A/CN.4/SER.A/2017

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

2017

Volume I

Summary records
of the meetings
of the sixty-ninth session
1 May–2 June and
3 July–4 August 2017

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 … 2017*).

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-ninth session of the Commission (A/CN.4/SR.3348–A/CN.4/SR.3389), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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CONTENTS

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Mr. Miguel de Serpa Soares, Under-Secretary-General for 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 provisional agenda for its sixty-ninth session at its 3348th meeting, held on 1 May 2017. Modified based on the decision made by the Commission at its 3354th meeting,[*] held on 9 May 2017, the agenda was as follows:

1. Organization of the work of the session.
2. Immunity of State officials from foreign criminal jurisdiction.
3. Provisional application of treaties.
4. Protection of the environment in relation to armed conflicts.
5. Protection of the atmosphere.
6. Crimes against humanity.
7. Peremptory norms of general international law (*jus cogens*).[**]
8. Succession of States in respect of State responsibility.
9. Programme, procedures and working methods of the Commission and its documentation.
10. Date and place of the seventieth session.
11. Cooperation with other bodies.
12. Other business.

[*] The Commission decided to include in its programme of work the topic "Succession of States in respect of State responsibility" (see the 3354th meeting below, p. 58, para. 47). See also *Yearbook … 2017*, vol. II (Part Two), chap. XI, sect. A.

[**] The Commission decided, at its 3374th meeting held on 13 July 2017, to modify the title of the topic "*Jus cogens*" to: "Peremptory norms of general international law (*jus cogens*)" (see the 3374th meeting below, p. 230, para. 42). See also *Yearbook … 2017*, vol. II (Part Two), chap. VIII, sect. B.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
ASEAN	Association of Southeast Asian Nations
AUCIL	African Union Commission on International Law
CAHDI	Committee of Legal Advisers on Public International Law
EFTA	European Free Trade Association
FARC-EP	*Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (Revolutionary Armed Forces of Colombia–People's Army)
GATT	General Agreement on Tariffs and Trade
IAJC	Inter-American Juridical Committee
ICRC	International Committee of the Red Cross
IMO	International Maritime Organization
IOM	International Organization for Migration
ITLOS	International Tribunal for the Law of the Sea
MINURSO	United Nations Mission for the Referendum in Western Sahara
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
OAS	Organization of American States
SACU	Southern African Customs Union
UNODC	United Nations Office on Drugs and Crime
WHO	World Health 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	Permanent Court of International Justice, *Collection of Judgments* (Nos. 1–24: up to and including 1930)
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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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*
Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo	Advisory Opinion, *I.C.J. Reports 2010*, p. 403.
	Request for Advisory Opinion, 8 October 2008, 2008 General List No. 141. Available from the Court's website: www.icj-cij.org.
Adamov	*Adamov (Evgeny) v. Federal Office of Justice*, Case No. 1A 288/2005, Appeal Judgment, Federal Supreme Court of Switzerland, ILDC 339 (CH 2005).
Ahmet Doğan et al. *v. Ehud Barak*	Case No. 2:15-cv-08130-ODW(GJSx), Judgment of 13 October 2016, United States District Court for the Central District of California.
Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change	Case No. C-366/10, Judgment of 21 December 2011, Grand Chamber, European Court of Justice, *European Court Reports 2011*, p. I-13833.
Al-Adsani v. the United Kingdom	Application no. 35763/97, Judgment of 21 November 2001, Grand Chamber, European Court of Human Rights, ECHR 2001-XI.
Almonacid-Arellano et al. *v. Chile*	Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 September 2006, Inter-American Court of Human Rights, Series C, No. 154.
Application for Revision of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore	Application instituting proceedings filed in the Registry of the Court on 2 February 2017, 2017 General List No. 167. Available from the Court's website: www.icj-cij.org.
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)	Judgment, *I.C.J. Reports 2007*, p. 43.
	Provisional Measures, Order of 13 September 1993, *I.C.J. Reports 1993*, p. 325.
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)	Judgment, *I.C.J. Reports 2015*, p. 3.
Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination	*(Ukraine v. Russian Federation)*, Provisional Measures, Order of 19 April 2017, *I.C.J. Reports 2017*, p. 104.
Arancibia Clavel	*Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros*, Case No. 259, Judgment of 24 August 2004, Supreme Court of Argentina.
Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)	Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 2006*, p. 6.
Arrest Warrant of 11 April 2000	*(Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3.
Augustin Ngirabatware	Case No. MICT-12-29, International Residual Mechanism for Criminal Tribunals. The decisions related to this case are available from the Mechanism's website: www.irmct.org/en.
Avena	*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004*, p. 12.
Barcelona Traction	*Barcelona Traction, Light and Power Company, Limited*, Judgment, *I.C.J. Reports 1970*, p. 3.
Barrios Altos v. Peru	Merits, Judgment of 14 March 2001, Inter-American Court of Human Rights, Series C, No. 75.
Bemba Gombo	*The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/13, Judgment of 19 October 2016, Trial Chamber VII, International Criminal Court. Available from the Court's website: www.icc-cpi.int.
Bilcon of Delaware et al. *v. Government of Canada*	Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, Permanent Court of Arbitration.
Bo Xilai	Judgment of 8 November 2005, Bow Street Magistrates' Court, England, ILR, vol. 128 (2006), p. 713.

Case	*Nature and source of the decision*
Bouterse	Case Nos. R 97/163/12 Sv and R 97/176/12 Sv, Judgment on Appeal of 18 September 2001, Supreme Court of the Netherlands, *Netherlands Yearbook of International Law*, vol. 32 (2001), p. 282.
	Judgment of 20 November 2000, Court of Appeal of Amsterdam, *Yearbook of International Humanitarian Law*, vol. 3 (2000), pp. 677–691. See also *Netherlands Yearbook of International Law*, vol. 32 (2001), p. 266.
Bouzari	*Bouzari and Others v. Islamic Republic of Iran*, Decision of 30 June 2004, Ontario Court of Appeal (Canada), ILR, vol. 128 (2006), p. 586.
The Case of the S. S. "Lotus"	Decision No. 9 of 7 September 1927, *P.C.I.J., Series A, No. 10*.
Case of the S. S. "Wimbledon"	Judgment of 17 August 1923, *P.C.I.J., Series A, No. 1*.
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)	Judgment, *I.C.J. Reports 2015*, p. 665.
Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)	Judgment, *I.C.J. Reports 2008*, p. 177.
Chagos Marine Protected Area (Mauritius v. United Kingdom)	Award of 18 March 2015. Available from the website of the Permanent Court of Arbitration: https://pca-cpa.org.
Chile–Measures Affecting the Transit and Importation of Swordfish	*Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union*), Order of 16 December 2009, *ITLOS Reports 2008–2010*, p. 13.
	Chile–Measures affecting the Transit and Importing of Swordfish, Arrangement between the European Communities and Chile, WT/DS193/3. Available from the WTO website: www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm.
Corfu Channel	Merits, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.
Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC (No. 1)	Final Appeals Nos. 5, 6 and 7 of 2010 (Civil), Decision of 8 June 2011, Hong Kong Special Administrative Region of the People's Republic of China, Court of Final Appeal, ILR, vol. 147 (2012), p. 376.
Dispute concerning delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean	(*Ghana/Côte d'Ivoire*), Provisional Measures, Order of 25 April 2015, *ITLOS Reports 2015*, p. 146.
Durand and Ugarte v. Peru	Merits, Judgment of 16 August 2000, Inter-American Court of Human Rights, Series C, No. 68.
EC Measures Concerning Meat and Meat Products (Hormones)	WTO Appellate Body Report, WT/DS26/AB/R, WT/DS48/AR/R (adopted 13 February 1998).
Fang v. Jiang Zemin	*Fang and Others v. Jiang Zemin and Others*, Case No. 2004-404-5843, Judgment of 21 December 2006, High Court of New Zealand, ILR, vol. 141 (2011), p. 702.
Ferrini v. Federal Republic of Germany	Decision No. 5044/2004 of 11 March 2004, Court of Cassation (Italy), ILR, vol. 128 (2006), p. 658.
Filártiga v. Peña-Irala	Decision of 30 June 1980, United States Court of Appeals for the Second District, 630 F.2d 876 (2d Cir. 1980).
Fujimori	Case No. 5646-2005, Decision of 11 July 2007, Supreme Court of Chile.
Gabčikovo–Nagymaros Project	*(Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7.
	Reply of the Republic of Hungary, 20 June 1995, vol. I. Available from the Court's website: www.icj-cij.org.
Gelman v. Uruguay	Merits and Reparations, Judgment of 24 February 2011, Inter-American Court of Human Rights, Series C, No. 221.
Goiburú et al. *v. Paraguay*	Merits, Reparations and Costs, Judgment of 22 September 2006, Inter-American Court of Human Rights, Series C, No. 153.
Gomes Lund et al. *("Guerrilha do Araguaia") v. Brazil*	Preliminary Objections, Merits, Reparations and Costs, Decision of 24 November 2010, Inter-American Court of Human Rights, Series C, No. 219.
Hailemariam	*Special Prosecutor v. Hailemariam*, Criminal File No. 1/87, Decision of 9 October 1995, Federal High Court of Ethiopia, ILDC 555 (ET 1995).

Case	*Nature and source of the decision*
Ilgar Mammadov v. Azerbaijan	Application no. 15172/13, Judgment of 22 May 2014, First Section, European Court of Human Rights.
Immunities and Criminal Proceedings	*(Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, *I.C.J. Reports 2016*, p. 1148.
	Application instituting proceedings filed in the Registry of the Court on 13 June 2016, 2016 General List No. 163. Available from the Court's website: www.icj-cij.org.
Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt	Advisory Opinion, *I.C.J. Reports 1980*, p. 73.
Jadhav	*(India v. Pakistan)*, Provisional Measures, Order of 18 May 2017, *I.C.J. Reports 2017*, p. 231.
Jiménez v. Aristeguieta et al.	Decision of 12 December 1962, United States Court of Appeals for the Fifth Circuit, 311 F.2d 547 (5th Cir. 1962).
Jones v. Ministry of the Interior of Saudi Arabia and Another	*Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Another, Mitchell and Others v. Al-Dali and Others*, Decision of 14 June 2006, House of Lords, [2006] UKHL 26, reproduced in ILR, vol. 129 (2007), p. 713.
Jones and Others v. the United Kingdom	Applications nos. 34356/06 and 40528/06, Judgment of 14 January 2014, Fourth Section, European Court of Human Rights, ECHR 2014.
Judgment No. 238/2014	*Judgment No. 238/2014*, 22 October 2014, Constitutional Court of Italy. Available from the Court's website: www.cortecostituzionale.it.
Juridical Condition and Rights of Undocumented Migrants	Advisory Opinion OC-18/03 of 17 September 2003, Inter-American Court of Human Rights, Series A, No. 18.
Jurisdictional Immunities of the State	*(Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99.
Kalogeropoulou and Others v. Greece and Germany	Application no. 59021/00, Judgment of 12 December 2002, First Section, European Court of Human Rights, ECHR 2002-X.
Kenyatta	*Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court. Available from the Court's website: www.icc-cpi.int.
Khurts Bat	*Khurts Bat v. the Investigating Judge of the German Federal Court*, Case Nos. CO/3672/2011 and CO/1655/2011, Decision of 29 July 2011 ([2011] EWHC 2029 (Admin)), Administrative Court, England and Wales High Court, ILR, vol. 147 (2012), p. 633.
Kokaryo (Guanghualiao) Dormitory	Case No. 1987 (O) 685, Decision of 27 March 2007, Supreme Court of Japan, *Minshu*, vol. 61, No. 2, p. 711. See: www.courts.go.jp/app/hanrei_en/detail?id=885.
La Cantuta v. Peru	Merits, Reparations and Costs, Decision of 29 November 2006, Inter-American Court of Human Rights, Series C, No. 162.
LaGrand	*(Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466.
Land Boundary in the Northern Part of Isla Portillos	*(Costa Rica v. Nicaragua)*. The verbatim records of the public sittings held in 2017 are available from the Court's website: www.icj-cij.org.
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory	Advisory Opinion, *I.C.J. Reports 2004*, p. 136.
Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965	Order of 14 July 2017, *I.C.J. Reports 2017*, p. 282.
	Request for Advisory Opinion, 22 June 2017, 2017 General List No. 169. Available from the Court's website: www.icj-cij.org.
Legality of the Threat or Use of Nuclear Weapons	Advisory Opinion, *I.C.J. Reports 1996*, p. 226.
Letelier and Others v. The Republic of Chile and Linea Aerea Nacional-Chile	Judgment of 20 November 1984, United States Court of Appeals for the Second Circuit, ILR, vol. 79, p. 561.
Lighthouses case between France and Greece	Decision of 24 July 1956, Permanent Court of Arbitration, ILR, vol. 23 (1956), p. 91.
López Ostra v. Spain	Judgment of 9 December 1994, European Court of Human Rights, Series A, No. 303-C.

Case	*Nature and source of the decision*
Mapiripán Massacre v. Colombia	Merits, Reparations and Costs, Judgment of 15 September 2005, Inter-American Court of Human Rights, Series C, No. 134.
Maritime Delimitation in the Caribbean Sea and the Pacific Ocean	*(Costa Rica v. Nicaragua)*, Order of 31 May 2016, *I.C.J. Reports 2016*, p. 235.
	Application instituting proceedings filed in the Registry of the Court on 25 February 2014, 2014 General List No. 157. Available from the Court's website: www.icj-cij.org.
Maritime Delimitation in the Indian Ocean	*(Somalia v. Kenya)*, Preliminary Objections, Judgment, *I.C.J. Reports 2017*, p. 3.
	Application instituting proceedings filed in the Registry of the Court on 28 August 2014, 2014 General List No. 161. Available from the Court's website: www.icj-cij.org.
Military and Paramilitary Activities in and against Nicaragua	*(Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14.
Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre and Others	Case No. 867/15, Judgment of 15 March 2016, South Africa Supreme Court of Appeal, [2016] ZASCA 17.
The MOX Plant Case	*(Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, International Tribunal for the Law of the Sea, *ITLOS Reports 2001*, p. 95.
Mwandinghi	*Minister of Defence, Namibia v. Mwandinghi*, Decision of 14 December 1990, High Court of Namibia, ILR, vol. 91 (1993), p. 341.
Mytilineos Holdings SA	*Mytilineos Holdings SA v. 1. The State Union of Serbia and Montenegro, 2. Republic of Serbia*, Partial award on jurisdiction of 8 September 2006, Arbitration under the United Nations Commission on International Trade Law Arbitration Rules.
Nuclear Tests	*(Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 253.
	(New Zealand v. France), Judgment, *I.C.J. Reports 1974*, p. 457.
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament	*(Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 2016*, p. 255.
	Application instituting proceedings filed in the Registry of the Court on 24 April 2014, 2014 General List No. 158. Available from the Court's website: www.icj-cij.org.
	(Marshall Islands v. Pakistan), Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 2016*, p. 552.
	Application instituting proceedings filed in the Registry of the Court on 24 April 2014, 2014 General List No. 159. Available from the Court's website: www.icj-cij.org.
	(Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, *I.C.J. Reports 2016*, p. 833.
	Application instituting proceedings filed in the Registry of the Court on 24 April 2014, 2014 General List No. 160. Available from the Court's website: www.icj-cij.org.
Oleynikov v. Russia	Application no. 36703/04, Judgment of 14 March 2013, European Court of Human Rights.
Pinochet	*Regina v. Bow Street Metropolitan Stipendiary Magistrate,* ex parte *Pinochet Ugarte (No. 3)*, 24 March 1999, England, House of Lords, reproduced in ILR, vol. 119 (2002), p. 135.
Priebke	*Priebke, Erich s/ solicitud de extradición*, Case No. 16.063/94, Decision of 2 November 1995, Supreme Court of Argentina.
Prince of X Road Accident Case	Decision of 25 June 1964, Supreme Court of Austria, ILR, vol. 65 (1984), p. 13.
Prosecutor v. Anto Furundžija	Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, vol. 1, p. 466.
Prosecutor v. Blaškić	Case No. IT-95-14-AR108 bis, Judgment on the request of the Republic of Croatia for review of the Decision of Trial Chamber II of 18 July 1997, Judgment of 29 October 1997, Appeals Chamber, International Tribunal for the Former Yugoslavia, ILR, vol. 110 (1998), p. 688. Also available from: www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html.

Case	*Nature and source of the decision*
The Prosecutor v. Germain Katanga	Case No. ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute, Decision of 24 March 2017, Trial Chamber II, International Criminal Court. The decisions related to this case are available from the Court's website: www.icc-cpi.int.
Prosecutor v. Kupreškić et al.	Case No. IT-95-16-T, Judgment of 14 January 2000, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, vol. II, p. 1398.
The Prosecutor v. Omar Hassan Ahmad Al Bashir	Case No. ICC-02/05-01/09, International Criminal Court. The decisions related to this case are available from the Court's website: www.icc-cpi.int.
	Case No. ICC-02/05-01/09, Decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court, of 9 April 2014, Pre-Trial Chamber II.
	Decision pursuant to article 87(7) of the Rome Statute on the refusal by the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, of 13 December 2011, Pre-Trial Chamber I.
	Corrigendum to the decision pursuant to article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, of 13 December 2011, Pre-Trial Chamber I.
Questions relating to the Obligation to Prosecute or Extradite	*(Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422.
Radilla-Pacheco v. Mexico	Preliminary Objections, Merits, Reparations, and Costs, Judgment of 23 November 2009, Inter-American Court of Human Rights, Series C, No. 209.
Redward	*F. H. Redward (Great Britain) v. United States (Hawaiian Claims),* Decision of 10 November 1925, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 157.
Regina v. Jones (Margaret) and Others	Decision of 29 March 2006, House of Lords, [2006] UKHL 16, reproduced in ILR, vol. 132 (2008), p. 668.
Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Malaysia v. Singapore)	Application instituting proceedings filed in the Registry of the Court on 30 June 2017, 2017 General List No. 170. Available from the Court's website: www.icj-cij.org.
Reservations to the Convention on Genocide	Advisory Opinion, *I.C.J. Reports 1951*, p. 15.
Robert E. Brown	*Robert E. Brown (United States) v. Great Britain*, Decision of 23 November 1923, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120.
Russian Embassy	*Russian Embassy, Re, Russian Federation*, Case No. 5 Ob 152/04w, Final Appeal, 9 November 2004, Supreme Court of Justice (Austria).
Samantar v. Yousuf	Case No. 11-1479, Judgment of 2 November 2012, United States Court of Appeals for the Fourth Circuit, 699 F.3d 763 (4th Cir. 2012).
	Case No. 08-1555, Supreme Court of the United States, 560 U.S. 305 (2010).
S. D. Myers Inc. v. Government of Canada	NAFTA Arbitration Tribunal, Second partial award on damages of 21 October 2002 and Final award on costs of 30 December 2002, ILR, vol. 126 (2005), p. 161.
Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others	Case No. 27740/2015, Decision of 24 June 2015, High Court of South Africa (Gauteng Division, Pretoria) [2015] ZAGPPHC 402.
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge	*(Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, p. 12.
Suleymane Guengueng et al. *v. Senegal*	Communication No. 181/2001, Decision of 17 May 2006, *Official Records of the General Assembly, Sixty-first session, Supplement No. 44* (A/61/44), annex VIII, sect. A, p. 160.
S. v. Austria	Case No. 1Ob149/02x, Decision on final appeal of 30 September 2002, ILDC 1618 (AT 2002).
United States–Import Prohibition of Certain Shrimp and Shrimp Products	WTO Appellate Body Report, WT/DS58/AB/R (adopted 6 November 1998).

Case	*Nature and source of the decision*
United States–Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products	WTO Appellate Body Report, WT/DS381/AB/R (adopted 13 June 2012).
United States–Standards for Reformulated and Conventional Gasoline	WTO Appellate Body Report, WT/DS2/AB/R (adopted 20 May 1996).
Velásquez-Rodríguez v. Honduras	Merits, Judgment of 29 July 1988, Inter-American Court of Human Rights, Series C, No. 4.
Xuncax et al. *v. Gramajo*	Decision of 12 April 1995, United States District Court, District of Massachusetts, 886 F. Supp. 162 (1995).
Zhang v. Jiang Zemin and Others	Decision of 14 November 2008, Supreme Court of New South Wales (Australia), ILR, vol. 141 (2011), p. 542.

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

	Source
Covenant of the League of Nations (Versailles, 28 June 1919)	League of Nations, *Official Journal*, No. 1, February 1920, p. 3.
Slavery Convention (Geneva, 25 September 1926)	League of Nations, *Treaty Series*, vol. LX, No. 1414, p. 253.
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)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	*Ibid.*, vol. 1, No. 4, p. 15, and vol. 90, p. 327.
General Agreement on Tariffs and Trade (GATT) (Geneva, 30 October 1947)	*Ibid.*, vol. 55, No. 814, p. 187.
Charter of the Organization of American States (Bogotá, 30 April 1948)	*Ibid.*, vol. 119, No. 1609, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid.*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the Protection of War Victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, 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.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) (Geneva, 8 December 2005)	*Ibid.*, vol. 2404, No. 43425, p. 261.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	*Ibid.*, vol. 213, No. 2889, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	*Ibid.*, vol. 189, No. 2545, p. 137.
State Treaty for the Re-establishment of an Independent and Democratic Austria (Vienna, 15 May 1955)	*Ibid.*, vol. 217, No. 2949, p. 223.
Convention (No. 105) concerning the Abolition of Forced Labour (Geneva, 25 June 1957)	*Ibid.*, vol. 320, No. 4648, p. 291.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, No. 7310, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*., vol. 596, No. 8638, p. 261.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965) (opened for signature at New York on 7 March 1966)	*Ibid.*, vol. 660, No. 9464, p. 195.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	*Ibid.*, vol. 993, No. 14531, p. 3.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	*Ibid.*, vol. 999, No. 14668, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	*Ibid.*, vol. 1144, No. 17955, p. 123.
Convention on Special Missions (New York, 8 December 1969)	*Ibid.*, vol. 1400, No. 23431, p. 231.
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970)	*Ibid.*, vol. 823, No. 11806, p. 231.
Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970)	*Ibid.*, vol. 860, No. 12325, p. 105.
European Convention on State Immunity (Basel, 16 May 1972)	*Ibid.*, vol. 1495, No. 25699, p. 181.
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. 138.
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.

	Source
International Convention for the Prevention of Pollution from Ships, 1973 ("MARPOL Convention") (London, 2 November 1973), as modified by the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 ("MARPOL Convention") (London, 17 February 1978)	United Nations, *Treaty Series*, vol. 1340, No. 22484, p. 184 and p. 61.
International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973)	*Ibid.*, vol. 1015, No. 14861, p. 243.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87, or *United Nations Conference on the Representation of States in their Relations with International Organizations, Vienna, 4 February–14 March 1975*, *Official Records*, vol. II (United Nations publication, Sales No. E.75.V.12), p. 207.
Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) (Santiago, 16 June 1976)	OAS, *Treaty Series*, No. C-16. Available from the website of the OAS: www.oas.org/dil/treaties_year_text.htm.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3.
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	*Ibid.*, vol. 1302, No. 21623, p. 217.
International Convention against the Taking of Hostages (New York, 17 December 1979)	*Ibid.*, vol. 1316, No. 21931, p. 205.
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981)	*Ibid.*, vol. 1496, No. 25702, p. 65.
Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan, 23 March 1981) (renamed in 2008: Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region)	United Nations Environnment Programme, *Selected Multilateral Treaties in the Field of the Environment*, vol. 2, Cambridge, Grotius, 1991, p. 118.
Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (Abidjan, 30–31 March 2017)	Document UN Environment (Ecosystems Division)/ABC-WACAF/COP.12/10. Available from: https://abidjanconvention.org/themes/critai/documents/meetings/plenipotentiaries/working_documents/en/ABC-WACAF-COP12%20-%20Oil%20and%20Gaz%20Protocol%20Final%20version%20(05.06.18).pdf. See also decision CP.12/6, in document UNEP/ABC-WACAF/COP.12/7.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (Vienna, 8 April 1983)	United Nations, *Juridical Yearbook 1983* (Sales No. E.90.V.1), p. 139.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984)	United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.
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. For the Kigali amendment of 15 October 2016, see the website of the United Nations Treaty Collection: https://treaties.un.org, *Depositary, Status of Treaties*, chap. XXVII.
Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi, 21 June 1985)	*Official Journal of the European Communities*, C 253, 10 October 1986, p. 10.

	Source
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.
Convention on the Rights of the Child (New York, 20 November 1989)	United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3.
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.
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.
Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992)	OAS, *Treaty Series*, No. 75.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79.
Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000)	*Ibid.*, vol. 2226, p. 208.
Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (Nagoya, 15 October 2010)	Secretariat of the Convention on Biological Diversity, *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety*, Montreal, 2011.
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya, 29 October 2010)	United Nations Environment Programme, document UNEP/CBD/COP/10/27, annex, decision X/1, annex I.
Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992)	United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67.
European Charter for Regional or Minority Languages (Strasbourg, 5 November 1992)	*Ibid.*, vol. 2044, No. 35358, p. 575.
Protocol on the Programme for the Regional Study of the El Niño Phenomenon in the South-East Pacific (Callao, 6 November 1992)	Permanent Commission of the South Pacific, "Protocol on the Programme for the Regional Study of the El Niño Phenomenon in the South-East Pacific", in *Convenios, Acuerdos, Protocolos, Declaraciones, Estatuto y Reglamento de la CPPS*, 3rd ed., Guayaquil, 2007, pp. 103–115.
North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA) (Mexico City, Ottawa and Washington, D.C., 17 December 1992)	Washington, D.C., United States Government Printing Office, 1993; available from the NAFTA secretariat: www.nafta-sec-alena.org.
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)	United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 45.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	*Ibid.*, vols. 1867–1869, No. 31874.
Understanding on Rules and Procedures Governing the Settlement of Disputes (annex 2)	*Ibid.*, vol. 1869, p. 401.
Inter-American Convention on the Forced Disappearance of Persons (Belém, 9 June 1994)	ILM, vol. 33, No. 6 (November 1994), p. 1529.
Framework Convention for the Protection of National Minorities (Strasbourg, 1 February 1995)	United Nations, *Treaty Series*, vol. 2151, No. 37548, p. 243.
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
Inter-American Convention against Corruption (Caracas, 29 March 1996)	OAS, *Treaty Series*, No. B-58.
Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996)	A/50/1027, annex.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	*Ibid.*, vol. 2187, No. 38544, p. 3. For the amendment to article 8 of the Rome Statute of the International Criminal Court (Kampala, 10 June 2010), see *ibid.*, vol. 2868, No. 38544, p. 197. For the Amendments on the crime of aggression to the Rome Statute of the International Criminal Court (Kampala, 11 June 2010), see *ibid.*, vol. 2922, No. 38544, p. 199.
Criminal Law Convention on Corruption (Strasbourg, 27 January 1999)	*Ibid.*, vol. 2216, No. 39391, p. 225.
Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Geneva, 17 June 1999)	*Ibid.*, vol. 2133, No. 37245, p. 161.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	*Ibid.*, vol. 2178, No. 38349, p. 197.
United Nations Convention against Transnational Organized Crime (New York, 15 November 2000)	*Ibid.*, vol. 2225, No. 39574, p. 209.
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.
Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001)	United Nations, *Treaty Series*, vol. 2562, part I, No. 45694, p. 3.
Convention on Cybercrime (Budapest, 23 November 2001)	*Ibid.*, vol. 2296, No. 40916, p. 167.
Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems (Strasbourg, 28 January 2003)	*Ibid.*, vol. 2466, No. 40916, p. 205.
ASEAN Agreement on Transboundary Haze Pollution (Kuala Lumpur, 10 June 2002)	Available from the ASEAN website: www.asean.org, *Legal Documents*.
African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003)	ILM, vol. 43, No. 1 (January 2004), p. 5.
United Nations Convention against Corruption (New York, 31 October 2003)	United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.
Treaty on Mutual Legal Assistance in Criminal Matters (Kuala Lumpur, 29 November 2004)	*Ibid.*, vol. 2336, No. 41878, p. 271.
United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004)	*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38, annex.
Council of Europe Convention on the Prevention of Terrorism (Warsaw, 16 May 2005)	United Nations, *Treaty Series*, vol. 2488, No. 44655, p. 129.
Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005)	*Ibid.*, vol. 2440, No. 43977, p. 311.
Free Trade Agreement between the EFTA States and the SACU States (Höfn, 26 June 2006)	Available from the EFTA website: www.efta.int/.
International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006)	United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.
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 Protocol) (Malabo, 27 June 2014)	*Ibid.*

	Source
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala, 23 October 2009)	United Nations, *Treaty Series*, vol. 3014, No. 52375, p. 3.
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 (vol. no. to be determined). Available from: https://treaties.un.org.
Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (Brussels, 30 October 2016)	*Official Journal of the European Union*, L 11, p. 23, 14 January 2017.
Council of Europe Convention on Cinematographic Co-production (revised) (Rotterdam, 30 January 2017)	Council of Europe, *Treaty Series*, No. 220.
Council of Europe Convention on Offences relating to Cultural Property (Nicosia, 19 May 2017)	*Ibid.*, No. 221.

CHECKLIST OF DOCUMENTS OF THE SIXTY-NINTH SESSION

Symbol	*Title*	*Observations and references*
A/CN.4/701	Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur	Reproduced in *Yearbook … 2016*, vol. II (Part One).
A/CN.4/702	Provisional agenda for the sixty-ninth session	Available from the website of the Commission, documents of the sixty-ninth session. The agenda as adopted is reproduced above, p. viii.
A/CN.4/703	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first session, prepared by the Secretariat	Available from the website of the Commission, documents of the sixty-ninth session.
A/CN.4/704	Third report on crimes against humanity, by Sean D. Murphy, Special Rapporteur	Reproduced in *Yearbook … 2017*, vol. II (Part One).
A/CN.4/705 [and Corr.1]	Fourth report on the protection of the atmosphere, by Shinya Murase, Special Rapporteur	*Idem.*
A/CN.4/706	Second report on *jus cogens*, by Dire Tladi, Special Rapporteur	*Idem.*
A/CN.4/707	Provisional application of treaties. Memorandum by the Secretariat	*Idem.*
A/CN.4/708	First report on succession of States in respect of State responsibility, by Pavel Šturma, Special Rapporteur	*Idem.*
A/CN.4/L.892 and Add.1	Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading	Available from the website of the Commission, documents of the sixty-ninth session.
A/CN.4/L.893	Immunity of State officials from foreign criminal jurisdiction: Titles of Parts Two and Three, and texts and titles of draft article 7 and annex provisionally adopted by the Drafting Committee at the sixty-ninth session	*Idem.*
A/CN.4/L.894	Protection of the atmosphere: Text of draft guideline 9 and preambular paragraphs as provisionally adopted by the Drafting Committee during the sixty-ninth session	*Idem.*
A/CN.4/L.895/Rev.1	Provisional application of treaties: Texts and titles of the draft guidelines provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions	Document distributed at the session. See also the 3382nd meeting below, p. 295, para. 25.
A/CN.4/L.896 and Add.1	Draft report of the International Law Commission on the work of its sixty-ninth session, chapter XI (Other decisions and conclusions of the Commission)	See the adopted text in *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10). The final text appears in *Yearbook … 2017*, vol. II (Part Two).
A/CN.4/L.897	*Idem*, chapter I (Organization of the session)	*Idem.*
A/CN.4/L.898	*Idem*, chapter II (Summary of the work of the Commission at its sixty-ninth session)	*Idem.*
A/CN.4/L.899	*Idem*, chapter III (Specific issues on which comments would be of particular interest to the Commission)	*Idem.*
A/CN.4/L.900 and Add.1/ Rev.1 and Add.2–3	*Idem*, chapter IV (Crimes against humanity)	*Idem.*
A/CN.4/L.901 and Add.1–2	*Idem*, chapter V (Provisional application of treaties)	*Idem.*
A/CN.4/L.902 and Add.1–2	*Idem*, chapter VI (Protection of the atmosphere)	*Idem.*
A/CN.4/L.903/Rev.1 and Add.1–3	*Idem*, chapter VII (Immunity of State officials from foreign criminal jurisdiction)	*Idem.*
A/CN.4/L.904	*Idem*, chapter VIII (Peremptory norms of general international law (*jus cogens*))	*Idem.*

Symbol	*Title*	*Observations and references*
A/CN.4/L.905	*Idem*, chapter IX (Succession of States in respect of State responsibility)	*Idem.*
A/CN.4/L.906	*Idem*, chapter X (Protection of the environment in relation to armed conflicts)	*Idem.*
A/CN.4/SR.3348–A/CN.4/SR.3389	Provisional summary records of the 3348th to 3389th meetings	Available from the website of the Commission, documents of the sixty-ninth session. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

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

Held at Geneva from 1 May to 2 June 2017

3348th MEETING

Monday, 1 May 2017, at 3.05 p.m.

Temporary Chairperson: Mr. Gilberto Vergne SABOIA

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Opening of the session

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

Election of officers

Mr. Nolte was elected Chairperson by acclamation.

Mr. Nolte took the Chair.

2. The CHAIRPERSON thanked the members of the Commission for the trust they had placed in him and said that he would make every effort to ensure that the current session was productive and successful.

Mr. Valencia-Ospina was elected First Vice-Chairperson by acclamation.

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

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

Mr. Aurescu was elected Rapporteur by acclamation.

Introductory remarks of the Chairperson

3. The CHAIRPERSON extended a special welcome to the new members and recalled that, when he had first joined the Commission, he had wondered whether 34 independent, eminent persons from all the regions of the world would be able to agree on something meaningful. He had quickly learned, however, that they could, not least owing to the common institutional spirit, or *esprit de corps*, within the Commission. The latter's strength was due to its members' intellectual rigour and capacity, their technical knowledge and vision, their respect for each other's views, their ability to dialogue and their discipline and hard work. The Commission was also fortunate to be supported by an extremely knowledgeable and competent secretariat.

4. In 2007, before attending his first session, he had read some academic articles that had cast doubt on the future of the Commission. Some commentators had been of the opinion that the Commission had exhausted suitable topics, while others thought that a commission that dealt with general matters of international law was obsolete, on account of the multitude of special regimes that had come into being. Indeed, initially he had also felt that the Commission focused mainly on completing old topics. He had, however, discovered that the Commission, albeit slow, was receptive and creative. By 2012, the Commission had embarked upon a completely different programme of work and, since then, it had been so productive that the time might have come to review its working methods in order to ensure that its output was thoroughly considered before submission to States' scrutiny.

5. The success and productivity of the Commission depended not only on the initiative and hard work of its members, but also on whether the climate of international relations was conducive to agreement on general questions of international law. In retrospect, the history of the Commission showed that there had been phases when it had been more productive than others. Current indications from a variety of regions suggested that the world was entering a period when it might be more difficult to reach agreement among States on some significant issues. If that were true, the Commission's

responsibility as a guardian of the general rules of international law was all the greater. The Commission was not just another diplomatic negotiating venue for States. Its competitive advantage stemmed from its special rapporteurs' rigorous and impartial scientific research and from broad-minded debate among its members, to whom States had entrusted the preliminary identification and the cultivation of common legal rules and interests, including those of humankind as a whole. That task was especially important when States were reluctant to move forward and agree on the development of international law. The ability of the Commission members to reach agreement on such matters became all the more valuable when the environment outside the meeting room was challenging. He therefore hoped that the current session would set an example of how effective the Commission could be.

Adoption of the agenda (A/CN.4/702)

The agenda was adopted.

6. The CHAIRPERSON invited the Bureau and the special rapporteurs to join him to discuss the programme of work and a number of organizational matters.

The meeting was suspended at 3.35 p.m. and resumed at 4.20 p.m.

Organization of the work of the session

[Agenda item 1]

7. The CHAIRPERSON drew attention to the proposed programme of work for the first two weeks of the Commission's current session, which would begin with the consideration of the topic "Crimes against humanity".

8. The Drafting Committee on provisional application of treaties would seek to conclude the work left over from 2016 with a view to the Commission taking a decision, during the first part of the session, on the draft guidelines proposed by the Drafting Committee on the basis of the Special Rapporteur's first four reports.[1]

9. The current year would be a particularly important one for the Planning Group, which would be chaired by Mr. Valencia-Ospina, as it would have to make the necessary recommendations on events to commemorate the seventieth anniversary of the Commission in 2018. It would also have to examine the proposals for the inclusion of new items in the Commission's programme of work.

10. He took it that the Commission agreed to the proposed programme of work for the first two weeks of the session.

It was so decided.

[1] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/664 (first report); *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675 (second report); *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687 (third report); and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/699 and Add.1 (fourth report).

Crimes against humanity[2] (A/CN.4/703, Part II, sect. A,[3] A/CN.4/704,[4] A/CN.4/L.892 and Add.1[5])

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

11. Mr. MURPHY (Special Rapporteur), introducing his third report on crimes against humanity (A/CN.4/704), said that he wished to recall, by way of background, that the Commission had decided at its sixty-sixth session to include the topic in its programme of work[6] and that its objective, as noted in the syllabus of the topic,[7] was to draft articles for what would become a convention on the prevention and punishment of crimes against humanity. The draft articles would focus on strengthening national criminal laws on crimes against humanity, with a view to enhancing States' ability to investigate alleged offenders and to prosecute or extradite them. That outcome would not interfere with, and indeed would be complementary to, the jurisdiction of international criminal tribunals such as the International Criminal Court.

12. At its sixty-seventh session, the Commission had considered the Special Rapporteur's first report on the topic[8] and had provisionally adopted draft articles 1 to 4, together with commentaries thereto.[9] At its sixty-eighth session, the Commission had considered the second report[10] and had provisionally adopted draft articles 5 to 10, together with commentaries thereto.[11]

13. While an advance copy of his third report, in English only, had been circulated to the Commission members in January 2017, the final version in all six official languages had not been available until April 2017; he hoped that the delay had not created any difficulties. Both the Commission, at its sixty-eighth session, and the Sixth Committee, at the seventy-first session of the General Assembly, had urged him to complete his work on the topic as soon as possible. Consequently, and considering that the Commission's workload for the second part of its sixty-ninth session was likely to be lighter than usual, he had made his third report somewhat longer than he had originally intended, in the interest of enabling the Commission to complete the adoption of the draft articles on first reading by the end of the sixty-ninth session.

14. The report began with an introduction that outlined the Commission's work on the topic thus far, summarized the 2016 debate on the topic in the Sixth Committee and described the purpose and structure of the report. A total

[2] For the history of the work of the Commission on this topic, see *Yearbook … 2017*, vol. II (Part Two), chap. IV, sect. A, p. 19.

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

[4] Reproduced in *Yearbook … 2017*, vol. II (Part One).

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

[6] See *Yearbook … 2014*, vol. II (Part Two) and corrigendum, p. 164, para. 266.

[7] *Yearbook … 2013*, vol. II (Part Two), annex II.

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

[9] *Ibid.*, vol. II (Part Two), pp. 33 *et seq.*, paras. 116–117.

[10] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/690.

[11] *Ibid.*, vol. II (Part Two), pp. 151 *et seq.*, para. 85.

of 39 Member States had made statements during the relevant discussion in the Sixth Committee; their comments had been generally favourable and supportive of the Commission's work, and many States had endorsed the idea that the draft articles become a convention on the prevention and punishment of crimes against humanity. In addition, the Commission continued to receive, and to post on its website, helpful information from States on their national laws and practices.

15. Chapter I of the report dealt with the rights, obligations and procedures applicable to the extradition of an alleged offender, based on the different types of extradition provisions included in various treaties addressing crimes. Criminal law treaties that addressed extradition tended to follow one of two approaches: some treaties simply imposed a general obligation on States to consider the offences referred to in the treaty to be extraditable offences under their existing and future extradition treaties, while others set forth more detailed extradition provisions that allowed the treaty itself to be used as a basis for extradition. Treaties in the second category also tended to address a wide range of issues that could arise in the context of extradition, such as the inapplicability of the political offence exception, satisfaction of the requirements of national law in the extradition process, extradition of a State's own nationals, the prohibition on extradition when the individual concerned might face persecution after extradition, and requirements of consultation and cooperation. Chapter I also included a proposed draft article that addressed those points in the context of crimes against humanity.

16. Chapter II addressed the obligation of *non-refoulement*, which made it impermissible for a State to return an individual to a territory when there were substantial grounds for believing that he or she would be in danger of a specified harm, the nature of which varied depending on the subject matter of the treaty in question. That obligation was found in a wide range of legal instruments, including conventions relating to refugees and asylum, human rights and criminal law. While there were limited exceptions to the obligation of *non-refoulement* in the specific context of conventions on refugees, including on grounds of national security, such exceptions were not included in more recent human rights treaties or treaties dealing with specific crimes. Chapter II contained a proposed draft article providing for an obligation of *non-refoulement* in the context of crimes against humanity.

17. Chapter III addressed the rights and obligations of States regarding mutual legal assistance in connection with criminal proceedings. In some treaties, mutual legal assistance provisions were minimal, typically consisting of just a general obligation to afford the greatest possible measure of assistance. Other treaties contained more detailed provisions that placed a general obligation on all States parties but also amounted to what might be described as a "mini mutual legal assistance treaty" that essentially created a detailed bilateral mutual legal assistance treaty relationship between States parties that did not otherwise have such a relationship or that elected to use the mini mutual legal assistance treaty to facilitate cooperation. Such provisions addressed topics such as the transfer of detained persons to another State to provide evidence, the designation of a central authority to handle mutual legal assistance requests, the option of having witnesses testify via videoconference, and permissible and impermissible grounds for refusing mutual legal assistance requests. Chapter III contained a proposed draft article on mutual legal assistance in the context of crimes against humanity.

18. Chapter IV addressed the participation and protection of victims, witnesses and others in relation to proceedings within the scope of the draft articles, as well as reparation for victims. Unlike many earlier treaties addressing crimes under national law, more recent treaties contained provisions concerning victims and witnesses, typically in relation to the protection of victims and witnesses appearing before courts and tribunals and the provision of reparations to victims and their families. Chapter IV contained a proposed draft article addressing those points.

19. Chapter V addressed the relationship between the draft articles and the rights and obligations of States with respect to competent international criminal tribunals, such as the International Criminal Court. While the draft articles had been crafted so as to avoid any conflict in that regard, a provision that made clear that the rights and obligations of States under the constitutive instruments of competent international criminal tribunals prevailed over their rights and obligations under the draft articles would nevertheless be valuable. Chapter V contained a proposed draft article establishing such a provision.

20. Chapter VI dealt with the issue of federal State obligations. It reviewed the practice by some States of making a unilateral declaration when signing or ratifying a treaty to exclude its application to parts of their territory. Some treaties drafted in recent years had included articles precluding States from making such declarations. Chapter VI contained a proposed draft article addressing the issue.

21. Chapter VII addressed monitoring mechanisms and dispute settlement. Various mechanisms existed for the monitoring of situations of crimes against humanity, either as such or in the context of the types of violations, for example torture, that might occur when such crimes were committed. In addition, numerous treaties, in particular human rights treaties, provided for the creation of a monitoring mechanism body, which could take the form of a committee, commission, court or meeting of States parties. One interesting development in that regard, which had not been discussed in the third report, had been the creation by the General Assembly in December 2016 of a new body to collect evidence of international crimes in the Syrian Arab Republic, the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.[12]

22. If the draft articles were transformed into a convention on the prevention and punishment of crimes against humanity, consideration might be given to the selection of one or more monitoring mechanisms to supplement existing mechanisms. The Secretariat's 2016 memorandum

[12] See General Assembly resolution 71/248 of 21 December 2016.

on existing treaty-based monitoring mechanisms[13] offered an excellent survey of the various mechanisms used in international law. The development of a new mechanism for crimes against humanity might help to ensure that States parties fulfilled their commitments under the convention, for example their commitments concerning the adoption of national laws and appropriate preventive measures, the prompt and impartial investigation of alleged offenders and compliance with their *aut dedere aut judicare* obligation. However, in his view, the selection of a particular mechanism or mechanisms depended largely on factors other than legal reasoning. In addition, choices would have to be made with regard to structure: a new monitoring mechanism might be incorporated immediately or might be developed at a later stage, as had occurred with the creation of the committee to monitor implementation of the International Covenant on Economic, Social and Cultural Rights. Lastly, a monitoring mechanism could be developed in tandem with a monitoring mechanism for the Convention on the Prevention and Punishment of the Crime of Genocide, for which there had been periodic calls in recent years. In his view, it might be best for States to select the most appropriate mechanism for a new convention on crimes against humanity. He had therefore not made a proposal for a specific mechanism.

23. Chapter VII also discussed dispute settlement clauses, which required States parties to a treaty to negotiate in the case of a dispute and, if those negotiations failed, to make use of further methods of compulsory dispute settlement, including arbitration and resort to the International Court of Justice. Chapter VII contained a proposed draft article on inter-State dispute settlement.

24. Chapter VIII addressed other issues that had arisen in the course of the Commission's discussions, specifically concealment of crimes against humanity, immunity and amnesty.

25. Chapter IX proposed a preamble highlighting a number of core elements that motivated and justified the draft articles.

26. Chapter X addressed the issue of final clauses and discussed the options open to States, in particular their options for a final clause on reservations. Although the report did not contain proposals in that regard, as the Committee did not usually include final clauses among its draft articles, chapter X would be particularly useful in the event that the draft articles were transformed into a convention.

27. Chapter XI addressed the future programme of work. In his view, if the Commission managed to conclude its work on the draft articles at the current session, it would be possible to complete the first reading. To achieve that goal, the Drafting Committee would have to complete its work on the draft articles and revisit some of the previously adopted draft articles. One issue that might be discussed, and one that had been raised in the Drafting Committee in 2016, was whether to retain draft article 5[14] as a single article or to split it into a series of draft articles. If all went well, the full set of draft articles and the commentaries thereto would be ready for the Commission's approval in the second part of the session.

28. Before ending his statement, he wished to note that the topic continued to attract considerable interest beyond the Commission. He was regularly approached by Governments, international organizations, treaty bodies, nongovernmental organizations (NGOs) and scholars. Over the previous year, he had briefed representatives of the Office on Genocide Prevention and the Responsibility to Protect and members of the Committee on Enforced Disappearances, had met with Mr. Santiago Villalpando, the Chief of the Treaty Section of the Office of Legal Affairs, had participated in an interactive dialogue with members of the Sixth Committee, had chaired a panel at the Assembly of States Parties to the Rome Statute of the International Criminal Court and had participated in various university events. He hoped to continue those efforts over the following year. Indeed, Amnesty International had invited him to participate in an upcoming workshop in Geneva at which many NGOs, the Committee on Enforced Disappearances and the Office of the United Nations High Commissioner for Human Rights would be represented. Amnesty International had published an analysis of his report,[15] which had been made available to the members of the Commission.

29. In response to the request by Mr. Hassouna at the previous session[16] for an update on the initiative launched by Belgium, the Netherlands and Slovenia to develop a mutual legal assistance and extradition treaty for the prosecution of the most serious international crimes, he said that he was not aware of any notable progress in that regard. He could, however, report that an expert group meeting might take place in late June. In the Netherlands, the Advisory Committee on Issues of Public International Law had recently recommended that the Government should support the initiative for a convention on crimes against humanity. It remained his view that those two initiatives were not in conflict.

30. Mr. HMOUD, noting that the Special Rapporteur planned to complete the first reading at the current session, said that some of the issues raised in the third report, for example monitoring mechanisms and dispute settlement, were usually left to a diplomatic conference. He wished to know whether there would be further draft articles and why the issue of inter-State dispute settlement had been addressed in the draft articles. In addition, the relationship between monitoring mechanisms and dispute settlement might require further discussion.

31. Mr. MURPHY (Special Rapporteur) said that certain issues had been addressed in the report because they had previously been discussed, at least informally, in the Commission. For several of those issues, he had concluded that a corresponding draft article should not be adopted. For example, while it had been useful to survey existing and potential monitoring mechanisms, he had not selected a specific mechanism. He agreed that, like

[13] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698.

[14] *Ibid.*, vol. II (Part Two), pp. 151–152 (draft article 5).

[15] Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, London, 2017.

[16] See *Yearbook … 2016*, vol. I, 3301st meeting, p. 88, para. 14.

final clauses, such issues were usually left to a diplomatic conference. The only draft articles that he was proposing were those contained in annex II. The Commission might decide that other issues should be addressed, in which case it might no longer be possible to complete the first reading at the current session, as a fourth report on the topic might be required.

32. Mr. SABOIA said that he would be grateful for clarification regarding the status of the "remaining issues" discussed in the third report, namely concealment of crimes against humanity, immunity and amnesty.

33. Mr. MURPHY (Special Rapporteur) said that, in chapter VIII of the report, he had considered how those three issues, which had previously been discussed in the Commission, at least informally, had been dealt with in treaties relevant to the topic. He had concluded that the Commission should not address those issues in the draft articles.

34. Mr. TLADI said that he wished to congratulate the Special Rapporteur for his well-written and well-researched third report. He was of the view, however, that it could have been much shorter, even allowing for the fact that it covered much ground and presented many draft articles. Given the Commission's approach to the topic, which was not necessarily to codify existing rules of customary international law but rather to develop a proposed convention based on existing instruments, none of the options chosen by the Special Rapporteur could be wrong.

35. The report itself provided an illustration of the one concern that he had with the Commission's approach to the topic, which ran contrary to what he had been advocating since the topic was first included in the Commission's long-term programme of work,[17] namely, that, in addition to crimes against humanity, the topic should cover war crimes and genocide. He remained unconvinced by the responses of the Special Rapporteur and other Commission members, who had pointed out that those crimes had their own regimes and were thus not in need of augmentation. Indeed, none of the proposed draft articles in the report had an equivalent in either the Geneva Conventions for the Protection of War Victims and the Protocols Additional thereto or the Convention on the Prevention and Punishment of the Crime of Genocide.

36. That point was further illustrated in chapter I (Extradition). In paragraph 21 of his report, the Special Rapporteur noted that there was currently no global or regional convention devoted exclusively to the extradition of alleged perpetrators of crimes against humanity. Such a convention would have clearly set forth the rights, obligations and procedures applicable to the extradition of such alleged offenders. However, that very point also applied to the extradition of alleged perpetrators of war crimes and genocide. To begin with, there was no provision at all in the war crimes regime that was applicable to extradition in the case of war crimes committed during a non-international conflict, a gap that could reasonably be filled by the Commission through its work on the topic. More importantly, article 88, 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) established no more than a rudimentary obligation for the High Contracting Parties to cooperate in the matter of extradition. It called on them to do so when circumstances permitted, and to give "due consideration" to the request for extradition of the State in whose territory the alleged offence had occurred. That obligation was by no means equivalent to what the Special Rapporteur referred to in his report as "clearly stated rights, obligations and procedures" with regard to the extradition process. Nor did the Convention on the Prevention and Punishment of the Crime of Genocide provide much more detail, apart from the fact that the obligation laid down in its article VII was for the Contracting Parties to pledge themselves to grant extradition in accordance with their laws and treaties in force. His observation applied equally to draft articles 12, 13 and 14, which were the substantive provisions proposed by the Special Rapporteur in his report.

37. The statement contained in paragraph 22 of the report that "many States would not extradite in the absence of an extradition agreement" might or might not be correct. It would have been useful for the Special Rapporteur to back up that statement with examples of practice and perhaps even statistics, where those were available.

38. Although the Special Rapporteur had decided not to propose a provision on addressing conflicting requests for extradition, it was important to do so, even if such a provision did nothing more than outline the broad principles to be taken into account by the State in whose territory the alleged offender was found. While questioning whether it was true that many extradition treaties did not seek to regulate which requesting State had priority in the event of conflicting requests for extradition, he recalled that the purpose of looking at other instruments and regimes was not simply to reproduce their provisions but rather to seek inspiration from them. From that perspective, the Commission ought not to feel constrained by what had or had not been done in the past.

39. In drafting a provision that detailed how a State should exercise its sovereign right to take a decision regarding extradition, it might be relevant to identify and take into account factors such as the State (or entity) that had made the first request; the State in which the alleged crimes had been committed; the State that possessed the majority of the evidence; the State where most of the witnesses lived; and the State that was more likely to engage in genuine prosecution of the alleged offender. In the case of an international criminal tribunal that was seeking the surrender of an alleged offender, one relevant factor might be whether other requesting States were parties to the statute of that tribunal and were thus obliged to respect its provisions.

40. The Special Rapporteur seemed to suggest that the reason for not including in the draft articles a provision on how to address conflicting requests for extradition was that such provisions were not usually included in other treaties. That was not a sufficient reason because the offences covered by most of those other treaties were, by and large, transnational crimes, and not core crimes, like

[17] See *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 170.

the ones covered by the draft articles. It was also possible that there were fewer States with jurisdiction over transnational crimes, so that the question of competing requests either did not arise or arose less frequently. It might be possible to draw inspiration for a provision on that subject from article 90 of the Rome Statute of the International Criminal Court. Lastly, for the reasons stated in the report, he fully agreed that it was unnecessary to spell out the dual criminality requirement.

41. With regard to paragraphs 37 to 41 of the report, it was unclear what purpose would be served by including in the draft articles a provision making it an obligation for States parties to recognize crimes against humanity as an extraditable offence in existing and future treaties. That was because the obligation to extradite or prosecute (*aut dedere aut judicare*) established by the Commission in draft article 9[18] implied a duty to extradite if no submission to prosecution occurred. Even though it was phrased as a duty to submit to prosecution, that provision clearly implied that the offence of crimes against humanity was an extraditable offence. If the Special Rapporteur did not consider that implication to be clear, then perhaps that point should be made in paragraph 1 of draft article 11, instead of seeking to regulate the content of existing and future treaties. On the reasoning that the Commission's aim ought to be to add value rather than simply incorporate provisions from existing instruments, the best approach seemed to be to specify in the draft articles that, for the purposes of the draft articles or a future convention, whichever was appropriate, crimes against humanity were extraditable offences. That would eliminate the need for the interpretation (and possible misinterpretation) of future treaties.

42. With regard to paragraphs 42 to 49 of the report, he agreed with the general thrust of the Special Rapporteur's proposal that the political offence exception should not apply to extradition for crimes against humanity. It would, however, be useful to provide examples of practice where the exception applied. There was no mention of crimes against humanity in the examples of practice identified by the Special Rapporteur in paragraph 46, nor were crimes against humanity, as such, included in the antepenultimate footnote to the same paragraph, which provided examples of bilateral treaties that specified particular offences that should not be regarded as political offences. It might be worth considering the reasons why that was so. He agreed with the Special Rapporteur's point that it was the conduct of committing a crime against humanity that could never be regarded as a political offence. It was a wholly different matter, however, when the request for extradition was made with a political motive.

43. With regard to paragraphs 50 to 55, which related to the circumstances in which a State's national law made extradition conditional on the existence of a treaty, he failed to see the value that would be added by a provision in draft article 11 specifying that the draft articles—or eventual convention—would serve as the legal basis for extradition. The only justification would be that it was reflected in other extradition instruments. In that case as well, draft article 11 ought to be read in conjunction with draft article 9. The latter clearly provided that, if a requested State did not submit the case of an alleged offender to its competent authorities for the purpose of prosecution, it must proceed to extradite the offender. That obligation was not dependent on the existence of another treaty, as was clear from the judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. It was therefore unclear which cases such a provision would address. It was noteworthy that, in paragraph 71 of his report, the Special Rapporteur recognized the relevance of draft article 9 in relation to the extradition by a State of one of its own nationals, which obviated the need for a special provision on extradition in such cases. The same considerations applied to the other cases he had mentioned.

44. In the light of those comments, draft article 11 as proposed by the Special Rapporteur should be significantly streamlined. At the outset, a clear link should be established between draft articles 11 and 9. The first paragraph should thus simply state that draft article 9 provided for the extradition of an alleged offender in the event that a State did not submit the offender for prosecution; alternatively, it could state that the draft article set forth the rules and procedures relating to extradition. Paragraphs 3, 4 and 5 of draft article 11 were superfluous; the rest of the draft article should focus on the detailed procedures for extradition.

45. With respect to paragraphs 9 and 10 of draft article 11, the Commission should consider including broader language that permitted a requested State to set the necessary conditions for the extradition of the alleged offender. It could, for example, stipulate that the extradited person should not be subjected to the death sentence or to other cruel, inhuman or degrading treatment or punishment in the requesting State. Although he did not propose to spell out that particular condition, he would not be opposed to doing so. The inclusion of a general recognition of the requested State's prerogative to set conditions for extradition and to have them respected by the requesting State, if the latter accepted the extradition on the basis of those conditions, and the inclusion of the death penalty as an example in the commentaries, would be sufficient. Draft article 9 should also include a provision that addressed competing requests for extradition.

46. With regard to draft article 13 on mutual legal assistance, he expressed a preference for a shorter text, noting that paragraphs 1 and 2 could easily be merged. Paragraph 5 did not appear to express a genuine obligation, and the draft articles would not at all be impoverished if it were excluded. Although he agreed with the principle concerning the transmission of information by States without a prior request, he felt that in those circumstances, a State should be permitted to set such reasonable conditions as it deemed necessary. The caveat in paragraph 7 concerning the disclosure of information of an exculpatory nature without first seeking the concurrence of the requested State was problematic; he had a similar difficulty with the related caveat set out in paragraph 21.

47. He agreed with the Special Rapporteur's statement in paragraph 199 that, as such, there did not appear to be any conflict between the rules set forth in the current draft

[18] *Yearbook … 2016*, vol. II (Part Two), p. 166 (draft article 9).

articles and those set forth in the instruments establishing international criminal tribunals. However, he was uncomfortable with the content of draft article 15: first, it seemed unlikely that such a conflict would arise, given that the subject matter of the draft articles was the facilitation of national-level jurisdiction; and second, even if it did, it was not altogether clear that the provisions of the constitutive instrument of the international criminal tribunal in question should prevail. Draft article 15 had obviously been drafted with the Rome Statute of the International Criminal Court in mind. However, other international criminal tribunals might well be established in the future, and the Commission should consider whether it could agree to allow provisions established by those unknown entities to prevail over its carefully drafted instrument. The Statute itself had been based on the principle of the primacy of national jurisdiction, and draft article 15 seemed to be in direct conflict with that principle. Consequently, he did not support sending draft article 15 to the Drafting Committee.

48. With regard to draft article 16, which provided that the draft articles applied to all parts of federal States, he was of the view that, as a matter of law, that provision was self-evident and therefore unnecessary, and it ought not to be included in the draft articles. As a matter of fact, chapter VI, as a whole, was also unnecessary and ought not to have been included in the third report. He therefore did not support the referral of draft article 16 to the Drafting Committee.

49. With respect to the chapter on monitoring mechanisms, he felt that it could have been shorter. Moreover, there did not appear to be any real distinction between commissions and committees, as they were described in the report. The Special Rapporteur's decision not to propose any mechanism but simply to provide a range of options that States could, at the appropriate time, select, was a sensible one. On the other hand, given the myriad existing mechanisms identified by the Special Rapporteur as being potentially applicable to crimes against humanity, the adoption of a convention that did not provide for a monitoring mechanism would also be acceptable.

50. Given his long-held view that the most important contribution of the Commission's work to the development of international law was the establishment of rules on inter-State cooperation mechanisms, he agreed that such mechanisms were likely to be more useful than monitoring mechanisms. He fully endorsed the Special Rapporteur's decision to propose a draft article on inter-State dispute settlement and agreed with him that it should include a requirement for negotiation, failing which arbitration and settlement before the International Court of Justice should be provided as options. He further agreed that provision should be made for the possibility of opting out of inter-State dispute settlement. He did not agree, however, with the Special Rapporteur's policy preference in paragraph 2 of his proposed draft article 17, which designated arbitration as the default inter-State dispute settlement mechanism and the International Court of Justice as a fallback when States were unable to agree on the organization of the arbitration. That choice by the Special Rapporteur appeared to be based on article 12 of the Convention for the Suppression of Unlawful Seizure of Aircraft. Yet other options, not considered by the Special Rapporteur, provided a different and better formula. They included article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations and article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination, which designated the Court as the default mechanism for the settlement of disputes, with other modes, notably arbitration, provided for if the parties agreed.

51. In conclusion, he was in favour of referring draft articles 11, 12, 13, 14 and 17 to the Drafting Committee. He had no problem with the draft preamble, and he supported the Special Rapporteur's intention to complete the set of draft articles at the current session.

The meeting rose at 5.45 p.m.

3349th MEETING

Tuesday, 2 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

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 crimes against humanity (A/CN.4/704).

2. Mr. MURASE said that he remained concerned about the difficulty inherent in the topic of crimes against humanity. In taking up a topic, the Commission could either engage in codification and progressive development or respond to specific requests by the General Assembly to elaborate new conventions. In the latter case, the Commission did not have to concern itself with the customary law status of the rules that it was elaborating and could simply make a new law, often resorting to analogies with similar treaty regimes. As there had been no such specific request by the General Assembly, the topic should be considered to fall under the Commission's usual mandate, based on the "established" rules of customary law for codification and "emergent" customary rules for progressive development. The Special Rapporteur, however, did not

seem to be concerned with the customary law status of rules, as though the Commission had been requested to develop a new law on the subject. That concern had also been expressed by some delegations, including China, in the Sixth Committee in 2016.

3. He reiterated his serious concern about the methodology applied in drafting draft article 11 on extradition. The Special Rapporteur referred to the provisions of the United Nations Convention against Corruption relating to extradition, concluding that they provided a "suitable basis" for the draft article and that their inclusion "appears warranted". The Convention was irrelevant to crimes against humanity, and the mere enumeration of similar treaty provisions on crimes other than crimes against humanity did not provide any evidence of the existence of relevant rules of customary international law. Such a methodology would be permitted only if the General Assembly had requested the elaboration of a new convention; however, as no such request had been made, the third report as a whole, and draft article 11 in particular, seemed to deviate from the Commission's mandate.

4. As the Special Rapporteur aptly observed in paragraph 83 of the report, "a crime against humanity by its nature is quite different from a crime of corruption". Draft article 11, paragraph 6, by analogy with article 44, paragraph 8, of the United Nations Convention against Corruption, stipulated that extradition of an alleged perpetrator of crimes against humanity should be subject to conditions, including the minimum penalty requirement for extradition set forth in the national law of the requested State. While the minimum penalty might be relevant to extradition in cases of corruption, it was the maximum penalty, capital punishment, that was relevant in cases of crimes against humanity. As an author of the *Max Planck Encyclopedia of Public International Law* had rightly pointed out, the problem of the death penalty must be addressed in draft article 11, paragraph 6, since under most extradition treaties and statutes, surrender could be denied if the offence for which extradition is requested is punishable by death under the law of the requesting State. Perhaps the maximum penalty aspect would be better dealt with in draft article 12 on *non-refoulement*.

5. With regard to the portion of the report on dual criminality, he reiterated his earlier comment that it was not clear from draft article 5[19] to what extent States had an obligation to incorporate into their national laws the definition of crimes against humanity contained in draft article 3.[20] If States were required to incorporate the definition verbatim, he agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in draft article 5, but if that was not the case it might be necessary to do so. According to draft article 11, paragraph 4 (*a*), a State was obliged to extradite an alleged offender on the basis of the draft articles, given that the word "shall" was used in the *chapeau* of paragraph 4. However, the Special Rapporteur had not provided sufficient evidence of the customary nature of paragraph 4 (*a*). Article 44, paragraph 6 (*a*), of the United Nations Convention against Corruption, which served as a model for the paragraph, applied only to crimes of corruption. The word "shall" in the *chapeau* should therefore be replaced with "may".

6. In paragraphs 62 and 71 of the report under consideration, the Special Rapporteur indicated that even if the requested State refused a request for extradition or surrender because of its national laws, it remained obliged to submit the case to its competent authorities for the purpose of prosecution, pursuant to draft article 9.[21] However, draft article 9 dealt with procedural rather than substantive matters, and did not refer to the penalties that the court would subsequently impose. Draft article 9 did not impose an obligation on other States that were required to establish jurisdiction over the offence to do so. While the Special Rapporteur dealt with retaliatory trials in draft article 10,[22] he did not seem to be concerned with sham trials. Although he addressed the problem of amnesties in chapter VIII, section C, his conclusion in paragraph 297 that "the present draft articles should not address the issue of amnesties under national law" seemed inappropriate. The conclusion that a national amnesty would not bar prosecution of a crime against humanity by a competent international criminal tribunal or a foreign State seemed to be worth mentioning in the draft articles, particularly in the light of the doubt surrounding the implication in draft article 15 that a newly established international criminal tribunal could establish a lower standard for guaranteeing international human rights.

7. According to paragraph 26 of his third report, the Special Rapporteur had decided not to make any proposal for a provision on multiple requests for extradition, leaving the ultimate decision to the requested State. However, General Assembly resolution 3074 (XXVIII) of 3 December 1973 gave priority "as a general rule" to the countries in which alleged offenders had committed crimes against humanity, because the territorial State in which the crimes had been committed had more evidence than other requesting States and was thus best placed to prosecute and punish the alleged offender. If the Special Rapporteur were to take sham trials into consideration, it would thus be preferable to give priority to the territorial State, for the sake of judicial economy and effective punishment.

8. In draft article 12, paragraph 1, the words "or extradite" overlapped with draft article 11, paragraph 11, and should be deleted. Draft article 12 should be placed after draft article 4 on the obligation of prevention,[23] in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In draft article 13 on mutual legal assistance, the simple analogy with the United Nations Convention against Transnational Organized Crime was inappropriate. That instrument provided for long-form mutual legal assistance because it dealt with transnational crimes, the prosecution of which necessitated cooperation and mutual assistance between States. In contrast, crimes against humanity tended to be committed in a single State and were thus not transnational in nature. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the

[19] *Ibid.*, pp. 151–152 (draft article 5).

[20] *Yearbook … 2015*, vol. II (Part Two), p. 37 (draft article 3).

[21] *Yearbook … 2016*, vol. II (Part Two), p. 166 (draft article 9).

[22] *Ibid.*, p. 168 (draft article 10).

[23] *Yearbook … 2015*, vol. II (Part Two), p. 47 (draft article 4).

Protection of All Persons from Enforced Disappearance provided for short-form mutual legal assistance, since such crimes were committed by State organs and the co-operation of the territorial State could not be expected. Given that the same was true for crimes against humanity, the short-form article would be preferable.

9. Concerning draft article 14 on victims, witnesses and others, he said that in general, protection of victims was dealt with in human rights law, while international criminal law focused on the prevention and punishment of particular crimes, either imposing an obligation on States parties to incorporate the crime into national criminal law as a punishable offence or else setting out priorities for the exercise of competing national jurisdictions. In contrast to draft article 13, which adopted the criminal law approach by mirroring the United Nations Convention against Corruption, draft article 14 mainly relied on the International Convention for the Protection of All Persons from Enforced Disappearance and thus took the human rights law approach. Given that the preamble to the latter Convention suggested that, due to its extreme seriousness, enforced disappearance could, in certain circumstances, constitute a crime against humanity, it seemed appropriate to draw on that Convention in formulating the draft articles.

10. However, draft article 14 was not without its problems. First, paragraphs 1 and 3 reflected the human rights approach while paragraph 2 reflected the criminal law approach, providing for the participation of victims in criminal proceedings, something which did not appear in the International Convention for the Protection of All Persons from Enforced Disappearance. Such a selective approach might risk making the whole project unacceptable to States. Allowing victims to participate in criminal proceedings might be erosive to existing judicial systems and would not be acceptable to States unless there were strong incentives for them to yield their sovereignty. Unfortunately, that did not seem to be the case with crimes against humanity, which were typically committed with the involvement of State officials. Taking provisions from both approaches might increase the effectiveness of the convention but at the same time might give States less incentive to accede to it.

11. Second, it seemed problematic to include guarantees of non-repetition, a concept that had been developed in the context of the Commission's articles on the responsibility of States for internationally wrongful acts,[24] in connection with the right to obtain reparations. In that text, a distinction was made between non-repetition and cessation, on the one hand, and reparation for injury, including restitution, compensation and satisfaction, on the other. In other words, guarantees of non-repetition were not generally seen as a form of reparation. Admittedly, article 24, paragraph 5, of the International Convention for the Protection of All Persons from Enforced Disappearance included guarantees of non-repetition as a form of reparation; while that might be justified for such crimes that were continuing in nature, caution had to be taken not to transfer that unique form of reparation to a more general field without careful consideration.

12. Third, article 14, paragraph 3, referred to the right to obtain reparation on a collective basis, something that was not explicitly provided for even in the International Convention for the Protection of All Persons from Enforced Disappearance and thus seemed to fall under the category of progressive development. The Special Rapporteur must explain why he thought it important to include that form of reparation in the draft articles: in paragraph 194 of his report, he merely noted that "in some situations only collective forms of reparation may be feasible or preferable", without any explanation. That contrasted sharply with the treatment of individual reparations, which was supported by ample references. The collective forms of reparation cited, such as the building of monuments of remembrance, were measures that had been taken voluntarily or through reconciliation processes, and he was not convinced that it was appropriate to refer to them in a universal instrument.

13. With regard to chapter VIII, section A, on the concealment of crimes against humanity, he said that in a commentary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it was stated that the terms "complicity or participation" in article 4, paragraph 1, had to be interpreted to include "concealment".[25] In the light of the principle of legality, he would appreciate clarification of whether or not complicity in crimes against humanity included concealment of such crimes.

14. The meaning of draft article 15 on the relationship to competent international criminal tribunals was unclear. If the rights and obligations under the constitutive instruments of the competent international criminal tribunals were to prevail over the rights and obligations under the draft articles, one might wonder about the purpose of elaborating draft articles on the topic. Draft article 15 might undermine the fight against impunity by prioritizing international criminal jurisdictions and the constitutive instruments of international criminal tribunals, which would run counter to the principle of complementarity in the Rome Statute of the International Criminal Court and leave room for interpretative confusion between the Statute and the proposed convention on crimes against humanity.

15. The Special Rapporteur's approach to immunity left something to be desired. Although his analysis of the immunity of State officials arguably corresponded to the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, he did not properly explain why the draft articles simply ignored the treaty provisions referred to in paragraph 281 that provided that State officials had international criminal responsibility or should be punished. Draft article 5, paragraph 4, surely implied the irrelevance of acts of States or of the superior orders defence, in line with article 2, paragraph 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

[24] The draft articles adopted by the Commission 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.

[25] M. Nowak and E. McArthur (eds.), *The United Nations Convention against Torture: a Commentary*, Oxford University Press, 2008, p. 238, para. 25.

nevertheless, such a provision might not be strong enough to prevent impunity for those responsible for the gravest crimes against humanity. True, simultaneous efforts were being made by the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction, but one of the purposes of drafting a convention on crimes against humanity must surely be to fill the impunity gap. The Commission needed to promote the progressive development of international law in the area of immunities, especially immunity *ratione personae*, in order to keep pace with the Rome Statute of the International Criminal Court and build a truly complementary system of international criminal justice. It should therefore include in the draft articles an "irrelevance of official capacity" provision, based on article IV of the Convention on the Prevention and Punishment of the Crime of Genocide. Noting that the draft articles were silent on the issue of reservations, he said that such silence went against the spirit of the Statute and would be a threat to the integrity of the proposed future convention on crimes against humanity.

16. He was not opposed to sending the draft articles to the Drafting Committee if the majority of members so wished.

17. In closing, he drew attention to the disparities in the length of the reports by the special rapporteurs on different topics. For example, he had been obliged to reduce his own report to meet the limit of 30,000 words, having been told that failure to do so would mean that it would not be translated and issued as an official document. It had been his understanding that this rule applied to all the special rapporteurs' reports, but it seemed that Mr. Murphy had been allowed to submit a report more than three times as long as his own.

18. The CHAIRPERSON said that the secretariat would look into the issue of word limits.

19. Mr. HASSOUNA thanked the Special Rapporteur for his clear, comprehensive and well-researched third report and for his continued efforts to reach out to Governments and NGOs in different regions. Indeed, the Commission should aim not only to prepare draft articles but also to convince Governments of their importance and relevance so as to ensure their eventual acceptance and implementation.

20. Although the report was considerably longer than recommended by the Commission, the detailed analysis that it contained would enable significant progress to be made at the present session. There was an urgent need to formulate and codify legal rules on the topic, as crimes against humanity were being committed with increasing frequency.

21. As he had stated at the previous session, his preference would be for the draft articles to form the basis of a new convention, a view seconded by several States in the Sixth Committee in 2016. Renowned international criminal lawyer Cherif Bassiouni had said that it had long been time for a special convention on crimes against humanity to regulate not only the hierarchical relationships between States and international tribunals but also the horizontal relationships among States; such a convention would enhance harmonization among national legislations and ensure greater compliance with the Rome Statute of the International Criminal Court by both States parties and non-parties.

22. In the third report, the Special Rapporteur analysed treaties on matters other than crimes against humanity and used them as models for elaborating the draft articles, rather than for codifying existing custom. When taking such an approach, due consideration must be given to the different nature of the crimes addressed by, and to the special context of, each convention. As a result, the Special Rapporteur had introduced stylistic and substantive modifications to the language of the conventions that he had studied, a move that he himself welcomed. However, the proposed legal rules on crimes against humanity should clearly be in harmony with the rules laid down in other treaties.

23. Referring to the very welcome commentary on the third report by Amnesty International,[26] he said that in general, he agreed with many of the concerns raised with regard to some of the proposed draft articles. It should be borne in mind, however, that the draft articles were intended not to cover in great detail all issues related to the topic, but to focus on the basic, non-controversial ones. After all, the Commission's objective should be to formulate a universally accepted convention that complemented existing international regimes, especially the Rome Statute of the International Criminal Court.

24. Turning to the proposed draft articles and preamble, he said that draft article 11 did not include a provision on multiple requests for extradition. In such cases, requests could be handled by a central authority, perhaps the same body or one similar to the authority mentioned in draft article 13 on mutual legal assistance. An important provision in draft article 11 related to the establishment of a default rule whereby the draft articles should be used as a basis for extradition unless the State in question notified the depositary to the contrary. The provision could help to harmonize the approaches of various States to extradition law. Another provision in draft article 11 subjected the draft article to the conditions or requirements set out in the law of the requested State. He agreed with that principle, which allowed the national laws of States to continue to operate. Anyone who objected to acknowledging the requirements for extradition under national laws overlooked the fact that the draft articles did not actually create an obligation to extradite, the real obligation being to prosecute if extradition was not granted. Given that the purpose of draft article 11, paragraph 11, was to ensure that individuals were not extradited when there was a danger of their rights being violated, he would support the inclusion in that paragraph of references to other categories of persecution and human rights concerns that would justify the denial of an extradition request.

25. In connection with chapter II, section A, of the report and draft article 12, he said that the definition of a "real risk" of being subjected to human rights violations such as torture, and the standard for examining evidence of that risk, required further clarification. He supported the inclusion of non-State actors in draft article 12, paragraph 1,

[26] Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, London, 2017.

particularly in the light of the growing number of transboundary crimes committed by such actors. However, extending the principle of *non-refoulement* of a person at risk of falling victim to a crime against humanity to other serious crimes under international law might lead to overlapping with existing treaties that addressed those crimes.

26. Concerning draft article 13, he said that the Special Rapporteur seemed to favour the adoption of a provision on a detailed form of cooperation among States, as doing so would provide them with more guidance. He himself, however, believed that a less detailed provision, such as those already contained in some treaties, would offer States greater flexibility. Moreover, some paragraphs of draft article 13 seemed unnecessarily long and could be shortened by the Drafting Committee. The list of grounds for the refusal or postponement of mutual legal assistance by the requested State required further clarification, including as to whether the list was exhaustive.

27. In draft article 14 on victims, witnesses and others, the recognition of the right to complain to the competent authorities was essential. The rights to the truth and to the protection of evidence by the State could likewise be included. It could be emphasized that the protection of witnesses was not limited to physical protection, but encompassed wider measures similar to those provided for in article 68, paragraph 1, of the Rome Statute of the International Criminal Court. In draft article 14, paragraph 3, it would be appropriate to define the scope and extent of the reparation to which victims were entitled, and it should be made clear that the list of forms of reparation in that paragraph was not exhaustive.

28. Draft article 15, the provision addressing potential conflicts, contained a reference to a "competent" international criminal tribunal. It could be clarified in the commentary that such a tribunal must comply with the fundamental principles of international criminal law.

29. Draft article 16 rightly did not include a "territorial clause" that would limit the application of the draft articles, since they should cover all parts of federal States.

30. Draft article 17 described a comprehensive, multistep process for the settlement of disputes concerning the interpretation or application of the draft articles. The question arose as to whether a monitoring mechanism should be created for crimes against humanity. Such a mechanism would certainly help to ensure that States fulfilled their commitments under the future convention. However, because of the variety of legal, policy and financial factors at play in the selection of such a mechanism, he considered that its creation could best be envisioned in a future protocol.

31. He shared the Special Rapporteur's view that the issues of immunity and amnesty were controversial and should therefore not be addressed in the draft articles, but left to relevant treaties and the evolution of customary international law. Although the Special Rapporteur had chosen not to include a provision on concealment of crimes against humanity, the Commission could reconsider the issue in the context of the draft article on victims' rights.

32. Lastly, he agreed with the wording of the preamble, particularly the emphasis on inter-State cooperation, the reaffirmation of the purposes and principles of the Charter of the United Nations and the assertion that crimes against humanity threatened international peace and security. While the Commission should not overburden the preamble with additional paragraphs, he did think that the notion of justice should be included: the objective of achieving justice for victims could be mentioned in the fourth preambular paragraph, for instance.

