespread, long-term and severe" could be deleted, as it was not clear whether that standard applied in the current context.

39. Mr. PARK said that he had similar concerns to those expressed by Mr. Murphy. He proposed replacing the words "it is considered that there is a similar requirement" in the second sentence with "it is considered that, as *lex ferenda*, there might be a similar requirement". In the same sentence, a full stop should be inserted after "global atmosphere" and the remainder of the paragraph should be deleted. The reference to the Protocol on Strategic Environmental Assessment to the Convention on the Environmental Impact in the Transboundary Context (Kiev Protocol) was not appropriate, since the scope of the Protocol was limited to transboundary atmospheric pollution; it did not address global atmospheric degradation.

40. Mr. NOLTE said that he supported the proposals made by Mr. Murphy. However, he was in favour of replacing the words "geoengineering activities" in parentheses with a reference to draft guideline 7, which addressed the intentional large-scale modification of the atmosphere. He wondered whether Mr. Park's far-reaching proposal to include a reference to *lex ferenda* was really compatible

with draft guideline 4. Furthermore, he saw no need to delete the remainder of the paragraph, as proposed by Mr. Park. In his view, the reference to the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context seemed appropriate, since, among other things, it was an example of collaboration among certain States in a global context.

41. Mr. VÁZQUEZ-BERMÚDEZ said that he fully agreed with Mr. Nolte's comments and that he supported Mr. Murphy's proposals, which adequately reflected the focus of the draft guideline.

42. Mr. TLADI said that he did not support Mr. Park's proposal to include a reference to *lex ferenda*. He believed that the proposal by Mr. Murphy would sufficiently nuance the text. If the words "widespread, long-term and severe" were retained, a reference should perhaps be added to indicate the source of that expression.

43. Mr. MURASE (Special Rapporteur) said that he agreed with Mr. Murphy's proposals, although he would keep the word "severe" before "damage" in the third sentence, and with Mr. Nolte's proposal to replace "geoengineering activities" with a reference to draft guideline 7. He was, however, not in favour of inserting a reference to *lex ferenda*, which was not appropriate in the current context. The reference to the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context should be kept, as that instrument addressed global issues such as biodiversity and climate as well as transboundary issues.

44. Mr. MURPHY said that he agreed with Mr. Park's point about the scope of the Protocol and the relevance of a reference to that instrument in the current context. However, he would not insist on the removal of that reference. As to the proposal to replace the words "geoengineering activities" with a reference to draft guideline 7, he suggested that the latter perhaps be added in a footnote rather than in parentheses.

45. Mr. ŠTURMA said that he supported the statements of Mr. Park and Mr. Murphy concerning the Protocol.

46. Mr. VÁZQUEZ-BERMÚDEZ said that, since the first sentence referred to both "atmospheric pollution" and "atmospheric degradation", he was of the view that the paragraph could be adopted as agreed by the Special Rapporteur.

Paragraph (6), as amended, was adopted.

Paragraph (7)

47. Mr. TLADI proposed that, in the second sentence, the words "talks about the fact that environmental issues" be replaced with "provides that environmental issues".

Paragraph 7, as amended, was adopted.

The commentary to draft guideline 4, as amended, was adopted.

Commentary to draft guideline 5 (Sustainable utilization of the atmosphere)

Paragraph (1)

48. Mr. PARK proposed that, in order to reflect the discussions in the plenary, a sentence be added at the end of the paragraph to read: "Some members expressed doubts that the atmosphere could be treated analogously as aquifers or watercourses." The wording was taken from the statement of the Chairperson of the Drafting Committee.

49. Sir Michael WOOD proposed that, in the first sentence, the words "limited resource" should be replaced with "natural resource" in order to reflect the language of the draft guideline itself. He suggested deleting the fifth sentence, since it was very theoretical and difficult to follow. The beginning of the sixth sentence should then be recast to read: "First and foremost, this draft guideline proceeds on the premise that …".

50. Mr. MURPHY said that he supported the proposals made by Mr. Park and Sir Michael. In the sixth sentence, he proposed replacing the words "the atmosphere is a limited resource" with "the atmosphere is a resource with limited assimilation capacity".

51. Mr. NOLTE said that, in the third sentence, the words "In actuality, though" should be replaced with "In truth, however". At the end of the same sentence, he proposed adding the words "exploitable and" before "exploited", in line with the second sentence. With regard to Sir Michael's proposal to delete the fifth sentence, he considered that the sentence had value, inasmuch as the function of the commentary was to explain the general considerations that had led to certain conclusions. He would, however, propose deleting the words "First and foremost", which were not necessary. The point being made in that sentence was that the conclusion was based at least in part on an analogy, which was perfectly plausible.

52. Mr. MURASE (Special Rapporteur) said that he accepted Sir Michael's proposal to replace "limited" with "natural" in the first sentence. He also agreed to Mr. Nolte's proposals to replace the words "In actuality, though" and to add the words "exploitable and" in the second sentence. The fifth sentence was important and should therefore be retained. He could, however, accept the deletion of the opening words "First and foremost". He agreed to Mr. Nolte's proposed amendment to the sixth sentence.

53. Sir Michael WOOD said that, in his view, the fifth sentence was unintelligible; he had no idea what it was intended to suggest.

54. Mr. SABOIA said that he understood the fifth sentence as combining the concept of a shared resource with that of global commons, both of which were useful for the purposes of the topic.

55. Mr. VÁZQUEZ-BERMÚDEZ said that the fifth sentence adequately reflected the source and inspiration for the draft guideline by referring to both shared resources and the recognition of commonality of interests in relation to the atmosphere.

Paragraph (1), as amended, was adopted.

Paragraph (2)

56. Sir Michael WOOD said that the first sentence could be deleted, since it simply repeated what was said in the first sentence of paragraph 1 of draft guideline 5. The opening phrase of the second sentence should then be recast to read: "The second part of paragraph 1".

Paragraph (2), as amended, was adopted.

Paragraph (3)

57. Mr. MURPHY said that in the final sentence, the reference to geoengineering in parentheses should be replaced with a footnote reference to draft guideline 7, as had been done in paragraph (6) of the commentary to draft guideline 4.

58. Mr. NOLTE proposed that the words "most notably in the form of aerial navigation" be deleted from the end of the second sentence in order to avoid potential misunderstandings.

59. Mr. PARK proposed that the third sentence, whose meaning was unclear, be recast to read: "Obviously, most human activities that have been carried out directly or indirectly affect atmospheric conditions."

60. Mr. MURPHY said that, in his view, Mr. Park's proposed change would be going too far, as it suggested that most human activities directly or indirectly affected the atmosphere, which was not the case.

61. Mr. MURASE (Special Rapporteur) said that the wording "directly or indirectly affect" might carry additional connotations, so he would rather retain the original formulation. He did not believe that it was necessary always to specify "human" activities. He accepted the proposals by Mr. Murphy and Mr. Nolte.

62. Mr. VÁZQUEZ-BERMÚDEZ said that, in his opinion, the paragraph in its current formulation succeeded in its objective of explaining the scope of the term "utilization". He agreed with the Special Rapporteur that amendments should not be introduced that would change its meaning. He supported the proposal to replace the reference to geoengineering in the text with a footnote.

63. Mr. KAMTO said that, in his view the current formulation was unacceptable, at least in the French version. The phrase "Obviously, most of the activities that have been carried out so far" was much too categorical, and the Commission should exercise caution in making such statements that were not backed up by the necessary studies or data. He would be inclined to agree with Mr. Park's proposal. In that regard, he suggested that the word "Obviously" be replaced with, for example, "Probably".

64. Mr. SABOIA said that some of the concerns raised by Mr. Kamto might have to do with translation problems, as the French text seemed to convey stronger language than the other versions. Like Mr. Vázquez-Bermúdez and others, he would consider the paragraph acceptable with the minor amendments proposed; he was not in favour of Mr. Park's proposed change.

65. Mr. MURPHY said that, the differences in opinion could perhaps be bridged by replacing, in the third sentence, the word "Obviously" with "Likely" and saying "most of these activities" rather than "most of the activities", so as to clearly signal that they were human activities.

66. Mr. MURASE (Special Rapporteur) said that Mr. Murphy's proposal was acceptable.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

67. Sir Michael WOOD said that, in the interests of clarity, the first sentence should be split into two; the first should end after "'need to reconcile environmental protection and economic development'" and the second sentence should read: "The Commission also noted other relevant precedents."

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 5, as amended, was adopted.

Commentary to draft guideline 6 (Equitable and reasonable utilization of the atmosphere)

Paragraph (1)

68. Sir Michael WOOD proposed the deletion of the last sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

69. Mr. KAMTO proposed that the footnote to the paragraph be restructured to reflect the relevance of the sources cited. In his view, the footnote should first refer to the chapter by Juliane Kokott; a sentence should then be added indicating that the use of the notion of equity in jurisprudence on delimitation was also illuminating and citing the 1986 judgment of the International Court of Justice in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* and the chapter by Prosper Weil.

Paragraph (2) was adopted, subject to that amendment to its footnote.

Paragraph (3)

70. Mr. MURASE (Special Rapporteur) said that a cross reference to the second footnote to paragraph (1) of the commentary to the preamble should be added to the footnote to the paragraph under consideration.

71. Mr. MURPHY proposed that, to improve the readability of the last sentence, the words "of life" should be removed.

Paragraph (3), as amended, was adopted.

The commentary to draft guideline 6, as amended, was adopted.

Commentary to draft guideline 7 (Intentional large-scale modification of the atmosphere)

Paragraph (1)

72. Mr. TLADI said that, in the first sentence, the text that followed the semicolon seemed superfluous and could be deleted.

73. Mr. PARK suggested that, for the sake of transparency and in line with the custom of the Commission, a new sentence be added at the end of the paragraph to read: "A number of members remained unpersuaded that there was a need for a draft guideline on this matter, which essentially remains controversial, and the discussion on it was evolving, and is based on scant practice." That sentence was drawn from the relevant statement of the Chairperson of the Drafting Committee at the current session.

74. Mr. MURASE (Special Rapporteur), referring to Mr. Tladi's proposal, said that the "intention" element was very important in the context of the draft guideline and that he would therefore prefer to retain the current formulation. As to Mr. Park's suggestion, he was in the hands of the Commission.

75. Mr. NOLTE suggested that the sentence proposed by Mr. Park be placed at the end of the commentaries.

It was so decided.

Paragraph (1) was adopted.

Paragraph (2)

76. Sir Michael WOOD proposed that the opening phrase of the paragraph be recast to read: "The term 'activities aimed at intentional large-scale modification of the atmosphere', is taken in part from …".

77. Mr. MURPHY proposed that the words "any technique" be replaced with "techniques".

Paragraph (2), as amended, was adopted.

Paragraph (3)

78. Mr. MURASE (Special Rapporteur) proposed that the last four sentences of the paragraph be deleted.

79. Mr. MURPHY proposed that, in the first sentence, the word "geoengineering" be placed in quotation marks. He supported the Special Rapporteur's proposal to delete the last four sentences.

Paragraph (3), as amended, was adopted.

Paragraph (4)

80. Mr. MURASE (Special Rapporteur) proposed that, for the sake of consistency with the previous paragraph, the last sentence be deleted.

81. Mr. MURPHY said that, while he agreed with that proposal, he had doubts about the appropriateness of the paragraph as a whole. In referring to "'albedo enhancement'", for example, the Commission appeared to be straying from its area of expertise.

82. Mr. ŠTURMA said that he shared Mr. Murphy's doubts. Members of the Commission were legal experts, not scientists; he felt uneasy about adopting a paragraph whose meaning was not clear to him.

83. Mr. NOLTE said that he shared the unease expressed by Mr. Murphy and Mr. Šturma. He would prefer to delete the paragraph.

84. Mr. MURASE (Special Rapporteur) said that the information in the paragraph had been substantiated by scientists and would be of interest to delegates in the Sixth Committee.

85. Sir Michael WOOD said that, while he agreed that the Commission should not delve too deeply into the domain of science, the paragraph was interesting and should be retained, with the exception of the last sentence, which did not fit in with the commentary.

86. Mr. PETRIČ, supported by Mr. SABOIA, said that, if the paragraph was retained, it should at least be made clear that the information that it contained was based on input from scientists rather than from the Commission itself.

87. Mr. VÁZQUEZ-BERMÚDEZ said that the Commission should avoid giving the impression that it was endorsing solar radiation management as an activity that had only positive effects. He proposed retaining the first sentence and placing the second sentence in a footnote, preceded by an introductory phrase, such as "According to scientific experts". The third sentence should be deleted.

88. The CHAIRPERSON said he took it that the Commission wished to accept the proposal made by Mr. Vázquez-Bermúdez.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

89. Mr. MURPHY said that he would prefer to simplify the paragraph by deleting the third, fourth and fifth sentences, in which an attempt was made to characterize certain obligations under the Convention on the prohibition of military or any other hostile use of environmental modification techniques and under the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I). The second sentence could be redrafted to include references to those two instruments, without going into further detail.

90. Mr. PARK said that he agreed with the thrust of Mr. Murphy's proposal, but that the third, fourth and fifth sentences could perhaps be amended slightly and moved to a footnote.

91. Mr. MURASE (Special Rapporteur) said that he could accept Mr. Murphy's proposal, as modified by Mr. Park.

92. Mr. MURPHY said that, if that was the approach taken, he wished to propose a number of changes to the three sentences and the Commission would need to agree on a revised text.

Paragraph (5) was adopted on that understanding.

Paragraph (6)

93. Mr. MURPHY proposed that, for the sake of clarity, the first sentence be redrafted to read: "Likewise, other activities will continue to be governed by various regimes."

Paragraph (6), as amended, was adopted.

Paragraph (7)

94. Mr. MURPHY proposed that the opening phrase of the first sentence be modified to read: "Activities aimed at large-scale modification of the atmosphere have a significant potential for …". In the third sentence, he proposed inserting the words "with respect to weather modification" after "World Meteorological Organization".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

95. Mr. NOLTE said that it had been noted, during the Commission's discussion of the topic, that draft guideline 7 should not give rise to the misunderstanding that the Commission was encouraging intentional modification techniques. He therefore proposed that the second sentence be redrafted to read: "It simply sets out the principle that such activities, if undertaken at all, should be conducted with prudence and caution."

96. Mr. KAMTO, referring to the expression "prudence and caution" in the third sentence, said that it would be useful for readers if the Commission quoted the language of the International Tribunal for the Law of the Sea directly. He therefore proposed inserting a new fourth sentence that would read: "As was stated by the International Tribunal for the Law of the Sea in *The MOX Plant Case*, 'prudence and caution require that [States] cooperate in exchanging information concerning risks or effects … and in devising ways to deal with them, as appropriate'."

97. Sir Michael WOOD said that he would prefer not to include Mr. Nolte's proposed language, which was not necessary or helpful in that it carried a negative implication. The Commission made clear its position with regard to environmental modification techniques in the first sentence.

98. While he agreed with the point raised by Mr. Kamto, he would not want to suggest that prudence and caution were limited to the exchange of information. He therefore proposed that the language used by the Tribunal in *The MOX Plant Case* and, if appropriate, in the other two cases cited, should be quoted in a footnote.