33. With regard to the future programme of work, the Special Rapporteur raised the question of whether it was necessary to undertake additional work, which would then be dealt with in a fourth report to be submitted in 2018. At a previous session, he himself had referred to a number of additional issues that might be addressed by the Special Rapporteur, including State responsibility, the retroactive application of the convention, the enforcement of the mandatory rules under the convention, the principle of double jeopardy and the party empowered to determine that a crime against humanity had been committed.[27] He had made clear, however, that such issues should be examined by the Special Rapporteur on a selective basis, according to their relevance and importance to the subject matter of the convention, and that the Special Rapporteur should be given full discretion in that regard. He now considered that, since the Special Rapporteur had determined that all relevant key issues related to the topic had been covered in his three reports,[28] the Commission should endorse his proposal to complete the consideration of the draft articles on first reading in 2017. He wished to remind the Special Rapporteur, however, that it would be a challenge to revise the draft articles and prepare the commentaries thereto by the end of the current session.

34. In conclusion, he recommended that the proposed draft articles and preamble be referred to the Drafting Committee.

35. Mr. TLADI asked what Mr. Hassouna had meant by "fundamental principles of international criminal law" and whether he knew of any existing international criminal tribunals that did not conform to those principles.

36. Mr. HASSOUNA said that it was worth specifying in the commentary that competent international criminal tribunals should, in a general sense, comply with the well-established fundamental principles of international criminal law. It had not been his intention to imply that some tribunals currently failed to do so.

37. Mr. PARK said that the draft articles set out in the Special Rapporteur's report appeared to be largely based on the United Nations Convention against Corruption, particularly with regard to extradition and mutual legal assistance. While that might be the most desirable approach, crimes against humanity, unlike the act of corruption, occurred on a large scale and could involve multiple individuals. Moreover, some States recognized

[27] See *Yearbook … 2015*, vol. I, 3258th meeting, p. 106, para. 22.

[28] *Ibid.*, vol. II (Part One), document A/CN.4/680 (first report); *Yearbook … 2016*, vol. II (Part One), document A/CN.4/690 (second report); and *Yearbook … 2017*, vol. II (Part One), document A/CN.4/704 (third report).

so-called "universal jurisdiction" for crimes against humanity, while such a broad form of jurisdiction was generally not recognized for acts of corruption. Although the Special Rapporteur did seem to take those differences into account, a more careful review was still necessary.

38. Commenting on the first paragraph of draft article 11, he said that, under the established principles of international law, extraditable offences were substantive offences. In the draft articles provisionally adopted to date, the provision that set out the underlying acts or offences of substantive crimes against humanity—murder, extermination, enslavement, deportation and so forth—was not draft article 5, but draft article 3. The first sentence of draft article 11, paragraph 1, should therefore be amended to begin "Each of the offences referred to in draft article 3".

39. Draft article 5 actually dealt with modes of liability. For the purpose of extradition, what mattered most were the substantive criminal offences provided for in draft article 3, not the modes of liability set out in draft article 5. Thus, draft article 11, paragraph 8, should refer not to the items set out in draft article 5, such as committing, ordering or failing to prevent a crime against humanity, but to the items listed in draft article 3, such as murder, torture or enslavement. Similarly, draft article 11, paragraph 2, should refer to draft article 3, not draft article 5: States might refuse to extradite a person on the basis of the political offence exception in relation to the substantive offences set out in draft article 3, but for the purpose of claiming that exception, the differing manners of participating in a crime listed in draft article 5, paragraphs 2 or 3, were of limited relevance.

40. He agreed that it was necessary for a new convention on crimes against humanity to contain a provision on extradition to fill the gaps where no treaty-based extradition relationships existed. Although some States had concluded extradition agreements on a bilateral level, there was currently no global or regional convention on the extradition of alleged offenders, and many States would not extradite in the absence of an extradition agreement.

41. He also agreed that it was appropriate to broaden the political offence exception along the lines of article 13, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance. Any room for exceptions, particularly of a political nature, should be limited as much as possible, for the sake of effective implementation. According to draft article 11, paragraph 8—a new paragraph that was not to be found in either the United Nations Convention against Corruption or the United Nations Convention against Transnational Organized Crime—an offence should be treated as having been committed not only in the State where it physically occurred, but also in any State that was required to establish jurisdiction over the offence in accordance with draft article 6, paragraph 1. While such a broad approach could avoid conferring primary jurisdiction on certain States, the scope of such jurisdiction needed to be better clarified. For example, could that form of jurisdiction go beyond the territorial, nationality or passive personality principle, since draft article 6, paragraph 3, did not exclude the establishment of other forms of criminal jurisdiction by a State?

42. In relation to draft article 11, paragraph 13, he would find it helpful to further discuss the relationship between the draft article on extradition and other multilateral agreements aimed at enhancing the effectiveness of extradition, including a possible treaty on mutual legal assistance and extradition that was being promoted by Belgium, the Netherlands and other States.

43. His last point on draft article 11 was that, since paragraphs 6 and 7 both concerned extradition procedures subject to national laws, it might be worth considering combining the two paragraphs.

44. Turning to draft article 12, he said it was appropriate to include a provision on the principle of *non-refoulement*, as it was a well-established principle under international law and was contained in many international treaties. Nevertheless, that principle must be carefully reviewed in relation to draft article 11, paragraph 1, to ensure there was no conflict between the two provisions. Moreover, there was a high threshold requirement of being "widespread or systematic" for an act to constitute a crime against humanity, and there might be instances in which individuals faced other forms of serious human rights abuse that did not meet that threshold. It might be desirable to review further whether the principle of *non-refoulement* should be applied only to crimes against humanity, or also to other forms of serious human rights abuse. Furthermore, it would be helpful to explain in the commentary the standard for assessing what constituted "substantial grounds" for believing that a person would be in danger of being subjected to a specific crime based on international jurisprudence and practice of States.

45. Draft article 13 reflected the Special Rapporteur's view that a long-form mutual legal assistance article was preferable to a short-form one. However, because of its length, the text seemed to create an imbalance within the set of draft articles. Perhaps draft article 13 could be turned into a separate protocol. Moreover, although a long-form article was quite detailed, there was still a possibility that it would conflict with international obligations under other bilateral or multilateral treaties on mutual legal assistance, notwithstanding the provisions of draft article 13, paragraphs 8 and 9: specifically, States might disagree on which provisions were effective and facilitated cooperation. In any case, there would need to be a careful review of long-form mutual legal assistance in other model treaties and prospective multilateral treaties on mutual legal assistance.

46. He fully agreed with the need for provisions on the protection of victims and witnesses of crimes against humanity. Draft article 14 well reflected the idea behind other relevant international provisions, particularly article 68 of the Rome Statute of the International Criminal Court. That said, he would suggest three modifications to draft article 14.

47. First, some text should be included on the protection of vulnerable witnesses, especially victims of sexual violence and children, following the example of article 68, paragraphs 1 and 2, of the Rome Statute of the International Criminal Court. Such measures as holding proceedings *in camera* could be very effective in protecting

victims of sexual violence and children who were participating in the proceedings as witnesses. Accordingly, a sentence encouraging States to implement *in camera* proceedings should be added to draft article 14.

48. Second, he would suggest adding a paragraph corresponding to article 70 of the Rome Statute of the International Criminal Court, urging States to criminalize offences against the administration of justice. Although such offences were not considered core international crimes, they had become an issue in almost every case before the International Criminal Court. In that respect, the Court's judgment of 19 October 2016 in the *Bemba Gombo* case—the first-ever conviction under article 70—was noteworthy. Witness intimidation had serious consequences beyond the immediate case it affected. In view of the varying degrees of witness protection currently available in each State, coordinated efforts worldwide to criminalize offences against the administration of justice in domestic legislation were crucial for the successful implementation of the draft convention in general, and draft article 14 in particular.

49. Third, the regime of victim participation and reparation established by the Rome Statute of the International Criminal Court had been widely praised as one of the Statute's major innovations and achievements. After a decade of practice, however, many commentators recognized the gap between the high expectations on the part of victims and the lack of resources available to the Trust Fund for Victims established pursuant to article 79 of the Statute. With regard to the mechanism for victim participation, it appeared that, in its jurisprudence since 2012, the Court had started to reduce the temporal scope of victim participation by generally excluding the investigation stage. In that context, paragraphs 2 and 3 of draft article 14 should be recast as recommendations rather than strict obligations. More specifically, given the varying financial situations of States around the world, paragraph 3 of draft article 14 should be reworded to begin "Each State shall endeavour to ensure" rather than "Each State shall take the necessary measures to ensure".

50. While it was appropriate to specify, in draft article 15, that the rights or obligations of a State under the constitutive instrument of a competent international criminal tribunal prevailed over its rights or obligations under the draft articles, there were questions as to how that would apply in relation to the principle of complementarity as set out in article 17 of the Rome Statute of the International Criminal Court, under which the primary responsibility for prosecuting international crimes lay with States and national courts. A careful review was needed to determine whether draft article 15 might conflict with the principle of complementarity.

51. Draft article 16, on federal State obligations, also seemed appropriate. However, it would be more effective to include a clause that expressly denied any accommodation to federal States.

52. In chapter VII of his report, the Special Rapporteur went into some detail about monitoring mechanisms and dispute settlement but refrained from making any concrete proposals, on the grounds that the selection of a particular mechanism turned less on legal reasoning than on policy factors, the availability of resources and the relationship of any new mechanism with those that already existed; and that, moreover, a monitoring mechanism could be incorporated immediately in a new convention or developed at a later stage. Such a conclusion might be based on a realistic approach, but it seemed rather passive in view of the important role played by monitoring mechanisms in the protection and promotion of human rights. In drafting a new convention on crimes against humanity, it would be better to aim for the maximum protection against such crimes. The Special Rapporteur should therefore propose a possible monitoring mechanism.

53. Regarding draft article 17, the effect of paragraph 3 would be to allow States to enter a reservation regarding the procedures set out in paragraph 2 and thus to opt out of any inter-State dispute mechanism, which could hinder the effective implementation of the convention.

54. On the remaining issues addressed in chapter VIII of the report, he broadly agreed with the Special Rapporteur's conclusions regarding the concealment of crimes against humanity (para. 277), immunity (para. 284) and amnesty (paras. 296–297). More specifically, he believed that the issue of granting amnesties under national law was closely related to transitional justice, so that it was not an appropriate subject to be regulated in the draft articles.

55. In his view, the last paragraph of the draft preamble should be deleted, even though it was adapted from the preamble to the Rome Statute of the International Criminal Court. It did not fit the topic under discussion, for two reasons: first, the scope of the Statute and that of the topic before the Commission were different; and, second, the paragraph could give rise to a debate on humanitarian armed intervention, the responsibility to protect, the right to self-determination and, especially, the right of peoples to seek and receive support from other countries in pursuit of the exercise of their right to self-determination, as set out in General Assembly resolutions 2625 (XXV) of 24 October 1970 and 3314 (XXIX) of 14 December 1974.

56. Mr. NGUYEN commended the Special Rapporteur on his well-prepared, comprehensive reports on crimes against humanity, a topic corresponding to the urgent requirement to prevent and punish any act of terrorism, genocide or torture, war crime or crime against humanity. The work would fill the gap between different national jurisdictions and provide an effective global tool for achieving justice and fairness. He agreed with the Special Rapporteur that there was considerable interest in developing national capacity to address serious international crimes and to ensure a well-functioning principle of complementarity.

57. Regarding the methodology and approach to the study, he believed that the Commission should carefully consider the more detailed approach, especially with regard to extradition and mutual legal assistance. The Special Rapporteur proposed to model the future text after articles 44 and 46 of the United Nations Convention against Corruption, because 181 States had signed the Convention and the issues arising were largely the same. In his own opinion, the draft articles should be based on existing treaties

and State practice, instead of on a single convention: the issues arising under the United Nations Convention against Corruption and the future convention on crimes against humanity differed in substance. The former prevented and punished economic offences committed by individuals and legal persons under national law. In contrast, the future convention on crimes against humanity sought to prevent and punish criminal and political offences committed by individuals, in violation of international and national law. Crimes against humanity and corruption differed in their very nature, their level of severity and their psychological impact on the global community.

58. In the Special Rapporteur's view, expressed in paragraph 125 of his report, article 46, paragraph 2, of the United Nations Convention against Corruption provided a suitable basis for draft article 13, paragraph 2, on mutual legal assistance. However, it rekindled the debate on the liability of a "legal person" for the commission of a crime against humanity. A "legal person" could be held liable for offences related to economic crimes such as corruption, tax fraud and evasion. In reality, most of the draft articles in the third report referred not only to the United Nations Convention against Corruption, but also to the provisions of the Rome Statute of the International Criminal Court, the United Nations Convention against Transnational Organized Crime, the International Convention for the Protection of All Persons from Enforced Disappearance and other texts. His recommendation was to name some important international texts, while emphasizing the guidance of the United Nations Convention against Corruption and other instruments in respect of particular crimes.

59. Draft article 11 underlined the State's obligation to extradite alleged perpetrators of crimes against humanity. It would read better, however, if paragraphs 1 and 2 were combined to read: "For the purposes of extradition between States, States undertake to include the offences referred to in draft article 5 as extraditable offences in every extradition treaty to be concluded between them." Dual criminality was precluded, in view of the obligation of extradition set out in draft articles 2[29] and 3, draft article 11, paragraphs 3 and 6, and the obligation of criminalization of such offences in national law contained in draft article 5. That approach should be carefully considered, however. The terms "extraditable offence" and "extradition conditional" indicated that the obligation was subject to the State's willingness and decision: the State could enter a reservation to the identification of an act as a crime against humanity. Moreover, the preclusion of dual criminality might have an impact on a State's possible accession to the future convention. In order to criminalize certain offences in national laws, time was required for amending or adjusting broad domestic criminal legislation, potentially including the State's Constitution, and, in such cases, extradition was temporarily not feasible. For all of those reasons, the decision not to include the dual criminality principle in draft article 13 should be reconsidered.

60. Draft article 12 referred to the principle of *non-refoulement*. While in previous conventions, the terms "places", "frontiers of territories" and "to another State" had frequently been used, draft article 12, paragraph 1, replaced them with the term "territory under the jurisdiction of another State", a more precise formulation. However, there were some territories under the jurisdiction of the State that were effectively controlled by another force due to political reasons or civil war, and the State could invoke that reason to justify its refusal of the obligation of *non-refoulement*. Therefore, the phrase "territory under the jurisdiction or effective control of another State or Administration" should be used.

61. He welcomed the references in the three reports on crimes against humanity to Asian practice, specifically the Bangkok Principles on Status and Treatment of Refugees[30] and the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.[31] More should be written about regional practice on the principle of *non-refoulement*.

62. Turning to draft article 13, he said he supported the adoption of a long-form article on mutual legal assistance. The transmission of information without prior request was not a new initiative in legal proceedings regarding crimes against humanity. It had been mentioned in a number of instruments, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. He supported that initiative to facilitate proceedings. However, in order to avoid replication of information, he recommended encouraging the use of a two-step procedure for the transmission of the information: when the sending State considered that certain information was necessary and useful for the proceedings carried out by the receiving State, it could send an alert and a list containing the information. The receiving State would immediately respond by a written confirmation or an oral declaration. After receiving the confirmation, the information would be transmitted in full.

63. Article 46, paragraph 8, of the United Nations Convention against Corruption had been taken as the basis for draft article 13, paragraph 4: under both instruments, States were not permitted to decline to render mutual legal assistance on the ground of bank secrecy. However, the fiscal matters referred to in article 46, paragraph 22, of the Convention had not been included in draft article 13 among the grounds on which a request for mutual legal assistance could not be refused. Bank secrecy and fiscal matters were usually taken into consideration for economic offences. The possibility of taking one or both of them as grounds to refuse mutual legal assistance in investigations, prosecutions and judicial proceedings relating to crimes against humanity was left open and depended on the State's practice. The Special Rapporteur suggested that some of the grounds in article 46, paragraph 3 (*f*) ("including government, bank, financial, corporate or business records") not be included, because they related to

[29] *Yearbook … 2015*, vol. II (Part Two), p. 35 (draft article 2).

[30] "Final Text of the AALCO'S 1966 Bangkok Principles on Status and Treatment of Refugees as adopted on 24 June 2001 at the AALCO's 40th Session, New Delhi". Available from the AALCO website: www.aalco.int.

[31] Law No. NS/RKM/1004/006 (27 October 2004), available from the website of the Extraordinary Chambers in the Courts of Cambodia: www.eccc.gov.kh/en, *Legal documents, Law on ECCC*.

corruption rather than to crimes against humanity. However, the brief explanations given in paragraphs 131, 149 and 162 of the report were unsatisfactory: they should be reconsidered and clarified in the commentary.

64. Paragraph 1 of draft article 17, on inter-State dispute settlement, underlined the priority to be given to negotiation. One rule in inter-State dispute settlement was that resort to negotiation preceded any other means or mechanism, including compulsory settlement. However, in some cases, a State could invoke that rule to prevent another State from seeking other peaceful means to overcome a deadlock. Since States had the obligation to resort to all peaceful means, not merely negotiation, the Commission should consider replacing the term "negotiation" in paragraph 1 with the phrase "peaceful means, notably negotiation and arbitration".

65. Paragraph 2 also emphasized the importance of negotiation and indicated that if a dispute could not be settled by such means, it must be submitted to arbitration. The option of arbitration should be covered in greater detail, in order to explain why an attempt should initially be made to organize bilateral arbitration of a matter concerning a crime against humanity, with the subsequent accordance of priority to the International Court of Justice if negotiation fell through.

66. Regarding the other issues discussed in chapter VIII, he agreed with the Special Rapporteur's preference for not including concealment of crimes against humanity in the draft articles. In a century of advanced technology and public media, it was no longer easy to conceal a crime against humanity. Moreover, such concealment might involve a document, a piece of evidence or the ownership of property, factors that were addressed in other draft articles. He likewise endorsed the Special Rapporteur's proposal not to include immunity and amnesty in the draft articles. Crimes against humanity were grave acts that must be punished, and any immunity or amnesty should therefore be excluded. Principle III of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[32] stated that the commission of an act that constituted a crime under international law while one was acting as Head of State or responsible government official did not relieve the person from responsibility under international law. That principle was increasingly recognized in treaties and judgments of international courts as a customary international rule. However, in practice, States were reluctant to accept explicit text on the exception of immunity *ratione personae*.

67. The question of amnesties was also ambiguous. At the international level, crimes against humanity had acquired the nature of peremptory norms (*jus cogens*): no amnesty could therefore be granted for perpetrators of crimes against humanity, since such crimes were contrary to *jus cogens*. At the national level, however, the prevailing political party might resort to amnesty for the purposes of national reconciliation and to avoid separation and civil war, and the possibility of amnesty depended on national jurisdiction. In fact, amnesty had played a role in national reconciliation and in ending violence in some cases: the political decision to grant amnesty to Khmer Rouge leaders after the genocide in Cambodia was an example.

68. The Special Rapporteur had presented a useful and detailed summary of the five approaches to reservations taken in existing treaties. However, no specific approach to reservations was proposed for the future convention on crimes against humanity. In order to reconcile the integrity of international treaties with the objective of gaining the broadest participation of States, the third approach to reservations should be considered. Under that approach, the convention would contain a provision identifying the articles to which reservations could be formulated, while prohibiting all other reservations. A reservation could thus be made for a limited number of provisions, without prejudice to the purpose and objective of the treaty and to the fundamental rights and obligations of member States.

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

[Agenda item 1]

69. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of provisional application of treaties was composed of the following members: Mr. Gómez Robledo (Special Rapporteur) Mr. Argüello Gómez, Ms. Galvão Teles, Mr. Jalloh, Mr. Kolodkin, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

70. The CHAIRPERSON noted that Mr. Grossman Guiloff, Mr. Nguyen and Mr. Park had also expressed a wish to be part of the Drafting Committee on the provisional application of treaties. He recalled that in 2016, the Commission had taken note of some of the draft guidelines on that topic that had been provisionally adopted by the Drafting Committee,[33] but that the Drafting Committee had not had time to complete its work. With a view to the completion of a set of draft guidelines based on the proposals made by the Special Rapporteur so far, he proposed that the Commission refer back to the Drafting Committee the draft guidelines it had provisionally adopted in 2016, namely draft guidelines 1 to 4 and 6 to 9.

It was so decided.

The meeting rose at 12.30 p.m.

3350th MEETING

Wednesday, 3 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh,

[32] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[33] See *Yearbook … 2016*, vol. II (Part Two), pp. 219–220, para. 257, and footnote 1430.

Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur's third report on crimes against humanity (A/CN.4/704) contained a great deal of useful information, in particular on the international instruments upon which the Special Rapporteur had drawn in preparing the proposed draft articles. The proposals were based essentially on existing treaties—the majority in the area of contemporary international criminal law—and, to a far lesser extent, on legal writings concerning that sphere of law. The Special Rapporteur also referred to human rights instruments, which had a clear bearing on the Commission's work, considering the legal rights and interests it was seeking to protect by ensuring the prosecution of crimes against humanity. While the approach taken by the Special Rapporteur was a legitimate one, given that those international instruments were a part of the international practice on which the Commission's work must be based, several issues nonetheless arose in connection with that approach.

2. First, even though the Special Rapporteur referred to a large number of legal instruments in the report under consideration, the proposed draft articles drew upon no more than three or four conventions, at least two of which (the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime) concerned offences that were fundamentally different from the offences defined as crimes against humanity. Crimes in the latter category made up the "hard core" of crimes under international law; in other words, the most serious crimes of concern to the international community that outraged or shocked the conscience of humanity.

3. Second, the Special Rapporteur's preference for those instruments was not explained in the report, other than by factors such as the large number of States that had ratified them and States' familiarity with the mechanisms they established; those factors were not, in her view, sufficient in themselves to justify that preference. The implication was that basing the draft articles on those instruments would make them more likely to be readily accepted by States and quickly transformed into an international treaty. The Special Rapporteur, however, offered no answers to key questions such as whether the wording of the provisions on which the draft articles were based was reflected in implementing legislation at the national level; whether those provisions had been applied in inter-State relations; and whether they had actually proved their effectiveness in addressing problems of international legal cooperation. Had such considerations been included in the third report, the Commission could have held a more in-depth discussion and based its decisions on factors that went beyond what could be seen as a "copy-and-paste" approach of choosing from among existing formulations. The Commission's primary concern was not to offer States draft articles that would easily gain acceptance, but to offer them draft articles that were as well founded as possible in terms of contemporary international law, taking into account the needs and interests of States in the matters under the Commission's consideration.

4. Third, as a way of addressing that methodological difficulty, it would have been useful for the Special Rapporteur to have included more analysis of international practice in the broadest sense, including decisions of international and national courts, the practice of other international bodies, examples of national legislation on the matters dealt with in the report, and the *travaux préparatoires* of the international instruments mentioned in the report. Such an analysis of practice would not necessarily be limiting for the Commission's work; it was useful and necessary even for the progressive development of international law and the formulation of proposals that departed from such practice. She trusted that the Special Rapporteur would be in a position to provide some examples of international practice, either in his summing-up of the debate or in the Drafting Committee and, in any event, in the commentaries to the draft articles.

5. Fourth, it was important for the Commission to consider the objective and context of its work on crimes against humanity, especially in relation to the proposed draft articles. The Commission should bear in mind that the ultimate purpose of the draft articles was to prevent the occurrence and promote the prosecution of crimes against humanity and that, consequently, the cooperation and mutual legal assistance envisaged in that regard were intended only to serve as instruments for achieving that overall objective. The Commission should consider whether draft articles 11 (Extradition) and 13 (Mutual legal assistance), in particular, were well suited to that purpose or whether they could cause States to lose sight of the ultimate aim of the draft articles as a whole. That comment was not intended to express either support for or opposition to what the Special Rapporteur called "long-form" articles, but only to draw attention to the question of where the lengthy provisions of such articles should be placed. For example, at the Commission's 3349th meeting, Mr. Park had raised the possibility of turning them into a protocol.[34] In any case, diluting the substantive importance of the draft articles by overemphasizing matters exclusively relating to cooperation and international legal assistance would send a poor signal.

6. With respect to draft article 11, she shared the view expressed by Mr. Park at the preceding meeting, in relation to paragraph 1, that "extraditable offences" were the offences referred to in draft article 3, not draft article 5. She agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in the draft article, and endorsed the exclusion of the "political offence" exception (para. 2) and the stipulation that

[34] See the 3349th meeting above, p. 12, para. 45.

the draft articles could be used as a basis for extradition (para. 3). Concerning that last point, the option given in paragraph 4 (*a*) should be discussed further, as it could weaken the draft article. In paragraph 6, the reference to a "minimum penalty" should be deleted, as crimes against humanity were subject to the most severe penalties, pursuant, *inter alia*, to draft article 5, paragraph 6.[35] Paragraph 8 should be revised to broaden the concept of the territory in which the offence was deemed to have occurred for the purposes of extradition. Currently, paragraph 8 limited the definition of that territory to the cases enumerated in draft article 6, paragraph 1,[36] even though draft article 6, paragraph 3, provided that the draft articles did not "exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law".

7. Regarding the extradition of a State's own nationals, referred to in paragraphs 9 and 10 of draft article 11, it was important to include an express reference to a State's obligation to prosecute a national who could not be extradited; it was insufficient, in paragraph 9, to refer to the general obligation set forth in draft article 9.[37] She also had concerns about the wording of paragraph 10, which did not clearly spell out the obligations incumbent on a State that was requested to extradite one of its nationals for the purpose of enforcing a sentence; the paragraph seemed to afford such States a degree of discretion that was incompatible with the aim of the draft articles. Lastly, with regard to paragraph 11, she requested clarification of the phrase "prejudice to that person's position". The paragraph should perhaps be fleshed out in the Drafting Committee.

8. Draft article 12 (*Non-refoulement*) should be placed between draft articles 14 and 15, as it was not logically related to either draft article 11 (Extradition) or draft article 13 (Mutual legal assistance).

9. Draft article 13, which the Special Rapporteur described as a "mini mutual legal assistance treaty", was disproportionately long in comparison to the rest of the draft articles and included some contradictory elements. If the draft article was meant to constitute a fully fledged system of mutual legal assistance, it should be understood as a special regime that was to be applied in full, in preference to other rules, in cases involving crimes against humanity. Nonetheless, paragraphs 8 and 9 of the draft article departed from that model by establishing the primacy of existing mutual legal assistance treaties between the States concerned, merely indicating that States were "strongly encouraged" to apply draft article 13 if it facilitated cooperation. That preference for general agreements on mutual legal assistance would have been understandable if a "short form" of draft article 13 had been proposed, but was not warranted in the context of the "long form". If the "long form" was retained, draft article 13 should have primacy over other rules, except where a legal gap was identified or a general agreement on mutual legal assistance was more conducive to the achievement of the overall objective of the draft articles. Draft article 13 should therefore be revised in one of three ways: to make the "long-form" article applicable only in cases where no general agreement on mutual legal assistance was in force between the States concerned; to stipulate that the "long-form" article should take precedence over general agreements on mutual legal assistance, for the reasons she had outlined; or to adopt a "short-form" article that established the primacy of any existing mutual legal assistance treaties between the States concerned, provided that they did not contain provisions that were incompatible with the object and purpose of the draft articles. Those options should be discussed in depth before draft article 13 was revised in the Drafting Committee.

10. With regard to draft article 14, she fully agreed on the necessity of addressing the issue of victims, witnesses and other affected persons in the draft articles, especially as the very serious and direct effects that crimes against humanity had on individuals were duly recognized in existing international instruments. She generally approved of the draft article's content. However, she would appreciate an explanation of the view, expressed in paragraph 168 of the report, that States should have latitude in determining exactly which persons qualified as "victims" of a crime against humanity. Although that view was not reflected in the draft article, such latitude might, depending on how it was interpreted, tend to weaken the obligations set forth in the draft article. It might be useful to address the issue in the commentary, so as to establish reasonable parameters within which States could exercise their discretion.

11. The indication, in draft article 14, paragraph 2, that victims' participation in criminal proceedings should be allowed by each State "subject to its national law" seemed extremely limiting. While she understood and shared the Special Rapporteur's wish to account for the diversity of national legal systems and models, the rules on victims' right to participate in proceedings should be more prescriptive, although they should respect the principles underpinning the national laws of States in terms of standing to take part in criminal proceedings. The Drafting Committee should consider wording that would take account of both of those elements. Lastly, she took the view, for the reasons expressed by previous speakers, that "guarantees of non-repetition" should not be included among the forms of reparation listed in draft article 14, paragraph 3.

12. With regard to draft article 15, she understood and shared the Special Rapporteur's concern to ensure the integrity and primacy of States' obligations under the constitutive instruments of competent international criminal tribunals, in particular the Rome Statute of the International Criminal Court. From the beginning of the Commission's work on the topic, she had highlighted the need to ensure that the draft articles did not conflict with the Statute. However, she was not convinced that the wording of draft article 15 fully addressed that concern. At the Commission's 3348th meeting, Mr. Tladi had raised the matter of the primacy of national courts in the Statute.[38] Although she did not share that interpretation, as, in her view, the principle of complementarity pointed to another solution, there was clearly some basis to his concern. In addition, at the 3349th meeting, Mr. Hassouna had mentioned the

[35] *Yearbook … 2016*, vol. II (Part Two), pp. 151–152 (draft article 5).

[36] *Ibid.*, p. 162 (draft article 6).

[37] *Ibid.*, p. 166 (draft article 9).

[38] See the 3348th meeting above, p. 6, para. 47.

need to ensure that the international tribunals in question complied with the fundamental principles of international justice.[39] She wondered whether there might indeed be some international criminal tribunals whose constitutive instruments excluded a well-established principle such as the inapplicability of immunities before international criminal tribunals; the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) was one such instrument. The assertion of primacy, as established in draft article 15, thus posed various problems.

13. Moreover, the application of such a provision to the States parties to a future convention on crimes against humanity would entail difficulties if some of those States were parties to the constitutive instrument of a particular international tribunal and others were not. The Rome Statute of the International Criminal Court itself did not go so far as to establish the primacy of the obligations it set forth over those under other international treaties. Article 89, paragraph 1, and articles 90 and 93 of the Statute established different rules in relation to the primacy of the obligation to cooperate with the International Criminal Court depending on whether the State in question was a party to the Statute. Those differentiated regimes applied in particular to the surrender of persons and other forms of cooperation, which were issues that were also regulated, *mutatis mutandis*, in draft articles 11 and 13, respectively. The most appropriate way to preserve the integrity and universality of the Statute might thus be a simple "without prejudice" clause. Such clauses had already been used in other international instruments mentioned in the third report, as well as by the Commission itself and to similar ends. The alternative wording could be discussed in greater detail in the Drafting Committee.

14. With regard to draft article 16, she endorsed the proposal and justification given in the third report and had no further comments.

15. Although draft article 17 was limited to inter-State dispute settlement, that issue was analysed in the report alongside the equally important issue of monitoring mechanisms, on the basis of the excellent 2016 memorandum by the Secretariat on that subject.[40] However, the Special Rapporteur had adopted different positions on those two issues, addressing only the first in the draft articles. She had personally never fully understood the idea of establishing a specific mechanism for monitoring compliance with draft articles such as those under consideration. In her view, a meeting of States parties would be sufficient to fulfil that task. Nevertheless, it was unclear how other monitoring instruments within the human rights protection system would function in relation to the draft articles. In any case, as the Special Rapporteur himself noted, the issue had more to do with political negotiation than with the technical legal work of the Commission.

16. While draft article 17 was acceptable in the abstract, it exemplified the risks inherent in the "copy-and-paste" approach. She was not sure that the dispute settlement model proposed in it, which was patterned after existing models established by other treaties on criminal matters, was the most appropriate in the context of crimes against humanity. She had two concerns in that connection.

17. First, she was not convinced that it was necessary to establish a tiered system in which States that could not settle disputes through negotiation submitted them to arbitration before ultimately bringing them to the International Court of Justice. For articles on crimes against humanity, it would be preferable to establish a system involving only the International Court of Justice. However, there were other possibilities, such as a choice between arbitration and judicial settlement, or, where the jurisdiction of the International Court of Justice had not been accepted, mandatory arbitration. In any case, further analysis of practice was needed to evaluate the effectiveness, advantages and disadvantages of each option.

18. Second, a more serious concern related to draft article 17, paragraph 3, which allowed States to declare that they did not consider themselves bound by draft article 17, paragraph 2, and thus excluded arbitration and judicial settlement. While she recognized the voluntary nature of judicial settlement in contemporary international law, she did not consider that a provision of that kind should be included in a set of draft articles on crimes against humanity, the aim of which was to prevent and punish the commission of such crimes. Allowing States to formulate a reservation to the provision on dispute settlement would undermine both the obligation to combat impunity and the role of the International Court of Justice as a judicial reference body, to the detriment of efforts to promote the rule of law at the domestic and international levels, which was one of the goals of the United Nations. The Commission, as a subsidiary organ of the General Assembly tasked with the codification and progressive development of international law, should not make proposals of that kind. If the Commission was not certain of the need to establish a compulsory dispute settlement system, it should refrain from making any proposals in that regard, leaving the issue subject to the general rules on dispute settlement and, in any event, leaving any proposals and decisions on the matter to be made by States during the negotiation of a future convention, as was the Commission's usual practice.

19. There were two issues that, while highly important, had not given rise to individual draft articles, namely immunities and reservations. With regard to immunities, the Special Rapporteur stated that "the draft articles on crimes against humanity should not address the issue of immunity of State officials or officials of international organizations, and instead should leave the matter to be addressed by treaties on immunities for particular classes of officials and by customary international law", adding that his approach "should not be construed as having any implications for the Commission's work on 'Immunity of State officials from foreign criminal jurisdiction'". While she, as Special Rapporteur for that topic, was grateful for the Special Rapporteur's efforts to prevent conflict between the two sets of draft articles currently under consideration, she was not sure that the draft articles on crimes against humanity should not contain any reference to that other topic. At the very least, it should be left in abeyance until the Commission had come to a decision

[39] See the 3349th meeting above, p. 11, para. 28.

[40] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698.

on the issue of limitations and exceptions to immunity, which was dealt with in her fifth report.[41] In any case, she wished to reiterate the comment made by Mr. Murase, at the Commission's 3349th meeting, on the need to include a rule on the irrelevance of official capacity in the determination of criminal responsibility for the commission of crimes against humanity.[42] That rule was recognized in a number of international instruments, 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 Rome Statute of the International Criminal Court. The Commission itself had included clauses on the irrelevance of official capacity in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[43] and in the draft code of crimes against the peace and security of mankind.[44]

20. The Special Rapporteur had chosen not to make a specific proposal on the issue of reservations, even stating in paragraph 326 of the report that "a complete prohibition might preclude the widespread adherence of States to the convention". While she agreed that, in line with the Commission's usual practice, the issue of reservations, like that of final clauses, should not be addressed in the draft articles, she wished to comment on the role that reservations could play in a future convention and to offer considerations that could be taken up by States at a later stage. To begin with, it was debatable whether an international treaty for the prevention and punishment of crimes against humanity should be subject to the ordinary regime of reservations. In her view, reservations should not be allowed in relation to the definition of crimes against humanity or the basic obligations of prevention, criminalization under domestic law and establishment of State jurisdiction over such crimes, nor should they apply to the basic elements of mutual legal assistance and cooperation, including extradition. Where reservations were considered necessary, the most coherent regime would, in her view, consist of a closed list of reservations; an obligation to indicate the reasons for a reservation, in particular effects on national legislation; and a system for monitoring reservations in force.

21. Concerning the draft preamble, the almost word-for-word reproduction of the preamble to the Rome Statute of the International Criminal Court was perhaps unnecessary. Instead, it might be useful to include other references that would shed more light on the meaning of the new draft instrument. In any case, that minor point could be left to the Drafting Committee. She had no comments on the future programme of work and endorsed the Special Rapporteur's proposal in that regard. Lastly, she recommended that the draft articles be referred to the Drafting Committee.

22. Mr. REINISCH said that he would address a few very specific points, some of which had already been raised in part by other Commission members. The Special Rapporteur's third report was unusually long, but it contained such a wealth of information that it was difficult to see how it could have been significantly condensed.

23. He noted that the United Nations Convention against Corruption had been used as a template for the very detailed proposed draft article 11 on extradition and that some members had questioned that approach, arguing that crimes of corruption and crimes against humanity were very different in nature. While acknowledging that difference, he considered that the particular type of crime addressed in a treaty was not necessarily a major consideration with regard to extradition obligations. As the article on extradition in the United Nations Convention against Corruption was very comprehensive and well balanced, it could serve as guidance for the draft articles under consideration. Of course, he did not wish to preempt a discussion of the extent to which modifications might be required.

24. With regard to draft article 16 on federal State obligations, he agreed that States should be prevented from making reservations that diminished their obligations under the draft articles. Indeed, in his view, the Commission should also discuss the possibility of including a general "no reservations" clause in the draft articles. While he had no firm view on the matter, it seemed to him that several of the draft articles, such as those on mutual legal assistance, extradition and inter-State dispute settlement, already contained often far-reaching "opt-out" provisions or other provisions allowing States to diminish their obligations. That suggested that any further unilateral limitations might be inappropriate and that reservations should perhaps not be allowed at all.

25. With regard to monitoring mechanisms and dispute settlement, draft article 17, paragraph 2, appeared to make the right to refer a dispute to an arbitral tribunal and ultimately to the International Court of Justice dependent on the impossibility of settling it through negotiation "within a reasonable time". He wondered why this paragraph reflected the language used in relatively weak dispute settlement provisions. In international dispute settlement, particularly under the former General Agreement on Tariffs and Trade (GATT) system, such language had in practice often prevented effective dispute settlement by allowing States to insist that the "reasonable time" for negotiation had not yet elapsed. As draft article 17, paragraph 3, allowed States to opt out of any dispute settlement mechanism of an arbitral or judicial character, it seemed preferable to establish a specific time frame for negotiation, after which States would have the right to submit disputes to arbitration and ultimately to the International Court of Justice. Nevertheless, in the light of Ms. Escobar-Hernández's comments, he noted that the matter would depend on the final form of draft article 17.

26. Mr. JALLOH said that, having lived through a horrific war in his native country, Sierra Leone, he was very familiar with the dangers of crimes against humanity and considered that the Commission should do its utmost to strengthen the system of accountability for the perpetrators of core international crimes. The Special Rapporteur had made an impressive contribution to the Commission's efforts to address that scourge.

[41] *Ibid.*, document A/CN.4/701.

[42] See the 3349th meeting above, p. 9, para. 15.

[43] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[44] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

27. He generally endorsed the approach to the topic taken by the Special Rapporteur in his third report. He appreciated that, at a general level, the Special Rapporteur had relied considerably on provisions drawn from precedents derived from several transnational crimes conventions. However, while in some cases that might be appropriate, he cautioned that proper account must be taken of the specificities of crimes against humanity as core crimes under international law. The special nature of those grave crimes, which posed particular problems of enforcement at the national level, was clearly recognized by States in the preamble to the Rome Statute of the International Criminal Court, which aptly characterized them as "grave crimes" that threatened "the peace, security and well-being of the world" and as the "most serious crimes of concern to the international community as a whole".

28. With regard to the proposed draft article 11, he fully agreed with the Special Rapporteur's inclusion of what was essentially a "mini extradition treaty" within the draft articles, much like the "mini mutual legal assistance treaty" proposed in draft article 13. However, he urged the Special Rapporteur to consider the provisions of draft article 11 more carefully so as not to overlook some of the benefits that were to be gained from examining other conventions, as well as to ensure that they took into account the specificities of crimes against humanity.

29. He completely agreed with the Special Rapporteur that there was no need to include a dual criminality requirement, such as the one contained in article 44 of the United Nations Convention against Corruption, in draft article 11. The reasons for that position, as set forth in the report, were quite convincing and were further strengthened by the practice of States with respect to other stand-alone conventions on crimes such as torture and apartheid, which likewise did not contain a dual criminality requirement. On the issue of including crimes against humanity as extraditable offences in existing and future treaties, he was not entirely sure that there was, in fact, a need to retain the proposed language contained in draft article 11, paragraph 1. He largely shared the concerns that had been raised by Mr. Tladi on that issue at the Commission's 3348th meeting.

30. He fully concurred with the Special Rapporteur's view that the future convention on crimes against humanity should not include a political offence exception. While many transnational crimes conventions did include that exception, it was inappropriate in the context of crimes against humanity. The argument for excluding the political offence exception took on particular relevance with regard to the situation in many regions of the world where acts constituting crimes against humanity were committed in an attempt to preserve the interests of a particular ethnic group that was virtually equivalent to a political group. To endorse the political offence exception in such a context would undermine the nature of the crimes against humanity regime. Further evidence of the strong trend against the availability of the political offence exception for core crimes could be found in the database on rules of customary international humanitarian law that had been compiled by the International Committee of the Red Cross (ICRC),[45] specifically the information on State practice relating to rule 161 on international cooperation in criminal proceedings. In addition, many of his concerns regarding draft article 11 were addressed in the Amnesty International report containing its commentary to the third report on crimes against humanity.[46]

31. With regard to draft article 12 on *non-refoulement*, he proposed that the words "territory under" in paragraph 1 and the words "in the territory" in paragraph 2 be deleted. In addition, an emphasis on the exercise of jurisdiction on a basis other than that of territoriality could, in his view, bolster the impact and effectiveness of the future application of the *non-refoulement* provision.

32. Draft article 13, which constituted the so-called "mini mutual legal assistance treaty", should be regarded as a companion to the extradition clause set out in draft article 11, and the two should serve as the backbone of the future crimes against humanity regime in terms of ensuring its effectiveness. In view of the horrific nature of crimes against humanity, the reference, in paragraph 3 (*i*), to other types of assistance that were "not contrary to the national law of the requested State" seemed too limiting and should be deleted, since national legislation tended to be more restrictive and less progressive than it could be with regard to international crimes. He proposed that the list contained in paragraph 3 be amended so as to expressly include, as forms of assistance, the provision of information on the identification and whereabouts of persons or location of items and the use of videoconferencing while taking evidence from persons or for the purpose of providing information, evidentiary items and expert evaluations. In paragraph 3 (*d*), the phrase "including the exhumation and examination of gravesites" should be added to the existing text. Furthermore, given the gravity of crimes against humanity, paragraph 8 should be recast in order to indicate that obligations under any other treaty, bilateral or multilateral, that governed or would govern, in whole or in part, mutual legal assistance were superseded by the draft articles on crimes against humanity.

33. Before concluding his comments on draft article 13, he wished to point out that article 72 of the Rome Statute of the International Criminal Court, which concerned the protection of national security information, provided a useful framework for State cooperation regarding information that could not be disclosed to the public but that States could provide to a competent tribunal by way of legal assistance. Such assistance had proved crucial for the conduct of prosecutions by *ad hoc* tribunals such as the Special Court for Sierra Leone, and the Commission might wish to review the practice of such tribunals in that regard. He proposed an addition to paragraph 20 indicating that the requested State could provide to another State materials that, under its national law, were not available to the general public, for the purposes of carrying out investigations and prosecutions of crimes against humanity.

34. Draft article 14 set out a framework for the effective protection of victims, witnesses and other affected persons, whose participation was crucial for the successful

[45] Database available from the website of ICRC: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

[46] Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, London, 2017.

prosecution of crimes against humanity. The proposed provision seemed to be based on contemporary international legal approaches to that subject, particularly in international criminal tribunals. The Special Rapporteur should perhaps consider breaking down some of the issues that were raised in the draft article. It was important to be mindful of the distinction between the place and status of victims in the human rights corpus versus their place and status in the international criminal law corpus, which could imply different sets of expectations from institutions. Doing so would help to strengthen the Commission's efforts to address the rights of victims, *inter alia*, in respect of their participation in criminal proceedings.

35. It was regrettable that draft article 14 was fairly short. Although he endorsed the wording of paragraph 1 (*a*), he proposed that it be supplemented with a clear obligation on States to examine the complaints referred to in the subparagraph in order to determine, in accordance with draft article 7,[47] whether there were reasonable grounds for believing that acts constituting crimes against humanity had been or were being committed. With regard to paragraph 1 (*b*), the Commission should consider drawing inspiration from some aspects of the system that had been set up under the Rome Statute of the International Criminal Court, such as the establishment of a victims and witnesses unit, as a supplement to the future convention, especially if the crimes against humanity regime would be complementary to that of the Statute, which seemed to be the approach preferred by States. The focus of paragraph 1 (*b*) on the protection of potential witnesses from intimidation should be reviewed. The experience of international and internationalized criminal courts, as reflected in article 68, paragraph 1, of the Statute, demonstrated that protection must also include broader measures to protect the psychological well-being, dignity and privacy of victims and provide support to those at risk. He had personally seen how vital such provisions had been to the success of the work of the Special Court for Sierra Leone and the International Tribunal for Rwanda. Without such protection, many of the witnesses would not have testified, the persons ultimately responsible for the commission of crimes against humanity would not have been brought to justice and the victims would not have had the satisfaction of regaining their dignity in court. Paragraph 1 (*b*) would therefore be more comprehensive if it recognized the tremendous danger faced by people who testified against individuals who were, in many cases, the most powerful members of society, including Heads of State.

36. Paragraph 2 was an excellent proposal, but it was critical to ensure victims' effective participation. Some guidance along those lines could be provided in the commentaries. The Commission could perhaps clarify in paragraph 2 that States must enable victims to present their views and concerns where their personal interests were affected, although the budgetary constraints that many States faced could hinder the implementation of such a rule. Paragraph 3 should further define the scope and extent of the reparations to which victims were entitled and should recognize that crimes against humanity often involved a large number of victims. The reparations programmes that States had established, often in consultation with victims, tended to be more expeditious and effective than the processing of reparations through the judicial system. However, reparation in the form of financial compensation posed a huge obstacle to many States, especially those where periods of bad governance had led to political turmoil, conflict and the commission of serious crimes, such as crimes against humanity. It was sobering to realize that even the International Criminal Court struggled to properly finance its Trust Fund for Victims and to fulfil its obligations under article 79 of the Rome Statute of the International Criminal Court, with many States parties showing little inclination to donate the funds required.

37. Finally, with regard to victims, he proposed that the Special Rapporteur consider article 45, paragraph 3, of the Statute of the African Court of Justice and Human Rights as amended by the Malabo Protocol, which provided that the African Court of Justice and Human Rights could "invite and take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States".

38. Concerning draft article 15 on the relationship to competent international criminal tribunals, he agreed that it was necessary to avoid any conflict between the draft articles and States' rights and obligations with respect to such tribunals. The latter should be deemed to include not only the International Criminal Court, but also such future *ad hoc* tribunals as might be set up by the Security Council under Chapters VI or VII of the Charter of the United Nations, or by States in cooperation with regional organizations acting in compliance with current international law. As both the broad and the narrow approach discussed by the Special Rapporteur seemed eminently sensible, he did not share the concern expressed in paragraph 206 of the third report that a broad provision on potential conflicts might inadvertently undermine the draft articles, because it might be better to resolve any potential conflicts in favour of the competent international court.

39. The proposed draft article 16 on federal State obligations was essentially predicated on article 29 of the 1969 Vienna Convention on the Law of Treaties (1969 Vienna Convention), which set forth the default rule of customary international law that a treaty was binding upon each party in respect of its entire territory unless a different intention appeared from the treaty or was otherwise established. He supported that draft article as a means of precluding the potential complications described in chapter VI of the report.

40. With regard to draft article 17 on inter-State dispute settlement, while he welcomed the fact that paragraphs 212 to 238 of the report built on the excellent memorandum by the Secretariat concerning existing treaty-based monitoring mechanisms which might be of relevance to the future work of the Commission, he was disappointed that the Special Rapporteur seemed to suggest, in paragraph 238, that the selection of a monitoring mechanism, a matter that was key to the integrity of the future convention, should be set aside and that the Commission should content itself with the mere possibility that States might choose one of the procedures listed in paragraph 230, namely reports by States parties; complaints, applications or communications by individuals;

[47] *Yearbook … 2016*, vol. II (Part Two), p. 164 (draft article 7).

inter-State complaints; inquiries or visits; urgent action; or presentation of information for meetings of States parties. Although the justification for that approach, that it was a policy matter best left to the decision of States, presumably because it raised issues of a political rather than a technical nature, was not problematic in and of itself, in the specific context of crimes against humanity it would be unfortunate if the Commission, which had great technical expertise on the matter, failed to produce any recommendation. He therefore hoped that some common ground could be found in order to enable the Commission to recommend a strong monitoring mechanism ensuring that the future convention was useful for States.

41. Draft article 17 was also somewhat problematic with regard to the vital issue of inter-State dispute settlement, because it drew on the inapposite context of conventions concerning transnational crimes. He tended towards the view that, as in the case of conventions regarding genocide and war crimes, the regime for dispute settlement in a convention on crimes against humanity should be judicial, even though Article 33 of the Charter of the United Nations enumerated a variety of peaceful means of dispute settlement. For that reason, he was opposed to creating a regime for opting in or out of the judicial settlement of disputes over the interpretation and application of a future convention on crimes against humanity. His concerns would be allayed if paragraphs 1 and 2 were amended to provide for the judicial settlement of such disputes before the International Court of Justice and if paragraphs 3 and 4 were deleted in their entirety.

42. As for chapter VIII, at first blush he would be inclined to agree with the Special Rapporteur that it might be wise to decouple the discussion of immunity for crimes against humanity from the wider consideration of immunity of State officials from foreign criminal jurisdiction, in order to avoid any perception that the Commission's position on one topic signalled its intentions with regard to the other. However, compartmentalizing the debate might deliver an unintended blow to the perceived status of immunity before national courts. Indeed, it was hard to see how the Commission could avoid considering the consistency or inconsistency of its position when it resumed its debate on the broader topic of immunity of State officials from foreign criminal jurisdiction. A more exhaustive discussion of the issue in the Special Rapporteur's report, including an examination of the case law of the International Criminal Court, the International Court of Justice and other tribunals, academic literature and a number of regional instruments, might have helped the Commission to identify current and historical trends concerning the status of immunity and to take an informed decision on whether to accept the Special Rapporteur's suggestion that the draft articles on crimes against humanity should not address the question of immunity. Acceptance of that suggestion was made all the harder by the fact that the Commission had played a vital role in the development of the thinking on core issues of immunity, as embodied in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and in other substantive provisions that had eventually led to the idea that individuals' official capacity was largely irrelevant if they were being prosecuted for certain core international crimes. In fact, notwithstanding the case law of the International Court of Justice, as established, *inter alia*, by the case concerning the *Arrest Warrant of 11 April 2000*, there was nothing to prevent the Commission from endorsing a draft article along the lines of article 27 of the Rome Statute of the International Criminal Court in order to do right by victims of atrocity crimes. That would serve to complement, rather than undermine, the regime of national prosecutions for crimes against humanity as part of the core crimes contemplated by the Statute.

43. While he appreciated the useful discussion of amnesty in the report, as a former legal adviser in the Special Court for Sierra Leone he had difficulty with the apparent rejection of the Court's position, since that seemed to imply that, under the future convention on crimes against humanity, combatants, especially non-State armed groups, could rape, kill and maim and receive a blanket amnesty, as had happened under the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone,[48] and thereby avoid prosecution by national courts. As the caveat that one State's amnesty for an international crime did not bind another State was inadequate, he was in favour of including a limited provision indicating at the very least that, even though amnesties might not *per se* be prohibited by international law, States should not conclude agreements containing blanket amnesties for crimes against humanity, which were impermissible.

44. With regard to the future programme of work, he would prefer the Commission to take its time and deal thoroughly with the subject rather than rushing through a first and second reading of the draft articles.

45. Returning to paragraph 26 of the report, he said that he was worried that the failure to include a provision on competing extradition requests might create problems for States parties to the future convention, especially as draft article 17 provided that disputes should preferably be settled by negotiation or, if that was to no avail, by arbitration; only if that also failed did States have the option, not the obligation, to refer them to the International Court of Justice. Article 90 of the Rome Statute of the International Criminal Court specifically addressed that issue and set forth different rules depending on the identity of the requesting parties and the factual situation in which the requests were received. One solution which the Drafting Committee might like to consider would be to require the requested State to take account of the dates of the requests, the nature and gravity of the offences to which they referred (if different), the interests of each requesting State (including whether the offence had occurred in its territory and the victim's nationality) and the possibility of subsequent transfer between the requesting States. He therefore proposed that, in the future convention, the Commission take an approach similar to that of article 90 of the Statute and list the factors that requested States should consider in determining the State to which they would grant extradition in the event that they received concurrent requests. He would be submitting a detailed proposal for consideration by the Special Rapporteur and the Drafting Committee.

[48] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Lomé on 7 July 1999 (S/1999/777, annex).

46. Although he had expressed some concerns about some of the draft articles, and would be opposed to retaining the possibility of reservations to a future convention on the topic, he was not opposed to referring the draft articles to the Drafting Committee.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/703, Part II, sect. G[49])

[Agenda item 9]

47. Mr. VALENCIA-OSPINA (Chairperson of the Planning Group) announced that the Planning Group would be composed of the following members: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

The meeting rose at 11.55 a.m.

3351st MEETING

Thursday, 4 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the Special Rapporteur's third report on crimes against humanity (A/CN.4/704).

2. Mr. KOLODKIN said that the Special Rapporteur was to be commended on the quality, structure and readability of his third report, whose length was justifiable given his objective of completing work on the topic without delay. He did not consider that the Special Rapporteur should have substantiated the customary nature of the rules proposed in the report, since many of them were detailed and related to procedural matters. He welcomed the Special Rapporteur's brief explanations as to why he had chosen to use the wording from existing international instruments. He had no difficulty with lifting provisions *mutatis mutandis* from treaties on topics other than crimes against humanity insofar as they related to procedural matters. The Special Rapporteur's choice of what to include in the draft articles was logical and balanced. The draft articles adopted previously together with those proposed in the third report had good prospects of becoming a convention. He therefore supported the Special Rapporteur's proposal to complete the first reading of the topic during the current session on the basis of the third report. He was in favour of referring all the draft articles in the third report to the Drafting Committee, with the exception of draft articles 15 and 16.

3. He would have preferred a shorter version of draft article 11, on extradition, but could work with the longer version in the report. The Special Rapporteur's approach was not to include a dual criminality requirement in the conditions governing extradition, in particular in the light of draft article 3, paragraph 4.[50] However, that provision did not promote the uniformity of national laws criminalizing acts identified as crimes against humanity. If such an approach was followed, he suggested that the matter be explained by means of the commentary to draft article 11, based on the text of paragraph 33 of the report. Furthermore, a reference to membership of a particular social group should be added to draft article 11, paragraph 11, and the recommendation made by Amnesty International concerning the provision taken into account.[51]

4. In draft article 12, on *non-refoulement*, he questioned the need for the words "under the jurisdiction". His preference would be simply to say "to another State"—the expression used in the International Convention for the Protection of All Persons from Enforced Disappearance, on which the Special Rapporteur had implied he would base the draft article, but for some reason had not. Moreover, the use of the term "extradite" in the draft article raised questions as to its relationship with draft article 11.

5. He would also have preferred a shorter version of draft article 13, on mutual legal assistance, and wondered whether its paragraph 8 really added anything to paragraph 9. In paragraph 16 (*b*), instead of referring to "essential interests", he suggested that it might be helpful to list the grounds on which mutual legal assistance could be refused, in line with draft article 11, paragraph 11. He wondered how paragraph 21 of draft article 13, concerning the need for the prior consent of a State transmitting information for its disclosure by the receiving State, could be reconciled with its paragraphs 6 and 7 which, as he understood them, concerned the transmission of information received beforehand from a third State.

6. He had several concerns regarding draft article 15 on the relationship to competent international criminal tribunals. The provision seemed contrived and was

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

[50] *Yearbook … 2015*, vol. II (Part Two), p. 37 (draft article 3).

[51] See Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, London, 2017, chap. IV, p. 27.

not in keeping with the principle of complementarity enshrined in the Rome Statute of the International Criminal Court. As currently worded, it might deter some States from participating in a future convention on crimes against humanity; the legal bases underpinning the provision were unclear. The constitutive instruments of international criminal tribunals varied greatly in nature and content. In his opinion, any conflict that might arise between the obligations under such constitutive instruments and those of any future convention should be resolved on a case-by-case basis, by applying different rules of international law, treaty provisions or general principles of law. The proposal to amend the draft article to the effect that the competent international tribunal must comply with the principles of international law would not resolve the problem of who would determine whether a tribunal had been established in accordance with such principles. For example, the Russian Federation had abstained from voting on Security Council resolution 1757 (2007) of 30 May 2007 on the establishment of the Special Tribunal for Lebanon, because it had considered that its establishment did not fully comply with international law. If the proposed amendment to draft article 15 was adopted, as a party to the future convention the Russian Federation could claim that the obligations arising under the Statute of the Special Tribunal for Lebanon did not prevail over those under the convention. He therefore proposed that the draft article be deleted.

7. As to draft article 16, on federal State obligations, he considered that matters relating to the territorial scope of any future convention were adequately covered by article 29 of the 1969 Vienna Convention. Moreover, he was not convinced by the example of three treaties with clauses that expressly denied any accommodation to federal States, cited in paragraph 210 of the report. In his opinion, more examples could be found of universal treaties on crimes that did not contain a provision similar to draft article 16. Accordingly, he proposed its deletion.

8. He endorsed the basic thrust of draft article 17 and saw no reason to depart from the tried and tested three-tier method of inter-State dispute settlement it described. It would be wrong to impose on States parties to a future convention the compulsory jurisdiction of the International Court of Justice. He suggested that the commentary to the draft article mention the need for the negotiation as well as any attempt to agree on the organization of the arbitration to be in good faith and genuine. As to the wording of the draft article, he recalled that when discussing the first few draft articles, some members had spoken of the responsibility of States, not only in the sense of the prevention and punishment of crimes against humanity, but also in the sense of their commission. Responsibility in that sense was not explicitly mentioned in the draft article; however, it was mentioned in the commentary to draft article 4, on the obligation of prevention, where parallels were drawn with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. If the Commission considered that draft article 17 covered the responsibility of States for crimes against humanity, then it should include an explicit reference in its paragraph 2, based on article IX of that Convention. Paragraph 2 would therefore read: "Any dispute between two or more States concerning the interpretation or application of the present draft articles, including those relating to the responsibility of a State for crimes against humanity …".

9. Regarding the remaining issues not covered in the draft articles, he agreed with the Special Rapporteur that the inclusion of questions such as monitoring mechanisms, reservations, immunity and amnesty would complicate the project for States; in any case, the question of a monitoring mechanism for a convention on crimes against humanity could be decided at a later date, as with other treaties. As far as immunity and amnesty were concerned, he did not share the view that the trial and criminal prosecution in international or hybrid courts of the perpetrators of crimes against humanity should be an integral part of any post-conflict settlement. In his view, justice should not be imposed on a nation or a State that had lived through the hardest moments in its history and suffered crimes against humanity. They should have the right to choose between criminal prosecution, full or partial amnesty or the establishment of truth, justice and reconciliation commissions according to their specific circumstances. It should not be an obligation established *a priori* in an international treaty as a general rule that would provide for all future cases.

10. He held a similar view regarding proposals that the draft articles should refer to the irrelevance of the immunity of State officials from foreign criminal jurisdiction with regard to crimes against humanity. States were free to choose not to invoke the immunity of their officials suspected of committing crimes against humanity and liable to foreign prosecution. It was their right, and, in some cases, they exercised that choice. A rule on the absence of such immunity should not be imposed on States. Instead of being a panacea for the commission of crimes against humanity, it was more likely that such a rule would make it difficult for some States to participate in a future convention. In many cases, there was every justification for bringing criminal proceedings in relation to crimes against humanity but there were insufficient legal grounds. In that connection, he referred to the case of the former President of the Soviet Union, Mikhail Gorbachev, summoned as a witness in the criminal case against former Soviet officers accused of having committed crimes against humanity in Vilnius, Lithuania, in January 1991. The Russian Ministry of Justice had refused to deliver the summons to Mr. Gorbachev and had invoked a provision of a bilateral treaty on mutual legal assistance, but it could have invoked the former President's immunity *ratione materiae*.

11. If it was feasible for the Drafting Committee to revisit some of the draft articles adopted previously, he stressed the need to consider where to place the provision to the effect that no exceptional circumstances could be invoked as a justification of crimes against humanity, currently in draft article 4, paragraph 2.

12. Mr. HMOUD said that the Special Rapporteur was to be commended on his third report, which aimed to cover all remaining issues as well as matters raised by members, States and other actors. The Special Rapporteur had struck a balance between practicality, legal policy and the need to have an effective law enforcement instrument to combat crimes against humanity. The draft articles adopted

previously, together with most of the articles proposed in the report, constituted a comprehensive set of articles ready for submission to the General Assembly. Nonetheless, the success of the project would largely depend on the Commission's ability to achieve a final product that took into account all the legitimate concerns of relevant actors and the international community. In that regard, he had some general comments to make.

13. Like other members, he found the report far too long and, although relatively easy to read, it could have been condensed, especially in its discussion of comparative treaty provisions. It could have been divided into two parts so that two separate debates could have been held, as with the topic of reservations to treaties. Concerning the Special Rapporteur's intention to complete the first reading of the topic during the current session, he shared the view that the Commission should not rush matters. It was too important a topic to rush: its outcome would affect the lives of millions of human beings. He was convinced that through the Special Rapporteur's tremendous efforts, the draft articles would make a big difference in the fight against crimes against humanity. However, it was imperative that the Commission create solid and common ground for States to build on for a convention.

14. Regarding the sources used in the report, he agreed that there was more emphasis on treaty law than on exploring the customary law basis for some of the draft articles. Certain provisions were based on treaties or conventions that were not relevant to the current project and had no plausible link to it. That was especially true of the formulations based on the text of the United Nations Convention against Corruption, yet instruments which were more relevant to the topic, such as the 1949 Geneva Conventions for the Protection of War Victims and the Convention on the Prevention and Punishment of the Crime of Genocide, were only briefly discussed, mostly in the footnotes. Provisions from conventions that purported to punish international crimes, such as terrorism, were mentioned in some places and not in others, without any explanation. While he understood that some of the proposed draft articles served policy considerations, purported to fill gaps or to maximize protection against crimes against humanity, he recalled that the final product would be subject to inter-State negotiations, where a plausible connection with the relevant instruments would be sought. Nonetheless, as far as procedure-related matters were concerned, such as the provisions concerning extradition and mutual legal assistance, he considered that the proposed draft articles were defensible.

15. The consideration and treatment of customary international law needed further elaboration on other matters such as *non-refoulement*, immunity and amnesty. The Commission's deliberations and the reactions of various actors on the draft articles proposed in the report must be taken into account in order to decide how to deal with such matters on second reading. He held the view that merging the Commission's work on crimes against humanity with other initiatives to create an inter-State mutual legal cooperation mechanism for other international crimes would weaken the outcome of the Commission's project and the opportunity to fill gaps in the protection against crimes against humanity.

16. Turning to specific comments on the draft articles, he said that draft article 11 was one of the most important in the project and was necessary to exclude the possibility of any procedural impediment to the implementation of a State's obligation to extradite. Extradition procedures varied from one State to another, and unless there were bilateral or multilateral arrangements that established uniform conditions and processes, extradition would face legal obstacles. The Special Rapporteur provided sufficient reasons for choosing the long version of the extradition provision in the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime over the short version in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance; however, he was not convinced that the fact that there were 181 States parties to the United Nations Convention against Corruption was an indication that States would accept the same text for a future convention on crimes against humanity. He agreed with the Special Rapporteur that a provision requiring dual criminality was not necessary in the draft article on extradition, since the requirement of criminalization under national law was already contained in draft article 5.[52]

17. Regarding draft article 11, paragraph 1, on offences deemed extraditable, he considered that reference should be made to draft article 5 and not to draft article 3, as some members had suggested, since the latter merely defined crimes against humanity. He agreed that the political offence exception should not apply to extradition—it was a universally accepted principle. Under draft article 11, paragraph 4 (*b*), a State did not have an obligation to conclude extradition treaties with other States when it did not use the draft articles as a basis for extradition, but should seek to do so. Since that could create an impediment to extradition and the State would have to submit the case for prosecution based on draft article 9, he suggested that it might be worthwhile considering making the procedure under paragraph 4 (*b*) mandatory, in case there was no extradition treaty between the requesting and requested States.

18. Draft article 11, paragraph 11, under which a State had the right to deny an extradition request on the ground of possible persecution, required further study. When seeking to prevent extradition, States could always claim that a request had been made on unlawful, political or other grounds. They would then have to submit the matter to prosecution by national authorities, which might attempt to shield the State from international responsibility for breach of the treaty obligation. In his view, objective guarantees against a politically motivated extradition request were thus a better alternative. He considered that multiple extradition requests should be decided by the requested State. There was no reason to consider that the territorial State or the State that received the first request should have priority over the State of the victims or perpetrators. Nonetheless, the requesting and requested States should be encouraged to consult with each other before determining to which State the perpetrator would be extradited.

[52] *Yearbook … 2016*, vol. II (Part Two), pp. 151–152 (draft article 5).

19. In draft article 13, on mutual legal assistance, the Special Rapporteur had again opted for the long-form approach taken in the United Nations Convention against Corruption as opposed to the short-form approach taken in such instruments as the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Protection of All Persons from Enforced Disappearance. Draft article 13 purported to ensure maximum inter-State cooperation in the investigation, prosecution and trial of cases involving crimes against humanity. It offered the requested State the flexibility to accede to requests for assistance within the limitations of its national laws while preserving the core benefit of a streamlined procedure for the provision of mutual legal assistance. However, the Special Rapporteur offered no explanation or evidence to justify the assertions made in paragraph 122 of the report, that the long form was "viewed by States as necessary in the context of crime prevention and punishment in important areas of transnational organized criminal law" and that it had been "accepted in practice by States". The fact that 181 States were parties to the United Nations Convention against Corruption did not make the long form accepted practice in the field of combating crimes against humanity. That said, the long-form article, with its "mini mutual legal assistance treaty", could serve as a useful tool for maximizing cooperation where no treaty existed between the requesting and requested States. He was not sure that draft article 13, paragraph 8, which gave priority to obligations under bilateral or multilateral treaties governing mutual legal assistance, was necessary. As a general rule, previous treaty obligations remained valid unless they conflicted with later treaty obligations on the same subject matter.

20. Draft article 14, on victims, witnesses and others, was yet another important inclusion in the draft that reflected developments in the field. The protection of victims and witnesses was especially warranted in view of the gravity of the crimes involved and the possibility that the perpetrators could be part of the State or organizational apparatus responsible for implementing policies that involved crimes against humanity. There was no global treaty to protect the victims and witnesses of crimes against humanity and no uniformity in the instruments or practice of international tribunals dealing with such crimes. Thus, it was particularly important to harmonize the rules that applied at the inter-State level. Although there was an emerging norm that provided victims and witnesses of crimes against humanity with legal standing and protection, the exact content thereof was still not uniform.

21. He agreed with the Special Rapporteur that there was no need to provide a definition of who qualified as a victim of a crime against humanity. That should be left for States to determine, as long as their laws recognized the concept. While the protection envisaged in the draft articles was essentially aimed at individuals, nothing in the draft articles restricted a State's ability to extend such protection to legal persons it considered as victims. Similarly, while the participation of victims in criminal proceedings was important, it should be left to each State to provide for it in its laws and procedures. The qualification in draft article 14, paragraph 2, was therefore appropriate.

22. The provision of reparation, which was addressed in draft article 14, paragraph 3, strengthened the protection of victims and provided them with needed relief. The paragraph was drafted in such a way as to take account of the disparities in States' ability to provide measures of reparation. It should be noted that it was the individual perpetrator who should assume responsibility for reparations. A State whose wrongful act or omission contributed to the commission of crimes against humanity should also assume responsibility in regard to reparation, as should any organized group involved in the perpetration of such a crime. To demand "full" reparation or remedy would be to set a threshold so high as to be almost impossible to meet in all situations. Experience with setting up voluntary trust funds was not encouraging, though it would be worthwhile considering the establishment of mandatory victims' funds with stable resources. Such funds could contribute to relief and rehabilitation efforts. On the question of guarantees of non-repetition, he was not sure how they could be implemented when the perpetrator of the offence was an individual.

23. With regard to draft article 16, he agreed that there should be no exception to the application of the draft articles to all parts of federal States, whether under declarations of territorial application or so-called "federal clauses". Any such limitations would be incompatible with the objective of providing maximum protection under a future convention. If such limitations were permitted, a federal State fighting insurgents in one part of its federal territory where crimes against humanity were being committed would be able to opt out of the application of the convention to that part of its territory. Consequently, the final clauses of a future convention should ensure that draft article 16 was not subject to reservations.

24. Regarding draft article 17, on inter-State dispute settlement, the Special Rapporteur provided many examples of existing and possible monitoring mechanisms. The core issue was the role envisaged for any given mechanism. The role of existing treaty monitoring bodies was determined by their mandate under their respective instruments. Their interpretative role, which was also derived from their mandate, might be useful but could not be considered authoritative for the purposes of the current drafting exercise. Providing the treaty bodies with a role in monitoring the implementation of a future convention would be legally complicated and controversial. Nevertheless, the creation of a monitoring mechanism for a future convention on crimes against humanity was important for several reasons. First, States were usually hesitant to invoke inter-State dispute settlement mechanisms for legal, political, financial or other reasons. Thus, violations of the obligations under a future convention, if they were to be confronted in an effective and swift manner, should be dealt with in the context of a monitoring mechanism. That would ensure that States and organizations acted in a manner that was consistent with the spirit and content of the convention. Second, the interpretation of the convention could be included in the mandate of the monitoring mechanism, so as to avoid leaving its interpretation to each State, which would lead to disparities in its application. Third, draft article 17 contained an opt-out clause that would limit the application of the dispute settlement mechanism to

resolving disputes, making States less hesitant to invoke it. It should be remembered that a monitoring mechanism and a dispute settlement mechanism served distinct purposes. Whereas dispute settlement procedures took a certain amount of time, action to stop or prevent the commission of crimes against humanity must be swift and would be best served by the creation of a monitoring mechanism. He was in favour of an independent monitoring mechanism composed of experts serving in their personal capacity, as well as a mechanism for convening a conference of States parties, which would help ensure that action was taken swiftly. As such mechanisms would play an integral part in combating crimes against humanity in an effective manner, there was no plausible reason for not including them in the draft article. As for the dispute settlement mechanism set out in draft article 17, there was some merit in allowing States to opt out of it and seek arbitration or referral to the International Court of Justice, since that would encourage more States to become parties to the convention.

25. As to the question of *non-refoulement*, covered in draft article 12, he noted that the Special Rapporteur had not provided any customary law source to justify its inclusion. There was not even an evolving norm to that effect under customary international law. While the Special Rapporteur had chosen not to provide for the prohibition of immunity and amnesty in the draft articles, in part because he did not perceive an established customary basis for a rule on their prohibition, he had done the opposite with regard to *non-refoulement*. In his third report, the Special Rapporteur cited several conventions and treaties that prohibited *refoulement*, but they were all related either to the protection of a protected person, such as someone in a situation covered by the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV), or of individuals at risk of a particular crime being committed against them by virtue of their beliefs, race, religion or other consideration, under such instruments as the International Convention for the Protection of All Persons from Enforced Disappearance, the Convention relating to the Status of Refugees or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Draft article 12, as formulated, did not take that into account, especially in relation to the grounds that a State could invoke for not expelling or returning a person. Draft article 12, paragraph 2, bore no relation to the definition of crimes against humanity. A consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law could exist independently of the commission of crimes against humanity. Draft article 12, paragraph 2, should have been formulated to reflect the definition of such crimes in draft article 3. Moreover, crimes against humanity might be committed in one part of a State but not in another. To introduce a blanket prohibition of return to all areas or territories, when such return was otherwise not prohibited under international law, would create legal obstacles to the implementation of a future convention. Returning an individual to the State authorities or to areas where that person would be in no danger of being subjected to crimes against humanity should not be prohibited. If included, draft article 12 should be amended to reflect that.

26. While the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction was ongoing, it was not specifically relevant to the current discussion on the topic of crimes against humanity, where the question was whether there should be any reference to the issue of immunity. Without the inclusion of some form of provision barring immunity of State officials, there was a risk that States might invoke such functional or personal immunity to block prosecution or extradition. Even if domestic law criminalized crimes against humanity on the basis of draft article 5, a State might refuse extradition and submit the case to its prosecution authorities, who could invoke the immunity of State officials. Remarkably, in such cases the relevant State would not be violating its obligations under the draft articles. It was therefore important to include a provision that, at least, made it clear that a person's official capacity did not confer immunity. In any case, the commentary should not give the impression that immunity was not prohibited under the draft articles.

27. He did not share the Special Rapporteur's view that amnesty was not yet prohibited under customary international law for the crimes of most concern to the international community. The prohibition of crimes against humanity was *jus cogens*, and amnesty ran counter to such peremptory rules. In that regard, he noted the discrepancy in the analysis attributed to Antonio Cassese in paragraph 292 and the quote of his in the last footnote to that paragraph. It should also be noted that the Special Rapporteur did not discuss United Nations practice in the field or the fact that the United Nations did not endorse peace agreements that provided amnesty for the most serious international crimes such as crimes against humanity. If no provision on amnesty was included in the draft articles, the prohibition of amnesty should at least be mentioned in the preamble. Also, the commentaries should refrain from giving the impression that amnesty might be allowed under the draft articles: failing to punish the offence would violate draft article 5 on criminalization under national law.

28. As for the relationship to competent international criminal tribunals, which was the subject of draft article 15, the relevant rules under general international law should apply, namely the *lex posterior derogat legi priori* rule as set forth in article 30 of the 1969 Vienna Convention. While he understood the concerns expressed by some commentators in relation to the Rome Statute of the International Criminal Court, a special rule in the draft articles that gave precedence to certain prior rules over others should be resorted to only in exceptional circumstances, which did not exist in the present case. Such a draft article would create unnecessary legal complications, given that the draft articles had been drawn up with the preservation of the integrity of the Statute in mind.

29. Reservations were a legal policy issue, and so there was a need to balance all the various legal interests. The Special Rapporteur had elaborated on every possible option, from no reservations at all to a list of allowed and prohibited reservations. The best possible option, however, was to remain silent on the matter and to refer in the commentary to the relevant rules of the 1969 Vienna Convention and the Guide to Practice on Reservations to

Treaties,[53] especially on issues such as reservations that violated the object and purpose of the instrument or vague and general reservations. Making a list was not a good idea, as it would be open to challenge during the inter-State negotiations on the future convention.

30. Although he had no objection to replicating the preamble from the Rome Statute of the International Criminal Court, it should be tailored to the particularities of the draft articles as an inter-State law enforcement instrument to combat crimes under national law.

31. In conclusion, he recommended sending draft articles 12, 14, 15, 16 and 17 and the preamble to the Drafting Committee, but reserved his position with regard to draft article 13 for the reasons he had given.

32. Mr. TLADI, referring to Mr. Hmoud's assertion that the United Nations did not endorse peace agreements that provided amnesty for the most serious international crimes, noted that, in 2011, the Security Council had in fact endorsed the peace agreement between the warring parties in Yemen.[54] He would be interested to hear Mr. Hmoud's views on that.

33. Mr. HMOUD said that, in the case of Yemen, the Security Council had been essentially referring to the agreement between the parties to the conflict, and had not dealt with the issue of the amnesty granted to President Saleh under an accord brokered by the Cooperation Council for the Arab States of the Gulf, which was a separate matter altogether.

34. Mr. JALLOH said that Mr. Hmoud was correct to say that the position of the United Nations was that, under international law, amnesties were not permissible for the most serious international crimes—genocide, war crimes and crimes against humanity. That was why the Special Representative of the Secretary-General present at the Lomé peace negotiations in 1999 had entered a disclaimer with respect to the agreement reached between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone.[55] The disclaimer had proved to be crucial to what was to become article 10 of the Statute of the Special Court for Sierra Leone,[56] which had provided the basis for the decision of the Court's Appeals Chamber on the defendant's claim that he could not be tried because the agreement granting him amnesty had been signed by representatives of the international community. Since then, the United Nations had maintained its policy position on amnesties.

35. However, a distinction should be drawn between blanket amnesties and more limited ones. In the case of Colombia, for example, when the Government was trying to conclude an agreement to put an end to years of internal armed conflict, the Prosecutor of the International Criminal Court had decided to keep a watchful eye on the situation before deciding whether to prosecute. That suggested that the acceptability of a carefully tailored amnesty of limited scope and with some elements of accountability built into it remained something of an open question.

36. Mr. KOLODKIN said that clarity was needed on whether the policy position of the United Nations was actually that of the Organization, its Members or its Secretariat.

37. Mr. GÓMEZ ROBLEDO said that in the case of Colombia it was important to bear in mind that the Prosecutor of the International Criminal Court had still not requested the Pre-Trial Chamber to open an investigation. The case was still at the preliminary review stage in the Office of the Prosecutor.

38. Mr. GROSSMAN GUILOFF suggested that, given the need to establish the facts with regard to amnesty and international law, the Secretariat could be asked to compile a compendium of decisions of the United Nations treaty bodies and statements by the United Nations High Commissioner for Human Rights on the subject.

39. Mr. JALLOH said that he agreed with Mr. Gómez Robledo's comments and supported Mr. Grossman Guiloff's proposal. Nevertheless, he wished to draw attention to a statement by the Prosecutor of the International Criminal Court on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia–People's Army. The Prosecutor had said that the final peace agreement was undoubtedly a historic achievement and a critical step towards ending a protracted conflict; however, she had gone on to say that she had supported the efforts by Colombia to bring an end to the decades-long armed conflict "in line with its obligations under the Rome Statute [of the International Criminal Court]" since the beginning of the negotiations and "would continue to do so during the implementation phase".[57] He interpreted that as meaning that she was going to keep a watchful eye on the situation and reserved the right to prosecute, provided, of course, that there was evidence likely to lead to a conviction. Her statement suggested, to him at least, that she might be open to the idea of a peace agreement that included an element of accountability but offered no blanket amnesty.

40. The CHAIRPERSON said that if the Secretariat were to prepare the compendium proposed by Mr. Grossman Guiloff, it would need to be given a precisely formulated request and a clear time frame. He suggested that the Drafting Committee on crimes against humanity could take up those matters.

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[53] 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 corrigenda 1–2, pp. 23 *et seq*. See also General Assembly resolution 68/111 of 16 December 2013, annex.

[54] See Security Council resolution 2014 (2011) of 21 October 2011.

[55] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, signed at Lomé on 7 July 1999 (S/1999/777, annex).

[56] 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.

[57] Statement of the Prosecutor of the International Criminal Court, Ms. Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army, available from: www.icc-cpi.int/news/statement-icc-prosecutor-fatou-bensouda-conclusion-peace-negotiations-between-government.

41. Mr. SABOIA said that he agreed with the suggestions made by Mr. Grossman Guiloff and the Chairperson, adding that the Drafting Committee, in formulating the request, should bear in mind the case law of the Inter-American Court of Human Rights, which had taken a number of decisions relating to amnesty.

42. Mr. GROSSMAN GUILOFF said that he also agreed with the Chairperson's suggestion. He wished to clarify that the Colombian peace agreement did exclude serious crimes under international law, including crimes against humanity. It was true that the implementation of the agreement needed to be carefully monitored with regard, *inter alia*, to the length of the prison sentences handed down. It was important to note that a truth commission had been established, and that the experience of various truth commissions in Latin America showed that amnesty was not a valuable tool in the process of national reconciliation.

43. Mr. ŠTURMA said that the Special Rapporteur had prepared a report which was very clear, well structured and documented by numerous references to relevant treaties. The report could have been slightly shorter; it was in fact two reports rolled into one, having been drafted to take advantage of a window of opportunity in which all the draft articles presented could be adopted on first reading at the present session. He fully supported the Special Rapporteur's approach in that respect.

44. Since there had been some debate on the nature of the present topic within the International Law Commission, he wished to reiterate that the topic was not outside the mandate of the Commission. On the contrary, the drafting of articles for future conventions had always been part of its mandate. The definition of crimes against humanity and the general obligation to prevent and punish such crimes undoubtedly involved the codification of customary international law, as they were crimes arising from violations of *jus cogens*. At the same time, the primary purpose of the draft articles was to provide a multilateral treaty on inter-State cooperation, including extradition and mutual legal assistance, with obligations that would be binding on States parties. Although the drafting of such provisions differed from the usual codification work, the Commission was not barred from going ahead without a prior request from the General Assembly.

45. In an ideal world, it would be preferable to have one comprehensive convention on all core crimes under international law. However, from a practical perspective, there was little chance that a convention that also included genocide and war crimes would be adopted, and a convention on crimes against humanity was better than none. While a convention on crimes against humanity would need to include more elements than older treaty regimes, it should be borne in mind that the most recent treaties were not always the most appropriate models for such a convention.

46. In his view, the fundamental theoretical problem was distinguishing between crimes against humanity as crimes under general customary international law and transnational crimes, such as corruption, which were criminalized only under special conventions. In the words of Mr. Cherif Bassiouni, the former were based on a direct enforcement regime and the latter on an indirect enforcement regime. It was not merely a theoretical distinction, but also had practical implications. It would be a rather unfortunate consequence if the draft articles created the misleading impression that crimes against humanity were just like ordinary crimes or merely treaty-based offences.

47. Concerning the methods used by the Special Rapporteur, he focused on treaty obligations aimed at enhanced inter-State cooperation. Since most of the draft articles presented in the report dealt with new treaty law obligations, it made sense to base them primarily on examples and comparisons of existing multilateral criminal law conventions. Such an approach was justified, as the Commission was aiming to develop a new, progressive, state-of-the-art convention. However, it was justified only to the extent that it would not dilute the aforementioned distinction. From that perspective, the extensive references to the United Nations Convention against Corruption might be counterproductive. Although it was the most recent and detailed criminal law instrument, it might not necessarily be compatible with crimes against humanity, which were much closer in nature to the conventions against torture, genocide or enforced disappearances. That did not mean that provisions from the United Nations Convention against Corruption should not be used, but that they should be amended, where appropriate.

48. Turning to the proposed draft articles, he said that draft article 11 on extradition was certainly one of the most important provisions. In view of the debate on the nature of crimes, he agreed with the Special Rapporteur that there was no need to include a double criminality requirement. He also supported the inclusion of a provision on the non-applicability of political offences to extradition, as set out in paragraph 2. He considered that the basic obligation was already covered in draft article 9,[58] on *aut dedere aut judicare*, and that draft article 11 included provisions of a more procedural and technical nature. However, he shared the view that some provisions applicable to corruption or other transnational but ordinary crimes were not suited to crimes against humanity, particularly the minimum penalty requirement in draft article 11, paragraph 6, and the territorial aspect reflected in draft article 11, paragraph 8.

49. As to the possible grounds for refusal of extradition, he agreed that the issue of the death penalty merited consideration. It should be included in draft article 11 rather than in draft article 12 because the principle of *non-refoulement* was established as an absolute obligation. A death penalty exception should be left as an option, at the discretion of individual States.

50. With regard to draft article 13, he believed that the option of a "mini mutual legal assistance treaty" was justified; yet, once again, the model of the United Nations Convention against Corruption should be modified. For example, draft article 13, paragraph 4, according to which States should not decline to render mutual legal assistance pursuant to the draft article on the ground of bank secrecy, was perfectly relevant for corruption and other economic crimes, but seemed odd in the context of crimes against humanity.

[58] *Yearbook … 2016*, vol. II (Part Two), p. 166 (draft article 9).

51. Regarding draft article 14, he welcomed the inclusion of a provision on the protection of victims, witnesses and others, particularly the inclusion of the right of victims to obtain reparation. Although he considered that guarantees of non-repetition were not a typical form of reparation, he supported all the forms set out in draft article 14, paragraph 3. In his view, it was an issue of terminology rather than of substance: if the word "reparation" was replaced by a more general term, such as "remedy" or "redress", it might well cover all the forms.

52. Concerning draft article 15, he found the treatment of the relationship to competent international criminal tribunals useful. However, in view of possible future international or hybrid criminal tribunals, he welcomed the idea of including a qualification. For example, the words "which respects general principles of criminal law" could be placed after "instrument of a competent international criminal tribunal", with an explanation in the commentary that the principles were those set out in the Rome Statute of the International Criminal Court.

53. As to chapter VII, he welcomed the presentation of existing monitoring mechanisms, but endorsed the Special Rapporteur's decision not to mention them in the draft articles. Nevertheless, perhaps some mechanisms could be dealt with in an optional protocol, which the Commission might be entrusted to draft in the future, depending on the views of States in the Sixth Committee. He expressed support for the dispute settlement mechanism described in draft article 17 that covered both negotiation and judicial settlement. However, the provision on the procedure for referring any dispute that could not be settled through negotiation to the International Court of Justice might have to be streamlined and strengthened, with a reference made to the issue of State responsibility, in line with article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

54. He commended the Special Rapporteur for having addressed the important remaining issues in chapter VIII of the report. He agreed that a provision on concealment would not be appropriate in the draft articles on crimes against humanity and that issues related to transitory justice, such as amnesty, should not be covered. However, he would welcome at least a brief provision on the irrelevance of official capacity, similar to article IV of the Convention on the Prevention and Punishment of the Crime of Genocide or article 27 of the Rome Statute of the International Criminal Court. He also agreed that the question of final clauses should be left to the conference of States parties to decide.

55. In conclusion, he recommended that all the draft articles be referred to the Drafting Committee, and expressed the hope that the Commission would be able to adopt them on first reading.

56. Mr. CISSÉ, referring to chapter I of the report, said that, according to paragraph 22, many States refused to extradite in the absence of an extradition agreement. The Commission should focus on how to resolve that difficulty with a view to combating crimes against humanity as effectively and firmly as possible. As the Special Rapporteur had rightly recalled, one way of addressing the issue would be to consider that, once a State was a party to a multilateral convention that contained provisions on extradition, as would be the case with a future convention on crimes against humanity, the convention would form the legal basis for extradition in the absence of an extradition treaty. In other words, the new convention would take precedence, which would strengthen the legal regime of extradition and the system of accountability, by depriving States that did not wish to extradite a person of the excuse that there was no extradition treaty in place. That aspect was well reflected in paragraphs 23 and 50 of the report. The scenario in which extradition was not made conditional on the existence of a treaty was also well illustrated in paragraph 56. However, he questioned the relevance of quoting article 44 on extradition from the United Nations Convention against Corruption *verbatim* and *in extenso*. Since crimes against humanity and the crime of corruption were different in nature, it was important to make judicious choices among the 18 paragraphs of article 44 and keep only those applicable to crimes against humanity. Simple comparisons were not sufficient, and it was therefore necessary to refocus the debate primarily on crimes against humanity. He welcomed the Special Rapporteur's effort to reduce the number of paragraphs to 13, but believed that an additional effort at concision could be made in order to stick more closely to the topic.

57. While the drafting of a new convention concerned the international community as a whole, it was of particular concern to the African continent, which had been the scene of grave crimes against humanity. He was therefore of the opinion that the report should have gone into more detail on the situation in Africa. It would also be worth considering including a provision in the draft article on extradition that States must adopt legislation criminalizing and punishing crimes against humanity. The legislative systems in many African countries were still lacking in that regard or too weak to effectively punish such crimes. Over the past few decades, ordinary African citizens and high-ranking political and military officials had been prosecuted by the international criminal courts. The Commission's project would benefit from taking account of the extremely important role that could be played by African regional and subregional organizations when it came to punishing and preventing crimes against humanity. For example, the Special Rapporteur could focus his research on initiatives or other legal instruments adopted by the African Union or the Economic Community of West African States in the field of corruption and consider to what extent their approach to extradition issues might be applicable to crimes against humanity committed on that continent and elsewhere. The issue of immunity was not covered in any of the draft articles proposed in the report, despite the fact that political and military officials very often claimed immunity in order to escape prosecution for crimes against humanity. The elaboration of such a draft article would be entirely appropriate, as it would not contradict the relevant provisions of article 27, paragraphs 1 and 2, and article 33 of the Rome Statute of the International Criminal Court.

58. With regard to the wording of draft article 11, paragraph 1 could be amended in the Drafting Committee. He proposed that, in the French version, the word *peut* ("may") in the first and second sentences be replaced with *doit*

("must"), as the former might be interpreted to mean that States could simply choose whether or not to extradite. The word *doit* would be more appropriate and would be more effective in combating impunity for crimes against humanity. A "without prejudice" clause could be added at the end of paragraph 1, referring to the relevant provisions of international legal instruments related to extradition for crimes against humanity. For the sake of expediency and consistency, paragraph 4 should address the plausible hypothesis in which a State did not make extradition conditional on the existence of an extradition treaty.

59. Chapters II, III, IV and V largely reflected the applicable law in the area of extradition from both a procedural and a substantive point of view, and the Special Rapporteur was to be commended on his in-depth research into various aspects of the issue. However, for the purposes of a draft convention on crimes against humanity, chapter VI on federal State obligations seemed somewhat excessive and did not contribute a great deal to the overall clarity of the report. In addition, the provisions on dispute settlement did not seem relevant in that crimes against humanity already came under the jurisdiction of international criminal tribunals such as the International Criminal Court. In any event, the States concerned could bring cases before the International Court of Justice, the principal judicial organ of the United Nations.

60. In his view, the length of the report had not had an impact on its quality. He recommended the referral of all the proposed draft articles to the Drafting Committee.

61. Mr. SABOIA said that the report covered a wide range of issues of great relevance for a convention such as the one envisaged. Extradition, the first topic addressed in the report, was a very important tool for ensuring that alleged offenders, if not prosecuted in one State, were subject to prosecution by another State, with due care taken to respect the protection afforded in international human rights and refugee law. He agreed with the proposal not to have a separate provision on dual criminality, for the reasons summarized in paragraph 32. He also agreed with the proposals regarding the provisions on inclusion of crimes against humanity as an extraditable offence in existing and future treaties and exclusion of the political offence exception to extradition. He endorsed the content of the first five paragraphs of draft article 11. Regarding paragraph 6, on other requirements of the requested State's national law, he found the analysis and proposed language pertinent. Nonetheless, like previous speakers, he wondered whether the Special Rapporteur had considered the possible imposition of the death penalty by the requesting State as one of the grounds for refusing extradition, as provided for in the Constitution and national law of Brazil, as well as in article 23 of the draft articles on the expulsion of aliens. As paragraph 6 of draft article 11 referred to the "minimum penalty" and other grounds on which extradition could be refused, that might be the place to consider the matter. He supported the recommendation made in the paper by Amnesty International that the list of grounds for denying extradition cited in paragraph 11 be the same as the one contained in the Rome Statute of the International Criminal Court.[59]

62. As to draft article 12, the Special Rapporteur had chosen the International Convention for the Protection of All Persons from Enforced Disappearance as a model, substituting the reference to enforced disappearance with one to crimes against humanity. The principle of *non-refoulement* was commonly used in international human rights instruments to avoid exposing a person subject to extradition or expulsion to the danger of being subjected to torture, summary execution, or other gross violations of human rights in another State or territory. The protection afforded by the principle extended to all persons and situations—a point which was addressed in draft article 11, paragraph 11, only as a possible exception to the obligation to extradite and not as a mandatory norm. Linking it solely to crimes against humanity, which had a very high threshold, would narrow the scope of protection. He therefore proposed that the words "and other crimes under international law or gross violations of human rights" be added at the end of paragraph 1 of draft article 12.

63. Mutual legal assistance, dealt with in draft article 13, was a matter of great significance for the effectiveness of a future convention on crimes against humanity. Legal assistance could be a tool both for law enforcement and for early warning or deterrence of crimes against humanity. As shown by the Special Rapporteur, there was a gap in that area, as existing treaties generally had only a few provisions establishing general obligations. Instruments such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption provided useful precedents of what was referred to by the Special Rapporteur as a "long-form mutual legal assistance article". He therefore expressed support for paragraphs 1 to 5 of draft article 13. He proposed the addition of the phrase "collecting or obtaining forensic evidence" in paragraph 3 (*d*). He was in favour of the deletion of the phrase "that is not contrary to the national law of the requested State" in paragraph 3 (*i*). Mutual legal assistance and cooperation in the field of international crimes should follow high standards and the practice of international tribunals, such as the International Criminal Court and the International Tribunal for the Former Yugoslavia, and not necessarily be tied to national standards. The inclusion of a provision on bank secrecy, as in paragraph 4, warranted further explanation. Paragraphs 6 and 7 provided for a sophisticated model of information sharing, which had proved quite effective in the fight against organized transnational crime. It remained to be seen how it would operate in cases of international crimes, where political factors might play a larger role and high-ranking officials might be involved. At first sight there might be some conflict between the operation of actions under paragraphs 6 and 7, which appeared to fall outside the area of competence of the central authorities, and those provided for in paragraph 10 on the designation and operation of central authorities. Paragraph 16 contained an excessively long and often vague and subjective list of grounds for refusing mutual legal assistance; an effort should be made to delete some of them.

64. Stressing the importance of the provisions on participation and protection of victims and witnesses and others, he said that, in his extensive analysis of relevant

[59] See Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity* (footnote 51 above), chap. III, pp. 10–11.

treaties and institutions, the Special Rapporteur could have looked more deeply at the practice of the International Criminal Court. The jurisprudence of the Inter-American Court of Human Rights could also be helpful. The participation in the criminal proceedings of victims and witnesses might help the proceedings, afford victims and relatives a measure of satisfaction and give added legitimacy to the process. The Special Rapporteur's consideration of that matter in the third report was well reasoned, and the proposed draft article 14 was a good text that should be referred to the Drafting Committee. Possible changes aimed at strengthening and widening the scope of protection and compensation recommended by Amnesty International deserved attention. With regard to chapter V of the report under consideration, on the relationship to competent international criminal tribunals, he endorsed the Special Rapporteur's analysis, beginning in paragraph 203 of the report, on the importance of avoiding any broad language that might weaken the draft articles. He therefore supported the text of draft article 15.

65. He also supported the text of draft article 16, which provided that clauses authorizing exceptions to obligations for federal States were unacceptable. However, paragraph 208 of the report contained language that might be interpreted as opening the possibility of reservations to that article. In chapter X, on final clauses, the Special Rapporteur, although apparently neutral on the options at hand, was in fact leaning towards not including a clause on reservations. In his view, that would be a great mistake. In the twenty-first century, when efforts were being made to improve coverage of the prohibition and repression of crimes such as genocide, crimes against humanity and war crimes, he questioned the purpose of a convention that left the door open to reservations of all kinds. He would thus be in favour of a draft article prohibiting them.

66. With regard to chapter VII of the report, he appreciated the useful review of existing and potential monitoring mechanisms provided therein. The Special Rapporteur made pertinent points on factors that could influence the choice of a particular mechanism, with an emphasis on the availability of resources and the possible relationship with existing mechanisms. He welcomed the suggestion that the development of a monitoring mechanism for a future convention on crimes against humanity might be made in tandem with the establishment of such a mechanism for the Convention on the Prevention and Punishment of the Crime of Genocide. While he understood that it might be necessary to postpone consideration of that matter, he was convinced that a future convention would not fulfil its goal if no means was provided to monitor compliance and provide early warning of situations of concern. He endorsed Mr. Hmoud's remarks in that regard. The convention must be a living instrument, providing for channels of communication with relevant bodies dealing with serious situations where gross human rights violations and breaches of international humanitarian law threatened to reach the threshold of crimes against humanity. Of course, duplication with other bodies and ambitious structures should be avoided. The chosen mechanism and structure could function under the umbrella of an existing multilateral organization, if possible.

67. Regarding chapter VIII, on remaining issues, he agreed with the Special Rapporteur that there was no need to include a separate provision specifically criminalizing the concealment of a crime against humanity. However, he did not share the Special Rapporteur's view on immunity. It was regrettable that, in his analysis of the issue, the Special Rapporteur had not duly taken into account two important works, produced by the Commission at the request of the General Assembly, which had practically launched a new phase of international criminal law. The first was the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[60] Principle III of which provided that "[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law". The second was the draft code of crimes against the peace and security of mankind,[61] article 7 of which established that "[t]he official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment".[62] Article 8, meanwhile, stipulated that, "[w]ithout prejudice to the jurisdiction of an international criminal court",[63] each State party had an obligation to establish its jurisdiction over the crimes set out under the code. While he understood the need to avoid overlap with other topics on the Commission's agenda, the matter at hand was not the immunity of State officials from foreign criminal jurisdiction; rather, it was the obligation of each State party to establish jurisdiction over all individuals under its competence and to exercise that jurisdiction irrespective of the official position of those individuals. A convention on crimes against humanity should not contain any provision that could be interpreted as accepting, even implicitly, the exclusion of responsibility on account of official capacity, as that would open the door to impunity, undermine the credibility of the convention and damage the International Criminal Court. He therefore shared the view that the Commission could envisage a provision similar to article IV of the Convention on the Prevention and Punishment of the Crime of Genocide. Amnesties, the granting of which was a controversial issue, should not, in his view, be permissible with respect to crimes against humanity or to other core crimes under international law. Subject to the comments made, he supported the referral of the draft articles to the Drafting Committee.

68. Ms. LEHTO said that she wished to join other members in thanking the Special Rapporteur for his comprehensive third report, which provided a solid basis for the Commission's debate. While the length of the report had drawn comments, it could be justified insofar as the early completion of the topic was dependent on the inclusion of all the remaining draft articles and related issues that needed to be addressed. The Commission had a clear interest in proceeding expeditiously with the topic of crimes against humanity for several reasons.

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[60] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[61] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

[62] *Ibid*., p. 26.

[63] *Ibid*., p. 27.

69. First, the topic was of great practical relevance. A future convention based on the draft articles would facilitate inter-State cooperation in criminal matters with a view to ensuring that crimes against humanity were investigated and prosecuted. It would also provide practical tools for the implementation of the principle of complementarity under the Rome Statute of the International Criminal Court. Second, the urgent need for such a convention had been widely recognized, and Governments, international organizations, treaty bodies, civil society organizations and scholars were following the Commission's work on the topic with keen interest. Third, given that the most sensitive issues had, arguably, already been discussed in relation to the draft articles contained in the Special Rapporteur's second report,[64] and that what remained were, to a large extent, standard provisions for which there were numerous precedents, it would not have been ideal to produce two reports to be discussed in two successive years. The Special Rapporteur's ambition to complete the first reading at the current session was therefore laudable.

70. She was not saying that the proposed draft articles should not be carefully considered, but it was worth recalling that the network of international criminal law conventions had grown, over the previous three decades, into an important body of law. Those instruments mostly contained standard provisions and formulations with substantially similar content. Procedures for extradition and mutual legal assistance, in particular, had developed and matured in that way by gradual accumulation. Of course, that did not preclude the Commission from modifying and improving the text of the draft articles, and she agreed that the Commission should strive to achieve the best possible outcome.

71. As to the methodology, she believed that it was appropriate to refer to relevant criminal law conventions and to use, with the necessary modifications, the provisions and formulations that best served the purposes of the draft articles. The addition of examples of State practice in the commentaries, as proposed by some members, would be welcome, but she did not see a need for an extensive analysis of State practice.

72. Turning to the draft articles proposed in the report, she said that, while it had been pointed out that draft articles 11 and 13, in particular, had been modelled on the United Nations Convention against Corruption, it should be noted that many of the individual paragraphs were standard provisions found in a number of other conventions. She agreed with the Special Rapporteur that there was no reason to include a dual criminality requirement in draft article 11 and endorsed the statement, in paragraph 32 of the report, that when an extradition request was sent from one State to another for an offence referred to in draft article 5, the offence should be criminal in both States and the dual criminality requirement should be "automatically satisfied". It had been suggested that in draft article 11, paragraph 1, reference should be made to the substantive offences set forth in draft article 3 and not to the modes of liability provided for in draft article 5. While it was a valid point that paragraphs 1, 2, 3, 7 and 8 of draft article 11 should refer to draft article 3, it was debatable whether they should refer exclusively to that draft article.

73. In existing conventions, such as the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of the Financing of Terrorism and the Council of Europe Convention on the Prevention of Terrorism, the rules on extradition contained references to both substantive and ancillary offences, while in the International Convention for the Protection of All Persons from Enforced Disappearance, reference was made simply to "the offence". Although there might be other conventions in which reference was made only to one or the other set of offences, by referring to both draft article 3 and draft article 5, the Commission could ensure that it left no room for conflicting interpretations.

74. Given the very serious nature of crimes against humanity, and following the approach taken in recent United Nations criminal law conventions that dealt with serious crimes, she supported the exclusion of the political offence exception in draft article 11, paragraph 2. At the same time, it was clear that, in line with current practice, the prohibition of the political offence exception must have as its corollary the so-called "discrimination clause" protecting the person whose extradition was sought from persecution.

75. She shared the view that there was cause to reconsider the formulation of the discrimination clause in draft article 11, paragraph 11, as the list of prohibited grounds originated from previous decades and might not include all the impermissible grounds recognized under modern international law. She therefore supported the Special Rapporteur's proposal to add the words "or membership in a particular social group", or language to that effect. The most appropriate wording could be agreed upon in the Drafting Committee. In her view, the reference to national law in draft article 11, paragraph 6, was too open-ended, as it allowed States to refuse extradition on grounds that were not appropriate with regard to crimes against humanity. It could be useful to include, in that paragraph, a general reference to conditions that were deemed impermissible as grounds for refusal, and to enumerate them in the commentary. The existence of the death penalty as a recognized ground for refusal in many jurisdictions could also be addressed.

76. She fully supported the inclusion of the principle of *non-refoulement* as draft article 12. However, it would be desirable to give further consideration to whether the principle should be applied only to crimes against humanity or also to other serious human rights violations. She agreed that references to territory could be removed from both paragraphs of the draft article, leaving just the mention of jurisdiction.

77. It was true that draft article 13 stood out because of the level of detail that it contained. At the same time, its provisions offered useful tools for States wishing to exercise their jurisdiction with regard to crimes against humanity. Some streamlining might be required, but she would caution against making wholesale changes. Whether the

[64] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/690.

detailed regulations should instead appear in an annex to the convention was a separate matter altogether, and one that she believed should be explored.

78. Draft article 14 was consistent with recent developments in international criminal law that reflected growing concerns regarding the victims of violent crime and the security of witnesses. To quote the United Nations Office on Drugs and Crime (UNODC): "States have a responsibility to respect the fundamental rights of victims, assist them in accordance with their special needs, and protect them from further harm. All criminal justice systems have a duty to put in place procedures to provide measures for the protection of persons whose cooperation with the criminal justice system in an investigation or prosecution, puts them, or persons closely associated with them, at risk of serious physical or emotional harm."[65] She therefore wished to commend the Special Rapporteur for including victims, witnesses and others in the provision.

79. She proposed that the wording of draft article 14 be more closely aligned with that of the International Convention for the Protection of All Persons from Enforced Disappearance. That would apply, first and foremost, to article 24, paragraph 1, of the Convention, which contained a definition of "victim" for the purposes of the Convention that extended to any individual who had suffered harm as the direct result of an enforced disappearance. There was a risk, as pointed out by another member, that allowing the decision as to who should receive protection to be taken at the national level might lead to the use of very narrow definitions or to selective policies that excluded certain groups and prioritized others. She further proposed aligning draft article 14, paragraph 1 (*a*), with article 12, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance, which laid down an obligation to investigate complaints. As to draft article 14, paragraph 1 (*b*), she supported the proposal to provide for broader measures aimed at protecting the psychological well-being, privacy and dignity of victims and witnesses. She also concurred with the view that it was important to devote special attention to the protection of victims of sexual and gender-based violence and child victims of international crimes, as both groups were in a particularly vulnerable position.

80. With regard to draft article 14, paragraph 3, paragraphs 4 and 5 of article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance contained some helpful language on reparations, including compensation, that could help in addressing some of the points raised earlier in the debate. Article 24, paragraph 4, stipulated that "[e]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation", while paragraph 5 contained a list of different forms of reparation that could be granted where appropriate, and clarified that the right to obtain reparation covered material and moral damages.

[65] UNODC, "Victim assistance and witness protection", available from: www.unodc.org/unodc/en/organized-crime/witness-protection.html.

81. She expressed support for draft article 15 as well as the proposal to clarify, in the related commentary, that competent international criminal tribunals must fulfil certain fundamental criteria, which would provide a safeguard against the future "unknown entities" referred to by one member. She also expressed support for draft article 16 and valued the thorough analysis of monitoring mechanisms contained in chapter VII of the report. She would not object to the Special Rapporteur expressing a preference in that regard or presenting a model clause, as he had done for reservations in chapter X. She supported the inclusion of draft article 17 and saw merit in the proposal to strengthen the case for judicial settlement.

82. As to chapter VIII of the report, she agreed with the proposal not to address concealment or immunity in the draft articles, for the reasons presented by the Special Rapporteur; however, she supported the proposal to include a provision on the duty of States parties to exercise jurisdiction over all individuals under their competence, irrespective of the official position of those individuals. The issue of amnesty, meanwhile, warranted further reflection.

83. Concerning chapter IX, she appreciated the fact that the draft preamble was not overly long and agreed that the Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court were obvious models to be followed. Nevertheless, she too had reservations about including the last two paragraphs, on the threat or use of force and on intervention in an armed conflict or in the internal affairs of any other State. It was not clear how the paragraphs were linked to the substance of the draft articles, as the operative part of any future convention. She would also appreciate a reference to the Statute in the preamble.

84. The analysis of reservations in chapter X, coupled with a model provision, would be helpful for States, if and when they embarked on negotiations on the basis of the draft articles. However, she did not take as sceptical a view of the prohibition of reservations as the Special Rapporteur. The Rome Statute of the International Criminal Court was, in that sense, an appropriate model for a future convention on crimes against humanity, but she welcomed the many safeguards that he had included in his model clause. To conclude, she supported the referral of the draft articles to the Drafting Committee.

85. Mr. AL-MARRI said that he wished to express his appreciation to the Special Rapporteur for his comprehensive third report, which addressed a number of key issues and contained excellent proposed draft articles.

86. Having presided over the Conference of the States Parties to the United Nations Convention against Corruption, he was highly sensitive to the link, emphasized by the Special Rapporteur, between the Convention and the draft articles, particularly in terms of extradition and mutual legal assistance. Indeed, the draft article on extradition was largely modelled on article 44 of that Convention.

87. He considered that there was a major need to strengthen international cooperation in order to expedite the prosecution of perpetrators of crimes against humanity. He welcomed the reference, in the report, to the

political offence exception, which was also addressed in article 44 of the Convention.

88. As a public prosecutor with experience of tackling serious crimes, he valued the provisions contained in the report, and as a lawyer specialized in fighting corruption, he was thankful to the United Nations and other actors for the significant human and financial resources that had been devoted to capacity-building in the countries that needed it most.

89. He agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in the draft article on extradition. Moreover, while it was useful to draw on experience of implementing the United Nations Convention against Corruption, the differing nature of corruption and crimes against humanity meant that reliance on the provisions of the Convention should be limited, as acknowledged by the Special Rapporteur.

90. Since the granting of extradition requests and the provision of mutual legal assistance were largely contingent on political will, considerations of a political nature were a major factor and should be borne in mind. The issue of *non-refoulement* was complicated, and he would urge the Commission to reconsider draft article 12 in order to ensure that it was in harmony with draft article 11.

91. Draft article 17, on inter-State dispute settlement, was somewhat premature and should be considered at a later date. He agreed with the Special Rapporteur that the draft articles should be finalized in the near future and, though time might be an issue, he was hopeful that the first reading could be completed at the current session.

92. Crimes against humanity had to be viewed in relation to other serious crimes, and the Commission should provide guidance to States or other actors that might be reluctant to punish the perpetrators of such crimes. Lastly, he stated his view that, for the time being, the Commission's focus should be on reinforcing territorial, rather than universal, jurisdiction.

The meeting rose at 1.05 p.m.

3352nd MEETING

Friday, 5 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

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 crimes against humanity (A/CN.4/704).

2. Mr. RUDA SANTOLARIA, after thanking the Special Rapporteur for his excellent third report, said that, like Ms. Escobar Hernández and Mr. Park, he was of the view that draft articles 11 and 13, which included references to draft article 5,[66] should also refer to draft article 3,[67] which reproduced almost word for word the definition of crimes against humanity set out in article 7 of the Rome Statute of the International Criminal Court. In addition, like Mr. Park, he considered that draft article 13 on mutual legal assistance should be moved to a separate protocol.

3. With regard to draft article 14, it seemed appropriate to take account of the situation of victims, witnesses and others and to emphasize the need to protect complainants, witnesses and their relatives and representatives, as well as other persons participating in proceedings within the scope of the draft articles. While he was in favour of including draft article 16 on federal State obligations, he would prefer that it did not include the words "without any limitations or exceptions", which might convey a misleading impression as to the territorial scope of the obligations undertaken by such a State.

4. He did not support the Special Rapporteur's proposal for draft article 17. In his view, given the nature of the subject matter of a future convention and the manner in which the specific issue of dispute settlement had been dealt with in other treaties on international crimes, including those on genocide and on apartheid, consideration should be given to wording that combined elements of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide and of article XII of the International Convention on the Suppression and Punishment of the Crime of Apartheid. In the same vein, any disputes arising out of the interpretation or application of the draft articles could initially be the subject of negotiations between the States concerned; however, if no solution could be found within six months or another reasonable time frame agreed by the parties, either of those States could bring the dispute before the International Court of Justice.

5. He fully agreed with the comments made by Ms. Escobar Hernández and Mr. Murase concerning the issue of immunity. Although it was indeed necessary to avoid overlap with the topic of immunity of State officials from foreign criminal jurisdiction and not to prejudge the outcome of the Commission's work in that regard, the failure to take into account the provisions of treaties intrinsically linked to the future convention might be seen

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[66] *Yearbook … 2016*, vol. II (Part Two), pp. 151–152 (draft article 5).

[67] *Yearbook … 2015*, vol. II (Part Two), p. 37 (draft article 3).

as a step backwards. It would therefore be appropriate to include in the draft articles a provision equivalent to article IV of the Convention on the Prevention and Punishment of the Crime of Genocide, in line with Mr. Murase's suggestion.

6. Regarding the question of amnesty, he was of the view that a provision on the impermissibility of general amnesties should be included in the draft articles. In that regard, he would draw a distinction between, on the one hand, situations of transitional justice, in which amnesty could be considered for certain offences as a part of the post-conflict reconciliation process and, on the other, amnesty for horrendous crimes, such as crimes against humanity, which should never go unpunished. When addressing the issue of amnesty, the Special Rapporteur had rightly described the *Barrios Altos v. Peru* case, heard by the Inter-American Court of Human Rights, as "a seminal case". In that regard, it should be noted that, in paragraph 44 of its judgment of 14 March 2001 on the merits, the Court had emphasized the manifest incompatibility of self-amnesty laws with the American Convention on Human Rights: "Pact of San José, Costa Rica" and concluded that such laws lacked legal effect and could not obstruct the investigation of the grounds on which that case was based or the identification and punishment of those responsible. In his view, the failure to include in the draft articles an explicit reference to the impermissibility of general amnesties would undermine the two central aims of the future convention, namely to prevent and punish crimes against humanity. One could not but wonder whether, in the event of such amnesties being permitted, other persons in the countries concerned or in other countries might assume that those responsible for terrible atrocities were not always punished and thus seek, ultimately, to exonerate themselves by means of tailor-made laws or agreements.

7. Lastly, a future convention on crimes against humanity should contain a prohibition on reservations in line with article 120 of the Rome Statute of the International Criminal Court. Although such a provision might discourage some States from becoming parties to such a convention, as the Special Rapporteur had noted, it would have the beneficial effect of not lowering the standards of the Statute.

8. Sir Michael WOOD said that he would like to thank the Special Rapporteur for his excellent third report, which, like his previous reports,[68] was clear and thorough and contained ample references to precedents in support of the drafts proposed. The report was long, but that was inevitable once the Commission had urged the Special Rapporteur to provide it with the materials needed for it to be in a position to complete a first reading at the current session. He hoped that the Commission would achieve that goal, which would represent an important outcome for the first year of the current quinquennium. Like Mr. Hassouna, he, too, wished to congratulate the Special Rapporteur on his extensive outreach efforts.

9. At the current session, Mr. Murase had once again questioned whether the topic was within the Commission's mandate and, as Mr. Kolodkin had noted, Mr. Murase had said some rather odd things about customary international law. Mr. Tladi had once again explained his views on the scope of the topic. He had already explained at the previous session why he considered those views to be wrong. He agreed with Ms. Lehto on the propriety of the general approach to the topic and would not repeat what he had said on the matter on earlier occasions.

10. As he was taking the floor rather late in the debate, and much had already been said, he would be rather brief. He agreed with virtually everything that Mr. Kolodkin had said. The Commission had to strike a balance between a set of draft articles that covered every conceivable issue in all its aspects and a concise and straightforward text that States would find comprehensible, useful and effective and would, hopefully, find easy to accept and ratify. He continued to believe quite strongly that, in order to maximize the participation of States in an eventual convention, it was important to maintain the focus of the draft on the core criminal law provisions, namely provisions on criminalization and the establishment of jurisdiction in domestic law; prevention; and the investigation and prosecution, or extradition or surrender, of alleged offenders.

11. Every additional clause beyond those core provisions risked diverting attention from them and making it harder for some States to become parties to the future convention. He would not have proposed the inclusion of a draft article on federal State obligations or a draft article on the relationship to competent international criminal tribunals. Nor should the Commission, under the topic, enter into such matters as immunity, amnesty or what to do with competing extradition requests. To do so might make the draft unacceptable to a good number of States, which would render the Commission's efforts ineffective. In his view, the Commission should be careful not to overload the draft with matters that were not strictly necessary, and the inclusion of which would make it harder for States to find consensus.

12. Regarding amnesty in particular, he shared the concern expressed by Mr. Kolodkin at the previous meeting. He doubted that the Commission would be able to foresee all the complex situations that might arise in a context of crimes against humanity in the future, and where States might find amnesty necessary to ensure a proper transition. He was not sure that the Commission needed to request the Secretariat to carry out a study on that complex and largely political matter.

13. The Special Rapporteur had proposed very lengthy provisions on extradition and on mutual legal assistance that were based closely on texts prepared by criminal law experts in the context of specific—largely economic—crimes. While he had an open mind concerning those proposals, his preference would have been to adopt the shorter version of those articles and to maintain the focus of the text on the core *aut dedere aut judicare* provision.

14. He agreed with Mr. Reinisch's comments on draft article 17 on inter-State dispute settlement. Like other speakers, he did not see the need to make an attempt

[68] *Ibid.*, vol. II (Part One), document A/CN.4/680 (first report); and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/690 (second report).

to arbitrate a precondition for submission to the International Court of Justice. Such a precondition appeared in some older conventions, but it was hardly appropriate in the case of a new convention on crimes against humanity. Mr. Kolodkin's suggestion to borrow language from article IX of the Convention on the Prevention and Punishment of the Crime of Genocide was interesting and could be considered by the Drafting Committee.

15. He had detailed comments on many of the texts proposed by the Special Rapporteur at the current session and had noted the many helpful suggestions made by others in the debate, such as Ms. Lehto's proposal concerning the last two paragraphs of the draft preamble, as well as those made by Amnesty International in its thoughtful commentary,[69] which would no doubt be of use to the Commission in its work. Those were matters that could be discussed in the Drafting Committee.

16. He could agree to the referral of all the draft provisions proposed in the report to the Drafting Committee, although, like others, he saw no need for draft articles 15 and 16 and would invite the Special Rapporteur to consider whether those two provisions should in fact be sent to the Drafting Committee.

17. Ms. GALVÃO TELES said that she appreciated the Special Rapporteur's excellent third report, his thorough oral presentation and, more generally, his extensive outreach efforts, which, together with the debates in the Sixth Committee, had confirmed the extreme importance of the topic of crimes against humanity. A convention on crimes against humanity would become a fundamental part of the edifice that the international community was building to promote accountability for the most serious international crimes and the fight against impunity.

18. While proposed draft article 11 provided for a detailed extradition regime that was inspired in large part by various existing instruments, there was nevertheless some room for improvement. For example, the draft article did not include criteria applicable in the event of multiple requests for extradition; such criteria might represent a useful addition, as Mr. Hassouna, Mr. Jalloh and Mr. Tladi had noted. The State in whose territory the crimes had been committed was perhaps better positioned to conduct an investigation, as pointed out by Mr. Murase and others, but there might also be other useful criteria. In its proposed international convention on the prevention and punishment of crimes against humanity,[70] the Crimes Against Humanity Initiative of the Whitney R. Harris World Law Institute had suggested criteria—in a non-hierarchical order—that might be taken into consideration in determining priority in cases of multiple requests for extradition. Those criteria were: the territory where the crimes had been committed; the nationality of the offender; the nationality of the victim; and the forum most likely to have the greater ability and effectiveness in carrying out the prosecution, and which provided greater fairness and impartiality.

19. Regarding draft article 11, paragraph 6, given the nature of the crime and its punishment, it would, as some members had noted, be more appropriate not to refer to the minimum penalty requirement under national law but rather to focus on the grounds on which States could refuse extradition in many legal systems, for example the risk of the death penalty being applied in the requesting State. The practice of many States in that regard should at least be mentioned in the commentary.

20. As for the extradition by a State of its own nationals, which was addressed in draft article 11, paragraphs 9 and 10, it would seem appropriate, as Ms. Escobar Hernández had noted, to add a specific provision to the effect that, even if a State could not or did not extradite its own nationals, it had a duty to prosecute in accordance with the *aut dedere aut judicare* obligation contained in draft article 9.

21. Draft article 12 on *non-refoulement* was a very important provision. However, it would be better placed earlier in the text, perhaps after draft article 4[71] on the obligation of prevention, to which it was closely linked, as recognized by the Special Rapporteur in paragraph 97 of the report. Although the expression "in danger of being subjected to a crime against humanity" closely tracked language used in international conventions and by international courts, it might be helpful for States in determining what constituted such a danger if the explanations and practice contained in paragraphs 100 to 105 of the report on how that danger should be assessed were included in the commentaries to the draft articles.

22. With regard to draft article 13, a less detailed "short-form" article might allow for greater flexibility, as Mr. Hassouna and Mr. Kolodkin had noted, and would be better suited to crimes against humanity than the current "long-form" article, which was modelled on the United Nations Convention against Corruption. As they currently stood, the draft articles on crimes against humanity risked turning into draft articles on mutual legal assistance in the context of crimes against humanity. Moreover, the "mini mutual legal assistance treaty" on crimes against humanity seemed to give rise to a procedural imbalance with the regimes of genocide and war crimes, which, furthermore, might complicate the prosecution at the national level of the same case for different crimes. As she could see the merit in giving States detailed and specific guidance on their legal obligations, she proposed, as a compromise solution, retaining the core mutual legal assistance obligations—such as the obligation of general cooperation—in the draft articles and to include the "long-form" provisions, which were more technical and procedural in nature, in a separate protocol or annex, as had been suggested by Ms. Escobar Hernández, Ms. Lehto and Mr. Park.

23. The inclusion of draft article 14 on victims, witnesses and others was justified by the development of international criminal law in recent decades. However, the definition of "victim" presented a challenge. If the Commission were to accept the Special Rapporteur's proposal in paragraph 168 of the report to give States

[69] Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity*, London, 2017.

[70] Text available from the website of the Whitney R. Harris World Law Institute: https://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/convention-text/.

[71] *Yearbook … 2015*, vol. II (Part Two), p. 47 (draft article 4).

latitude in determining exactly which persons qualified as "victims" of a crime against humanity, the commentary should nonetheless give some indication as to who qualified as victims; in that regard, the examples and recommendations contained in the commentary prepared by Amnesty International on the Special Rapporteur's third report might prove useful. Also of use was the recommendation by Amnesty International that draft article 14 should be amended to clarify the obligations of States to protect persons who became at risk on account of investigations and prosecutions for crimes against humanity and to ensure that appropriate measures were taken to protect their physical safety, psychological well-being, dignity and privacy.[72] Lastly, it should be made clear that the list of forms of reparation in paragraph 3 of the draft article was not exhaustive.

24. Draft article 15, unlike Article 103 of the Charter of the United Nations and article XVI, paragraph 3, of the Marrakesh Agreement Establishing the World Trade Organization, cited by the Special Rapporteur in paragraph 200 of the report, gave prevalence to external instruments—existing or future—in the event of a conflict between the rights or obligations of a State under the draft articles and its rights and obligations under a constitutive instrument of a competent international tribunal. Many members had expressed support for that provision, but others had expressed doubts or suggested its deletion. In her view, if the Commission wished to retain the draft article it would be necessary to amend it by specifying that certain conditions should be met, perhaps along the lines suggested by Ms. Escobar Hernández or Mr. Hassouna or by the inclusion of a reference to the application of general principles, as had been suggested by Mr. Hmoud.

25. Draft article 16 on federal State obligations did not seem necessary in the light of article 29 of the 1969 Vienna Convention. However, she was prepared to accept it in view of the fact that, as mentioned in chapter VI of the report, there were precedents in other conventions and it might meet a practical need to ensure that the obligations arising from a future convention were binding on a State in respect of its entire territory.

26. With regard to draft article 17, she shared the views of those members, such as Ms. Escobar Hernández, Ms. Lehto and Mr. Tladi, who had advocated the inclusion of a clause providing for the referral of disputes to the International Court of Justice, such as that included in the Convention on the Prevention and Punishment of the Crime of Genocide. She noted the relevance of Mr. Reinisch's suggestion that a time limit for negotiations be established, as was the case in other conventions that contained dispute settlement clauses similar to the clause proposed by the Special Rapporteur. That said, it remained to be decided whether the Commission should propose a clause on a dispute settlement mechanism, since such clauses were usually contained in final clauses, which, as the Special Rapporteur rightly mentioned, were usually left for States to negotiate.

27. Echoing comments made by other Commission members, she noted that, in his proposed draft preamble, the Special Rapporteur had perhaps relied too heavily on the preamble to the Rome Statute of the International Criminal Court. In her view, the Drafting Committee should carefully review the proposed text in order to make it more specific to the subject of crimes against humanity and to the provisions of the draft articles. She supported the proposal made by other speakers that the draft preamble should contain a reference to the Statute, or at least to its article 7, which concerned crimes against humanity.

28. The question of whether the future convention on crimes against humanity should have a monitoring mechanism was one that perhaps required further analysis. Her sense was that, in the arena of international human rights and international humanitarian law, there was currently a general "monitoring mechanism fatigue", which suggested that a cautious approach should be taken to the question if the positive momentum for a convention was to be maintained. In her opinion, the matter should be a policy decision for States to take, perhaps at a later stage, in the light of broader considerations, such as the possible development of a monitoring mechanism in tandem with a monitoring mechanism for the Convention on the Prevention and Punishment of the Crime of Genocide.

29. Although she could understand the Special Rapporteur's position that the draft articles should not include a provision on immunities, she agreed with several other Commission members that draft articles on a convention on crimes against humanity could not be silent on the issue of the irrelevance of official capacity in determining individual criminal responsibility for crimes against humanity. Possible inspiration for a clause could be taken from article 27, paragraph 1, of the Rome Statute of the International Criminal Court, which provided that the Statute "shall apply equally to all persons without any distinction based on official capacity". The principle expressed in article 27, which had its origin in the Charter of the International Military Tribunal[73] and the Charter of the International Military Tribunal for the Far East,[74] was a cornerstone of the crimes against humanity regime and should be included in the future convention.

30. The issue of whether to permit reservations to the future convention should be left for States to decide, for the reasons already mentioned in relation to a dispute settlement mechanism. She therefore concurred with the Special Rapporteur's views on the matter and found the list of options presented in paragraphs 321 to 326 of his report to be useful. However, precisely because such a list had been provided, the Commission should provide guidance as to which reservations might or might not be envisaged. In her view, it was a matter of principle that no reservations should be permitted to the future convention or, at least, to certain specific and fundamental provisions of the current draft articles, such as those relating to the general obligation to prevent and punish, the

[72] See Amnesty International, *International Law Commission: Commentary to the Third Report on Crimes against Humanity* (footnote 69 above), chap. IV, p. 21.

[73] For the Charter of the International Military Tribunal, see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

[74] Charter of the International Military Tribunal for the Far East, in C. I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 4, Washington, D.C., United States Department of State, 1968, pp. 20–32.

definition of crimes against humanity, the obligation of *non-refoulement*, criminalization under national law, the establishment of national jurisdiction and the obligation to prosecute or extradite.

31. In conclusion, she was in favour of referring the draft articles to the Drafting Committee, and she supported the Special Rapporteur's goal of achieving a first reading of the draft articles at the current session. Nevertheless, given the comprehensive nature of the proposals in the third report and the richness of the debate thus far, she would support the allowance of more time for the completion of the first reading, if necessary, since the Commission's common goal should be to strive to draft the best possible legal instrument on such an important topic.

32. Mr. PETER said that, while the preamble to a text was not legally enforceable, it was important inasmuch as it conveyed the spirit of the instrument and thus provided guidance to those involved in its application. However, the draft preamble proposed by the Special Rapporteur was, to a large extent, extraneous to the future convention on crimes against humanity, as had been noted by some members. It should therefore be reformulated—for example, through the addition of a reference to the principle of universal jurisdiction—to better reflect the primary aim of the convention itself, namely to combat impunity for crimes against humanity.

33. Although the Special Rapporteur had analysed the principle of universal jurisdiction in his second report, that analysis had not resulted in a specific proposal, despite spirited efforts to urge him to proceed in that direction. The principle had been invoked on several occasions in connection with the issuance of warrants against political leaders, particularly those in African countries. Furthermore, while, in his third report, the Special Rapporteur urged States to enact laws on crimes against humanity, Africa had in 2012 already adopted the African Union Model National Law on Universal Jurisdiction over International Crimes.[75] The Commission should take account of such developments instead of seeking to reinvent the wheel. Noting that there was only one reference to universal jurisdiction in the third report, he urged the Special Rapporteur to adopt an open-minded approach in that regard and recalled that, in the discussion in the Sixth Committee, Hungary had requested that additional analysis be given to the concept of universal jurisdiction.

34. In his third report, the Special Rapporteur took—perhaps unintentionally—positions on immunity, amnesty and reservations whose effect was to undermine the Rome Statute of the International Criminal Court rather than to complement or improve upon it, as he had promised he would do when introducing the topic before the Working Group on the long-term programme of work during the Commission's sixty-fourth session.

35. With regard to immunity, the Special Rapporteur indicated in paragraph 284 of his report that, consistent with the approach taken in prior treaties addressing crimes, he was of the view that the draft articles on crimes against humanity should not address the issue of immunity of State officials or officials of international organizations, and instead should leave the matter to be addressed by treaties on immunities for particular classes of officials and by customary international law. The Special Rapporteur also indicated that this approach should not be construed as having any implications for the Commission's work on the topic of immunity of State officials from foreign criminal jurisdiction. The Rome Statute of the International Criminal Court, on the other hand, was very clear on the issue of immunity for persons alleged to have committed core crimes: article 27, paragraph 1, provided that the Statute applied equally to all persons without any distinction based on official capacity. By remaining silent on immunity, the future convention would abandon the standard set by the Statute for one of the offences covered in the Statute. As a consequence, persons charged with genocide, war crimes or aggression would be treated differently from those charged with crimes against humanity under the convention that specifically dealt with that offence. If such a trend continued, the Rome Statute would soon become an empty shell, and instead of improving upon its contents, the Commission would be pruning it slowly, albeit in good faith. Like the Statute, the future convention should be very clear on the question of immunity. The Commission's work on the topic of the immunity of State officials from foreign criminal jurisdiction was not directly relevant to that of crimes against humanity because it addressed crimes in general, not necessarily core crimes such as crimes against humanity.

36. With regard to amnesty, the Special Rapporteur set out his view in paragraph 297 of his report that, consistent with the approach taken in prior treaties addressing crimes, the draft articles should not address the issue of amnesties under national law. However, some Commission members had requested that a study should be conducted by the Secretariat on that issue. Such a study might shed more light on the subject, going beyond *The Belfast Guidelines on Amnesty and Accountability*[76] on which the Special Rapporteur had based his position. He himself would refrain from making any further comments on the subject until that study had been completed.

37. The Special Rapporteur's uncertainty as to what position to adopt regarding the question of reservations was unhelpful. In his own view, the subject of reservations was an area in which the Special Rapporteur should, relying on the Rome Statute of the International Criminal Court for guidance, make a concrete proposal for consideration by the Commission.

38. He supported the Special Rapporteur's proposal to adopt the draft articles on first reading during the current session and on second reading during the seventy-first session. According to that schedule, the Commission's consideration of the topic would take a total of seven years to complete. While that might be short by the Commission's standards, he believed that the Commission's work took

[75] African Union, document EX.CL/731(XXI)c, available from: www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf.

[76] Transitional Justice Institute, University of Ulster, *The Belfast Guidelines on Amnesty and Accountability*, 2013, available from: www.ulster.ac.uk/transitional-justice-institute/our-research/past-projects/belfast-guidelines-on-amnesty-and-accountability.

too long, sometimes unnecessarily so. Furthermore, it was frustrating when good topics were sometimes abandoned immediately after the designated Special Rapporteur's term of office on the Commission came to an end. The Commission must look critically at those problems and should step up the pace of its work if it wished to remain relevant in the field of international law.

39. Lastly, he wished to raise an issue concerning guidelines on the length of the reports prepared by special rapporteurs, which, in fact, differed widely. For example, the most recent report on the topic of protection of the atmosphere (A/CN.4/705) had been restricted to a length that was three times shorter than that of the report under consideration and a little more than half that of the fifth report on immunity of State officials from foreign criminal jurisdiction.[77] Even allowing for variations in the nature of those topics, that difference in length was too great and gave the impression that a double standard was at work. Noting that the matter had more to do with equality of treatment than with length *per se*, he was of the view that it had become urgent for the Commission to set rules and provide clear guidance on the length of reports.

40. In conclusion, he recommended referring all the draft articles to the Drafting Committee. The Special Rapporteur should make bold decisions on the questions that remained pending, while remaining as faithful as possible to the Rome Statute of the International Criminal Court, departing from it only when there were compelling reasons for doing so.

41. The CHAIRPERSON said that the Bureau would consider the concerns that had been expressed.

42. Mr. HASSOUNA said that the concerns raised by Mr. Peter regarding the length of reports were fully understood. He recalled that the secretariat had indicated that it would look into the matter in order to find a solution for future reports. Perhaps the issue of the length of reports and other matters raised in that connection could also be taken up by the Working Group on methods of work.

43. Mr. HUANG said that he would begin by sharing his basic views on the topic. First, although it was clear that it was the common wish of the international community to punish more severely crimes against humanity and other serious international crimes through international cooperation and that it was in the interests of the whole of humankind to do so, the topic under consideration raised complex and sensitive political issues. It was therefore of vital importance that the Commission engage in further study of the matter and sought more substantiation of relevant international practice with a view to its codification. As members of the Sixth Committee had not yet reached broad agreement on the feasibility of drafting a separate international convention on crimes against humanity, whether that should be the Commission's goal should not be decided until after the second reading of the draft articles. In fact, general national practice and existing international conventions already covered the punishment of crimes against humanity in an adequate manner: those crimes now fell under the jurisdiction of the International Criminal Court; countries were obliged under existing international law to take measures to exercise criminal jurisdiction over the suspected perpetrators of such crimes; and specific crimes categorized as crimes against humanity, such as genocide, torture and enforced disappearance, were already covered by separate international conventions. What really mattered was the political will of the States concerned and of the international community as a whole to punish offenders. Moreover, it was a fact that, since 1986, only three Commission texts had been turned into international conventions, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention) and the United Nations Convention on Jurisdictional Immunities of States and Their Property had not yet entered into force. It was therefore doubtful whether States really had much of a will to conclude a separate convention on crimes against humanity.

44. Second, the Commission's deliberations on the topic should be based on general national practices that constituted international customary law. In other words, rather than seeking to blaze a trail and draft new laws, its aim should be codification and for that it was necessary to examine the national practice of all countries and to make allowances for differences in national legal systems. The Special Rapporteur's three reports and the draft articles and commentaries provisionally adopted by the Commission were primarily concerned with the practice of a few, newly established international criminal tribunals and made little reference to general national practice and *opinio juris*. That situation might well result in an imbalance between the codification of customary international law and the progressive development of international law.

45. On the one hand, there was insufficient relevant general national practice to form a basis of customary international law. While countries agreed in principle on the need to punish crimes against humanity, some acts defined as such in the draft articles were absent from or otherwise designated in national criminal codes. The Commission would be led astray in its deliberation on that topic if it focused on the progressive development of international law in that area owing to a dearth of evidence of pertinent customary international law.

46. On the other hand, the current practice of international criminal tribunals was too limited and inconsistent to be broadly accepted by the international community. Furthermore, the lack of agreement on the definition and constituent elements of the crimes covered by the Rome Statute of the International Criminal Court had led some States not to accede to it. Against that backdrop, the Special Rapporteur had adopted a methodology largely resting on induction and borrowing from the provisions of international conventions to combat torture, corruption, hostage-taking, unlawful seizure of aircraft and terrorism, and he had produced a set of obligations that were deeply controversial since they fell outside the scope of existing international law. If they were presented as the fruit of the Commission's work on the topic, to be embodied in a convention, that work might simply be left on the shelf to gather dust.

[77] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/701.

47. Third, for the sake of coherence, it would be unwise for the draft articles on crimes against humanity to touch on the application of rules on immunity of State officials from foreign criminal jurisdiction when the Commission was debating the very same matter as a separate topic. He disagreed with members who had suggested the inclusion in the draft articles of a text similar to article 27 of the Statute, which ruled out any exemption of State officials from criminal responsibility, because, although the international community regarded crimes against humanity as serious international crimes, there were no customary rules of international law that excluded the possibility of granting State officials immunity from foreign criminal jurisdiction. In any case, such immunity was essentially procedural and did not exempt the individuals concerned from substantive responsibility. The Commission should therefore adopt a prudent approach to the question of immunity. For the same reason, he was against introducing the concept of universal jurisdiction in the draft articles. As discussions in the Sixth Committee over the previous nine years had shown, there was no consensus among States concerning the definition or scope of application of that concept.

48. When discussing the prevention and punishment of crimes against humanity, the Commission should not ignore the root causes of those crimes. Reality showed that most incidents involving widespread or systematic attacks against the civilian population occurred during complex, political, economic, racial or religious disputes or conflicts, some of which were the horrific consequences of outside interference aimed at forcibly changing the legitimate Government of another country. The tragedies of "failed States" were a case in point. Legal sanctions alone were not enough to punish crimes against humanity. Instead, what was needed was a multi-pronged approach where political solutions were regarded as equally as important as legal solutions, if not more so. Preventing and punishing crimes against humanity required the combined use of all possible legal, political, economic and cultural means. The Commission and the Special Rapporteur should therefore abandon purely legalistic thinking and not rule out political solutions such as immunity, reconciliation, special pardon or general amnesty as means to obtain justice, reduce tension or restore social and public order.

49. It was also essential to remember the principles embodied in the Charter of the United Nations, especially those of sovereign equality, the prohibition of the illegal use of force, non-interference in the internal affairs of other countries and the peaceful settlement of international disputes. Those basic norms were of paramount importance for preventing and punishing crimes against humanity and must be complied with in good faith. In that connection, he recalled that the proceedings instituted against Mr. Uhuru Muigai Kenyatta by the International Criminal Court had given rise to controversy in Kenya and the African Union over whether the Court was trying to impose its values and interfere in the internal affairs of Kenya. The Commission should draw a lesson from that and similar cases. Any international cooperation to prevent and punish crimes against humanity must rest on the independence, equality and mutual respect of States and the consent of the countries involved, and must seek to safeguard international and regional peace and to reduce tension. Since it was essential to reject double standards and power politics in State-to-State relations and to oppose any illegal use of force or any attempt to overthrow the legitimate Government of another country ostensibly in order to punish crimes against humanity, the corresponding wording must be incorporated in the preamble to the draft articles.

50. Turning to the Special Rapporteur's third report, he said that he agreed with the comments of a number of other members about its length. In his view, the length of the report was only the surface of the problem and in fact reflected three main substantive issues. First, the Special Rapporteur had taken the progressive development of international law too far, because he proposed a complete set of draft articles that went beyond the codification of customary international law in that they transcended its scope and applied to crimes against humanity rules that were applicable to different crimes. As a result, there was an imbalance between *lex lata* and *lex ferenda*. Second, the Special Rapporteur had tried too hard to introduce a complete, stand-alone legal system for punishing crimes against humanity which would then overlap with existing international law regimes and rules. The draft articles could be described as dealing with everything and anything, including subjects where there was no need for detailed new texts because well-established treaty mechanisms or domestic law rules already existed. Moreover, since crimes against humanity were different in nature from the crime of corruption or transnational organized crimes, it was difficult to apply the same rules by analogy. Third, the draft articles were unduly idealistic and full of noble elements that bore little relation to the complex and cruel reality of international relations. For example, jurists advocated the punishment of offenders regardless of their official positions, yet none of the leaders of powerful countries had ever been prosecuted by the International Criminal Court. When working on the draft articles and while encouraging Member States to accept the idea of the rule of law, the Commission should also have regard to States' ability to accept the relevant rules, and it should leave sovereign States the necessary space and discretion. When an issue involved State sovereignty, it was essential to uphold the principles of sovereign equality and voluntary consent. When considering the provisions of draft article 17 on compulsory dispute settlement, it should be asked how many permanent members of the Security Council had accepted the compulsory jurisdiction of the International Court of Justice and how many of those countries had acceded to the Rome Statute of the International Criminal Court. However nicely a rule was crafted, it would remain mere words on paper without the extensive support of Member States.

51. On the issue of extradition, he shared the views expressed by many members that it was necessary to ponder whether article 44 of the United Nations Convention against Corruption formed an appropriate basis for draft article 11. The statements in paragraph 21 of the report that "extradition of such offenders may occur pursuant to the rights, obligations and procedures set forth in multilateral or bilateral extradition agreements addressing crimes more generally, where they exist between a requesting State and requested State, or pursuant

to national laws or policies when those are regarded as sufficient by the requested State" and in paragraph 26 that "[a] variety of factors in any given situation may suggest that one or the other requesting State is best situated to prosecute, and it is always the case that the State where the alleged offender is present may elect to submit the case to its own competent authorities for the purpose of prosecution instead of extraditing" argued against the incorporation of provisions on extradition into the draft articles. The Special Rapporteur merely showed that there were two approaches to extradition, one "more detailed", the other "less detailed", and suggested that the rationale for adopting the more detailed approach was the accession of 181 States to the abovementioned Convention. Although the Special Rapporteur acknowledged in paragraph 83 that a "crime against humanity by its nature is quite different from a crime of corruption", he provided insufficient evidence that the rules proposed in that Convention were appropriate. The reasoning given in paragraph 152 for the wording of draft article 13 on mutual legal assistance, namely that the issues arising in the context of mutual legal assistance were largely the same regardless of the nature of the crime, was also unconvincing, since States were not necessarily willing to transpose rules from one convention to another.

52. While the status of the principle of *non-refoulement* was undeniably established in customary international law, the Special Rapporteur, in the report under consideration, did not demonstrate that the norms of such instruments as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Convention for the Protection of All Persons from Enforced Disappearance should apply in the event of crimes against humanity, since the latter crimes were plainly more varied in their forms than those of torture or enforced disappearance. Hence there was insufficient evidence that the provisions of the conventions on those crimes could be transferred directly to draft article 12.

53. The reasoning supporting the formulation of draft article 13 was similar to that underpinning draft article 11. Yet again, there was a lack of evidence and practice showing that the rules of the United Nations Convention against Corruption applied equally to crimes against humanity. Nor was any proof given that "more detailed" legal assistance provisions took precedence over "less detailed" ones. Three United Nations conventions contained "less detailed" provisions and focused on promoting international cooperation. However, it was unclear whether draft article 13 sought to guide cooperation among States parties or to provide a basis for cooperation among States that had not concluded legal assistance treaties, thereby turning the article into a "mini mutual legal assistance treaty". He wondered how many States were in that situation and whether they would be willing to apply the provisions set forth in paragraphs 10 to 28 of the draft article in question. If States were unwilling to apply them, or had already concluded legal assistance treaties, the draft article would be less useful.

54. As far as draft article 14 was concerned, the fact that issues relating to victims, witnesses and other affected persons invariably arose after a crime against humanity had been committed did not logically imply that provisions on those persons' rights should be included in a treaty on that kind of crime because, as could be seen from paragraphs 163 to 168 of the report, different treaties adopted a variety of approaches to their rights, and States parties often defined the term "victim" in accordance with their domestic law. Hence their rights would be better protected through provisions on litigation procedures of States or international criminal judicial organs. While he agreed with the view of some members that the intention behind paragraph 3 on reparation was good, he wondered whether it was operable and what restitution or a guarantee of non-repetition really meant in practice in the context of crimes against humanity.

55. Since paragraph 198 of the report stated that the draft articles had been written in order to avoid any conflict with States' rights or obligations in relation to international criminal tribunals, the need for draft article 15 was questionable. Indeed, its inclusion might complicate relations between parties and non-parties to the Rome Statute of the International Criminal Court or to agreements governing other international criminal tribunals in the future. That issue should therefore be decided by States at diplomatic conferences. He agreed with the view on immunity expressed by the Special Rapporteur in paragraph 284 of the report. However, the inclusion of draft article 15 would inevitably raise questions about the relationship between articles 27 and 98 of the Statute, a matter which had not been clarified by the Assembly of States Parties to the Rome Statute of the International Criminal Court.

56. Draft article 16 on federal State obligations seemed to lack substantive meaning and some treaties explicitly ruled out any adjustments to accommodate a federal structure. If the Commission were determined to include the content of that draft article, it might be better to leave the matter until the second reading.

57. He supported the view that the selection of a particular monitoring mechanism should be left to the decision of States. He disagreed with those members who thought that draft article 17, paragraph 3, permitting withdrawal from inter-State dispute settlement, would weaken the role of international criminal judicial organs. Even in the absence of the provisions set out in draft article 17, States could peacefully resolve disputes concerning the interpretation or application of the potential convention according to existing rules.

58. As crimes against humanity were different from the other three crimes covered by the Rome Statute of the International Criminal Court, rather than echoing the preamble to the latter, the preamble should be worded in a way as to be more relevant to the prevention and suppression of such crimes.

59. He was in favour of submitting all the draft articles contained in the third report to the Drafting Committee.

The meeting rose at 11.45 a.m.

3353rd MEETING

Monday, 8 May 2017, at 3.05 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON, noting that it was the seventy-second anniversary of the end of the Second World War in Western Europe, a war following which the first convictions for crimes against humanity had been handed down at the Nuremberg trials, invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of crimes against humanity (A/CN.4/704).

2. Mr. OUAZZANI CHAHDI, having commended the Special Rapporteur on the quality of his report, said that it was also lengthy, but that given the nature of the topic, it was preferable to have a comprehensive document that could serve as the basis for a thorough debate.

3. He agreed entirely with the proposals made by the Special Rapporteur with regard to extradition, in particular that there was no need to include a dual criminality requirement in the draft articles. He also supported the exclusion of the political offence exception.

4. Chapter IV of the report, on victims' rights and participation in criminal proceedings, raised the important and topical issue of protection of witnesses and whistle-blowers. In Morocco, the reluctance of some individuals to report corruption for fear of endangering themselves had prompted the adoption, in 2011, of a law amending the provisions of the Code of Criminal Procedure on the protection of victims, witnesses, experts and whistle-blowers in relation to corruption, embezzlement and influence peddling, among other offences. It was his belief that the draft articles should contain binding provisions requiring States parties to any future convention to introduce, in their domestic law, measures to protect persons who provided information in relation to crimes against humanity.

5. The monitoring mechanisms discussed by the Special Rapporteur in chapter VII of the report were of great relevance, because without a binding follow-up mechanism, the convention would be difficult to implement. As for the settlement of disputes concerning the implementation or interpretation of a future convention, the best course would be for them to be referred exclusively to the International Court of Justice.

6. In chapter X, on final clauses, the Special Rapporteur addressed the issue of reservations, the use of which should, in his own view, be strictly limited or prohibited altogether, as in the Rome Statute of the International Criminal Court, even though that might discourage some States from becoming parties to a future convention.

7. Turning to the proposed draft articles, he said that draft article 11 as currently worded was not, *a priori*, problematic, though the reference to a "minimum penalty" in paragraph 6 should be clarified. In draft article 12, paragraph 1, the expression "to territory under the jurisdiction of another State" was likewise unclear. Some of the points raised in draft article 13, which had the semblance of a mini-treaty, should be expressed more succinctly, as pointed out by previous speakers. Regarding draft article 14, he proposed that, in the French text, the words *Chaque État prend les mesures nécessaires pour* ("Each State shall take the necessary measures to ensure that") be replaced with *Chaque État est appelé à prendre les mesures nécessaires pour* ("Each State is called upon to take the necessary measures to ensure that"), which was, in his opinion, more prescriptive. Draft article 16, on federal State obligations, did not belong in the draft articles, in view of the contents of article 29 of the 1969 Vienna Convention. Draft article 17 should not contain provisions on final clauses, as it currently did in paragraphs 3 and 4, and the importance of referring disputes to the International Court of Justice should be underlined; the wording used in the Convention on the Prevention and Punishment of the Crime of Genocide was of interest in that respect.

8. The draft preamble should be expanded to contain additional references, such as to the Rome Statute of the International Criminal Court. The Commission might wish to draw inspiration from the proposals put forward in the draft articles produced by the Crimes Against Humanity Initiative at Washington University's Whitney R. Harris World Law Institute.[78]

9. To conclude, he said that he supported the referral of the draft articles to the Drafting Committee.

10. Mr. VÁZQUEZ-BERMÚDEZ said that he wished to thank the Special Rapporteur for his third report, which complemented the previous two;[79] it contained draft articles that were based on the provisions of various international criminal law treaties and were underpinned by extensive research and analysis. A matter that informed the draft articles as a whole was the *jus cogens* nature of the prohibition of crimes against humanity, which had been recognized by the Commission itself, by regional and international courts and in domestic jurisprudence. The

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[78] Text available from the website of the Whitney R. Harris World Law Institute:https://sites.law.wustl.edu/WashULaw/crimesagainsthumanity/convention-text/.

[79] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/680 (first report); and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/690 (second report).

assertion that the prohibition of crimes against humanity was a *jus cogens* norm should be made explicitly in a preambular paragraph.

11. Turning to the proposed draft articles, he said that, since extradition was a key mechanism for cooperation among States in ensuring the prosecution of crimes against humanity, draft article 11 had to include all the requisite elements for its successful implementation. Some members of the Commission had stated that the references to draft article 5[80] should be replaced with references to draft article 3.[81] He himself considered that there was an implicit cross reference to draft article 3, since the crimes against humanity mentioned explicitly in draft article 5 were necessarily the acts defined and listed in draft article 3. However, in the interests of total clarity, and to avoid possible problems of interpretation, reference should be made to both draft article 3 and draft article 5. If reference were made only to the former, it would not be clear, for example, whether attempted commission of a crime against humanity or complicity in its commission could lead to extradition.

12. He agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in draft article 11, bearing in mind that, under draft article 5, States had to ensure that crimes against humanity constituted criminal offences under domestic law. However, because there might be cases of non-compliance with that requirement, it should be specified in the commentary to draft article 11 that the fact that an offence had not been criminalized could not justify a State's failure to respond to an extradition request, especially if that prevented cases from being submitted to the national authorities for the purpose of prosecution.

13. He backed the decision not to include the political offence exception to extradition in draft article 11, paragraph 2, in line with various international criminal law treaties.

14. Draft article 11, paragraph 4, was innovative, in that it reversed the default rule found in other conventions by stipulating that, if a requested State that made extradition conditional upon the existence of a treaty with the requesting State chose not to use the draft articles as the legal basis for cooperation on extradition, it was not obliged to extradite until it had signed an extradition agreement. It would be preferable to go even further, however, by simply deleting paragraph 4 and, for the sake of legal certainty, replacing the word "may" in paragraph 3 with "shall". Moreover, it should be mentioned in the commentary that, if the requested State did have an applicable extradition treaty with the requesting State, it could choose to implement it.

15. In draft article 11, paragraph 6, the reference to the "minimum penalty requirement for extradition" should be deleted: it was unnecessary in view of the obligation imposed on States in draft article 5, paragraph 6, to ensure that, under their criminal law, crimes against humanity were punishable by appropriate penalties that took into account their grave nature.

16. The Special Rapporteur had not included a paragraph on the non-extradition of nationals, despite addressing, in paragraphs 9 and 10 of draft article 11, scenarios in which the person sought was a national of the requested State. However, it was necessary to add a paragraph similar to article 44, paragraph 11, of the United Nations Convention against Corruption expressly indicating that, if a State refused to extradite an alleged offender solely on the ground that he or she was one of its nationals, it was obliged to submit the case to its authorities for the purpose of prosecution. In contrast to article 44, paragraph 11, however, it should not be asserted that the obligation to prosecute should be discharged at the request of the State seeking extradition.

17. In draft article 11, paragraph 11, the phrase "that compliance with the request would cause prejudice to that person's position for any of these reasons" was not entirely clear and, although found in certain conventions, was so broad as to be unsuitable in the context of fighting impunity for serious crimes.

18. He did not believe that there were obvious reasons for establishing an order of preference when it came to considering multiple, competing extradition requests. It should be left to the requested State to decide, taking into account the particular situation. Prior consultations between the requested State and the requesting State should, however, be encouraged.

19. He agreed with the inclusion of draft article 12 and, in general, with its content. In draft article 13, the Special Rapporteur presented what had been labelled as a mini-treaty, in other words a long version of provisions on mutual legal assistance inspired, in particular, by article 46 of the United Nations Convention against Corruption. Unlike the short version that appeared in several conventions, which was perhaps too general, the long version offered the obvious advantage of providing States with a detailed guide. Certain changes would be necessary to adapt draft article 13 to the context of crimes against humanity, but he generally supported the proposed text, which contained subtitles for ease of reading. True, draft article 13 was longer than the others, which was why consideration might be given to Mr. Park's proposal to move the majority of the text to an annex: paragraphs 1 to 9 could be retained and paragraphs 10 to 28 transposed.

20. In draft article 13, paragraph 3, a new subparagraph (*g*) *bis* should be inserted, which in Spanish would read: *localizar e inmovilizar activos para su decomiso, su restitución o el cobro de multas* ("locating and immobilizing assets for purposes of forfeiture, restitution or collection of fines"). Similar language was found in the Inter-American Convention on Mutual Assistance in Criminal Matters, in the Treaty on Mutual Legal Assistance in Criminal Matters and in relevant bilateral agreements. Such a provision could prove particularly important in the context of reparation for victims involving not only the individual responsibility of the perpetrators of crimes against humanity but also the liability of legal persons. He was in favour of keeping draft article 13, paragraph 4, on bank secrecy, which was perfectly applicable to investigations into movements of funds linked to the commission of crimes against humanity and might also be useful in the context of reparation for victims.

[80] *Yearbook … 2016*, vol. II (Part Two), pp. 151–152 (draft article 5).

[81] *Yearbook … 2015*, vol. II (Part Two), p. 37 (draft article 3).

21. The inclusion of a draft article on victims, witnesses and others was highly important and reflected the international community's growing concern for the protection of victims of serious crimes and their rights, including the rights to redress and access to justice. The Drafting Committee should be able to refine the text, taking into account, in particular, the International Convention for the Protection of All Persons from Enforced Disappearance.

22. He agreed with the Special Rapporteur that all the traditional types of reparation appeared to be potentially relevant in the aftermath of the commission of crimes against humanity. Some doubts had been expressed about the inclusion of guarantees of non-repetition, but it had to be borne in mind that crimes against humanity were committed pursuant to a State or organizational policy and that, consequently, the State or organization that pursued that policy might be requested by the victims to provide guarantees of non-repetition, which would help to prevent future occurrences of the crime.

23. In proposing draft article 15, the Special Rapporteur had been sensitive to the desire expressed by various States for the draft articles not to conflict in any way with the rights or obligations of States with regard to competent international criminal tribunals. Under the Special Rapporteur's guidance, the draft articles were being drawn up in a manner that was harmonious with the Rome Statute of the International Criminal Court and did not affect the obligations thereunder. However, as it was clearly impossible to anticipate what kind of international, regional or even subregional tribunals would be set up in the future, the best solution might be to include a "without prejudice" clause, as proposed by Ms. Escobar Hernández.

24. It was appropriate to include a draft article on federal State obligations, with language taken from article 41 of the International Convention for the Protection of All Persons from Enforced Disappearance. In the context of a convention on the prevention and punishment of one of the most serious crimes, it was right to avoid disparate obligations within a State and in relation to unitary or non-federal States. It was important not to allow any reservations to draft article 16 in a future convention.

25. While there were already mechanisms to monitor possible cases of crimes against humanity, it should be noted that, for a future convention to fill a gap in international law and prevent and punish crimes against humanity through cooperation among States and with international organizations, monitoring mechanisms should be established to promote effective implementation. In his view, there should be a draft article calling for the creation of two monitoring mechanisms. The first could be a meeting of States parties, held periodically and exceptionally when circumstances so required, with a broad mandate to promote cooperation in the implementation of the convention and to serve as a forum for the discussion of any relevant issues. The second could be a committee of independent experts elected by States parties to make recommendations concerning the fulfilment of obligations under the convention.

26. He supported the inclusion of the proposed draft article on inter-State dispute settlement, but agreed with previous speakers that, if a dispute could not be settled through negotiation, it should be referred to the International Court of Justice, without there being an intermediate arbitration stage. Moreover, to promote the widest possible participation in the convention, and bearing in mind that some States would be reluctant to accept compulsory jurisdiction with regard to dispute settlement, it was reasonable to insert an opt-out clause.

27. If there was no consensus on expressly including a provision on the concealment of crimes against humanity, it should be explained in the commentary that the Commission had decided to proceed without one on the understanding that concealment fell within the scope of complicity.

28. The issue of immunity was crucial, and its handling could have a significant impact on the effectiveness of a future convention. The decision not to include a provision precluding immunity from foreign criminal jurisdiction for State officials and members of international organizations should not be misinterpreted as meaning that immunity could be used to block trials, extraditions or even requests for legal assistance. That point should be made clear in the commentary. At the very least, there should be a draft article on the irrelevance of a person's official position in determining his or her criminal responsibility for a crime against humanity, as proposed by Mr. Murase and other members of the Commission. A provision of that kind had been inserted in existing conventions on the most serious crimes and in two instruments developed by the Commission, namely the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[82] and the draft code of crimes against the peace and security of mankind.[83]

29. He did not share the view that the Special Rapporteur appeared to take with regard to amnesties. In his opinion, there was sufficient State practice and national and international jurisprudence to assert that customary international law prohibited amnesties or pardons for the most serious crimes of concern to the international community as a whole. The prohibition of amnesty for crimes against humanity had been recognized in the jurisprudence of international tribunals, such as the International Tribunal for the Former Yugoslavia, regional human rights courts, such as the African Commission on Human and Peoples' Rights, and national courts. It had also been provided for in many national laws, including the Constitution of Ecuador, article 80 of which established that crimes against humanity, among other serious crimes, were not subject to amnesty.