99. Mr. KAMTO said that, if the Commission cited the three cases, it should quote directly from the relevant judgments in the text of the paragraph, particularly as the Tribunal had been consistent in its use of the words "prudence and caution".

100. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. Nolte's proposal, which reflected the debate that had been held within the Commission. He also supported the proposal made by Mr. Kamto.

101. Mr. NOLTE said that the first sentence of the paragraph set out the Commission's formal position. One of the Commission's concerns was, however, to ensure that prudence and caution were exercised not only when an activity was being carried out, but also when the decision was taken whether to engage in an activity. He hoped that Sir Michael would find the phrase "if undertaken," more acceptable, as it was less negative than the wording which he had initially proposed.

102. Mr. McRAE supported that amendment.

103. Mr. MURASE (Special Rapporteur) agreed to the new amendment proposed by Mr. Nolte and the insertion of the quotation taken from the order of the International Tribunal for the Law of the Sea in *The MOX Plant Case*, as proposed by Mr. Kamto.

Paragraph (9), as amended, was adopted.

Paragraph (10)

104. Mr. MURASE (Special Rapporteur) said that the second sentence should be deleted.

105. Mr. NOLTE proposed that the final sentence read: "It is understood that international law would continue to operate in the field of application of the draft guidelines".

Paragraph (10), as amended, was adopted.

Paragraph (11)

106. Mr. MURPHY said that the final phrase of the first sentence should state that "a draft guideline may be required", as an environmental impact assessment probably had to be conducted for some types of activities, such as geoengineering, not because they would adversely affect the atmosphere, which was the subject of draft guideline 4, but rather because they would for example affect the lithosphere and maritime environment. In the final sentence, the words "'widespread, long-term and'" should be deleted in the phrase in quotation marks.

107. Mr. MURASE (Special Rapporteur) agreed to the amendments proposed by Mr. Murphy and suggested that, in the last sentence, "is likely to" should be changed to "may well".

Paragraph (11), as amended, was adopted.

108. Mr. VÁZQUEZ-BERMÚDEZ, referring to Mr. Park's proposal to insert a new sentence which would become paragraph (12) of the commentary, recalled that

some members were of the opinion that the draft guideline in question was no more than a common denominator and could be improved on second reading. He therefore proposed the addition, at the end of the sentence proposed by Mr. Park, of the phrase “other members were of the view that the draft guideline could be improved during the second reading”.

109. Mr. TLADI said that States might well be under more obligations than those specified in the draft guidelines. For that reason, he proposed the phrase “the draft guideline could be enhanced during the second reading”.

The new paragraph (12) proposed by Mr. Park, as amended by Mr. Vázquez-Bermúdez and further amended by Mr. Tladi, was adopted.

The commentary to draft guideline 7, as amended, was adopted.

Commentary to draft guideline 3 (Obligation to protect the atmosphere) (*concluded*)

Paragraph (5) (*concluded*)

110. Mr. MURASE (Special Rapporteur) said that, in the fifth sentence, “actual adverse effects” should read “significant adverse effects” and that the word “significant” should also be inserted in the seventh sentence before the words “adverse effects”.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 3, as a whole, as amended, was adopted.

111. The CHAIRPERSON invited the members of the Commission to resume their consideration of the portion of chapter VIII contained in document A/CN.4/L.886.

B. Consideration of the topic at the present session (*concluded*)*

112. Mr. MURASE (Special Rapporteur) said that the footnotes to paragraph 3 should be deleted.

It was so decided.

Paragraph 9 (*concluded*)*

Paragraph 9 was adopted.

Section B, as amended, was adopted.

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (*concluded*)

1. Text of the draft guidelines, together with preambular paragraphs (*concluded*)* [A/CN.4/L.886]

113. Mr. LLEWELLYN (Secretary to the Commission), referring to a question that had been raised previously by Mr. Murphy concerning the footnotes to the draft guidelines and preambular paragraphs previously adopted, said that it was not the Commission’s usual practice to attach such footnotes.

114. The CHAIRPERSON took it that the Commission wished to delete all the footnotes in the subsection.

It was so decided.

Section C, as amended, was adopted.

Chapter VIII of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter IX. Jus cogens (A/CN.4/L.887)

115. The CHAIRPERSON invited the members of the Commission to consider chapter IX of the draft report contained in document A/CN.4/L.887.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 5

Paragraphs 2 to 5 were adopted.

1. Introduction by the Special Rapporteur of the first report

Paragraph 6

116. Mr. MURPHY said that the paragraph would probably read better if the phrase “prior to that” was deleted in the second sentence. In the third sentence, the phrase “the Commission was invited” should be altered to “the members of the Commission were” and he proposed replacing, in the final sentence, “several themes” with “two general points”.

117. Mr. TLADI (Special Rapporteur) said that he was happy to accept the first two suggested amendments. He would, however, prefer to retain the word “themes”.

Paragraph 6, as amended, was adopted.

Paragraph 7

118. Mr. TLADI (Special Rapporteur) said that the antepenultimate sentence should refer to the “fundamentally process-oriented/methodological nature of the topic”.

Paragraph 7, as amended, was adopted.

Paragraph 8

119. Mr. MURPHY suggested that the final sentence be recast to read: “In addition, scholarly writings on the topic, while not dispositive, could also assist in analysing primary sources.”

Paragraph 8, as amended, was adopted.

Paragraph 9

120. Mr. NOLTE suggested that, for the sake of clarity, the phrase “that applied to the parties of the treaties”, in the final sentence, be deleted.

Paragraph 9, as amended, was adopted.

* Resumed from the 3341st meeting.

Paragraph 10

121. Mr. MURPHY, referring to the three footnotes to the paragraph, said that it would be best not to include references to the sources relied upon in the report or by members in their statements. One solution might be to replace those footnotes with just one footnote referring to the relevant pages in the Special Rapporteur's first report (A/CN.4/693) where those sources were mentioned.

Paragraph 10 was adopted with that amendment to the footnotes.

Paragraph 11

122. Mr. NOLTE said that he wondered whether the Commission should emphasize the fact that it had not foreseen States' acceptance of the proposition referred to in paragraph 10. He therefore proposed starting the paragraph with "Regarding the acceptance of the proposition by States, reference was made …". In the third sentence, the word "States" should be inserted before the words "had raised" and, in the final, sentence it would be more accurate to speak of "widespread assumptions" than "popular belief".

123. Mr. TLADI (Special Rapporteur) agreed to all the suggested changes.

Paragraph 11, as amended, was adopted.

Paragraph 12

124. Mr. MURPHY suggested that the footnote to the paragraph simply refer to the relevant pages of the first report where the cases mentioned in the footnote were discussed and that, in the final sentence, the phrase "regional and national courts" be preceded by the word "by".

Paragraph 12, as amended and with an amendment to its footnote, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

125. Mr. MURPHY said that it might be helpful to insert the phrase "of the third draft conclusion" after the words "second paragraph" in the final sentence.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

2. Summary of the debate

Paragraph 16

126. Mr. VÁZQUEZ-BERMÚDEZ said that, in order to reflect the views expressed in the debate, he proposed the insertion of an additional sentence at the end of the paragraph which would read: "It was stressed that the scope of the topic extends beyond the law of treaties and includes areas of international law such as the responsibility of States for internationally wrongful acts."

127. Mr. NOLTE said that without further explanation the phrase "potentially transformational nature of peremptory norms" in the final sentence was difficult to understand.

128. Sir Michael WOOD said that he was also puzzled by the aforementioned phrase. Perhaps the best solution would be to end the sentence after the word "Commission". He supported the proposal by Mr. Vázquez-Bermúdez to add an additional sentence.

129. Mr. MURPHY suggested replacing the phrase "reference was made" with "members made reference to" in the first sentence.

Paragraph 16, as amended, was adopted.

Paragraph 17

130. Mr. MURPHY proposed the insertion of the word "reviewing" before "the practice of States" in the final sentence.

131. Sir Michael WOOD said that the third sentence could be more strongly worded by replacing "was cited in support of the assertion" with "confirmed".

132. Mr. VÁZQUEZ-BERMÚDEZ suggested inserting, in the third sentence, the phrase "and other international courts and tribunals" after the words "International Court of Justice", since they, too, had referred to the concept of *jus cogens* in their decisions.

Paragraph 17, as amended, was adopted.

Paragraph 18

133. Mr. MURPHY proposed altering "stick" to "adhere" in the fourth sentence.

134. Mr. VÁZQUEZ-BERMÚDEZ suggested the deletion of the phrase "as in the case of customary international law" in the second sentence.

135. Mr. NOLTE said that the meaning of the penultimate sentence would be clearer if it were recast to read: "It was also suggested that if the Special Rapporteur were to undertake further study on the theoretical aspects of *jus cogens*, he could look at the link between the concept of *jus cogens* and that of transnational public policy which is relevant in the field of international investment law."

136. Mr. TLADI (Special Rapporteur) said that it was important to say that the link had been invoked because Mr. Forteau had made the point that there were specific investment arbitration cases which had referred to that link and that the Commission might therefore need to look at it.

137. Mr. NOLTE said that it might be unclear whether the words "which had been invoked" in the penultimate sentence related to transnational public policy or the two concepts.

138. Mr. TLADI (Special Rapporteur), supported by Mr. McRAE, said that in order to avoid any ambiguity the sentence should end after the phrase "transnational public policy".

Paragraph 18, as amended by Mr. Nolte and by the Special Rapporteur, was adopted.

Paragraph 19

139. Mr. KITTICHAISAREE proposed the insertion of the word "international" before "public order" at the end of the first sentence.

140. Mr. VÁZQUEZ-BERMÚDEZ proposed the deletion of the three sentences preceding the final sentence and the insertion of the following text:

> "It was expressed that the *jus cogens* norms are essentially norms of customary international law with an especial *opinio juris*, that is, the conviction of the existence of a legal right or obligation of a peremptory character. Accordingly, such a norm consists of a general practice accepted as a peremptory law. In other words, a general practice accompanied by an *opinio juris cogens*. It was also pointed out that treaties might be at the origin or reflect norms of *jus cogens*, and that peremptory norms might also be based on general principles of law, which deserved further study."

141. Mr. NOLTE said that it would be better to speak of a "special form of *opinio juris*" rather than "an especial *opinio juris*".

142. The CHAIRPERSON invited the members of the Commission to pursue their consideration of the portion of the draft report contained in document A/CN.4/L.887 at the following meeting.

The meeting rose at 1 p.m.

3344th MEETING

Wednesday, 10 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (*concluded*)* (A/CN.4/689, Part II, sect. H, A/CN.4/L.878)

[Agenda item 11]

REPORT OF THE PLANNING GROUP (A/CN.4/L.878)

1. Mr. NOLTE (Chairperson of the Planning Group), presenting the Planning Group's report (A/CN.4/L.878), said that the Group had held four meetings. It had had before it section H of chapter II, entitled "Other decisions and conclusions of the Commission", of the topical summary of the discussion held in the Sixth Commission of the General Assembly during its seventieth session (A/CN.4/689); the part of the proposed strategic framework for the period 2018–2019,[520] with respect to Programme 6, "Legal Affairs"; General Assembly resolution 70/236 of 23 December 2015 on the report of the International Law Commission on the work of its sixty-seventh session, and General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels.

2. The Working Group on the long-term programme of work had been reconstituted at the current session under the chairpersonship of Mr. McRae. It had submitted its report on the work of the quinquennium (section A.1 of document A/CN.4/L.878) and, in particular, it had recommended the inclusion of two topics in the long-term programme of work, namely the settlement of international disputes to which international organizations were party and the succession of States in respect of State responsibility.

3. The Planning Group had welcomed the two memoranda prepared by the secretariat (A/CN.4/679 and Add.1) and had taken note of six potential topics: (*a*) General principles of law; (*b*) International agreements concluded with or between subjects of international law other than States or international organizations; (*c*) Recognition of States; (*d*) Land boundary delimitation and demarcation; (*e*) Compensation under international law, and (*f*) Principles of evidence in international law. It had recommended that those six topics be further considered by the Working Group on the long-term programme of work at the Commission's sixty-ninth session (in 2017).

4. At the end of every quinquennium the Commission usually included in chapter III of its annual report an invitation to States to propose possible new topics. That invitation would be made in chapter III of the draft report on the sixty-eighth session and the Commission would examine it in due course. At the request of the General Assembly, the Planning Group had considered the question of the rule of law at the national and international levels in its report. The Commission's comments thereupon were to be found in section A.2 of that document.

5. He drew the Commission members' attention to three points.

6. The first point concerned section A.3 of the Group's report entitled "Consideration of paragraphs 9 to 12 of resolution 70/236 of 23 December 2015 on the report of the International Law Commission on the work of the sixty-seventh session" and, more specifically, the possibility of holding one half session in New York. After considering all the relevant factors, the Commission recommended that in 2018 the first part of its seventieth session be held in New York and it requested the secretariat to make the requisite administrative and organizational arrangements. Emphasis was placed on the need to ensure access to

* Resumed from the 3323rd meeting.

[520] A/71/6 (Prog. 6).

library facilities at Headquarters and electronic access to the resources and research assistance of the Library of the United Nations Office at Geneva. In accordance with its practice, the Commission would decide on the dates of its seventieth session in 2017, in other words in the year immediately preceding the seventieth session.

7. The second point, covered in section A.4 of the report, concerned the seventieth anniversary of the International Law Commission. The Commission recommended that events be organized to celebrate its seventieth anniversary during its seventieth session in 2018. Those events could be split between the first half of the session in New York and the second half of the session in Geneva.

8. Since such a celebration would require a substantial amount of organization, institutional arrangements had been put in place. The Commission requested the secretariat to take the first steps towards organizing those commemorative events in consultation with the Chairperson of the Commission and the Chairperson of the Planning Group.

9. The third point concerned section A.6 of the report, on documentation and publications, which not only made the usual points, but also drew attention to the particular situation which the Commission faced with respect to the availability of documentation.

10. In conclusion, the Commission recommended that its following session be held from 1 May to 2 June and from 3 July to 4 August 2017. He took it that, subject to the necessary adjustments, the Planning Group's recommendations would be included in the chapter of the Commission's report entitled "Other decisions and conclusions of the Commission" in accordance with its usual practice.

11. The CHAIRPERSON invited the members of the Commission to take note of the report of the Planning Group whose recommendations would be included in the final chapter of the Commission's report.

12. Mr. MURPHY drew members' attention to paragraph 43 of the report and asked whether, since its workload would be considerably lighter, the Commission should not meet for less than ten weeks the following year. At the beginning of the current quinquennium, when the Commission had found itself in a similar situation, it had met for nine weeks.

13. Mr. NOLTE (Chairperson of the Planning Group) said that paragraph 43 had not yet been presented for adoption and that the Planning Group had discussed that eventuality. Consultations were being held with the secretariat and with the special rapporteurs on various topics in order to determine the number of weeks that would be necessary. As there would still be a fair number of topics on the agenda, eight in all, and perhaps some groundwork, the decision had been taken to recommend a 10-week session.