30. In addition, when amnesty had been granted as part of a post-conflict transitional justice process, crimes against humanity and other core crimes under international law had been explicitly excluded, as in the Arusha Peace and Reconciliation Agreement for Burundi.[84]

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[82] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[83] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

[84] Arusha Peace and Reconciliation Agreement for Burundi, signed at Arusha on 28 August 2000. Available from: https://peacemaker.un.org/sites/peacemaker.un.org/files/BI_000828_Arusha%20Peace%20and%20Reconciliation%20Agreement%20for%20Burundi.pdf.

31. The most recent example worth citing was the 2016 Colombian peace agreement, which had put an end to the internal conflict in the country.[85] One of the chapters of the agreement, on the so-called "Special jurisdiction for peace", expressly provided that no amnesties, pardons or similar measures could be granted for crimes against humanity.

32. In the light of the above, the draft articles should explicitly exclude the possibility of granting amnesty, which might undermine one of the objectives of a future convention, namely to end impunity for the perpetrators of crimes against humanity. The granting of amnesty would also impede the discovery of the truth and the provision of full reparation to victims and their families. Moreover, the *jus cogens* nature of the prohibition of crimes against humanity meant that it could not be derogated from by an amnesty decree or law.

33. He believed that there should be a draft article prohibiting reservations, or that the Commission should at least make a recommendation to States in that regard, in order to safeguard the integrity of a future convention, which was evidently particularly important for the purposes of preventing and punishing crimes against humanity.

34. In draft articles that might be sensitive for States, such as the one on accepting the competence of the International Court of Justice, the Commission could insert opt-out clauses, which would give States flexibility when they became parties to a future convention.

35. As to the future programme of work, it seemed reasonable to attempt to complete the first reading of the draft articles in 2017, but the Commission would need to conduct a careful and unhurried analysis of all the proposed draft articles and the proposals put forward during the debate.

36. To conclude, he said that he supported the referral of all the draft articles to the Drafting Committee.

37. Mr. GÓMEZ ROBLEDO said that a convention on crimes against humanity would undoubtedly fill a gap in international law; however, he did not understand why the drafting exercise did not cover war crimes and genocide. On that point, he did not find the Special Rapporteur's arguments persuasive. Neither the 1949 Geneva Conventions for the Protection of War Victims together with the Protocols Additional thereto nor the Convention on the Prevention and Punishment of the Crime of Genocide contained demonstrably effective accountability mechanisms. Nor had a specific situation ever been considered by the International Humanitarian Fact-Finding Commission provided for in article 90 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) or at meetings of the High Contracting Parties provided for in article 7 thereof. That left the application of international humanitarian law entirely in the hands of the depositary, Switzerland, and of ICRC, which were averse to any politicization of that work. As a result, since the end of the cold war, the Security Council had been the sole guardian of the application of international humanitarian law, with all the attendant disadvantages of that arrangement. The inclusion of war crimes and genocide in the convention would therefore constitute real progress in the prevention and punishment of such crimes.

38. It was impossible to avoid thinking that the purpose of the draft convention was to offer an instrument that was made to measure for those States that had no intention of becoming parties to the 1998 Rome Statute of the International Criminal Court. The draft convention could also have the undesirable effect of discouraging further ratifications of the Statute, especially at a time when two or more States appeared ready to denounce that instrument.

39. The Commission, most unfortunately, was confining itself to its technical role without taking account of the political climate, which had changed radically since 1998. Was it really the best time to send a text to the General Assembly when it was unlikely to promote international cooperation better than the existing treaties on terrorism, transnational organized crime and corruption? Moreover, the Commission had a responsibility to make a recommendation on the matter of a monitoring mechanism—not a minor issue to be addressed in the final clauses, but something that was crucial to the effective implementation of the convention.

40. One serious omission from the draft articles was an obligation that States must refrain from committing crimes against humanity. As the Commission itself had pointed out in its commentary to draft article 58 of the text on the responsibility of States for internationally wrongful acts: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved."[86]

41. Similarly, the International Court of Justice had pointed out, in its 2007 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 even though article 2 of the Convention did not expressly require States to refrain from committing genocide, it would be paradoxical if States were under an obligation to prevent the commission of genocide by persons over whom they had some influence, but were not forbidden to commit such acts through their own organs: "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" (para. 166 of the judgment).

42. Another serious omission was a provision to rule out the use of military courts to try crimes against humanity. As pointed out in 2015 by Amnesty International in its *Initial Recommendations for a Convention on Crimes against Humanity*,[87] any future convention should stipulate that

[85] Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, signed at Bogotá on 24 November 2016. Available from: www.peaceagreements.org/view/1845.

[86] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 142 (para. (3) of the commentary to draft article 58).

[87] Amnesty International, *International Law Commission: Initial Recommendations for a Convention on Crimes against Humanity*, London, 2015. Available from the Amnesty International website: www.amnesty.org/download/Documents/IOR4012272015ENGLISH.pdf.

persons suspected of criminal responsibility for crimes against humanity should be tried and sentenced by the ordinary civilian courts, and not, under any circumstances, by military courts or quasi-judicial military bodies. Many countries in Latin America had redefined their systems of military justice to reflect that view, so that military courts were prohibited from hearing any cases involving a civilian victim. The case law of the Inter-American Court of Human Rights was settled on the matter, as reflected in the rulings in *Durand and Ugarte v. Peru* and *Radilla-Pacheco v. Mexico*.

43. Reparation for harm caused by crimes against humanity should take account of the nature of such crimes and their consequences for victims and society as a whole. Victims must have access to full reparation, in line with General Assembly resolution 60/147 of 16 December 2005 on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law and recent decisions of the International Criminal Court and the Inter-American Court of Human Rights. Reparation must be adequate, effective and prompt, and proportionate and appropriate to the gravity of the crimes committed, the harm suffered and the circumstances of each case. Adequate reparation for such crimes should include both individual and collective reparations, in line with the March 2017 ruling of the International Criminal Court in *The Prosecutor v. Germain Katanga*. Furthermore, there should be no question of choosing between "one or more" of the various forms of reparation in draft article 14, paragraph 3, since, with the exception of restitution, all the other forms should be granted in all cases where crimes against humanity had been committed. The phrase "one or more of the following forms" should simply be replaced with "the following forms", and the conjunction "and" inserted before the last item in the list, "guarantees of non-repetition". The problem had already been addressed in article 75 of the Rome Statute of the International Criminal Court, which talked of "restitution, compensation and rehabilitation".

44. At the same time, the following wording from paragraph 16 of the aforementioned Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law could usefully be included in the draft articles: "States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations."[88] The Special Rapporteur might find it useful to look at recent Mexican legislation, which established a very thorough system of reparation for victims.

45. It was understandable that the Commission was finding it difficult to make a consensus recommendation to the General Assembly on a monitoring mechanism. There was no single model, there were clear risks of duplication with existing treaty monitoring mechanisms and, perhaps especially, all States, big or small, were experiencing a sort of "treaty body fatigue". However, a convention on crimes against humanity without a monitoring mechanism would be a dead letter from the start. It was wrong to claim that the issue was so political that it would be better dealt with by the General Assembly itself. The Commission could discuss the issue, on the basis of the excellent memorandum by the Secretariat,[89] and perhaps propose something on the lines of a meeting of scientific experts, as had been done for the topic of protection of the atmosphere. Among the new members of the Commission were human rights experts who would surely have much to offer in such a discussion.

46. Perhaps a provision on federal State obligations was not actually needed; however, not all individual States in a federal State were well versed or even interested in international law, and it was very important to find a way to harmonize federal legislation. That was no easy task: in Mexico, for example, the Constitution and legislation had had to be constantly amended to ensure a consistent approach throughout the country to the crimes of torture and enforced disappearance.

47. Lastly, he said that all the draft articles in the report should be forwarded to the Drafting Committee.

48. Mr. GROSSMAN GUILOFF, after commending the Special Rapporteur on the quality of his third report and the thoroughness of his research, said that, in the absence of a universal treaty on extradition, it was imperative to ensure that the rules on crimes against humanity were incorporated in domestic legislation and to enhance international cooperation in that area.

49. Among the many valuable provisions contained in the draft articles was the exclusion, in draft article 11, paragraph 2, of political offences as justification for refusing extradition. Politics could be blamed for many things, but not for condoning crimes against humanity. In the Western hemisphere, before the concept of crimes against humanity had been fully developed, the political offence exception to requests for extradition had been used as a means of protecting from persecution in their countries of origin people who had taken certain political stances. That said, there could be no excuse for granting impunity for such crimes.

50. Another valuable provision was contained in draft article 11, paragraph 9, which permitted the extradition by a State of one of its own nationals on certain conditions. The prohibition of the extradition of nationals was incompatible with the interconnected nature of the contemporary world. He also welcomed the inclusion of the *aut dedere aut judicare* principle in draft article 9[90] and the establishment of rules on mutual legal assistance in draft article 13.

51. The draft articles drew on two main conceptual sources: the rich legal traditions of international criminal law and international human rights law. The latter was "victim centred", while criminal law had more of a focus on accountability. However, the two traditions overlapped

[88] General Assembly resolution 60/147, annex, para. 16.

[89] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/698.

[90] *Ibid.*, vol. II (Part Two), p. 166 (draft article 9).

to some extent, as in their rejection of impunity. The principles that should guide the Commission in drafting a convention like the present one, where the two traditions were interwoven, included effectiveness and balance. It should see which rules from one or the other tradition were the most appropriate and then ensure that the text as a whole drew in a careful and balanced way from both traditions. In the preamble especially, the emphasis could perhaps be more on sources from international human rights law and international humanitarian law.

52. Concerning the absence of a provision on the obligation to provide training, he said that both the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance included specific rules on that subject, with generally positive results. Many judicial authorities, prosecutors and members of security forces had received training on national rules and there was far greater awareness of treaty rules among both officials and civilians. In general, there was something of a "prevention gap" in the draft as a whole; that problem could be addressed by referring to training and capacity-building in the preamble and elaborating further on international cooperation within the text of the instrument.

53. He had seen no rule saying that in terms of protection, it was a floor rather than a ceiling that was being proposed, meaning that if any other treaty or piece of domestic legislation established rules that went further than the convention, they would take precedence. Generally speaking, human rights treaties contained a provision indicating that the rules they contained were without prejudice to the provisions of other international instruments that offered greater protection; article 16, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or article 29 of the American Convention on Human Rights: "Pact of San José, Costa Rica" could be cited as examples.

54. He realized that the dual criminal and humanitarian nature of the draft might pose a challenge to its adoption. He had also taken note of the complications pointed out by some members of the Commission regarding draft article 15. It would be interesting to see how the Drafting Committee resolved such problems while retaining rules to ensure fulfilment of the convention's objectives.

55. It would be helpful to add some language to paragraphs 7, 9 and 10 of draft article 11 to state that domestic legislation on extradition must be consistent with the obligations under international law. Moreover, it did not make sense to limit the reasons for affording protection to those listed in paragraph 11 of the draft article. A phrase such as "or any other status" could be added, or discrimination could be explicitly prohibited. Also, some provision could be included so as to afford protection not just on the basis of one's status, but also on the basis of one's actions, in cases where people were seeking to avail themselves of the protection offered by obligations under a treaty.

56. On the question of *non-refoulement*, covered in draft article 12, he said that given the nature of the crime in question—namely, a widespread attack on the civilian population—it would be a good idea to add a general prohibition referring to existing prohibitions in international law. Proving the existence of a widespread attack on a civilian population for the purposes of compliance with the principle of *non-refoulement* could be problematic. Perhaps a reference to military courts could be included, as Mr. Gómez Robledo had suggested, and as could effective guarantees of due process for individuals in *refoulement* cases. The problems arising from the use of military courts had been thoroughly addressed in the jurisprudence at the regional level and that of several United Nations treaty bodies, and the topic could perhaps be mentioned in the draft.

57. In view of the objectives of the future convention, it was essential to include adequate rules on victims that at the very least did not detract from the existing rules in international law. To that end, four issues had to be fully addressed: the definition of a victim; reparations; the rights of victims; and the protection of victims and witnesses.

58. Draft article 14 did not define victims, but the elements of such a definition were firmly grounded in the international law of responsibility for harm to nationals of other States. The human rights treaty monitoring bodies had developed ample practice in that area. Moreover, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law covered the various ramifications of that right. It therefore did not seem sufficient to leave the definition of victims to national law, as draft article 14 did. The "fourth instance formula" alluded to by previous speakers did not offer States any margin of appreciation for determining who was a victim where gross violations of human rights were concerned. Neither had any of the human rights treaty bodies ever left such a definition to national law, as a careful reading of general comment No. 3 (2012) of the Committee against Torture[91] clearly showed. Rule 85 of the Rules of Procedure and Evidence[92] of the International Criminal Court did include a definition of victims, although it was a fairly terse one.

59. The meaning of "reparation" was likewise well established in international law. In view of the gravity of crimes against humanity, the Special Rapporteur had correctly included in draft article 14, paragraph 3, references to reparation on both an individual and a collective basis and to guarantees of non-repetition. However, stronger wording was needed, in order to emphasize the need for "effective" reparation. Other important aspects of reparation that merited inclusion were the actual availability of judicial remedies and legal aid, the enforceability of court decisions and the right to the truth. Draft article 14, paragraph 1, should include a reference, not only to individuals, but also to groups of individuals who were subjected to a crime against humanity.

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[91] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X, p. 254.

[92] Rules of Procedure and Evidence of the International Criminal Court, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002* (ICC-ASP/1/3 and Corr.1, United Nations publication, Sales No. E.03.V.2, Part Two, sect. A), p. 52.

60. Turning to amnesty, he said that the Special Rapporteur had cited a great many instruments and rulings, and he himself could suggest several more, which specifically indicated that there could be no amnesty for crimes against humanity. The human rights treaty bodies had firmly upheld that position and in some cases had extended the prohibition of amnesty to cover grave and systematic violations of human rights. It would be worth providing in the commentary to the draft articles a comprehensive analysis of the situation with regard to amnesty.

61. Concerning reservations, he said that he would prefer to see reservations excluded; otherwise, if no consensus existed in the Commission, a mixed, restricted system could be envisaged. As to the relevance of official status, he thought that some mention should be made of it, if not in the draft articles, then in the commentary. It did not seem to him that conditions were right for establishing a new body for monitoring the implementation of the future convention—for economic and other reasons. Perhaps the most pragmatic approach would be to set up an assembly of States parties to carry out peer review.

62. In conclusion, he said that he supported the referral of all the draft articles to the Drafting Committee and hoped that the extremely important work thereon would be concluded expeditiously.

63. Mr. RAJPUT said that the length of the report on crimes against humanity was understandable, considering the variety of issues that had to be handled. Since the objective was to prepare a convention, the Special Rapporteur had a large amount of discretion to select an approach to the topic and to make policy choices. The procedural aspects discussed in the report thus represented policy preferences rather than the position of law. However, he would have liked to have seen more analysis of the reasons for choosing one treaty over others, and, in particular, for the choice of the United Nations Convention against Corruption as a model for the provisions on extradition and mutual legal assistance. That instrument was very different from the future convention on crimes against humanity. Nevertheless, the provisions on extradition that it contained were procedural in nature; they were not inseparably linked to the crime of corruption. They thus provided a robust framework for ensuring that extradition took place and for obviating technical legal problems, and they served the purpose of preventing perpetrators of crimes against humanity from hiding under the veil of the technicalities of bilateral extradition treaties.

64. Referring to paragraph 26 of the report, he said that although no provision to address multiple requests for extradition was envisaged, he thought that multiple requests would inevitably arise, due to the prospect of prosecution in multiple forums. Some method of prioritizing them should be proposed, based on the place of commission of the offence, the presence of victims or witnesses, the nature of domestic criminal law and the criminal adjudication system.

65. The dual criminality rule was primarily a creation of treaty practice and should not be included in the proposed convention. However, the reason should be, not that crimes against humanity would automatically be criminalized in all States, as suggested in paragraph 35 of the third report, but that issues of temporality could create problems. He saw no need for paragraph 1 of draft article 11, urging States to include extraditable offences in every treaty that they concluded. It stated the obvious and could be used to argue that if a bilateral extradition treaty did not contain a reference to crimes against humanity, then the requirements under that treaty, which might be less strict than those in the future convention, should apply. He endorsed draft article 11, paragraph 2, because offenders might try to defend their actions as political in nature, thereby creating an obstacle to extradition.

66. He favoured a long-form provision on mutual legal assistance. Such a provision should be detailed, because it would make the conduct of trials effective and efficient, the objective being not merely to put the accused on trial but also to achieve results based on credible and incriminating evidence. Treaty negotiations on detailed provisions were tedious, but it was better to have them, subject to their subsequent alteration by contracting parties based on the peculiarities of the domestic laws.

67. He did not agree with the Special Rapporteur's suggestion that no definition of victims be included in the draft articles, in order to give States latitude to determine the definition based on their national laws. Some clarification needed to be provided, if not in the draft articles, then in the commentary. For example, if a victim was defined solely as a person subjected to a crime against humanity, the chances of his or her being alive were rare; however, the category of victim must not be too broad so as to include persons who were unduly remote from the individuals who were actually the victims. The term "reparation" had a specific meaning in international law that might limit the amount of compensation that could be awarded to victims. An alternative might be to use the standard wording in some investment treaties: "prompt, adequate and effective compensation".

68. He agreed with the criticisms of the Special Rapporteur's proposal regarding inter-State dispute settlement. In situations involving crimes against humanity, the compulsory jurisdiction of the International Court of Justice should be provided for as a fast means of dealing with disputes about enforcement of the convention or concurrent requests for extradition and prosecution.

69. As to amnesty, it was one of the tools for achieving peace; although it might be prone to abuse, that did not mean it was consistently abused, and if it was, then monitoring and dispute settlement procedures under the future convention could be brought into play. He would like to see a pragmatic approach taken to amnesty, with a case-by-case analysis. Amnesty should not be completely ruled out, but he agreed with the Special Rapporteur that the convention should say nothing about it, leaving it to States to select an appropriate approach when negotiating the text.

70. In the earlier discussion about amnesty, reference had been made to a so-called "United Nations policy" and the practice of some treaty bodies. Amnesty had been used in the past by several States, and it was very difficult to see how the policy or practice of an international organization

could supersede the practice of States, as noted in draft conclusions 4 and 12 on identification of customary international law and the commentaries accompanying those draft conclusions.[93]

71. He did not support the view expressed by some members that the proposed convention on crimes against humanity should have an explicit reference to exclusion of immunities, along the lines of article 27, paragraph 2, of the Rome Statute of the International Criminal Court. There was a difference in the structure and, most importantly, the object of the proposed convention and the Statute. The former aimed at the creation of a "diffused network" permitting prosecution in various domestic courts, and the latter at the establishment of a single international tribunal. He strongly supported the creation of a "diffused system", under which an alleged offender would be precluded from escaping from one system, rather than a system centred on a single institution, which made some serious international crimes subject to institutional limitations. That reasoning was supported by the fact that the Convention on the Prevention and Punishment of the Crime of Genocide also did not make a provision on immunity because it, too, followed the scheme as contemplated under the proposed convention on crimes against humanity. In addition, the inclusion of immunity in the proposed convention would overlap with the ongoing discussion under the topic "Immunity of State officials from foreign criminal jurisdiction".

72. Some members had suggested that the Special Rapporteur address the question of reservations, because States ought not to be able to opt out of provisions that dealt with important international crimes. Although he understood their wish not to weaken the impact of the proposed convention, he did not agree with them. The extensive provisions on mutual legal assistance, monitoring and dispute resolution were all indispensable for an effective enforcement mechanism, but some of them might require reservations to be permissible, to ensure that the obligations under the proposed convention were compatible with domestic law, particularly in relation to capital punishment. If States wished to ratify the proposed convention subject to reservations, which might alter procedural aspects without interfering in any way with their core obligations, it would be a small price to pay for achieving greater acceptability of the future convention. Enhancing its acceptability did not reduce its value; on the contrary, it strengthened the regime. Far more forums for prosecution would be opened up, making the fight against crimes against humanity more efficient and successful.

73. A number of members had expressed concern regarding misuse of reservations, but under contemporary international law the right to formulate reservations was by no means absolute. The International Court of Justice had made it clear in its advisory opinion in *Reservations to the Convention on Genocide* that a reservation had to be in conformity with the object and purpose of the treaty from which reservations are sought to be made. The Commission itself had dealt extensively with the regime of reservations in its 2011 Guide to Practice on Reservations to Treaties,[94] draft guideline 4 of which addressed the legal effects of reservations, indicating that reservations to a treaty reflecting a *jus cogens* norm were invalid.

74. He supported the referral of all the draft articles to the Drafting Committee and commended the Special Rapporteur for addressing the procedural aspects of combating crimes against humanity, in the absence of which substantive provisions might not help to achieve the goal of combating crimes against humanity.

75. Mr. HMOUD said that he did not agree with Mr. Rajput's argument that the use of amnesty by several States opened the door to amnesty for crimes against humanity, superseding any prohibition under customary international law. While such practice might exist in certain States, he strongly doubted that it could be said that it was general and comprehensive practice by the international community constituting customary international law, particularly when it came to crimes against humanity.

76. Mr. RAJPUT said that in order to determine whether a principle existed in international law, the principle from the *Case of the S. S. "Wimbledon"* of *expressio unius est exclusio alterius* would operate, whereby a rule would not exist unless it had been established that it did not. He had not stated that a practice of amnesty existed with regard specifically to crimes against humanity, but rather that amnesty in broad terms existed. Only if it was established that such a practice did not exist in customary international law could it be said that amnesty could not apply to crimes against humanity. It would be necessary to provide sufficient evidence that it was not merely a treaty practice but also represented the psychological readiness of the State to accept it as a customary international law principle. Such principles could not then be superseded by the policy or practice of the United Nations or of an international organization.

77. Mr. HMOUD said that the issue was whether amnesty for crimes against humanity was not actually prohibited under international law. The answer was in the negative, as evidenced by the writings of authors and jurists. When the international community identified the prohibition of a crime as *jus cogens*, as was the case with crimes against humanity, then the removal of the element of punishment for the crime, as amnesties would do, would be a violation of *jus cogens*.

78. Mr. GROSSMAN GUILOFF said that such a complex topic deserved thorough and objective discussion. He agreed with Mr. Rajput that a simple resolution of the General Assembly or a regional body did not supersede State practice. However, did decisions by international courts that had been applied by States not constitute State practice? Perhaps at a later stage the Commission should examine the numerous examples of amnesty laws, particularly those in the publication on *Rule-of-Law Tools for Post-Conflict States* by the Office of the United Nations

[93] See *Yearbook … 2016*, vol. II (Part Two), p. 66 (draft conclusion 4) and p. 76 (draft conclusion 12).

[94] 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 corrigenda 1–2, pp. 23 *et seq*. See also General Assembly resolution 68/111 of 16 December 2013, annex.

High Commissioner for Human Rights.[95] The argument that the thinking had evolved on the issue of amnesties should not be regarded as an extreme position.

79. Mr. JALLOH said that he agreed that such an important issue should be dealt with deliberately and cautiously, taking into account the practice of States at the national level, as well as the practice of international institutions, including international tribunals set up by the United Nations and regional human rights courts and commissions. The final text of the peace agreement in Colombia excluded amnesties and pardons for crimes against humanity and war crimes as defined under the Rome Statute of the International Criminal Court. He supported the proposal that the Secretariat prepare a memorandum on the issue.

80. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Mr. Hmoud's remarks. In his earlier statement, he had given examples of State practice, including national legislation and jurisprudence, as well as international jurisprudence that supported the existence of a principle of customary international law that prohibited amnesty in cases of crimes against humanity, especially when they constituted violations of *jus cogens*. He had also referred to post-conflict agreements, including the Colombia peace agreement, which expressly excluded amnesties and pardons for crimes against humanity.

81. Mr. RUDA SANTOLARIA said that he also agreed with Mr. Hmoud concerning violations of *jus cogens*. The Commission should not disregard the possibility that amnesties could be used for certain crimes in the context of transitional justice, but not for crimes against humanity. He agreed that the Commission should have more time to discuss the issue and should request the Secretariat to prepare a memorandum.

82. The CHAIRPERSON said that it had been his understanding that the question of amnesties would be discussed in the Drafting Committee, which would then decide whether to request a memorandum by the Secretariat.

83. Speaking as a member of the Commission, he said that by drafting a successful convention on crimes against humanity, the Commission would provide an essential missing element for the system of international criminal justice. The Commission had a responsibility to do what it could to ensure that the future convention was ratified by as many States as possible. However, in the current climate, it could not be taken for granted that this would happen. In recent years, there had been a marked slowdown in the conclusion and ratification of multilateral treaties in other areas, and there had even been challenges to some existing treaties. Many were of the view that if the Rome Statute of the International Criminal Court were to be negotiated and submitted to ratification today, it would not be nearly as successful as it had been 15 years earlier. There were a number of specific issues about which States were sensitive or having second thoughts, which might cast doubt on their readiness to ratify a convention on crimes against humanity.

84. The Commission could, of course, say that if States were reluctant to accept certain obligations, they could still modify the Commission's text when they negotiated it among themselves. The text of the Commission, however, would set the terms of the debate and would receive the support of a core group of States, even if others considered that it went too far; however, any treaty on crimes against humanity needed to be supported and ratified by more than just a core group. A convention on crimes against humanity needed to reach a number of ratifications similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide or the 1949 Geneva Conventions for the Protection of War Victims. It would send a very unfortunate signal if the future convention were ratified only by a simple majority or even less. The Commission should therefore aim to reduce as far as possible the number of potential difficulties for States, even if that meant that some worthy aims were not fulfilled.

85. He understood that the Special Rapporteur had tried to meet that challenge by proposing certain well-known and proven models and by leaving out certain potential sticking points. That was a generally wise approach, but certain models that might be appropriate in other contexts might be less so when applied to crimes against humanity. For example, he had doubts as to whether the draft articles on extradition and on mutual legal assistance should follow the long-form model of the provisions in the United Nations Convention against Corruption. He would favour the short-form model that appeared in treaties whose subject matter was more closely related to crimes against humanity. The Special Rapporteur argued that the provisions of the United Nations Convention against Corruption had been widely ratified and tested in practice, which was a strong argument. From that perspective, the long version seemed to offer the requisite solutions to practical problems. On the other hand, the greater the level of detail, the greater the risk that a provision would raise questions or become outdated.

86. Given that several members had expressed their preference for shorter versions of the provisions on extradition and mutual legal assistance, he proposed that the Special Rapporteur submit to the Drafting Committee both short and long versions so that it could choose which to use as the basis for its work. That approach could also help in making a distinction between the main text of the proposed convention, which would contain a short version of the basic rules on extradition and mutual legal assistance, and an annex which might contain more detailed provisions, as had been proposed by several members. Such an annex would also allow for different rules regarding the possibility of future amendments that might become necessary in the light of experience under the convention. Regardless of which form the Commission chose to pursue, it was important to leave States considerable freedom to keep or enact national legislation regarding possible limitations on cooperation.

87. He agreed that there was no need for a political offence exception but that it was necessary to ensure that a State did not extradite an alleged offender if a requesting State was pursuing the extradition on account of the individual's political opinions. He was in favour of adding the

[95] Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (United Nations publication, Sales No. E.09.XIV.1).

words "or membership in a particular social group" at the end of the list of factors in draft article 11, paragraph 11, as was done in the International Convention for the Protection of All Persons from Enforced Disappearance. He would go even further in providing human rights safeguards, in line with article 33 of the Convention relating to the Status of Refugees.

88. He generally agreed with draft article 14 on victims, witnesses and others, and with the explanations given by the Special Rapporteur. That was an important area, but one in which national legal traditions regarding criminal procedure and possible forms of compensation differed widely. He therefore supported the approach taken by the Special Rapporteur to leave room for the definition of "victim" in national law and of the possible forms of reparation, in particular for cases of mass atrocities. Otherwise, there was a serious risk that States would hesitate to ratify the future convention.

89. In his view, the Special Rapporteur had given a very good reason for not including a provision on immunity. Any attempt to declare immunity irrelevant, along the lines of article 27 of the Rome Statute of the International Criminal Court, would need to be explained, either as creating a new legal rule or as reflecting existing international law. In the present inter-State context, if the Commission were to say that a provision along the lines of article 27 created a new rule, many States might hesitate to ratify the future convention. If, on the other hand, the Commission said that such a provision reflected existing customary international law, then it would pre-empt the debate on the immunity of State officials from foreign criminal jurisdiction. Of course, the Commission could avoid prejudicing that debate by making it clear that the inclusion of a rule like that in article 27 of the Statute would be without prejudice to the status of that rule under customary international law. States would then be alerted and could freely choose whether to take the risk of binding themselves further than was now the case under customary international law. If the only concern was for consistency in international law, he would favour such a transparent solution, which would force States to show whether they believed that under no circumstances should they be entitled to claim immunity for their officials when crimes against humanity were alleged to have been committed. However, that was likely to make many States hesitant about ratifying the draft convention.

90. The same concerns applied with regard to the inclusion of a provision on amnesties. It would be helpful to know how many States would support a blanket prohibition or some form of prohibition of amnesties, but he would advise not risking the success of the draft convention by burdening it with that question, important as it was.

91. The question of reservations raised the same concern. He saw a deep irony in the fact that the Commission was now discussing whether to exclude or to seriously restrict the possibility of formulating reservations, as set out in articles 19 to 23 of the 1969 Vienna Convention. After all, it had been the objective of ensuring that as many States as possible ratified the Convention on the Prevention and Punishment of the Crime of Genocide that had originally led the International Court of Justice to recognize the liberal rules on reservations that were contained in the 1969 Vienna Convention.

92. In conclusion, he said that if a convention on crimes against humanity was not widely ratified, or if the ratification process languished for a long time, it might affect the working and perception of international criminal justice more generally. The Commission had no option but to make the project a success.

The meeting rose at 6.05 p.m.

3354th MEETING

Tuesday, 9 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*continued*) (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. MURPHY (Special Rapporteur), summing up the discussion on his third report on crimes against humanity (A/CN.4/704), said that he wished to thank the members of the Commission for the comments and suggestions that they had contributed to what had been an exceptional debate. Although, in his summing-up, he would not be able to address each and every one of them, he had paid close attention to and recorded all the views that had been expressed.

2. With regard to the general issues raised during the debate, Mr. Murase had reiterated a view that he had expressed in 2016, at the Commission's 3296th meeting, to the effect that the Commission was potentially overstepping its "usual mandate"[96] by drafting a new convention. The Special Rapporteur's view, as he had noted in 2016, was that the Commission could, if it wished, pursue a topic by formulating draft articles with the intention of using them to form the basis of a convention. Article 16 of the statute of the International Law Commission allowed for the possibility of a referral by the General Assembly of a proposal along those lines, but article 17 expressly contemplated the drafting of conventions without such a referral. Given that the Commission had proceeded in that

[96] See *Yearbook … 2016*, vol. I, 3296th meeting, p. 47, para. 42.

manner in the past, he could see no basis for claiming that the practice was improper, and no State had asserted as much in the discussions in the Sixth Committee over the last three years.

3. It was heartening that the vast majority of Commission members supported the goal of completing the topic on first reading at the current session. Only two had cautioned against rushing to a first reading. He appreciated the comments made by several members to the effect that the Commission must continue striving to craft draft articles that were meaningful and effective but were also acceptable to States. The Commission was aiming to produce not an obscure hortatory instrument, but a full-scale treaty that was welcomed by States and civil society alike.

4. An interesting discussion had taken place on the advantages and disadvantages of the so-called "long-form" provisions that he had proposed for the purpose of addressing extradition and mutual legal assistance under the draft articles. Several members had questioned whether those provisions were necessary or appropriate; others had endorsed them and, in relation to mutual legal assistance, had said that they were important for contemporary law enforcement cooperation. Still others had endorsed them but said that they should be streamlined.

5. Having carefully considered all the views expressed, he did not believe, first of all, that the nature of the offence to which particular long-form provisions referred was relevant when considering the usefulness of such provisions. When one State sought legal assistance from another, for example, the value of having effective procedures that were set out in such provisions did not change based on the criminal offence concerned. In particular, he did not agree with the notion that crimes against humanity were, as a general rule, confined to a single State's internal affairs, thus making transnational cooperation less relevant. To take just one example, it would be entirely plausible for members or victims of Islamic State in Iraq and the Levant, also known as Daesh, to turn up in any number of countries, creating a need for transboundary cooperation in investigating and prosecuting the alleged offenders for crimes against humanity.

6. Second, he wished to respond to what perhaps had been the most pertinent question on the issue, namely whether the long-form provisions in the United Nations Convention against Transnational Organized Crime (2000) and the United Nations Convention against Corruption (2003) had, in practice, actually been useful. There were some data that suggested that those provisions were, in fact, working quite well. To save time, he would focus primarily on the second of the two conventions. Of the 181 States parties to the United Nations Convention against Corruption, none had filed a reservation to its provisions on extradition or mutual legal assistance, and only 19 had informed the United Nations Secretary-General that they would not use the extradition provisions as the legal basis for their cooperation with other States in relation to extradition. In addition, UNODC had issued a report in 2015, entitled *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*,[97] which contained a number of favourable findings concerning the use of such provisions.

7. Those findings included the fact that most States had reported having fulfilled their obligations under the United Nations Convention against Corruption to deem corruption offences to be included as extraditable offences in any extradition treaty existing between them and other States and to include such offences as extraditable offences in future extradition treaties. Those provisions were analogous to draft article 11, paragraph 1, of the Commission's draft articles on crimes against humanity. Furthermore, the majority of States parties to the Convention had confirmed that under no circumstances would an offence established in accordance with the Convention be treated as a political offence (a matter covered by the Commission's draft article 11, para. 2). Only a minority of States parties required a treaty for extradition to occur; however, in practice, most States parties relied on treaty-based processes. The majority of States parties had confirmed that they allowed the relevant article of the Convention to be used as the legal basis for extradition in cases where they had no extradition treaty with the other State party concerned (as provided for in the Commission's draft article 11, paras. 3 and 4).

8. Given that the average duration of judicial or administrative extradition proceedings reported by States parties ranged from 1 to 18 months, the relevant provision of the Convention (corresponding to the Commission's draft article 11, para. 7) appeared to be valuable in encouraging expeditious processing. Although the possible grounds for refusal of extradition were provided for under national law, most countries could reject extradition requests based on the same types of grounds as those referred to in the Convention (corresponding to the Commission's draft article 11, para. 11). Furthermore, the obligation set forth in the Convention's provision on consultations before refusing extradition (which was analogous to the Commission's draft article 11, para. 12) already existed in the national law or practice of some States parties, according to the UNODC report, while other States parties viewed it as useful because it was "directly applicable and self-executing in their own legal systems".[98] In contrast, the report indicated that States parties had reported relatively little practice under the Convention provisions corresponding to the Commission's draft article 11, paragraphs 9 and 10. Thus, if the Commission was looking for places to cut text, those paragraphs represented one possibility.

9. Overall, the UNODC report revealed a significant amount of State practice showing that the extradition provisions of the United Nations Convention against Corruption were operating quite well. States were familiar with and had accepted the approach set out in those provisions, and they had tailored international laws and practices to reflect it. Consequently, he considered it appropriate for the draft articles to include a long-form provision on extradition.

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[97] UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, United Nations, New York, 2015.

[98] *Ibid*., p. 199.

10. According to the same report, the value of the long-form provision was even more apparent in the area of mutual legal assistance. Many States parties had mentioned that the provision on that subject in the United Nations Convention against Corruption (a provision analogous to the Commission's draft article 13) was important because it provided for international cooperation between them and other States in the absence of a bilateral or regional mutual legal assistance treaty. Although bilateral treaties took precedence, several States had reported that, on numerous occasions, they had expressly invoked the Convention in their requests for mutual legal assistance, including through the use of the "mini-treaty" provisions contained in the Convention.

11. Third, many scholarly commentators had also noted the value of the long-form provisions in the United Nations Convention against Corruption and its predecessor conventions, highlighting the impact of those provisions in promoting cooperation even on matters that went beyond the specific crimes covered by the particular treaty in which they appeared. According to one UNODC official, the success of the Convention had been due, in large part, to its detailed provisions on extradition and mutual legal assistance.

12. Fourth, the Commission should not overlook the fact that many States viewed extradition and mutual legal assistance as critical elements in addressing the most serious crimes of concern to the international community. Indeed, the initiative launched by Slovenia, together with Belgium and the Netherlands, focused on creating a multilateral treaty exclusively on those two issues and had attracted the interest of a number of States. It was therefore a mistake to downplay the value of robust provisions on those issues; the Commission risked having its draft articles perceived as being out of step with contemporary practice if it aimed for substandard provisions in that area.

13. Lastly, his impression was that some of the concerns expressed about the long-form provisions related not so much to their substance as to their "packaging" and to the possibility that they might "drown out" the other draft articles when placed alongside them. Some members had proposed to solve the problem by placing them in an annex. He was open to ideas in that regard; one possibility might be to simply move draft articles 11 and 13 to the end of the other draft articles or just before draft article 17 on dispute settlement. Ultimately, that matter could be sorted out in the Drafting Committee.

14. The specific comments and suggestions advanced by Commission members during the plenary debate could also be taken up in the Drafting Committee. With regard to draft article 11 on extradition, several members, noting that it did not contain any provisions on multiple or competing requests for extradition, had proposed that the matter should be addressed in either the draft articles or the commentary thereto, perhaps drawing inspiration from article 90 of the Rome Statute of the International Criminal Court or from General Assembly resolution 3074 (XXVIII) of 3 December 1973. Others were of the view that the issue should not be addressed in the draft articles at all. Obviously, in any given context, the optimal State for prosecuting an offender could differ; it could be the State where the crime had occurred, the State where the alleged offender was located or some other State. With the Commission's approval, he would craft a commentary for its consideration that laid out a series of factors to be taken into account by requested States in any given situation.

15. Most Commission members had said they agreed that draft article 11 did not need to address the issue of dual criminality, given that the draft articles required all States to ensure that crimes against humanity constituted offences under their criminal law. One member had expressed concern, however, in relation to a possible transition period during which States were amending their laws, while another had noted that, even with the definitions set forth in draft article 3,[99] there could be differences between the national laws of States. Yet another had made the point that draft article 3, paragraph 4, acknowledged the ability of States to establish a broader definition of crimes against humanity than that set forth in the draft article. Paragraph (41) of the commentary to draft article 3, which had been provisionally adopted by the Commission in 2015, indicated that "[a]ny elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance".[100] The Commission could continue to discuss the issue of dual criminality in the Drafting Committee, but the prevailing view seemed to be that draft article 11 should not include any provision along those lines.

16. One interesting question that had arisen in the discussion was whether draft article 11 should refer to the offences set forth in draft article 5[101] or the definition of crimes against humanity set forth in draft article 3, or to both. The Commission's practice in earlier draft articles, such as draft articles 6, 8, and 10,[102] had been to refer to draft article 5, because that was the draft article that set out the offences constituting crimes against humanity. Draft article 3 was important but was merely a definition clause. He was inclined to continue with the Commission's past practice. In any event, the matter could be discussed further in the Drafting Committee.

17. There had been numerous suggestions for additions or deletions to draft article 11, in particular paragraph 6 on the role of national law in the extradition process and paragraph 11 on grounds for refusing to extradite. All those suggestions could be considered in the Drafting Committee. At the same time, it was important to keep in mind that the draft articles did not impose an obligation to extradite, but rather set forth an *aut dedere aut judicare* obligation. Subject to its other obligations, a State could decline to extradite for whatever reasons it wished, but it was still bound by its obligation to prosecute.

18. Although most members appeared to support the referral of draft article 12 on *non-refoulement* to the Drafting Committee, some had queried its relationship to

[99] *Yearbook … 2015*, vol. II (Part Two), p. 37 (draft article 3).

[100] *Ibid.*, p. 47 (para. (41) of the commentary to draft article 3).

[101] *Yearbook … 2016*, vol. II (Part Two), pp. 151–152 (draft article 5).

[102] *Ibid.*, pp. 162, 165 and 168 (draft articles 6, 8 and 10).

draft article 11, paragraph 11, especially in regard to the term "extradite". In fact, draft article 11, paragraph 11, was best seen as a safeguard clause for persons accused of committing crimes against humanity, in that it clearly indicated that a State was not under an obligation to extradite under certain egregious circumstances. By contrast, draft article 12 was intended to prevent persons from being sent to a place where they might be exposed to crimes against humanity. The two draft articles therefore served completely different purposes.

19. Some members had put forward the interesting idea of switching the position of draft article 12 to immediately follow draft article 4[103] in order to highlight its preventive nature. Another member had suggested that it should be placed after draft article 14. Both proposals merited consideration in the Drafting Committee.

20. While a number of members were content with the language of the draft article as it stood, various suggestions had been made for amending the grounds for *non-refoulement*. Some members had urged broader coverage of all serious human rights abuses, while others were in favour of a targeted reference to the underlying constituent elements of crimes against humanity set forth in draft article 3. Several members had cautioned against possible overlap with other treaty regimes. Further suggestions concerning draft article 12 had included altering or clarifying the references to "territory".

21. Many useful modifications, additions and deletions had been suggested to draft article 13 on mutual legal assistance, such as amendments to the list of types of assistance in paragraph 3. Some members had queried the need to refer to bank secrecy and bank records, although another had urged the retention of those provisions. Three members had expressed concern about the grounds for refusing assistance set forth in paragraph 16. Two members had asked whether the draft articles would allow existing mutual legal assistance treaties to continue in operation, or whether they would require States to use draft article 13 instead. Since existing mutual legal assistance treaties were usually much more detailed than draft article 13, it would probably be better to harness existing treaties than to force States to use the provisions of the draft article, which were really intended for use in cases where the States concerned had no treaty relationship. All those matters could be discussed in the Drafting Committee.

22. While all members had said that they welcomed draft article 14, various proposals had been made with a view to refining its wording. Some members had suggested that paragraph 1 (*a*) on the right to complain be amended to impose an obligation on States to examine complaints in order to determine, in accordance with draft article 7,[104] whether there were reasonable grounds to believe that crimes against humanity had been or were being committed. Two members had proposed the inclusion of the right to truth or the right to protection of evidence, while others had suggested that the term "victim" should be defined either in the draft article itself or in the commentary thereto; one member had said that there was no need to provide a definition.

23. With respect to paragraph 1 (*b*), several members had submitted that it was important to extend victim protection to include emotional and psychological well-being, privacy and dignity, thereby echoing article 68, paragraph 1, of the Rome Statute of the International Criminal Court. One member had recommended the addition of a sentence encouraging States to hold *in camera* proceedings, particularly for vulnerable witnesses. Two members had said they were in favour of specifically mentioning children and victims of sexual and gender-based violence, and another member had referred to the need to protect whistle-blowers.

24. Some members had said that paragraph 2 on victim participation was insufficiently prescriptive and had proposed drawing on article 68, paragraph 3, of the Rome Statute of the International Criminal Court, while others had cautioned against allowing victim participation to impede the functioning of national judicial systems. One member would have preferred paragraphs 2 and 3 to be cast as recommendations rather than as strict requirements.

25. In paragraph 3, some members had advocated the insertion of adjectives such as "prompt", "full" or "effective" before the noun "reparation", along the lines of the wording of article 24, paragraph 4, of the International Convention for the Protection of All Persons from Enforced Disappearance. Other members had said that it should be made clear that the list of reparations was not exhaustive. On the other hand, a number of members had said that they welcomed the flexibility offered to States in order to take account of the disparity in their ability to provide reparations. A few members considered it unwise to include guarantees of non-repetition, while others supported the inclusion of all the forms of reparation listed in paragraph 3.

26. There had been considerable disagreement among members with regard to the retention of draft article 15 (Relationship to competent international criminal tribunals). Several members had expressed uncertainty about whether the draft article was really necessary or appropriately formulated. It had been argued that the draft articles did not conflict with the obligations owed to international criminal tribunals, that the Commission should be wary of giving priority to unknown future tribunals, and that it was inadvisable to override legal rules that would otherwise operate with respect to complicated issues concerning international tribunals, such as non-parties to international tribunals and Security Council decisions. It had also been maintained that, even in the context of the Rome Statute of the International Criminal Court, it was confusing to overlay the principle of complementarity, which gave precedence to national systems, with a rule that seemed to contradict it.

27. Some members had suggested that a solution might lie in making it plain that the competent international criminal tribunal must comply with the fundamental principles of international criminal law. That proposal had led other members to express concerns about what exactly such a standard meant and who would determine whether it was being met. Two members had suggested that the Commission might resort to a "without prejudice" clause. Another member was of the opinion that such a provision

[103] *Yearbook … 2015*, vol. II (Part Two), p. 47 (draft article 4).

[104] *Yearbook … 2016*, vol. II (Part Two), p. 164 (draft article 7).

was usually found not in the kind of treaty the Commission was crafting, but in treaties creating a quasi-constitutional international organization.

28. In the light of the debate, he was personally of the view that draft article 15 should be referred to the Drafting Committee on the understanding that the Committee would consider whether such an article was really needed, given the lack of identified conflicts with international criminal tribunals. Attempting to find language dealing with the issue of unspecified and unknown conflicts carried risks that might not be offset by any great benefits. Existing treaties that dealt with crimes against humanity contained no such provisions and did not appear to encounter any difficulty in relation to international criminal tribunals.

29. Members' views on draft article 16 (Federal State obligations) were divided. A large group thought that it should be retained, perhaps in revised form, but another substantial group doubted its value or necessity, since the principles established in article 29 of the 1969 Vienna Convention already accomplished its underlying objective. On balance, the draft article had sufficient support to be referred to the Drafting Committee, which would determine whether to retain it and, if so, how to word it.

30. Virtually all of the members had expressed support for the inclusion of a provision along the lines of draft article 17 on inter-State dispute settlement, which was regarded as reflecting a tried and tested three-tier process of negotiation, arbitration and judicial settlement, although it might be possible to leave the issue for States to address as part of the final clauses. Several interesting improvements had been proposed. For example, several members preferred to place greater emphasis on judicial dispute settlement, with some of them voicing scepticism about the role that arbitration could play in settling disputes concerning an instrument addressing crimes against humanity. Some members had suggested the incorporation in paragraph 2 of language concerning State responsibility similar to that contained in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. A number of members had recommended that the open-ended phrase "within a reasonable time" be replaced with a reference to a specific time period, such as six months, within which States must negotiate a settlement. A few members took the view that allowing States to opt out of a judicial settlement provision would hinder the effective implementation of the treaty, although others were in favour of an opt-out provision, on the ground that participation in dispute settlement should be on a voluntary basis.

31. His proposal that the Commission leave the question of a possible monitoring mechanism to a diplomatic conference had been welcomed by some members, but others had said that the Commission should make some sort of proposal, concerned that a new convention would be ineffective without such a monitoring mechanism. While he understood their unease, it was premature for the Commission to address the matter before it knew what States' preferences might be. To that end, it might be wise to await States' comments on the matter in the Sixth Committee and perhaps to include a request for their views in the report on the work of the Commission at its sixty-ninth session.

32. None of the members had said that they opposed the referral of the draft preamble to the Drafting Committee. The debate had produced some useful suggestions, such as tailoring that part of the treaty to reflect the need for inter-State cooperation and the development of rules in national legal systems. Other proposals had encompassed the inclusion of references to "achieving justice for victims", to the *jus cogens* nature of rules related to crimes against humanity, to international human rights law and international humanitarian law and to the Rome Statute of the International Criminal Court. Some members had proposed the deletion of one or both of the final paragraphs. One member was in favour of adding wording to the effect that any international cooperation must be based on the independence and equality of States, mutual respect between them and the consent of the countries concerned. All those suggestions could be discussed in the Drafting Committee with a view to developing a thoughtful and useful preamble.

33. Concerning the three issues raised in chapter VIII of his third report, namely concealment, immunity and amnesty, he recalled that he had decided not to propose any draft articles or draft provisions on those matters. Several members had expressed support for that decision with regard to the concealment of crimes against humanity, noting, *inter alia*, that existing treaty practice left that issue to the operation of national laws. Notwithstanding the questions that had been raised as to whether concealment was covered by the concept of complicity and whether it could be addressed under draft article 14 on the rights of victims, witnesses and others, his view was that, under existing treaties, concealment was not considered to rise to the level of an international crime. For example, lying about the location of an alleged offender was not deemed to constitute participation or complicity in an international crime; to the extent that it represented an obstruction of justice, it was left to national law.

34. Views were more sharply divided, however, with respect to immunity. While his position was that other treaties addressing international crimes under national law likewise did not contain provisions on the matter, some members had said that there should be a draft article establishing that officials, including diplomats and Heads of State, did not have immunity from prosecution for crimes against humanity. Other members preferred an approach that focused on the irrelevance of official capacity, using language that was found in article IV of the Convention on the Prevention and Punishment of the Crime of Genocide and was echoed in article 27, paragraph 1, of the Rome Statute of the International Criminal Court; some of those members had said that such a provision would prevent individuals from avoiding substantive responsibility based on their official position, but would not address the question of whether such officials might enjoy procedural immunity. Another view was that the Commission should refrain from addressing immunity in the draft articles so as to avoid conflict with the topic on the immunity of State officials from foreign criminal jurisdiction. Given the wide range of views expressed in the discussions, he proposed that the Drafting Committee discuss various options, such as a new draft article, a new provision in an existing draft article, a preambular paragraph, guidance in the commentary or some other solution.

35. Several members had said they agreed that the issue of amnesty should not be addressed in the draft articles. One argument in support of that view was that it was not possible to foresee future situations that might make it necessary for States to use amnesty, in limited circumstances, as part of a transitional justice process even with respect to crimes against humanity. Other members, however, took the view that either the draft articles or the commentary should contain provisions that precluded amnesties in whole or in part. For example, it had been suggested that the draft articles include at least a limited clause providing that States should not conclude agreements granting blanket amnesties in respect of crimes against humanity. One member had suggested that a clause on amnesty be included in the preamble to the draft articles. The dominant view seemed to be that the Commission should take a position on the subject, but that it should do so in the commentary, not in the draft articles themselves. He understood that the Drafting Committee was to consider the possibility of requesting the Secretariat to prepare a study on the matter. The commentary to draft article 5 should include some paragraphs on the overall impermissibility of amnesties for crimes against humanity, having regard to the obligations set out in that draft article, while also leaving States some leeway in the event of exceptional circumstances.

36. Concerning reservations, his third report laid out a series of options for States to consider when drafting the final clauses of the future convention on crimes against humanity. Most members had said that they supported that approach, although a few had expressed a preference for a "no reservations" clause. Other suggestions included a mixed reservations system and the identification of specific provisions to which reservations would be permitted. In general, the Commission seemed inclined to refrain from proposing a draft article on reservations and to follow its previous practice of leaving the issue for States to determine in the negotiations on the future convention. The Commission could revisit the issue on second reading if States requested it to provide further guidance.

37. He proposed that the Commission refer draft articles 11 to 17 and the draft preamble to the Drafting Committee, which would include the issues of immunity and amnesty in its discussions, taking account of the various positions expressed in the Commission's debate. Should the Commission agree to that proposal, he hoped that the Drafting Committee would be able to revise those articles and finalize draft articles 1 to 10 by the end of the first part of the current session. He would then prepare a full set of commentaries for consideration during the second part of the session.

38. Mr. TLADI said that the discussions in the Drafting Committee were likely to resemble a second plenary debate, in view of the many issues that would have to be revisited. He wondered why the Special Rapporteur had said that the Drafting Committee would discuss the issue of amnesty, since such committees did not normally deal with commentaries, and he understood that the Special Rapporteur intended to refer to amnesty only in the commentary.

39. Mr. MURPHY (Special Rapporteur) said he agreed that commentaries were not normally referred to the Drafting Committee; he had meant only to indicate that the discussions in that body would help him to ascertain what approach he should take in crafting the paragraphs on amnesty so as to reach the widest possible agreement.

40. Mr. JALLOH said that in the light of the Special Rapporteur's view, set out in paragraph 297 of his report, that the draft articles should not address the issue of amnesties under national law, he was not sure why the Drafting Committee was considering the idea of requesting a Secretariat study on the subject.

41. Mr. MURPHY (Special Rapporteur) said that part of the discussion in the Drafting Committee would relate to the question of what additional information was needed in relation to amnesty, whether further study would be useful and whether the Secretariat was in a position to undertake such a study.

42. Mr. SABOIA said his understanding was that the purpose of the Drafting Committee's discussions on amnesty was to determine how the Commission's views and concerns regarding certain kinds of amnesty should be reflected in the commentary, so as to make Governments aware of the Commission's position.

43. Mr. MURPHY (Special Rapporteur) said that he shared Mr. Saboia's understanding. Several Commission members had said that the commentary should go beyond the considerations set out in the report and provide a more thoughtful analysis of the problems associated with amnesty, especially in view of the criminalization requirement in draft article 5, which made blanket amnesties impermissible.

44. Mr. GROSSMAN GUILOFF said that it would be worthwhile to attempt to reach consensus on the issue, which was very sensitive. In any event, the Commission should leave open the possibility of requesting information on State practice with regard to amnesty at a later stage of its work.

45. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 11 to 17 and the draft preamble to the Drafting Committee.

It was so decided.

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

[Agenda item 1]

46. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of crimes against humanity would be composed of the following members: Mr. Murphy (Special Rapporteur), Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Mr. Kolodkin, Ms. Lehto, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Reinisch, Mr. Saboia, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

* Resumed from the 3349th meeting.

Programme, procedures and working methods of the Commission and its documentation (*continued*)[*] (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

47. The CHAIRPERSON proposed, in the light of the consensus that had emerged from consultations, that the topic "Succession of States in respect of State responsibility" should be included in the Commission's programme of work and that Mr. Šturma should be appointed as Special Rapporteur.

It was so decided.

The meeting rose at 11.30 a.m.

3355th MEETING

Wednesday, 10 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Protection of the atmosphere[105] (A/CN.4/703, Part II, sect. B,[106] A/CN.4/705,[107] A/CN.4/L.894[108])

[Agenda item 5]

Fourth report of the Special Rapporteur

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the protection of the atmosphere (A/CN.4/705).

2. Mr. MURASE (Special Rapporteur) said that he would first like to express his appreciation to the members of the Commission for their active participation in the informal dialogue session with atmospheric scientists on 4 May 2017, a summary of which would shortly be uploaded on to the website of the International Law Commission. Unfortunately, in order to meet the 30,000-word limit imposed on reports, he had had to delete, among other things, the two annexes, a number of footnotes and references and two subparagraphs from draft guideline 9. As a result, there were some discrepancies in the cross-referencing between paragraphs. In addition, paragraph 65 had been included by mistake and should be ignored.

3. The report addressed the interrelationship between the law relating to the protection of the atmosphere and other branches of international law, notably the law of international trade and investment, the law of the sea, and human rights law. Those areas had been highlighted because of their intrinsic links with the law relating to the protection of the atmosphere.

4. In chapter I of the report, he discussed the general guiding principles of interrelationship. The real strength of international law, as an integral system of law, lay in interrelationships. The law relating to the protection of the atmosphere was not a sealed or autonomous law: it existed and functioned in relation to other fields of international law, as had been stressed by the Study Group on fragmentation of international law in its 2006 report.[109] Guided by the conclusions of the Study Group,[110] the Special Rapporteur discussed in his fourth report the question of interrelationship as a matter of ensuring coordination when there were overlaps or conflicts between two multilateral treaty regimes. In cases of conflict between two multilateral treaties, the interpretation of those treaties should be guided by the rules set out in article 30 of the 1969 Vienna Convention. He had also considered the question of a "systemic interpretation" of multilateral treaties under article 31, paragraph 3 (*c*), of the 1969 Vienna Convention. The concept of "mutual supportiveness" had been considered the most basic guiding principle for coordination, as confirmed by the relevant international instruments and judicial decisions. Those considerations were reflected in draft guideline 9 concerning the guiding principles on interrelationship. It should be noted that all the draft guidelines proposed in the report employed the hortatory "should", rather than binding expressions.

5. Chapter II of the report dealt with the interrelationship between the law relating to the protection of the atmosphere and international trade and investment law. In the area of international trade law, there had been heated debates and abundant jurisprudence since the early 1990s on "trade and the environment" in the context of article XX of GATT, which provided that environmental measures by States should not be applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade".

6. The most important decision in relation to the atmosphere in that context was that of the Appellate Body of the World Trade Organization (WTO) in the 1996 *United States–Standards for Reformulated and Conventional Gasoline* case, in which it declared that "clean air was a

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[*] Resumed from the 3350th meeting.

[105] At is sixty-seventh and sixty-eighth sessions (2015 and 2016), the Commission provisionally adopted five preambular paragraphs and draft guidelines 1 to 8, and the commentaries thereto (*Yearbook … 2015*, vol. II (Part Two), pp. 19–26; and *Yearbook … 2016*, vol. II (Part Two), pp. 172–179).

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

[107] Reproduced in *Yearbook … 2017*, vol. II (Part One).

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

[109] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

[110] *Ibid.*, vol. II (Part Two), pp. 177–184, para. 251.

'natural resource' that could be 'depleted'", noting that, in accordance with article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, GATT was "not to be read in clinical isolation from public international law" (pp. 14 and 17 of the decision). Thus, the Appellate Body had emphasized the importance of adopting a systemic interpretation in a spirit of mutual supportiveness and sustainable development. The concept of mutual supportiveness had been confirmed in the *United States–Import Prohibition of Certain Shrimp and Shrimp Products* case as the guiding principle in the broad context of trade and the environment. By contrast, the decision of the European Court of Justice in the *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* case had had to be suspended because of the lack of sufficient mutual supportiveness between the relevant aviation agreements and the European Union Greenhouse Gas Emissions Trading Scheme.

7. The concept of mutual supportiveness had first appeared in Agenda 21[111] and had been incorporated in various environmental agreements, including the United Nations Framework Convention on Climate Change. It had also been stressed by the WTO Committee on Trade and Environment and in several declarations agreed at WTO ministerial conferences. The concept was also taken as a guiding principle in some free trade agreements.

8. Although the relationship between international investment law and the environment had not been examined as closely as that between trade law and the environment, the relevant treaty practice and arbitral cases confirmed that the guiding principle was the same in both trade and investment law. Thus, draft guideline 10 covered both.

9. Chapter III of the report addressed the interrelationship with the law of the sea. The close interaction between the oceans and the atmosphere had been the main issue discussed by the scientific experts at the dialogue the previous week. Polluting substances from land-based sources were transported to the oceans through the atmosphere. Temperature rises in the oceans as a result of global warming were the cause of ocean acidification and extreme weather. Emissions from ships were also a problem. Some of those problems were addressed in the provisions of the United Nations Convention on the Law of the Sea, while others were addressed in the relevant International Maritime Organization (IMO) regulations and conventions regulating land-based pollution of the oceans through the atmosphere. The rules of the United Nations Convention on the Law of the Sea and related instruments generally supplemented those on the protection of the atmosphere, but the *Nuclear Tests* case heard by the International Court of Justice and *The MOX Plant Case* heard by the International Tribunal for the Law of the Sea raised the question of the mutual supportiveness of those two branches of law.

10. One issue that could not be ignored in the context of the law of the sea was the sea-level rise caused by global warming and the resulting baseline issue. Sixth Committee delegates from small island States had spoken up strongly on that matter in recent years. The International Law Association Committee on Baselines under the International Law of the Sea had been considering the options for adjusting the baseline for the countries affected. He believed that the issue should be referred to in the draft, and it was thus included in the second paragraph of draft guideline 11, on the interrelationship of law on the protection of the atmosphere with the law of the sea.

11. Chapter IV of the report considered the interrelationship with international human rights law. International human rights norms were relevant to the protection of the atmosphere to the extent that they provided for rights and obligations that could protect humans from atmospheric pollution and atmospheric degradation. In the decisions and jurisprudence of human rights bodies and tribunals, the right to life was often evoked as a general right and the right to health and the right to environment as specific rights when considering remedies for damage resulting from atmospheric pollution and atmospheric degradation. Of course, it was not easy to claim remedies for such damage because of the need to prove a direct link of causality, among other things. The limitations of the extrajurisdictional application of human rights treaties could be another barrier.

12. Certain groups of people deserved special attention under international law because of their vulnerability to the impact of atmospheric pollution and degradation. They included indigenous people and people living in small island States and low-lying States, who were in danger of being forced to migrate as sea levels rose. Women, children and the elderly, as well as persons with disabilities, also needed to be protected. Future generations, which were already referred to in draft guideline 6 on the equitable and reasonable utilization of the atmosphere,[112] should be specifically mentioned in the context of human rights protection. Draft guideline 12, on the interrelationship with human rights law, took those considerations into account.

13. He wished to stress that each of the four draft guidelines he had referred to had distinct content and standing, and therefore should not be merged.

14. In his next report, he intended to deal with domestic implementation, compliance at the international level and certain specific features of dispute settlement. As he had previously mentioned, it was not his intention to draft a set of dispute settlement clauses. Rather, he would point out some of the features that might be considered unique to disputes over the protection of the atmosphere, which tended to be fact-intensive and science-heavy. The assessment of scientific evidence was therefore an important part of the dispute settlement process. He hoped that the first reading on the topic would be concluded in the following year.

15. Lastly, he would like to mention some of the outreach activities he had undertaken in recent years in relation to the topic of protection of the atmosphere. He had given lectures on the topic at various universities and

[111] *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 1, annex II.

[112] *Yearbook … 2016*, vol. II (Part Two), p. 177 (draft guideline 6).

institutions in China and Europe; he had spoken at various forums in Japan, including the annual meeting of the Japanese Society of International Law; and he had made presentations on the topic at the annual conferences of the Asian–African Legal Consultative Organization. It was gratifying to see that there was strong enthusiasm and support outside the Commission for work on the topic.

16. Mr. TLADI said that, while he thought the Commission had made good progress on the topic in the previous year,[113] he found it difficult to comment on the fourth report, because he was not really sure where its contents fitted into the broader scheme of the topic. In fact, he was really not sure whether the issues covered ought to have been covered, at least not as topics in and of themselves. The issues of interrelationships and mutual supportiveness could provide guidance to the Special Rapporteur and the Commission on how to approach the topic of protection of the atmosphere, but they should not serve as self-standing topics.

17. On first reading the report, he had been happy to note that, for once, the infamous 2013 understanding,[114] on the basis of which the topic had been included on the Commission's agenda, would not be part of the debate. However, he suspected that the subjects considered in the report were considered precisely because the real issues that the Special Rapporteur had intended to cover were excluded from the scope of the topic, leaving him no choice but to scrape the bottom of the barrel with generic issues that could apply just as well to other topics such as crimes against humanity, the protection of the environment in relation to armed conflicts or the immunity of State officials from foreign criminal jurisdiction. Indeed, the issues of mutual supportiveness and interrelationships would be just as relevant for any topic seeking to address normative or primary rules. They might well serve as the basis for the Commission's approach to all its topics, but he very much doubted that it was appropriate to consider them as individual topics.

18. Moreover, the Special Rapporteur referred to mutual supportiveness and interrelationships as "principles", but they were not legal principles in the way that, say, the precautionary principle was a legal principle. Rather, they were common-sense objectives. Certain legal principles, such as the principle of interpretation found in article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, had been developed to facilitate those objectives.

19. In paragraph 8, the Special Rapporteur referred to "self-contained" or "sealed" regimes, while noting that international law related to the protection of the atmosphere was not one of them. Although the Study Group on fragmentation of international law had referred to self-contained regimes in its conclusions, he preferred to steer clear of the phrase "self-contained"; *lex specialis*, special rules, or even areas, branches or fields of international law were more appropriate terms.

20. The apparent justification for the detailed assessment of mutual supportiveness and interrelationships that "[t]here is a strong tendency nowadays in international law towards 'compartmentalization' … which often leads to its fragmentation", in paragraph 12, was wholly unsupported subsequently in the report. The only authority for that statement was the Special Rapporteur's own book. It would have been better for the Special Rapporteur to provide some examples of that so-called "tendency" towards compartmentalization. In his own experience, the trend was actually in the opposite direction, away from compartmentalization.

21. Assuming that the Special Rapporteur was correct about the need to isolate specific areas of international law to buttress his principles of mutual supportiveness and interrelationships, he would be interested to know why human rights, the law of the sea, trade and investment had been selected. Why not, for example, biodiversity or even hazardous wastes? International law rules regulating biodiversity were more likely to relate to the protection of the atmosphere, and in a more direct way, than either human rights or investment law. Over and above the arbitrariness of the choices made, he was concerned about the Special Rapporteur's characterization of the concepts of mutual supportiveness and interrelationships and how they were reflected in legal doctrine. In paragraph 10, the Special Rapporteur cited the conclusions of the work of the Study Group on fragmentation of international law. Yet, conclusion (2), which apparently provided the main justification for his report, did not call for mutual supportiveness or interrelationships between areas of international law, but rather between rules, norms or principles—including rules, norms and principles from within the same field or area.

22. Thus, the idea of mutual supportiveness or interrelationships between areas was problematic. The flaw in the Special Rapporteur's approach could be illustrated by the discussion of the free trade–environment tension. That tension was not, as might be suggested by the Special Rapporteur, between areas of international law, but between different rules of international law. Some rules that fell within the area of the environment might be more pro-trade than pro-environment. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, for example, very much promoted free trade and investment through its various mechanisms, namely joint implementation, international emissions trading, and even the clean development mechanism. Similarly, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, while constituting international environmental agreements, served, on the whole, to promote and protect free trade. It was not the areas of international law that were at stake in the environment–trade tension, but the rules within those areas. For example, in the *EC Measures Concerning Meat and Meat Products (Hormones)* case before the WTO Appellate Body, Canada and the United States had relied on the provisions of an environmental agreement, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, to trump environmental concerns.

23. In some cases, the Special Rapporteur's characterization of the rules in the various areas of international law was, at best, inaccurate. It was suggested in paragraph 52,

[113] *Ibid.*, chap. VIII.

[114] See *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

for example, that the United Nations Convention on the Law of the Sea covered atmospheric pollution. It did not. The fact that article 194, paragraph 3 (*a*), referred to "pollution" and "atmosphere" did not mean that it covered atmospheric pollution. In fact, the article covered marine pollution, including pollution from or through the atmosphere, not atmospheric pollution. Similarly, it was stated in paragraph 55 of the report that parties to the Convention were obligated to comply with rules in other conventions as rules of reference. That was, at best, a highly questionable statement, the only authority for which was what appeared to be an unpublished manuscript cited in the first footnote to paragraph 55. The provisions referred to in that paragraph did not have the effect the Special Rapporteur claimed they did. Article 211 of the United Nations Convention on the Law of the Sea, for example, simply required States to adopt measures. Those measures would be binding only on the States that adopted them. Article 211 further stated that those measures ought to meet certain standards. That did not magically obligate States parties to the Convention to comply with other treaties to which they were not a party. It simply obligated them to ensure that if they did adopt other measures, those measures met certain standards.

24. Thus, even if the Commission was to consider the draft guidelines proposed by the Special Rapporteur, the Drafting Committee should redraft them to focus on specific rules, norms or principles of international law, rather than on broad areas such as the law of the sea, investment law and so on.

25. As stated by the Special Rapporteur, it was true that, in its work, the Commission should apply the principles and rules of general international law to various aspects of the problem of atmospheric protection. That should, however, be the basic approach taken at all times, and, at that late stage of the work on the topic, did not need to be addressed in a dedicated report and certainly not in a draft guideline. He would like to think that draft guideline 3, on the obligation to protect the atmosphere,[115] had been adopted following that approach.

26. It was clear from the report that the concepts of mutual supportiveness and interrelationship could be applied, and reflected a number of legal principles that did apply, to the protection of the atmosphere, including the principle of sustainable development. In paragraph 12, for example, the Special Rapporteur noted that the concept of interrelationship reflected the interdependence of environmental protection and social and economic development. It was a question of mutual supportiveness not between areas of international law but between substantive rules or objectives, as acknowledged in the report itself. In paragraph 14, the Special Rapporteur referred to mutual supportiveness as having first appeared in Agenda 21, paragraph 2.3 of which stipulated that "[t]he international economy should provide a supportive international climate for achieving environment and development goals by … [m]aking trade and environment mutually supportive".[116] The quote conveyed a substantive point and related to sustainable development. It also indicated that mutual supportiveness and interrelationship concerned policy goals or even rules and principles, but not branches of international law.

27. In paragraph 15 of the report, the Special Rapporteur recognized that, from a substantive perspective, mutual supportiveness was reflected in sustainable development, which was a cornerstone of international law, linking long-term economic growth to the prevention of irreparable harm to the environment. Although he personally would have conceptualized sustainable development differently, the idea that it promoted mutual supportiveness was one that he espoused. The fact was, however, that the notions of mutual supportiveness and interrelationship, though useful in analysing the substantive concepts and principles related to the protection of the atmosphere that had been considered in the Special Rapporteur's third report,[117] did not and should not have an existence or significance that was divorced from other principles of international law.

28. Given that the two notions were of general relevance, he worried that, by attempting to address them in the report under consideration, the Special Rapporteur risked straying into other topics and, for example, hastily re-examining the report of the Study Group on fragmentation of international law, or exploring the meaning of article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, again without adequate forethought. The Commission might well wish to consider those subjects in the future, but it should do so knowingly, rather than by accident.

29. The hasty consideration of important subjects very often resulted in broad statements that ignored nuances. The discussion of WTO jurisprudence was a case in point. Beginning in paragraphs 18 and 23, that jurisprudence was presented as an example of mutual supportiveness, ignoring the fact that WTO bodies had consistently been criticized for prioritizing trade objectives over environmental concerns. It should be recalled that, in the *EC Measures Concerning Meat and Meat Products (Hormones)* case, the WTO Appellate Body, when considering the role of precaution in sanitary and phytosanitary measures, had emphasized that the precautionary principle could not relieve a panel from applying the terms of the relevant agreement "without a clear textual directive to that effect" (para. 124 of the decision). That statement was consistent with WTO instruments, in particular article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Considering such complicated issues hastily led to real tensions being overlooked and to the provision of solutions that were too good to be true, precisely because they were.

30. In short, he thought that the decision to consider mutual supportiveness and interrelationship as self-standing issues was ill conceived. Similarly, it was incorrect to speak of the mutual supportiveness of areas of international law, rather than rules of law. Since he had issues with the report as a whole, it was difficult to comment on the proposed draft guidelines, but he would do so anyway, in case the Commission chose to refer them to the Drafting Committee.

[115] *Yearbook … 2016*, vol. II (Part Two), p. 173 (draft guideline 3).

[116] See *Report of the United Nations Conference on Environment and Development* … (footnote 111 above), p. 14.

[117] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/692 (third report).

31. Regarding draft guideline 9, first, interrelationship was not a principle of international law; the initial phrase of the provision should therefore be deleted. Second, when expressing the desirability of developing, interpreting and applying rules of international law in a mutually supportive and harmonious manner, international rules relating to the protection of the atmosphere should not be subordinated to other rules of international law. Third, if the text was retained, it should be drafted in a more general way, since the aforementioned desirability applied to all areas of international law.

32. He saw no need for a guideline on international trade and investment law. After all, the notions of mutual supportiveness and interrelationship should apply to rules of international law, not to areas or branches of law. Moreover, the Commission should avoid using language from trade regimes, such as "not constitute a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade or foreign investment", in a way that legitimated the domination of trade interests over environmental concerns and incorporated, wholesale, the jurisprudence of WTO. In sum, he considered draft guideline 10 to be unacceptable.

33. He had similar concerns about draft guideline 11. The gist of the first paragraph was that States should take appropriate measures to protect the atmosphere from atmospheric pollution and atmospheric degradation, yet draft guideline 3 already set out an obligation to protect the atmosphere by exercising due diligence in taking appropriate measures. The only real contribution of draft guideline 11 was to specify that those measures should be "in the field of the law of the sea, taking into account the relevant provisions of the United Nations Convention on the Law of the Sea". There was, however, nothing in draft guideline 3 that excluded measures relating to the oceans, investments or trade. Indeed, it established that the measures should be "in accordance with applicable rules of international law".[118]

34. Draft guideline 11 also addressed the issue of pollution of the marine environment from or through the atmosphere. Aside from the fact that, by calling on States to "deal with" such pollution rather than "prevent" it, the Special Rapporteur diluted the unambiguous obligation imposed in article 194 of the United Nations Convention on the Law of the Sea, it was not clear whether marine pollution fell within the scope of the topic at hand. It was very worrying that such an important matter, which was currently the subject of discussions in the General Assembly, should be treated as incidental.

35. Draft guideline 11, paragraph 2, which addressed an important issue that the Commission might one day wish to explore, had absolutely nothing to do with the topic, while draft guideline 12, the substance of which he supported, was also irrelevant and should not be retained.

36. If there was a consensus among members of the Commission to refer the proposed draft guidelines to the Drafting Committee, he would not object. If there were enough members who opposed that referral, however, he would join them.

37. In terms of how to proceed with the topic, the 2013 understanding, which was, in his view, the reason why the Special Rapporteur had delved into strange subjects in his fourth report, had been adopted during the previous quinquennium, in part owing to the fear that the Commission's work might influence the climate change negotiations that had been taking place at the time. The Special Rapporteur might wish to engage informally with other members about revisiting the understanding with a view to undertaking the topic in a proper manner. In any event, the fourth report and the draft guidelines proposed therein were leading the Commission in completely the wrong direction. He nevertheless wished to thank the Special Rapporteur for his hard work under the difficult circumstances occasioned by the restrictions imposed as a consequence of the 2013 understanding.

38. Sir Michael WOOD said that he wished to thank the Special Rapporteur for his fourth report and introduction thereof. He greatly appreciated the Special Rapporteur's extensive outreach efforts and found it regrettable that the report had had to be shortened in order to render it compliant with the recommended page limit. The Commission simply could not work on that basis, and he hoped that ways could be found to prevent any repeat of the situation in which the Special Rapporteur had found himself.

39. The fourth report was not an easy read. It required careful attention in order to identify the nature, and legal or other basis, of the proposed draft guidelines, which the Special Rapporteur had described as hortatory. He agreed with virtually everything that Mr. Tladi had said, with the notable exception of his comments regarding the 2013 understanding. Nevertheless, he wished to raise five general points about the report, before turning to the proposed draft guidelines.

40. First, it was important to recall the history of the topic in the Commission and in the Sixth Committee. The syllabus, which was contained in annex II to the Commission's report on the work of its sixty-third session,[119] was very ambitious and merited re-reading. It was also interesting to compare the report under consideration with the International Law Association draft articles on legal principles relating to climate change, adopted at its 2014 conference in Washington, D.C.,[120] which had been developed within a committee chaired by the Special Rapporteur.

41. The topic "Protection of the atmosphere" had been included in the Commission's programme of work after extensive discussions in 2012 and 2013, which had led to a carefully crafted and formal understanding that had underpinned all subsequent work on the topic. The understanding had been an essential part of the compromise that had enabled the Commission to agree to take up the topic, and was reflected in one of the draft preambular paragraphs[121] and in paragraphs 2, 3 and 4 of draft guideline 2,[122] as provisionally adopted by the Commission.

[118] *Ibid.*, vol. II (Part Two), p. 173 (draft guideline 3).

[119] *Yearbook … 2011*, vol. II (Part Two), annex II.

[120] International Law Association, *Report of the Seventy-Sixth Conference held in Washington D.C., August 2014*, London, 2014, resolution 2/2014, annex, pp. 22–26.

[121] *Yearbook … 2016*, vol. II (Part Two), p. 173 (draft preamble).

[122] *Yearbook … 2015*, vol. II (Part Two), p. 23 (draft guideline 2).

42. Notwithstanding the caution with which the Commission as a whole had approached the topic, representatives of States in the Sixth Committee had, over the years, continued to express strong reservations about the Commission's work. In his reports,[123] the Special Rapporteur's description of the debates in the Sixth Committee had perhaps been somewhat optimistic, and the fourth report was no exception. In paragraph 16 of its topical summary of the debate held in 2016 (A/CN.4/703), the Secretariat, noting the differing views among States, had painted a rather different picture than had the Special Rapporteur.

43. Members of the Commission had themselves expressed serious doubts about the utility of the work on the topic. No one questioned the importance of the protection of the atmosphere; the issue was whether the Commission could make a useful contribution by drawing up anodyne guidelines as part of a "one-size-fits-all" approach. Would such guidelines help or hinder negotiators, or indeed simply be ignored?

44. The recent negotiations that had culminated in the Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted in Kigali, illustrated the potential for existing agreements to deal with emerging challenges concerning the atmosphere, without the need for new overarching guidelines or principles.

45. It was perhaps the case that the draft guidelines were not really aimed at States at all, but were being prepared with potential domestic or international litigation in mind, in the hope that they would inspire judge-made law where States had yet to conclude treaties. It would be interesting to hear the Special Rapporteur's take on the matter. In any case, it was not the Commission's role to provide fodder for litigation against States.

46. As he had made clear in previous years, he had strong reservations about continuing with the topic. There were already a great many multilateral agreements addressing the main threats to the environment. Moreover, it was a particularly crucial and delicate time for progress in environmental matters, and the Commission's work might have an adverse effect with regard to sensitive ongoing issues among States.

47. In any event, the 2013 understanding must continue to be applied faithfully. In 2016, delegates in the Sixth Committee had reaffirmed the importance that they attached to it, yet, in his fourth report, the Special Rapporteur did not even acknowledge its existence and, by discussing common but differentiated responsibilities, again tried to evade it.

48. His second general point was that lawyers must always distinguish law from policy. That was certainly true for the Commission, and was perhaps especially true for the topic at hand, which was not to say, of course, that the Commission should not be aware of the policy aspects of its work, and indeed take them into account. In the syllabus of the topic, the Special Rapporteur had correctly noted that "the Commission, composed as it is of legal experts, will deal only with the *legal* principles and rules pertaining to the protection of the atmosphere rather than the development of policy proposals".[124]

49. His third general point concerned whether the Special Rapporteur was trying to conjure up an entirely new field of international law, which had indeed seemed to be the intention behind the proposals that he had originally put forward in the Working Group on the long-term programme of work. Those proposals had not been approved by the Commission, yet the expression "law on the protection of the atmosphere" appeared in the titles of three of the draft guidelines proposed in the fourth report, while references to "rules of international law relating to the protection of the atmosphere" appeared in all four. Moreover, in paragraph 8, the Special Rapporteur spoke of "[i]nternational law related to the protection of the atmosphere (sometimes referred to as 'the law of the atmosphere' in the present report)".

50. There were several problems with that approach. Were all the terms the same? Did they refer to the whole of international law insofar as it applied to the protection of the atmosphere, or only to what was covered in draft guidelines 3 to 8?[125] Did they cover matters excluded by the 2013 understanding, the draft preamble and draft guideline 2? What was the relationship between the so-called "law on the protection of the atmosphere" and "international environmental law", which some already saw as a distinct branch of international law? Lastly, and most importantly, was the use of those terms intended to suggest that "the law of the atmosphere" was a "special regime of international law"? If so, what was meant by the expressions "law of the atmosphere", "special regime of international law" and "autonomous regime", which was used in paragraph 8 of the report?

51. Whatever the answers to those questions, the concept of "the law of the atmosphere" seemed to have returned to centre stage in the fourth report, which had not been the Commission's intention when the topic had been included in the programme of work and which constituted, in his view, a fundamental problem with the report and, perhaps, with the project as a whole.

52. His fourth general point concerned the uncertainty over the nature of the draft guidelines. Draft guideline 2, as currently worded, did not specify whether the draft guidelines would be, or would "contain", "guiding principles". The purpose of some of the draft guidelines already adopted seemed to be to restate legal rules, and they were formulated as obligations. Others contained the word "should" and thus appeared to be intended to set forth policy guidelines. The title of a chapter of the fourth report, like that of proposed draft guideline 9, contained the words "guiding principles", which seemed to beg the question left open in draft guideline 2 as to what was the legal intention behind the various formulations. The commentaries that had so far been adopted did not clarify the matter.

[123] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667 (first report); *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681 (second report); and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/692 (third report).

[124] *Yearbook … 2011*, vol. II (Part Two), p. 194, para. 26.

[125] For draft guidelines 3 to 8, see *Yearbook … 2016*, vol. II (Part Two), pp. 172 *et seq*., paras. 95–96.

53. His fifth general point, which he mentioned in connection with possible future topics as well as the topic at hand, was that the Commission did perhaps need to review how it gathered information about the scientific or technical aspects of its work.

54. Turning to the proposed draft guidelines, he said that the structure of draft guideline 9 was difficult to grasp, and the rules referred to therein were unspecified. Explanations for the provision were given in paragraphs 8 to 20 of the report, under the mysterious heading "Guiding principles of interrelationship".

55. The 2006 report of the Commission's Study Group on fragmentation of international law, parts of which were described in chapter I, section A, of the report under consideration, was no doubt relevant to the protection of the atmosphere, as it was relevant to all matters to which international law applied, but he did not find it helpful to pick out parts of it and deduce from them a "principle of interrelationship". While he shared the Special Rapporteur's desire to show that, in the words of the Study Group, "[i]nternational law is a legal system", it was ironic that, having conjured up an "autonomous regime" that he called "the law of the atmosphere", the Special Rapporteur then had to go to great lengths to conjure up new "guiding principles of interrelationship" to ensure that there was no fragmentation. Quite frankly, the whole edifice had no basis in the real world. For example, it was not helpful to superimpose on existing provisions, in particular the relevant provisions of the 1969 Vienna Convention and the corresponding customary international law, new and wholly vague notions such as a "principle of interrelationship", which might be of interest to some theorists, but did not help States or practitioners and were liable to sow confusion in the important field of the law of treaties.

56. He had read chapter I, section B, of the report, on what the Special Rapporteur called the "concept of mutual supportiveness", several times, but could not find any evidence for a legal principle of that name. At most, the chapter might suggest a policy position, though he was not entirely sure what.

57. In short, he found the explanations given in support of draft guideline 9 unconvincing, and the provision itself largely unintelligible and devoid of meaning. The Special Rapporteur mentioned the need to reconcile conflicts between international commitments by reference to the rules on treaty interpretation found in the 1969 Vienna Convention. Those long-standing rules already applied to States parties to the Convention, and to other States as customary international law, and it was difficult to see what the draft guideline could add to them.

58. Draft guideline 9 went beyond interpretation and purported to impose on States some kind of obligation to "develop" the law, though it did not specify how. Perhaps the guideline merely expressed a wish in that regard, but, in any event, it would be strange to seek to impose such an obligation, moral or otherwise, on States.

59. Lastly, there was a clear bias in draft guideline 9. It was stated that rules of international law must be interpreted and applied in a mutually supportive and harmonious manner, but also with a view to effectively protecting the atmosphere, which suggested that preference must be given to those rules that seemed more favourable to the protection of the atmosphere. There was, however, no basis whatsoever for establishing such an interpretative presumption, other than personal or policy preferences.

60. With regard to draft guideline 10, on the interrelationship between the law on the protection of the atmosphere and international trade and investment law, the overview in chapter II of the report of the environmental and dispute resolution provisions of free trade agreements showed that such agreements already commonly provided for taking into account environmental protection measures in certain circumstances. The nature and scope of such measures varied, but it was the parties to the agreements who should decide how best to reflect their existing domestic and international commitments, and how to balance their aspirations on environmental protection with the trade commitments being made. It was questionable whether draft guideline 10 could usefully add anything as regards trade law.

61. The same considerations applied to investment law. As currently formulated, the draft guideline raised a number of questions. As the Special Rapporteur stated in paragraph 37, most of the free trade agreements and bilateral investment treaties in force contained provisions that, in one way or another, protected the environment. The examples he cited showed that negotiating States decided, on a case-by-case basis, just what treaty provisions they wished to include on the matter. Moreover, were arbitrary or unjustifiable discrimination, and disguised restrictions of trade, the only possible violations of investment and trade law respectively when States adopted environmental measures? The draft guideline seemed somewhat reductive of the body of rules of those areas of international law.

62. There were a number of problems with chapter III of the report and draft guideline 11, which attempted to describe the relationship between the law of the atmosphere and the law of the sea. Draft guideline 11, paragraph 1, said that "States should take appropriate measures in the field of the law of the sea" to protect the atmosphere from pollution. The report mentioned a number of existing instruments relating to regulation of pollution from ships, but it could also have mentioned the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and the 1996 Protocol thereto, which had provisions regulating incineration at sea.

63. Air pollution from maritime transport was dealt with by IMO under its key convention in that area, the International Convention for the Prevention of Pollution from Ships, 1973 ("MARPOL Convention"). Efforts should be concentrated in that Organization, which in recent years had focused on measures to combat vessel-source air pollution. In addition to the amendments to the Convention that tackled emissions of sulphur oxide and nitrogen oxides,[126] IMO had, *inter alia*, agreed to a cap of 0.5 per

[126] For the amendments, see resolution MEPC.177(58) of 10 October 2008, and resolution MEPC.273(69) of 22 April 2016, available from: www.imo.org/en/OurWork/Environment/Pages/Index-of-MEPC-Resolutions-and-Guidelines-related-to-MARPOL-Annex-VI.aspx.

cent on the sulphur content of maritime fuel applicable internationally from 2020. It had also recently approved a road map for the development of a comprehensive strategy on the reduction of greenhouse gas emissions from ships. Why the Commission should seek to superimpose on those efforts general guidelines regarding formation, interpretation or application of the law escaped him.

64. It was proposed in draft guideline 11, paragraph 1, that States take appropriate measures in the field of the law of the sea to deal with questions of maritime pollution from or through the atmosphere, something which was already happening. As noted in paragraph 58 of the report, there were already a number of regional seas conventions regulating such matters, as well as the regulatory initiatives mentioned in paragraph 52, including the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities,[127] which came under the broad umbrella of the United Nations Environment Programme. IMO was also developing binding rules to tackle air pollution in the maritime sector. He therefore questioned what the Commission would be adding by advancing draft guideline 11, paragraph 1.

65. Draft guideline 11, paragraph 2, dealt with the baselines for measuring the territorial sea and other maritime zones under the law of the sea, which clearly fell outside the scope of the topic and had no place in the draft. In any event, as drafted, the provision raised a host of questions, such as why the matter should be limited to small island States and low-lying States. The Special Rapporteur referred to common but differentiated responsibilities in paragraph 59, even though that was excluded by the 2013 understanding. His claim that there were conflicting approaches to such responsibilities by the United Nations Convention on the Law of the Sea, IMO and the United Nations Framework Convention on Climate Change was precisely the kind of unhelpful characterization that the understanding had sought to avoid. Indeed, the Special Rapporteur did not identify any recent developments in support of that claim. In fact, contemporary State practice had evolved into a more balanced approach, as was demonstrated in the Paris Agreement under the United Nations Framework Convention on Climate Change, which referred to "common but differentiated responsibilities" but also to "different national circumstances". In any event, it was difficult to see a place for common but differentiated responsibilities in the United Nations Convention on the Law of the Sea and its related agreements, and he would not want the Special Rapporteur's claims in that respect to be reflected in either the guidelines or the commentary.

66. Draft guideline 12 concerned human rights law and the protection of the environment, an area on which much had been said and written, and he did not see that there was anything that the Commission could usefully add to the debate. Further, the text proposed was problematic in a number of important respects, and the objections he had expressed in relation to draft guideline 10 applied equally to draft guideline 12. First, again, States were urged to develop, interpret and apply human rights law in a certain way. Second, chapter IV of the report discussed the interrelationship with international human rights law, drawing upon the 1972 Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration")[128] and the 1992 Rio Declaration on Environment and Development.[129] That was familiar territory, and it was not clear why it needed to be taken up in the particular context of the atmosphere. The analysis also appeared to be a stepping stone for the Commission to take a position on a human right to a healthy environment, which was not appropriate under a topic on protection of the atmosphere. A clean and healthy environment did not require an individual human right to back it up, given that the purpose of environmental regulation was precisely to achieve that outcome. It was therefore questionable why the focus of the report went so far beyond what had been developed to date—an examination of guidelines for substantive principles on the protection of the atmosphere—into questions about the development of specific human rights.

67. In draft guideline 12, paragraph 2, it was not clear why States needed to be reminded to comply with their obligations under international human rights instruments, and why only to "make best efforts" to do so. Reference was made in particular to "the human rights of vulnerable groups of people" although, in principle, human rights were vested in individuals. It was hard to see what impact draft guideline 12, paragraph 3, which urged States to consider the impact of sea-level rise on certain States, would have, beyond the existing consideration of such matters. The reference in draft guideline 12, paragraph 4, to "the interests of future generations of humankind" was surely a policy statement, not one of law, and as such had no place in the Commission's work. There could be no basis, as suggested in the report, for any right of action on behalf of future generations.

68. Noting the issues to be addressed in the next report, he said that it was not clear what the Special Rapporteur had in mind by way of implementation at the domestic level and how that was a matter for the Commission. As for compliance and dispute settlement, he had consistently questioned whether those issues should form part of the Commission's work on the topic, especially if there was a subtext of promoting litigation. Such issues were hardly appropriate as part of general guidelines, particularly as existing multilateral environmental agreements, such as the Montreal Protocol on Substances that Deplete the Ozone Layer and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, already had their own specific compliance and implementation regimes.

69. For those reasons, he had doubts about referring the draft guidelines to the Drafting Committee, in particular

[127] Information on the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities is available from: www.unenvironment.org/explore-topics/oceans-seas/what-we-do/addressing-land-based-pollution/governing-global-programme.

[128] *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.

[129] *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 1, annex I.

draft guideline 9, but also draft guidelines 10 to 12. If, nevertheless, there was a general wish to do so within the Commission, he considered that the Drafting Committee would have to rethink the formulations if it was to ensure consistency with basic tenets of international law, including the freedom to negotiate or not to negotiate treaties, and the law of treaties in general. Perhaps the draft guidelines proposed at the current session could become a single guideline stressing the need to consider protection of the atmosphere in the context of other rules of international law. In previous years, the Special Rapporteur had helpfully proposed new texts to the Drafting Committee in the light of the debate in plenary session. Depending on how the debate went, he would encourage him to do the same at the current session.

70. Mr. PARK said that, like other members, he agreed that the rights and obligations concerning protection of the atmosphere should be identified in the framework of general international law, although he was not sure whether reference could be made to a "law of the atmosphere" as such. He endorsed the Special Rapporteur's statements, in paragraph 9 of the report, that international law relating to the protection of the atmosphere was also part of general international law, and that the legal principles and rules applicable to the atmosphere should be considered in relation to the doctrine and jurisprudence of general international law. However, he wondered whether the three fields of international law highlighted by the Special Rapporteur—international trade and investment law, the law of the sea, and international human rights law—were the only fields relevant to the protection of the atmosphere. The Special Rapporteur mentioned several times in the report that those fields were intrinsically linked to the protection of the atmosphere but did not explain why. The fact that only those fields were listed would seem to imply that other areas should not be included.

71. In his view, other relevant fields of international law, such as air and space law, also had intrinsic links with the law on the protection of the atmosphere, something which the Special Rapporteur himself had recognized in his first report. He recalled that, during the discussion of draft guideline 7,[130] on intentional large-scale modification of the atmosphere, at the previous session, he had contended that the scope of temporal application should be limited only to peacetime, and not be extended to situations of armed conflict. Without such a limitation, the law on armed conflict would inevitably also have intrinsic links with the protection of the atmosphere.

72. Brief mention was made of aviation activities in the portion of the report dealing with international trade law. Air and space law was an independent and separate area from trade law, and he was not convinced that the fact that frequency of use of aviation and space objects might disturb the composition of the atmosphere should be connected only with trade law. The protection of the atmosphere might also be relevant to the issue of international liability for injurious consequences arising out of acts not prohibited by international law. Questions then arose concerning its relation to the articles on prevention of transboundary harm from hazardous activities,[131] in particular draft article 3, on prevention, and draft article 10, on factors involved in an equitable balance of interests.

73. As the Special Rapporteur noted in paragraph 7 of the report, his analysis of the interrelationship between the rules on the protection of the atmosphere and the rules in other fields of international law was not intended to expand the scope of the topic beyond draft guideline 2 and preambular paragraph 5, provisionally adopted by the Commission in accordance with the 2013 understanding. Nevertheless, expansion of the scope of the topic seemed inevitable in the process of considering other fields of international law.

74. Mutual supportiveness seemed to be one of the main concepts in the report, guiding the interrelationship between the topic under consideration and other branches of international law. The Special Rapporteur mentioned in paragraph 14 that mutual supportiveness could "be regarded as an indispensable principle of present-day international law when coping with issues of interpretation, fragmentation and competition among regimes". The concept was referred to as the "principle of mutual supportiveness" in draft guidelines 10 and 11 and as "mutually supportive manner" in draft guideline 12. However, he wondered whether the Special Rapporteur illustrated sufficiently that the concept of mutual supportiveness had become a well-established principle of international law, especially in the context of interpretation of treaties. Was a simple reference to the principle of mutual supportiveness sufficient?

75. To answer that question, it was necessary to consider the exact current legal status of mutual supportiveness. As far as he understood, mutual supportiveness enhanced positive interaction or built constructive and interactive relationships between trade and environmental measures. Consequently, it seemed that its scope was limited to specific areas and it could not be applied in all areas of international law. The report of the Study Group on fragmentation of international law briefly mentioned mutual supportiveness in the context of conflict of norms only in two instances, yet in paragraph 412 of that report, reference was made to "the technique of 'mutual supportiveness'"[132] rather than the "principle of mutual supportiveness". It was undeniable that mutual supportiveness had emerged and developed in a specific context—that of the relationship between trade agreements and multilateral environmental agreements. In order for a treaty to be interpreted in the light of mutual supportiveness, all concerned States must be parties to the treaty. For the time being, mutual supportiveness was not yet explicitly recognized by international courts and tribunals, except the WTO Dispute Settlement Body and the WTO Appellate Body. For those reasons, he considered that the denomination of mutual supportiveness as a principle of international law in the context of interpretation of treaties or legal norms went too far. Furthermore, as

[130] *Yearbook … 2016*, vol. II (Part Two), p. 177 (draft guideline 7).

[131] The articles on prevention of transboundary harm from hazardous activities 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.

[132] See *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, p. 84, para. 412.

noted in paragraphs 16 and 17 of the fourth report, mutual supportiveness required States to consider and prevent possible conflicts in advance, from the negotiating stage. However, that *ex ante* aspect of mutual supportiveness would appear to be in conflict with the 2013 understanding, as well as the principles set out in preambular paragraph 5 and draft guideline 2, according to which work on the topic would proceed in a manner so as not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution.

76. With regard to chapters II, III and IV, overall it seemed that the focus on the three selected fields of international law was somewhat inconsistent. Most aspects of the explanation of State practice and jurisprudence, which constituted the legal basis for the draft guidelines, did not relate to the atmosphere but rather to the environment in general. However, the Commission was not discussing the protection of the environment in general, and should therefore focus on the protection of the atmosphere in particular. The discussion in chapter II on international trade and investment law in relation to the protection of the atmosphere emphasized the avoidance of normative conflicts in interpretation and application, while discussion of the law of the sea in chapter III seemed to create certain obligations to protect the atmosphere in terms of that law. In the case of human rights law addressed in chapter IV, it seemed that the discussion was directed towards providing guidance in the development of human rights norms. At that stage, he considered it necessary to clarify the purpose of the discussions in those three chapters, namely, whether they aimed to provide draft guidelines in the case of conflict between relevant norms, or to put the protection of the atmosphere as a priority above all other norms. If the Special Rapporteur intended the latter, it was necessary to fundamentally reconsider whether such a methodology was suitable.

77. The Special Rapporteur addressed the situation of small, low-lying island States in draft guideline 11, paragraph 2, and draft guideline 12, paragraph 3. He too had strong sympathy with low-lying South Pacific island States, such as Kiribati and Tuvalu, which were endangered by climate change and sea levels that were rising well above the global average. In principle, he fully agreed that the problem of rising sea levels was serious; however, it was closely related to issues such as the disappearance of statehood, maritime delimitation, especially the rights exercised by small island States in respect of their exclusive economic zones after a change in the baseline of the territorial sea, and the recognition of environmental refugees. Consequently, the situation gave rise to complex political and legal issues. Like previous speakers, he believed that it would be too risky to consider such issues in the context of the draft guidelines, for a number of reasons.

78. First, at its previous session, the Commission had completed the second reading of the draft articles on the protection of persons in the event of disasters,[133] which also covered the situation of seriously affected low-lying coastal countries, including small island developing countries. According to paragraph (4) of the commentary to draft article 3 (*a*), the draft articles applied equally to sudden-onset events (such as an earthquake or tsunami) and to slow-onset events (such as drought or sea-level rise), as well as frequent small-scale events (floods or landslides).[134] Second, all those issues should be dealt with more seriously in other political forums, such as the United Nations Climate Change Conference, the General Assembly or the Security Council. The Commission's discussion on the issues might have some positive effects, but, on the other hand, it might precipitate negative obstacles to a future high-level political round table.

79. Turning to the draft guidelines proposed by the Special Rapporteur, he said that while he endorsed the fundamental approach to the issue of interrelationship, it was not clear whether the somewhat repetitive draft guideline 9 was necessary in view of the subsequent guidelines. If such a general explanation was needed, he would propose rephrasing the title and specific contents to illustrate, for example, whether the guiding principles on interrelationship concerned the interrelationship with other areas of international law in general. He proposed the deletion of the word "develop"; it would be sufficient to "interpret and apply the rules".

80. In his fourth report, the Special Rapporteur referred to a number of legal instruments related to trade and investment that had incorporated the concept of "mutual supportiveness" between trade and investment and the environment, on the basis of which the Special Rapporteur proposed draft guideline 10. His initial impression of the draft guideline was that it was similar in content to draft guideline 9, except for the fact that it referred specifically to international trade and investment law. In that context, he wondered what was meant by the statement "States should take appropriate measures" for the protection of the atmosphere, since it was not evident from the relevant portion of the report.

81. He was not quite sure of the purpose of draft guideline 11: to illustrate the relationship between the law of the sea and existing relevant rules for the protection of the atmosphere; or to create new norms in the field of the law of the sea for the purpose of enhancing the protection of the atmosphere. In that connection, he asked whether the intent of the expression "States should take appropriate measures in the field of the law of the sea" was to impose new obligations upon States, or whether, in the event of conflict, interpretation and application should favour the protection of the atmosphere. Furthermore, the problem of rising sea levels due to global warming should not be considered in the draft guideline.

82. With regard to draft guideline 12, while in paragraph 1 he understood the need to prescribe that States should "interpret and apply" international human rights norms, he considered that to require them "to develop" such norms was going too far, by imposing certain values to be protected. His questions therefore were whether the protection of the atmosphere was an overriding value that provided guidance for other normative frameworks such as human rights law and whether there was consensus on the issue. He did not deem it necessary to discuss the issue of compliance with international human rights norms separately in paragraph 2. Since the

[133] *Yearbook … 2016*, vol. II (Part Two), pp. 25 *et seq.*, paras. 48–49.

[134] *Ibid.*, p. 29 (para. (4) of the commentary to draft article 3).

interrelationship between the protection of the atmosphere and human rights law had been illustrated, it would be enough to state the need for special consideration of vulnerable groups of people and the interests of future generations, as reflected in the draft articles on the protection of persons in the event of disasters. He considered that it would be better to delete paragraphs 3 and 4. The substance of paragraph 3 was already covered by paragraph 2. As to paragraph 4, in his view, the need to take into account the interests of future generations was dealt with in draft guidelines 5 and 6.[135] However, if it was deemed necessary to retain the substance of paragraph 4, it could be incorporated in the preamble.

83. Since some of the draft guidelines proposed by the Special Rapporteur overlapped and were in parts ambiguous, he proposed that all four draft guidelines be merged into one guideline, entitled "Guiding principles on interrelationship with other relevant international law". The text would read:

> "Without prejudice to the relevant customary international law concerning the interpretation of treaties, especially article 31 of the 1969 Vienna Convention on the Law of Treaties, States should interpret and apply the rules of international law relating to the protection of the atmosphere in a mutually supportive and harmonious manner with other relevant rules of international law, *inter alia*, international trade law, international law of the sea and international human rights law."

84. The Special Rapporteur proposed that his next report address several issues, including the implementation of domestic law. As domestic obligations had already been discussed in draft guidelines 3 and 4,[136] he asked whether the intention was to deal with the procedural aspects of domestic implementation. It was also proposed that compliance and dispute settlement issues be discussed. He wondered whether it would be appropriate to address specific features of dispute settlement relating to the law on the protection of the atmosphere given the complexity of the issue. In conclusion, he thanked the Special Rapporteur for his efforts and expressed the hope that the draft guidelines adopted on first reading would be based on the discussions held during the current session.

85. Mr. NGUYEN said that he wished to thank the Special Rapporteur for his fourth report and for his initiative to organize the informal meeting with scientists. He welcomed the Special Rapporteur's basic approach, namely to deal with the three main threats to the atmosphere in one legal instrument in order to avoid the fragmentation of rules in international environmental law. The Special Rapporteur had provided a comprehensive review of State practice, domestic and international legislation and international jurisprudence, and the topic met the requirements established by the Commission for its consideration. However, in the interests of clarity, he wished to make a few comments regarding the previous reports.

86. In his first report, the Special Rapporteur had introduced the notion, in draft guideline 3, that the protection of the atmosphere was a "common concern of humankind".[137] However, the draft guideline had been amended and the notion had subsequently been incorporated in the preamble as a "pressing concern"[138] of the international community as a whole. In his opinion, the term "pressing concern" was ambiguous: it could be understood in different ways depending on the attitude of each State and the reliability of scientific data. The neighbouring States of polluting States often showed greater concern than other States about transboundary air pollution. By contrast, other States questioned the existence of climate change due to unconfirmed scientific data, while others still invoked the need for economic development to assert the principle of common but differentiated responsibilities, and developed countries, having supported the protection of the atmosphere and the environment in the territory under their jurisdiction, continued to export pollutants to developing countries. In other words, the term "concern" was not a strict legal term that entailed rights and obligations for States. They could decide to take measures to protect the environment or not, depending on their own concerns and the seriousness of the consequences that pollution caused them.

87. In his second report, the Special Rapporteur had noted that the concept of the common concern of humankind had been established in State practice and in literature.[139] Yet some parties had questioned the reasons for climate change and threatened to withdraw from the Paris Agreement under the United Nations Framework Convention on Climate Change. The protection of the atmosphere was not simply a common concern. It should be a common objective towards a clean and safe environment for present and future generations, and proposals for joint action to achieve that end were required. For those reasons, he recommended that the term "common objective" be used instead of "pressing concern". The protection of the atmosphere must be the ultimate objective for humankind through the adoption of measures that would serve as the basis for the cooperation of all States.

88. In that connection, he drew attention to the ASEAN (Association of Southeast Asian Nations) Agreement on Transboundary Haze Pollution of 2002, which provided a progressive approach that could be applied in the context of the protection of the atmosphere. The Agreement established a legal framework for ASEAN countries to take individual but concerted action to control haze pollution in the ASEAN region. Under the Agreement, ASEAN member States were required to take internal legislative, administrative or other measures to prevent and mitigate haze pollution.

89. The Special Rapporteur had devoted his fourth report entirely to the interrelationship between international law on the protection of the atmosphere and other fields of international law. As a result, it contained four draft guidelines on one single issue; however, the language used in draft guidelines 10, 11 and 12 was repetitive as these draft guidelines all mentioned the principle of

[135] *Ibid*., pp. 176–177 (draft guidelines 5 and 6).

[136] *Ibid*., pp. 173 and 175 (draft guidelines 3 and 4).

[137] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667, pp. 273–274, para. 90.

[138] *Yearbook … 2015*, vol. II (Part Two), p. 19 (draft third preambular paragraph).

[139] See *ibid.*, vol. II (Part One), document A/CN.4/681, p. 201, para. 30.

mutual supportiveness. In order to avoid repetition and to ensure balance between related issues, he proposed that the common provision in draft guidelines 10, 11 and 12 be combined with draft guideline 9, paragraph 1, to read:

> "In line with the principle of interrelationship, States should develop, interpret and apply the rules of international law relating to the protection of the atmosphere in a mutually supportive and harmonious manner with other relevant rules of international law, notably international trade law and international investment law, law of the sea, and human rights law, with a view to resolving conflict between these rules and to effectively protecting the atmosphere from atmospheric pollution and atmospheric degradation."

90. Regarding terminology, he noted that various terms were used in the report, such as "interrelationship" "mutual supportiveness" and "harmonization", without any explanation as to the distinction between them. Moreover, the principles were referred to in different ways: "principles guiding interrelationship", "guiding principles on interrelationship" and "guiding principles of interrelationship". That might lead to problems of interpretation and give to understand that the "principle of interrelationship" was only one of many other principles governing the interrelationship between the law on the protection of the atmosphere and other relevant fields of international law. Furthermore, although the principle of interrelationship was purported to be the main focus of chapter I of the report, a detailed analysis of the principle was not provided, covering, for example, its establishment, recognition by the international community and use in treaties and "soft law".

91. In chapter II of the report, the Special Rapporteur endeavoured to prove the wide recognition of the concept of mutual supportiveness between trade, investment and environmental issues in treaties, free trade agreements, multilateral environmental agreements, judicial decisions and State practice. The first part of draft guideline 10 was modelled on the *chapeau* of article XX of GATT. The second part contained the recommendation that, in order to avoid any conflict, States should ensure that interpretation and application of relevant rules of international law conform to the principle of mutual supportiveness. However, that portion of the report prompted a few remarks.

92. First, the Special Rapporteur cited only a few of the more than 20 multilateral environmental agreements to illustrate the recognition of mutual supportiveness as a general principle of international environmental law. There were not enough cases of environmental disputes being adjudicated to consider the applicability of the principle when addressing the relationship between the environment and trade from the international environmental law perspective. The Special Rapporteur based his analysis primarily on WTO dispute settlement practice concerning environmental protection measures that might be in violation of WTO fundamental principles. Similarly, the Special Rapporteur relied solely on judicial decisions concerning investment disputes to address the relationship between international environmental law and international investment law. Moreover, no mention was made of the fact that most of the environmental protection claims under the WTO dispute settlement mechanism failed to fulfil the strict requirements under the *chapeau* of article XX of GATT, even though the WTO Dispute Settlement Body had addressed environmental issues in a more open and mutually supportive manner through its interpretation of article XX, paragraph I (*g*), of GATT, for example, in the *United States–Standards for Reformulated and Conventional Gasoline* case. It should be noted that draft guideline 10 did not include a very important phrase from the *chapeau* of article XX, "between countries where the same conditions prevail". It should also be noted that few investment agreements used the formulation proposed in draft guideline 10. He therefore posited that the draft guideline might not be applicable to both trade and investment issues.

93. Second, although the Special Rapporteur proposed the principle of mutual supportiveness to avoid conflicts between international environmental law and international trade law, he remained silent as to how States should act in cases where a conflict had already taken place. In such cases, the mutual supportiveness principle might not be applicable; however, cooperation and good faith between States could play an important role. The Special Rapporteur had overlooked the most typical case of a conflict involving international environmental and trade obligations and issues relating to international jurisdiction, namely, the *Chile–Measures Affecting the Transit and Importation of Swordfish* case. The case, which had been considered in parallel before two tribunals and eventually resolved through a political agreement, cooperation and good faith, had evidently been of utmost importance in resolving the conflict. He therefore proposed that a reference to the importance of cooperation and good faith in resolving conflicts be included, either in draft guideline 10, or in draft guideline 8,[140] on the obligation to cooperate.

94. Third, although the Special Rapporteur mentioned the North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA) and some other bilateral agreements, the contribution of developing countries, such as Viet Nam, towards mutual supportiveness and sustainable development was also worthy of note. For instance, the 2016 European Union–Viet Nam free trade agreement,[141] in its preamble, referred to strengthening economic, trade and investment relations in accordance with the objective of sustainable development, and in its chapter XV, reaffirmed the principle of mutual supportiveness in the interpretation and application of the agreement.

95. In chapter III of the report, the Special Rapporteur attempted to demonstrate the wide recognition of mutual supportiveness between the United Nations Convention on the Law of the Sea and other international instruments regulating issues relating to atmospheric pollution and atmospheric degradation. Accordingly, draft guideline 11 provided that the interpretation and application of the rules of international law relating to the protection of the atmosphere should conform to the principle of mutual

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[140] *Yearbook … 2015*, vol. II (Part Two), pp. 24–25 (draft guideline 5). In 2016, draft guideline 5 was renumbered as draft guideline 8 (see *Yearbook … 2016*, vol. II (Part Two), p. 172, footnote 1210).

[141] Information on this free trade agreement is available from the European Union website: https://ec.europa.eu/commission/presscorner/detail/en/IP_16_184.

supportiveness. He wished to make a number of comments on that portion of the report.

96. First, it dealt mainly with the international rules governing the protection of the marine environment, rather than the protection of the atmosphere. The most important question that needed to be addressed was whether the "atmosphere" could be considered as part of the marine environment. In paragraph 57 of the report, the Special Rapporteur referred to a commentary to article 194 of the United Nations Convention on the Law of the Sea to argue that the atmosphere could be regarded as a component of the marine environment, at least to the extent that there was a direct link between the atmosphere in the superjacent airspace and the natural qualities of the subjacent ocean space; however, he did not provide sufficient information on current views and approaches to support that argument. The lack of an in-depth analysis of the relationship between the law on the protection of the atmosphere and the law of the sea gave rise to confusion between the protection of the marine environment and that of the atmosphere. The Special Rapporteur focused mainly on land-based and vessel pollution sources with reference to article 212 of the United Nations Convention on the Law of the Sea. He could have mentioned article 195 of that Convention, on the duty not to transfer, directly or indirectly, damage or hazards from one area to another or to transform one type of pollution into another. In paragraph 52 of the report, the Special Rapporteur asserted that Part XII of the Convention covered atmospheric pollution from land-based sources; in fact, it covered all kinds of pollution to the marine environment from land-based sources to atmospheric pollution in coastal areas to the sea and to the oceans. Moreover, the report should have provided information on the interrelationship between the Convention and the regulatory instruments of IMO, not on the Organization itself.

97. Second, some of the cases cited in the report were not appropriate for illustrating the interrelationship between the United Nations Convention on the Law of the Sea and other international legal instruments. In certain cases, the International Tribunal for the Law of the Sea had not even mentioned the Convention or the atmosphere, yet the Special Rapporteur asserted that the Tribunal had addressed the mutual supportiveness between the Convention and other international legal instruments. The Special Rapporteur needed to substantiate his arguments to make them more convincing.

98. Third, while the Special Rapporteur's analysis of the sea-level rise and its impacts on the determination of the normal baseline, forced migration and human rights was adequate, more examples of regulations, case law and doctrine should have been provided as the legal basis for draft guideline 12, paragraph 3. The sea-level rise was the direct consequence of global warming and climate change—atmospheric pollution was just one of many contributing factors. The impact of the sea-level rise on the change of baselines to measure territorial waters and other maritime zones was one of the urgent issues that confronted coastal States, especially small island States and low-lying States. The maritime baseline was linked with the maritime boundary of territorial seas, which served as a basis for identifying national airspace. In his view, the issue of the sea-level rise should be dealt with under general international law and the law of the sea, not under the law on the protection of the atmosphere. It must be set apart from the 2013 understanding, according to which questions relating to outer space, including its delimitation, were not part of the topic, and the outcome of the Commission's work should be draft guidelines that did not seek to impose on existing treaty regimes any legal rules or legal principles not already contained therein. Furthermore, according to draft guideline 2, paragraph 4, nothing in the draft guidelines should affect the status of airspace under international law nor questions related to outer space, including its delimitation. For those reasons, he proposed that draft guideline 11, paragraph 2, and draft guideline 12, paragraph 3, be amended to avoid any misunderstanding. He further proposed that the topic of the sea-level rise be included in the Commission's long-term programme of work.

99. In chapter IV of the report, the Special Rapporteur had addressed the interrelationship between the law on the protection of the atmosphere and international human rights law in a clear and detailed way and had invoked many relevant regulations and judicial decisions to support his proposals. Nevertheless, draft guideline 12 failed to illustrate that interrelationship in detail. In particular, draft guideline 12, paragraph 1, merely repeated the importance of mutual supportiveness between the law on the protection of the atmosphere and international human rights law, perhaps to ensure a consistent approach in the interrelationship between the law on the protection of the atmosphere and other relevant fields of international law. It might be helpful if the draft guideline specified more concrete conditions for the applicability of international human rights law to the protection of the atmosphere, including: the causal link between environmental pollution or degradation and the impairment of protected human rights; a certain minimum level of adverse effect sufficient to apply international human rights law; and a sufficient nexus between the pollutant emission and the State.

100. In conclusion, he expressed appreciation of the Special Rapporteur's efforts and the hope that the proposed amendments to the draft guidelines would be taken into account.

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

[Agenda item 1]

101. The CHAIRPERSON drew attention to the programme of work proposed for the remaining three weeks of the session. It should be noted that, on 16 May, the Drafting Committee would discuss the topic "Crimes against humanity" and not "Protection of the atmosphere". It might be necessary to reconsider the scheduling of the meeting of the Working Group on the long-term programme of work closer to its proposed date. If he heard no objection, he would take it that the Commission wished to adopt the programme of work, as amended, on that understanding.

It was so decided.

The meeting rose at 1 p.m.

3356th MEETING

Thursday, 11 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/703, Part II, sect. B, A/CN.4/705, A/CN.4/L.894)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the topic of protection of the atmosphere (A/CN.4/705).

2. Ms. ORAL said that she appreciated the great effort made by the Special Rapporteur to work within the restrictions placed on the Commission's consideration of the topic while endeavouring to contribute to the progressive development of international environmental law through the formulation of guidelines. However, those restrictions might have encumbered that effort, inasmuch as the report was somewhat imbalanced in its singular focus on the concept of mutual supportiveness.

3. Chapter I of the report discussed the fragmentation of international law, a matter of particular concern in the sphere of international environmental law, as the latter was covered by over 900 instruments and was dealt with by several institutions and international organizations. Whereas in its report,[142] the Study Group on fragmentation of international law had identified the principles of harmonization and systemic integration as means of resolving conflicts between different branches of international law, the report under consideration gave great weight to the role of mutual supportiveness as a way to resolve such conflicts, although the normative status of that concept was unclear. While the concept was mentioned in Agenda 21,[143] it was not among the key principles incorporated in the Rio Declaration on Environment and Development[144] adopted at the United Nations Conference on Environment and Development in 1992. Even though mutual supportiveness undoubtedly had a role to play, she was not convinced that it had reached a high enough level of acceptance and use to be deemed a general principle of international law. Moreover, it was unclear whether the Special Rapporteur sought to use mutual supportiveness as a rule for resolving normative conflicts or as a principle for creating an obligation to protect the atmosphere.

4. The origins of the concept lay in the specialized field of international trade law, where it was reflected, for example, in the preamble to the Marrakesh Agreement Establishing the World Trade Organization and in the Doha Declaration,[145] in an attempt to link the environment and trade. In non-trade agreements, such as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, mutual supportiveness was used to address potential conflict with trade agreements. The list of instruments and judicial decisions provided in the report showed that mutual supportiveness was principally a policy objective in the context of international trade and investment and not a principle of general international law or a principle with general application. One learned writer, Professor Jorge Viñuales, viewed broad statements of mutual supportiveness as suggestive of policy goals, while another, Professor Riccardo Pavoni, regarded mutual supportiveness as a vague concept. In the aforementioned report, the Study Group on fragmentation of international law had briefly referred to mutual supportiveness as an interpretative technique, but considered its open-endedness to be a weakness. The Special Rapporteur did not provide a clear definition of the term. Indeed, it remained unclear how it would resolve conflicts or why it would be superior to conflict clauses of the kind to be found in article 22 of the Convention on Biological Diversity.

5. The above-mentioned report of the Study Group paid greater attention to the principle of systemic integration deriving from article 31, paragraph 3 (*c*), of the 1969 Vienna Convention as a means of resolving problems of fragmentation. That principle had been used by a number of international courts and tribunals. However, in his fourth report, the Special Rapporteur did not discuss article 31, paragraph 3 (*c*), or the principle of systemic integration as a method for ensuring a holistic or integrative interpretation of treaties that would take account of other relevant treaties. The report also made no mention of the principle of harmonization, other than a loose reference to it in draft guideline 9, although the Study Group had viewed the principle as one of the rules, methods and techniques for dealing with collisions of norms and regimes. The problem therefore appeared to be that, rather than seeking ways to harmonize existing treaties on protection of the atmosphere with other specialized regimes, the Special Rapporteur was attempting to use mutual supportiveness as a tool to build protection of the atmosphere into those regimes.

6. The language of draft guideline 9 was confusing in that it referred to the "principle of interrelationship", although no explanation of that term had been given in the report. She agreed with other members that there was really no such principle. The aim of that draft guideline

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[142] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

[143] *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 1, annex II.

[144] *Ibid*., resolution 1, annex I.

[145] Adopted on 14 November 2001 at the fourth session of the Ministerial Conference of WTO, at Doha (WT/MIN(01)/DEC/1).

was also somewhat confusing because it seemed to subject protection of the atmosphere to other rules of international law, such as those on trade, whereas she would have expected it to have the reverse objective. Furthermore, the reference to "other rules of international law" called to mind the wording of article 31, paragraph 3 (*c*), of the 1969 Vienna Convention and the principle of systemic integration, although the latter was never expressly mentioned in the report. The last part of draft guideline 9 seemed to create a presumption in favour of protection of the atmosphere along the lines of the conflict clauses in the Convention on Biological Diversity and the Cartagena Protocol on Biosafety to the Convention on Biological Diversity. Some judicial bodies had also used a principle of environmental law applied in Latin America and known as *in dubio pro natura*, which signified that, when there was a conflict between obligations or interpretations, the solution that furthered protection of the environment should prevail. The Special Rapporteur could perhaps have examined that principle as a possible route to resolving conflicts.

7. Turning to chapter II on interrelationship with international trade and investment law, she said that trade law was a classic area where significant normative conflict with environmental treaties and norms could arise. Trade agreements and investment agreements, whether multilateral, regional or bilateral, could have a regulatory chilling effect on environmental protection, notwithstanding the incorporation of references to the latter or of mutual supportiveness clauses in some WTO instruments, or in other instruments such as NAFTA. A number of the cases cited by the Special Rapporteur had demonstrated that conflict and the risk that trade norms such as non-discrimination, most-favoured-nation clauses and rules against subsidies could operate against national measures seeking to protect the environment. The *United States–Import Prohibition of Certain Shrimp and Shrimp Products* case and the *United States–Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products* dispute were instances where environmental interests had been subordinated to trade rules. She concurred with Mr. Tladi that the case law of WTO bodies had had a negative effect with respect to environmental concerns. The Commission should therefore be careful about incorporating trade law concepts into draft guidelines aimed at protecting the atmosphere.

8. Draft guideline 10 seemed to be imposing a specific obligation on States to protect the atmosphere in trade and investment law. While she agreed with the sentiment, she anticipated that its wording was likely to raise concerns among some States. Its language could be simplified by simply stating:

> "Where applicable, in order to further sustainable development, in the fields of international trade law and international investment law, States should exercise their rights and obligations in a mutually supportive manner with other rules of international law relating to the protection of the atmosphere."

9. In connection with chapter III of the report on interrelationship with the law of the sea, she wished to thank the Special Rapporteur for organizing a meeting with a panel of experts, who had highlighted the linkage between the atmosphere and the ocean. Although the United Nations Convention on the Law of the Sea was considered to be the constitution of the oceans and provided the most comprehensive global framework for the protection and preservation of the marine environment, it did not cover climate change, which had not become an item on the international agenda until a decade after the adoption of the Convention in 1982. The question of climate change and its impact on the marine environment through ocean acidification and the issue of State obligations in relation to climate change, which could be inferred from Part XII of the Convention, required much more detailed analysis and in-depth treatment than they had been given in the report.

10. The statement in paragraph 51 of the report that greenhouse gas emissions from ships was a main factor contributing to climate change was inaccurate, since they accounted for only 10 per cent of the pollution of the marine environment in general and, according to an IMO study, no more than 2.2 per cent of total global emissions for 2014.

11. Paragraph 53 of the report was also confusing because, in an effort to encompass greenhouse gas emissions from land-based sources, that paragraph apparently tried to establish a link between shipping and IMO, on the one hand, and land-based sources of marine pollution, on the other. However, to the best of her knowledge, IMO was not regarded as a competent organization for dealing with pollution from those sources, since it had a mandate to deal with shipping and pollution from vessel-based sources—the subject matter of article 211 of the United Nations Convention on the Law of the Sea. For example, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter regulated incineration of waste at sea by ships. She was therefore unsure what treaties had been incorporated into the United Nations Convention on the Law of the Sea "by reference". The link made in paragraph 53 between the principle of common but differentiated responsibilities and States' obligations under article 194, paragraph 1, of the aforementioned Convention was highly controversial, because in the climate change regime the application of that principle was closely associated with the issue of developed States' historical responsibility for greenhouse gas emissions leading to anthropogenic climate change. In any event, it was unclear why the rationale for common but differentiated responsibilities and national circumstances should apply to shipping and, in any case, it was a matter that fell outside the scope of the topic.

12. In paragraphs 50, 54 and 62 of his report, the Special Rapporteur linked mutual supportiveness to States' obligations under the United Nations Convention on the Law of the Sea and IMO instruments in relation to climate change, and offered it as a solution to the extremely complex interrelationship between the Convention, IMO, the climate change regime and the application of common but differentiated responsibilities and national circumstances. That seemed too facile a solution to such complex questions of law. She therefore doubted that the concept of mutual supportiveness applied in respect of the United Nations Convention on the Law of the Sea and the protection of the atmosphere.

13. Moreover, it was stretching the interpretation of the decision of the International Tribunal for the Law of the Sea in *The MOX Plant Case* to regard it as an example of the application of mutual supportiveness in the context of the law of the sea, since the case was concerned with marine pollution and was of no relevance to protection of the atmosphere. The Tribunal had denied the provisional order requested by Ireland on grounds of lack of urgency; its decision did not concern sustainable development or mutual supportiveness, as the Special Rapporteur had indicated in his report.

14. The Special Rapporteur also addressed the very serious challenge of the repercussions of rising sea levels resulting from climate change. While that was an extremely important matter raising many serious legal issues extending across several areas of law, she was unsure that it was appropriate to address such a complex question in one broad guideline.

15. She fully concurred with Mr. Tladi's comment that draft guideline 11 diluted what was a clear obligation under article 194 of the United Nations Convention on the Law of the Sea to take all measures consistent with that Convention that were necessary to prevent, reduce and control pollution of the marine environment from any source. Likewise, the draft guideline, couched in hortatory language, would imply a lower standard of action than the mandatory language of article 212 of the Convention, which required States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere. She reiterated her concern about applying the concept of mutual supportiveness in the context of the Convention, where there were very clear obligations.

16. Paragraph 2 of draft guideline 11, which called on States and competent international organizations to take into account the situation of small island States and low-lying States with regard to the baselines for the delimitation of their maritime zones under the law of the sea, dealt with a question of delimitation, not protection of the atmosphere. It should therefore not be included in the draft guideline. The question addressed in that paragraph was indeed a serious matter, and she agreed with Mr. Nguyen that it could be considered for inclusion as a separate topic in the long-term programme of work of the Commission. The Commission should therefore be careful not to prejudice any future work it might undertake on the matter by endorsing a vague hortatory guideline of questionable application.

17. Turning to chapter IV of the report, she said that it was fair to say that there was now a firmly established relationship between protection of fundamental human rights and protection of the environment under international law. Indeed, the United Nations had appointed Special Rapporteurs on human rights and the environment, whose reports might be usefully consulted by the Special Rapporteur and the Commission.

18. On the question of extraterritoriality, she noted that there was currently a request for an advisory opinion before the Inter-American Court of Human Rights that included the question of whether an exception to the principle of the territoriality of "jurisdiction" pursuant to the American Convention on Human Rights: "Pact of San José, Costa Rica" existed under multilateral environmental agreements or under regional treaties for the protection of oceans and seas. It might also be useful to follow developments in those proceedings.

19. She agreed in principle with the Special Rapporteur's objective to create an express linkage between protection of the atmosphere and human rights. However, her concern was that the reliance on the hortatory principle of mutual supportiveness where there was existing law and practice would operate regressively, instead of progressively developing international environmental law, international law and human rights law.

20. After listening to colleagues at the previous meeting, she tended to agree with the views of those who had questioned the need for so many guidelines and who had suggested that they be merged into one. Accordingly, if the Commission was in agreement, she would support the referral of draft guidelines 9 to 12 to the Drafting Committee with a view to their merger into a single guideline.

21. Mr. HMOUD said that he would first like to thank the Special Rapporteur for his comprehensive and well-researched fourth report, which reflected his dedication to the topic and his efforts to achieve a successful outcome.

22. Like other colleagues who had spoken before him, he was still grappling to understand the purported goal of the report and the draft guidelines contained therein on the interrelationship between international law on the protection of the atmosphere and other fields of international law. The role of the draft guidelines being developed by the Commission was to provide guidance to States and other actors on their obligations under international law in relation to protection from atmospheric pollution and atmospheric degradation. Thus far, the Commission had been able to agree on a set of draft guidelines that sought to identify the main characteristics of the legal system of atmospheric protection. Such a system did not, however, exist in isolation in international law; he, like others before him, was therefore not comfortable with it being described in paragraph 8 as an autonomous regime. Although in that paragraph the Special Rapporteur went on to state that the law of the atmosphere was in no way a self-contained or sealed regime, the distinction was not clear. Self-contained regimes, such as diplomatic law, were the exception in international law, encompassing both primary rules on rights and responsibilities and secondary rules on administration and compliance. Their treatment and interrelationship with regimes and rules of international law were complex, as the report of the Study Group on fragmentation of international law had demonstrated. Nonetheless, according to the proposed workplan, the Special Rapporteur's next report would tackle compliance and dispute settlement, which would suggest that the topic was more about a self-contained legal regime. Like Mr. Tladi, he considered that there was a need for caution in that regard.

23. Presumably, it was on that premise that the Special Rapporteur had introduced the issue of the interrelationship of the law on the protection of the atmosphere with

other fields of international law. Even self-contained or autonomous regimes needed to interact with other fields of law in certain circumstances, and their principles could not exist in isolation. The question that arose was whether such an interrelationship could be regulated through a set of guidelines, as proposed in the fourth report. It was hard to understand how the guidelines on interrelationship would serve both treaty-based protection rules and those principles contained in the draft guidelines. What were the rules of interpretation that would be applied? Article 31 of the 1969 Vienna Convention was about treaty interpretation, so it would apply insofar as treaty rules were concerned. Other customary rules might assist in that regard, but then it would be necessary to clarify whether principles of different fields of law or the interrelationship between different legal regimes were at issue.

24. On another point, the draft guidelines proposed in the fourth report sometimes treated the law on the protection of the atmosphere as *lex generalis* with respect to certain fields and at other times as *lex specialis* in relation to other fields. The Special Rapporteur provided some sources for jurisprudence, case law and treaty law to underpin certain propositions for the specific relationships, but they were in no way conclusive.

25. In paragraph 7 of his report, the Special Rapporteur stated that there was an intrinsic link between the law relating to the protection of the atmosphere and international human rights law, the law of the sea and international trade and investment law. However, as other colleagues had asserted the previous day, such an intrinsic relationship was not clear and might not warrant draft guidelines dealing specifically with potential interrelationship issues. Furthermore, the Special Rapporteur did not discuss the interrelationship with international environmental law, a field of international law that was crucial to the law on the protection of the atmosphere. Were the rules on atmospheric protection part of international environmental law? Were they special rules *vis-à-vis* the general rules of environmental protection or did they exist separately? It was noteworthy that the sources provided in the report regarding questions of interrelationship mainly involved cases and treaties on environmental law; it would have been more pertinent therefore to discuss the relationship of the law on the protection of the atmosphere with international environmental law before dwelling on issues relating to certain other fields of international law.

26. Turning to specific points raised in the report, he said that he agreed with the Special Rapporteur's assertion in paragraph 9 that the law on the protection of the atmosphere was part of general international law and that the legal principles and rules applicable to the atmosphere should, as far as possible, be considered in relation to the doctrine and jurisprudence of general international law. The Special Rapporteur then endorsed a generalist or integrative approach, which cut across the boundaries of special regimes. However, throughout the report there seemed to be no synergy between the treatment of special regimes and rules on atmospheric protection, nor were any explanations provided concerning potential conflict between such rules and the special regimes or as to why the interpretation of certain atmospheric rules in the light of special regimes should warrant dedicated guidelines.

27. In any case, the Commission should avoid rewriting the rules of the 1969 Vienna Convention on interpretation and the conclusions of the Study Group on fragmentation of international law,[146] nor should it choose which rules and conclusions to apply on interrelationship and then add new elements for determining interrelationship. Rules on hierarchy, conflict and interpretation should all be taken into account, together with the principle of harmonization.

28. An additional element that the Special Rapporteur introduced to apply to interrelationship was the concept of mutual supportiveness. That concept was applied throughout the report to assist in determining interrelationship and dealing with possible conflicts and the interpretation of rules. The report referred to Agenda 21, which placed emphasis on making trade and environment mutually supportive, and stated that the concept of mutual supportiveness pursued a balance between the different branches of international law in the light of the concept of sustainable development. It was clear from such a statement that mutual supportiveness was, as Sir Michael Wood had mentioned the previous day, a policy consideration, or, as Mr. Tladi had said, an objective; it could not, however, be a legal principle with "normative dimensions", as stated in paragraph 15 of the report. He did not agree with the statement in paragraph 14 that mutual supportiveness could be regarded as "as an indispensable principle of present-day international law when coping with issues of interpretation, fragmentation and competition". No evidence was presented for the proposition that mutual supportiveness was a principle of international law, and an article in the *European Journal of International Law*, cited in the report, was not sufficient to declare it as such. The report further stated, in paragraph 15, that mutual supportiveness required States to negotiate in good faith with a view to preventing *ex ante* possible conflicts and to interpret, apply and implement relevant rules in a harmonious manner in order to resolve *ex post* actual conflicts to the extent possible. The so-called "normative content" of mutual supportiveness was not supported by evidence or practice. While States ought to negotiate in good faith and seek to implement relevant rules in a harmonious manner, the whole content of the proposition lacked any legal basis. The same could be said about the idea that there existed a "close alliance" between the concepts of sustainable development and mutual supportiveness. A policy connection might exist, but there was no normative relationship on which to build. In his report, the Special Rapporteur acknowledged that the relevant article of the 1969 Vienna Convention should be applicable in order to resolve matters of interpretation and conflict but stated that the traditional methods of treaty interpretation themselves might not lead to the desired mutual supportiveness. Again, the policy purpose of mutual supportiveness should not trump rules of international law, including the 1969 Vienna Convention rules, or seek to amend them. However, draft guideline 9 seemed to do just that: although drafted in non-binding form, the guideline was normative in content. While mutual supportiveness could be provided for in the draft guideline as a goal or simply as guidance, the guideline should stress that matters of interpretation and conflict ought to be determined by the relevant rules of

[146] *Yearbook … 2006*, vol. II (Part Two), pp. 177–184, para. 251.

the 1969 Vienna Convention and customary international law. He would opt for using the term "harmonious manner" rather than "mutually supportive", as the former was an established concept in that regard. Draft guideline 9 also provided that States should "develop" the rules on atmospheric protection in a mutually supportive and harmonious manner with other rules of international law. That was simply unimplementable and lacked sound basis in either theory or practice. Furthermore, the draft guideline provided that, when resolving conflict, priority should be given to protecting the atmosphere from atmospheric pollution and atmospheric degradation. That ran counter, not only to the logic for mutual supportiveness as advanced in the report, but was also a sweeping policy statement that ran contrary to international law. What if, for example, the conflict was with *jus cogens* rules of another field of international law and the application of the *jus cogens* rules would lead to the atmospheric protection being undermined in a particular situation?

29. On interrelationship with international trade law, the Special Rapporteur referred to article XX of GATT and provided relevant case law to support the proposition of mutual supportiveness, such as the *United States–Import Prohibition of Certain Shrimp and Shrimp Products* case before the WTO Appellate Body. However, in his view, the relationship between article XX and the concept of mutual supportiveness had not at all been substantiated. The article allowed contracting parties to adopt national measures to, *inter alia*, protect human health and conserve natural resources as long as they were not arbitrary or discriminatory, or a disguised restriction on international trade. If anything, article XX provided for the prioritization of certain higher policy trade goals, while at the same time providing for the right of the State to take national protection measures. It was not about mutual supportiveness. On the other hand, WTO case law had dealt with the issue of interrelationship with international environmental law principles in the *EC Measures Concerning Meat and Meat Products (Hormones)* case, in which the Appellate Body had determined that the "precautionary principle", to the extent that it could be considered to exist under international environmental law, was not binding in the context of WTO. How could that proposition be reconciled with mutual supportiveness? If anything, the ruling denoted that trade and environmental regimes might not always apply in an integrated manner. The issue in the *United States–Standards for Reformulated and Conventional Gasoline* case, referred to in paragraph 28 of the report, was treaty interpretation and whether 1969 Vienna Convention rules and customary international law rules on interpretation applied when interpreting WTO law. It was not an example of mutual supportiveness between trade law and environmental law.

30. On investment law, what was said about article XX of GATT could be said about article 1114 of NAFTA, which allowed the adoption of appropriate national environmental measures and recognized the inappropriateness of relaxing environmental measures for purposes of investment protection. The same could be said about the right to take national environmental measures under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, as long as the measures served a legitimate policy objective. Again, the two examples were not about mutual supportiveness in the field of international law but about resolving conflict between national legal measures and potential treaty obligations. Indeed, the case law under NAFTA pointed in that direction, including the *S. D. Myers Inc. v. Government of Canada* case, which involved national environmental measures. The reference in that case to mutual supportiveness was a policy statement, not a legal norm. Bilateral investment treaties were not consistent in their treatment of environmental standards and, when they provided for measures in that connection, it was more in the context of the right to enforce national environmental standards. As such, he was of the view that draft guideline 10 should be substantially reformulated or deleted.

31. On interrelationship with the law of the sea, it should be noted that the United Nations Convention on the Law of the Sea, although dealing with marine pollution from land-based and airborne sources, did not address atmospheric pollution as such. Indeed, in paragraphs 57 and 62, the report acknowledged the limited interrelationship between the law of the sea and the protection of the atmosphere. In addition, while the relevant IMO instruments and standards dealt with land-based pollution and pollution from vessels, they were not examples of mutual supportiveness; rather, they related to the adoption of certain environmental measures at the national level, as well as on national vessels.

32. The issue of sea-level rise and its effects on small island States was a matter of serious concern, which, as the Special Rapporteur indicated, required a *lex ferenda* approach. However, as other colleagues had mentioned, it was not only a matter of baselines: issues such as sovereignty and territory were involved, which needed a holistic approach and in-depth engagement by the international community. He was not sure that anything was added by the statement in draft guideline 11, paragraph 2, about the need to consider the situations of small island States and low-lying States with regard to the baselines for maritime delimitation.

33. He did not support the proposition set out in draft guideline 11, paragraph 1. If measures were already being taken in the context of marine pollution to deal with atmospheric pollution and degradation, it was not clear what would be added by that paragraph. Furthermore, it was not clear what was meant by "appropriate measures in the field of the law of the sea". Were such measures national or international? Did they impose an obligation on international bodies such as IMO?

34. Lastly, on interrelationship with international human rights law, he understood that there existed distinct human rights protections that in certain circumstances might be affected by air pollution or atmospheric degradation. However, as the Special Rapporteur indicated, there had to be a link—a direct link—between atmospheric damage, the harm caused and the breach of relevant human rights. Different treaties varied in the emphasis placed on the different parts of that trilateral relationship, and it was doubtful that one standard could be set in that regard; in fact, to do so might restrict the ability of judicial and treaty bodies, as well as States, to interpret and apply

the treaty concerned. One size did not fit all, as the examples in the report demonstrated. He did not view the creation of a human right on atmospheric protection as a purpose of the exercise. Draft guideline 12, paragraph 1, prioritized effective protection of the atmosphere in the interrelationship between human rights law and the law of the atmosphere. However, nothing in the report pointed to case law or State practice that supported that proposition. Regarding draft guideline 12, paragraph 2, while he was in favour of a formulation that placed emphasis on the situation of particularly vulnerable groups, the question was how to achieve that objective and whether the draft guidelines were the best place to tackle it. The same applied to the situation of the population of small island States and low-lying States.

35. In conclusion, like Mr. Nguyen and Mr. Park, he was in favour of a single draft guideline on interrelationship with the rules and principles of other fields of international law. Such a draft guideline would stipulate adherence to the rules of the 1969 Vienna Convention and customary international law with regard to interpretation and resolution of conflict between rules on atmospheric protection and other rules of international law.

36. Mr. CISSÉ said that he wished to commend the Special Rapporteur on his well-researched fourth report on a complex topic. He noted that the title of the report, protection of the atmosphere, did not reflect its content, inasmuch as the topic had been addressed largely in terms of its relationship with other areas of international law. It would have been more straightforward to address the topic only in terms of its relationship with the law of the sea. In his view, trade law, human rights law and investment law should not be considered in the report, as they were only very distantly related to protection of the atmosphere.

37. The Special Rapporteur had concluded, in paragraph 62 of the report, that "[t]he interrelationship between the sea and the atmosphere covered by the United Nations Convention on the Law of the Sea is limited and unilateral (one way from the atmosphere to the oceans, but not the other way around)". However, in his view, that wording did not reflect the facts or the law, since influence was also exerted in the other direction, from the oceans to the atmosphere, as pollution from land-based sources could enter the atmosphere via the oceans.

38. While he welcomed the Special Rapporteur's efforts to describe and analyse pollution from land-based sources, he observed that the report made no mention of a significant source of marine and atmospheric pollution, namely pollution from offshore oil and gas extraction platforms located on the continental shelf and in the exclusive economic zone of coastal States. Pollution from such offshore platforms warranted consideration under the topic: first, because article 194, paragraph 3, of the United Nations Convention on the Law of the Sea recognized the need to deal with all sources of pollution of the marine environment and, second, because it had been specifically addressed in the Convention for the Protection of the Marine Environment of the North-East Atlantic, annex III to which covered the prevention and elimination of pollution from offshore sources, and in the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region, to which an Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities had recently been adopted. The Commission could enrich its work by considering how and to what extent such offshore activities were regulated in the interests of protecting the atmosphere, both in regional practice and in law.

39. Regarding land-based sources of pollution, he wished to point out that, in the list of international instruments dealing with that subject contained in paragraph 58 of the report, no mention was made of two relevant African legal instruments, namely the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region and the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region.

40. Sea-level rise as a result of global warming was a matter of urgent concern. Among other effects, it caused coastal erosion and changes of baselines used to determine maritime boundaries between coastal States. However, in that connection, he agreed with the Special Rapporteur that boundary treaties could not be called into question, even in the event of a fundamental change of circumstances, such as sea-level rise.

41. Although only small island States and low-lying States were mentioned in draft guideline 11, the situations of all coastal States should be considered in the context of the use of baselines for the delimitation of maritime zones. For small island States and low-lying States, what was most urgent was to ensure their very existence.

42. Mr. ŠTURMA said that, while he had supported the inclusion of the topic in the Commission's programme of work, he had some concerns regarding the Special Rapporteur's report and plan for future work and, like some other members, was not entirely convinced that the proposed draft guidelines contributed much to the development of rules on protection of the atmosphere.

43. He fully recognized that, as international law was a single legal system, the rules and principles of one of its branches could not be applied in complete isolation from those of others and of general international law. In that regard, the work of the Study Group on fragmentation of international law was of great importance and surely also relevant to protection of the atmosphere as a sub-area of international environmental law. He had been surprised by the use of the expression "international law on the protection of the atmosphere", since, in his view, it was more an emerging corpus of principles and rules than a branch of international law in the manner of, for example, the law of the sea or international trade law. Care should be taken not to contribute to the fragmentation of international law by creating new branches.

44. While the concept of mutual supportiveness might be useful as a tool for interpretation and resolution of conflicts of norms, it could hardly be described as a legal principle in the usual sense of the term. It had first appeared

in Agenda 21 and had been reflected in some WTO documents and case law, but it was not necessarily used in other areas of international law. The application of the principle of systemic integration expressed in article 31, paragraph 3 (*c*), of the 1969 Vienna Convention and of other rules on conflict resolution highlighted in the work of the Study Group on fragmentation of international law might serve the same or equivalent function. In the same vein, international and regional human rights bodies relied on the principle of proportionality, which was not unknown even in the field of investment law and arbitration.

45. The usefulness of the concept of mutual supportiveness depended largely on the nature of the rules involved. In his view, neither interrelationship nor mutual supportiveness had yet become principles of international law.

46. Turning to the draft guidelines themselves, he said that he did not see the added value of draft guideline 9 in relation to articles 30 and 31 of the 1969 Vienna Convention or to the conclusions of the work of the Study Group on fragmentation of international law. If such a draft guideline were needed at all, it should refer instead to well-established rules of treaty interpretation and application that could be used in the resolution of conflicts of norms.

47. He supported the inclusion of draft guideline 10, at least as far as the first sentence was concerned. In that sentence, the words "States should" might be replaced with "States may" in order to reflect language used in WTO agreements and case law and international investment law. However, the second sentence seemed to repeat the content of draft guideline 9 and was therefore redundant. If something more was to be said in the context of trade and investment law, mention could be made of the principles of good faith and proportionality.

48. Regarding draft guideline 11, paragraph 1, more consideration should be given to which provisions of the United Nations Convention on the Law of the Sea were relevant and the extent to which they related to the protection of the atmosphere. As in the previous draft guideline, the second sentence was redundant. Like many other members, he considered that draft guideline 11, paragraph 2, was clearly outside the scope of the topic; while he recognized the major challenges faced by small island States and low-lying States, the draft guidelines should be within the Commission's mandate and coherent with international law.

49. Draft guideline 12, paragraph 1, was partly misleading and partly redundant. The case law of the European Court of Human Rights and of other international human rights bodies generally concerned the direct or indirect protection of the individual rights of persons living in areas directly affected by environmental pollution, which was related only loosely, if at all, to the protection of the atmosphere.

50. The collective rights of vulnerable groups of people, the inhabitants of small island States and ecological migrants seemed to be a different case. Although international law was not yet sufficiently developed in those areas, draft guideline 12, paragraphs 2 and 3, seemed to be useful in terms of policy objectives and the progressive development of international law.

51. Draft guideline 12, paragraph 4, was redundant, as the interests of future generations were already reflected in draft guideline 6,[147] and it could therefore be deleted.

52. He would not oppose the referral of the draft guidelines to the Drafting Committee if that was the wish of the majority of Commission members.

The meeting rose at 11.20 a.m.

3357th MEETING

Friday, 12 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Al-Marri, Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/703, Part II, sect. B, A/CN.4/705, A/CN.4/L.894)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the topic of protection of the atmosphere (A/CN.4/705).

2. Mr. AURESCU thanked the Special Rapporteur for organizing a meeting with major scientists in the field of environmental protection and international environmental law and for his outreach to academia. The methodology used in the report involved coordination and harmonization between norms of international environmental law and other provisions of international law: in other words, interrelationships. He himself would have preferred to see greater emphasis placed on the distinction between relationships of interpretation and relationships of conflict. Such a distinction was all the more relevant with reference to the concept of mutual supportiveness outlined beginning in paragraph 14 of the report. The Special Rapporteur saw that concept as a useful tool in solving conflicts between norms relating to the protection of the atmosphere and norms belonging to other sub-branches of international law, with the former to be accorded priority. Neither interrelationship nor mutual supportiveness had yet become a principle, however; rather, they were methods of interpretation or of resolution of conflicts between norms.

[147] *Yearbook … 2016*, vol. II (Part Two), p. 177 (draft guideline 6).

3. The Special Rapporteur should have gone into greater detail about the link between interrelationship and mutual supportiveness, on the one hand, and the rules on interpretation set forth in the 1969 Vienna Convention and in the relevant customary international law, on the other. In cases of conflicts between norms, there was a need to point out which was the prevailing norm; otherwise, the technique of mutual supportiveness would work like a two-way street. Of greatest relevance for the topic were examples when the prevailing norm was one relating to the protection of the environment; however, some of the examples in the report did not fall into that category. The question of whether the law on the protection of the atmosphere existed as a distinct sub-branch of international law was a secondary issue; what was really important was to identify the proper way of drafting guidelines enabling the international community to ensure the best protection of the atmosphere.

4. Turning to draft guideline 9, which he saw as a *chapeau* to draft guidelines 10 to 12, he said that this aspect should be stressed in the text. The title needed to be changed, since the subject was not interrelationship in general, but the concept of interrelationship as it applied to the protection of the atmosphere in international law. The reference to principles should be removed; the final phrase, "from atmospheric pollution and atmospheric degradation", should be deleted; and the purpose of the draft guideline should be more clearly expressed.

5. The first part of draft guideline 10 appeared to subordinate the efforts of States to protect the atmosphere to certain requirements of investment and trade law. The final sentence could be deleted, since its subject was already covered in draft guideline 9. In the first paragraph of draft guideline 11, the words "to protect the atmosphere" should be replaced with "to the purpose of protecting the atmosphere" and the final sentence of that paragraph could be deleted, for the same reason as in draft guideline 10. He fully backed the idea expressed in paragraph 2 of draft guideline 11, namely support for small island States and low-lying States. Clearly, the rise of the sea level as a result of climate change had a huge negative impact upon those States, with a whole series of consequences related to international law, such as the effect upon territory and population, the effect upon baselines and entitlement to maritime spaces, the exercise of sovereign rights and jurisdiction in maritime spaces, especially the exploration and exploitation of their resources, the validity of maritime delimitations that had already been performed and the impact upon future delimitations. What was missing in that paragraph, however, was a reference to the legal regime for protection of the atmosphere. The latter's relationship with the problems of small island States and low-lying States should be made a separate topic, so that the Commission could consider all the legal aspects and consequences.

6. In the first paragraph of draft guideline 12, the words "with a view to effectively protecting the atmosphere" should be replaced with "with the purpose of effectively protecting the atmosphere" and the phrase "make best efforts" should be deleted, since it contradicted the concept of mutual supportiveness that was mentioned in the same paragraph. Concerning the second paragraph, he agreed with Sir Michael that the reference to the human rights of vulnerable groups of people invoked collective rights, a concept not accepted in international human rights law, which only knew individual rights. An option would be to speak of the human rights of persons belonging to vulnerable groups. His earlier comments about small island States and low-lying States were equally applicable to paragraph 3 of the draft guideline. Paragraph 4 was more a policy statement than a guideline as such and would be much better placed in the preamble.

7. Since all the draft guidelines proposed in the report had a similar structure and wording, it might be possible, as others had suggested, to replace them all with a single one. Another option might be to have two guidelines, the first one based on a revision of draft guideline 9 to become a general *chapeau* concerning the concepts of interrelationship and mutual supportiveness as they applied to norms on protection of the atmosphere in relation to those of other sub-branches of international law. The second text could be a consolidated version of draft guidelines 10 to 12.

8. With those remarks, he said he was in favour of referring the draft guidelines to the Drafting Committee.

9. Mr. HASSOUNA thanked the Special Rapporteur for his fourth report, a comprehensive and well-argued document, and commended him for seeking to promote and explain the project to Governments, organizations and academic institutions. The informal dialogue between scientists and members of the Commission had certainly enhanced the latter's knowledge of the scientific and technical aspects of the topic. Although some States had questioned the suitability of the topic, he himself believed that the Commission should build on the progress made to date. In line with the 2013 understanding,[148] it should continue to adopt a balanced approach, identifying the legal principles applicable to the protection of the atmosphere while avoiding policy debates related to political negotiations on environmental issues.

10. During the discussions in the Sixth Committee, some delegations had expressed the hope that the Commission's work would counteract the increasing fragmentation of environmental law and had underlined the need to produce a comprehensive regulatory framework. The Special Rapporteur had attempted to address those concerns by referring in his report to "principles" of interrelationship and mutual supportiveness. However, no "principle" of interrelationship existed in any of the main treaties on international environmental law, in the law of treaties or in State practice, nor did scholars recognize it as a principle. It was likewise doubtful whether mutual supportiveness was a legal principle.

11. Despite those reservations, he agreed that the draft guidelines should note the relationship between various branches of international law with respect to the protection of the atmosphere and encourage States to harmonize potential conflicts between norms in different branches with a view to ensuring the effective protection of the atmosphere. The reference in draft guideline 9 to a "principle" of interrelationship could be rectified by citing

[148] See *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

instead the well-established principle of normative or systemic integration, which was based on two key provisions, article 31, paragraph 3 (*c*), of the 1969 Vienna Convention and principle 4 of the 1992 Rio Declaration on Environment and Development.[149] Draft guideline 9 should also state that the rules of international law relating to the protection of the atmosphere must be interpreted based on the provisions of the 1969 Vienna Convention and customary international law.

12. Concerning draft guideline 10 on the interrelationship between the law on the protection of the atmosphere and international trade and investment law, he said that it reflected prevalent practice regarding fair and equitable treatment obligations but neglected to mention sustainable development: that omission should be remedied. The term "appropriate measures" was rather vague and required clarification in the commentary. On draft guideline 11, interrelationship with the law of the sea, he said the term "appropriate measures" in paragraph 1 likewise required clarification in the commentary. Did it refer to a due diligence standard, as in the United Nations Convention on the Law of the Sea, to an obligation of States to cooperate with each other in good faith, or to an obligation to pass legislation to address the new issues of atmospheric pollution? Moreover, he did not see how draft guideline 11, paragraph 2, related to the protection of the atmosphere, and the specific reference to small island States and low-lying States overlooked the fact that all States with coastlines were affected by rising water levels. If the Special Rapporteur was trying to emphasize the special circumstances of small island States and low-lying States, he could have inserted the word "particularly" before "consider the situation". He would support the inclusion of a sentence acknowledging the difference between developed and developing nations, particularly with regard to technical capabilities and resources. In their comments on previous reports, States had indicated that the draft guidelines did not take that difference sufficiently into account. As the Special Rapporteur suggested in his fourth report, developing States had fewer tools for adequately responding to transboundary pollution.

13. Referring to draft guideline 12 on the interrelationship with international human rights law, he said that the Special Rapporteur did not make it clear why provisions on the protection of the atmosphere were necessary when the equivalent seemed to exist in human rights treaties and decisions of tribunals. The draft guideline failed to mention the three minimum requirements applied by international courts in finding violations of the most commonly cited human rights: a "direct link" between atmospheric pollution or degradation and the impairment of a protected right; a "certain minimum level" attained by the adverse effects of atmospheric pollution or degradation; and a "causal link" between an action or omission of a State and atmospheric pollution or degradation.

14. Draft guideline 12 was likewise silent on how the rights were interpreted at the regional or local levels compared with the international level. For example, as the Special Rapporteur pointed out in paragraph 73 of his report, the European Court of Human Rights was mainly concerned with individual rights, whereas the jurisprudence of the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights focused more on the collective rights of indigenous or tribal peoples. It would be appropriate to include in the commentary a non-exhaustive list of the human rights generally cited by international courts, namely the rights to life, property and private and family life, in order to make States better aware of how to fulfil their obligations to protect the atmosphere. Clarification in the commentary was also needed of the phrase "make best efforts" in paragraphs 1 and 2, and of what was meant by "international human rights norms" in paragraph 2. The commentary to paragraph 4 could list factors that should be taken into account in the interests of future generations, with examples derived from specific cases such as those of the Ganges and Yamuna Rivers. Finally, a definition of the term "indigenous peoples" should be included in the commentary.

15. Overall, the draft guidelines appropriately addressed the lack of harmonization in existing conventions on the protection of the atmosphere, but many of them would benefit from further clarification, and some could be deleted or merged with others. He did not think that a dispute settlement clause would be appropriate for inclusion and would like to know which features of dispute settlement were to be dealt with in the next report. He supported the Special Rapporteur's aim of concluding the consideration of the topic on first reading in 2018 and finalizing the topic in 2020, although the project might need to be updated by then to take account of scientific and technical developments.

16. In conclusion, he recommended referring the draft guidelines to the Drafting Committee, on the understanding that the Special Rapporteur would take account of all the comments made by members of the Commission by submitting a revised text as a basis for the Drafting Committee's work.

17. Ms. GALVÃO TELES said that she wished to join with others in expressing her appreciation to the Special Rapporteur for organizing the recent informal meetings with scientific experts on the protection of the atmosphere. The meetings had provided a very useful background for the Commission's consideration of what was an important but difficult and complex topic.

18. The proposals put forward by the Special Rapporteur in his fourth report needed to be considered with some caution. In the first place, the areas of international law where he suggested that an intrinsic link had been established with the protection of the atmosphere were perhaps only some of those where one did exist. Second, the interrelationship was envisaged not in terms of specific rules but as relationships between whole bodies or areas of international law. Third, the subject was addressed in terms of what was described as the "principles" of interrelationship and mutual support. However, it was questionable whether those were autonomous legal principles or just a conceptual framework for analysis.

[149] *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 1, annex I.

19. It might be better to approach the topic on the basis of the conclusions of the Study Group on fragmentation of international law,[150] particularly conclusions (2), (3) and (4). Conclusion (2) drew a distinction between relationships of interpretation, when a norm could assist in the interpretation of another norm, and the two norms were applied in conjunction, and relationships of conflict, when two norms were both valid and applicable but pointed to incompatible decisions, so a choice had to be made between them. According to conclusion (3), the norms must be interpreted in accordance with or analogously to the 1969 Vienna Convention. Conclusion (4) mentioned the generally accepted principle that when several norms bore on a single issue, they should be interpreted so as to give rise to a single set of compatible obligations. In the light of those conclusions, she supported the suggestion that the four draft guidelines proposed by the Special Rapporteur should be condensed into one that addressed the protection of the atmosphere in the context of other rules of international law.

20. At the same time, the preamble could refer to the policy objective of endeavouring, when developing new rules of international law, to do so as far as possible in a manner that was supportive of the protection of the atmosphere. A more thorough explanation of the different areas of international law that were intrinsically linked with the protection of the atmosphere could then be provided in the commentary.

21. Although the four draft guidelines proposed by the Special Rapporteur highlighted some extremely important issues, she shared the concern expressed by some members of the Commission about whether the topic under discussion was the right place to address them. Some of them could perhaps form a separate topic. For instance, the rise in sea levels, covered in draft guideline 11, paragraph 2, and draft guideline 12, paragraph 3, was cited as one of the adverse impacts of climate change in the 2030 Agenda for Sustainable Development.[151] It was one of the challenges currently facing the international community, affecting coastal States and low-lying coastal countries in general and small island developing States in particular. The Committee on Baselines under the International Law of the Sea and the Committee on International Law and Sea Level Rise, of the International Law Association, had insisted that sea-level rise was a cross-cutting issue, with legal implications and ramifications in different areas of international law—not only the law of the sea, human rights law and migration law, but also population, territory, statehood and State responsibility. Perhaps, therefore, a more holistic approach to such a pressing and fundamental challenge would be better advised than the one taken in the report.