14. Sir Michael WOOD said that it would be wise for the Commission to make the most of the 10 weeks of the sixty-ninth session and for the Special Rapporteurs who had been reappointed and whose topics were on the agenda to present extensive reports.

15. Mr. KITTICHAISAREE said that consultations among the officers of the Commission with a view to appointing special rapporteurs took a long time and that the procedure should be shortened in order to enable newly appointed special rapporteurs to present a report in the second half of the session.

16. Mr. PETRIČ recalled that, in previous quinquennia, mainly for financial reasons, the Commission had been under pressure to lighten its programme of work. It had been encouraged to cut the length of its sessions to nine or even eight weeks, but that idea had been rejected. As the Planning Group assuredly had good reasons for recommending two five-week part-sessions, the Commission should be wary of proposing a shorter session in 2017.

17. Ms. ESCOBAR HERNÁNDEZ commented that the issue of reviewing the Commission's working methods had been raised on several occasions during the current and previous sessions and that it would be advisable to deal with that matter at the beginning of the following session. She therefore thought that the length recommended by the Planning Group was reasonable.

18. Mr. KAMTO said that 10 weeks would not be too long if the Special Rapporteurs presented extensive reports containing draft articles which would require consideration during debates in plenary sittings at the following session. He warned the Commission members not to take a hasty decision to curtail the session.

The Commission took note of the report of the Planning Group.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter IX. Jus cogens (*concluded*) (A/CN.4/L.887)

19. The CHAIRPERSON invited the members of the Commission to resume the adoption of chapter IX of the draft report at paragraph 19 of section 2, which they had started to discuss at the previous sitting.

B. Consideration of the topic at the present session (*concluded*)

2. Summary of the debate (*concluded*)

Paragraph 19 (*concluded*)

20. Mr. VÁZQUEZ-BERMÚDEZ said that he had given the secretariat the text of an amendment which he was proposing in light of the debate. In view of the amendments proposed in that context by Mr. Kittichaisaree and Mr. Nolte, the adjective "international" should be inserted before the words "public order" at the end of the first sentence and the words "form of" should be inserted before "*opinio juris*" in the penultimate sentence.

Paragraph 19, as amended, was adopted.

Paragraph 20

21. Sir Michael WOOD commented that, as it stood, the seventh sentence suggested that the Commission had made an unsuccessful attempt to identify the rules of customary international law. He therefore proposed replacing

the phrase "had not been feasible" with "would not have been feasible".

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Paragraph 24

22. Mr. NOLTE, noting that paragraphs 23 and 24 dealt with the same issue, namely members' doubts as to the existence of regional *jus cogens*, proposed that the phrase at the beginning of the first sentence "However, it was" be replaced with "However, other members" which provided a more logical bridge between the two paragraphs.

23. Mr. VÁZQUEZ-BERMÚDEZ supported that proposal and explained that the Inter-American Commission on Human Rights had stopped short of admitting the existence of regional *jus cogens*. He therefore proposed that the first sentence be recast to read "However, other members pointed out that some references to regional *jus cogens* with respect to certain norms had been made, for example by the Inter-American Commission on Human Rights."

24. Sir Michael WOOD commented that it would likewise be going too far to say that the existence of regional *jus cogens* had been recognized in Europe.

25. Mr. NOLTE said that, if his memory served him correctly, when the report had been considered, at least two decisions acknowledging the existence of regional *jus cogens* in Europe had been mentioned. He therefore proposed amending the end of the first sentence to state that reference had been made to the possibility that regional rules of *jus cogens* existed in Europe.

Paragraph 24, as amended, was adopted.

Paragraph 25

26. Mr. PARK proposed the deletion of the word "rule" after the term "persistent objector" in the last sentence of the English version.

27. Mr. VÁZQUEZ-BERMÚDEZ said that in order to reflect the Commission's debate on the matter of the persistent objector more accurately, the first sentence should be deleted and replaced with two sentences which could read: "Several members emphasized the incompatibility of the notion of the persistent objector with *jus cogens* norms, which have by definition a universal peremptory character. In this regard, those members added it would be impossible to admit, for example, a persistent objector to the prohibition of the crime of genocide."

Paragraph 25, as amended, was adopted.

Paragraph 26

28. Mr. MURPHY said that, as the form which would be taken by the outcome of the Commission's work was as yet undecided, it would be preferable to place the word "conclusions" in quotation marks in the first sentence and, in the English version of the second sentence, to replace the words "draft conclusions" with "type of outcome".

Paragraph 26, as amended, was adopted.

Paragraph 27

29. Sir Michael WOOD proposed the deletion of the phrase "which would require a decision on whether to have an indicative list or not" from the final sentence, because it referred not only to *jus cogens* rules but also to their content. It was, however, impossible to draw up a list of their content.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

30. Mr. VÁZQUEZ-BERMÚDEZ, noting that the paragraph recorded only the viewpoint of members who had expressed doubts about the inclusion of paragraph 2, although several members had welcomed it, proposed that the beginning of the second sentence be supplemented with the wording "Several members expressed support for the content of paragraph 2, while other members …".

31. Mr. MURPHY approved of that amendment, but suggested that, for the sake of symmetry, the words "other members" be replaced with "several others".

Paragraph 29, as amended, was adopted.

Paragraph 30

32. Mr. NOLTE drew attention to the second sentence which concerned his comments during the plenary debate and which did not faithfully reflect his view. He therefore proposed that the word "since" be replaced with "if" and that the phrase "of a more formal nature" be deleted.

33. Mr. VÁZQUEZ-BERMÚDEZ proposed the insertion of the phrase "by clarifying the nature of *jus cogens*" after "1969 Vienna Convention" in the final sentence and the addition of "as a whole" at the very end of it.

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 33

Paragraphs 31 to 33 were adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 34 and 35

Paragraphs 34 and 35 were adopted.

Paragraph 36

34. Mr. NOLTE proposed replacing "difference" with "differences" in the first sentence.

Paragraph 36, as amended, was adopted.

Paragraphs 37 to 40

Paragraphs 37 to 40 were adopted.

Paragraph 41

35. Mr. TLADI (Special Rapporteur) proposed replacing the phrase "He proceeded to supplement his first report with additional references to" at the beginning of the final sentence with "In addition to the authorities in his first report, he provided additional authorities for".

Paragraph 41, as amended, was adopted.

Paragraph 42

36. Mr. KITTICHAISAREE said that although Mr. Tladi would undoubtedly be reappointed Special Rapporteur for the topic *Jus cogens*, it would be preferable to recast the paragraph in impersonal terms in order to avoid creating the impression that the decision had already been taken at that stage.

37. Mr. TLADI (Special Rapporteur) said that the sentence could be amended as proposed by Mr. Candioti and Mr. Saboia to read "He further expressed the view that there was merit in considering suggestions for modifying the title of the project and that this could be considered in a future report."

Paragraph 42, as amended, was adopted.

Section B, as amended, was adopted.

Chapter IX of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter X. *Protection of the environment in relation to armed conflicts* (A/CN.4/L.888 and Add.1)

38. The CHAIRPERSON invited the members of the Commission to proceed with the adoption, paragraph by paragraph, of chapter X as reproduced in document A/CN.4/L.888.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Paragraph 7

39. Ms. JACOBSSON (Special Rapporteur) explained that a footnote based on footnote 372 of the report of the Commission on the work of its seventy-seventh session[521] would be inserted. It would contain the text of the draft principles provisionally adopted by the Drafting Committee.

Paragraph 7 was adopted.

[521] See *Yearbook ... 2015*, vol. II (Part Two), pp. 64–65.

Paragraph 8

Paragraph 8 was adopted.

40. Mr CANDIOTI proposed that, although it was not customary to do so, after paragraph 8 a paragraph be inserted paying tribute to the Special Rapporteur's excellent work on a thorny issue.

41. The CHAIRPERSON said that the proposal had been adopted and that the secretariat would draft that paragraph for inclusion in the report.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

42. Mr. MURPHY proposed replacing, in the first sentence, the term "legal fields" with "legal issues".

Paragraph 10, as amended, was adopted.

Paragraph 11

43. Ms. JACOBSSON (Special Rapporteur) said that, in the penultimate sentence, the phrase "the new trend among States" should be replaced with "the emerging trend among States".

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

Paragraph 15

44. Ms. JACOBSSON (Special Rapporteur) proposed the addition in the English text of the words "the United Nations Environment Programme (UNEP) and" after "the International Committee of the Red Cross (ICRC)", because she had also greatly benefited from cooperation with that entity.

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 20

Paragraphs 16 to 20 were adopted.

Paragraph 21

45. Mr. MURPHY said that the sentence "It was also pointed out that the topic should address the protection of the environment irrespective of its usefulness or economic value" implied that there might be circumstances where the environment was useless and had no economic value, which was clearly not the opinion of Commission members. That sentence must therefore be deleted.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 49

Paragraphs 22 to 49 were adopted.

Section B, as a whole, as amended, was adopted.

46. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, document A/CN.4/L.888/Add.1 which contained the remaining portion of chapter X. A revised version of the document containing the amendments proposed by the Special Rapporteur had been distributed.

C. Text of the draft principles on protection of the environment in relation to armed conflict provisionally adopted so far by the Commission

2. Text of the draft principles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

Introduction

Paragraph (1)

47. Mr. MURPHY said that as Part One of the draft principles contained general principles that concerned more than the protection of the environment before the outbreak of an armed conflict, the first part of the second sentence "provides guidance … *before* the outbreak of an armed conflict" should be deleted and the phrase added by the Special Rapporteur "contains draft principles of a more general nature that are of relevance to all three temporal phases" should be retained without the conjunction "and". At the end of the proposed new phrase it would be wise to add the words "before, during and after an armed conflict" in order to make it clear what phases were meant, since they were defined only later in the text.

48. Sir Michael WOOD said that the first part of the second sentence should be kept but slightly reworked. The whole sentence, with the addition proposed by the Special Rapporteur and amended by Mr. Murphy would then read: "Part One concerns the protection of the environment *before* the outbreak of an armed conflict, but also contains draft principles of a more general nature that are of relevance to all three temporal phases – before, during and after – an armed conflict." In the penultimate sentence "Part Two outlines" should be replaced with "Part Two pertains to".

Paragraph (1), as amended, was adopted.

Paragraph (2)

49. Mr. MURPHY said that, in the first line, only the word "principles" should be in quotation marks.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

50. Mr. MURPHY considered that the explanations given in paragraph (4) were out of place in a commentary. He proposed that the paragraph be recast to indicate only that the Special Rapporteur had proposed some definitions which the Commission was still considering and which could form the basis of a future draft principle 3.

51. Ms. JACOBSSON (Special Rapporteur) explained that, in that paragraph, she had wished to make it plain that she had never been convinced of the need to adopt a provision on the use of terms and on which opinions in the Sixth Committee and the Commission were still divided. If the paragraph were reworded, she would like her position to be duly reflected.

52. Sir Michael WOOD disagreed with Mr. Murphy and thought that, since the Special Rapporteur would no longer be a member of the Commission in 2017, that paragraph was very helpful and should be retained. The end of the last sentence should, however, be reworded to read "in order to evaluate the need for the paragraph in the light of subsequent debates".

53. Mr. CANDIOTI said that it would be advisable to evaluate the need not of the paragraph but of the provision.

54. The CHAIRPERSON said that if there were no objections, he would take it that the Commission was prepared to adopt paragraph (4) with the amendments proposed by Sir Michael and Mr. Candioti.

Paragraph (4), as amended, was adopted.

The introduction, as amended, was adopted.

Commentary to draft principle 1 (Scope)

Paragraph (1)

55. Sir Michael WOOD proposed deleting the words "the recognition" in the fourth sentence of the English text, commencing the following sentence with "However" and deleting in that sentence the phrase "in relation to the protection of the environment in armed conflict".

Paragraph (1), as amended, was adopted.

Paragraph (2) to (4)

Paragraphs (2) to (4) were adopted.

The commentary to draft principle 1, as a whole, as amended, was adopted.

Commentary to draft principle 2 (Purpose)

Paragraph (1)

56. Mr. MURPHY proposed to streamline the penultimate sentence by deleting the phrases "the purposive nature of the provision is found in" and "which in this case". Furthermore, the meaning of the last sentence was not plain and should be clarified or deleted.

57. Ms. JACOBSSON (Special Rapporteur) agreed to the deletion of the last sentence, but was unconvinced by the rewording proposed by Mr. Murphy for the last sentence, which she preferred to keep as it stood.

58. Mr. McRAE said that the term "purposive nature" was unduly complicated and could be replaced by "the purpose" without that altering the initial meaning of the sentence.

Paragraph (1), as amended by Mr. McRae, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

The commentary to draft principle 2, as a whole, as amended, was adopted.

Part One. General principles

Commentary to draft principle 5 (Designation of protected areas)

59. Mr. PARK (Rapporteur) noted that, in the revised version of document A/CN.4/L.888/Add.1 which the Special Rapporteur had distributed, the draft principles had been renumbered and their old numbers had been crossed out. He proposed that the old numbering still be shown in square brackets in order to make it easier for the reader to find the corresponding provisions in previous reports.

60. Ms. JACOBSSON (Special Rapporteur) recalled that, as the Chairperson of the Drafting Committee had said on presenting his report, the draft principles adopted at the previous and current sessions had been renumbered. Showing the old and new numbering side by side might be confusing. It would therefore be preferable to show only the new numbering.

61. Sir Michael WOOD agreed with Mr. Park that it was essential to show the old numbers in square brackets, otherwise it would be impossible for the reader to find the corresponding provisions and the relevant explanations in previous reports. Moreover, that was the Commission's usual practice.

62. After an exchange of view in which Mr. CANDIOTI, Ms. JACOBSSON (Special Rapporteur), Mr. SABOIA, Mr. VÁZQUEZ-BERMÚDEZ, Sir Michael WOOD and the CHAIRPERSON took part, the latter said that he took it that the Commission accepted the proposal of Mr. Park and Sir Michael that the old numbers of the draft principles be shown in square brackets.

It was so decided.

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

The commentary to draft principle 5, as a whole, was adopted.

Part Two. Principles applicable during armed conflict

Commentary to draft principle 9 (General protection of the natural environment during armed conflict)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

63. Mr. MURPHY said that, in the last sentence, "was duly noted" should be replaced with "was emphasized".

64. Mr. CAFLISCH endorsed that proposal, but thought that in a commentary it would be preferable to use the wording "should be emphasized".

65. Mr. CANDIOTI agreed with Mr. Caflisch and also proposed that, in the English version of the same sentence, "effects on" be replaced with "effects of".

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

66. Mr. MURPHY commented that, in the penultimate sentence, "draft articles" should be replaced with "draft principles".

Paragraph (9), as amended, was adopted.

Paragraph (10)

67. Mr. MURPHY said that the plan was to have the new members of the Commission appoint a new special rapporteur, with the result that it was not certain that the requirement set forth in article 36 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) would be addressed in a forthcoming draft principle. The last sentence in the paragraph should therefore be deleted.

68. Mr. VÁZQUEZ-BERMÚDEZ proposed the replacement of "will be addressed" with "would be addressed" in the English version, since the conditional tense was less affirmative.

69. Mr. MURPHY was not in favour of using the conditional tense which suggested an intention to give the new members of the Commission and the new special rapporteur instructions on what course to take. It would be preferable to opt for either "might be" or "could be".

70. Mr. CAFLISCH proposed "may have to".

71. Ms. JACOBSSON (Special Rapporteur) explained that the commentary had been drawn up before the draft principles had been considered. She had initially intended to deal with the matter of article 36 in draft principle 4. She currently intended to examine that issue in the informal commentary to draft principle 4 which she intended to write.

72. Ms. ESCOBAR HERNÁNDEZ considered it preferable to keep the phrase as it stood in order to respect the Special Rapporteur's wishes. The future tense in no way implied any intention to give instructions to the new members of the Commission or the new special rapporteur. Moreover, it was the Commission's practice to reconsider draft commentary before adopting a draft text on first reading. At that juncture it would make any amendments it considered necessary. It would be premature to alter that sentence at that stage when there was no knowing what decision the new members of the Commission would take.

73. Mr. SABOIA agreed with Ms. Escobar Hernández. If, however, it were decided to discard the phrase in its current form, it would be preferable to choose "may have to be".

74. Mr. McRAE proposed the wording "should be the subject of a future draft principle". That would express the Special Rapporteur's viewpoint without giving any instructions to the new members of the Commission.

75. Sir Michael WOOD thought it preferable to use "could".

76. Mr. MURPHY shared the view of Sir Michael.

That proposal was accepted.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted.

The commentary to draft principle 9, as amended, was adopted.

Commentary to draft principle 10 (Application of the law of armed conflict to the natural environment)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

77. Mr. MURPHY said that it would be wise to replace "as a civilian object" with "in the same way as a civilian object" in the penultimate sentence.

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (12)

Paragraphs (5) to (12) were adopted.

The commentary to draft principle 10, as amended, was adopted.

Commentary to draft principle 11 (Environmental considerations)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft principle 11 was adopted.

Commentary to draft principle 12 (Prohibition of reprisals)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

78. Mr. KITTICHAISAREE proposed that, for the sake of readability, the word "some" be deleted from the phrase "some other members" in the first sentence of the paragraph in the English version.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

79. Mr. PARK suggested that "prohibition against reprisals" be replaced with "prohibition of reprisals" in the second sentence of the English version.

80. Sir Michael WOOD considered that it would be preferable to reformulate the penultimate sentence of the paragraph to read "Some members were concerned that reproducing article 55, paragraph 2, verbatim in draft principle 12 could therefore be misinterpreted …".

Paragraph (5) as amended, was adopted.

Paragraph (6)

81. Mr. MURPHY proposed that "environmental reprisals" be replaced with "attacks against the natural environment by way of reprisal" in the first sentence.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

82. Mr. MURPHY commented that "the draft principles" should be replaced with "draft principle 12" in the first sentence.

Paragraph (8), as amended, was adopted.

Paragraph (9)

83. Mr. MURPHY drew attention to the lack of consensus on the prohibition of reprisals against the environment in non-international armed conflicts. The end of the second sentence of the paragraph should therefore be reworded "some members expressed the view that reprisals against the natural environment in armed conflicts are prohibited".

Paragraph (9), as amended, was adopted.

Paragraph (10)

84. Mr. PETRIČ proposed replacing "could" with "can" in the last sentence of the paragraph in order better to convey the controversy mentioned in the first sentence.

Paragraph (10), as amended, was adopted.

The commentary to draft principle 12, as amended, was adopted.

Commentary to draft principle 13 (Protected zones)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

85. Mr. KITTICHAISAREE noted that the first sentence of the paragraph spoke of the Convention for the Protection of Cultural Property in the Event of Armed

Conflict "referenced above". As no reference appeared to have been made to that Convention, he proposed the deletion of "referenced above".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft principle 13, as a whole, as amended, was adopted.

Section C, as amended, was adopted.

Chapter X of the draft report of the Commission, as a whole, as amended, was adopted.

The meeting rose at 6 p.m.

3345th MEETING

Thursday, 11 August 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter XII. ***Provisional application of treaties*** **(A/CN.4/L.890)**

1. The CHAIRPERSON invited the Commission to consider chapter XII of the draft report, which was contained in document A/CN.4/L.890.

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 6

Paragraphs 5 to 6 were adopted.

Paragraph 7

2. Mr. LLEWELLYN (Secretary to the Commission) said that the Special Rapporteur had proposed the insertion at the end of the second sentence of a footnote referring to draft guidelines 1 to 9.

3. The CHAIRPERSON said he took it that the Commission wished to accept the Special Rapporteur's proposal.

It was so decided.

4. Sir Michael WOOD said that, in the first sentence, the words "draft guidelines 1 to 3 and draft guidelines 4 to 9" should be replaced with "draft guidelines 1 to 4 and draft guidelines 6 to 9", as draft guideline 5 was not contained in the report of the Drafting Committee.

Paragraph 7, as amended, was adopted.

1. Introduction by the Special Rapporteur of the fourth report

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

5. Sir Michael WOOD proposed that, in the last sentence, the word "on" be replaced with "for".

Paragraph 10, as amended, was adopted.

Paragraph 11

6. Sir Michael WOOD said that, in the fifth sentence, he would prefer not to cite the *Yukos* and *Kardassopoulos* v. *Georgia* cases. The former, in particular, was quite controversial.

7. The CHAIRPERSON recalled that the paragraph was intended to reflect comments made by the Special Rapporteur and was not attributable to the Commission as a whole.

8. Mr. MURPHY, noting that the *Yukos* case was also mentioned in paragraph 25, said that the references should be retained to preserve the internal consistency of the document.

9. Mr. FORTEAU said that the controversial nature of the *Yukos* case should not prevent the Commission from mentioning it, particularly as it was of relevance and had been cited by the Special Rapporteur when introducing his report.

Paragraph 11 was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

2. Summary of the debate

Paragraph 17

10. Sir Michael WOOD, referring to the last sentence, suggested that the word "holistically" be replaced.

11. Mr. FORTEAU said that "holistically" could be replaced with "in a comprehensive and systematic manner".

Paragraph 17, as amended, was adopted.

Paragraph 18

12. Sir Michael WOOD said that the second sentence should be simplified to read: "They noted, however, that, while agreeing in general with the conclusions, many of them were reached by way of analogy, while the practice behind them was not always clear."

Paragraph 18, as amended, was adopted.

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

Paragraph 21

13. Sir Michael WOOD said that the first sentence could be clarified by replacing the words "different nature and characteristics of the treaty" with "nature and characteristics of the particular treaty". Turning to the second sentence, he proposed that the words "all involved different complexities" be replaced with "might raise different issues".

14. Mr. FORTEAU said that as he recalled it, the discussion had hinged on the need to take into account the existence of different categories of treaties in order to draw conclusions about their provisional application. Hence, it was important to keep the word "different" in the first sentence. He proposed that the original wording be retained, with the word "the", before "treaty", being replaced with "each".

Paragraph 21 was adopted, with the amendments made by Sir Michael Wood to the second sentence and by Mr. Forteau to the first.

Paragraphs 22 to 24

Paragraphs 22 to 24 were adopted.

Paragraph 25

15. Mr. KAMTO proposed adding some wording in order to reflect more accurately the debate held by the Commission. In the third sentence, the words "which was ongoing" [*qui était pendante*] should be replaced with "on the one hand, because it was ongoing, and on the other, because it was based on a treaty regime that could not be generalized" [*d'une part parce qu'elle était pendante, d'autre part parce qu'elle reposait sur un régime conventionnel qui ne pouvait être généralisé*]. In the sixth sentence, the words "it was suggested that" [*on a suggéré qu'*] should be inserted before "three different scenarios needed to be distinguished" [*il fallait distinguer trois cas de figure*].

16. Sir Michael WOOD, referring to the fifth sentence, said that it was an exaggeration to state that "article 46 of the 1969 Vienna Convention was key to the topic". He proposed replacing "key to" with "an important part of". The first part of the seventh sentence could be made more accurate by redrafting it to read: "The first was where an agreement on provisional application itself qualified provisional application by reference to internal law". In the ninth sentence, the words "an agreement on provisional application was silent with respect to internal law although" should be deleted, because one could have a situation where an agreement did contain a reference to internal law, but a State at the same time claimed that its consent to be bound by the agreement was invalid.

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

Paragraph 27

17. Sir Michael WOOD proposed that, in the second sentence, the words "rather complex and uncertain" be removed.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Paragraph 30

18. Sir Michael WOOD said that the arbitral tribunal referred to in the second sentence was merely administered by the Permanent Court of Arbitration, not a part of it. The words "the Arbitral Tribunal of the Permanent Court of Arbitration" should therefore be replaced with "an arbitral tribunal". He also proposed the deletion of the footnote to the paragraph, as it was not the Commission's practice to illustrate the summaries of its debates with footnotes. If readers wished to obtain further information on the debates, they should consult the summary records of the pertinent meetings.

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

19. Sir Michael WOOD said that the final sentence should be strengthened by replacing "could" with "needed to".

Paragraph 32, as amended, was adopted.

Paragraphs 33 to 40

Paragraphs 33 to 40 were adopted.

3. Concluding remarks of the Special Rapporteur

Paragraph 41

Paragraph 41 was adopted.

Paragraph 42

20. Mr. MURPHY said that, in the interests of consistency, the word "holistically" should be replaced with "in a comprehensive and systematic manner".

Paragraph 42, as amended, was adopted.

Paragraph 43

Paragraph 43 was adopted.

Paragraph 44

21. Mr. FORTEAU proposed that, in the first sentence, the words "in his view" [*selon lui*] should be inserted after "since" [*dès lors que*].

Paragraph 44, as amended, was adopted.

Paragraph 45

22. Mr. LLEWELLYN (Secretary to the Commission) said the first sentence indicated that in his concluding remarks, the Special Rapporteur had agreed with members of the Commission that it would be useful to undertake a comparative analysis of treaties providing for provisional application. He had subsequently decided to request the Codification Division to undertake such an analysis. That information would be incorporated into chapter XIII of the report, "Other decisions and conclusions of the Commission".

Paragraph 45 was adopted.

Paragraphs 46 to 49

Paragraphs 46 to 49 were adopted.

Section B, as amended, was adopted.

Chapter XII of the draft report of the Commission, as a whole, as amended, was adopted.

CHAPTER XI. *Immunity of State officials from foreign criminal jurisdiction* (A/CN.4/L.889 and Add.1–3)

23. The CHAIRPERSON invited the Commission to consider chapter XI of its draft report, beginning with the text contained in document A/CN.4/L.889.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

24. Mr. TLADI, supported by Mr. CANDIOTI, said that the first sentence should be redrafted, as its current wording could give rise to misunderstandings about why Mr. Kolodkin had been replaced as Special Rapporteur on the topic.

25. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that the Commission should use the same language as in paragraph 173 of its report on the work of its sixty-seventh session: "The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer with the Commission."[522]

Paragraph 3, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 4

26. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph 4 was important, because it referred to the exceptional circumstances surrounding the consideration of her fifth report (A/CN.4/701): it had been available in only two of the six official languages of the United Nations, and as a result, its consideration by the Commission at the current session had been only preliminary in nature. She suggested that, in the penultimate sentence, the phrase "In these circumstances" be inserted before the words "it was understood" in the English text, and she proposed an editorial correction to the Spanish version.

27. The final sentence seemed to indicate that in 2016, the Sixth Committee would not need to consider the Commission's work on the topic, because the Commission had held only a "partial" debate. She suggested that the words "a complete basis for consideration by States in the Sixth Committee of the General Assembly would only be available" be replaced with "the Commission would provide to the Sixth Committee of the General Assembly a complete basis of its work only after".

28. Mr. CANDIOTI, expressing support for the Special Rapporteur's suggestions, pointed out that the Commission's annual reports were submitted, not to the Sixth Committee, but to the General Assembly. He therefore proposed the deletion of the reference to the Sixth Committee in the sixth sentence and the replacement of the words "was a partial debate" with the phrase "was only the beginning of the debate".

Paragraph 4, as amended by the Special Rapporteur and Mr. Candioti, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

Paragraph 6 was adopted, subject to its completion by the Secretariat.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. TEXT OF THE DRAFT ARTICLES

Paragraph 7

29. Mr. MURPHY said that it was not the Commission's usual practice to include footnotes pointing to the location of the commentary to draft articles, as had been done in paragraph 7.

30. The CHAIRPERSON said that the secretariat would ensure that the text was aligned with the Commission's practice.

On that understanding, paragraph 7 was adopted.

Paragraph 8

Paragraph 8 was adopted.

[522] See *Yearbook ... 2015*, vol. II (Part Two), p. 71, para. 173.

31. The CHAIRPERSON invited the Commission to consider the portion of chapter XI of the draft report contained in document A/CN.4/L.889/Add.1.

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session

Paragraph 1

Paragraph 1 was adopted.

Commentary to draft article 6 (Scope of immunity *ratione materiae*)

Paragraph (1)

32. Mr. MURPHY proposed that, in the first sentence, the words "is intended to define" be replaced with the word "addresses", as draft article 6 did not provide a definition. In addition, the words "which covers" should be replaced with the word "covering". In the second sentence, the words "provisionally adopted by the Commission in 2014" should be deleted, as they were superfluous. In the third sentence, he proposed that the word "define" be replaced with the word "identify".

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could accept Mr. Murphy's proposals concerning the first and second sentences. However, she could not agree concerning the third sentence, since the words "define" and "identify" were not synonymous.

34. Mr. TLADI, referring to the proposal on the first sentence, said that in paragraph (1) of the commentary to draft article 5,[523] the Commission had used the formulation "is intended to define", and for the sake of consistency, that formulation should be retained in the commentary to draft article 6.

35. Mr. MURPHY said that the Commission should use whatever language was most appropriate, even if that meant changing formulations it had used previously. He would prefer to amend the formulation, especially since the Special Rapporteur had already indicated her approval for doing so.

36. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that in light of Mr. Tladi's point about maintaining consistency with the language used in the commentary to draft article 5, and without precluding the revision of that language when the commentary was adopted on first reading, she would prefer to retain the existing wording of the paragraph, except for two minor changes: an editorial amendment to the first sentence of the Spanish text and the deletion of the words "provisionally adopted by the Commission in 2014", as proposed by Mr. Murphy.

37. Mr. KITTICHAIRSAREE, referring to the third sentence, suggested replacing the word "define" with "stipulate".

38. Mr. VÁZQUEZ-BERMÚDEZ proposed that, in the third sentence, the word "define" be replaced with "determine".

Paragraph (1), as amended by the Special Rapporteur and Mr. Vázquez-Bermúdez, was adopted.

[523] *Yearbook … 2014*, vol. II (Part Two) and Corr.1–2, p. 146.