22. Like the Special Rapporteur, she hoped that the Commission would be able to conclude its first reading of the draft articles in 2018. She would join any consensus to submit the four draft guidelines to the Drafting Committee, though her strong preference was for the Drafting Committee to look into the possibility of merging them into one concise text.

23. Ms. ESCOBAR HERNÁNDEZ said that the Special Rapporteur was to be commended on his initiative to organize the meetings with scientific experts, as well as legal experts, who had provided the Commission with new insights that would enable it to make progress in its work.

24. The focus in the fourth report on the interrelationship between the so-called "law on the protection of the atmosphere" and other branches of international law was somewhat surprising. That type of interrelationship was a general topic applicable to all areas of international law, not just to the law on the protection of the atmosphere. Nevertheless, she fully endorsed the starting point of the report, namely the systemic nature of international law. As had been pointed out by previous speakers, however, the approach to that issue in the report was too limited, insofar as it focused on "mutual supportiveness" at the expense of other important aspects.

25. Another problem with focusing on mutual supportiveness was that it was not a clearly defined concept. It could undoubtedly play an important role in the interpretation of international law and in dispute settlement, but it could not be described as a principle of international law in the usual sense of the term. Moreover, mutual supportiveness, as defined in the context of WTO, was basically a tool with which to achieve certain objectives. While those objectives undoubtedly affected the relationship between the protection of the atmosphere and important areas of contemporary international law, mutual supportiveness belonged more to the sphere of policy options than to the legal sphere, unless it was defined more narrowly to identify it with the concept of systemic interpretation or consistent interpretation, which was not the case in the report.

26. The Special Rapporteur's analysis of the impact of climate change and global warming on coastal States was especially interesting. However, it was not clear that it was relevant to the specific issue analysed in the report, namely, the interrelationship between rules of international law. That did not mean it was unimportant, especially in view of the challenges for small island States, to which the Special Rapporteur referred in paragraphs 65 and 66. Nevertheless, it was undoubtedly a topic that deserved detailed study in the future work of the Commission.

27. Some of the references to specific cases or developments were not really relevant to the protection of the atmosphere. For example, paragraphs 35 and 44 mentioned various arbitral awards concerning Spain in respect of changes in electricity tariffs and their impact on investment in the renewable energy sector. While they were related to environmental questions and the protection of the atmosphere to some extent, they bore little connection to the specific topic of the interrelationship between rules of international law.

28. As for the draft guidelines themselves, in some cases they overlapped and their language was strongly prescriptive, which seemed incompatible with the very nature of a guideline and in places obscured their meaning. They also covered certain issues that did not fully correspond to the stated aim of the guidelines which, if she had understood correctly, was basically to ensure

[150] *Yearbook … 2006*, vol. II (Part Two), pp. 177–184, para. 251.

[151] General Assembly resolution 70/1 of 25 September 2015.

the application of the rules relevant to interrelationships and systemic integration to the topic of protection of the atmosphere. In that context, it would perhaps be preferable to produce simpler, less elaborate draft guidelines. Such an approach would clarify the objective pursued by the Special Rapporteur and would avoid blurring it with references to collateral issues.

29. Those collateral issues might well be addressed in the commentary. However, in view of the Special Rapporteur's preference for having several guidelines based on their content, consideration could be given to drafting two draft guidelines to address the issue from two complementary perspectives, treating separately the interrelationship criteria and the areas covered by the interrelationship. In any case, the Drafting Committee was best placed to take a decision on that question, and she was therefore in favour of sending the draft guidelines to it.

30. Mr. MURPHY said that, during the debate in the Sixth Committee at the seventy-first session of the General Assembly, a number of States had expressed serious doubts about the Commission's work on the topic of protection of the atmosphere. Concern had been expressed, for example, that the development of the guidelines might go beyond the mandate of the Commission, duplicate existing regulations concerning environmental protection and interfere with ongoing political negotiations or the application of existing agreements such as the Paris Agreement under the United Nations Framework Convention on Climate Change or the Montreal Protocol on Substances that Deplete the Ozone Layer. The Commission should keep those concerns in mind and be very cautious in its approach to the topic. Moreover, given that several speakers in the Sixth Committee had again welcomed the constraints indicated in the 2013 understanding, the Commission would be wise to continue to abide by it, for that was the basis upon which the topic had gone forward. In that context, it was unfortunate that the fourth report embarked on a discussion of matters such as "common but differentiated responsibilities". To be consistent with the 2013 understanding, such matters should neither be addressed in the reports nor make their way into the commentary.

31. Draft guideline 9 was entitled "Guiding principles on interrelationship", which suggested the existence of at least two principles. The text of the guideline, however, only identified one: a so-called "principle of interrelationship". The Special Rapporteur provided no legal basis for any such principle. He cited no treaties asserting the existence of such a principle, nor State practice articulating it. One scholarly source cited—written by Professor Alan Boyle and entitled "Relationship between international environmental law and other branches of international law"[152]—did not actually identify a "principle of interrelationship".

32. To be sure, some authors did discuss the interrelationship between environmental law and other areas of law, but in those cases, the word "interrelationship" was simply used interchangeably with words such as "interaction"; the authors did not identify any principle, let alone a legal principle. The same was true of scholarly articles on subjects such as trade and the environment. The use of the word "interrelationship", even repeatedly, did not make it into a legal principle. Perhaps that was why the Special Rapporteur himself at times referred to it as a "concept".

33. Other guidelines articulated the so-called "principle of mutual supportiveness", but again, one had to ask where the support was for that designation. No treaty was cited and no State practice was identified that articulated such a principle. None of the major treatises on environmental law, the law of treaties or general international law, as far as he could tell, mentioned a "principle" of mutual supportiveness. Perhaps, again, that was why the Special Rapporteur himself referred to it as a "concept" when it was introduced in paragraph 14 of the report, and why the basis for it appeared to be just a series of political references to the need for mutual supportiveness in some treaties and cases. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part—which was not yet in force—referred to mutual supportiveness but said nothing about a "principle" of mutual supportiveness.

34. Admittedly, there were a few academic writers who had tried to argue that, by some strange alchemy, those disparate references to mutual supportiveness had brought forth a legal "principle", but that smattering of scholars was counterbalanced by others who said it lacked an authoritative formulation. The aforementioned piece by Alan Boyle, for example, did not proclaim a principle of mutual supportiveness, but rather noted that "[r]ules of interpretation, priority of treaties, or a balancing of competing interests have generally provided an ample range of techniques for promoting coherence in the application of international law".[153]

35. Assuming for the sake of argument that a "principle of mutual supportiveness" did exist, what exactly did it mean? According to paragraph 15 of the report, it had "at least" two dimensions. First, it required States "to negotiate in good faith with a view to preventing *ex ante* possible conflicts". The idea that States were under some legal obligation as soon as they began negotiating a treaty, or even before, was a rather striking claim. In the original drafts of what had become article 18 of the 1969 Vienna Convention, the Commission had played around with the idea of imposing upon States, right at the start of the negotiations, an obligation not to defeat the object and purpose of an agreement, and States had rather emphatically said "No thanks". That was why article 18 of the 1969 Vienna Convention made the obligation come into play at the time of signature.

36. The second dimension of the alleged "principle" of mutual supportiveness, namely that States were required "to interpret, apply and implement relevant rules in a harmonious manner in order to resolve *ex post* actual conflicts to the extent possible", was also a rather odd claim; why should that be the sole legal principle to

[152] A. Boyle, "Relationship between international environmental law and other branches of international law", in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, pp. 125–146.

[153] *Ibid.*, p. 145.

be applied when legal rules collided? What about the "later-in-time" rule, *lex specialis* in comparison with *lex generalis* and the peremptory effects of *jus cogens*? The central problem with insisting upon that dimension was that there was already a tried and tested set of legal rules for the interpretation of treaties, set forth in articles 31 and 32 of the 1969 Vienna Convention. An especially relevant element in that context was article 31, paragraph 3 (*c*), according to which the interpretative process should take into account "any relevant rules of international law applicable in the relations between the parties". He did not see how the Commission would help the international legal community by clouding matters with an entirely new principle of mutual supportiveness under a topic on protection of the atmosphere rather than on treaty interpretation.

37. The 2006 report of the Commission's Study Group on fragmentation of international law[154] considered such issues with a much wider lens and did not conclude that a "principle of mutual supportiveness" should be a featured element for dealing with fragmentation. Indeed, it said nothing at all about a "principle of mutual supportiveness". As Mr. Park had noted, that report contained the words "mutual supportiveness" in only two instances, neither of which made reference to a "principle" and neither of which gave those words any special significance. Indeed, the Study Group had downplayed the concept so much that two scholars had written a piece saying that the report reduced mutual supportiveness to a footnote to history.

38. As others had noted, draft guideline 9 was somewhat contradictory: it emphasized harmonious interpretation and mutual accommodation, but at the same time seemed to give pride of place to obligations relating to protection of the atmosphere, contrary to the affirmation by Alan Boyle that "[w]hat cannot be supposed is that environmental rules have any inherent priority over others".[155] It was well settled in international law that States retained the discretion to depart, by mutual consent, from any rule that was not *jus cogens*, and could choose, for example, to privilege trade law or the law of the sea over rules protective of the atmosphere and vice versa. If protection of the atmosphere were really to take precedence over human rights, one wondered where that would lead. In the light of those observations, he did not favour sending draft guideline 9 to the Drafting Committee.

39. As others had noted, the problem with mutual supportiveness pervaded the other draft guidelines. He and other members had indicated very strong reservations during previous discussions of the programme of work when it came to the Special Rapporteur's plans to address different fields of international law. Referring to draft guideline 10, he said that many of the relevant treaties did evince an objective of encouraging trade and investment consistent with environmental protection. However, it was a considerable jump to claim that such an objective meant that there existed a systemic principle of mutual supportiveness, and an even greater leap to claim that such a principle operated so as to favour rules on protection of the atmosphere. Neither the primary instruments themselves nor arbitral awards privileged rules on environmental protection, much less rules specifically relating to protection of the atmosphere.

40. He agreed with others that the discussion in the report of various trade and investment cases was oversimplified, confusing or incomplete. For example, in both *S. D. Myers Inc. v. Government of Canada* and *Bilcon of Delaware* et al. *v. Government of Canada*, the tribunals had found that the relevant environmental protection measures violated international investment law obligations. It was not clear how those cases supported a mutually supportive or harmonious approach to the two fields of international law. The discussion of particular agreements was also oversimplified, confusing and incomplete. For example, a specific exception relating to environmental measures, such as that found in article 1106, paragraph 6, of NAFTA, was not the same as a generally applicable principle addressing environmental concerns, such as that found in article 1114, paragraph 1, of the same Agreement. The Special Rapporteur failed to recognize that those were sophisticated treaty regimes that differed considerably in how they calibrated their relationship to environmental matters. Similarly, investor rights and fair and equitable treatment were two very different things, but the former was inexplicably described in paragraph 31 as guaranteeing the latter.

41. The boldest move was probably in the text of draft guideline 10, which imposed a portion of the *chapeau* of article XX of GATT not just on all trade treaties worldwide, but on all investment treaties and customary international law in those fields. The Special Rapporteur had been selective in that he had chosen not to use the rather important phrase from the *chapeau* "between countries where the same conditions prevail". Missing too, of course, were the subparagraphs of article XX, which contained important requirements concerning necessity and relatedness when considering environmental and conservation matters, but which said nothing about the atmosphere. Draft guideline 10 was not even accurate with respect to GATT, let alone other treaties or customary rules. Consequently, he did not favour sending it to the Drafting Committee.

42. With regard to draft guideline 11, he said that in general, too much was made by the Special Rapporteur of a purported connection between the law of the sea and protection of the atmosphere. As had already been noted, articles 212 and 222 of the United Nations Convention on the Law of the Sea should be the principal focus, since they were the only two provisions dealing directly with pollution and the atmosphere, and they dealt only with pollution of the marine environment from or through the atmosphere and not with pollution of the atmosphere, as seemed to be suggested in paragraph 57 of the report. Likewise, the Special Rapporteur improperly characterized the various sources of pollution identified in Part XII of the Convention as relating to atmospheric pollution. The Convention did not address climate change or atmospheric degradation, but focused solely on sources of pollution that affected the marine environment.

[154] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

[155] Boyle, "Relationship between international environmental law and other branches of international law" … (see footnote 152 above), p. 128.

43. Draft guideline 11, paragraph 2, called upon States to consider the situations of small island States and low-lying States. Of course, no one could deny that those States faced acute problems from global climate change, but issues of baselines and delimitation of maritime zones relating to sea-level rise were not unique to them. Moreover, those issues were far too important to be addressed in such a cursory manner, and they did not relate to protection of the atmosphere as such but rather to sea-level rise. For that reason, he agreed with others that the situation of those specific States fell outside the scope of the topic, and he did not favour sending draft guideline 11 to the Drafting Committee.

44. As for draft guideline 12, the report's discussion of the relationship between human rights and the environment suffered by comparison with the very detailed work of the Special Rapporteur on human rights and the environment of the Human Rights Council, who had issued a series of sophisticated reports on the subject. In paragraph 70 of the fourth report, it was incorrectly stated that article 2 of the Convention on Long-range Transboundary Air Pollution "oblige[d]" the parties to protect man and his environment against air pollution, when in fact that article provided that they were "determined" to do so and would "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution". The human rights analysis in paragraphs 81 and 82 was very unclear as to the scope of the positive and negative legal obligations of States as they related to protection of the atmosphere. If that idea were pursued to its logical extreme, it would hold States responsible for incremental contributions to atmospheric degradation from everyday private activity that could, collectively, affect others. That seemed to be a radical and unsupported claim.

45. With respect to the individual paragraphs of draft guideline 12, he considered paragraphs 1 and 2 to be incorrect for the reasons previously noted. States must interpret and apply their international human rights obligations under the treaties to which they were party in accordance with established rules of treaty interpretation rather than with a view to achieving an objective that was not directly related to the human rights at issue. States were under no obligation to develop new international human rights obligations that were "mutually supportive" of the international legal obligations related to the protection of the atmosphere. Paragraph 3 had the same problems as paragraph 2. Paragraph 4 was based on paragraph 87 of the report, which referred to the standing of persons to bring human rights claims on behalf of future generations—a reference that was unwise. Certainly none of the sources cited in the report in relation to the interests of future generations was a human rights instrument, so that alone should give the Commission pause. Further, he did not see the relevance of pointing to the use of guardians acting on behalf of existing, but underage, persons in national and international law; that situation was not analogous to persons today acting on behalf of "future generations". He did not favour sending draft guideline 12 to the Drafting Committee.

46. With respect to the future work on the topic, he supported concluding a first reading in 2018. He had doubts, however, about the topics suggested for a fifth report. He did not see it as the Commission's role to instruct States as to how they should be implementing international obligations at the domestic level or complying with international obligations. Given that there were different types of compliance mechanisms in treaties relating to the atmosphere, the most the Commission could do was to issue some sort of bland admonishment. He did not know what specific features of dispute settlement the Special Rapporteur had in mind, but he certainly hoped it was not part of a mission to encourage litigation at the national or international level.

47. Mr. Park had proposed that the four draft guidelines be merged into a single draft guideline. His own concerns were such that he was not sure that a single draft guideline could be crafted that was useful and correct, but if the Special Rapporteur wished to propose one for referral to the Drafting Committee, that might be a path forward.

48. Mr. AL-MARRI said that the report of the Special Rapporteur recalled the work of former Commission member Chusei Yamada on transboundary groundwaters.[156] Developed countries seemed generally reluctant to accept the expansion of the topic "Protection of the atmosphere" when progress on the topic was influenced, to a large extent, by international negotiations regarding the reduction of greenhouse gas emissions, a source of tension between developed and developing countries as noted in paragraph 60 of the report. The need to achieve the Sustainable Development Goals[157] meant that States were likely to prioritize development over environmental protection. The Commission therefore had to be open-minded when dealing with the topic, which, as highlighted by the Special Rapporteur, should be considered in relation to the broad framework of general international law.

49. The Special Rapporteur had conducted an accurate analysis of the interrelationship between international law relating to the protection of the atmosphere and other relevant branches of international law. Draft guideline 9 was well crafted, but draft guidelines 10 to 12 required additional work to ensure that key concepts were sufficiently clear and that appropriate emphasis was placed on the protection of the atmosphere on the basis of the concept of mutual supportiveness. Draft guideline 12 should be studied in greater depth, with due consideration given to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, which had been adopted by the Commission in 2006,[158] and, in particular, to the issue of damage caused by hazardous activities to the environment itself with or without simultaneously causing damage to persons or property.

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[156] See *Yearbook … 2008*, vol. II (Part Two), chap. IV.

[157] See General Assembly resolution 70/1.

[158] 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.

Provisional application of treaties[159] (A/CN.4/703, Part II, sect. F,[160] A/CN.4/707,[161] A/CN.4/L.895 [Rev.1][162])

[Agenda item 3]

Report of the Drafting Committee

50. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the report of the Drafting Committee on the topic "Provisional application of treaties" (A/CN.4/L.895).

51. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee had held four meetings on the topic, from 2 to 9 May 2017. The focus had been on completing the consideration of the draft guidelines referred to it at the previous session, namely draft guidelines 5 and 10. At the previous session, the Drafting Committee had been unable to complete its consideration of draft guideline 5 because of a disagreement about the text as it had then stood, and the Special Rapporteur had undertaken to submit a fresh proposal at the current session. The consideration of draft guideline 10 had also been deferred because of a lack of time. At its 3349th plenary meeting, the Commission had decided to refer all the draft guidelines taken note of at the previous two sessions—draft guidelines 1 to 4 and 6 to 9—back to the Drafting Committee with a view to having a consolidated text prepared and provisionally adopted at the current session.[163]

52. The Committee had decided to consider draft guideline 10 first, to be followed by draft guideline 5, which, regrettably, it had not had time to do. It was envisaged that draft guideline 5 would be considered during the second part of the session; however, the prevailing view had been that the report of the Drafting Committee on the draft guidelines adopted thus far should be transmitted to the plenary now, so that it could take the necessary action as soon as possible in order to allow for the preparation of the commentaries. Although document A/CN.4/L.895 contained the titles and texts of draft guidelines 1 to 4 and 6 to 12 provisionally adopted by the Drafting Committee between 2015 and 2017, he would focus only on the draft guidelines provisionally adopted by the Drafting Committee at the current session, namely draft guidelines 10 to 12. His statement should be read together with the statements of his two predecessors, which were available from the Commission's website.

53. The Drafting Committee had spent the time allocated to it on developing a package of three draft guidelines based on the Special Rapporteur's proposal for draft guideline 10, which had sought to reflect the provisions of articles 27 and 46 of the 1969 Vienna Convention in a single provision. Since the scope of the draft guidelines had been enlarged at the previous session to include treaties entered into by international organizations, it had been felt that the corresponding provisions of the 1986 Vienna Convention should also be taken into account. To simplify matters, the Drafting Committee had decided to divide the two sets of issues relating to the operation of internal law into two separate draft guidelines—10 and 11—each with two paragraphs dealing with the position under the 1969 and 1986 Vienna Conventions, respectively. A third draft guideline—12—had later been added to deal with agreement regarding the limitations deriving from the internal law of the State or from the rules of the international organization. All three provisions had undergone a series of drafting refinements, with a view to making them more specific to provisional application and aligning them as much as possible with the draft guidelines previously adopted. Nonetheless, the commentary would clarify that both draft guidelines were without prejudice to articles 27 and 46 of both Conventions. The concern was that the Commission was envisaging a regime of provisional application that went beyond that provided for in article 25 of the 1969 Vienna Convention. However, according to another view, the flexibility implicit in the regime of provisional application already existed under the 1969 and 1986 Vienna Conventions themselves.

54. Draft guideline 10 dealt with the invocation of internal law, or, in the case of international organizations, of their rules, as justification for failure to perform an obligation arising under a treaty or a part thereof that was being provisionally applied. The Drafting Committee had decided to follow the language of article 27 of the 1969 and 1986 Vienna Conventions as closely as possible and, if any changes were made, to reflect them in both paragraphs of draft guideline 10. Accordingly, except where indicated otherwise, the modifications he was about to describe applied to both paragraphs.

55. The text in each paragraph could be divided into three parts. The opening clause, referring to a State or international organization "that has agreed to the provisional application of a treaty", was a streamlined version of the Special Rapporteur's proposal. The earlier reference to "consent"[164] to provisional application had been amended to "agreed" as an indication of both the voluntary nature of provisional application and the fact that it was based on an underlying agreement to provisionally apply the treaty. The Drafting Committee had included the standard reference to the provisional application of a "treaty or part of a treaty" for the sake of consistency with the draft guidelines adopted at the previous session. The middle clause in each paragraph—"may not invoke the provisions [of its internal law] as justification for its failure to perform"—was drawn verbatim from the 1969 and 1986 Vienna Conventions, as a further manifestation of the position taken in draft guideline 3 that the Commission's work on the topic should be based on the 1969 Vienna Convention and other rules of international law, which would include the 1986 Vienna Convention.

[159] At its sixty-eighth session (2016), on the basis of the draft guidelines proposed by the Special Rapporteur in his third and fourth reports (*Yearbook … 2015*, vol. II (Part One), document A/CN.4/687; and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/699 and Add.1), the Commission took note of draft guidelines 1 to 4 and 6 to 9, as provisionally adopted by the Drafting Committee (see *Yearbook … 2016*, vol. II (Part Two), pp. 219–220, para. 257, and footnote 1430).

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

[161] Reproduced in *Yearbook … 2017*, vol. II (Part One).

[162] Document distributed at the meeting. See also the 3382nd meeting below, p. 295, para. 25.

[163] See the 3349th meeting above, p. 15, para. 70.

[164] See *Yearbook … 2016*, vol. II (Part One), document A/CN.4/699 and Add.1, para. 179 (draft guideline 10).

56. The Drafting Committee had, however, departed from the language of the 1969 and 1986 Vienna Conventions by replacing the concluding words, "a treaty", with the phrase "an obligation arising under such provisional application", which clarified that the obligation flowed not from the treaty itself but from the agreement to provisionally apply it. That formulation had its origins in the Special Rapporteur's initial proposal, which had made reference to consent "to undertake obligations by means of provisional application of all or part of a treaty".[165] It also reflected the position in draft guideline 7 that provisional application produced legal effects. The title of the draft guideline—"Internal law of States or rules of international organizations and observance of provisionally applied treaties"—had been structured to indicate that what was being referred to was not internal law about provisional application of treaties, *per se*, but rather the effect of internal law on the provisional application of treaties.

57. With regard to draft guideline 11, the Chairperson of the Drafting Committee said that in his initial proposal, the Special Rapporteur had followed the approach taken in the 1969 Vienna Convention of including a reference to article 46 only in the form of the "without prejudice" clause contained in the second sentence of article 27. However, the Drafting Committee had decided early on to reflect the full text of the respective parts of article 46 of the 1969 and 1986 Vienna Conventions in the draft guidelines. Realizing that it would be complicated to do so within draft guideline 10, since it meant dealing with two distinct questions of internal law within a single provision, the Drafting Committee had moved the article 46 scenario of the invocation of internal law or rules regarding competence to a new draft guideline 11.

58. Once again, the provision was organized in two paragraphs, the first dealing with States and the second with international organizations. As with draft guideline 10, the Drafting Committee had tried as much as possible to keep to the formulation of the relevant provisions in both Conventions. Indeed, modifications had been limited to introducing express references to provisional application. Hence, the reference to "consent to be bound by a treaty" had been modified to read "consent to the provisional application of a treaty or part of a treaty". Likewise, the phrase "competence to conclude treaties" had been rendered as "competence to agree to the provisional application of treaties". While it had been suggested that the draft guidelines should also include article 46, paragraph 2, of the 1969 Vienna Convention, and its counterpart in article 46, paragraph 3, of the 1986 Vienna Convention, which provided a definition of a "manifest violation", the prevailing view had been that it was not necessary to include them in the text itself and that they would be discussed in the accompanying commentary. The title of draft guideline 11 was "Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties".

59. Draft guideline 12 had originated in a proposal made in the Drafting Committee to add a *chapeau* to earlier versions of what had become draft guidelines 10 and 11 in order to state that those provisions would apply unless and to the extent that the treaty in question provided otherwise or it had otherwise been agreed. The rationale had been to allow for the possibility that, for example, States might agree to limit provisional application so as to take into account their constitutional provisions on the competence to conclude treaties. It had also been recognized that there were treaties that expressly made provisional application subject to limitations of internal law that were not necessarily related to the competence to agree on the provisional application of treaties. For some members, the proposed *chapeau* had provided the necessary degree of flexibility. However, the Drafting Committee had been unable to agree on whether it should be included in draft guidelines 10 and 11, or only in the latter. The other concern had been that inserting the *chapeau* in either draft guideline could be seen as adding new elements to the 1969 and 1986 Vienna Conventions. As he had indicated earlier, the basic intention behind the draft guidelines had been not to prejudice existing treaty law, but to be consistent with the regime of the two Conventions.

60. The solution found had been to address limitations deriving from the internal law of States or the rules of international organizations in a separate provision, which had become draft guideline 12. The provision was cast as a "without prejudice" clause, applicable to the draft guidelines generally, and its purpose was to confirm that States or international organizations that agreed to the provisional application of a treaty could seek to condition that application upon limitations deriving from internal law, in the case of States, or rules, in the case of international organizations. The recognition of such a possibility had been largely supported in 2016 by members of the Commission during the plenary debate and by Member States in the Sixth Committee.

61. A key element of the provision was the reference to such a possibility existing as a "right" of the State or international organization. Other options considered had been "possibility", "freedom", "capability" and "ability". The Drafting Committee had also contemplated a different formulation that avoided making reference to whether the State was acting as of right or otherwise by establishing that the draft guidelines were "without prejudice to States or international organizations agreeing" on provisional application. However, difficulties in rendering the text in the other official languages of the United Nations had made it impossible to pursue that proposal. None of the other options that he had mentioned had garnered the necessary support, the concern being that they seemed to refer to the factual existence of the possibility of provisional application as opposed to the exercise of a legal prerogative inherent in the 1969 and 1986 Vienna Conventions. In the end, the Drafting Committee had settled on the word "right".

62. The commentary would clarify that the reference to "right" should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the State or the rules of the international organization. It was understood that the existence of any such internal limitations on the provisional application of the treaty would be covered in the agreement to provisionally apply the treaty, and,

[165] *Idem*.

accordingly, subject to agreement to the provisional application by the other parties. The commentary would also confirm that draft guideline 12 should not be construed as an invitation to States or international organizations to invoke their internal law or rules unilaterally to terminate provisional application.

63. In the title of draft guideline 12, which was "Agreement regarding limitations deriving from internal law of States or rules of international organizations", the reference to "agreement" had been included to reflect the consensual basis of provisional application.

64. To conclude, he recommended that the plenary adopt draft guidelines 1 to 4 and 6 to 12, without prejudice to the inclusion of a further draft guideline on the basis of the Special Rapporteur's proposal for draft guideline 5, or to its location within the draft guidelines.

65. The CHAIRPERSON invited the Commission to adopt the titles and texts of draft guidelines 1 to 4 and 6 to 12, as provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions of the Commission and contained in document A/CN.4/L.895.

Draft guidelines 1 and 2

Draft guidelines 1 and 2 were adopted.

Draft guideline 3

66. Mr. MURPHY asked whether, in the interests of clarity and consistency with draft guideline 6, it would be advisable to insert the phrase "between the States or international organizations concerned" after the words "provisionally applied".

67. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he had planned to make the same proposal during the final review of the draft guidelines by the Drafting Committee. If, however, there was a consensus among members to accept the proposal at the present meeting, he would be happy to do so.

68. The CHAIRPERSON asked what exactly was covered by the term "States" in the proposed addition.

69. Mr. MURPHY said that it covered only those States that had consented to the provisional application of a treaty at a certain point in time, not necessarily all the States that had signed or even ratified the treaty.

70. Ms. GALVÃO TELES said that Mr. Murphy's proposal helped to address the important issue of consistency in the draft guidelines, but that it should be dealt with during the final review of the draft guidelines by the Drafting Committee.

71. Ms. ORAL asked whether there was not already an implicit reference to States and international organizations in draft guideline 3, given that the provision set forth a general rule.

72. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the phrase proposed by Mr. Murphy could arguably also be inserted in draft guideline 1 and raised a host of issues that would be better addressed at a later stage.

73. Mr. MURPHY said that he would not stand in the way of the provisional adoption of the draft guidelines, on the understanding that it could not be taken as a sign that the Commission was entirely satisfied with the texts as they stood.

Draft guideline 3 was adopted.

Draft guideline 4

Draft guideline 4 was adopted.

Draft guidelines 6 to 9

Draft guidelines 6 to 9 were adopted.

Draft guideline 10

74. Mr. OUAZZANI CHAHDI proposed the deletion of the words "and observance of provisionally applied treaties" in the title.

75. The CHAIRPERSON said that the title juxtaposed the internal law of States or the rules of international organizations, on the one hand, and the observance of provisionally applied treaties, on the other. Removing either element would upset the balance that had been struck.

76. Mr. GÓMEZ ROBLEDO (Special Rapporteur), supported by Mr. PARK, said that, although some modifications had been inevitable, the Drafting Committee had endeavoured to stick as closely as possible to the wording of the title of article 27 of the 1969 Vienna Convention.

Draft guideline 10 was adopted.

Draft guidelines 11 and 12

Draft guidelines 11 and 12 were adopted.

The titles and texts of draft guidelines 1 to 4 and 6 to 12, as provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions, and as contained in document A/CN.4/L.895, were adopted, on the understanding that draft guideline 5 would be considered by the Drafting Committee at a later date.

77. The CHAIRPERSON said that the Special Rapporteur would prepare commentaries to the draft guidelines for inclusion in the Commission's report to the General Assembly on the work of its current session. The Special Rapporteur had requested the establishment of a working group to enable interested members to consider the draft commentaries and provide relevant guidance. Following consultations, it had been agreed that Mr. Vázquez-Bermúdez would chair the working group. He took it that the Commission agreed to establish a Working Group on the provisional application of treaties to elaborate commentaries to the draft guidelines, under the guidance of Mr. Vázquez-Bermúdez.

It was so decided.

78. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on the provisional application of treaties) said that the Working Group would be composed of the following members: Mr. Gómez Robledo (Special Rapporteur), Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

The meeting rose at 1 p.m.

3358th MEETING

Tuesday, 16 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/703, Part II, sect. B, A/CN.4/705, A/CN.4/L.894)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. LEHTO said that she appreciated the Special Rapporteur's fourth report on the protection of the atmosphere (A/CN.4/705) and the thoughtful, determined manner in which he had approached the topic under challenging circumstances. She also welcomed his many outreach activities and the interactive discussion he had organized the previous week with scientific experts from the United Nations Environment Programme, the World Meteorological Organization and the Economic Commission for Europe, who had provided insights on the complex interaction between the oceans and the atmosphere.

2. While she agreed that the search for interrelationships between the legal rules pertaining to the protection of the atmosphere and other related rules of international law was a meaningful way for the Special Rapporteur to approach the topic, that very ambitious aim required an analysis that was much more thorough than what had been possible within the limits of the Special Rapporteur's report. The analysis appropriately drew upon conclusions (1) to (4) of the work of the Commission's Study Group on fragmentation of international law[166] as a methodological basis for approaching the issue of interrelationship, although it departed from those conclusions in certain respects, in particular when introducing the concept of mutual supportiveness.

3. The 1969 Vienna Convention provided the framework for both the Study Group's analysis and the principle of harmonization, or systemic integration, referred to in the Special Rapporteur's report. As pointed out in the Study Group's report,[167] that principle worked best when it dealt with a relationship between two treaties that had identical parties and related topics; it thus would not be very helpful in respect of the relationship between different treaty regimes, such as trade law, human rights law and environmental law. The 2006 study also mentioned mutual supportiveness as a technique for resolving normative conflicts, but only between treaties that were part of the same regime. Some authors had criticized the study as not perceiving the autonomy of mutual supportiveness as a means of dealing with fragmentation, taking the view that mutual supportiveness was qualitatively different from harmonization in that it was linked, not to the presumption against normative conflict, but to the principle of normative cohesion or interconnection between different regimes. Mutual supportiveness also entailed encouraging States to negotiate proactively with a view to avoiding conflict between different treaty provisions, as highlighted in paragraphs 15 and 16 of the Special Rapporteur's fourth report.

4. Some Commission members had questioned whether reliance on that concept was warranted in the context of protection of the atmosphere. Thus far, the principle of mutual supportiveness had come into play primarily in international trade law; its status in general international law was uncertain. Some authors regarded it as an emerging principle of international law rooted in the overarching requirements of good faith and cooperation, while others saw it as a policy statement or a simple call for coordination. In any event, it could not be seen as creating obligations for States. Accordingly, some Commission members had said that the references to mutual supportiveness in the draft guidelines should be replaced with references to the 1969 Vienna Convention. She hoped that the Special Rapporteur would further develop the argument as to why the concept had added value and whether it could be usefully combined with the principle of harmonization.

5. She agreed with other Commission members that the Special Rapporteur's report did not always make clear the "intrinsic links" that international trade and investment law, the law of the sea and international human rights law had with international law on the protection of the atmosphere. One difficulty in that respect was the fact that the case law and treaties described in the report related mostly to environmental law in general; as a result, the analysis in chapters II, III and IV of the report, while interesting, raised few questions that directly concerned the protection of the atmosphere.

6. With regard to the proposed draft guidelines, she agreed with other Commission members that the number of guidelines should be reconsidered with a view to avoiding repetition. Draft guideline 9 introduced a new

[166] See *Yearbook … 2006*, vol. II (Part Two), pp. 177–178, para. 251.

[167] *Ibid.*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

concept, the "principle of interrelationship", which had been explored, *inter alia*, by the International Law Association in the context of sustainable development but which, like mutual supportiveness, seemed to constitute an approach rather than a principle. It did not appear to add anything to draft guideline 9, which already contained references to mutual supportiveness and harmonization. She supported the new wording of draft guideline 9 that had been proposed by Mr. Aurescu, since it provided useful safeguards.

7. Draft guidelines 10 and 11, which called on States to take appropriate measures in the fields of international trade law, international investment law and the law of the sea to protect the atmosphere, should be drafted carefully so as not to undermine existing obligations. She agreed with other Commission members that paragraph 2 of draft guideline 11 should be deleted, as it was not closely related to the topic under consideration. Draft guideline 12, on the manner in which States should develop, interpret and apply international human rights norms, exemplified the view of mutual supportiveness as a broad, proactive notion, but it was not clear whether such norms should be developed from that particular perspective. Paragraph 3 of the draft guideline referred to sea-level rise, but that problem, though important, could not be addressed in the context of the draft guidelines on protection of the atmosphere. The reference, in paragraph 4, to future generations seemed unnecessary, as draft guideline 6 already referred to "present and future generations of humankind".[168] Lastly, she recommended that the draft guidelines be referred to the Drafting Committee, which should consider the option of merging some or all of them.

8. Mr. REINISCH said that he shared the Special Rapporteur's view that the identification of potential conflicts between international law on the protection of the atmosphere and other fields of international law, and the provision of legal tools for avoiding and/or resolving them, was a very important exercise. Although the Special Rapporteur's report contained numerous references to "conflicts", it did not precisely define or characterize their nature. From reading the report, he deduced that at least two kinds of conflict could arise. The first was a conflict between the objectives pursued by environmental law and those pursued by other regimes such as trade law. In such cases, mutual supportiveness was difficult to achieve because the objectives clearly contrasted and sometimes even contradicted each other. In such situations, the traditional techniques offered by the 1969 Vienna Convention and discussed in the Commission's Study Group on fragmentation of international law provided the necessary toolbox for conflict resolution.

9. The second kind of conflict arose from the overlapping scope of different sets of obligations, even where they had common objectives; the Special Rapporteur cited, as an example, the interrelationship between IMO instruments, the United Nations Convention on the Law of the Sea and the United Nations Framework Convention on Climate Change. In such situations, the mutual supportiveness approach, implemented through harmonious interpretation, would be easier to pursue.

10. Another term that was not clearly defined in the report was "interrelationship". In paragraph 12, it was referred to as a "concept" that reflected "the interdependence of environmental protection and social and economic development", which suggested that it was meant to describe the fact that environmental measures might interrelate and sometimes even conflict with development measures. It also appeared to have a normative aspect, however, as shown by the indication that it was "expected to strike a proper balance in sustainable development". That normative aspect was also apparent in draft guideline 9, which referred to a "principle of interrelationship" that States should follow in order to avoid conflicts between different legal rules. Lastly, "interrelationship" was most often used in the report to describe the interaction between different legal regimes such as the law of the atmosphere and international trade and investment law.

11. In paragraph 7 of his fourth report, the Special Rapporteur identified several fields of international law—international trade and investment law, the law of the sea and international human rights law—as having "intrinsic links" with the law on the protection of the atmosphere, but gave no explanation of where such links came from. It was not clear why other fields such as intellectual property rights law or humanitarian law were not deemed to have a similar intrinsic link to the topic under consideration. In paragraph 18 of the report, concerning the interpretative principle of harmonization, the Special Rapporteur referred to the well-known case *United States–Standards for Reformulated and Conventional Gasoline*, which had come before the WTO Appellate Body. Given the report's subsequent focus on both trade and investment, it should be noted that this principle of interpretation had also been endorsed by a number of investment tribunals, which had emphasized that investment treaties could not be read in isolation from public international law.

12. Concerning draft guideline 9, he wondered whether the term "principle of interrelationship" should be replaced with "principle of mutual supportiveness" or "principle of harmonization". The term "interrelationship" seemed to be descriptive, whereas "mutual supportiveness" or "harmonization" could be regarded as normative principles for avoiding the conflicts that could result from the interrelationship among different norms. The draft guideline's purpose appeared to be to apply the "principle of interrelationship" to law-making, adjudication and enforcement ("develop, interpret and apply the rules of international law"), yet the end of the guideline could be misunderstood as relating only to interpretation and application, not development. It might therefore be appropriate to add "avoiding or" before "resolving conflict between these rules". Another question was whether the phrase "with a view to resolving conflict between these rules" was repetitive, since it reflected the wish to interpret and apply the rules in a "harmonious manner".

13. With regard to the interrelationship between the law on the protection of the atmosphere and international trade and investment law, which was dealt with in draft guideline 10, paragraph 31 of the report mentioned investment treaties that guaranteed "'fair and equitable treatment' against expropriation"; it would be more accurate to say "'fair and equitable treatment' as well as compensation for

[168] *Yearbook … 2016*, vol. II (Part Two), p. 177 (draft guideline 6).

expropriation", since the "fair and equitable treatment" standard did not entail any guarantees against expropriation, and the expropriation standard did not prohibit expropriation, but only tied it to a compensation requirement.

14. Draft guideline 10 contained two suggestions to States that were quite specific but did not directly result from the discussion in the paragraphs of the report that preceded the proposal. The first suggestion might be misunderstood as relating not to treaty-making in the fields of international trade and investment law, but to actual State measures for the protection of the atmosphere, as it reflected the proviso in article XX of GATT that State measures should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment. That wording, however, imposed proportionality requirements on State measures that were to be assessed in the light of the Agreement; it did not refer to treaty-making in the field of trade law. When States took "appropriate measures in the fields of international trade law and international investment law" by means of treaty-making, it did not seem appropriate to subject those measures to any specific test; for example, if they wished to adopt new treaty rules that afforded a higher level of protection, those rules should not be subject to the proportionality test referred to in article XX of the Agreement.

15. Another reason not to impose the language from the Agreement as an overarching standard was that States had much more freedom to adopt protective measures or allow for environmental considerations in the field of investment law than in the field of trade law. In WTO dispute settlement practice, the "proportionality" language in article XX had been interpreted in a manner that imposed a considerable burden on the party adopting the measures, but States that concluded treaties should have the discretion to determine the standard they wished to adopt. Further, the phrase included the stronger word "shall" instead of "should", which was used in the rest of the draft guideline. With respect to the second sentence of draft guideline 10, he wondered to what extent States could "ensure" that the relevant rules were interpreted and applied in accordance with the principle of mutual supportiveness, as that was usually the task of independent dispute settlement bodies.

16. He was concerned that draft guideline 11, paragraph 1, might weaken the existing obligations of States under the United Nations Convention on the Law of the Sea and other applicable treaties, both because of the hortatory language used and because its second sentence might be interpreted as a recommendation that the relevant rules of international law should be applied in a weakened form in order to avoid potential conflicts. In addition, like other Commission members, he questioned whether an issue as specific as sea-level rise and its impact on small island and low-lying States, which was addressed in draft guideline 11, paragraph 2, and draft guideline 12, paragraph 3, should be mentioned in draft guidelines on the more general topic of protection of the atmosphere.

17. There were some drafting problems with draft guideline 12. It was unclear from paragraph 2 whether States were required to comply with international human rights norms or merely to make their "best efforts" to comply with them. If the draft guideline was intended to remind States to take international human rights norms into account in developing, interpreting and applying rules and recommendations relevant to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, it should be reformulated to express that intention more clearly.

18. He endorsed Mr. Park's proposal to consider whether the four draft guidelines proposed by the Special Rapporteur could be merged into a single overarching structure.

19. Mr. RUDA SANTOLARIA said that he wished to thank the Special Rapporteur for introducing his fourth report and for organizing an informal meeting with leading scientists.

20. Turning to the report itself, he said he agreed with other Commission members that, while "mutual supportiveness" was an undeniably important aim or aspiration, it did not constitute a principle of general international law, let alone the "guiding principle" for States and international courts and tribunals in the harmonious interpretation and application of the relevant rules, as it was described in paragraph 17. To illustrate that point, he noted that the trade agreement provisions cited in paragraph 26 of the report, as well as identical provisions in other trade agreements concluded by Latin American countries with the United States of America and the European Union, reflected the will to enhance, increase or strengthen mutual supportiveness between trade and the environment and between multilateral environmental agreements and trade agreements as a goal or objective that the parties should seek to achieve. Thus, mutual supportiveness was not a principle of international law, but an aim.

21. In paragraph 18 of his fourth report, the Special Rapporteur rightly noted that article 31, paragraph 3 (*c*), of the 1969 Vienna Convention tacitly guaranteed the interpretative principle of harmonization by providing that "[a]ny relevant rules of international law applicable in the relations between the parties" should be taken into account in the interpretation of treaties. As an example, in paragraph 28 the Special Rapporteur cited the report of the WTO Appellate Body on the *United States–Standards for Reformulated and Conventional Gasoline* case, which referred to the "'general rule of interpretation'" set out in article 31 of the Convention as a rule of general or customary international law that the Appellate Body had been directed to apply by article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Unlike GATT of 1947, which had been interpreted in a very restrictive manner from a dispute settlement perspective, article 3, paragraph 2, of the Understanding explicitly stated that the WTO dispute settlement system was to clarify the provisions of the relevant agreements "in accordance with customary rules of interpretation of public international law". The Appellate Body had thus concluded that the General Agreement was "not to be read in clinical isolation from public international law" (p. 17 of the decision). However, as other Commission members had noted, the case law of WTO dispute settlement bodies did not always reflect an interpretation of parties' obligations under the relevant agreements that was harmonious with other applicable rules of international law.

22. Any abridgements that might have been made to the report were regrettable, as the inclusion of additional elements would have been useful for providing a comprehensive overview of the interrelationship of the rules relating to the protection of the atmosphere with international trade law and investment law, as well as with the law of the sea and international human rights law.

23. With regard to chapter III, section A, of the report, on the linkages between the sea and the atmosphere, he pointed out that several Latin American countries had launched a comprehensive multidisciplinary programme of study under the 1992 Protocol on the Programme for the Regional Study of the El Niño Phenomenon in the South-East Pacific. As for chapter III, section B, on the legal relationship between the law of the sea and the law on the protection of the atmosphere, he agreed with some other Commission members that, while rules relating to the protection of the atmosphere clearly existed, they did not constitute a specific branch of law, as did the law of the sea.

24. With regard to sea-level rise and its impact, especially on small island developing States, he noted that the General Assembly had recognized the seriousness of that threat by adopting resolution 69/15 of 14 November 2014 on the SIDS Accelerated Modalities of Action (SAMOA) Pathway. Nonetheless, a substantive analysis of the far-reaching consequences of sea-level rise, as described in particular in paragraph 11 of resolution 69/15, was beyond the scope of the report on the protection of the atmosphere. Like other Commission members, he believed that sea-level rise should not be addressed in the draft guidelines, but should be included in the Commission's long-term programme of work.

25. Lastly, he believed that the four draft guidelines proposed by the Special Rapporteur should be merged into two guidelines. The first could set out the importance of interpreting the rules relating to the protection of the atmosphere in a harmonious manner with other rules of international law, highlighting interpretation criteria that had acquired customary status, and the second could address the linkages between the sea and the atmosphere more specifically. As other Commission members had noted, it would be necessary to take account of the content of the draft guidelines that had already been provisionally adopted in order to avoid any overlap or repetition.

26. Mr. JALLOH said that he would like to thank the Special Rapporteur for his thoughtful fourth report, extensive outreach efforts and initiative to organize informal exchanges with scientists.

27. In a world in which facts, especially those based on scientific evidence, were increasingly being called into question, and in which some public officials took a cavalier attitude towards mounting environmental concerns, it was important to recognize the exceptional urgency of the challenges facing the environment. Moreover, it had been demonstrated that the lower layers of the atmosphere played a critical role in the regulation of those aspects of the weather system that had the most immediate impact on the lives of human beings around the world. The facts spoke for themselves: extreme weather events were increasingly frequent in an increasing number of countries, and global temperatures were rising. Worldwide, 2015 had been the warmest year on record. In that context, the need for international cooperation to combat climate change had never been more urgent, and international law, including the work of the Commission, had and should continue to have a useful role to play as part of those efforts.

28. During the election of the members of the Commission in the autumn of 2016, quite a few delegations to the General Assembly had expressed strong support for the Commission's recent work on topics related to the global environment. Many had stressed the great urgency of environmental issues, and some had mentioned the need to strike a balance between more traditional, State-centred topics of public international law and newer, human security-centred topics. On that last point, he agreed with the Special Rapporteur that such an approach would enable the Commission to identify new possibilities and opportunities for the twenty-first century. The Commission should build on its progress to date with a view to identifying and highlighting the existing international legal principles that should govern the protection of the atmosphere.

29. With regard to the report itself, he found it regrettable that administrative limitations had been imposed on the length of the report. He generally agreed with most of the concerns that other Commission members had raised, although there were a few specific aspects, in particular international trade law and international human rights law, on which his views differed.

30. The rise in sea level caused by global warming, which was identified in the report as one of the most profound impacts of atmospheric degradation on the sea, posed severe threats to coastal States, in particular those with heavily populated or low-lying coastal areas, and to small island States. Those threats raised a whole host of international legal issues, some of which had been identified by other Commission members.

31. He agreed entirely that greater attention should be paid to the specific concerns of small island developing States in further work on the topic of protection of the atmosphere and on other topics related to the environment. The 37 States Members of the United Nations that were classified as small island developing States relied on the Organization to find solutions that they were unable to develop on their own or in other multilateral forums. According to a concept note prepared by New Zealand in advance of a 2015 Security Council debate on the peace and security challenges facing small island developing States, the particular vulnerability of such States to the effects of climate change and weather-related disasters was compounding existing security and development challenges.[169] It was expected that, over time, competition for scarce resources would increase, thereby increasing the risk of armed conflict. Thus, failure to address climate change would inevitably result in a less secure future for those States.

32. While the Special Rapporteur was to be commended for highlighting the complex challenges facing small

[169] See S/2015/543, annex.

island developing States, those challenges called for a truly holistic solution that transcended the topic of protection of the atmosphere, and thus might be better addressed elsewhere, including through political negotiation. Nevertheless, the Commission could help to anticipate and address the fundamental international legal issues that they raised. Accordingly, he urged the Special Rapporteur to give serious consideration to Mr. Aurescu's proposal that the situation of small island developing States be addressed in greater detail in a subsequent report, which would include revised draft guidelines, or, alternatively, that it be excluded from the discussion on the protection of the atmosphere and dealt with comprehensively as a separate topic. If the Commission accepted the second option, it could then work to identify and address all the relevant international legal issues and their consequences for the affected States. In his view, both options seemed excellent.

33. Regarding the two main proposals—one made by Mr. Park and the other by Mr. Aurescu—for the merger or consolidation of the four draft guidelines set out in the fourth report, he recalled that the Special Rapporteur's initial position had been that each of the draft guidelines had a distinct content and nature and should therefore not be merged. In his own view, however, it was not altogether certain how distinct their content actually was, and it seemed to him that at least certain aspects of the draft guidelines could be merged. He welcomed Mr. Park's proposal to merge all of them into a single draft guideline because it addressed in a succinct way the main concerns that had been expressed by many Commission members about the "packaging" of the four proposed draft guidelines.

34. Mr. Aurescu's proposal, on the other hand, was to consolidate the four draft guidelines into two separate guidelines. The first would be based on a revised version of draft guideline 9 and would refer in general to the concepts of interrelationship and mutual supportiveness between norms on the protection of the atmosphere and other sub-branches of international law. It could also refer to systemic integration and the principle of harmonization, while underscoring the fundamental rules of interpretation found in article 31 of the 1969 Vienna Convention. The proposal also contained safeguards that, in his view, served to balance the various interests.

35. The second of the two reformulated guidelines would be based on a merger of proposed draft guidelines 10 to 12 and would refer in a non-exhaustive manner to the three sub-branches identified by the Special Rapporteur. Alternatively, that reformulated draft guideline, as proposed by Mr. Aurescu, could be split into two separate draft guidelines. Mr. Aurescu had further proposed that some of the wording of the existing draft guidelines 10 to 12 be transposed to the preamble, including the reference to future generations.

36. He could support either of those proposals or, given his view that both had merit, a combination of the two. However, he had a slight preference for Mr. Aurescu's proposal. As to the future plan of work, the Special Rapporteur might wish to consider setting up an informal working group of Commission members or holding informal consultations with members regarding the aspects that he proposed to cover in his fifth report. That might help the Commission to complete the first reading of the draft guidelines at its seventieth session, as proposed by the Special Rapporteur. He supported that timeline and was in favour of referring the draft guidelines to the Drafting Committee.

37. Mr. VÁZQUEZ-BERMÚDEZ said that, in his fourth report, the Special Rapporteur examined the interrelationship between the international law related to the protection of the atmosphere and other branches of international law. The Special Rapporteur also referred to some of the draft conclusions of the Commission's Study Group on fragmentation of international law, according to which the rules and principles of international law should be interpreted against the background of other rules and principles; any normative conflicts should be resolved in line with the approach laid out in the 1969 Vienna Convention; and norms that concerned the same issue should be interpreted so as to give rise to a single set of compatible obligations, in keeping with the principle of harmonization.

38. In recent decades, there had been a major increase in the development of international conventions at the global, regional and bilateral levels that related directly or indirectly to the protection of the atmosphere. Such developments could give rise to relationships of interpretation and relationships of conflict between those conventions and the rules and principles pertaining to other branches of international law. However, the relevant provisions of the 1969 Vienna Convention did not cover all circumstances: article 30, for example, was limited to the application of successive treaties relating to the same subject matter. Thus, in cases where States could anticipate potential conflicts of interpretation or application, provision was made in international treaties for what was known as "mutual supportiveness" as a means of avoiding or resolving such conflicts.

39. As noted by the Special Rapporteur in his report, conflicts between international law relating to the protection of the atmosphere and other branches of international law should be resolved, as far as possible, through active coordination and the application of the concept of mutual supportiveness. International Law Association resolution 2/2014, "Declaration of legal principles relating to climate change",[170] was consistent with that position. Various international legal instruments incorporated mutual supportiveness as a way of addressing the relationship between environmental, cultural and trade-related treaties from the perspective of synergy rather than conflict. Examples of such provisions included article 20 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and article 4 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

40. Despite the incorporation of the concept of mutual supportiveness in a number of treaties, it was still not

[170] International Law Association, *Report of the Seventy-Sixth Conference held in Washington D.C., August 2014*, London, 2014, resolution 2/2014, annex, pp. 22–26.

clear whether mutual supportiveness had achieved the status of a principle, as the Special Rapporteur seemed to maintain, or whether it served merely to guide States in interpreting and applying the treaties in which it was mentioned. In his view, the concept could be incorporated into the draft guidelines along the lines of the latter description. On the other hand, its use in guiding States during the treaty negotiation stage with a view to avoiding conflict with other laws would represent a novel development, and the Commission should consider the advisability of proceeding in that direction. If the Commission adopted draft guidelines to that effect, it should define the content and scope of mutual supportiveness in the relevant commentaries.

41. Draft guideline 9 was a general guideline that related to mutual supportiveness and harmonization. However, the interrelationship that might exist between rules belonging to different legal regimes or branches of international law should be considered a fact and not a principle. The reference to harmonization in draft guideline 9 did not make clear whether it was considered to be complementary to or independent of mutual supportiveness, especially in the light of the reference in the title to "Guiding principles" in the plural. The Special Rapporteur referred to the "principle of harmonization" in his report but did not develop it or elaborate on its relationship to the principle of mutual supportiveness.

42. Although he endorsed several of the comments made by other Commission members concerning draft guidelines 10, 11 and 12, he was not in favour of merging them into one draft guideline, as that would not take account of their specificities. In any event, that matter should be dealt with in the Drafting Committee.

43. Pursuant to draft guideline 10, States were to take appropriate measures in the fields of international trade law and international investment law to protect the atmosphere, provided that those measures did not "constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment". That wording had been taken directly from article XX of GATT. However, reproducing the wording of a treaty aimed at promoting free trade in a set of draft guidelines on the protection of the atmosphere could imply that the interpretation of that standard in WTO case law should be applied in relation to the latter topic. It would be advisable, therefore, to explore other language that was better adapted to the protection of the atmosphere, such as the suggestion to include a reference to sustainable development.

44. As had been pointed out, arbitral tribunals in the field of international investment tended to interpret environmental standards in such a way as to avoid conflict with investment rules and to give priority to States' obligations under the latter. The absence of clear guidance on the scope and application of the so-called "principles" of mutual supportiveness and harmonization could give rise to the arbitrary harmonization of environmental rules that conflicted with rules under other legal regimes, thereby reducing the effectiveness of international environmental law in general and the standards relating to the protection of the atmosphere in particular. The commentary to any future draft guideline on that subject should describe how those principles or tools should be applied in practice.

45. In the commentary to draft guideline 10, reference should be made to recent cases of investment arbitration relating to the protection of the atmosphere that pointed towards replacing the so-called "one-way street" that favoured foreign investors with a more balanced system in which both investors and host States had obligations and liability. The Special Rapporteur might also find it helpful to refer in the commentary to recent investment treaties that included an express obligation to respect domestic laws, including those relating to the environment. The Southern African Development Community Model Bilateral Investment Treaty Template,[171] for example, required investors to carry out environmental and social impact assessments in accordance with international standards, maintain an environmental management system and observe environmental standards that were consistent with the international environmental obligations of the host State or the investor State, whichever obligations were higher. That was an example of how the institutional framework of international investment law was being adapted to promote environmental protection and reflected the growing complementarity between the two legal regimes, which had the potential to go beyond mere harmonization.

46. With regard to draft guideline 11 on the interrelationship of law on the protection of the atmosphere with the law of the sea, it was important to point out that the oceans and the atmosphere interacted closely with each other in various physical processes, which included the negative impact of atmospheric pollution and degradation on the sea, including the sea-level rise caused by global warming. Although sea-level rise and its effects on the recession of coastlines had important legal ramifications for the population, territory and maritime areas of States, especially small island developing States, it involved a highly important and complex set of problems that exceeded the scope of the draft guidelines. As other speakers had pointed out, it could well constitute a separate topic to be included in the Commission's future programme of work. It was nevertheless worth pointing out that the development of norms on the protection of the atmosphere and the promotion of State cooperation in that area had a direct bearing on the effects of atmospheric pollution and degradation, including global warming and its grave consequences.

47. Lastly, draft guideline 12 should be reformulated so as to avoid giving the impression that it diminished the importance of human rights norms, which, of course, was not the Special Rapporteur's intention.

48. Mr. PETER said that protection of the atmosphere was a topic which affected the everyday life of real people, because it was linked to the impact of climate change. As it was a highly technical subject, the members of the Commission had benefited tremendously from listening to the presentations of the eminent scientists

[171] Southern African Development Community, *SADC Model Bilateral Investment Treaty Template with Commentary*, Gaborone, 2012 (available from: www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf).

who had been invited to address them on various areas of natural science that were of relevance to the topic. In the Sixth Committee, many delegations had underscored the value of that dialogue during the debate on the report of the International Law Commission on the work of its sixty-eighth session.[172]

49. The Commission was apparently completely oblivious to the main views expressed in the Sixth Committee with regard to its work. A majority of delegations had enthusiastically welcomed the inclusion of the topic "Protection of the atmosphere" in the Commission's programme of work. Only 2 of the nearly 50 delegations that had made statements on chapter VIII of the Commission's report in 2016 had failed to express support for its work on the topic. The only delegation that had recommended its discontinuance had been that of the United States.[173] Yet the current debate gave the impression that none of the Commission members wished to associate themselves with the topic, which, according to some of them, was not going anywhere.

50. In the Commission's current debate, several references had been made to the 2013 "understanding",[174] which had in fact been an ultimatum forcing the Special Rapporteur to accept severe restrictions on what matters he could deal with if he wished to pursue the subject. Those unethical constraints, which prevented the Special Rapporteur from freely exploring the subject matter and precluded an open debate, were not the way to approach a topic where valid scientific arguments were of key significance. Moreover, during the Sixth Committee debate in 2016, the delegation of Algeria had complained of the Special Rapporteur's failure to address the issue of international cooperation based on the common but differentiated responsibilities of States, not realizing that the "understanding" had placed that issue out of bounds, while the delegation of South Africa had actually objected to those restrictions. At least two delegations had explicitly expressed their approval of the Special Rapporteur's plan of work and of the subject matter he intended to cover in his fourth report. It was therefore high time for Commission members who objected to its contents to take note of the opinions expressed by Member State representatives in the Sixth Committee, who represented the wishes of the wider international community.

51. He fully supported the Special Rapporteur's choice of areas that were interrelated and intrinsically linked to the protection of the atmosphere. In the context of international trade and investment law, it might be useful to examine the model investment agreements of the International Centre for Settlement of Investment Disputes that incorporated environmental protection clauses, in order to see what action could be taken to ward off threats to the environment of developing countries from large investors whose sole aim was to make a profit. Another text worth mentioning in the context of the law of the sea was an instrument designed to prevent toxic waste from being dumped into the waters of developing countries, namely the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa. The Special Rapporteur should also address the impact on the environment, and therefore on the atmosphere, of accidents on offshore oil rigs, and should deal at greater length with the growing appreciation of the fact that human and peoples' rights included the right to a clean environment, as shown by the inclusion of that right in the Constitutions of three African States after it had been embodied in article 24 of the 1981 African Charter on Human and Peoples' Rights. In the light of those developments, it was unsurprising that most developing States viewed the Commission's annual report to the General Assembly as out of date and irrelevant.

52. The issue of the global mean sea-level rise caused by climate change was of vital importance to small island and low-lying States, whose very existence was in jeopardy. It was therefore untrue that there was no difference between their situation and that of other coastal States. In that connection, he drew attention to the statements made by the delegations of Tonga, Tuvalu and the Federated States of Micronesia during the Sixth Committee's debate on the Special Rapporteur's third report.[175] For that reason, he supported the contents of draft guidelines 11, paragraph 2, and 12, paragraph 3. The Commission should not ignore the plight of small island and low-lying States at their time of need, when their very survival was threatened by environmental degradation.

53. In view of time constraints, he would provide the Special Rapporteur with written comments on each of the four draft guidelines contained in the fourth report. The suggestion that they should all be combined into a single guideline was nonsensical and was indicative of a failure to appreciate their specific value and connectivity with the topic. The interrelationship between the atmosphere and the subject covered by each draft guideline was different. An attempt to lump together international trade and investment law, the law of the sea and international human rights law in a single guideline would produce an oddity that would imply that there was something fundamentally wrong with the Commission's understanding of basic public international law principles.

54. The list of areas which, in the opinion of the Special Rapporteur, were interrelated with protection of the atmosphere was neither cast in stone nor exhaustive. The Commission should be willing to learn from scientists and, possibly, to add to the list. The draft guidelines produced by the Special Rapporteur were backed by both law and science. They should therefore be referred to the Drafting Committee with the aim of strengthening them. They should not be watered down, because the wishes expressed by representatives of two States in the Sixth Committee did not represent the views of the world community. For that reason, he encouraged the Special Rapporteur to pursue his chosen path without being deterred by negative comments.

The meeting rose at 1.05 p.m.

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[172] *Yearbook … 2016*, vol. II (Part Two).

[173] See A/C.6/71/SR.26, para. 128.

[174] See *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

[175] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/692.

3359th MEETING

Wednesday, 17 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Protection of the atmosphere (*continued*) (A/CN.4/703, Part II, sect. B, A/CN.4/705, A/CN.4/L.894)

[Agenda item 5]

Fourth report of the Special Rapporteur (*concluded*)

1. Mr. LARABA said that the Special Rapporteur's fourth report was best considered in the light of the most important elements of his approach to the topic in his previous reports.[176] For instance, the Special Rapporteur had highlighted the need to take an exclusively legal approach to the topic, and to avoid politicizing the debate. He had strongly emphasized the importance of considering the relevant legal principles and rules within the framework of general international law, and thus resist the tendency towards compartmentalization, or fragmentation, caused by the dominant "single-issue" approaches to international environmental law. In addition, he had warned against smuggling *lex ferenda* proposals and preferences into the interpretation of *lex lata*. He had also noted the significant gaps in existing law relating to the atmosphere. The natural temptation to fill them should be avoided; otherwise, there would be a heightened risk of a surreptitious move towards *lex ferenda* proposals—precisely what he had cautioned against.

2. Chapter I of the fourth report, on guiding principles of interrelationship, introduced the key concept of "mutual supportiveness", which was omnipresent in the report and at the heart of the four draft guidelines. Yet although the concept of "interrelationship" was introduced, there was no definition of the term, nor were any references provided for it. The postulate on which it was based appeared to be that, in specialized fields, there were significant gaps and overlaps in international treaties because little or nothing had been done to coordinate or harmonize them. However, there was plenty of evidence, in both treaties and legal writings, of complementarity, convergence, harmonization and mutually positive influences among international conventions. Of course, if the Special Rapporteur had referred to that evidence, it would have been very difficult, if not impossible, for him to justify the fundamental proposition set out in the report, namely mutual supportiveness. That proposition depended on the absence of complementarity and coordination and on the existence of conflicts between conventions. By talking only of "potential" conflicts, the Special Rapporteur was able to move on to a discussion of mutual supportiveness as a means of coordinating treaty provisions into coherent schemes for the protection of the atmosphere. Such mutual supportiveness seemed to belong to the realm of *lex ferenda*.

3. In paragraph 14, the Special Rapporteur raised the concept of mutual supportiveness to the level of an "indispensable principle of present-day international law when coping with issues of interpretation, fragmentation and competition among regimes", noting that the call for mutual supportiveness had become a recurrent expression in international instruments and judicial decisions. However, if it was indeed a general principle of international law, one would have expected references to some general international instruments. Instead, the report referred, without citing them, to some conventions dealing with specific branches of international law. The fact that a supposedly general principle was at best drawn from *lex specialis* demonstrated, more clearly than anything else, that mutual supportiveness was not an essential principle of general international law.

4. Meanwhile, the legal writings on mutual supportiveness cited by the Special Rapporteur dealt mainly with the relationship of the law on protection of the atmosphere with international environmental law and international trade law. Many other studies on mutual supportiveness had led to different conclusions. He wished in particular to draw attention to a 2007 article in the *Revue générale de droit international public* by Laurence Boisson de Chazournes and Makane Moïse Mbengue on the principle of mutual supportiveness in relation to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the WTO agreements, in which the authors had concluded that mutual supportiveness was a very flexible concept that could be formulated in many different ways.[177]

5. For all those reasons, he had serious doubts about the content of draft guideline 9. Moreover, the points made by the Special Rapporteur himself in his first report on the risks of surreptitiously moving from *lex lata* to *lex ferenda* and the temptation to fill in the "gaps", remained pertinent, as did his warning that the Commission should resist the tendency towards compartmentalization or fragmentation.

6. As for the Special Rapporteur's decision to focus on the relationship of the law on the protection of the atmosphere with the law of the sea, international trade and investment law and international human rights law, he noted that the Special Rapporteur had referred in his second report to the generic "interrelationship with other relevant fields of international law",[178] which suggested that the branches of law on which he focused were not the

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[176] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/667 (first report); *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681 (second report); and *Yearbook … 2016*, vol. II (Part One), document A/CN.4/692 (third report).

[177] L. Boisson de Chazournes and M. M. Mbengue, "À propos du principe du soutien mutuel – Les relations entre le Protocole de Cartagena et les Accords de l'OMC", *Revue générale de droit international public*, vol. 111 (2007), Paris, Pedone, pp. 829–862.

[178] See *Yearbook … 2015*, vol. II (Part One), document A/CN.4/681, pp. 215–216, para. 79.

only branches that were relevant. It was unfortunate that the Special Rapporteur had not discussed his choices in that respect with the Commission.

7. In the section of his fourth report on the relationship with international trade law, the Special Rapporteur had needed to interpret the various international conventions cited in paragraphs 23 to 27 very broadly in order to corroborate the existence of the principle of mutual supportiveness. He seemed to think, for example, that the principle was contained in the first paragraph of the preamble to the Marrakesh Agreement Establishing the World Trade Organization, on the grounds that it was stated there that trade should be conducted "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development". The Agreement did not enshrine that principle; it simply called for States to draw up policies that encouraged mutual strengthening of trade and the environment. Nor was the fact that the WTO Committee on Trade and Environment had begun pursuing its activities "with the aim of making international trade and environmental policies mutually supportive"[179] necessarily an affirmation of the principle of mutual supportiveness.

8. The Special Rapporteur's interpretation of multilateral environmental agreements was especially broad. Article 3, paragraph 5, of the United Nations Framework Convention on Climate Change, for example, encouraged States parties to cooperate in the promotion of a "supportive and open international economic system that would lead to sustainable economic growth", but that did not amount to an expression of the principle of mutual supportiveness. Moreover, there were no references to "mutual supportiveness" in the most recent major multilateral environmental agreement, the Paris Agreement under the United Nations Framework Convention on Climate Change.

9. With regard to the law of the sea too, the Special Rapporteur's claim that the regulation on atmospheric pollution from vessels under the United Nations Convention on the Law of the Sea incorporated "mutual supportiveness" rested on a broad and liberal interpretation of the text, which allowed the Special Rapporteur to consider certain language as pertaining to mutual supportiveness when it did not necessarily do so.

10. Lastly, with regard to international human rights law, he wished to draw attention to the report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[180] Paragraphs 58 and 62 of that report clearly illustrated the evolving nature of the relationship between human rights and the environment. According to the Independent Expert, many aspects of that relationship were still not well understood and, in seeking to clarify them, States should take account of all the decisions and recommendations from the many forums that were actively developing and implementing the human rights norms relevant to environmental protection. The principle of mutual supportiveness was not expressly cited in that report, but the notions of complementarity, coordination and harmonization were clearly implied. The conclusions and recommendations of the Independent Expert could perhaps offer a starting point for the reformulation of the draft guidelines proposed by the Special Rapporteur.

11. Mr. RAJPUT said that, while most other aspects of the environment were covered by international law, until now, there had been no dedicated focus on the atmosphere. The Special Rapporteur had successfully performed the daunting task of providing guidelines on what was an important and complicated area. While he understood that treatment of the topic was severely constrained by the 2013 understanding,[181] the Special Rapporteur could respect those limitations and suggest ways of protecting the atmosphere through non-binding guidelines, since the atmosphere was physically distinguishable from other aspects of the environment, for which specialized branches of law had been developed in the past. The non-binding guidelines might contribute to the development of a new branch of law in the future, once there was adequate State practice to support it.

12. In his view, the Special Rapporteur's choice to examine the interrelationship with trade law, investment law, the law of the sea and human rights law was appropriate, as those fields all had inherent links with protection of the environment and thus also with the atmosphere. The connection between the atmosphere and those four areas arose in different situations. First, if a State adopted regulations on the protection of the atmosphere, they might interfere with private businesses, which could give rise to an investment claim being brought by a foreign investor that would suffer loss as a result. Second, if a State granted subsidies or other similar measures for the promotion of atmosphere-friendly technology, that could form the basis of a challenge at WTO as a trade-restrictive or trade-distortive measure. In the field of trade and investment, the draft guidelines could enable, rather than constrain, States to take action in future for the protection of the atmosphere. Third, human activity on the sea was bound to affect the atmosphere, as there was a geographical connection and the potential for pollution. Lastly, there had already been litigation in municipal courts based on protection of the environment as a human right and the possibility of proceedings in relation to the protection of the atmosphere could not be ruled out. In the draft guidelines, a suggestion could be made that States should develop relevant regulations in the future. The reference to other areas of law should not create additional obligations for States; as the Special Rapporteur had noted, the proposed guidelines were merely hortatory and did not impose legal obligations of any kind.

13. The Special Rapporteur had rightly drawn attention to the real threat of fragmentation, which could not be lightly discarded. The potential for fragmentation was particularly acute in the fields of trade and investment, where there was a tendency to claim that they were distinct from general international law and ought to be treated separately. That was also reflected in some of the jurisprudence

[179] Decision of 14 April 1994 on trade and environment, adopted at the Ministerial Meeting in Marrakesh, United Nations, *Treaty Series*, vol. 1867, No. 31874, pp. 133–134, at p. 134.

[180] A/HRC/22/43.

[181] See *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

of WTO cited in the report. In the WTO context, the debate had mostly surrounded the interpretation of article 3, paragraph 2, of the Understanding on Rules and Procedures Governing the Settlement of Disputes, a restrictive reading of which suggested that only rules of interpretation originating in customary law were relevant for dispute resolution. However, that view ignored the fact that WTO agreements were treaties and thus covered by the 1969 Vienna Convention, article 31, paragraph 3 (*c*), of which performed the pivotal task of systemic integration. It was only in the *United States–Import Prohibition of Certain Shrimp and Shrimp Products* case that the Appellate Body had gone beyond the narrow interpretation of article 3, paragraph 2, of the Understanding and had adopted an approach based on article 31, paragraph 3 (*c*), supporting a greater role for international law in the interpretation of WTO obligations. He therefore agreed with the Special Rapporteur that there was a need for systemic integration of specific fields of international law with general international law.

14. He shared the reservations expressed by other members concerning the use of "mutual supportiveness" to achieve the goal of systemic integration, which they argued did not have any normative legal value, either in specialized fields such as trade and environmental law or in international law generally. The inappropriateness of the term "mutual supportiveness" did not mean that systemic integration could not happen. It ought to and could be achieved only through settled principles of treaty interpretation, codified in the 1969 Vienna Convention and existing in customary law. He proposed that the Special Rapporteur reconsider the use of the term "mutual supportiveness" and in its place use "harmonization", the importance of which had been emphasized in paragraphs 37 to 43 of the report by the Commission's Study Group on fragmentation of international law.[182]

15. The focus must be on the avoidance of conflict between two norms, and that could be achieved through harmonious interpretation. The two norms that were to be harmonized must have the same normative value, as any attempt to harmonize an already settled binding norm with one that was not might undermine the value of the pre-existing norm. According to subparagraph (*d*) of the 2013 understanding, "the outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein".[183] Therefore, the outcome of the Commission's work in itself could not result in conflict with other obligations in the fields identified as having potential for conflict. However, such a possibility could not be ruled out in the future, as it was not known if and when such obligations might be established at the international level, through a treaty or otherwise. For example, it was possible that States might adopt municipal regulations for the protection of the atmosphere, in which case conflict with obligations under the specialized fields might arise. The regulations thus adopted by States could not be discarded simply as national laws and therefore subservient to treaty obligations, as they would fall within the rubric of regulatory freedom of States in international law, which was a right under customary international law. There was adequate State practice to establish that, if a State adopted a legitimate regulation that satisfied the requirements of being *bona fide*, non-discriminatory and in the public interest, it would be a customary norm. Thus, such a legitimate regulatory exercise would have to be harmonized with obligations under treaties in specialized fields. Therefore, a provision based on harmonization would enable States to undertake regulatory measures for the protection of the atmosphere.

16. There were two problems with draft guideline 10 as currently worded. It urged States to take appropriate measures in the fields of international trade and investment law to protect the atmosphere. While that was a laudatory suggestion, with the current state of negotiations at WTO such a provision would be ineffective. It would be preferable to make a proposal that gave due credence to the need for protection of the atmosphere in the trade and investment context. The standard of regulation contemplated in draft guideline 10—"shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment"—would create a provision incompatible with article XX of GATT and the regulatory freedom of States in general international law.

17. Similar issues arose in relation to draft guideline 11 on the law of the sea. There was no obligation to protect the atmosphere arising from the United Nations Convention on the Law of the Sea, but the need for harmonization might arise once a regulation on protection of the atmosphere was introduced that related to activities on the sea. For example, if a coastal State made a regulation limiting the use of a particular shipping technology or added a tax on the use of such technology for protection of the atmosphere, it would be applied to ships passing through the territorial sea, in which case there could be a conflict and harmonization would be required. The problems faced by small island States and low-lying States were indeed pressing and disturbing, but they applied to all coastal States due to receding coastlines. The topic of sea-level rise was extremely complex and should be dealt with rigorously and not in a summary fashion. He supported the proposal by some members that the Commission incorporate the topic in its long-term programme of work.

18. The Special Rapporteur on human rights and the environment was exploring the relationship between those two fields in detail, and it was also being dealt with by municipal courts; he therefore did not believe there was any need for it to be addressed in a draft guideline. He supported the general view that had emerged in the course of the debate that the draft guidelines should be merged. It could simply be noted in the redrafted guideline that there should be harmonization in situations where States adopted national regulations for the protection of the atmosphere in relation to the fields of trade, investment and the law of the sea. The rules of conflict resolution already existed in general international law, and the conclusions in the report of the Study Group on fragmentation of international law[184] would adequately cover any future potential conflicts. If the methods of conflict resolution were detailed in the draft

[182] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, pp. 15–16.

[183] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

[184] *Yearbook … 2006*, vol. II (Part Two), pp. 177–184, para. 251.

guideline, it might create problems owing to differences in treaty texts. The extent of regulatory freedom exercisable through WTO regulations was narrower than that in investment treaties. Article XX of GATT, which broadly limited regulatory freedom, set out the conditions under which there would be exceptions to obligations under WTO regulations. There were no equivalent limitations in investment treaties, thus States had considerable discretion, although investment tribunals had not been consistent in acknowledging and applying it. Therefore, a specific reference to trade and investment was indispensable. He proposed that the new draft guideline read:

> "In the event that States agree to enter into a treaty relating to the protection of the atmosphere or adopt legitimate national regulations for the protection of the atmosphere, the obligations under trade and investment law and the law of the sea should be harmoniously interpreted along with the measures undertaken for the protection of the atmosphere."

19. In conclusion, he said that there could be no disagreement with the Special Rapporteur's objectives, only with his methodology. He therefore supported referring all the draft guidelines to the Drafting Committee.

20. Mr. SABOIA said that the meeting with scientific experts organized by the Special Rapporteur had been very useful. There had been ample criticism by other members, much of it justified, of the methodology of the fourth report and certain inconsistencies among the concepts therein. However, he believed that the report had value and contained valid thoughts and references regarding the need to take a systemic and integrative approach to rules of international law so as to avoid fragmentation and resolve conflicts with a view to promoting harmonization. The Special Rapporteur tried to reflect the conclusions and recommendations of the Study Group on fragmentation of international law in the consideration of the relationship between rules on protection of the atmosphere and other spheres of international law. There had been criticism of the chosen fields of trade and investment law, the law of the sea and human rights law. However, it was difficult to deny the close relationship between economic activities and environmental problems, including protection of the atmosphere. The concept of sustainable development had originated in order to reconcile the needs of development with those of environmental protection. Little attention had been paid during the debate to the important shift in the WTO position regarding the relationship between international trade law and environmental protection with the aim of making them mutually supportive in order to promote sustainable development. The establishment of the Committee on Trade and Environment was one indicator of the increased importance being given to environmental issues in WTO. Although WTO might not have changed as much as the Special Rapporteur seemed to imply, the shift in dispute settlement procedures, of which the Appellate Body decision in the *United States–Standards for Reformulated and Conventional Gasoline* case was an example, nonetheless seemed noteworthy. The Appellate Body had made a firm statement on the need to respect and take into account general international law, customary international law and the 1969 Vienna Convention in interpreting rules of international trade.

21. Regarding the chapter on the interrelationship with the law of the sea, it had been rightly pointed out that the issues addressed in draft guideline 11, paragraph 2—the impact of sea-level rise on small island States and low-lying States—fell outside the scope of the topic. Nevertheless, most speakers had stressed that those were issues of great concern, and he endorsed the proposal to cover them under a separate topic in the Commission's long-term programme of work. He recommended that the report on the work of the Commission at its sixty-ninth session contain clear references to that part of the debate so that States could take it up in the Sixth Committee.