Paragraph (2)

39. Mr. MURPHY said that, in the first sentence, the words "similar structure" should be replaced with "different structure", and in the second sentence, the word "However" should be deleted. In the third sentence, he suggested deleting the words "material element and on the". He proposed the replacement of the words "In any case" with "Even so" in the fourth sentence and the deletion of the clause "provisionally adopted by the Commission in 2013" in the final sentence.

40. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the word "structure" in the first sentence referred to the various elements of immunity *ratione materiae* that were covered by the scope of draft article 6; it might be more appropriate to replace it with the word "content". She agreed to the deletion of the word "However" but doubted the wisdom of deleting the words "material element and on the". She had no problem with the deletion, in the final sentence, of the phrase "provisionally adopted by the Commission in 2013" and suggested an editorial amendment to the Spanish text of the first sentence.

41. Mr. KITTICHAISAREE said he was concerned that the term "material element" could be understood, erroneously in the current context, as referring to a constituent element of a crime, the *actus reus*, which was one of the meanings of the term under international criminal law, as evidenced by its inclusion in the Rome Statute of the International Criminal Court.

42. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the expression "material element" had been used repeatedly in the Commission's work on the topic over the past five years, and there had never been any expression of concern that it might be confused with the *actus reus*. She suggested that the Commission revisit the use of the expression during the adoption of the commentary on first reading but that it should retain it in the current paragraph.

Paragraph (2), as amended by the Special Rapporteur, was adopted.

Paragraph (3)

43. Mr. MURPHY proposed that, in the second sentence, the phrase "the immunity *ratione personae* regime" be replaced with the words "immunity *ratione personae*". The third sentence should be recast to read: "When drafting paragraph 1, the words 'during their term of office' were not used, since in some national systems, that expression might be viewed as not applying to all State officials and could therefore give rise to confusion."

44. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could go along with Mr. Murphy's proposal for the second sentence. However, as the third sentence was taken nearly verbatim from the report of the Drafting Committee at the Commission's sixty-seventh session, she was reluctant to change it.

45. Mr. MURPHY said that it was not the Commission's practice to insist that, because specific wording had been

used in the report of the Drafting Committee, it was imperative to use it in the commentary. His suggestion was perfectly consistent with the point of the third sentence, which was that the Commission had not chosen to use the expression "term of office" because that expression was viewed as problematic for some national legal systems.

46. Mr. FORTEAU proposed the deletion of the second and third sentences, since they explained something that was not in the draft article, whereas the goal of the commentary was to explain what was in the draft article.

47. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could agree to the deletion of the final sentence and Mr. Murphy's amendment to the second sentence.

Paragraph (3) was adopted with the amendments agreed to by the Special Rapporteur.

Paragraph (4)

48. Mr. MURPHY proposed that, in the first sentence, the word "the" be deleted before "paragraph"; the word "is" be inserted before the words "to emphasize"; the word "dimension" be replaced with the word "element"; the word "only" be deleted; and the word "such" be inserted before the final word "immunity". In the third sentence, the words "such an element" should be replaced with the phrase "the status of the official"; the words "but rather the subjective element of immunity (the beneficiary)" should be deleted; the word "thus" should be replaced with "already"; and the words "provisionally adopted by the Commission in 2014" should be deleted. In the final sentence, the words "the provision was" should be changed to "these provisions were".

49. Mr. KITTICHAISAREE, supporting Mr. Murphy's proposals, suggested that, in the first sentence, the word "material" be changed to "functional", given that the expression "functional immunity" was sometimes favoured over the term "immunity *ratione materiae*" – a view that he himself shared. In the second sentence, he proposed the deletion of the words "(subjective and material)", which would become superfluous if Mr. Murphy's proposal to delete the words "but rather the subjective element of immunity (the beneficiary)" was accepted.

50. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) agreed that the verb "is" should be inserted in the English version of the first sentence. In that sentence she would, however, prefer to retain the adjective "material" in the phrase "the material dimension of immunity *ratione materiae*", for the sake of consistency with language previously used by the Commission; she could, however, also accept the formulations "material element" or "material nature" in that context. The deletion of the words "(the beneficiary)" in the third sentence would improve the text, as would replacing "such an element" with "the status of the official". She had already expressed her opinion on doing away with the phrase "provisionally adopted by the Commission in 2014". She was against the deletion of the word "only" in the first sentence because, as it stood, that sentence conveyed the conclusion reached in discussions in plenary meetings and in the Drafting Committee that only State officials could perform acts covered by immunity *ratione materiae*. Similarly, she was opposed to deleting the words "subjective and material" in parentheses in the second sentence, since doing so would run counter to what had been agreed in the Drafting Committee. Lastly, she agreed to the replacement of "thus" with "already" in the third sentence, as proposed by Mr. Murphy.

51. Mr. SABOIA said that he, too, was in favour of retaining the reference to the material dimension of immunity *ratione materiae*. The word "only" was very important because it delimited the scope of that kind of immunity.

52. Mr. MURPHY said that he did not think that the Commission was saying that State officials were the only officials who could perform acts covered by immunity *ratione materiae*. The officials of international organizations could also carry out such acts. Although, for the purposes of the topic, the Commission was talking about State officials and their immunities, it was not true to say that they alone might perform acts covered by immunity *ratione materiae*.

53. Sir Michael WOOD concurred with Mr. Murphy and suggested that the solution might lie in adding the phrase "under the draft articles" at the end of the first sentence.

54. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed to Sir Michael's suggestion, because everything said in the commentaries was related to the draft articles.

55. Mr. KITTICHAISAREE said that the meaning of the term "material dimension", as used in the paragraph, was unclear. It was for that reason that he had proposed replacing that term with "functional dimension".

Paragraph (4), as amended, was adopted.

Paragraph (5)

56. Mr. TLADI said that draft article 6 expanded on what had been said in draft article 5. In paragraph (5) of the commentary to the latter, the Commission had already stated that this draft article was without prejudice to exceptions to immunity *ratione materiae*.[524] There was no need to repeat the same idea in the paragraph under consideration, which could therefore be deleted.

57. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that it was important to clarify which acts were in fact covered by immunity because that question was closely related to the issue of exceptions and limitations; it was not repetition, since the Commission was referring to two quite different things. Draft article 6 on the scope of immunity *ratione materiae* paralleled draft article 4, referring to the scope of immunity *ratione personae*.[525] Draft article 4 concerned exceptions applying to certain officials, whereas draft article 6 concerned exceptions and limitations related to acts. That was the reason why she wished to retain paragraph (5).

[524] *Ibid.*

[525] *Yearbook ... 2013*, vol. II (Part Two), p. 47 (draft article 4).

58. Mr. VÁZQUEZ-BERMÚDEZ and Mr. SABOIA said that they were also in favour of maintaining the paragraph, as the issue of exceptions and limitations was indeed central to the topic.

Paragraph (5) was adopted.

Paragraph (6)

59. Mr. MURPHY suggested the deletion of "essentially" and "very" in the second sentence as well as the deletion of the phrase "in order to be official" in the third sentence. He proposed replacing the phrase "on the contrary" with "conversely" in the fourth sentence and the insertion of the words "an act" after "continue to be such" in the penultimate sentence.

Paragraph (6), as amended, was adopted.

Paragraph (7)

60. Mr. MURPHY proposed that the last phrase of the final sentence be recast to read: "to reflect the definition of 'State official' in draft article 2 (*e*)".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

61. Mr. MURPHY said that the final sentence would read better if the phrase after the reference to draft article 4, paragraph 3, stated "which also deals with that relationship".

Paragraph (9), as amended, was adopted.

Paragraph (10)

62. Mr. MURPHY proposed some editorial adjustments to the English version of the text and the deletion of the phrase "provisionally adopted by the Commission in 2013" in the first sentence.

63. Mr. FORTEAU said that, if the phrase "provisionally adopted by the Commission in 2013" were to be deleted, the words "then" in the first sentence and "at that juncture" in the third sentence should also be removed.

Paragraph (10), as amended, was adopted.

Paragraph (11)

64. Mr. MURPHY queried the phrase "has the same effects" in the second sentence. He proposed that, in the fourth sentence, the phrase "provisionally adopted in 2014" be deleted.

65. Mr. FORTEAU said that the first point raised by Mr. Murphy concerned a mistranslation of the Spanish *incluye*, which should be rendered as "includes", not "has".

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted with a minor editorial amendment to the French text.

Paragraph (13)

66. Mr. FORTEAU said that it was his understanding that the penultimate sentence alluded to discussions in the Drafting Committee of the different consequences of immunity *ratione personae* during a term of office and immunity *ratione materiae* after a term of office. Some members had drawn attention to the procedural problems which existed in some national legal systems as a result of that disparity. It would facilitate understanding of the sentence if some explanation of the different consequences were provided.

67. Mr. MURPHY confirmed that such differences were problematical in the legal system of the United States, especially in relation to waiver.

68. Regarding the second sentence, in order to bring out the point on which the members of the Commission disagreed, he suggested that this sentence be merged with the third sentence and recast to read: "On the contrary, other members of the Commission consider that the Head of State, Head of Government and Minister for Foreign Affairs only enjoy immunity *ratione personae* during their term of office and, only after their term of office has come to an end, will they enjoy immunity *ratione materiae*."

69. Mr. SABOIA asked whether, when it was held that the members of the troika enjoyed immunity *ratione personae* for official and non-official acts, which therefore encompassed immunity *ratione materiae*, it was logical to say that only after they had left office did they enjoy immunity *ratione materiae*.

70. Mr. MURPHY said that the belief that the troika enjoyed both forms of immunity while in office was captured at the beginning of the paragraph. Some members were, however, of the opinion that the troika was entitled only to immunity *ratione personae*.

71. Mr. FORTEAU proposed inserting, after the words "the national courts of certain States" in the penultimate sentence, the phrase "(in particular with regard to the conditions for invoking immunity before these courts)" [*(en particulier en ce qui concerne les conditions d'invocation de l'immunité devant ces tribunaux)*] in order to reflect the concerns expressed in the Drafting Committee.

72. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed to the addition of the phrase in parentheses proposed by Mr. Forteau. In fact, it was difficult to convey the whole content of the debate on that matter. The question regarding the second and third sentences raised by Mr. Murphy went much deeper because it touched on the very notion and content of immunity *ratione personae*. The Commission members agreed that immunity *ratione personae* was general and broader in scope and encompassed the legal effects of immunity *ratione materiae*, since it applied to both private and official acts. The way in which draft articles 3, 4, 5 and 6 were worded made it difficult to accept Mr. Murphy's proposal.

She wondered whether both Mr. Murphy's and Mr. Saboia's concerns could be met by saying: "On the contrary, other members of the Commission consider that immunity *ratione personae* as defined in these draft articles is general and broader in scope and encompasses immunity *ratione materiae* …".

73. Mr. MURPHY said that his point was that he did not think that those two groups of members disagreed that immunity *ratione personae* was general, that it was broader in scope and that it encompassed immunity *ratione materiae* in the sense that everything covered by one immunity was found in the other. It would make more sense to replace the word "encompasses" with "supersedes" in the second sentence because the idea was that, while an official was in office, immunity *ratione personae* eliminated immunity *ratione materiae* and superseded the latter's legal effects.

74. Mr. TLADI suggested that the words "On the contrary" be deleted from the beginning of the same sentence and that the word "consider" be changed to "emphasize". In the next sentence, he suggested that the words "for these members" be inserted after the word "Consequently", to indicate more clearly where the difference of opinion lay.

75. Mr. SABOIA said that he endorsed the general approach being taken. The Commission seemed to be in agreement as to the nature of immunity *ratione personae*, and the relevant wording should not be deleted from the second sentence. It should be remembered that even immunity *ratione personae* included clear elements of a functional nature. Drafting the clause as suggested would further clarify the debate.

76. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could support the amendments proposed with the exception of the addition of the words "for these members". Draft article 4, which had already been adopted, established that the members of the troika enjoyed immunity *ratione personae* only during their term of office; as such, that position could not be represented as the view of only some members of the Commission. It was also reflected in the commentaries to draft articles 4 and 5. She suggested that the sentence in question should be amended to make that clear.

77. Mr. MURPHY said that the focus was not on who enjoyed immunity but the nature of that immunity.

78. Mr. TLADI suggested that the following wording for the sentence might respond to the concerns expressed: "Consequently, for these members, persons enjoying immunity *ratione personae* only enjoy such immunity during their term of office and, only after their term of office has come to an end, will they enjoy immunity *ratione materiae*."

79. Mr. SABOIA said that the Commission should be consistent in its methods. If a previous debate was being reproduced, it should be reproduced faithfully. It was not appropriate to try and alter such text to reflect other views, particularly if the members concerned were not present. He would prefer the words "for these members" not to be added.

80. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) reiterated her strong opposition to the inclusion of the words "for these members". The Commission should not reopen a debate on matters that it had already decided.

81. Mr. TLADI stressed that the proposed amendments were not intended to contradict anything that the Commission had already adopted. The position of the word "only" in the sentence was important: the suggestion to move it aimed to clarify the fact that some members of the Commission considered that the members of the troika did not enjoy both immunity *ratione personae* and immunity *ratione materiae* during their term of office, but only the former. That was a matter that the Commission had yet to resolve. Moreover, it was not the case that, once a matter had been decided, the views of dissenting members of the Commission could not be reflected.

82. Mr. MURPHY expressed support for Mr. Tladi's remarks. He suggested the following wording in an attempt to settle the matter: "Consequently, for these members, the Head of State, Head of Government and Minister for Foreign Affairs do not enjoy immunity *ratione materiae* during their term of office and only do so after their term of office has come to an end." He also expressed support for Mr. Forteau's suggested amendment to the next sentence.

83. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) welcomed Mr. Murphy's suggestion but requested that discussion of the paragraph be suspended to allow for final consultation on the exact wording.

84. The CHAIRPERSON took it that the Commission agreed to her request.

It was so decided.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

85. Mr. KITTICHAISAREE suggested that, in the first sentence, the words "which at one time governed" should be altered to "which governs", to reflect the fact that the situation referred to still pertained in a number of legal systems.

Paragraph (15), as amended, was adopted.

86. The CHAIRPERSON proposed that, pending agreement on paragraph (13) of the commentary to draft article 6, the Commission begin consideration of the portion of chapter XI of the draft report contained in document A/CN.4/L.889/Add.2.

It was so agreed.

Commentary to draft article 2 (Definitions), subparagraph (*f*)

Paragraph (1)

87. Mr. MURPHY suggested that the words "is intended to define" in the first sentence be changed to "defines".

Paragraph (1), as amended, was adopted.

Paragraph (2)

88. Mr. MURPHY suggested that, in the first sentence, the words "to identify a particular act as being 'performed in an official capacity'" be changed to "to identify a particular act as being an 'act performed in an official capacity'".

89. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) drew attention to a translation error in the English version of the text and requested that it be corrected.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

90. Mr. FORTEAU suggested that, in the last sentence, the word "direct" be altered to "individual".

Paragraph (4), as amended, was adopted.