22. On the interrelationship between protection of the environment and human rights, the Special Rapporteur had succeeded in showing how international human rights bodies, such as the Inter-American Commission on Human Rights, had incorporated the concept that a healthy environment was a precondition for the guarantee of some of the core human rights. A section of the report also provided important information on assessments by different organizations of the impact of environmental harm and atmospheric degradation on vulnerable groups. One of the most challenging problems concerning the interrelationship between human rights law and the norms relating to the environment and protection of the atmosphere was that of extra-jurisdictional application, covered in paragraphs 89 to 91 of the report, which had been scarcely touched upon in the debate. The Special Rapporteur suggested that cases in which an environmentally harmful activity by one State infringed on the right of a person in another State could be dealt with by applying the principle of non-discrimination or invoking the object and purpose of the treaty. It was worth noting that, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had stated that, "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" (para. 109 of the advisory opinion).

23. Although the concept of mutual supportiveness could not be considered a legal principle, it provided a useful tool for attempting to harmonize different areas of international law and resolve questions of interpretation and conflict. It could contribute to the integrated and systemic approach suggested by the Study Group on fragmentation of international law to address the challenge of the proliferation of different areas of international law. In conclusion, he expressed support for the proposal to refer the draft guidelines to the Drafting Committee with the recommendation that they should be consolidated into one or two draft guidelines.

24. Mr. OUAZZANI CHAHDI said that, in reading the report, he had wondered what added value the Commission's work on the topic might bring to the international community beyond the provisions of existing international agreements, particularly the Paris Agreement under the United Nations Framework Convention on Climate Change, when it came to developing the "law of the

atmosphere". Several delegations in the Sixth Committee had raised the same question. In addressing the issue, the Special Rapporteur relied on the Commission's work on the topics of fragmentation and interrelationship, and had structured the report around the concept of mutual supportiveness and harmonization. However, mutual supportiveness was more of a methodological approach than an "indispensable principle" of international law, as claimed by the Special Rapporteur in paragraph 14 of his report. In his own view, further clarification of the concept was required; the fact that it had first appeared in Agenda 21,[185] adopted by the United Nations Conference on Environment and Development in 1992, did not mean that it should be established as a principle of international law. Furthermore, what might be referred to as the "law of the atmosphere" had not yet acquired the status of an autonomous regime, as the Special Rapporteur asserted in paragraph 8, although he had rightly qualified that it was "in no way a 'self-contained' or 'sealed' regime".

25. With regard to the interrelationship between the protection of the atmosphere and other branches of international law, he agreed that it was necessary to properly justify the choice of fields, as others, such as aviation law or the law related to nuclear testing, could have been included. International trade law and investment law, however, were subjects far removed from the topic. With regard to the latter, in addition to the rights of States, it was also necessary to take account of the legitimate rights of investors, which included fair and equitable treatment and compensation in the event of expropriation, as discussed by the Special Rapporteur in the report. In the absence of an international multilateral agreement on investment guarantees, foreign direct investment was regulated by bilateral investment agreements, not all of which addressed environmental matters. Furthermore, the Special Rapporteur referred primarily to reciprocal investment agreements, whereas States sometimes concluded non-reciprocal agreements in order to attract higher investment in their territory and, in such cases, paid little attention to environmental matters.

26. With regard to the interrelationship between protection of the atmosphere and the law of the sea, he thanked the Special Rapporteur for having organized the briefing with scientific experts. However, he shared the view that the problem was particularly pollution from land-based sources, which emanated from fossil-fuel and waste emissions released into the atmosphere. For that reason, the pollution from vessels addressed by the Special Rapporteur in paragraph 56 of the report was of little relevance to the topic. He agreed with others that the technical issue of sea-level rise was not entirely relevant to the topic.

27. The chapter of the report on the relationship between protection of the atmosphere and international human rights law was interesting, but he wondered whether reference should not also be made to humanitarian law. Perhaps the analysis of the interrelationship of protection of the atmosphere with other branches of international law should be limited to international environmental law, the law of the sea and human rights and humanitarian law. In general, the draft guidelines lacked consistency. Regardless of how draft guideline 9 was reformulated, further clarification was required, particularly with regard to harmonization and mutual supportiveness. In draft guideline 11, paragraph 2, the problem of sea-level rise did not only concern small island States and low-lying States but also coastal States. Paragraph 3 of draft guideline 12 should be moved to draft guideline 11, which also dealt with the law of the sea. The question of whether or not to merge the draft guidelines into a single draft guideline should be left to the Drafting Committee. He agreed that the reference to future generations was a political statement rather than a legal one and was therefore out of place in the draft guidelines. He had no objection to referring the draft guidelines to the Drafting Committee.

28. The CHAIRPERSON, speaking as a member of the Commission, said that, when he had read the report for the first time, he had done so through the eyes of a reader seeking only to grasp the essence of the message that it conveyed. He had been impressed by the ecological and humanistic ethos, which had led the Special Rapporteur to take an integrative approach to the topic, as well as by the rich collection of relevant sources, including judicial and State practice, on the basis of which the Special Rapporteur had formulated a conceptually ambitious proposal.

29. When he had read the report for a second time, through the critical eyes of a lawyer who was sensitive to the details, he had thought that he would have expressed a number of points, and interpreted a number of sources, differently. In particular, he was not as confident as the Special Rapporteur that the law contained, or even should contain, a general principle in favour of the protection of the atmosphere.

30. Upon listening to other speakers during the debate, he had been reminded of his second reading experience. Many of the criticisms that they had made were, in his opinion, justified. Several members had rightly emphasized that the report did not sufficiently reflect the primacy of specific rules, the possibility of conflict between rules or the great number of ways in which certain rules might relate to one another. Reservations had also been expressed with regard to accepting, wholesale, a general principle of mutual supportiveness that would determine the relationship between rules from different areas of international law. He agreed that the Commission could not and should not speak of "principles" in the context in question.

31. That there were justified criticisms of the report should not, however, detract from the basic element that had informed the Special Rapporteur's approach, even though the Special Rapporteur had arguably taken that approach too far. The report addressed and established an important point with regard to which the Commission should remain open-minded, a point that was dealt with in articles 30 and 31, paragraph 3 (*c*), of the 1969 Vienna Convention.

32. He proposed that those provisions of the 1969 Vienna Convention serve as the basis for the Commission's work. They laid down rules that were well established, including as customary international law, and had been elucidated and illustrated by later treaties, State

[185] *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 1, annex II.

practice and the work of the Commission itself. The rules applied in all areas of international law and with respect to all treaties. It would be sufficient, and even prudent, for the Commission to limit itself to elaborating on those rules by referring to the materials provided by the Special Rapporteur in the report and the examples cited by many of the previous speakers.

33. That approach would not require the Commission to adopt more than one draft guideline. The most important question was whether, and to what extent, the concept of mutual supportiveness should be included. The concept had drawn a lot of criticism during the debate, but that appeared to have more to do with the Special Rapporteur's attempt to push it too far, in particular by declaring it to be a "principle" of international law.

34. Mutual supportiveness, as an approach to interpretation, was already contained in the rules of the 1969 Vienna Convention, in customary international law and in certain relevant areas of international law. The approach neither modified those rules nor prevailed over them; rather, it elaborated on and enriched them.

35. "Mutual supportiveness" had become a widely accepted expression for the need to reconcile and harmonize two or more rules of international law that were binding on two or more States. It was found, for example, in article 20 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

36. In his opinion, it was not circular reasoning to view references to mutual supportiveness in treaties as a sign of general recognition. The many references to mutual supportiveness expressed a conviction that treaties should, as far as possible, be interpreted in the light of other rules that were binding on the parties and interpreted and applied in an integrative manner. Mutual supportiveness essentially illustrated, and gave life to, what the 1969 Vienna Convention and the report of the Study Group on fragmentation of international law described in drier terms. It was a way of saying that States should interpret and apply two or more rules that were binding on them by giving them appropriate weight in relation to each other, which was the formulation that the Commission had used in its work on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". While it was not particularly important whether that approach was labelled "harmonization", "proportionality" or "mutual supportiveness", he favoured the last option for two reasons. First, it was accepted in more than one area of international law. Second, it reminded those who interpreted and applied laws to look at the object and purpose of the rules contained therein with a view to realizing them as fully as possible and to finding a sensible delineation between two or more norms. It was, of course, important for the mutual supportiveness approach not to impose an interpretation on a State that was bound by only one of two or more rules.

37. For the reasons that he had set out, he believed that the Commission should not dismiss the concept of mutual supportiveness prematurely. Instead, it should consider integrating the concept in a general draft guideline on the relationship between rules relating to the protection of the atmosphere and other rules of international law.

38. However, such a draft guideline should distinguish between the interpretation and application of rules, on the one hand, and their creation or formation, on the other. The former category related to legal processes, while the latter, which the Special Rapporteur called the "development" of international law, involved a political process. He therefore proposed dealing separately with the issue of what States should do when creating or forming new rules of international law.

39. On the basis of those considerations, he proposed a revised version of draft guideline 9, which would be entitled "Relationship between rules relating to the protection of the atmosphere and other rules of international law" and would read:

> "1. When interpreting and applying rules of international law, States shall:
>
> "(*a*) take into account, as far as possible in a harmonious and mutually supportive manner, any relevant rules relating to the atmosphere and other rules of international law applicable in the relations between the parties in accordance with article 31, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties; and
>
> "(*b*) determine, in accordance with article 30 of the Vienna Convention on the Law of Treaties, whether rules relating to the atmosphere and other rules of international law are in conflict.
>
> "2. States should aim to prevent and to resolve conflicts between rules relating to the atmosphere and other rules of international law by appropriate means."

40. Mr. MURASE (Special Rapporteur), summarizing the debate on the fourth report on the protection of the atmosphere said that he appreciated the many helpful comments, suggestions and criticisms made by members. He would begin by touching on a few general issues, before responding to observations about specific draft guidelines.

41. He was grateful to all the members who had attended the informal meeting with scientists and experts and was pleased that many had found the dialogue useful. A summary of the meeting would be uploaded to the Commission's website in the near future.

42. A range of opinions had been expressed with regard to the 2013 understanding, with which he had complied and to which he remained faithful. Mr. Murphy and Sir Michael Wood had condemned his reference to common but differentiated responsibilities in paragraph 59 of the report, arguing that the matter was excluded by the understanding. What they had conveniently ignored, however, was that the understanding established that "[t]he topic will not deal with, but is also without prejudice to, questions such as … common but differentiated responsibilities".[186] The "without prejudice" clause had

[186] *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168 (*a*).

been inserted by a member of the small group that had drafted the understanding on the grounds that developing countries would not have supported the topic if the principle of common but differentiated responsibilities had been unequivocally excluded. A reference to the principle had therefore been considered a necessary element of the understanding, and he had felt duty-bound, as Special Rapporteur, to respect the understanding, which was why he had discussed the principle in detail in his third report and mentioned it again in his fourth. He would continue to "not deal with" it by not including it in specific draft guidelines or seeking to build upon it in any way, and would instead merely reference it where appropriate and in accordance with relevant international law.

43. The Sixth Committee had approved the topic in 2011 without any conditions, and several members of the Commission had expressed sympathy with him for having to work under the restrictions imposed by the 2013 understanding. Mr. Tladi had suggested that the understanding could be revisited, but he personally thought that it was too late to do so, and would continue to abide by the understanding during the preparation of his fifth and final substantive report. Regardless of the constraints imposed on him, he would not have agreed to address the topic unless he had been sure that he could do so successfully and comprehensively. His conviction in that regard had not changed, and he was thankful to the members of the Commission for their continued support. That being said, restrictions had never before been placed on a Special Rapporteur in the form of an understanding in the long history of the Commission, and there should be no repeat of the situation. As stated by a former member of the Commission, the understanding was "disgraceful", not to mention "humiliating", for the Special Rapporteur. The debate on the topic had, at times, been divided, focusing not only on substantive issues but also on elements of the understanding. In his opinion, that was something that should be avoided in future.

44. Regarding the terms "law of the atmosphere", "autonomous regime" and "special regime of international law", the point made in the report was that the law relating to the protection of the atmosphere was not a "sealed" or "autonomous" regime. Instead, it existed and functioned only through its interrelationship with other branches of law.

45. He had been surprised to hear Mr. Murphy state that, at the Commission's sixty-eighth session, he had voiced his opposition to dealing with the issue of interrelationship. He personally did not recall that remark, and, indeed, had decided to devote a chapter of the report to the issue partly because, in 2012, Mr. Murphy had asked whether he was capable of tackling the intricate problem of the relationship between trade and the environment.

46. When exploring the issue of interrelationship, he had selected three areas of law, namely trade and investment law, the law of the sea and human rights law, because of the close links that they shared with the law relating to the protection of the atmosphere in terms of treaty provisions and jurisprudence. Those links had been recognized in, *inter alia*, textbooks on international environmental law and the International Law Association's 2014 declaration of legal principles relating to climate change.[187]

47. He had also considered the law of biodiversity, but had been unable to find any comparable close links. The "biosphere" was a much broader concept than the "atmosphere" and would have unduly expanded the scope of the topic. It had been suggested that the law of armed conflict and air and space law should also have been studied. The former was already mentioned in the commentary to draft guideline 7—which provided that the draft guideline applied only to "non-military" activities[188]—and bore insufficient relation to other parts of the draft guidelines. The latter, meanwhile, had been dismissed as irrelevant to the topic during discussions on draft guideline 2, paragraph 4.[189]

48. He therefore believed that the three areas of law selected were appropriate. That did not mean, however, that other areas were not also relevant, which was why he considered draft guideline 9 to be useful as a general rule that covered other areas or situations in which a conflict of norms might arise. Given that the term "interrelationship" was used as a descriptive notion throughout the report, it had been a mistake to speak of "the principle of interrelationship" in draft guideline 9. The reference should instead have been to "the principles on interrelationship".

49. He did not agree that the concept of mutual supportiveness had no normative value or status. Since it had been widely accepted in relevant treaty provisions and jurisprudence, it was fair to say that, at least in the context of trade and investment, it had acquired the status of a "subsidiary means for the determination of rules of law", in the sense of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. Mr. Saboia had mentioned that, even if mutual supportiveness was not recognized as a legal principle, it provided a useful tool for harmonizing different areas of international law, while Mr. Nolte had stated that some elements of mutual supportiveness should not be dismissed. He agreed that it was not appropriate to use the term "mutual supportiveness" in relation to all the issues dealt with in the report. In the contexts of the law of the sea and human rights law, the expression "in a harmonious manner" seemed preferable. The expression "systemic integration", which had been proposed by some members, was also suitable. Mutual supportiveness had been incorporated as a legal principle in the International Law Association's draft articles on legal principles relating to climate change, which were the fruit of six years of collective hard work by 33 leading academics from 17 different countries.

50. In that connection, some members had raised, either directly or indirectly, an important question of methodology. He believed that the Commission's work should be guided by its statute, article 15 of which

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[187] International Law Association, *Report of the Seventy-Sixth Conference held in Washington D.C., August 2014*, London, 2014, resolution 2/2014, annex, pp. 22–26.

[188] See *Yearbook … 2016*, vol. II (Part Two), p. 178 (para. (5) of the commentary to draft guideline 7).

[189] *Yearbook … 2015*, vol. II (Part Two), p. 23 (draft guideline 2).

provided that, for the purposes of "codification", the Commission should examine "State practice, precedent and doctrine". It was regrettable that, in recent years, there had been a tendency, in the work of the Commission, to undervalue doctrine and academic contributions, a point that he had also made in relation to other topics. He was glad to note that many members had based their arguments and suggestions on relevant writings, from which he had greatly benefited.

51. Many members had suggested that the four proposed draft guidelines should be merged into one, but he had doubts about whether the important issues raised therein could be appropriately addressed in a single guideline. One proposal had been to enumerate the three areas of law discussed in proposed draft guidelines 10 to 12, which did not make sense, in his opinion, as it would invite more questions and might constitute an obstacle to the provision of sufficiently detailed commentaries on each area of law. Another proposal had been to have two guidelines, which would be better than one, but would not overcome the problem of having a simple enumeration of areas of law that deserved greater consideration. However, since the majority of members were in favour of having a single guideline, he had drafted one comprising four simplified paragraphs. He expressed the hope that the Drafting Committee would reach a consensus on the number of guidelines and paragraphs, and would be flexible in that regard, as he had been in the past.

52. He endorsed the suggestion that the title of draft guideline 9 be changed, and proposed "Interrelationship" instead. Some members had stated that the report was unclear regarding the relationship between the proposed draft guidelines and certain articles of the 1969 Vienna Convention. It was, of course, not his intention to rewrite or go beyond the Convention; rather, the purpose of the report was to shed light on the relevance of article 30 and article 31, paragraph 3 (*c*), of the Convention in coping with the issue of conflicting treaties. Like a number of other members, he believed that it was important to refer to those two provisions in the draft guideline.

53. A concern had been expressed that the word "develop" in the expression "develop, interpret and apply the rules of international law" might be interpreted as imposing an obligation on States to legislate, but that had not been his intention. However, he shared the view that the development of rules of international law should be treated slightly differently to their interpretation and application. The words "avoiding" and "preventing", as alternatives to "resolving" conflict, were both acceptable to him. The issue of cooperation was not mentioned as it had already been dealt with in draft guideline 8.[190] The words "good faith", which he had proposed to insert in the past, did not feature as Sir Michael had always opposed such an addition because, in his view, it was to be assumed that the concept of good faith would be applied to all the draft guidelines.

54. Although the proposal by Mr. Aurescu to qualify the phrase "other relevant rules of international law" with the words "to which they may have a direct link" was a good one, the idea was already implicitly conveyed by the word "relevant". Clarifications could be provided in the commentary, if necessary. He was grateful to Mr. Aurescu, whose proposed rewording of draft guideline 9 had been supported by many members and had served as a template for his own proposal. Likewise, he was grateful to Mr. Nolte for his proposal for a new draft guideline that focused on article 30 and article 31, paragraph 3 (*c*), of the 1969 Vienna Convention.

55. On the basis of those considerations, he had revised draft guideline 9, and proposed that it appear as draft guideline 9, paragraph 1. The new text would read:

> *"Draft guideline 9: Interrelationship*
>
> "1. In conformity with the relevant rules on the interpretation of treaties provided by the Vienna Convention on the Law of Treaties, especially article 30 and article 31, paragraph 3 (*c*), and the rules of customary international law on the matter, States are called to develop, interpret and apply the international law rules relating to the protection of the atmosphere by using the method of systemic integration and the principle of harmonization in relation with other relevant rules of international law, with a view to preventing or resolving conflicts between these rules, if such conflicts arise, for the purpose of ensuring an effective protection of the atmosphere."

56. Regarding draft guideline 10, several members had pointed out the ambiguity of its wording, including the words "appropriate measures". Several other members had also pointed out that the citation from the *chapeau* of article XX of GATT might give the impression that the draft guideline served to justify the domination of free trade interests over environmental concerns, which had not been his intention. On the contrary, his intention had been to place both interests on an equal footing, and then try to reconcile them in a mutually supportive manner. It would thus probably be desirable to address that proposition concerning equal footing at the beginning of the draft guideline.

57. The concept of mutual supportiveness seemed to be well settled in trade law and, perhaps to a slightly lesser degree, in investment law. One member had described the concept as an aspiration short of a legal principle, in some of the free trade agreements to which he had referred. In his view, the concept of mutual supportiveness could still be employed in the context of trade and investment as a tool for coordination and interpretation. It had been encouraging to hear about recent arbitral decisions in the field of investment law, which echoed the statement from the *United States–Standards for Reformulated and Conventional Gasoline* case, "not to be read in clinical isolation from public international law". That might warrant a reference to systemic integration as well as to mutual supportiveness in the draft guideline.

58. He had thus revised draft guideline 10 accordingly and proposed that it appear as draft guideline 9, paragraph 2. The new text would read:

[190] *Ibid.*, pp. 24–25 (draft guideline 5). In 2016, draft guideline 5 was renumbered as draft guideline 8 (see *Yearbook … 2016*, vol. II (Part Two), p. 172, footnote 1210).

"2. Bearing in mind the importance of reconciling the interests of trade and investment, on the one hand, and those for protection of the atmosphere on the other, States should develop, interpret and apply relevant rules of international trade and investment law and relevant rules of international law relating to the protection of the atmosphere in a mutually supportive and integral manner."

59. In connection with draft guideline 11, on the law of the sea, several members had wondered whether the intent of the fourth report was to address marine pollution. That was certainly not the case. The focus of the report was that there were close linkages between the atmosphere and the oceans that should be borne in mind, and that were reflected in the United Nations Convention on the Law of the Sea and related instruments. He was certainly not proposing the establishment of a new law on marine pollution.

60. Most of the causes of marine pollution were land-based pollution, some of which reached the oceans from or through the atmosphere. In that sense, the relationship between the atmosphere and the oceans was unilateral, because human activities on the oceans that polluted the atmosphere were limited. Greenhouse gas emissions from ships were not the main source of climate change, as one member had asserted, but one of the main sources of climate change. He was not sure to what extent platforms for oil and gas drilling were responsible for polluting the atmosphere, although they undoubtedly posed a serious problem for marine pollution.

61. Draft guideline 11, paragraph 2, on the issue of sea-level rise, had been added to reflect the strong desire of the small island States expressed over the years in the Sixth Committee. There were around 40 small island States that were States Members of the United Nations, some of which were seriously affected by sea-level rise. He agreed with the many members who had indicated that the issue of sea-level rise should be treated as a separate topic. However, in the absence of any relevant treaty practice, it was difficult to foresee how the subject would come under the Commission's normal mandate of codification and progressive development of international law. The topic could be taken up by the Commission if a request was received from the General Assembly or under the procedure laid down in article 17 of the Commission's statute.

62. In any event, it would be some time before any law-making exercise on the sea-level rise could be started either by the Commission or by another competent organ. He therefore urged the Commission to agree to retain a provision on the sea-level rise, at least in the preamble to the draft guidelines, so as to send a message to the international community that the Commission was genuinely concerned by the important issue. As one member had cautioned, the issue did not concern only the delimitation of baselines, but also the loss of land and the potential loss of statehood in some extreme cases, resulting in climate refugees and mass migration.

63. Several members had asked why the matter should be limited to small island States and low-lying States, as any coastal State could be affected by the rising sea level. Nevertheless, he agreed with those who feared that broadening the scope of the provision might lower the level of attention to the most vulnerable and seriously affected group of States. Based on those considerations, he had revised the two paragraphs in draft guideline 11, and proposed that they appear as draft guideline 9, paragraph 3, and the fifth preambular paragraph, respectively. Paragraph 3 would read:

"3. Recognizing the close interaction between the atmosphere and the oceans, States should interpret and apply relevant rules of the law of the sea and relevant rules relating to the protection of the atmosphere in a harmonious manner."

The fifth preambular paragraph would read:

"*Also aware* of the situation of small island States and low-lying States with regard to the baselines for the delimitation of their maritime zones, potential loss of Statehood in some extreme cases and the protection of the affected people including migration,".

64. With regard to draft guideline 12, doubts had been expressed about the relevance to the topic of the interrelationship of the law on the protection of the atmosphere with human rights law. He endorsed the suggestion that if the intention was to remind States to take human rights norms into account when "developing, interpreting and applying the rules and recommendations relevant to the protection of the atmosphere", the provision could be reformulated to make that clearer. It had been recommended that the draft guideline provide more concrete conditions for international human rights law to be applicable to the protection of atmosphere, which, in his view, should be reflected in the commentary to the draft guideline. Other points to be reflected in the commentary suggested were: the rights of indigenous people in the light of the jurisprudence of regional courts and bodies, the fact that the most challenging problem to the interrelationship between human rights law and the protection of the atmosphere was extra-jurisdictional application and that the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was relevant in that regard.

65. Concerning draft guideline 12, paragraph 1, it had been suggested that, the words "make best efforts" be deleted and that the word "view" be replaced with the word "purpose". With regard to draft guideline 12, paragraph 2, one member had said that he was in favour of a formulation that placed emphasis on vulnerable people and those in small island States, but had questioned whether the draft guideline was the best place to tackle those issues, while another member had observed that it seemed to be useful as a matter of policy objective and progressive development of international law. It had been pointed out that human rights were vested in individuals, not groups of people, and thus the wording "the human rights of persons belonging to vulnerable groups" had been suggested, which he endorsed.

66. He did not agree that draft guideline 12, paragraph 4, was not necessary because the interests of future

generations were covered by draft guideline 6.[191] That provision dealt with the utilization of the atmosphere, and was not, at least directly, concerned with human rights. One member had expressed concern about the standing of persons to bring human rights claims on behalf of future generations, which was precisely why he had used the term "interests" of future generations, instead of "rights". He did not endorse the suggestion to move the whole text of the draft guideline to the preamble. Instead, he had revised the text of draft guideline 12 and proposed that it appear as draft guideline 9, paragraph 4, and the sixth preambular paragraph, respectively. Paragraph 4 would read:

> "4. States should develop, interpret and apply relevant rules of international human rights law in a harmonious manner with rules of international law relating to the protection of the atmosphere. States should give particular consideration to the human rights of persons belonging to vulnerable groups, including indigenous people, people of the least developed developing States and people of small island States and low-lying States, and women, children and the elderly as well as persons with disabilities."

The sixth preambular paragraph would read:

> "*Noting* that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,".

67. With regard to his future work, he did not consider that the suggestion of organizing an informal working group or consultations was helpful. At the present juncture, he had only preliminary ideas about his fifth report. It was not the Commission's practice to control the content of the Special Rapporteur's report before it was drafted. Members could criticize or support the report when it was presented to the Commission. He already had sufficient restrictions under the 2013 understanding, and would appreciate it if members continued to place their confidence in him, as Special Rapporteur, for the final phase of the project. He had tried his best to respond to the concerns and incorporate the suggestions made. Most members seemed to be in favour of referring all the draft guidelines in the fourth report to the Drafting Committee, on the understanding that they would be simplified and merged. He therefore recommended that the Commission refer to the Drafting Committee the four draft guidelines in the fourth report, on the understanding that they would be consolidated into one draft guideline, with four substantially simplified paragraphs, and two draft preambular paragraphs, as he had read out.

68. The CHAIRPERSON said he would take it that the Commission wished to refer to the Drafting Committee all the draft guidelines proposed in the fourth report, as well as the revised version of draft guideline 9 and the draft preambular paragraphs proposed by the Special Rapporteur, taking into account all the comments made during the debate.

69. Mr. PARK said that he objected to the referral to the Drafting Committee of the fifth preambular paragraph proposed by the Special Rapporteur. There should be a close relationship between the contents of the draft guidelines and the preamble, which was not the case for the draft fifth preambular paragraph. Issues such as potential loss of statehood and migration of the affected people as a result of the sea-level rise were serious, but the draft guidelines did not propose any concrete solution.

70. Mr. VALENCIA-OSPINA said he supported the idea that the new texts proposed by the Special Rapporteur be referred to Drafting Committee, on the understanding that they would not override the proposals made by members of the Commission during the debate—they should also be taken into account by the Drafting Committee.

71. Ms. ORAL said that she appreciated the Special Rapporteur's efforts to take into account all the comments made by members of the Commission and to condense the four draft guidelines into one. She supported the referral to the Drafting Committee of all the draft guidelines, including the revised version of draft guideline 9 proposed by the Special Rapporteur. She understood Mr. Park's concern about the need to refer to sea-level rise in a draft guideline, since she had had similar concerns. However, in view of the clarifications provided by the Special Rapporteur, she suggested that it could be left to the Drafting Committee to fine-tune the language of the relevant text to accommodate those concerns.

72. Mr. HMOUD said that he was in favour of referring the revised text of draft guideline 9 and the two draft preambular paragraphs proposed by the Special Rapporteur to the Drafting Committee. Like Mr. Park, he had some issues with the texts as currently worded, but considered that they could be resolved in the Drafting Committee.

73. Mr. CISSÉ said that he had no difficulty with the referral of the fifth preambular paragraph to the Drafting Committee, as the concern he had had relating to the States affected was covered in the text of the paragraph.

74. Sir Michael WOOD, after thanking the Special Rapporteur for trying to accommodate all views expressed, said he agreed that all the draft guidelines and the proposals discussed in plenary session, including the new texts proposed by the Special Rapporteur, should be referred to the Drafting Committee. As always, when proposals were referred to the Drafting Committee one could not be sure what the outcome would be. So, in his view, the Commission was not deciding at the present stage whether there would be four draft guidelines or one draft guideline and two additional draft preambular paragraphs.

75. Ms. ESCOBAR HERNÁNDEZ said that, first, she wished to express her appreciation to the Special Rapporteur for his efforts to reflect all the comments made during the plenary debate, in recognition of the Commission's collegiate approach to its work. Second, and, in her view, more importantly, the Special Rapporteur could simply have presented his proposal for new texts at the Drafting Committee stage; yet, in the interests of transparency, he had presented them in plenary session before their referral to the Drafting Committee. She further recalled that, in accordance with established practice, the referral of original or alternative proposals to

[191] *Yearbook … 2016*, vol. II (Part Two), p. 177 (draft guideline 6).

the Drafting Committee should be at the Special Rapporteur's initiative, although the Drafting Committee should take into account all the comments and proposals made by other members too. She was therefore in favour of referring all the texts proposed to the Drafting Committee for consideration.

76. Mr. MURASE (Special Rapporteur) said he agreed that all four draft guidelines should be referred to the Drafting Committee, on the understanding that his proposal for a revised version of draft guideline 9 and two draft preambular paragraphs as well as all other proposals made would be considered by the Drafting Committee. He had presented his proposals for new texts in the light of the request of Sir Michael and other members to present them in plenary session.

77. The CHAIRPERSON said he would take it that the Commission wished to refer to the Drafting Committee all the draft guidelines proposed in the fourth report, on the understanding that the Special Rapporteur's proposal to have one consolidated draft guideline 9 and two draft preambular paragraphs, as well as all the comments made during the debate, would also be taken into consideration.

It was so decided.

The meeting rose at 12.55 p.m.

3360th MEETING

Thursday, 18 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, 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. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of protection of the atmosphere was composed of the following members: Mr. Murase (Special Rapporteur), Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

[*] Resumed from the 3355th meeting.

Immunity of State officials from foreign criminal jurisdiction[192] (A/CN.4/703, Part II, sect. E,[193] A/CN.4/701,[194] A/CN.4/L.893[195])

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

2. The CHAIRPERSON invited the Special Rapporteur to introduce her fifth report on the topic of immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

3. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the Commission had begun its consideration of her fifth report on the topic at the previous session,[196] but, since the report had at the time been available in English and Spanish only, it had been decided that the consideration of the report would, on an exceptional basis, be continued and completed at the current session. Although she had already introduced the report at the previous session, she would briefly do so for a second time, primarily for the benefit of newly elected Commission members, but also to take into account the views that had been expressed by Commission members at the previous session and by States in the Sixth Committee.

4. The fifth report was dedicated to a study of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, an aspect of the topic that had been the subject of recurrent debate in the Commission and in the Sixth Committee and one that had, over the years, given rise to diverse and often opposing views. In the preparation of the report, she had continued to follow the same methodology as for her previous reports,[197] which was based essentially on an analysis of State practice, international jurisprudence and the previous work of the Commission. In addition, she had taken into account the information that States had provided in response to questions posed by the Commission. A total of 19 States had submitted written comments, which could be consulted on the Commission's website.[198] She had also taken into account the oral statements made by delegations in the Sixth Committee, in particular those made in 2014 and 2015.

[192] 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) and corrigendum, pp. 143 *et seq*., para. 132). At its sixty-eighth session (2016), the Commission provisionally adopted draft article 2 (*f*) and draft article 6 and the commentaries thereto (*Yearbook … 2016*, vol. II (Part Two), pp. 212 *et seq*., para. 250).

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

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

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

[196] See *Yearbook … 2016*, vol. I, 3328th meeting, pp. 329 *et seq*., paras. 2–19.

[197] *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).

[198] See the Analytical Guide to the Work of the International Law Commission: http://legal.un.org/ilc/guide/gfra.shtml.

5. Her fifth report formed a unitary whole with her four previous reports and, as such, should be read and understood together with them. Draft article 7, for example, acquired its full significance in the light of the draft articles that had provisionally been adopted thus far.

6. Turning to the main substantive and methodological issues in the report, she said that it had three aims: to analyse practice with a view to determining 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; to identify such situations, if they existed, and their legal basis; and, in the light of that analysis, to propose a draft article.

7. One of the main points that she wished to address concerned the term "limitations and exceptions", which reflected the various arguments that had been made in practice to support the non-application of immunity. Some crimes were understood not to be official acts or acts ostensibly connected with official status or simply not to be part of State functions, and they gave rise to limitations, whereas others were understood to be exempt from the regime of immunities because they violated *jus cogens* norms, internationally recognized human rights or, in a more general sense, the legal values and principles of contemporary international law, and they gave rise to exceptions. Thus, a limitation to immunity was identified as intrinsic or directly related to immunity or to one of its normative elements, whereas an exception was identified as extrinsic to immunity and to its normative elements, but as nevertheless belonging to the international legal system and thus as an element that should be taken into account in the determination of the applicability of immunity in a specific case.

8. That distinction served as a useful methodological tool with which to study the practice of the non-application of immunity and the legal basis for it. In any event, it should be noted that the two categories had similar effects in practice, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in certain circumstances. That diversity of approaches for understanding and explaining the situations in which immunity did not apply was reflected in practice and in the positions adopted by Commission members and by States in the Sixth Committee and was captured in the comprehensive formulation used in draft article 7, namely "Crimes in respect of which immunity does not apply".

9. Another point that she wished to address concerned the need to deal with limitations and exceptions under the specific regime of immunities and within the international legal system as a whole.

10. The issue of limitations and exceptions to immunity could not be dealt with in isolation. Indeed, limitations and exceptions acquired their full significance in the context of the study of immunity that had been undertaken in previous reports, which had made it possible to reveal the legal nature of that institution in contemporary international law and to identify the essential elements that had to be taken into account when examining the issue. Those elements included the interrelationship between immunity and jurisdiction and the notion of immunity as an exception to the exercise of jurisdiction; the notion of immunity as a procedural institution and its effect in some situations on the responsibility of the official; the distinction between the immunity of State officials from foreign criminal jurisdiction and the immunity of the State *stricto sensu*; and the distinction between the immunity of State officials before foreign criminal courts and their immunity before international criminal courts or tribunals.

11. In her fifth report, the Special Rapporteur considered the issue of limitations and exceptions to immunity on the basis of a view of international law as a normative system. From that standpoint, the immunity of State officials was a useful and necessary institution for ensuring that certain values and legal principles of the international legal order, in particular the principle of sovereign equality, were respected.

12. At the same time, however, the immunity of State officials from foreign criminal jurisdiction, as a component of that system, had to be interpreted in a systemic fashion. That systemic approach required that other institutions that were also related to the principle of sovereignty, especially the right to exercise jurisdiction, be taken into account, together with other sectors of the international legal order that reflected and embodied other values and principles of 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 Commission's development of a set of draft articles meant 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 in significant sectors of the international legal order, whose development in recent decades was one of its defining characteristics.

13. That systemic understanding of international law made it necessary to take into account the relationship between immunity and *jus cogens*, the values and principles of international law, the legal dimensions of the concepts of impunity and accountability, the fight against impunity, the right of access to a court, victims' right to redress and the State's obligation to prosecute certain international crimes.

14. The last point that she wished to address concerned the role that the Commission attributed to State practice in its work. As she had noted in all her reports, the study of practice was an essential basis of the Commission's work. No theoretical argument, personal preference or ideology could replace practice. On the contrary, practice was the necessary starting point for any rigorous study capable of facilitating the formulation of proposals for codification and progressive development. It was only after the completion of such a study that an analysis that incorporated theoretical components and that suggested options for a particular issue could be carried out, especially if the issue was a controversial one. However, the primacy of practice should be understood in its proper context. Practice should be duly taken into account, but it must also be interpreted and integrated into the international legal system. Or, to put it more simply, practice was neither neutral nor the sole basis on which decisions should be taken.

15. That had been her approach in the fifth report. It had been her clear intention to identify whether there were applicable rules of customary international law that could be codified and, if so, whether there was sufficient practice to establish the existence of a trend that would allow proposals for progressive development to be made. With regard to the existence of a rule of customary law, the report had taken into account the Commission's ongoing work on the identification of customary international law. With regard to the identification of a trend, the report was also anchored in an analysis of practice.

16. Of course, that study of practice could not be limited to international jurisprudence. Such an approach might be criticized as reductionist. On the contrary, in relation to the topic under consideration, the concept of practice should also include national legislation and the decisions of national courts, which, it must be remembered, were the bodies before which any issue related to immunity from jurisdiction was raised and whose decisions undoubtedly constituted an essential element of State practice, especially if it was borne in mind that, in accordance with the principle of separation of powers, such bodies occupied a central and privileged position in terms of the sovereign authority of the State to exercise jurisdiction.

17. On the basis of that study of practice, it was possible to conclude that the commission of international crimes must now be regarded as a limitation or an exception to immunity based on a rule of international customary law. Even if it were possible to question the existence of a relevant practice and *opinio juris* giving rise to an international custom, it did not seem possible under any circumstances to deny the existence of a clear trend in favour of certain limitations and exceptions, which would reflect an emerging custom.

18. The Commission should carry out its work in line with its mandate understood as a whole. That meant that it could, and should, address both codification and progressive development when a topic involved both components. That was certainly the case with respect to the immunity of State officials from foreign criminal jurisdiction and the issue of limitations and exceptions in particular.

19. Turning to draft article 7, she said that its three paragraphs set out all the elements that defined, in an integrated manner, the regime of limitations and exceptions to immunity.

20. Paragraph 1 sought to identify, in a general manner, the crimes in respect of which immunity did not apply. It had been drafted on the model of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The expression "does not apply" was intended to take account of the various views put forward thus far on the classification of each of the situations mentioned in the report as either a limitation or an exception. Moreover, it faithfully reflected the effects of limitations and exceptions to immunity. The formulation was especially appropriate in the case of international crimes, since, while it was widely debated whether such crimes could be committed in an official capacity, there was broad support for the view that they were not covered by immunity. In addition, she had chosen to define the situations in which immunity did not apply by reference to the crimes over which jurisdiction was sought rather than by reference to the proceedings in which those crimes could be examined.

21. The paragraph addressed three instances in which immunity did not apply, namely crimes under international law, crimes of corruption and crimes covered by the so-called "territorial tort exception". With regard to crimes under international law, she had chosen to refer explicitly to genocide, crimes against humanity, war crimes, torture and enforced disappearances. Those were the crimes that occurred most frequently in practice, were recognized in treaties and whose classification as crimes under international law was widely accepted by the international community.

22. Paragraph 2 defined the scope of limitations and exceptions. The provisions of paragraph 1 would not apply to persons who enjoyed immunity *ratione personae*—that is, Heads of State, Heads of Government and Ministers for Foreign Affairs—during their term in office. Consequently, limitations and exceptions to immunity would apply only to immunity *ratione materiae* as already defined by the Commission. The exclusion of those three categories of State officials was based on practice and had been confirmed by the International Court of Justice. However, it should be borne in mind that limitations and exceptions were inapplicable to Heads of State, Heads of Government and Ministers for Foreign Affairs only during their term of office, after which time the provisions of paragraph 1 would once again become applicable.

23. Lastly, paragraph 3, which took the form of a "without prejudice" clause, set out two scenarios in which immunity would not apply owing to the existence of special regimes. The first scenario involved the existence of a treaty in force between the forum State and the State of the official under which immunities of State officials could not be invoked before their respective criminal courts. The second involved a general obligation on the forum State to cooperate with an international tribunal. The regimes referred to in paragraph 3 reflected examples found in practice. Paragraph 3 (*b*), in particular, took into consideration the complex situation arising from the application of article 98, paragraph 1, of the Rome Statute of the International Criminal Court, which had been reflected in terms of the immunity of State officials from foreign criminal jurisdiction in the South African courts in *The Prosecutor v. Omar Hassan Ahmad Al Bashir*[199] and which had even led to the decision of the Government of South Africa to withdraw from the Statute.

24. As she had indicated on several occasions, the issue of limitations and exceptions to immunity was one of the most controversial aspects of the topic. Nevertheless, it was an aspect to which both Commission members and States continued to attach great importance. At the previous session, several Commission members had been

[199] Decision of 15 March 2016 of the South Africa Supreme Court of Appeal (*Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre and Others*) on the appeal by the Government of South Africa of the decision of 24 June 2015 by the High Court of South Africa (Gauteng Division, Pretoria) in *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*.

able to express their views on the issue both in formal statements and in mini-debates. Those views, in particular those expressed by Commission members, formed part of the general debate on the topic and would have to be taken into account in the final decision that the Commission would adopt at the current session.

25. She wished to make two comments in that regard. First, Commission members were divided in their views, and it was not yet possible to establish whether there was a majority view on the issue. Second, the debate on the topic had once again reopened the discussion on the scope of the Commission's mandate, in particular with regard to the role assigned to codification and progressive development and the manner in which *lex lata* and *lex ferenda* should be understood.

26. Several delegations in the Sixth Committee had also expressed their views on the topic during the seventy-first session of the General Assembly in 2016. A few had indicated that they would refrain from commenting on the question of limitations and exceptions to immunity until the Commission had concluded its discussion of the fifth report. The remainder, while indicating that their observations were of a preliminary nature pending completion of the debate, had commented on various issues addressed in the report and, at times, on draft article 7.

27. A number of delegations had unequivocally expressed the view that limitations and exceptions did not exist in respect of either immunity *ratione personae* or immunity *ratione materiae*, while others had expressed that view less categorically. Some delegations had declared their support for the differentiated treatment of immunity *ratione personae* and immunity *ratione materiae* with regard to limitations and exceptions, while several others had strongly supported the existence of limitations or exceptions in respect of immunity *ratione materiae*, particularly with regard to international crimes. The view had also been advanced that international crimes could not be understood as official acts and were therefore not covered by immunity *ratione materiae*.

28. Some delegations had expressed scepticism about the inclusion of crimes of corruption as exceptions or limitations to immunity. The view had also been expressed that acts of corruption were carried out for personal benefit and were therefore limitations to immunity and not covered by it. A number of delegations had expressed an interest in analysing in greater depth the subject of crimes of corruption in relation to immunity.

29. There had been general agreement concerning the non-application of limitations and exceptions in the case of immunity *ratione personae*.

30. A few delegations had emphasized the need to take into account the fact that immunity was based on the principle of the sovereign equality of States, that its objective was to preserve the stability of international relations and that, consequently, limitations and exceptions were to be avoided. A number of delegations had expressed the need to strike a balance between respect for the principle of sovereign equality—and the maintenance of stable international relations—and the fight against impunity. According to several delegations, it was necessary for the work of the Commission to take into account the advances that had been made in recent decades in international criminal law but to ensure that, in so doing, it did not undermine those advances. A few delegations had maintained that, in dealing with immunity and possible limitations and exceptions, the Commission should confine itself to codification, while a number of others had taken the view that the Commission should exercise both aspects of its mandate, namely, the progressive development and codification of international law.

31. Delegations had drawn attention to the need for caution in dealing with the question of limitations and exceptions to immunity. Some had also drawn attention to the risk that criminal jurisdiction might be exercised over a foreign official for political ends or without procedural safeguards being adequately respected. According to the delegations in question, in order to avert those risks, it was necessary to establish appropriate procedural mechanisms; a few others had highlighted the importance of examining the procedural aspects of immunity. Lastly, nearly all States that had participated in the debate had highlighted the importance of the topic, in general, and the question of limitations and exceptions to immunity, in particular.

32. The views expressed by delegations clearly illustrated the controversial nature of the topic, which, moreover, involved core categories of contemporary international law and touched on interests of major importance to States.

33. She recalled that, at the Commission's previous session, Mr. McRae had accurately identified the challenges posed by the question of limitations and exceptions to immunity, especially with regard to the role to be assigned to *lex lata* and *lex ferenda*, and the relative weight to be given to codification and progressive development in the Commission's work on the topic.[200] At the current session, it was for the Commission to respond to the question raised on that occasion by Mr. McRae, namely whether it would embrace the developing trend in international law identified by the Special Rapporteur or whether it would seek to halt it.

34. Regarding the Commission's future work on the topic, her intention was to hold informal consultations during the second part of the session in order to study various procedural aspects relevant to the topic, for which purpose she proposed to distribute a short working paper in due course. She planned to submit her sixth and final report on the topic for the Commission's consideration during its seventieth session, with a view to concluding the debate on the topic and adopting the draft articles on first reading during that session.

35. Mr. PARK said that the question of limitations and exceptions to immunity was one of the most difficult aspects of the Commission's work on the topic. The question was particularly important for the Republic of Korea, where national law provided for criminal jurisdiction

[200] See *Yearbook … 2016*, vol. I, 3331st meeting, p. 357, paras. 53–54.

over all foreigners who committed serious international crimes outside the territory of the State but who were present in it, regardless of their official status. However, it was uncertain whether high-ranking State officials could enjoy immunity from such jurisdiction, since the courts had never dealt with such cases. In that context, the work of the Commission was very important.

36. At the previous session, while a number of members had supported the Special Rapporteur's proposition that the commission of international crimes could constitute an exception to the immunity of State officials from foreign criminal jurisdiction under international customary law, others had taken the view that no such exception existed. For his part, he considered that work on the topic should take account of both the progressive development and codification of international law. The Commission's mandate was to identify existing international law and then to decide to what extent it was necessary to incorporate *lex ferenda* provisions into it. In that regard, the starting point for the Commission's work was existing international law. In its examination of the topic, the Commission must, first of all, establish the relevant existing international law and then take into consideration the *lex ferenda*. When considering the *lex ferenda* of immunity, the Commission must above all take into account the protection of human rights. Ultimately, he was in favour of striking a balance between *lex lata* and *lex ferenda* in the draft articles, and it was important not to confuse the two.

37. The Special Rapporteur concluded in paragraph 184 of her fifth report that there were sufficient elements pointing to the existence of a customary norm that recognized international crimes as a limitation or exception to immunity. She argued that there were limitations or exceptions because there was no consistent practice against the non-applicability of such immunity. Given that the immunity of State officials was recognized, in principle, under international law, it was important to ascertain whether there was consistent practice in favour of a limitation or exception. The Special Rapporteur did not appear to have succeeded in justifying her conclusion to that effect; consequently, more research was needed in order to substantiate that conclusion.

38. Generally speaking, he endorsed the Special Rapporteur's analysis in paragraphs 236 to 242 of her fifth report. However, he disagreed with her assessment of the decision reached by the European Court of Human Rights in the case of *Jones and Others v. the United Kingdom*, from which she inferred a trend not to recognize the immunity of State officials when the latter had committed acts of torture, even though that decision related to civil proceedings. In his view, the Court in its decision did not go so far as to recognize torture as a reason for the non-applicability of immunity, but rather merely observed a trend in the development of international law towards non-applicability, without recognizing the existence of a rule that allowed for a limitation or exception to immunity. It would be wiser to conclude that the Court considered a limitation or exception in the context of torture to fall into the category of *lex ferenda*.

39. In his view, the International Court of Justice and the European Court of Human Rights did not recognize the violation of a *jus cogens* norm as a basis for the non-applicability of immunity. For her part, in paragraph 187 of her report, the Special Rapporteur tended to downplay the value of the decisions of those courts, arguing that their decisions dealt with State immunity, not the immunity of State officials, and that their decisions could only be considered a "subsidiary means" of determination of the existence of a practice accompanied by *opinio juris* that was relevant as evidence of a customary norm and that they could never replace national courts in the process of the formation of custom.

40. To his mind, the Special Rapporteur provided no convincing explanation as to why limitations or exceptions to the immunity of State officials should be distinguished from limitations or exceptions to State immunity. Both types of immunity were procedural systems whose aim was to protect the sovereign equality of the State.

41. The value of judicial decisions as a subsidiary means under Article 38, paragraph 1, of the Statute of the International Court of Justice should not be underestimated. Those decisions served as important evidence of the formation of customary international law. In certain cases, it might be more relevant to examine the decisions of the International Court of Justice than to identify the practice of some States.

42. His own position was that it was difficult to conclude definitively that there already existed a limitation or exception to the immunity of State officials before national courts based on the commission of serious international crimes or crimes of corruption. Given the uncertainty of that situation, it would be better to consider such a limitation or exception as *lex ferenda*. The question then arose as to what extent *lex ferenda* should be reflected in the Commission's work on the topic. He had three comments in that regard.

43. First of all, in the twenty-first century, it could no longer be denied that the protection of persons against widespread and grave violations of human rights was becoming an essential value that the international community must pursue. In that regard, he fully agreed with the position taken by the Special Rapporteur in paragraphs 191 to 205 of her report.

44. Second, he supported the second approach mentioned in paragraph 157 of her report regarding the relationship between international criminal courts and national courts. When taking into account the development of international criminal law, it was also necessary to review the system of immunity before national courts. There was a growing demand throughout the world for human rights protection and for combating impunity; the system of immunity should therefore not hinder the protection of the common interests of the international community. The Commission should take that factor into account in its work as a matter of *lex ferenda*.

45. Third, a change in the scope of the functional immunity of State officials, immunity *ratione materiae*, from foreign criminal jurisdiction was inevitable and would not conflict with contemporary thinking, in the same way that State immunity was evolving from an

absolute concept to a relative one. Such a trend had been confirmed not only in national laws, for example in Belgium, the Netherlands and Spain, but also in the opinions of publicists. One illustration of such a change was the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, which had been adopted by the Institute of International Law in 2009.[201] Article III, paragraph 1, of the resolution clearly indicated the following: "No immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes."

46. Turning to draft article 7, he said that he supported the Special Rapporteur's decision not to refer to "limitations" or "exceptions" in the title, but to use wording reminiscent of the phrase "proceedings in which State immunity cannot be invoked", which was to be found in the United Nations Convention on Jurisdictional Immunities of States and Their Property. Genocide, crimes against humanity, war crimes, torture and enforced disappearances were all serious international crimes and therefore constituted a limitation or exception to immunity. Enforced disappearances, notwithstanding more limited State practice in that respect, merited inclusion in the list because it was today deemed to be a crime against humanity. He agreed with those Commission members who had stated in 2016 that it would have been preferable to include the crime of aggression in paragraph 1 (*a*), because it was a breach of *jus cogens* norms. On the other hand, there was insufficient evidence to support the retention of crimes of corruption in the draft article, since none of the conventions combating corruption contained an express provision on the non-applicability of immunity to such crimes. As far as paragraph 1 (*c*) was concerned, wide acceptance of the territorial tort exception meant that it could be said to exist in current international law.

47. With regard to paragraph 2, he agreed that a distinction should be drawn between immunity *ratione personae* and immunity *ratione materiae*. If the Commission were to conclude that a person enjoying immunity *ratione materiae* forfeited that immunity if he or she committed certain serious crimes, that would indubitably have a bearing on other immunity regimes, such as that of diplomats, which the Commission had excluded from the scope of the draft articles.

48. When drawing up a list of crimes to which immunity would not apply, the Commission must establish a balance between *lex lata* and *lex ferenda*. The interests of the international community would be compromised if it failed to make provision in international law for a response in the event of State officials committing genocide, crimes against humanity or other acts which violated *jus cogens* norms. No criminal could hide behind the screen of immunity that international law afforded to States or in respect of official acts.

49. Sir Michael WOOD said that he had a different opinion on many of the core ideas just set out by the Special Rapporteur. He very much agreed with the thoughtful statements which had been made by Mr. Huang and Mr. Singh at the previous session. He recalled that the previous year the Special Rapporteur had indicated that it might be advantageous to consider procedural aspects in parallel with exceptions. It was unfortunate that the Commission had not yet received the Special Rapporteur's sixth report on procedural aspects and procedural guarantees of the rights of State officials subject to foreign criminal jurisdiction. Procedural issues were of fundamental importance and were closely linked to questions of exceptions. Since their consideration must go hand in hand, it was impossible to make informed decisions on possible exceptions at the current session.

50. The Sixth Committee debate on the fifth report had been illuminating. It had shown that States expected the Commission to proceed with particular caution and to distinguish between existing rules of international law and proposals for new legal rules. Such a distinction was particularly important for States where the courts directly applied rules of existing customary international law. In that connection, he drew attention to paragraphs 51 and 52 of the topical summary of the discussion held in the Sixth Committee of the General Assembly during the seventy-first session, prepared by the Secretariat.[202]

51. Commenting generally on the methodology employed for the current topic and in particular for the issue of exceptions, he underscored the fact that immunities played a vital role in international relations. Provision had been made for them in long-standing, fundamental rules of international law, and attempts to curtail or remove them would pose considerable risks to the international order and to peaceful relations among States. The Commission must therefore strive to strike a proper balance between the need to punish perpetrators of crimes and respect for the sovereign equality of States. The way to do that was first to clearly distinguish between the existing law and possible new rules of law. Failure to do so would sow confusion and might lead to abuses and violations of existing law, which could potentially give rise to serious tension between States. It would be irresponsible of the Commission to foster such tensions.

52. Second, a balance could also be struck through the identification and development of proper procedural safeguards against abuse or misuse of any exceptions to immunities. For that reason, it would be useful to have the views of the current Special Rapporteur on the contents of subparagraphs 61 (*a*), (*e*), (*f*), (*g*), (*h*) and (*i*) of her predecessor's well-received third report[203] and on his conclusions with regard to waiver, all of which were well substantiated and closely related to possible exceptions. States were keen to have such safeguards put in place in order to avoid the harmful effects of politically motivated prosecution activities.

53. His first general comment on the fifth report was that very useful material was already available on the matters raised therein, such as the memorandum by the

[201] Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), pp. 226–227; available from: www.idi-iil.org, *Resolutions*.

[202] Document A/CN.4/703, available from the Commission's website, documents of the sixty-ninth session.

[203] *Yearbook … 2011*, vol. II (Part One), document A/CN.4/646 (third report of the first Special Rapporteur, Mr. Kolodkin).

Secretariat,[204] the first Special Rapporteur's reports, especially his second report,[205] and the summary records of the debates in the Commission[206] and the Sixth Committee in 2011 and 2016. The fifth report should not be read in isolation.

54. His second general point was that, although chapter I, section A, of the fifth report was entitled "General considerations" it did not set out any substantive general considerations. The list of publications on the subject contained in the first footnote to paragraph 12 was highly selective. The resolutions of the Institute of International Law mentioned in that paragraph had been controversial and had not received much acknowledgement from States. Each of the court decisions to which reference was made addressed very different points. In other words, none of the materials cited in the report told the Commission much.

55. Section B of chapter I disregarded the fact that within the Commission and the Sixth Committee there had been some strong disagreement with the Special Rapporteur's earlier reports. For example, she had not acknowledged his own position that the "values and legal principles that are affected by immunity" of which she had spoken in her preliminary report were vague and entirely subjective and, as such, could not be a basis for serious work by the Commission. A clear analysis of all relevant State practice in relation to each specific exception would have been more useful than the scattering of explanatory material through the report under consideration.

56. Third, although he did not intend to comment in detail on the wealth of theoretical questions raised in the report, as they were of no great significance for the decisions which the Commission would have to take, his silence should not be taken as agreement with the Special Rapporteur.

57. One of those questions was the distinction between limitations and exceptions. According to the Special Rapporteur, limitations were related to normative elements, while exceptions were defined by external elements. However, the practical significance of that distinction was unclear, perhaps because of the terminology employed in the report. Although the Special Rapporteur seemed to have in mind what her predecessor had more simply termed exceptions and absence of immunity, she had a much broader understanding of "exceptions". In her view, compliance with the values and legal principles of international law as a whole and the need to avoid undesired effects in certain areas of international law would constitute the starting point for defining exceptions to immunity. Such a subjective approach was certainly not a sound basis for establishing *lex lata* or making proposals for new law.

58. The Special Rapporteur had suggested that, since for the purposes of the draft articles it was unnecessary to maintain the distinction between limitations and exceptions, which hardly existed in practice, they could be subsumed under the umbrella term of "non-application of immunities". However, that approach should be taken only if the Commission was unable to agree on how to distinguish between limitations and exceptions. He believed that such a distinction was possible and, for that reason, he would prefer not to deal with them in one provision.

59. The two claims advanced in the report in support of draft article 7, paragraph 1 (*a*), namely that it reflected an existing rule of customary international law and that there was a majority trend towards such a rule, were inconsistent and he disagreed with both. On the contrary, he agreed with the conclusion drawn in paragraph 90 of the former Special Rapporteur's second report which the current Special Rapporteur had noted in paragraph 16 of her fifth report—that there was no customary norm, or trend towards the establishment of such a norm, making it possible to assert that there were exceptions to immunity—because in fact there was no general practice establishing any such exceptions or adequate evidence of their acceptance as law.

60. He had expected the Special Rapporteur to propose that the Commission recommend to States in the General Assembly that they should consider adopting treaty-based rules—with the essential procedural safeguards—embodying certain exceptions to immunity *ratione materiae* as new rules of law which States could adopt, modify or reject. He would not have been opposed to working on such a proposal for new law. However, the Special Rapporteur appeared to claim in her fifth report that such exceptions were or might already be customary international law, whereas in 2016 many States in the Sixth Committee had noted that this was not the case. The methodology of the analysis in paragraphs 181 to 189 and the specific evidence relied on therein were therefore unconvincing.

61. As for methodology, the Special Rapporteur purported to invoke elements from the Commission's work on the topic "Identification of customary international law", but her approach had little to do with it. An examination of the various materials to which she referred made it clear that they did not support her thesis. The judgment in the *Bouterse* case had been set aside by the Supreme Court of the Netherlands and the *Hailemariam* case seemed to be irrelevant, since it involved an Ethiopian national.

62. As for the core arguments for the existence of an exception to immunity as a rule of customary international law when international crimes had been committed, the Special Rapporteur claimed that there was a trend towards such an exception in national courts, although there was no evidence of any such a trend and she contradicted that claim in paragraph 220 of the report, which pointed to a paucity of practice. She also maintained that national laws had gradually included that exception, but paragraphs 42 and 44 contradicted that idea. The implementing laws of the Rome Statute of the International Criminal Court were of dubious relevance, as they had in principle been enacted solely for the purposes of that treaty. The Special

[204] 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).

[205] Reports of the first Special Rapporteur, 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).

[206] See *Yearbook … 2011*, vol. I, and *Yearbook … 2016*, vol. I.

Rapporteur also seemed to rely on the conclusion of treaties criminalizing specific conduct and providing for individual criminal responsibility. But, as the International Court of Justice had explained in the case concerning the *Arrest Warrant of 11 April 2000*, such treaties in no way affected immunities under customary international law. In that connection, he drew attention to the Court's findings in paragraph 59 of its judgment of 14 February 2002, where it 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 … These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions".

63. The Special Rapporteur was seeking to bolster that proposed exception by including a section in the report, section A.2 of chapter IV, on what she termed the "systemic foundation" for it. That section, which seemed to simply put forward "various arguments in favour" of the exception, was totally unconvincing and unnecessary for the purposes of determining the *lex lata*. Its very inclusion in the report already showed that the Special Rapporteur was not convinced that the exception formed part of customary international law. Moreover, any true systemic foundation should not only look at arguments in favour, as was done in the report, but should also develop and look at those against, and then try fairly to weigh them.

64. Draft article 7, paragraph 1 (*b*), proposed a limitation or exception for what, in the English translation, read "corruption-related crimes". The French text had similar wording, while the term used in the Spanish text was *los crímenes de corrupción*. He had three general comments in that regard.

65. First, even in Spanish, the expression *los crímenes de corrupción* was extraordinarily vague. What relationship to corruption must an offence have in order to be covered by the proposed exception? What crimes were covered by the Spanish text? Did they include bribery, embezzlement, misappropriation of property, abuse of functions, illicit enrichment and money-laundering? Perhaps, however, there was no need to go into those questions, because the proposed exception in question seemed not to be a very serious one. There was no basis whatsoever for singling out, for the purposes of the present topic, among all transnational crimes, corruption-related crimes.

66. Second, he understood that the Special Rapporteur did not see that draft subparagraph as *lex lata*. That was apparent from paragraph 234 of the report, where she simply stated that it "might be appropriate" to have a provision establishing corruption-related crimes as a "limitation or exception"—which implied, he supposed, that it might not be appropriate.

67. Third, the Special Rapporteur's approach to the issue seemed to be that corruption-related crimes could be either a "limitation" of immunity *ratione materiae* or an exception thereto. Clarity was needed in that regard. If it was a limitation, that type of act would not be covered by draft article 6, paragraph 1,[207] and would therefore fall outside the scope of immunity *ratione materiae*. If it was an exception, it would be necessary to demonstrate the existence of an exception under customary international law or some rationale for distinguishing that crime from all other transnational crimes.

68. In support of draft article 7, paragraph 1 (*b*), the Special Rapporteur referred in paragraph 37 of her fifth report to a number of conventions that criminalized corruption. None of those instruments, however, supported the idea of crimes of corruption as a "limitation or exception". He would draw attention in that regard, for example, to an interpretative note to article 16 of the United Nations Convention against Corruption, which concerned the criminalization of bribery of foreign public officials and officials of public international organizations. That note read: "This article is not intended to affect any immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law."[208]

69. Draft article 7, paragraph 1 (*c*), concerned a possible territorial crime exception. The matter had been carefully considered in Mr. Kolodkin's second report and in the 2008 memorandum by the Secretariat. Such an exception could certainly be considered, although it was controversial, and the Commission would need to address some additional issues not covered in the Special Rapporteur's fifth report, including procedural ones. At the previous session, Mr. Singh had pointed out a whole series of omissions, such as the need to address military activities;[209] he agreed with what Mr. Singh had said on that occasion.

70. Draft article 7, paragraph 2, reflected existing practice and should not give rise to much debate within the Commission. However, in order to express more clearly the important point made therein, it might be preferable to dispense with that paragraph and simply to specify in the title and text of the draft article that the entire draft article only applied with respect to immunity *ratione materiae*.

71. Draft article 7, paragraph 3, raised a number of questions. For example, it was not clear why subparagraph (*a*) was limited to treaties under which immunity would not be applicable, rather than to treaties under which immunity would be applicable, and it was not clear what kind of tribunal was envisaged in subparagraph (*b*).

72. Turning to the future of the topic, he said that it was difficult to see where the topic was heading unless and until the Commission was able to reach agreement on the question of whether to include exceptions to immunity *ratione materiae* at all and, if so, on what basis—*lex lata*

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[207] See *Yearbook … 2016*, vol. II (Part Two), p. 216 (draft article 6).

[208] UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption* (United Nations publication, 2012), p. 186. Available from: www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf.

[209] See *Yearbook … 2016*, vol. I, 3331st meeting, p. 354, para. 28.

or as new law. Only then might it be possible to engage constructively on what those exceptions should be. As he had explained, he did not see the central proposal in the fifth report, as set out in draft article 7, paragraph 1, as providing a basis for agreement. He saw no basis in existing State practice for an exception for so-called "international crimes", and no support whatsoever for singling out corruption-related crimes. In his view, it would not be right at the current stage, and on the basis of the report under consideration, to propose a text like draft article 7, paragraph 1, even as a new rule of international law.

73. For all those reasons, and like some of those who had spoken in the debate the previous year, he did not support sending draft article 7 to the Drafting Committee.

74. It was worth stepping back and seeing where the Commission was with the topic. The Commission had adopted four draft articles and one paragraph of another, together with some rather extensive commentaries. In 2015, the Drafting Committee had provisionally adopted a further two draft provisions, which the Commission would presumably adopt at the current session, together with commentaries. He looked forward to seeing the Special Rapporteur's drafts for those commentaries and he trusted that Commission members would have sufficient time to consider them carefully, perhaps even in a working group, before they were asked to adopt them in plenary.

75. The Commission also needed to return to some of the draft articles already adopted to ensure a degree of consistency between them, including on terminology. That was a matter for the Drafting Committee, which also had to complete work on some of the drafts already submitted to it, in particular some of the proposed definitions in draft article 2.

76. There were inconsistencies and uncertainties of language within the texts so far adopted by the Commission, and he hoped that it would have an opportunity to return to those texts before the first reading was completed. For example, it had yet to be explained what was meant by "immunity from jurisdiction". Particularly important in practice would be the question of whether that included, as surely it must, inviolability of the person, such as freedom from arrest and detention. Perhaps the Commission would come back to that matter in 2018, when it would hopefully return to the all-important procedural aspects of the topic.

77. Indeed, as he had said before, he did not see how the Commission could seriously consider exceptions, except perhaps in an entirely preliminary way, without knowing anything about the procedural matters that would be proposed to it. The Commission—and States—needed to have the overall picture. For example, it could be seen from paragraph 245 of the report that the Special Rapporteur had not covered in the present report what was perhaps the main and least controversial exception, namely waiver. To deal with exceptions without covering waiver would be to give a very misleading picture. It seemed clear that the Drafting Committee could not deal definitively with the issues raised by draft article 7 until the Commission had received and debated the Special Rapporteur's proposals on related procedural matters, to be addressed in the sixth report, which would not now be available until 2018.

78. In conclusion, he said that it would now be for the Commission to decide how to proceed with the topic, in the light of further careful study and a report from the Special Rapporteur on procedural issues, or at least an indication of the extent to which she agreed with what the previous Special Rapporteur had said on procedure in his third report. As he had said, he would not support sending draft article 7 to the Drafting Committee, but he did look forward to the Commission's further informal consultations referred to earlier by the Special Rapporteur of those matters later in the session on the basis of a brief working document presented by the Special Rapporteur.

79. Mr. HMOUD said that he wished to note that there was an understanding that members who had spoken on the topic at the previous session had the right to take the floor again, for example if they wished to respond to a point raised at the current session.

80. Mr. NGUYEN said that he would like to thank the Special Rapporteur for her well-documented fifth report. Although the report exceeded the specified page limit, its length was acceptable in view of the complexity and sensitivity of the topic under discussion. However, the analysis of cases and the reference to State practice concerning Asia should be further developed. For instance, in the section on national judicial practice, only one footnote, the second footnote to paragraph 110, dealt with the *Bo Xilai* case heard by the Bow Street Magistrates' Court in the United Kingdom concerning the request for an arrest warrant against a Chinese minister of trade. The lack of examples of regional practice might affect the Special Rapporteur's conclusions on the questions considered in the report.

81. Like other speakers, he was of the view that there was a need to strike a balance between *lex lata* and *lex ferenda*, in accordance with the Commission's mandate. Similarly, a balance should be struck between the need to punish the perpetrators of international crimes and to respect State sovereignty.

82. He agreed with the Special Rapporteur's reasoning for not using the words "limitations" and "exceptions" in draft article 7. However, as the wording of the title and the content of the draft article in fact referred mainly to the notion of "exception" rather than "limitation", the question of limitations and exceptions should be further clarified. In particular, he agreed with other Commission members who had spoken at the previous session that the Special Rapporteur should clarify the legal nature of exceptions to immunity for the crimes listed in draft article 7. In paragraph 219 of the report, she identified only two categories of international crimes: the first included international organized crimes such as piracy, corruption and human trafficking, while the second concerned such crimes as war crimes and crimes against humanity. However, draft article 7, paragraph 1, provided for three categories of crimes in relation to which immunity did not apply: international crimes undermining the fundamental legal values of the international community, corruption-related crimes and crimes committed in the territory of the forum State. Although apartheid was mentioned in paragraph 219 along with other international crimes such as genocide, it had been omitted from draft article 7 for

no clear reason. All international crimes universally recognized as such and falling under international jurisdiction should be included in draft article 7, paragraph 1, including apartheid.

83. The crime of aggression had not been included in draft article 7, paragraph 1, for the reasons given in paragraph 222 of the report. The identification of an act of aggression fell within the responsibility and functions of the Security Council under Chapter VII of the Charter of the United Nations and of the General Assembly in the event of a deadlock in the Security Council. Under article 5 of the Rome Statute of the International Criminal Court, provision was made for the Court to exercise jurisdiction with respect to the crime of aggression in accordance with the relevant provisions of the Charter of the United Nations. Furthermore, the crime of aggression was provided for in article 16 of the Commission's 1996 draft code of crimes against the peace and security of mankind.[210] Therefore, the crime of aggression must fall within the scope of international jurisdiction, rather than domestic jurisdiction. Crimes against the peace and security of mankind were crimes under international law and punishable as such, whether they were punishable under national law. Accordingly, in the light of the above, no rule of immunity should apply in national jurisdictions for a crime of aggression committed by State officials. Hence, he would agree with other members who, at the previous session, had proposed the inclusion of that crime in the list of exceptions to immunity.

84. Customary law generally recognized immunity *ratione personae* for Heads of State, Heads of Government and Ministers for Foreign Affairs in all circumstances. Therefore, bearing in mind the need for consistency with paragraph 2, the term "*ratione materiae*" should be inserted after the word "immunity" in paragraph 1 of draft article 7 in order clearly to identify the type of immunity in question. Such mention would also reflect the spirit of international law and the treatment at the national level of crimes committed by foreign State officials, without distinction based on official capacity. The paragraph should provide for the possibility of including new core international crimes that were universally recognized as such and subject to punishment, and to which immunity did not apply. Some national laws, for instance the 2015 Criminal Code of Viet Nam, provided for questions of criminal liability and exceptions to immunity to be settled through diplomatic channels on a case-by-case basis.

85. Among the various forms of international organized crime, draft article 7, paragraph 1 (*b*), referred only to corruption-related crimes. That might be explained by a concern about the threat that such crimes posed to sustainable development and to the stability and security of societies and about the need to give priority to fighting corruption at all levels. Even though 181 States had become parties to the United Nations Convention against Corruption, exceptions to immunity for crimes of corruption should be considered in the light of a series of factors, such as the economic nature of the crimes involved and the capacity—private or official—in which the acts concerned had been performed. The commentary should provide clarification of the relevant circumstances. The explanation provided in paragraphs 230 to 234 of the report to support the inclusion of corruption-related crimes should be further developed. In that connection, the footnote to paragraph 230 did not support the general assessment that the response of national courts had generally been to deny immunity; more proof of national practice was required to substantiate such a claim. It should be further noted that article 4 of the United Nations Convention against Corruption, on protection of sovereignty, included provisions on respect for sovereign equality and non-intervention in the domestic affairs of other States. Accordingly, the reference to corruption-related crimes in the draft article should be accompanied by a requirement not to undermine sovereignty or to interfere in domestic affairs.

86. While supporting the inclusion of the concept of the territorial tort exception in draft article 7, paragraph 1 (*c*), he had doubts about the use of the conjunction "or" in the clause "Crimes that cause harm to persons, including death and serious injury, or to property". Its use might suggest that, even though the crimes in question caused harm only to property, State officials forfeited their right to invoke immunity. In reality, serious crimes caused harm to both persons and property; the level of harm should be specified.

87. In conclusion, he recommended sending draft article 7 to the Drafting Committee.

The meeting rose at 12.30 p.m.

3361st MEETING

Friday, 19 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

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).

[210] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

2. Mr. TLADI said that he wished to congratulate the Special Rapporteur on her detailed, well-researched report. However, given that the Commission had provisionally adopted draft articles on the definition of immunity and had drawn a distinction between immunity *ratione personae* and immunity *ratione materiae*, chapter III of the report seemed entirely superfluous. The report devoted too much attention to decisions of the International Court of Justice that had already been debated *ad nauseam* in the Commission. Too much of the report had been set aside for marginal issues that were regarded by the Commission as falling outside the scope of the topic. They included immunity from civil jurisdiction, immunity of the State as such and immunity arising from instruments and the jurisprudence of international tribunals. However, he agreed with the Special Rapporteur that the issue of exceptions or limitations was important, and perhaps even crucial, to the topic.

3. Neither the Vienna Convention on Diplomatic Relations nor the Vienna Convention on Consular Relations, discussed in chapter II of the report, was directly relevant to the topic. Draft article 1,[211] already provisionally adopted under the topic, established that the draft articles were without prejudice to special rules that applied to, among others, diplomats and consular officials. Draft article 1 also made it plain that the Commission's project was limited to criminal proceedings, thereby making 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, cited in paragraph 28 to justify the territorial tort exception, equally irrelevant.

4. In paragraph 29 of the report, in an apparent attempt to extend the territorial tort exception to the criminal sphere, the Special Rapporteur referred to paragraph (4) of the Commission's commentary to draft article 12 of the draft articles on the jurisdictional immunities of States and their property.[212] There was, however, nothing in the language of the commentary to justify that extension. All that paragraph (4) did was to recall that, while draft article 12 applied mainly to damage caused by negligence, there was nothing to prevent it from applying to damage caused intentionally. The Special Rapporteur's suggestion that this implied an extension to criminal jurisdiction was based on the incorrect assumption that intentional damage could be addressed only through criminal proceedings.

5. In paragraph 225, the Special Rapporteur stated that the territorial tort exception had been incorporated "into all national laws governing immunity, with the exception of those of Pakistan". First, the instruments referred to in the report all concerned the immunity of the State itself. Second, the statement was inaccurate, as the Diplomatic Immunities and Privileges Act of South Africa, which governed the immunity of officials other than diplomats, did not provide for such an exception.

6. As far as he could tell, a number of the cases cited in the footnote to paragraph 227 concerned civil, not criminal, proceedings. In *Letelier and Others v. The Republic of Chile and Linea Aerea Nacional-Chile*, for example, the only person criminally convicted had been a United States national who had not enjoyed immunity from the jurisdiction of American courts. More importantly, the case concerned the enforcement of a judgment against the property of the Government of Chile, which was a civil matter. *Ferrini v. Federal Republic of Germany*, in which the core legal issue had been State immunity, also concerned civil proceedings. It was not clear that *Jiménez v. Aristeguieta* et al., which was also referred to in the same footnote, supported the existence of an exception to immunity, since the court in that case had held that the appellant had not acted in the capacity of a State official.

7. A case cited in the footnote in question that did appear to be relevant, in that it involved an official and did not concern civil proceedings, was *Khurts Bat*. The case was complicated, but as far as he could tell it did not support the territorial tort exception. It would have been helpful for the Special Rapporteur to provide succinct explanations as to why each, or at least some, of the cases cited corroborated the argument that she was presenting.

8. In paragraph 33 of the report, the Special Rapporteur mentioned a group of treaties that addressed core crimes under international law, citing specific provisions in the treaties. During the debate on the third report on crimes against humanity (A/CN.4/704), however, most members of the Commission had been of the opinion that, in principle, those provisions concerned the issue of responsibility and did not, therefore, remove any procedural immunities that attached to an individual.

9. The Special Rapporteur also mentioned that agents of the State were referred to in the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Nevertheless, pursuant to the Convention, the State with territorial jurisdiction had the primary duty to prosecute acts of torture, including those committed by its own officials, where immunity under international law was not applicable. The mere inclusion of a reference to agents of the State was therefore an inadequate basis for concluding that the Convention removed immunity.

10. In paragraph 37 of the report, the Special Rapporteur seemed to suggest that several anti-corruption conventions removed immunity, which was decidedly not the case. If anything, an honest reading of the conventions revealed that they were consistent with international law on immunities. While it was true that article 16 of the United Nations Convention against Corruption contained a reference to offering or giving to a foreign public official an undue advantage, the provision foresaw the prosecution, not of the "foreign public official", but of the State's own national. Moreover, in article 16, paragraph 2, States parties were urged merely to "consider" criminalizing the solicitation or acceptance of a bribe by a foreign public official, which seemed to suggest that there might be a legal impediment to the prosecution of foreign officials, particularly if they came from States that were not parties to the Convention. At any rate, an interpretative note that accompanied article 16 made it clear that the article did not affect rules of international law related to immunities.

[211] *Yearbook … 2013*, vol. II (Part Two), p. 39 (draft article 1).

[212] *Yearbook … 1991*, vol. II (Part Two), p. 45 (para. (4) of the commentary to draft article 12).

11. Like Sir Michael Wood, he doubted whether the domestic court cases mentioned in the footnote to paragraph 230 substantiated the Special Rapporteur's argument. From a methodological perspective, it might have been better to provide more detailed descriptions of those cases in order to enable the Commission to formulate an opinion, as brief references in a footnote did not facilitate a thorough debate.

12. The only conclusions that could be drawn from the treaty practice referred to in the report were that: it did not reveal any exceptions to the rules governing the immunity of officials from foreign criminal jurisdiction; there was a significant amount of practice pointing to exceptions with regard to the immunity of States themselves, but that did not necessarily affect the immunity of officials; and the exceptions that had been established with respect to the immunity of officials related to civil jurisdiction.

13. Paragraph 44 dealt with national laws regulating jurisdictional immunity, among which the Special Rapporteur included the Foreign States Immunities Act of South Africa. The Act, however, was not about the immunity of officials at all. It was true, as noted in the report, that the Act mentioned Heads of State, but only insofar as they personified the State. A South African legislative enactment that did apply to specific officials was the Diplomatic Immunities and Privileges Act, which, despite its name, covered not only diplomats but also other officials, including Heads of State as such (immunity *ratione personae*). It was noteworthy that the Act did not provide for any exceptions to immunity. With regard to the legislative enactments described by the Special Rapporteur in paragraphs 47 to 53 of the report, as he understood it, the Foreign Sovereign Immunities Act of the United States and the State Immunity Act of Canada both applied principally to the immunity of States themselves and to civil, rather than criminal, proceedings.