Paragraph (5)

91. Mr. MURPHY suggested that the second sentence be shortened to end at "the broadest possible range of cases of responsibility" and that the third sentence be shortened to end at "should be examined carefully". He questioned the statement in the antepenultimate sentence to the effect that *ultra vires* acts could not be considered as acts performed in an official capacity. He was not sure that it was accurate to say that *ultra vires* acts of a State could not be considered acts attributable to that State. He suggested that the reference be either clarified or deleted.

92. Mr. FORTEAU suggested that the second sentence be shortened even further to end at "only in respect of State responsibility". It would be odd to say that the Commission had formulated rules with the goal of providing for the broadest possible range of cases of responsibility.

93. Mr. ŠTURMA said that he agreed with Mr. Murphy's suggested amendments to the first and second sentences. It was his understanding that the reference in the antepenultimate sentence to *ultra vires* acts referred not to the acts of States but to *ultra vires* acts performed by officials, although he acknowledged that the wording was not entirely clear.

94. Mr. SABOIA agreed with the comments made by Mr. Šturma. He pointed out that it was customary to interpret legal texts taking into account the usual meaning of the words along with the context, object and purpose of the text. The approach taken to State responsibility could not simply be transferred wholesale to the immunity of State officials. For instance, a State might wish to broaden immunity to include other officials not exercising elements of governmental authority but acting in another capacity.

95. Sir Michael WOOD suggested that Mr. Saboia's point could be reflected by amending the words "in respect of State responsibility" in the second sentence, as shortened by Mr. Forteau, to "in the context and for the purpose of State responsibility". He agreed with Mr. Forteau: to retain the reference to the goal of the rules being to provide for the broadest possible range of cases of responsibility would be to describe the Commission's work in very sweeping terms. With regard to the antepenultimate sentence, he suggested that the words "*ultra vires* acts and" be deleted, as their inclusion raised issues best avoided at that stage.

96. Mr. SABOIA said that deleting the reference to *ultra vires* acts would exclude the responsibility of persons who might be receiving remuneration from a State to perform certain acts that this State considered to be useful but for which it preferred not to assume responsibility.

97. Mr. FORTEAU agreed that the reference to *ultra vires* acts should be kept. He suggested that the words "for the purpose of immunity from foreign criminal jurisdiction" [*pour les besoins de l'immunité de juridiction pénale étrangère*] be added in the antepenultimate sentence between "cannot be considered" and "as acts performed".

98. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that Sir Michael's suggested amendment to the second sentence reflected her intention perfectly. The reference to *ultra vires* acts should be retained; in that regard, she expressed support for Mr. Forteau's suggested addition.

99. Sir Michael WOOD expressed his continuing concern about the reference to *ultra vires* acts, which harked back to the Commission's discussion of whether illegal acts by an official could carry immunity. Most cases of immunity related to illegal or potentially illegal acts. The reference to *ultra vires* acts confused the issue. He suggested that alternative wording, such as "acts performed by officials outside their functions", might be clearer. Officials frequently acted *ultra vires*, but it did not mean that they did not enjoy immunity in third States.

100. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that Sir Michael's concern, which she fully shared, seemed to be covered by the last sentence of the paragraph.

101. Sir Michael WOOD said that the reference in the last sentence to "such *ultra vires* acts" was similarly confusing. He was not convinced that it resolved the issue.

102. Mr. FORTEAU said that the problem seemed to be with what constituted *ultra vires* acts. In its commentary to article 4 of the draft articles on the responsibility of States for internationally wrongful acts,[526] the Commission had distinguished between *ultra vires* acts and acts that violated the rules governing the conduct of State representatives, in other words, illegal acts. Paragraph (5) seemed to reflect that distinction accurately.

103. Sir Michael WOOD requested further time to consider the matter.

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[526] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42 (commentary to draft article 4).

104. The CHAIRPERSON took it that the Commission agreed to suspend consideration of paragraph (5) and return to it later.

It was so decided.

Paragraph (6)

105. Mr. FORTEAU pointed out that the words "provisionally adopted by the Commission in 2014" in the final sentence could be deleted, as had been done elsewhere in the chapter.

Paragraph (6), as amended, was adopted.

Paragraph (7)

106. Mr. MURPHY suggested that the words "concepts of" before "elements of governmental authority" in the second sentence be deleted. He also suggested a minor editorial amendment to the English version of the text.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

107. Mr. MURPHY, supported by Mr. FORTEAU, suggested that both paragraphs (8) and (9) could be deleted. Although he understood their relevance and the Special Rapporteur's desire to reflect the Commission's debate on whether the definition of an "act performed in an official capacity" should include a reference to the fact that the act must be criminal in nature, the explanation given in the two paragraphs went beyond what was necessary.

108. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she would prefer to retain both paragraphs unless there was strong opposition. It had been agreed not to include the criminal dimension in the definition of an "act performed in an official capacity" but that dimension did play a role in identifying such acts. It was important to maintain that link, and the two paragraphs had been included in the commentary to that end.

109. The CHAIRPERSON took it that the Commission agreed to suspend discussion of the two paragraphs until its next meeting.

It was so decided.

The meeting rose at 1.05 p.m.

3346th MEETING

Thursday, 11 August 2016, at 3 p.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter XI. ***Immunity of State officials from foreign criminal jurisdiction* (*concluded*) (A/CN.4/L.889 and Add.1–3)**

1. The CHAIRPERSON invited the members of the Commission to continue their adoption, paragraph by paragraph, of the portion of chapter XI of the draft report contained in document A/CN.4/L.889/Add.2.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (*continued*)

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session (*continued*)

Commentary to draft article 2 (Definitions), subparagraph (*f*) (*continued*)

Paragraphs (8) and (9) (*concluded*)

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to merge paragraphs (8) and (9) into a single paragraph that would read:

> "The Commission did not consider it appropriate to include in the definition of an 'act performed in an official capacity' a reference to the fact that the act must be criminal in nature. In so doing, the aim was to avoid a possible interpretation that any act performed in an official capacity was, by definition, of a criminal nature. In any case, the concept of an 'act performed in an official capacity' must be understood in the context of the present draft articles, which is devoted to the immunity of State officials from foreign criminal jurisdiction."

Paragraphs (8) and (9), as amended and merged, were adopted.

Paragraph (10)

Paragraph (10) was adopted.

Paragraph (11)

3. Mr. KITTICHAISAREE proposed that, in the first sentence, the words "a list" be replaced with the words "an exhaustive list".

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

4. Sir Michael WOOD proposed that, in the final sentence, the phrase "the courts have been seized of other acts" be replaced with the phrase "the courts have considered other acts".

5. Mr. MURPHY proposed that, in the first sentence, the words "More specifically" be replaced with the word "Moreover" and that the words "the following conduct" be replaced with the phrase "acts that were claimed to be in an official capacity".

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed Mr. Murphy's proposals. Indicating that a mistake had been made with regard to the case cited in the second footnote to the paragraph, she proposed that another case be cited in its place. She had in mind the case *Wei Ye* v. *Jiang Zemin*.

7. Mr. HUANG said that the case referred to in the aboved-mentioned footnote was totally unrelated to the current topic, apart from the fact that it referred to Falun Gong, which was a sect.

8. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the case mentioned, the question had arisen as to whether the acts at issue could be classified as official acts for the purposes of immunity and that it was for that reason that she had cited it. The intention had not been to say whether the judgment handed down by the court in that case was correct but simply to describe it.

9. Mr. FORTEAU said that the existing footnote should be kept, as it correctly described what the court had concluded in that case.

10. Mr. TLADI said that the Commission had, on several occasions, cited cases in which the judgment handed down had not, in its opinion, been correct, but that those cases reflected practice, and as the judgments of national courts were concerned, the Commission had decided not to determine their relevance on the basis of their correctness. That said, at the Commission's sixty-ninth session, when reference was made to the cases involving the Minister of Justice and the Southern Africa Litigation Centre in the context of the consideration of exceptions to immunity, certain caveats should be mentioned in connection with those court cases so as to reflect his particular preferences and views about the correctness or lack of correctness concerning the decisions handed down.

11. Sir Michael WOOD, supported by Mr. MURPHY, said that he agreed with previous speakers and proposed that the text in parentheses be replaced with "alleged human rights violations".

12. Mr. KITTICHAISAREE said that Sir Michael's proposal would not solve the problem because it would mean that the word "alleged" would have to be inserted in front of each reference to a case.

13. Mr. KAMTO said that he, too, was of the view that existing judgments should be reflected whether or not they met with the Commission's approval, and he proposed to delete the text contained in parentheses.

14. Mr. SABOIA said that he agreed with Mr. Tladi and endorsed Sir Michael's proposal.

15. Mr. HUANG said that, under the current topic, the Commission was concerned with criminal jurisdiction. Given that the case mentioned in the footnote was a civil case, he proposed that the footnote be deleted. In several countries, in particular Canada, Spain and the United States of America, the cases brought by Falun Gong against the Government of China had usually been rejected, which, in his view, made the reference to that case unnecessary.

16. Mr. ŠTURMA, stressing that what was important was the type of case that was cited, said that the reference should be retained if it related to a criminal case that illustrated what was explained in the commentary, but if it related to a civil case, that was a different matter.

17. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) acknowledged that the case in question was a civil case but pointed out that it was not the first time the Commission had referred to a civil case in its commentaries in order to determine whether a particular act had been considered by a court to fall within the scope of immunity from jurisdiction. In her opinion, the footnote should not be deleted, and she was prepared to cite other examples of case law. She stressed that the Spanish courts had not rejected cases related to Falun Gong for reasons relating to the type of acts at issue or to immunity but solely because the domestic legislation on universal jurisdiction had been amended, and all pending proceedings that did not fall within the scope of the new provisions had consequently been removed from the docket.

18. Mr. FORTEAU proposed that, in order to address the concern expressed by Mr. Huang, the words "In relation to civil proceedings, see" be inserted at the beginning of the footnote.

19. Mr. HUANG said that he preferred to simply delete the reference in the footnote and to replace it with another reference.

20. The CHAIRPERSON suggested that paragraph (13) be left in abeyance so as to allow time for the Special Rapporteur to coordinate with Mr. Huang on the amendment of the footnote in question.

Paragraph (13) was left in abeyance.

Paragraph (14)

21. Mr. PARK (Rapporteur) said that the content of paragraph (14) prejudged the outcome of the discussion that would be held on draft article 7 regarding exceptions to immunity during the Commission's sixty-ninth session. He therefore asked whether its adoption could be postponed.

22. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph (14) did not indicate which acts could constitute exceptions to immunity but merely provided examples of cases in which domestic courts had concluded that immunity was not applicable because the acts at issue could not be considered as acts performed in an official capacity. She therefore saw no reason to delete the paragraph. After having reviewed information provided by Mr. Murphy concerning two cases cited in the first and last footnotes to the paragraph, she noted that the

references to the cases *Jiménez* v. *Aristeguieta* et al. in the first footnote and *Islamic Republic of Iran* v. *Pahlavi and Others* in the last footnote would be deleted. The reference to the first footnote that appeared in parentheses in the last footnote to the paragraph should be deleted and replaced with the information on the *Jiménez* v. *Aristeguieta* et al. case that had previously been included in the first footnote to the paragraph.

23. Mr. SABOIA agreed with the Special Rapporteur that paragraph (14) was purely factual and did not at all prejudge the outcome of the discussion that would take place at the Commission's sixty-ninth session.

24. Mr. VÁZQUEZ-BERMÚDEZ said that he, too, was in favour of retaining paragraph (14), which contained examples of case law relevant to the discussion concerning acts performed in an official capacity.

25. Sir Michael WOOD said that he understood Mr. Park's reservations and was not convinced himself that the paragraph belonged in the commentary to draft article 2 (*f*). Moreover, he was not sure that all the cases referred to in the footnotes were actually relevant.

26. Mr. PETRIČ said that he, too, had some difficulty with the footnotes, but that did not mean that paragraph (14) should be deleted, even though no one had proposed to do so. Nevertheless, in view of the objections that had been made, he agreed with Mr. Park that the Commission should postpone its adoption.

27. Mr. FORTEAU proposed that, in order to address the concerns of members who did not wish to prejudge the future debate, a "without prejudice" clause should be added to the end of the paragraph that would read: "The factual reminder of those various examples is without prejudice to the position that the Commission may take on the subject of exceptions to immunities."

28. Mr. MURPHY said that he saw no need to include such a clause in paragraph (14), which did not prejudge the future debate any more than the preceding paragraphs did.

29. Mr. FORTEAU said that the clause in question was, in his view, justified in the case of paragraph (14) because, unlike the preceding paragraphs, which contained examples of acts performed in an official capacity, it referred to non-official acts, namely, acts that, in principle, were excluded from the scope of application of immunity. Paragraph (14) was therefore directly related to the subject of exceptions to immunity, on which the Committee would reach a decision at its sixty-ninth session.

30. The CHAIRPERSON said he took it that the Commission wished to adopt paragraph (14) with the addition proposed by Mr. Forteau and the amendments to its first and last footnotes proposed by the Special Rapporteur.

Paragraph (14), as amended, was adopted.

Paragraph (16)

Paragraph (16) was adopted.

31. The CHAIRPERSON invited the Special Rapporteur to read out paragraph (13) of the commentary to draft article 6 as reproduced in document A/CN.4/L.889/Add.1 and paragraph (5) of he commentary to draf article 2 (*f*), reproduced in document A/CN.4/L.889/Add.2, which had been left in abeyance and which had been amended in the light of comments made during the discussion, a new version of which she had asked to have circulated.

Commentary of draft article 6 (Scope of immunity *ratione materiae*) (*concluded*)

Paragraph (13) (*concluded*)

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph (13) of the commentary to draft article 6 had been revised to read:

> "(13) However, regarding the situation described in draft article 6, paragraph 3, some members of the Commission consider that, during their term of office, Heads of State, Heads of Government and Ministers for Foreign Affairs, enjoy both immunity *ratione personae* and immunity *ratione materiae* (*stricto sensu*). Other members of the Commission emphasized that, for the purposes of these draft articles, immunity *ratione personae* is general and broader in scope and encompasses immunity *ratione materiae*, since it applies to both private and official acts. For these members, such officials enjoy only immunity *ratione personae* during their term of office, and only after their term of office has come to an end will they enjoy immunity *ratione materiae*, as provided for in draft article 4 and reflected in the commentaries to draft articles 4 and 5. While favouring one or other option might have consequences before the national courts of certain States (in particular with regard to the conditions for invoking immunity before these tribunals), such consequences would not extend to all national legal systems. During the debate, some members of the Commission expressed the view that it was not necessary to include paragraph 3 in draft article 6, and that it was sufficient to refer to the matter in the commentaries thereto."

33. Sir Michael WOOD proposed deleting the words "*stricto sensu*" in parentheses at the end of the first sentence.

Paragraph (13), as amended, was adopted.

The commentary to draft article 6, as a whole, as amended, was adopted.

Commentary to draft article 2 (Definitions), subparagraph (*f*) (*continued*)

Paragraph (5) (*concluded*)

34. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that paragraph (5) of the commentary to draft article 2 (*f*) had been revised to read:

> "(5) For the purpose of attributing an act to a State, it is necessary to consider, as a point of departure, the rules included in the articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session. Nonetheless,

it must be borne in mind that the Commission established those rules in the context and for the purposes of State responsibility. Consequently, the application of the rules to the process of attributing an act to a State in the context of immunity of State officials from foreign criminal jurisdiction should be examined carefully. For the purposes of immunity, the criteria for attribution set out in articles 7, 8, 9, 10 and 11 of the articles on the responsibility of States for internationally wrongful acts do not seem generally applicable. In particular, the Commission is of the view that, as a rule, acts performed by an official purely for their own benefit and in their own interests cannot be considered as acts performed in an official capacity, even though they may appear to have been performed officially. In such cases, it is not possible to identify any self-interest on the part of the State, and the recognition of immunity, whose ultimate objective is to protect the principle of the sovereign equality of States, is not justified. It does not mean, however, that an unlawful act as such cannot benefit from immunity *ratione materiae*. Several courts have concluded that unlawful acts are not exempt from immunity simply because they are unlawful, even in cases when the act is contrary to international law. The question whether or not acts *ultra vires* can be considered as official acts for the purpose of immunity from criminal jurisdiction will be addressed at a later stage, together with the limitations and exceptions to immunity."

35. Mr. KITTICHAISAREE proposed that, in the third sentence, the words "of an official" be inserted after the words "attributing an act".

36. Mr. FORTEAU said that, in the final sentence, the word "foreign" should be inserted before the words "criminal jurisdiction".

Paragraph (5), as amended, was adopted.

37. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, the portion of chapter XI contained in document A/CN.4/L.889/Add.3.

B. Consideration of the topic at the present session (*concluded*)

1. Introduction by the Special Rapporteur of the fifth report

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

38. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the third sentence of the Spanish text, the word *restricciones* should be replaced with the word *excepciones*.

39. Mr. SABOIA said that the English text should be corrected accordingly.

Paragraph 5 was adopted, subject to the requisite amendments to the English and Spanish texts.

Paragraph 6

40. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the end of the third sentence contained a mistake and should be corrected to read: "but rather to the exercise of the prerogative of the State of the official".

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 13

Paragraphs 7 to 13 were adopted.

2. Summary of the debate

Paragraph 14

41. Mr. CANDIOTI proposed that, in the first sentence, the words "was partial and preliminary" be replaced with the phrase "was only the beginning of the discussion".

Paragraph 14, as amended, was adopted.

Paragraph 15

42. Mr. HUANG proposed that, in the penultimate sentence, the word "highly" be inserted before the words "politically sensitive". He further proposed that the following sentence be added to the end of the paragraph: "It was emphasized that the Commission should focus on codification instead of development of new norms of international law in dealing with the issue of exceptions to the immunity of State officials from foreign criminal jurisdiction."

43. Mr. CANDIOTI, referring to the first sentence, said that the phrase "Those members who spoke", variants of which were found in several other paragraphs of the present document, was somewhat infelicitous because it suggested that other members had wished to take the floor but had been prevented from doing so. It would be preferable to use the expressions that were typically used to summarize the discussion, such as "members", "most members" or "some members", depending on the situation, or else impersonal expressions. As to the sentence proposed by Mr. Huang, it would be necessary, if it was retained, to indicate in one way or another that it reflected the position of a very small minority of Commission members who had taken part in the discussion.

44. Mr. FORTEAU said that he concurred with the view expressed by Mr. Candioti. In order to correctly reflect the debate, if the sentence proposed by Mr. Huang was added to the text, another sentence should be added to indicate that other members had, conversely, expressed opinions in favour of the progressive development of the law. On the other hand, that divergence of views was clearly reflected in paragraphs 17 and 18, and for that reason, it might not be necessary to amend paragraph 15.

45. Sir Michael WOOD said that, since the discussion that was summarized in the document was only the beginning of the debate and since relatively few Commission members had taken part in it, the Commission must be very careful in deciding how to present the views expressed, a requirement that the existing wording fully met. It would be counterproductive to attempt to take stock of

how many members were in favour of each position, as well as unnecessary, since the summary records could be consulted by anyone who wished to have a full account of the debate.

46. Mr. CANDIOTI said that he would not insist on amending the introductory phrase "Those members who spoke" and would leave it up to the Special Rapporteur and the Secretariat to resolve the issue in whatever manner they deemed appropriate. He maintained, however, that the sentence that Mr. Huang proposed to add might upset the balance of the paragraph by including a minority view, when the rest of the paragraph described the generally positive reception of the Special Rapporteur's fifth report.

47. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to the drafting change proposed by Mr. Huang in the penultimate sentence nor to the sentence he wished to add to the end of the paragraph, except that, if that sentence was included in the text, it should be reformulated in order to avoid giving the impression that it expressed the general opinion of the Commission. A sentence would also need to be added, as had been pointed out by Mr. Forteau, in order to reflect the other views that Commission members had expressed.

48. The CHAIRPERSON suggested that paragraph 15 be left in abeyance and that it be taken up again at a later stage.

It was so decided.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

49. Sir Michael WOOD said that, while some members had criticized the approach adopted by the previous Special Rapporteur, others had praised it. He therefore proposed that the phrase "by some members of the Commission" be added to the end of the final sentence.

50. Mr. FORTEAU proposed that, in the final sentence, the words ", in their view," be inserted after the words "given that" and before the words "the approach" in order to indicate that it was not the Commission's position but only that of the members to whom reference was made at the beginning of paragraph 17.

51. Mr. KAMTO proposed that, in the final sentence, the phrase "given that the approach taken by the former Special Rapporteur had been the subject of critical comment" be deleted, since it did not seem to serve any purpose.

52. Mr. SABOIA, Mr. McRAE and Mr. CANDIOTI supported that proposal.

53. Mr. CANDIOTI said that the word "bold" in the first sentence had a certain emotional connotation and did not belong in a report of the Commission. He proposed that it be replaced with the qualifier "lucid".

54. Mr. SABOIA endorsed Mr. Candioti's proposal.

Paragraph 17, as amended, was adopted.

Paragraph 18

55. Mr. CANDIOTI said that he was against the idea of referring to the "loss of balance" caused by the Special Rapporteur, who had allegedly "made a gradual deviation from her own approaches in the treatment of the topic"; the last sentence of the paragraph, which had an unacceptable emotional connotation, should be deleted.

56. Mr. MURPHY recalled that some Commission members had, in fact, referred to a "loss of balance". The sentence did nothing more than to capture what had been said in the debate. Care must be taken to avoid modifying the text on the basis of the personal positions of Commission members.

57. Mr. SINGH said that he supported the retention of the last sentence and proposed that, in the first sentence, the words "with appreciation" be inserted after the word "recalled".

The proposal was adopted.

Paragraph 18, as amended, was adopted.

Paragraphs 19 to 25

Paragraphs 19 to 25 were adopted.

Paragraph 26

58. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed the deletof the footnote to the paragraph, since it was not the Commission's practice to place footnotes in summaries of debates.

Paragraph 26, as amended, was adopted.

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Paragraph 29

59. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested the deletion of the footnote to the paragraph.

60. Mr. FORTEAU pointed out that the phrase "possible measures of redress" that appeared in the first sentence of the paragraph actually referred to criminal sanctions, and the word "redress" should be replaced with the words "prevention and punishment" in all language versions. He proposed that this phrase be replaced with the phrase "other possible measures to ensure prevention and punishment".

61. Sir Michael WOOD proposed that the formulation "other ways of avoiding impunity" could be used in the English version.

62. Mr. FORTEAU supported Sir Michael's proposal and proposed that the phrase *pour empêcher l'impunité* could be used in the French version.

Paragraph 29, as amended, was adopted.

Paragraph 30

63. Mr. FORTEAU said that the third sentence of the English version referred to the "affected State", while the French version referred to *l'État de nationalité* (State of nationality). Both expressions were approximations. It would be preferable to refer to "the State of which those persons are the agents".

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 38

Paragraphs 31 to 38 were adopted.

Paragraph 39

64. Mr. FORTEAU said that it was unclear what was meant by the phrase "the issue for determination before the domestic court".

65. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had intended to convey the idea that, in some cases, the immunity of a State official and the question of whether exceptions existed had to be established on the basis of domestic law and not international law.

66. Mr. FORTEAU said that, in his understanding, it was a matter of stating that "in some instances, the question submitted to the domestic court was not the question of immunity under international law but that of immunity under the domestic law".

67. Mr. MURPHY proposed that a full stop be placed after the phrase "in the context of each case" and that the remainder of the sentence be deleted. A new sentence, beginning with the words "For example," and continuing with the wording proposed by Mr. Forteau, should then be added.

The proposal was adopted.

Paragraph 39, as amended, was adopted.

Paragraph 40

68. Mr. KAMTO said that, for the sake of clarity, the second sentence of the paragraph should be shortened.

69. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) explained that the sentence was indeed difficult to understand because it was inaccurate. She suggested that it could be reformulated so that it would read: "In this context, some members supported the methodological approaches pursued by the Special Rapporteur in viewing immunity on the basis of a view of international law as a complete normative system, in order to ensure that the regime of immunity did not produce negative effects on, or nullify, other components of the contemporary system of international law as a whole."

70. Mr. KAMTO endorsed that proposal.

Paragraph 40, as amended, was adopted.

Paragraph 41

Paragraph 41 was adopted.

Paragraph 42

71. Mr. KITTICHAISAREE proposed that, in the second sentence of the English text, the word "and" between the words "State" and "had" be replaced with the words "which therefore".

Paragraph 42, as amended, was adopted.

Paragraph 43

72. Mr. KITTICHAISAREE proposed that, in the final sentence, the words "foreign criminal" be inserted between the words "from" and "jurisdiction".

Paragraph 43, as amended, was adopted.

Paragraphs 44 and 45

Paragraphs 44 and 45 were adopted.

Paragraph 46

73. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested that, in the first sentence, the words "the crime of" be inserted between the words "of" and "aggression".

Paragraph 46, as amended, was adopted.

Paragraphs 47 to 53

Paragraphs 47 to 53 were adopted.

74. The CHAIRPERSON drew attention to paragraphs (13) and (15) of document A/CN.4/L.889/Add.2, which had been left in abeyance in order to allow the Special Rapporteur time to revise them in consultation with interested members.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission (*concluded*)

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its sixty-eighth session (*concluded*)

Commentary to draft article 2 (Definitions), subparagraph (*f*) (*concluded*)

Paragraph (13) (*concluded*)

75. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, following consultation with Mr. Huang, the second footnote to the paragraph had been amended to read: "In re *Ye* v. [*Jiang*] *Zemin*, United States Court of Appeals, Seventh Circuit, 383 F.3d 620 (8 September 2004) (this case was settled before a civil court)."

76. Mr. MURPHY said that the case in question had not been "settled".

77. Mr. FORTEAU, noting that all the examples of case law cited in the first footnote to the paragraph were criminal cases, proposed to reformulate the portion of the Special Rapporteur's proposal in parentheses to read: "unlike the cases cited in the previous footnote, this was a case before a civil court".

78. Mr. MURPHY said that the last footnote to the paragraph also referred to a series of criminal cases and could therefore also be mentioned in the text proposed by Mr. Forteau.

Paragraph (13), as amended, was adopted.

Paragraph (15)

79. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested that the paragraph be retained as it stood, but that the following sentences be added to the end of the paragraph: "Some members were of the view that the Commission should focus on codification rather than on the formulation of new rules concerning limitations and exceptions. Others members stated that, as part of addressing limitations and exceptions to immunity, the Commission should take into account both the codification and the progressive development of international law."

Paragraph (15), as amended, was adopted.

The commentary to draft article 2 (f), as a whole, as amended, was adopted.

Section C, as amended, was adopted.

Chapter XI of the draft report of the Commission, as a whole, as amended, was adopted, subject to the requisite adjustments.

Chapter I. *Organization of the work of the session* (A/CN.4/L.879)

80. The CHAIRPERSON invited the members of the Commission to begin their consideration, paragraph by paragraph, of chapter I of the draft report contained in document A/CN.4/L.879.

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted, subject to the completion of paragraph 7 by the Secretariat.

Chapter I of the draft report of the Commission, as a whole, as amended, was adopted, subject to the requisite adjustments.

Chapter II. *Summary of the work of the Commission at its sixty-eighth session* (A/CN.4/L.880)

81. The CHAIRPERSON invited the members of the Commission to begin their consideration, paragraph by paragraph, of chapter II of the draft report contained in document A/CN.4/L.880.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Paragraph 2 was adopted, subject to its completion by the Secretariat.

Paragraph 3

82. Sir Michael WOOD proposed that, in the first sentence, the word "thereof" and the words "and others" be deleted.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraph 8

83. Mr. MURPHY proposed, in the third sentence, replacing the word "subsequently" with the word "also".

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

84. Sir Michael WOOD proposed that, for the sake of consistency with the second sentence of paragraph 8, in the second sentence, the words "considered and" be deleted.

Paragraph 10, as amended, was adopted.

Paragraph 11

85. Sir Michael WOOD proposed that, in the first sentence, the words "of general international law" be inserted between the word "norms" and the words "(*jus cogens*)". In addition, he wished to know why, in the last sentence, it was specified that the report presented to the Commission by the Chairperson of the Drafting Committee had been an "oral" one.

86. Mr. FORTEAU said that the word "oral" appeared to have been added to show that it was the oral presentation of the report that was meant and not the report itself. He proposed that the beginning of the final sentence be amended to read: "The Chairperson of the Drafting Committee presented the interim report of the Drafting Committee".

Paragraph 11, as amended, was adopted, with a minor editorial amendment to the English text.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

87. Sir Michael WOOD said that, in the final sentence, the words "at the sixty-eighth session of the Commission" should be inserted after the word "topic", and the words "sixty-eighth session" should be replaced with the words "sixty-ninth session".

88. Mr. KITTICHAISAREE proposed that, in that sentence, the word "speak" be replaced with the word "comment".

89. Mr. CANDIOTI said that it was inaccurate to say that the discussion had been "preliminary in nature", as several members had spoken at great length on the topic.

90. Mr. MURPHY, endorsing that comment, proposed replacing the words "was preliminary in nature" with the

words “was commenced”. He also proposed, in the final sentence of the English version, replacing the word “and” with the word “but”.

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

Paragraph 17

91. Mr. CANDIOTI, noting that several unrelated subjects were mixed together haphazardly in the paragraph, proposed that it be split into several separate paragraphs.

92. Mr. FORTEAU said that, in order to clearly reflect the content of the paragraph, it would be useful to insert before the first sentence, in bold characters, the words “As regards ‘Other decisions and conclusions of the Commission’ (chap. XIII)”.

Paragraph 17, as amended, was adopted with an editorial amendment to the English text.

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted.

Chapter II of the draft report of the Commission, as a whole, as amended, was adopted.

The meeting rose at 5.55 p.m.

3347th MEETING

Friday, 12 August 2016, at 10.05 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-eighth session (*concluded*)

Chapter III. ***Specific issues on which comments would be of particular interest to the Commission*** **(A/CN.4/L.881)**

1. The CHAIRPERSON invited the Commission to consider chapter III of the draft report, contained in document A/CN.4/L.881.

Paragraph 1

Paragraph 1 was adopted with minor editorial changes.

Paragraph 2

2. Mr. FORTEAU proposed deleting the word “also” [*également*]; in addition, he proposed inserting, after the words “any information on”, the phrase “the issues referred to in the preceding paragraph, as well as” [*les points rappelés au paragraphe précédent, ainsi que*].

Paragraph 2, as amended, was adopted.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 3

3. Sir Michael WOOD said that paragraph 3 as currently drafted might be understood to mean that the Commission wanted information only on case law; however, both judicial practice and executive practice were important. He therefore proposed replacing the phrase “in particular judicial practice” with the phrase “including judicial and executive practice”.

4. Mr. MURPHY said that he supported the amendment proposed by Sir Michael. He further proposed inserting, in subparagraph (*c*), the phrase “, and whether it is undertaken in consultation with the authorities of the foreign State”.

5. Mr. KITTICHAISAREE proposed replacing, in subparagraph (*c*), the word “moment” with the word “phase” or “stage”. He requested clarification as to which instruments were referred to in subparagraph (*d*).

6. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she supported adding a reference to executive practice and replacing the word “moment” with the word “phase”. In response to Mr. Murphy’s proposal, she pointed out that subparagraph (*d*) dealt with the instruments available to the executive for referring information to the national courts. She would not oppose the language proposed by Mr. Murphy, however, as long as it was incorporated into subparagraph (*d*) and not subparagraph (*c*).

7. Mr. CANDIOTI said that the substance of Mr. Murphy’s proposal seemed to be covered under subparagraph (*e*), in the reference to the mechanisms for international legal cooperation. It would be useful if the question of consultation with the authorities of the State was addressed in a future report by the Special Rapporteur.

8. Sir Michael WOOD said that he agreed that subparagraph (*e*) was the most logical location for the inclusion of the language proposed by Mr. Murphy. The phrase “international legal assistance and cooperation that State authorities may use in relation to a case” could be replaced with the phrase “international legal assistance, cooperation and consultation between States in cases”, thereby incorporating the reference to consultation sought by Mr. Murphy.

9. Mr. MURPHY said that since the focus should be on the State, he would suggest that the phrase “between the State and a relevant foreign State” be inserted after the word “consultation” in Sir Michael’s proposal.

10. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed that the most appropriate place

for the amendment was in subparagraph (*e*). While she did not oppose the formulation "between the State and a relevant foreign State", she would still prefer to maintain the subparagraph as originally drafted, because it covered both bilateral cooperation and broader forms of cooperation.

11. Mr. VÁZQUEZ-BERMÚDEZ said that the focus should certainly remain on bilateral cooperation and tribunals. On the basis of all the proposals, he suggested that subparagraph (*e*) be amended to read: "the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered".

Paragraph 3, as thus amended, was adopted.

B. New topics

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Chapter III of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter XIII. *Other decisions and conclusions of the Commission* (A/CN.4/L.891)

12. The CHAIRPERSON invited the Commission to consider chapter XIII of the draft report, contained in document A/CN.4/L.891.

A. Requests by the Commission for the Secretariat to prepare studies on two topics on the Commission's agenda

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

1. Working Group on the long-term programme of work

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

13. Mr. FORTEAU proposed inserting, in the first sentence, the words "during the current quinquennium" [*au cours du present quinquennat*] after the words "already recommended".

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

14. Sir Michael WOOD said that the capitalization in the name of the Working Group should be corrected and that the phrase "the decision on new topics" in the final sentence should be replaced with the words "the decision to place new topics on the long-term programme of work". In addition, that sentence of the paragraph did not accurately reflect the aims of the Working Group; he therefore proposed that the end of the sentence, beginning with the words "during the current quinquennium", be replaced with the words "to make such additions during the course of the current quinquennium".

15. Mr. FORTEAU proposed that, for the sake of greater clarity, a footnote referring back to paragraph 7 be inserted.

Paragraph 11, as amended, was adopted.

Paragraph 12

16. Sir Michael WOOD proposed deleting, in the second sentence, the word "('survey')", as what was meant was unclear.

Paragraph 12, as amended, was adopted.

Paragraph 13

17. Mr. KAMTO said that the somewhat ambiguous pronoun "It" in the second sentence of paragraph 13 should be replaced with the words "The Commission". In addition, the title of the second potential topic seemed to make two assumptions: that there existed subjects of international law other than States or international organizations; and that agreements concluded with or between such subjects of international law could be described as international agreements. If the Commission decided to take up the topic, it would determine whether such assumptions were in fact correct; in the meantime, he proposed deleting the word "International" in the phrase "International agreements".

18. Mr. FORTEAU, supported by Ms. ESCOBAR HERNÁNDEZ, said that the Commission could not change the titles of potential topics which were proposed by the Secretariat in an official document of the United Nations; moreover, changing them would imply that the Commission had already taken a position on them. He proposed inserting quotation marks around each title and replacing the word "welcomed" with the words "took note of" to indicate that the Commission had not yet endorsed the titles.

19. Mr. CANDIOTI said that paragraph 13 would undoubtedly be of great interest during the proceedings of the Sixth Committee. He requested clarification on the scope of the first topic proposed.

20. Mr. McRAE said that the potential topic "General principles of law" referred to sources of international law as per Article 38 of the Statute of the International Court of Justice. Further clarification on all the topics proposed could be sought from the Secretariat's memorandum (A/CN.4/679/Add.1) mentioned in paragraph 12.

21. Mr. VALENCIA-OSPINA proposed inserting, in the first sentence, the words "as listed by the Secretariat" after the words "six potential topics".

22. Mr. LLEWELLYN (Secretary to the Commission) said that in the six working papers that it had prepared on potential topics, the Secretariat had not taken any position on those topics. He supported the amendment proposed by Mr. Valencia-Ospina but suggested that the verb "listed" might be replaced with the verb "proposed", so as not to underplay the amount of work invested by the Secretariat in preparing the working papers.

Paragraph 13, as amended, was adopted.

2. Consideration of General Assembly resolution 70/118 of 14 December 2015 on the rule of law at the national and international levels

Paragraphs 14 to 22

Paragraphs 14 to 22 were adopted.

3. Consideration of paragraphs 9 to 12 of General Assembly resolution 70/236 of 23 December 2015 on the report of the International Law Commission on the work of the sixty-seventh session

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

4. Seventieth anniversary session of the International Law Commission

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Paragraph 29

23. Sir Michael WOOD proposed that the last sentence of paragraph 29 become a new paragraph, with subsequent paragraphs of chapter XIII to be renumbered accordingly.

It was so decided.

Paragraph 29, as amended, was adopted.

Paragraphs 30 and 31

Paragraphs 30 and 31 were adopted.

5. Honoraria

Paragraph 32

24. Mr. KITTICHAISAREE proposed the insertion of the word "strongly" before "reiterates its views concerning the question of honoraria". For many years, the Commission had been expressing the same views, with no results.

25. Sir Michael WOOD said that, while he agreed with those sentiments, he thought that in the current financial situation, it would be impolitic to use the phrase "strongly reiterates".

Paragraph 32 was adopted.

6. Documentation and publications

Paragraphs 33 to 35

Paragraphs 33 to 35 were adopted.

Paragraphs 36 and 36 *bis*

26. The CHAIRPERSON proposed the insertion in paragraph 36 of two new sentences about the new arrangements used during the session for advance editing of documentation, as a result of which the quality of documentation in general had been improved. In particular, the Commission's report to the General Assembly would be of an editorial quality closer to that of the *Yearbook of the International Law Commission*. If the arrangements were continued, they would help to reduce the backlog in the issuance of the *Yearbook*. The two new sentences would read: "In particular, the Commission noted with satisfaction that a number of experimental measures to streamline the editing of the Commission's documents were introduced following exchanges between the secretariat of the Commission and the services involved in the editing of documents. The new arrangements contributed to the improvement of the documents considered by the Commission and facilitated its work." He likewise proposed the creation of a new paragraph, 36 *bis*, using the final two sentences in paragraph 36.

27. Following a remark by Mr. FORTEAU and a query from Mr. KAMTO, Mr. LLEWELLYN (Secretary to the Commission) explained that under the new arrangements, the editors had been working side by side with the secretariat to produce the various chapters of the Commission's report to the General Assembly. As a result, the Commission's report would be issued well in advance of the start of the seventy-first session of the General Assembly.

28. The CHAIRPERSON and Mr. KAMTO expressed profound gratitude to all the linguistic services involved in the issuance of the Commission's documentation.

29. Mr. VÁZQUEZ-BERMÚDEZ said that he endorsed paragraph 36 *bis* in general but proposed that the words "and disappointment" should be deleted, since the point was conveyed sufficiently well with the words "expressed concern".

Paragraphs 36 and 36 bis were adopted, with the inclusion of the sentences proposed by the Chairperson and the deletion proposed by Mr. Vázquez-Bermúdez.

Paragraphs 37 to 39

Paragraphs 37 to 39 were adopted.

7. *Yearbook of the International Law Commission*

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

30. Mr. HUANG expressed concern about the lengthy delays in the publication in Chinese of the Commission's documentation. Thanks to several years of efforts, the large backlog in issuance of the *Yearbook* in Chinese had been greatly reduced, but a number of volumes (2005 to 2010) were still being edited. The main reasons for the backlog were lack of financing and imbalance in the staffing of the linguistic services in Geneva: there were two editors each for the English, French and Spanish versions of the

Yearbook of the International Law Commission, but only one each for the Arabic, Chinese and Russian versions.

31. Chinese, as one of the six official languages of the United Nations, should be treated on an equal footing with all the other languages; Chinese readers had the right to receive the Commission's publications on the same basis as readers in other languages. There were over 660 law schools and hundreds of thousands of law students in China, where the subject of international law was compulsory. He therefore hoped that the Commission would give due attention to the problem of the backlog in publication of the *Yearbook of the International Law Commission* in Chinese. The funding must be allocated in a more balanced manner, and the prompt editing of the *Yearbook* assured.

32. Mr. HASSOUNA supported those comments. All languages in the United Nations should be treated equally, and the *Yearbook of the International Law Commission* should be published in all languages on an equal footing.

With those comments, paragraph 41 was adopted.

8. Assistance of the Codification Division

Paragraph 42

Paragraph 42 was adopted.

9. Websites

Paragraph 43

Paragraph 43 was adopted with an editorial amendment proposed by Mr. Forteau.

10. United Nations Audiovisual Library of International Law

Paragraph 44

Paragraph 44 was adopted.

Section B, as amended, was adopted.

C. Date and place of the sixty-ninth session of the Commission

Paragraph 45

33. Mr. HUANG pointed out that 1 May was observed as a public holiday by about 80 countries around the world and asked why it was to be a working day at the Commission's sixty-ninth session.

34. Mr. LLEWELLYN (Secretary to the Commission) said that a decision on which holidays were to be observed in the United Nations was made by the General Assembly every year.

35. Mr. HASSOUNA said the question had been discussed in the Planning Group, where some members had suggested that the sixty-ninth session begin on 8 May 2017, not 1 May 2017. The relevant services in Geneva, however, had stated that 1 May to 2 June 2017 were the only dates available for the first part of the session. It was unfortunate that the Commission had no opportunity to express its preferences regarding the scheduling of meetings.

36. Mr. LLEWELLYN (Secretary of the Commission) said that in principle, the Commission should be able to do so. The underlying reality, however, was that a huge number of meetings took place every year at the United Nations Office at Geneva, and scheduling had to be done a great many years in advance.

37. Mr. FORTEAU drew attention to the phrase "The Commission decided". He pointed out that in the report on its previous session, it had used the words "The Commission recommended", but his preference would be to use the term "decided" now and in all future reports.

38. Mr. TLADI, supported by Mr. SABOIA and Mr. CANDIOTI, said that the Commission could make recommendations about the dates for its future sessions, but it was the General Assembly that made the final decision.

39. Sir Michael WOOD said that the Commission was entitled to make a decision about the dates for its future session, even though the General Assembly might subsequently decide otherwise. It was therefore correct to use the phrase "The Commission decided" in paragraph 45.

40. Mr. VÁZQUEZ-BERMÚDEZ proposed that, taking into account the comment just made by Sir Michael, paragraph 45 be adopted as it stood.

Paragraph 45 was adopted.

Section C was adopted.

D. Cooperation with other bodies

Paragraphs 46 to 49

Paragraphs 46 to 49 were adopted.

Section D was adopted.

E. Representation at the seventy-first session of the General Assembly

Paragraph 50

Paragraph 50 was adopted.

Section E was adopted.

F. International Law Seminar

Paragraphs 51 and 54

Paragraphs 51 to 54 were adopted.

Paragraph 55

Paragraph 55 was adopted, on the understanding that it would incorporate editorial corrections by Ms. Jacobsson.

Paragraphs 56 to 60

Paragraphs 56 to 60 were adopted.

Paragraph 61

41. Mr. SABOIA said that Brazil should be mentioned along with the other countries cited in the first sentence as having made voluntary contributions to the

United Nations Trust Fund for the International Law Seminar since 2014.

42. Sir Michael WOOD, supported by Mr. CANDIOTI, Mr. FORTEAU, Mr. KAMTO, Mr. TLADI and Mr. VALENCIA-OSPINA, suggested that the Secretariat be requested to make sure the list of countries contained in paragraph 61 was correct.

Paragraph 61 was adopted on the understanding that the secretariat would check the list of countries therein.

Paragraphs 62 and 63

Paragraphs 62 and 63 were adopted.

Section F, as amended, was adopted.

Chapter XIII of the draft report of the Commission, as a whole, as amended, was adopted.

The report of the International Law Commission, as a whole, as amended, was adopted.

Chairperson's concluding remarks

43. The CHAIRPERSON said that the end of the sixty-eighth session also marked the end of the current quinquennium. The Commission was submitting to the General Assembly the full set of draft articles on protection of persons in the event of disasters, completed on second reading. It was to be hoped that the General Assembly would use them as the basis for a convention. The Commission was also submitting two sets of draft conclusions completed on first reading: draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and draft conclusions on identification of customary international law. Earlier in the quinquennium, the Commission had completed its work on three important topics, namely expulsion of aliens, the obligation to extradite or prosecute (*aut dedere aut judicare*) and the most-favoured-nation clause. The Commission could be proud of its productivity, its creativity and the collegial spirit in which it worked. He was grateful to his colleagues in the Bureau and to the former Chairpersons of the Commission for their advice and guidance: growing up in Africa, he had learned that individuals were never as important as the community that surrounded them. He thanked the secretariat, the Codification Division and the Legal Liaison Office in Geneva for their competent assistance and continuous support. He also thanked the précis-writers, interpreters, editors, conference officers, translators and other members of the conference services who extended their assistance to the Commission on a daily basis.

Closure of the session

44. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-eighth session closed.

The meeting rose at 12.15 p.m.

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