14. The section of the report devoted to international judicial practice was unduly long, and much of what it covered, particularly the cases concerning the *Arrest Warrant of 11 April 2000* and *Jurisdictional Immunities of the State*, had already been discussed in the Special Rapporteur's preliminary report.[213] In addition, many of the issues highlighted in paragraphs 61 to 71 with respect to the *Arrest Warrant of 11 April 2000* case were immaterial to the question of exceptions. The relationship between immunity and impunity and the existence of an alternative model for deducing an individual's criminal responsibility, addressed in paragraphs 63 to 67, did not reveal anything about exceptions to immunity. Judge Al-Khasawneh's dissenting opinion, which he himself supported, concerned the question of whether a Minister for Foreign Affairs should enjoy immunity *ratione personae*, an issue that the Commission had disposed of—incorrectly, in his own view—in 2013. For the purposes of the report under consideration, the only conclusion that could be drawn from the *Arrest Warrant of 11 April 2000* case was that there were no exceptions to immunity *ratione personae*; no conclusion could be reached with regard to immunity *ratione materiae*.

15. Although, in paragraph 86 of the report, the Special Rapporteur asserted that it was not her intention to analyse in detail the case concerning *Jurisdictional Immunities of the State*, that was precisely what she did in paragraphs 73 to 86. In paragraph 74, it was stated that the case was being examined with regard to "the nature of immunity and its relationship with jurisdiction and the regime of the international responsibility of the State". However, those issues were peripheral to the focus of the report, which was exceptions. In fact, of the paragraphs in the fifth report devoted to the case concerning *Jurisdictional Immunities of the State*, only paragraphs 79, 80, 83 and 85 were relevant to the issue of exceptions. The message to take away from those paragraphs was that, according to the Court, there were no exceptions to immunity for grave crimes and no territorial tort exception under customary international law.

16. The section of the report concerning international criminal tribunals was too long, particularly as immunity from foreign criminal jurisdiction and immunity from the jurisdiction of international tribunals were two completely different matters. In paragraph 108, the Special Rapporteur stated that the decisions of international criminal tribunals that she had analysed "lead to the conclusion that international criminal courts or tribunals, including the International Criminal Court, have unequivocally rejected the possibility of the immunity of State officials, both *ratione personae* and *ratione materiae*, being invoked in said courts". That statement, however, did not capture all the nuances of the jurisprudence of international tribunals. The jurisprudence of the International Criminal Court, for instance, had been at best confused and confusing with regard to immunity. In the cases concerning the failure by Chad and Malawi to cooperate in the arrest of President Omar Al Bashir, the Court's Pre-Trial Chamber had unequivocally rejected the possibility of the immunity of State officials from the Court's jurisdiction. In its ruling on the obligation of the Democratic Republic of the Congo to cooperate, however, it had decided—incorrectly, in his view—that article 27 of the Rome Statute of the International Criminal Court did not affect States that were not parties, and that their Heads of State therefore retained their immunities, even before the Court.

17. In paragraph 113 of the report, the Special Rapporteur mentioned the judgments of South African courts concerning the non-arrest of President Al Bashir during his participation in the African Union Summit in Johannesburg in 2015. Contrary to popular belief, the Supreme Court of Appeal of South Africa had found that, under customary international law, there was absolute immunity from jurisdiction, and that there were no exceptions to that rule under international law.[214] It had also found that there had been an obligation to arrest President Al Bashir, but solely on the basis of domestic legislation, not of international law. The Court's decision might well constitute an important piece of practice that could, under the right circumstances, create an impetus for the development of law. Ultimately, however, it had to be assessed in connection with the practice of the executive and even

[213] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/654 (preliminary report).

[214] See the judgment of 15 March 2016 of the South Africa Supreme Court of Appeal in *Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre and Others*.

the legislature in South Africa, which was currently considering repealing or amending the legislation on which the decision of the Supreme Court had been based. On 7 April 2017, the Government of South Africa had asserted before the Pre-Trial Chamber of the International Criminal Court that, in its view, Heads of State had absolute immunity before national courts. Its submissions were an important element of practice that should be taken into account when assessing the state of international law on the issue of immunity, as should the previous cases of non-arrest of President Al Bashir and the subsequent ones in Djibouti, Jordan and Uganda. In any event, the conclusion drawn by the Special Rapporteur in paragraph 121 of the report was probably correct and provided the essence of what the Commission should include in draft article 7.

18. As it was, he saw no basis, in the report, for draft article 7, paragraph 1 (*b*) or (*c*). The anti-corruption conventions that presumably formed the basis for draft article 7, paragraph 1 (*b*), could not justify the conclusion that, under existing international law, there was an exception to the rule relating to immunity *ratione materiae*. Although some officials had been prosecuted for acts of corruption, the fact that those acts had not been deemed official meant that there would have been no question of immunity in the first place. Similarly, there was no support for the territorial tort exception reflected in draft article 7, paragraph 1 (*c*). The practice referred to in the report related, in principle, to civil, rather than criminal, proceedings, and could thus not form the basis of a draft article.

19. While he agreed with the thrust of draft article 7, paragraph 1 (*a*), he believed that it should cover the four crimes under the Rome Statute of the International Criminal Court and, possibly, torture. The crime of aggression should be included. He agreed that there was general support from States for exceptions to immunity *ratione materiae* for core crimes. As long as the Commission avoided the terms "progressive development" and "*lex ferenda*" in the commentary, he was sure that ways could be found to reflect the fact that relevant law was in a state of flux.

20. He agreed with draft article 7, paragraph 2, but would also be in favour of accepting Sir Michael's proposal to delete the paragraph and to specify simply that the draft article applied only to immunity *ratione materiae*.

21. That proposal would resolve the problem that he had with draft article 7, paragraph 3, which, though crafted as a "without prejudice" clause, was wholly prejudicial. Everything that the Commission had done had been without prejudice to other treaty regimes. Why, therefore, should a "without prejudice" clause be included in draft article 7, paragraph 3? If there was going to be a "without prejudice" clause, it should be drafted to apply to the draft articles as a whole, not to just one provision.

22. Mr. KOLODKIN said that the fifth report on immunity of State officials from foreign criminal jurisdiction pursued a specific objective: to place strict limitations on immunity from foreign criminal jurisdiction, since such immunity, in the eyes of the Special Rapporteur and like-minded people, made it difficult to bring to justice perpetrators of international crimes and, accordingly, jeopardized the exercise and defence of human rights. Immunity, in her view, was diametrically opposed to human rights and responsibility for their violation.

23. At the end of every speech, Cato the Elder used to say *Cathago delenda est*—"Carthage must be destroyed". Slightly modified to become "Immunity must be destroyed", the phrase could be used to end or begin not only the fifth report of the Special Rapporteur, but all of them. The fifth report was entirely predicated upon the destruction of immunity, which the Special Rapporteur used as justification for limitations or exceptions to immunity. Citing paragraphs 179 to 181, 184, 189 and 190 of the fifth report, he noted the skill with which the Special Rapporteur challenged all, or nearly all, of the arguments in favour of immunity, including those contained in the rulings of the International Court of Justice. She cast doubt on the procedural nature of immunity in the context of criminal jurisdiction. She did not agree that the immunity *ratione materiae* of State officials was equivalent to the immunity of the State. Pursuing that line of reasoning, she asserted that immunity from criminal jurisdiction and the rules of *jus cogens* that prohibited certain acts lay on the same plane of substantive law and that the peremptory norms prevailed over the rules on immunity. It was a strong case against immunity *ratione materiae*, cleverly constructed by a Grand Master of the law.

24. He congratulated her on her report, but he could agree neither with her approach to the topic and much of her argumentation, particularly in paragraphs 190 to 217, nor with draft article 7. On the other hand, he agreed with practically everything that Sir Michael had said at the current session, and with what Mr. Huang and Mr. Singh had said at the previous session.

25. In the six years since he had presented his third report, the practice and *opinio juris* of States, the positions taken by the International Court of Justice and the European Court of Human Rights, the Commission's discussion of the topic and the literature gave no grounds whatsoever for revising the main points made in his three reports.[215] His second report had dealt with exceptions to immunity and had been based on the 2002 judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*. Although that judgment had been opposed by three judges and criticized in the literature, he himself had maintained that the Court was not only right but also consistent in its position on immunity, as could be seen from its 2008 judgment in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In 2012, the Court had adopted a ruling in the case concerning *Jurisdictional Immunities of the State* which confirmed its position in the *Arrest Warrant of 11 April 2000* case and, consequently, the conclusions advanced in his own reports. The fact that the ruling concerned the immunity of the State from civil, not criminal, jurisdiction, changed nothing. The ruling demonstrated that the decisions adopted by Italian courts violated the international legal obligations of Italy that

[215] Reports of the first Special Rapporteur, 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).

flowed from the rules on State immunity. In 2014, the Constitutional Court of Italy had declared that the ruling of the International Court of Justice was contrary to the Constitution of Italy and that a 1957 law on compliance with the Charter of the United Nations, particularly Article 94 thereof, was unconstitutional.[216]

26. With all due respect for Italian jurisprudence, he had to say that this ruling by the Constitutional Court was far from incontrovertible. Nevertheless, it occupied a large place in the current Special Rapporteur's fifth report. In paragraph 122, she spoke of the "significance" of the ruling; it became clear to the reader that she was using it to support her own position. She said nothing about the fact that the ruling directly contradicted the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* or that carrying out the ruling might bring into play the responsibility of Italy under international law, including for a breach of Article 94 of the Charter of the United Nations. Italian courts had subsequently adopted a number of decisions that went against the position of the International Court of Justice. In his view, national judicial practice like that of Italy could not form the basis for the Commission's conclusions.

27. As other members of the Commission had repeatedly stated, each case drawn from practice must be thoroughly analysed and accurately assessed. The circumstances surrounding the consideration of immunity in each specific case must be understood: was the immunity of the official invoked by the Government? Were the official's acts declared to have been performed in an official capacity? At what stage was the question of immunity raised? How did the Government react to the court's decision?

28. In that context, it would be interesting to know whether the question of immunity had been invoked, and if so, by whom, when a Spanish court had issued orders for the arrest of the former President of the People's Republic of China and a number of former Chinese officials in 2013 and 2014 and for the arrest of the Prime Minister of Israel and seven former and serving Israeli officials in 2015. No one had been arrested following those orders, China and Israel had reacted with strong dissatisfaction and the question arose as to what purpose had been served by those court decisions, other than to cause harm to intergovernmental relations. In what way had the decisions advanced the struggle for human rights?

29. In nearly all court cases, statements in the Sixth Committee and the Commission and in the literature, references were made both to civil and to criminal cases, although the need to take into account the difference between immunity from civil proceedings and immunity from criminal proceedings was often emphasized. Everyone understood that the two situations were different, but it was also clear that they had much in common. What were their common points, and where did they differ? As he saw it, the International Court of Justice had provided the key to the answer. In its judgments in *Arrest Warrant of 11 April 2000* and *Jurisdictional Immunities of the State*, the Court described the law of immunity from foreign jurisdiction as an institution of international law and as essentially procedural in nature. The law of immunity regulated the exercise of jurisdiction in respect of particular conduct and was thus entirely distinct from the substantive law that determined whether that conduct was lawful or unlawful.

30. Based on the Court's rulings, elements common to various subcategories of immunity could be deduced. In all cases, immunity was a rule of customary international law. It was procedural, not substantive, in nature. The rules of law on immunity were confined to determining whether the jurisdiction of one State could be exercised in respect of another State. The fact that immunity might bar the exercise of jurisdiction in a particular case did not alter the applicability of the substantive rules of law. The unlawfulness of an act and the gravity of the unlawfulness in no way affected the official character of the act, and vice versa: the act's official character did not make it lawful. The question of immunity must be resolved by a national court as a matter of international law before it could hear the merits of the case and before the facts could be established. Lastly, one general rule flowed from the rules just listed: the absence of exceptions to immunity from foreign jurisdiction.

31. Conversely, there were some aspects of the law of immunity that were characteristic either of immunity from criminal jurisdiction or of immunity from civil jurisdiction. The former was often invoked at the pretrial stage, meaning at an earlier stage than in civil proceedings. Indeed, the question of immunity was often resolved by prosecutors before reaching the courts, and, consequently, the general public was often not aware of the many cases when immunity from foreign jurisdiction had been successfully invoked. Moreover, the question of immunity had to be resolved at a stage when it was still too early to speak of the commission of a crime, guilt or the responsibility of the person whose immunity was being considered, in view of the presumption of innocence at that stage.

32. Also of special significance in the context of immunity from foreign criminal jurisdiction was which acts of the State exercising jurisdiction were precluded by immunity. Did immunity obstruct the investigation or prosecution of a foreign official? A related question, about the interplay between immunity and inviolability, had been raised by Sir Michael Wood. Unfortunately, the Special Rapporteur had not considered such matters, even though they were important for the formulation of provisions on the scope or limitation of immunity. For the work on the topic, it was necessary to have a clear picture of which rules applied to all types of immunity, and which only to immunity from foreign jurisdiction.

33. Although international law admitted of no exceptions to immunity, there was nothing to prevent States from making such exceptions in their relations among themselves—for example, by concluding treaties. However, he wondered whether that would be the kind of development of international law that would improve life for the international community. Did the Commission really think that a world in which States sought to prosecute the officials of other States, as Spain had recently tried to do to those of China and Israel, would

[216] See *Judgment No. 238/2014* of the Constitutional Court of Italy.

be a better world? Did it really see that as the correct way to fight for human rights and against impunity? Did it not think that, on the contrary, it might set off new conflicts among States?

34. Would it not be better to take the position that under existing international law, immunity *ratione materiae* protected State officials who were acting in that capacity from foreign criminal jurisdiction, irrespective of the gravity of the incriminating acts, but did not prevent investigation, prosecution and other measures? In order for immunity *ratione materiae* to preclude the exercise of foreign criminal jurisdiction over an official, it had to be invoked by the official's State, meaning that the State had to acknowledge the acts in question as its own. The State that had suffered harm because of the official's acts would then be justified in raising the issue of the responsibility under international law of the official's State. It could then be suggested that the official's State should revoke his or her immunity or receive the evidence collected for a criminal trial. If the State did not invoke the official's immunity, that would amount to its tacit revocation.

35. Before taking such a position, however, the Commission would have to consider matters it had not yet dealt with, foremost among them being the procedural aspects of immunity. It could also propose to States a draft article on exceptions to immunity, separating it from the others that had already been proposed by designating it as optional. He would not condone the presentation of such a draft article as a progressive or desirable development of international law, however.

36. As to the content of draft article 7, he agreed with the criticisms advanced by Sir Michael and Mr. Tladi and was not in favour of referring it to the Drafting Committee, at least, not until agreement had been reached about how its status, as part of existing international law or as a new law, was to be presented to States.

37. Ms. GALVÃO TELES said that current practice in relation to immunity was not clear enough to enable approaches applicable to all aspects of the limitations and exceptions to immunity, particularly immunity *ratione materiae*, to be identified. The Commission must therefore decide whether to pursue progressive development in those areas where the practice was unclear but there were also other principles and values of international law that had to be taken into account. Citing paragraphs 71, 72 and 75 of the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* case, she said that a balance had to be struck between the principles of sovereign equality, stability in the conduct of international relations and immunity, on the one hand, and combating impunity for the most serious international crimes, on the other.

38. An approach that favoured codification and *lex lata* could certainly be adopted with respect to immunity *ratione personae*. With respect to immunity *ratione materiae*, however, she believed that the Commission should opt for progressive development and *lex ferenda*, taking into account the trends in the development of the values and principles of international law.

39. She agreed with the conclusion reached in paragraph 240 of the report that it was not possible, on the basis of practice, to determine the existence of a customary rule allowing the application of limitations or exceptions to immunity *ratione personae* or to identify a trend towards such a rule. That had been very clearly demonstrated in the *Arrest Warrant of 11 April 2000* case, which was perhaps the most important piece of case law in that area. However, the same clarity was not to be found in the context of immunity *ratione materiae*. Practice was not unequivocal, but seemed to reveal a trend towards excluding the application of immunity *ratione materiae* to State officials in cases of international crimes, as the three judges had noted in their separate opinion in the *Arrest Warrant of 11 April 2000* case. Several arguments were cited in the report to support that conclusion: international crimes could not be considered "acts performed in an official capacity"; an exception to immunity was warranted because of the heinous and serious nature of the crimes; immunity could undermine the values and principles recognized by the international community as a whole; and immunity was contrary to *jus cogens* in the case of international crimes.

40. The main source for the principle of immunity of State officials from foreign criminal jurisdiction was customary international law. However, immunity *ratione materiae* must be reconciled with several recent treaties that imposed obligations on States to prosecute or extradite for certain international crimes, such as genocide, crimes against humanity and war crimes. In her view, torture and enforced disappearance should be added to that group, as their regimes shared some similarities, including the obligation to prosecute perpetrators at the national level. The Special Rapporteur provided examples of national jurisprudence to illustrate that trend with respect to torture and, to a lesser degree, enforced disappearance. Those two crimes, together with the aforementioned three, constituted the basic elements for which there existed State practice and clear provisions in international instruments.

41. Other categories to be included among the exceptions to the application of immunity *ratione materiae* were corruption and the "territorial tort exception". With regard to corruption, which was generally defined as abuse of power for personal gain, the reason for making an exception to immunity *ratione materiae* should be because crimes of corruption could not be considered "acts performed in an official capacity". Official capacity was merely instrumental in the commission of such crimes, since the person abused his or her special position for private purposes. While draft article 6[217] on the scope of immunity *ratione materiae* might be sufficient to exclude corruption-related crimes from the application of immunity, for the sake of clarity they should be mentioned in draft article 7.

42. The proposal to include in the draft articles a territorial tort exception, on the basis of article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, was an interesting one from a practical perspective, but it could be argued that article 12 was formulated too generally, and a more

[217] *Yearbook … 2016*, vol. II (Part Two), p. 216 (draft article 6).

restrictive formulation might be more appropriate in the context of immunity of State officials as opposed to immunity of States.

43. With regard to the title of draft article 7 and the *chapeau* of the first paragraph, she agreed with the Special Rapporteur that the distinction between limitations and exceptions was of no practical importance because both terms had the same consequences, namely the non-application of the legal regime of immunity of State officials from foreign criminal jurisdiction. Consequently, she supported the proposal that, for the purposes of the draft articles, the phrase "immunity shall not apply" should include both limitations and exceptions.

44. With regard to draft article 7, paragraph (1) (*a*), for the reasons outlined earlier, she supported the inclusion of specific references to genocide, crimes against humanity, war crimes, torture and enforced disappearance as international crimes in respect of which immunity should not apply. Other crimes could be added, but she considered the current formulation to be sufficiently balanced, reflecting the evolution of international law in terms of the fight against impunity for the most serious international crimes. With the exception of enforced disappearance, the formulation corresponded to the 2009 resolution of the Institute of International Law on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, which specified that "[n]o immunity from jurisdiction other than personal immunity in accordance with international law applies with regard to international crimes".[218]

45. With regard to "corruption-related crimes" mentioned in paragraph 1 (*b*), she supported the Special Rapporteur's proposal, since acts of corruption were not "acts performed in an official capacity" and should therefore not fall under the scope of immunity *ratione materiae*. However, in the light of draft article 6, another possibility would be to explain explicitly in the commentary that "[c]orruption-related crimes" were not "acts performed in an official capacity" and to specify which crimes came under that category. In that case, it would not be necessary to keep that category in the draft article itself.

46. Regarding the crimes listed in subparagraph (*c*), the territorial tort exception was perhaps more relevant in the context of the immunity of the State, and the subparagraph was perhaps drafted in overly absolute terms; it might be taken to cover all kinds of activities undertaken by State officials in the forum State. Another possibility had been put forward by the previous Special Rapporteur in his second report, the final paragraph of which stated: "A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity."[219] It would also be useful to illustrate, perhaps in the commentary, the types of acts covered by the exception, such as political assassinations, spying, sabotage and abduction.

47. As for paragraph 2 of draft article 7, the Special Rapporteur's proposal seemed sufficiently clear and uncontroversial, as it reflected long and consistent State practice and the principle of sovereign equality of States. However, it would be necessary to clarify in the commentary that it was without prejudice to the principle of individual criminal responsibility for international crimes and the need to guarantee the existence of effective mechanisms to combat impunity for such crimes. The procedural nature of immunity could not exonerate a State official of his or her individual criminal responsibility, nor could it be equated to impunity. In that regard, a reference to paragraph 60 of the judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000* case should be added to the commentary. She supported the important "without prejudice" clause in paragraph 3; perhaps, as Mr. Tladi had proposed, the "without prejudice" clause should be applied to the whole set of draft articles.

48. In conclusion, she was in favour of sending draft article 7 to the Drafting Committee. She expressed the hope that the new Commission would remain on the side of progressive development, and that its work on such an important topic would not interrupt the trend discernible in international law towards limiting exceptions to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, at least in respect of international crimes. With regard to the future workplan proposed by the Special Rapporteur, she looked forward with great interest to the sixth report, which would deal with procedural aspects of immunity, as well as to the adoption of the draft articles on first reading.

49. Mr. HASSOUNA said that, although the Special Rapporteur's fifth report exceeded the recommended length, its interesting and detailed analysis would contribute to a better understanding of the issues at stake. Given that the subject matter was politically sensitive and important to States, it should be approached cautiously so as to ensure a general consensus on the outcome. To that end, the Commission should attempt to strike a balance between preserving the basic norms of the existing immunity regime, while responding to the international community's current efforts to combat impunity. Such an approach should focus on the harmonization of *lex ferenda* and *lex lata* in accordance with the Commission's mandate.

50. He appreciated the Special Rapporteur's thorough study of State and judicial practice on the issue of exceptions and limitations to the immunity of State officials. Such practice should be the foundation for drafting articles on the topic. As some members had noted, however, the Special Rapporteur's study of practice was somewhat unusual. She drew on a number of sources to establish the existence of a trend in international law to recognize exceptions to immunity *ratione materiae*, and based

[218] Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), pp. 226–227; available from: www.idi-iil.org, *Resolutions*.

[219] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, p. 426, para. 94 (*p*).

draft article 7 on those sources. Several problems arose, including the fact that she did not distinguish between exceptions and limitations or establish a time frame for how rapidly the trend had evolved, and she emphasized different sources of law depending on the exception she was attempting to establish. Therefore, although a trend was shown to exist for some exceptions, it did not exist for all of the exceptions listed in the proposed draft article.

51. The Special Rapporteur's analysis of the legal nature of immunity and its relationship with jurisdiction, responsibility and national and international levels of jurisdiction was helpful, although as some members had noted, it was a complex matter. On the one hand, the quest for accountability should not be regarded as a mechanism for meddling in a State's internal affairs or serve as an excuse to politically prosecute a high-ranking official. On the other hand, the effective implementation of *jus cogens* norms throughout the world was paramount. There were numerous possible measures to prosecute a perpetrator of international crimes, such as domestic prosecution, waiver of immunity, prosecution after termination of term of office and prosecution before the international criminal justice system. However, those alternatives were not always sufficient. Both of those perspectives must be kept in mind when reading through the exceptions, so as to help draft a well-balanced text that addressed all of those issues. Of course, the principle of sovereign equality was not the only fundamental principle that the international system of law recognized. The protection of human rights, the pursuit of justice and compliance with obligations arising from sources of international law were indispensable to the functioning of the international legal system.

52. Paragraph 2 of draft article 7 was uncontroversial and its content was established in customary international law. However, because it did not cover "[c]rimes in respect of which immunity does not apply", as the title of the draft article indicated, the Commission might wish to reword it. Some members had felt that the reference to the absolute nature of immunity *ratione personae* should be deleted, but he believed that it was important to keep exceptions to both immunity *ratione personae* and *ratione materiae* in the same provision so that the difference between the two was explicit. The "without prejudice" clause in paragraph 3 was similarly uncontroversial, although the Commission might wish to identify in the commentary the international tribunal to which the provision referred. The concept of waiver should be included in draft article 7, paragraph 3, to clarify that, although immunity *ratione personae* applied in cases involving the crimes set forth in draft article 7, paragraph 1, immunity was nonetheless not always assured.

53. With regard to draft article 7, paragraph 1 (*a*), while the Special Rapporteur had convincingly established in the report that there was a trend towards recognizing an exception to immunity with respect to certain international crimes, it was unclear why she had chosen only the crimes mentioned in that subparagraph. She had included crimes that, as stated in paragraph 219 of the report, "undermine the fundamental legal values of the international community as a whole" and were typically regarded as *jus cogens* norms. However, her list omitted slavery, apartheid and the crime of aggression. The crime of aggression had been omitted, she had stated, because it could have too many political implications for the stability of relations between States.

54. The domestic cases cited in the first footnote to paragraph 114 showed a general trend towards recognizing an exception to immunity *ratione materiae* for international crimes such as crimes against humanity. Draft article 7, paragraph 1 (*a*), should therefore be reworded to be flexible enough to cover future *jus cogens* norms. To that end, it should include a list of crimes, with a clarification that the list was not exhaustive but illustrative of *jus cogens* norms in respect of which immunity *ratione materiae* could not apply. That illustrative list should include the crimes of aggression, apartheid and slavery, including modern forms of slavery. Aggression was a clear cause of crimes against humanity and war crimes, and it made no sense to include the latter but not the crime of aggression. Its inclusion in the Rome Statute of the International Criminal Court through the Amendments on the crime of aggression adopted in Kampala, even though they had not yet taken effect, proved that States saw it as a serious international crime for which individuals should be prosecuted.

55. With regard to the crime of apartheid, article 3 of the International Convention on the Suppression and Punishment of the Crime of Apartheid provided that international criminal responsibility applied to individuals and representatives of the State regardless of where they resided and where the acts were perpetrated. The Convention essentially set forth a *prima facie* exception to functional immunity from foreign criminal jurisdiction and stipulated that apartheid was a crime against humanity. Article 7, paragraph 1 (*j*), of the Rome Statute of the International Criminal Court recognized it as a crime when committed in the context of a crime against humanity. However, as it might not always be possible to prove the requisite contextual elements to establish a crime against humanity, apartheid should be listed separately in draft article 7, paragraph 1 (*a*).

56. Slavery, including modern forms of slavery such as forced labour and human trafficking, should also be listed separately in the proposed draft article. It was typically included among crimes against humanity and war crimes, but it should be listed separately because, again, it might not always be possible to establish the requisite contextual elements to prove a crime against humanity, or the requisite nexus to an armed conflict to establish it as a war crime. The prohibition of slavery, like the prohibition of torture and enforced disappearance, was included in several international instruments, including the International Covenant on Civil and Political Rights, and numerous regional instruments, including the African Charter on Human and Peoples' Rights. Moreover, the 1926 Slavery Convention had specifically been concluded not only to address slavery, but also to prevent "compulsory or forced labour from developing into conditions analogous to slavery" (art. 5). The International Labour Organization's 1957 Convention (No. 105) concerning the Abolition of Forced Labour and its 1999 Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour were also relevant in addressing modern forms of slavery.

57. For the sake of clarity, the commentary to the draft article could usefully specify the legal source to be used for determining whether an individual's conduct came under one of the listed international crimes for the purpose of precluding the application of his or her functional immunity, since various international and regional conventions had adopted different definitions of some of those crimes. The Special Rapporteur should also consider adding appropriate language to draft article 7, paragraph 1, to make clear the link between the crimes set forth therein and the State official whose immunity was in question.

58. "Corruption-related crimes" should be removed from the list of crimes to which immunity did not apply, as there was insufficient State practice or treaty law to support their inclusion, and the Special Rapporteur did not convincingly demonstrate that a trend was emerging in international law to recognize an exception. Neither the United Nations Convention against Corruption, the Council of Europe's Criminal Law Convention on Corruption nor the Inter-American Convention against Corruption contained any general provisions referring to the immunity of State officials, though they did explicitly recognize that such officials could practise corruption. The only corruption-related conventions that did refer to immunity had provisions that were highly deferential towards domestic legislation or simply had a "without prejudice" clause. Moreover, the Special Rapporteur did not cite any relevant international judicial practice or national legislation to establish a corruption exception to either immunity *ratione personae* or immunity *ratione materiae*.

59. With regard to State practice regarding corruption, the Special Rapporteur cited only three domestic cases in which the existence of limitations or exceptions to immunity in cases of corruption had been accepted, as compared to the 13 she cited for the commission of international crimes. Of the three cases, two were from Europe and one was from Chile, which hardly constituted "widespread" or "representative" practice in the context of customary international law. The Special Rapporteur seemed to acknowledge that the basis for including corruption was somewhat tenuous by stating that it "might" be appropriate to include a provision that expressly defined corruption as a limitation or exception to immunity *ratione materiae*.

60. In addition, it was possible to view corruption-related offences as *ultra vires* acts falling outside the scope of a State representative's "official capacity", and thus as acts not covered by functional immunity as a matter of law. Indeed, the Special Rapporteur noted that, in the light of the criteria established in the fourth report,[220] corruption-related offences could be considered to be outside the scope of a representative's official capacity. She consequently concluded that there appeared to be "no need at present to analyse them from the perspective of limitations or exceptions". However, she further noted that, in practice, distinguishing between official acts and private acts with respect to corruption-related offences was not always clear-cut. Thus, whether corruption-related offences fell outside the scope of functional immunity should be determined on a case-by-case basis at the national level.

61. "Crimes that cause harm to persons" should be retained in the draft article, but the exception should be defined more narrowly. The Commission seemed to agree that such an exception existed, mainly because of the importance of the principle of territoriality, and in the light of the caveat introduced by Mr. Kolodkin in his second report that a crime had to have been committed by a foreign official who had been present in the territory of the forum State without the State's express consent for the discharge of his or her official functions.[221] The main problem with the broader exception in the current report was that the Special Rapporteur deduced the existence of such an exception from the context of civil jurisdiction and placed it in the context of criminal jurisdiction. Most treaties on State immunity and most national legislation on the subject included a "territorial tort" exception in the context of civil jurisdiction, which the Special Rapporteur used to support immunity in the context of criminal jurisdiction. However, the same treaties and national laws did not contain exceptions for genocide, crimes against humanity, war crimes and so on. If the Special Rapporteur was to rely on national law to establish exceptions in customary international law, then she must also acknowledge the absence of such exceptions in the same legislation. The exception proposed could expose a foreign State official to prosecution for crimes such as defamation, failure to pay parking tickets and the like, since the analogous exception to immunity from criminal jurisdiction was so broad.

62. The draft article therefore needed to be reformulated, taking the above arguments into account, and perhaps using language from Mr. Kolodkin's second report. In addition, all sources of law should be treated equally: the Special Rapporteur downplayed the significance of national legislation omitting exceptions to immunity for international crimes such as crimes against humanity, but emphasized national legislation in her treatment of the "territorial tort" exception.

63. As to her future programme of work, the Special Rapporteur could consider focusing on the relationship between immunity of State officials and statutes of limitations for crimes that were not included in the present draft articles. It was important to make sure that the statute of limitations for crimes for which there was no exception or limitation to immunity did not run out before a State official's immunity *ratione personae* expired. The Special Rapporteur might also like to further explain the distinction between a limitation and an exception with regard to the procedural aspects of immunity.

64. In conclusion, he recommended that draft article 7 be referred to the Drafting Committee, together with the relevant proposals put forward during the debate.

65. Mr. VALENCIA-OSPINA said that, for reasons outside the control of the Special Rapporteur, her fifth report had now been introduced for the second time to the

[220] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686 (fourth report).

[221] See *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631, p. 423, para. 82.

Commission. That gave the Commission the advantage of knowing in advance the opinions on the topic expressed by members of the Sixth Committee at the seventy-first session of the General Assembly.

66. With regard to the question whether the fifth report actually dealt with exceptions or limitations to immunity, he said that all the Commission's work on the topic so far had been based on the explicit or implicit understanding that the immunity of State officials was generally applicable unless there were exceptional circumstances, an approach that could be described as "immunity by default". The fifth report concerned cases in which immunity by default was not applicable.

67. The temporal scope of immunity *ratione materiae* was covered in draft article 6, provisionally adopted by the Commission at its sixty-eighth session. Such immunity applied to acts performed in an official capacity by State officials during their term of office; while it could be invoked when that term had ended, the important thing was to determine whether the author enjoyed such immunity at the time of perpetrating the act. Draft article 6, paragraph 3, clarified that individuals who enjoyed immunity *ratione personae* at the time of perpetrating the act could invoke immunity *ratione materiae* after their term of office had come to an end, provided that the relevant criteria were met. While the Special Rapporteur explained in paragraph 241 of her fifth report that immunity *ratione personae* ended the moment the person's term of office came to an end, the point she was making was rather obscured by the scattered references to the temporal scope of immunity in draft articles 4,[222] 6 and 7. That problem could be alleviated by bringing together in a single draft article all the references to the temporal scope of immunity, or, at least, by rewording draft article 7, paragraph 2, so as to remove all ambiguity. Moreover, while such a broad and unrestrictive view of immunity *ratione personae* perhaps represented the views of the vast majority of States, a number of States had spoken at the Sixth Committee in favour of limiting it, at least in respect of the most serious international crimes such as genocide.

68. The conclusive list of crimes in respect of which immunity did not apply, contained in the first paragraph of draft article 7, was a matter of deep concern. Experience had shown that if the Commission was to propose such a list, the result might be another half-century of absolute immunity for the international crimes not included in the list of exceptions. If the Commission were to decide to produce such a list, the choice of what to include and what to exclude must be made with the greatest possible care. He concurred with the arguments put forward at the Commission's previous session that the crime of aggression should be included in the list of crimes in respect of which immunity did not apply. Wars of aggression, after all, were the first international crime listed in the Commission's 1950 formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[223]

69. While torture was rightly included in the list in draft article 7, paragraph 1, the report was not consistent in its approach to that subject. On the one hand, it mentioned the implicit waiver of immunity by States that had ratified instruments such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, while on the other, it referred to the premise that a rejection of jurisdiction could lead to impunity. It also overlooked the definition of torture in the Convention, which specified that, for an act to be defined as torture, the pain or suffering it caused must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (art. 1). That requirement meant that in the vast majority of cases, "immunity by default" would be the norm.

70. One question that had been frequently raised in debates in both the Commission and the Sixth Committee was whether international crimes could be committed in the exercise, in an official capacity, of State authority. In view of the structure of the draft articles, the Special Rapporteur appeared to have already made her mind up on that question. If the perpetration of such crimes could never constitute an "act performed in an official capacity", there could be no *ab initio* immunity for such acts and therefore the current discussion on the crimes in respect of which immunity did not apply would be superfluous.

71. Unlike some colleagues, he was not convinced that there was no relationship of any kind between immunity from foreign criminal jurisdiction and immunity from the jurisdiction of the International Criminal Court. It was stated in both the preamble to and article 1 of the Rome Statute of the International Criminal Court that the International Criminal Court was to be "complementary to national criminal jurisdictions". Clearly, the Court did not have the resources to investigate and try all cases of genocide, crimes against humanity, war crimes and crimes of aggression. That complementarity and the Court's limited resources carried the seeds of possible impunity as long as there were no sufficiently vigorous national criminal courts to conduct trials in the majority of cases. Therefore, immunities in the context of the International Criminal Court and foreign criminal jurisdictions must be congruent.

72. In that connection, it was instructive to recall a concept elaborated by a distinguished former member of the Commission, Georges Scelle, that of *dédoublement fonctionnel*, or role-splitting, whereby national institutions performed the tasks of the international legal system. If national criminal courts were to effectively try international crimes, they would require a jurisdiction with a reach comparable to that of the International Criminal Court.

73. Lastly, he was in favour of sending draft article 7 to the Drafting Committee for its consideration in the light of the views expressed during the present debate.

The meeting rose at 12.45 p.m.

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[222] *Yearbook … 2013*, vol. II (Part Two), p. 47 (draft article 4).

[223] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

3362nd MEETING

Tuesday, 23 May 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

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

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

Fifth report of the Special Rapporteur (*continued*)

1. Mr. VÁZQUEZ-BERMÚDEZ said that the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction had important implications for States, in particular for the legal proceedings of their national courts. He generally agreed with the Special Rapporteur's approach to that question in her fifth report on the topic (A/CN.4/701) and with her in-depth analysis of the national and international judicial practice in that regard. Her systemic argument for the non-applicability of immunity in respect of the most serious international crimes was also significant.

2. In her report, the Special Rapporteur noted that a large number of States had supported the existence of various exceptions to immunity *ratione materiae*, the main one being the commission of the most serious crimes of concern to the international community as a whole. As the Commission had observed on many occasions, international law was a legal system whose rules and principles operated in relation to other rules and principles and should be interpreted in that context. In its advisory opinion in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice stated that "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part" (para. 10 of the advisory opinion).

3. In its consideration of the current topic, the Commission had to balance the sovereign equality of States and the stability of international relations, on the one hand, with the prevention and punishment of serious crimes of concern to the international community as a whole, on the other. The fact that international criminal tribunals set up by the international community were limited in some ways, such as in the scope of their jurisdiction or the amount of their operating resources, lent greater importance to the role of national courts and inter-State cooperation in preventing and combating impunity for the commission of those serious crimes.

4. On the basis of her analysis of practice, and supported by the writings of publicists, the Special Rapporteur rightly concluded that it was not possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions to immunity *ratione personae* or to identify a trend in that direction. However, with regard to immunity *ratione materiae*, she concluded that it was possible to identify the existence, or at least a clear trend towards the emergence, of a customary rule that excluded the applicability of such immunity with regard to the most serious international crimes.

5. That conclusion was consistent with the development of international criminal law since the Second World War, including the adoption of treaties that required States to provide for the jurisdiction of their national courts over international crimes. The application of immunity *ratione materiae* to international crimes that were addressed in current or future conventions would have a major impact on the application and effectiveness of those conventions, considering that those who perpetrated international crimes were generally State officials.

6. It would be regrettable if the State of nationality of current or former officials accused of torture, for example, were to request the forum State not to extradite such officials, but to consider that they had immunity from jurisdiction on the grounds that the alleged acts of torture had been performed in an official capacity. Such claims would conflict with the obligations of States under various treaties, such as the obligation to prosecute or extradite.

7. A request for the extradition of such an official by the State of nationality would in no way conflict with the obligation of States to prevent and punish that serious crime. However, an invocation of immunity *ratione materiae* in an effort to impede the prosecution of the official would, in the absence of any other process for determining his or her criminal responsibility, open the door to impunity for the commission of a serious crime. The risk was that the immunity of State officials from foreign criminal jurisdiction might no longer be an exclusively "procedural bar" but a "substantive bar". Along those lines, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000* indicated that international law sought "the accommodation of this value [immunity] with the fight against impunity, and not the triumph of one norm over the other" (para. 79 of the joint separate opinion).

8. According to the report, the balance to be struck between those norms implied that State officials had absolute immunity from foreign criminal jurisdiction in the case of immunity *ratione personae*, as well as immunity *ratione materiae* as a general rule, with certain exceptions and limitations with regard to the most serious crimes. The exceptions and limitations to which the Special Rapporteur referred in her fifth report therefore applied only to immunity *ratione materiae*.

9. In draft article 7, the Special Rapporteur rightly proposed wording similar to that used by the Commission

in the draft articles on jurisdictional immunities of States and their property.[224] It was also in keeping with most State practice and international case law, which referred to the "non-applicability" of immunity or to the fact that immunity "could not be invoked" before national courts. He supported the inclusion of crimes of corruption and the "territorial tort exception" in the draft article.

10. With regard to the future workplan on the topic, an analysis of the procedural aspects of immunity in the Special Rapporteur's sixth report would be very helpful with a view to preventing politically motivated prosecutions and addressing the invocation or waiver of immunity by an alleged offender's State of nationality. He was in favour of referring draft article 7 to the Drafting Committee.

11. Mr. MURPHY said that there were three key questions that should be considered during the debate on the topic. The first was whether draft article 7 constituted existing law (*lex lata*) or was a proposal for new law. The second was whether procedural safeguards should be associated with draft article 7 in order to prevent its misuse. The third was whether, given the importance and sensitivity of the issue of limitations and exceptions to immunity and the likelihood that it would elicit divergent views among Commission members, any draft article on that issue should be discussed and developed simultaneously with its associated commentary.

12. In his view, draft article 7 did not constitute existing law but rather was new law, as was clear from several aspects of the report. First, the Special Rapporteur argued repeatedly that there was a "clear and growing trend" towards exceptions to immunity; her emphasis on a "trend" was an implicit acknowledgement that draft article 7 was not based on settled law and instead reflected a proposal for new law.

13. Second, the report provided no empirical assessment of the existence of a trend, and the evidence it did provide did not define any particular temporal arc in the emergence of exceptions or limitations. In fact, some evidence actually seemed to suggest the lack of a trend, for example in recent cases brought before the International Court of Justice and the European Court of Human Rights, or perhaps even a countertrend, as illustrated by a recent narrowing of the scope of some national laws.

14. Third, despite the acknowledgement in paragraph 20 (*a*) of the report that there was no clear consensus among States as to which questions concerning exceptions should be included in each of the two categories (*lex lata* or *lex ferenda*), the report downplayed that significant observation by failing to take it into account when considering whether State practice and *opinio juris* supported the existence, under current law, of a rule on exceptions to immunity.

15. Fourth, national case law did not support draft article 7. Despite the claims set out in the report that national case law supported the existence of certain limitations and exceptions to immunity *ratione materiae*, the report identified just 11 cases over the last 50 years in which a national court had denied immunity *ratione materiae* to a foreign State official in a criminal case involving the alleged commission of an international crime. Such evidence was neither widespread nor representative in terms of identifying existing customary international law.

16. Moreover, in her report, the Special Rapporteur incorrectly asserted that national courts had granted immunity *ratione materiae* in only a "small number of cases" involving alleged serious international crimes. In fact, it was possible to identify many such cases, especially by looking at both criminal and civil case law. Consequently, case law could not be declared to weigh unequivocally in favour of draft article 7. In addition, a thorough methodology for assessing national case law would have involved examining not just cases that had reached national court systems, but also situations where cases had not been pursued and the reasons for not pursuing them, which might include a belief that immunity was applicable.

17. Fifth, national legislation did not support draft article 7. As noted in paragraph 44 of the report, national laws regulating jurisdictional immunity were very few in number, and that made it difficult to identify settled law relating to any exceptions to immunity. In addition, most of those laws concerned immunity of States, not that of State officials from criminal jurisdiction. Even so, in her report, the Special Rapporteur indicated that they provided for a "territorial tort exception" that purportedly implied the existence of an analogous exception to immunity in the context of criminal jurisdiction. Yet it should be acknowledged that national laws did not provide for any exceptions to immunity in relation to the commission of genocide, crimes against humanity or war crimes—a fact that would appear to be equally relevant. Although, in her report, the Special Rapporteur mentioned several recent national laws that implemented the Rome Statute of the International Criminal Court, she also noted that many of them were applicable only to the surrender of persons to the Court, listing just five States that had enacted broader implementing statutes.

18. Sixth, international case law did not support draft article 7, and the report seemed to avoid the implications of the fairly consistent international case law rejecting exceptions to immunity for foreign State officials. In its judgment in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice rejected exceptions, albeit in the context of the immunity of an incumbent Minister for Foreign Affairs. In its judgment in *Jurisdictional Immunities of the State*, it also rejected such exceptions in the context of State immunity. While those cases did not involve the immunity *ratione materiae* of State officials, the Court's decisions were based on its emphasis on the procedural nature of immunity and its rejection of the idea that exceptions to immunity should be made for specific crimes. In its judgment in *Jurisdictional Immunities of the State*, the Court asserted that "customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated" (para. 84 of the judgment). The Court also observed that a problem of logic would arise if a denial of immunity was predicated upon the gravity of the alleged act, since, at the time immunity was denied, no such act

[224] *Yearbook … 1991*, vol. II (Part Two), pp. 13 *et seq.*, para. 28.

would have yet been proven. Such observations appeared to be influencing civil actions against State officials at the national level. Although *Jurisdictional Immunities of the State* did not concern the immunity of State officials, the implications of the Court's judgment seemed to run counter to draft article 7. Decisions of the European Court of Human Rights in the context of civil actions also seemed to run counter to draft article 7.

19. The Special Rapporteur relied in part on the *Prosecutor v. Blaškić* case, which had been decided by the International Tribunal for the Former Yugoslavia. However, that case addressed the ability of the Tribunal to subpoena State officials, not that of a State to exercise jurisdiction over a foreign State official. In fact, international criminal tribunals did not seem to have taken the position that there were exceptions to the norms governing immunity before national courts, other than those relating to cooperation that were provided for in their statutes.

20. Seventh, treaty practice generally did not support draft article 7. The fifth report was especially uneven in that regard, relying on treaty practice when it supported the draft article but setting it aside when it did not. For example, the report concluded that the territorial tort exception in treaties addressing immunity of States from civil jurisdiction supported the existence of an analogous exception in the context of criminal jurisdiction. However, it failed to consider that the lack of any such exception in treaties relating to genocide, crimes against humanity, war crimes, torture, enforced disappearance or corruption was equally relevant in that regard.

21. The absence in the United Nations Convention on Jurisdictional Immunities of States and Their Property of any provision permitting exceptions on those grounds did not fit into the narrative of a trend towards limitations and exceptions. Moreover, the Special Rapporteur disregarded the significance of the fact that treaties which States still plainly regarded as entirely acceptable, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, to which 191 and 179 States had acceded, respectively, contained no exceptions to immunity for diplomats or consular officials accused of genocide, crimes against humanity or war crimes. Indeed, immunity for acts performed by such persons in the exercise of their official functions continued even after they had left office.

22. Treaties that specifically addressed the crime of genocide, war crimes, enforced disappearance and apartheid did not expressly deny immunity to State officials either. Many people took the view that article IV of the Convention on the Prevention and Punishment of the Crime of Genocide referred only to individual criminal responsibility and not to a person's immunity from foreign criminal jurisdiction. In any event, the Special Rapporteur could have noted that, since article VI of that Convention provided that suspects could be prosecuted solely by the State where the genocide had allegedly occurred or by an international criminal tribunal, they could be denied immunity only in that narrower context. Conventions combating corruption likewise contained no provisions denying immunity to foreign government officials, although they did deal with the immunity of government officials within their own State. If there had really been a trend towards denying immunity from foreign criminal jurisdiction to State officials accused of involvement in enforced disappearances, for example, the drafters of the relatively recent International Convention for the Protection of All Persons from Enforced Disappearance might have been expected to include a provision to that effect, but they had not done so.

23. Some treaties might possibly waive the immunity of State officials when a crime was defined in such a way that it could be committed only by a State official and every State party had an obligation to exercise jurisdiction over an alleged offender who entered its territory. Even so, it would be a purely treaty-based exception to immunity that was essentially predicated on the acceptance of the waiver when the official's State acceded to the treaty and it would operate only when the offender was present in the forum State.

24. Lastly, with respect to treaty practice, it was necessary to explain why some global treaties on crime were said to bear out the exceptions listed in draft article 7, while others, such as those on sexual slavery, child prostitution or child pornography, trafficking in narcotics, attacks on diplomats, taking of hostages, terrorist bombings or cybercrime, did not.

25. Eighth, the report was inconsistent in its use of cases, legislation or treaties that did not relate to criminal law. The report generally attached great significance to civil courts' findings when they supported draft article 7 by purportedly establishing exceptions to immunity, but deemed certain cases before the European Court of Human Rights, where exceptions to immunity had been rejected, to be of little relevance because they concerned civil and not criminal matters.

26. Ninth, the report contained a discussion, which was ultimately abandoned, of the distinction between three very different situations: when the act at issue was not official and the question of immunity *ratione materiae* therefore did not arise, where there was a limitation of immunity; when the act at issue was official but so heinous that immunity was purportedly denied, where there was an exception to immunity; and when immunity was denied for some other reason such as to ensure compensation for victims. Instead of acknowledging that the different treatment of limitations and exceptions by States and courts demonstrated that draft article 7 was not settled law, the report lumped all three situations together in the draft article, which therefore lacked a firm basis. He agreed with other members that it might be better to deal with limitations and exceptions separately, instead of addressing them in one provision on the non-applicability of immunity.

27. Turning to the text of draft article 7, paragraph 1 (*a*), he said that he was sceptical about the existence of a consistent trend in State practice towards recognizing that immunity did not apply to the crimes listed in that subparagraph. Some States lifted immunity, while others did not. In some cases, a court lifted immunity for reasons other than a belief that there was an exception to immunity for international crimes. It was therefore important to

determine, in each case, whether the court had felt bound by a rule of customary international law, or whether there had been other issues at play.

28. As for draft article 7, paragraph 1 (*b*), the three cases cited in the report, where a national court had purportedly denied immunity *ratione materiae* to a foreign State official in a criminal case involving alleged corruption, did not constitute the widespread or representative practice needed to demonstrate the existence of a norm of customary international law. One of the most common arguments in favour of the inapplicability of immunity *ratione materiae* in cases of corruption was that a corrupt act could not be an official act. A failure to differentiate between that reasoning and the rationale relating to international crimes in subparagraph (*a*) created confusion as to the meaning and scope of the draft article.

29. With regard to draft article 7, paragraph 1 (*c*), the Special Rapporteur did not explain that the territorial tort exception to immunity from civil jurisdiction stemmed from the idea that it was reasonable for a foreign State to be civilly liable for insurable risks. That explanation did not, however, easily translate into an exception to immunity for criminal behaviour by officials. While the Special Rapporteur acknowledged in her report that national laws on State immunity permitted exceptions for State acts that were essentially commercial or private (*jure gestionis*), it ignored the other side of the coin, which was the preservation of State immunity for public acts (*jure imperii*). If the existence of a territorial tort exception in such laws was relevant to the immunity of State officials from foreign criminal jurisdiction, then the retention of immunity for public acts, such as military activities, would seem equally relevant, a point which had been addressed in the *Jurisdictional Immunities of the State* case.

30. Since draft article 7 did not reflect existing law, but was a proposal for new law, the Commission would have more freedom in its approach to the topic if the Special Rapporteur acknowledged that fact. When developing new law on that issue, the Commission should link its work with the question of procedural safeguards. It should not attempt to reach agreement on draft article 7 without knowing what procedural safeguards would operate in order to prevent abuse. It might therefore wish to refrain from referring the draft article to the Drafting Committee, or to refer it only on the understanding that it would be held there pending receipt of the Special Rapporteur's next report.

31. The connection between draft article 7 and procedural issues was illustrated by two examples. The first was the situation described in paragraph 82 of the previous Special Rapporteur's second report.[225] The second was *Ahmet Doğan v. Ehud Barak*, a case in the United States of America against Ehud Barak, a former Israeli Minister of Defence, in which it had been alleged that he had authorized the torture and extrajudicial killing of a United States national. Both the Government of Israel and the Government of the United States had supported Mr. Barak's claim to immunity on the ground that he had acted in his official capacity. In granting Mr. Barak immunity and dismissing the case, the District Court of the Central District of California had held that a defendant was entitled to immunity where the sovereign State had officially acknowledged and embraced the official's act. Thus, the procedural posture of the Government concerned was relevant to the granting or denial of immunity.

32. Given the divergence of views within the Commission on what was an important and sensitive issue, any draft article on it should be discussed and developed simultaneously with the associated commentary, either in the Drafting Committee or in a working group.

33. Mr. TLADI, referring to Mr. Murphy's suggestion that draft article 7, paragraph 1 (*a*), should be considered in tandem with procedural aspects, said that the example of the *Ahmet Doğan v. Ehud Barak* case seemed to pertain not so much to the question of exceptions as to the question of what constituted an official act. The Commission had already adopted a definition of an "act performed in an official capacity" without waiting to examine the procedural aspects of immunity. In fact, in the past, it had not been unusual for the Commission to adopt draft articles before considering other related aspects of a topic. He was therefore unconvinced by Mr. Murphy's assertion that the Commission had to discuss procedural aspects before dealing with draft article 7.

34. Mr. MURPHY said that the Commission had often considered draft articles in tandem, because it had been useful to see the relationship between them. Looking not at one draft article but at a cluster of them gave the Commission a sense of how a project was unfolding. Procedural aspects could be directly related in various ways to exceptions to immunity. Many people regarded waivers as a form of exception. In a case such as that of Ehud Barak, the concept of an official act, the ability to maintain immunity and the posture of the State advancing immunity as a procedural objection before the court were all interlinked. For that reason, the draft articles could not be viewed in isolation from each other. His principal point was that immunity was a very sensitive and complicated issue on which the Commission had held a somewhat explosive debate six years earlier. Since he was greatly concerned about what was law and what was not law, his suggestion had been aimed at facilitating agreement, first by deciding whether the Commission was trying to codify law, second by finding a way of linking exceptions to procedural issues and third by finding a way to deal with the question in the commentary.

35. Mr. JALLOH said that, while he understood that Mr. Murphy's proposals were aimed at minimizing differences of opinion within the Commission, it seemed somewhat hazardous to discuss procedural mechanisms before the Special Rapporteur had submitted her sixth report.

36. Mr. HMOUD said that the question of whether there were substantive exceptions or limitations had nothing to do with procedure.

37. Mr. MURPHY said that there would be no harm in postponing further consideration of draft article 7 until

[225] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report of the Special Rapporteur, Mr. Kolodkin), p. 423.

the following session, when the Special Rapporteur's sixth report would be available, or in sending draft article 7 to the Drafting Committee but holding it there until the Commission had examined some of the procedural aspects. The two issues of exceptions to immunity and procedure were connected, because it was impossible to demonstrate the existence of settled law on exceptions and limitations from a mere 11 cases. If the Commission wanted to develop good law, it should be careful not to open the door to the pernicious use of new exceptions. He could not support the new regime promised by draft article 7 without procedural constraints to prevent prosecutors or magistrates from initiating vindictive legal proceedings against foreign officials.

38. Mr. CISSÉ said that the substantive question of exceptions and the formal question of procedure went hand in hand. The Special Rapporteur should be allowed enough time to produce an exhaustive report on procedural issues, especially in view of the sensitive nature of the subject matter.

39. Mr. ŠTURMA said that he agreed with a number of other speakers that crimes of corruption should not be included among the grounds for allowing an exception to immunity. On the other hand, he did support the territorial tort exception, although it required some qualification.

40. The Special Rapporteur's analysis of national courts' practice in her fifth report revealed a clear trend towards acceptance of the idea that the commission of international crimes was a bar to the application of the immunity of State officials from foreign criminal jurisdiction. The justification for that position was that either such crimes could not be deemed official acts, or they were so serious that they undermined the values and principles recognized by the international community as a whole. That conclusion seemed to be based on arguments of two types: inductive and deductive arguments.

41. The inductive argument turned on national legislative and judicial practice. Despite the diversity of national courts' positions, a trend could be seen towards making exceptions to immunity. While almost all national courts held that Heads of State and certain high-ranking officials enjoyed immunity from foreign criminal jurisdiction, some courts had concluded that immunity *ratione personae* might cease to apply if an international treaty clearly established that it had been waived or lifted or could not be invoked, as was the case of article 27 of the Rome Statute of the International Criminal Court. It was, however, plain that judgments were less than uniform on the matter of immunity *ratione materiae*.

42. Relevant State practice might be reflected in national legislation, which, though far from uniform, was indicative of nascent support for certain exceptions to immunity *ratione materiae*. Last but not least, the positions expressed by a number of delegations in the Sixth Committee, whether regarded as evidence of State practice or *opinio juris*, were supportive of certain exceptions to the immunity of State officials. Several States had expressed the view that international crimes should be considered *prima facie* as grounds for exceptions to immunity.

43. Those inductive arguments pointing to the existence of limitations and exceptions to the immunity *ratione materiae* of State officials could be supplemented with a number of deductive arguments based on the trends and values reflected in contemporary international law. First, the acceptance of the peremptory nature of *jus cogens* norms protecting fundamental values of the international community as a whole had given rise to the interpretation of such norms, by some national courts and many authors, as a basis for limiting or waiving immunity, notwithstanding the International Court of Justice ruling in *Jurisdictional Immunities of the State*, which rejected that position but, in his view, was open to criticism.

44. Second, in view of the need to protect human rights, access to justice and the right of victims to reparation, some regional courts, in particular the Inter-American Court of Human Rights, had found that in cases involving the exceptionally serious international crimes listed in draft article 7, paragraph 1 (*a*), the State had a duty to investigate and punish those responsible for such violations. The immunity of State officials from criminal jurisdiction could be considered an obstacle to the right of access to justice in such cases.

45. Third, the emergence of individual criminal responsibility, alongside the responsibility of States, for the commission of crimes under international law had affected the traditional rules on immunity. While the International Court of Justice, in *Arrest Warrant of 11 April 2000*, had held that the extension of a State's criminal jurisdiction pursuant to an *aut dedere aut judicare* obligation under an international convention did not affect immunities under customary international law, the situation seemed different with regard to immunity *ratione materiae*, which generally covered any acts of all officials. If there were no exceptions to such immunity, the prosecution of State officials for international crimes would in most cases be impossible.

46. Fourth, the obligation of States to establish and exercise jurisdiction over crimes under international law represented a means of resolving a possible conflict of norms through the systemic interpretation of international law. The approach based strictly on normative hierarchy was suited only to cases involving a direct conflict between two incompatible norms. That was not the case of rules on immunity that were procedural in nature. It was difficult to see how such rules could conflict with *jus cogens* norms prohibiting acts that constituted crimes under international law. The finding in *Arrest Warrant of 11 April 2000* that a procedural bar of immunity did not result in impunity was correct only when there was recourse to a criminal law mechanism other than the courts of the forum State, such as the courts of the official's State or a competent international criminal tribunal. If no alternative mechanisms were available to try perpetrators of international crimes, immunity from foreign criminal jurisdiction lost its exclusively procedural nature.

47. Although State practice afforded a number of examples supporting the idea that there were exceptions to the immunity of State officials, such practice was far from uniform and also offered good arguments to the contrary. Thus, inductive arguments in favour of exceptions must be

completed and balanced with deductive arguments. One final argument concerned the need to avoid fragmentation and achieve systemic integration of international law. Given that international law was a legal order or system, it could not include one rule requiring certain conduct and another rule prohibiting the same conduct, yet that would be the result if immunity was considered to be absolute. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance specifically included State officials in the definition of the crimes in question. Since States were obligated to establish and exercise their jurisdiction over those crimes, they could not at the same time be barred from prosecuting State officials by absolute immunity *ratione materiae*. Unlike the *jus cogens* argument, that approach did not portray the situation in absolute terms, as a choice between the peremptory prohibition of a crime or immunity. Instead, it advocated an interpretation that would allow both rules to have the broadest possible effect, pursuant to the principle of harmonization.

48. While he agreed with other Commission members that a report on the procedural aspects of immunity of State officials from foreign criminal jurisdiction would have facilitated the debate on exceptions, he did not wish to defer the consideration of draft article 7. Both the substantive parameters for exceptions, referring at least to core crimes under international law, and procedural rules, covering the invocation or waiver of immunity, including implicit waiver in some situations, were necessary for that purpose. It was important to consider criteria for exceptions to immunity, as immunity was not regarded as absolute in contemporary international law, but also to examine procedural rules that protected States and their officials from abuses of such exceptions in the form of politically motivated or legally unjustified investigations and prosecutions by foreign criminal authorities. He recommended that draft article 7, paragraphs 1 and 2, be referred to the Drafting Committee.

49. Ms. LEHTO said that the highly complex and politically sensitive issue of limitations and exceptions to the immunity of State officials, which was dealt with in the Special Rapporteur's well-researched and well-argued fifth report, was a key component of the topic under consideration. In referring to the Commission's earlier work on other aspects of the topic and to relevant treaties, national legislative practice and international and national judicial practice, the Special Rapporteur struck the right balance between the need for stability in international relations and the need for accountability for the most serious international crimes, concluding that there were no limitations or exceptions to the personal immunity of Heads of State or Government or Ministers for Foreign Affairs during their term of office but that exceptions could apply to such persons in the context of functional immunity.

50. Inevitably, the customary regime of immunities had been affected by developments in international criminal law in recent decades, including the establishment of international criminal jurisdictions that did not recognize official position or immunities as a bar to accountability and the key role of national courts in investigating and prosecuting international crimes. There were also internationalized or hybrid tribunals, cases that were referred from an international tribunal to a national court and the principle of complementarity in the Rome Statute of the International Criminal Court, under which national judicial systems had the primary responsibility for investigating and prosecuting grave crimes. All those situations required a coherent and predictable approach to immunity.

51. In analysing exceptions to immunity, the Commission should take into account national laws that had been adopted to implement the Rome Statute of the International Criminal Court. For example, when Finland had ratified the Statute in 2000, it had taken care to ensure that it could exercise jurisdiction over genocide, crimes against humanity and war crimes and had amended its Criminal Code to provide also for universal jurisdiction over those crimes.

52. She did not share the concerns expressed by other Commission members about the length of the fifth report and the number of court cases cited, as a comprehensive overview of the legal landscape related to the question of exceptions was useful. In particular, the *Arrest Warrant of 11 April 2000* judgment supported the conclusion that no exceptions applied to immunity *ratione personae*, as reflected in draft article 7, paragraph 2. That judgment also presented the argument of alternative means of redress, which the Special Rapporteur rightly criticized in paragraph 151 of the report. When such alternative means were not available or not effective, rules on immunity would contrast with the norms prohibiting international crimes; in other words, a procedural bar would become a substantive bar. In her report, the Special Rapporteur addressed several aspects of that conflict, including the *jus cogens* nature of such a prohibition, the obligation and primary responsibility of States to investigate and prosecute such crimes and the victims' right to access to justice and to reparations. The detailed analysis of international jurisprudence also usefully pointed out that the issue of exceptions had been addressed only partially by different courts and tribunals, within the limits of each particular case, and that some of the conclusions were therefore not relevant to the issue of exceptions.

53. The Special Rapporteur concluded, in paragraph 121 of her report, that there was a majority trend in national judicial practice to accept the existence of certain limitations and exceptions to immunity *ratione materiae*, but that it was nevertheless difficult to identify the existence of a clear and undisputed customary law rule to that effect. That seemed to be a valid description of the situation, and the Commission did indeed face a choice that was fully within its mandate. She shared the Special Rapporteur's view that the most serious international crimes must be seen to constitute a limitation or exception to the normal procedural rules of immunity. At the same time, immunity remained the general rule that protected certain specific functions of the State in its international relations, even if former State officials were held accountable in the unlikely event that they had committed such crimes.

54. While the Special Rapporteur's distinction between limitations and exceptions was a useful analytical tool, it had no practical implications and thus should not

be included in draft article 7. She supported the inclusion of the list of crimes set out in paragraph 1 (*a*) of the draft article as categories of crimes to which immunity *ratione materiae* did not apply. Torture and enforced disappearance were crimes against humanity, but merited separate mention because there were specific treaty regimes for those crimes. It might be possible to add other categories of crimes to that subparagraph, but its scope should remain fairly limited. Aggression was undoubtedly an international crime as serious as those listed in the subparagraph, and was covered by the Rome Statute of the International Criminal Court. Finland had ratified the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, and although its Parliament had emphasized that Finland should be able to exercise its primary jurisdiction over that crime, it had not added the crime of aggression to the category of crimes over which Finland could exercise universal jurisdiction, pointing out that the crime was not undisputedly one to which universal jurisdiction would apply. She therefore agreed with the Special Rapporteur's conclusions in paragraph 222 of the report.

55. Regarding paragraph 1 (*b*) of draft article 7, she did not think that crimes of corruption had any place in the draft article. The concept was unclear and could apply to many different crimes, including transnational crimes that could not be regarded as official acts because they served private interests. In relation to paragraph 1 (*c*), she agreed that there were sufficient grounds to speak of an absence of immunity with regard to crimes committed in the territory of the forum State; that question could best be addressed in the commentary. Paragraph 2 was in line with the Commission's earlier work and reflected *lex lata*. As to paragraph 3, she supported the inclusion of a "without prejudice" clause explicitly referring to cooperation obligations that might arise from other regimes by which a State was bound.

56. While the procedural aspects of the immunity of State officials from foreign criminal jurisdiction were important, she did not agree that the Commission could not discuss draft article 7 until it had received a comprehensive report on that subject. Although it was true that in the Sixth Committee, the representative of Norway, speaking on behalf of the Nordic countries, had said that robust procedural safeguards were important for the overall regime of immunities and exceptions, he had also expressed full and unconditional support for draft article 7, paragraph 1 (*a*). She recommended that the draft article be referred to the Drafting Committee.

57. Mr. JALLOH said that, as the Special Rapporteur noted in her thoughtful and creative fifth report, limitations and exceptions to immunity were one of the central issues, if not the central issue, that the Commission had to consider in its work on the controversial topic of the immunity of State officials from foreign criminal jurisdiction. For that reason, as several Commission members had noted, it should seek to strike a balance between, on the one hand, sovereignty, the exercise of jurisdiction and the procedural limits imposed by the institution of immunity and, on the other, the contemporary demands of justice, individual accountability and the international community's ongoing efforts to combat impunity.

58. In their comments on the Special Rapporteur's fifth report, some Commission members had warned of the risk of impairing the stability of international relations and of the even graver risk of the political abuse of exceptions to immunity, especially in respect of the leaders of weaker States. Recently, a number of African leaders had echoed those arguments, but most of those who had done so had themselves been accused of fomenting atrocity crimes. While the risk of impairment to the stability of international relations was often invoked, although it was not supported by empirical evidence, the instability and other negative impacts caused by atrocity crimes in the affected State, neighbouring States and the international community as a whole were left unmentioned.

59. It should be recalled that, soon after its establishment, the Commission had concluded that a clear distinction could not be maintained between the progressive development of international law and its codification, which were defined in the statute of the International Law Commission as the object of its work. Thus, the Commission should avoid the tendency to prioritize codification over progressive development. Indeed, the Commission would be more likely to achieve an outcome on the topic that was acceptable to most or all of its members if it bore in mind the prudent, wise and practical position that it had historically adopted with regard to the impossibility of maintaining a clear distinction between the two.

60. With regard to methodology, he agreed with other Commission members that the Special Rapporteur had provided a wealth of information on practice, which was necessary as a foundation for the draft article and might, in the future, prove to be a useful source for publicists and practitioners at the national and international levels. However, he had a number of concerns regarding the approach taken in the report. Above all, he did not think that customary international law currently provided for exceptions to the immunity of foreign officials from prosecution for war crimes, crimes against humanity and the crime of genocide before the national courts of third States, as the International Court of Justice had repeatedly emphasized since its decision in the *Arrest Warrant of 11 April 2000* case.

61. Although he could, at a normative level, accept the Special Rapporteur's conclusion that there was a "clear and growing trend" towards the acceptance of limitations and exceptions to immunity, he was not sure that the cases cited in support of that conclusion were the most relevant, as a number of them dealt with civil rather than criminal matters. Moreover, the judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000*, which was discussed extensively in the report, seemed to undermine the conclusion that express legal limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction currently existed. He nonetheless agreed with the Special Rapporteur that the judgment in that case was more limited in scope than was often recognized. Thus, while he accepted the Special Rapporteur's conclusion, he was not sure that she had chosen the best means of reaching it. She should perhaps have hewed more closely to the established process for identifying customary international law set out in paragraph 183 of the report. Nevertheless, if the Commission was engaged in the process of progressive development, that concern would largely disappear.

62. The fact that the report was in places a little tentative and perhaps even a little contradictory was not fatal to the Special Rapporteur's ultimate conclusion that there was a "clear trend" in favour of limitations and exceptions to immunity, at least in respect of certain core crimes, such as those included in the Rome Statute of the International Criminal Court. Indeed, such a conclusion could be reached on the basis of the practice of international courts and tribunals, their vertical relationship with national courts notwithstanding.

63. Turning to draft article 7, he recommended the retention of paragraph 1 (*a*), the deletion of paragraph 1 (*b*) and (*c*) and the retention of paragraphs 2 and 3.

64. He was in general agreement with paragraph 1 (*a*), which established that immunity did not apply in respect of the crime of genocide, crimes against humanity and war crimes, the three core international crimes over which the International Criminal Court currently exercised its jurisdiction. As stated in the preamble to the Rome Statute of the International Criminal Court, those crimes had come to be considered the "most serious crimes of concern to the international community as a whole" that "must not go unpunished". However, the Special Rapporteur's explanations for the omission of the crime of aggression from that paragraph were unconvincing. While it was true that the crime of aggression, like crimes against humanity, was not currently covered by a separate convention, the proceedings of 30 September 1946 of the Nuremberg Tribunal established that to initiate a war of aggression was "the supreme international crime".[226] The General Assembly's adoption of a definition of aggression by its resolution 3314 (XXIX) of 14 December 1974 and the inclusion of the crime of aggression in the Statute showed that it could give rise to criminal proceedings in domestic and international courts. Moreover, it was inaccurate to assert that there were very few pieces of national legislation that addressed the crime of aggression, as approximately 40 States currently exercised jurisdiction over it, and a very broad definition had been included in article 28M of the Statute of the African Court of Justice and Human Rights as amended by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

65. If, as was widely expected, the Assembly of States Parties to the Rome Statute of the International Criminal Court voted to activate the jurisdiction of the International Criminal Court over the crime of aggression, pursuant to the Amendments adopted in Kampala, the Court would acquire automatic jurisdiction over that crime. However, States parties to the Statute could opt out of these Amendments, and the Court would have no jurisdiction over the crime when committed by the nationals or in the territory of a State that was not a party to the Statute. Furthermore, in the *Regina v. Jones (Margaret) and Others* case in the United Kingdom, the Law Lords had found in 2006 that the crime of aggression was part of customary international law but was not prosecutable in domestic courts, absent legislative approval.

66. In that context, to permit the application of immunity in respect of the crime of aggression, while excluding its application in respect of the crime of genocide, crimes against humanity and war crimes, would undermine the Amendments adopted in Kampala. The Special Rapporteur could, within the framework of the Drafting Committee, add the crime of aggression to the list in paragraph 1 (*a*), which would be his own preference, or could at least refrain from adopting a final decision with regard to its non-inclusion until the Commission had had the opportunity to review the decision to be adopted in December 2017 by the Assembly of States Parties to the Rome Statute of the International Criminal Court. If the Commission decided not to add the crime of aggression to the list in paragraph 1 (*a*), it would leave a significant legal loophole that would obstruct the effective investigation and prosecution of the crime. Moreover, by establishing a hierarchy between the crime of genocide, war crimes and crimes against humanity, on the one hand, and the crime of aggression, on the other, the Commission would downgrade the status of the crime of aggression, thereby undermining the scope and reach of the Statute, which was predicated on the conduct of national prosecutions pursuant to the principle of complementarity.

67. While legitimate concerns might be raised regarding the inclusion of torture as a separate crime in draft article 7, paragraph 1 (*a*), particularly the fact that the view of torture as a war crime or a crime against humanity was more firmly grounded in customary international law, its inclusion was nonetheless justifiable, especially in the light of its presumed peremptory status. It was defined as a discrete crime in article 1, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, as clarified in several judgments of the International Tribunal for the Former Yugoslavia, the main elements of that definition met with general international acceptance. Thus, he commended the progressive decision to include torture in paragraph 1 (*a*), which might be a welcome legal development that complemented the emerging international consensus that torture was a discrete and heinous international crime.

68. The inclusion of enforced disappearance in paragraph 1 (*a*) was also justifiable and commendable from the perspective of progressive development. However, some States might object to its inclusion. The crime was defined in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, to which 56 States were parties. In the *Prosecutor v. Kupreškić* et al. judgment, the International Tribunal for the Former Yugoslavia had found that enforced disappearance fell under the category of "other inhumane acts", and the case law of the inter-American system was particularly instructive in that connection.

69. Alternatively, instead of specifying the crimes in respect of which immunity did not apply, a more general formulation could be used in paragraph 1 (*a*) to exclude the application of immunity in respect of "the most serious crimes under international law".

70. With regard to paragraph 1 (*b*), he was not convinced that the concept of crimes of corruption was completely clear. In the African regional system, efforts had

[226] International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 22, Nuremberg, 1949, p. 427.

been made to define the scope of corruption and related offences within a single provision. Corruption and related offences, irrespective of their gravity, were defined in article 4 of the African Union Convention on Preventing and Combating Corruption, and that definition was reproduced in article 28I of the Statute of the African Court of Justice and Human Rights as amended by the Malabo Protocol, where it was prefaced with the qualification that the acts specified therein constituted acts of corruption if they were "of a serious nature affecting the stability of a [S]tate". That qualification was intended to establish a gravity threshold for international criminal responsibility. In fact, it could be argued that the Protocol on the Statute of the African Court of Justice and Human Rights did not adequately convey the gravity of the crime of corruption, which had far-reaching consequences for States and, according to some authors, could amount to a crime against humanity. He nevertheless had doubts regarding the inclusion of corruption among the crimes in respect of which immunity did not apply.

71. Concerning paragraph 1 (*c*), it did not seem appropriate to include a territorial tort exception, which applied to civil rather than criminal proceedings.

72. He did not share Mr. Tladi's concern that the provisions of paragraph 3 were prejudicial to ongoing judicial proceedings, as the obligation to cooperate with an international tribunal would arise for States parties to the relevant statute and might not arise for States that were not parties, unless that obligation was imposed by a Security Council resolution adopted under Chapter VII of the Charter of the United Nations. With regard to the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Pre-Trial Chamber II of the International Criminal Court had found, in its April 2014 decision on the cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and surrender to the Court, that the very fact that Security Council resolution 1593 (2005) of 31 March 2005 had referred the situation to the Court gave rise to an obligation to cooperate with it, and that the Security Council had "implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State" (para. 29 of the decision). In his view, article 98, paragraph 1, of the Rome Statute of the International Criminal Court entailed a general obligation on the part of the Sudan to cooperate with the Court, stemming from a resolution that constituted a "decision" within the meaning of Article 25 of the Charter of the United Nations and, in the event of any conflict, would prevail in accordance with the supremacy clause contained in Article 103 of the Charter of the United Nations. In any case, the provisions of paragraph 3 did not apply to the Court only, but to any "international tribunal", whether or not it was a criminal tribunal, and applied only to the "forum State".

73. With regard to the future programme of work, he was comfortable with the Special Rapporteur's proposal to examine the procedural aspects of immunity in her sixth and last report. He believed that the development of procedural safeguards such as those provided for in article 18 of the Rome Statute of the International Criminal Court would address many of the objections that Commission members had raised. In that connection, he noted that, in a 2009 decision adopted by the Assembly of the African Union, African States had identified the need for an international regulatory body with competence to review and/or handle complaints or appeals arising out of abuse of the principle of universal jurisdiction by individual States.[227] In addition, the provisions of the Statute included an example of a mechanism for the postponement of execution of a request in respect of an ongoing investigation or prosecution. In any case, he would urge the Special Rapporteur to put forward proposals in her sixth report to address the concerns that had been raised regarding the possible abuse of exceptions to immunity. However, the Commission should not defer the adoption of draft article 7 pending its consideration of a procedural mechanism.

74. He fully supported the referral of draft article 7 to the Drafting Committee, subject to the amendments proposed by Commission members, including the proposed deletion of crimes of corruption and of the territorial tort exception.

The meeting rose at 1.05 p.m.

3363rd MEETING

Wednesday, 24 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

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. TLADI recalled that at the Commission's 3361st meeting, he had argued that the "without prejudice" clause in draft article 7, paragraph 3, was, in fact, wholly prejudicial. Mr. Jalloh, in attempting to rebut that argument at the 3362nd meeting, had given an interpretation

[227] See Decisions and declarations of the Thirteenth Ordinary Session of the Assembly of the African Union, 1–3 July 2009, Sirte (Libyan Arab Jamahiriya), Decision on the abuse of the principle of universal jurisdiction (Doc.Assembly/AU/11(XIII)), para. 5.

of the Rome Statute of the International Criminal Court that showed precisely why draft article 7, paragraph 3, was prejudicial: that provision suggested something about the content of legal rules in another regime that was subject to ongoing litigation. He himself saw that as a cause for deep concern and therefore found draft article 7, paragraph 3, to be unacceptable. The only solution would be to have a "without prejudice" clause that applied to the draft articles as a whole, rather than to only one provision.

3. Mr. JALLOH said that his point had been that draft article 7, paragraph 3, contained a reference, not specifically to the International Criminal Court, but to "an international tribunal", which did not necessarily have to be criminal in nature. He was not convinced that a broad "without prejudice" clause was desirable, but he was open to further discussion of the matter.

4. Mr. GÓMEZ ROBLEDO, referring to the Special Rapporteur's fifth report, said that the need to address the topic of exceptions to immunity was clear; the issue was whether the progressive development of international law should be avoided, at all costs and against the wishes of the international community, or whether the Commission should display the same boldness and creativity as it had in the past.

5. The States that had commented on the topic during the most recent debate in the Sixth Committee held divergent views on it, but that lack of consensus in no way implied that they were opposed to the consideration of the topic, as some members of the Commission had suggested. Moreover, it would be premature to draw any kind of conclusion from the debate in the Sixth Committee, which would be influenced by the ongoing debate within the Commission. As noted in paragraph 19 (*a*) of the report, although some past and present members of the Commission had maintained that there were no exceptions to immunity, they were in the minority.

6. In studying the topic, it was important to start from the outset of discussions on individual criminal responsibility, in 1950, when the Commission had adopted the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[228] In its commentary to Principle III, the Commission had recognized that the immunity of State officials from foreign criminal jurisdiction could not be applied to acts that were condemned as criminal by international law.[229] In 1996, it had expressed the same basic idea in its commentary to article 7 of the draft code of crimes against the peace and security of mankind.[230]

7. In the draft code, the Commission had envisaged the concurrent jurisdiction of an international criminal court to complement the jurisdiction of national courts, whose participation it had deemed crucial to the effective implementation of the code. That sentiment had come to be embodied in the principle of complementarity on which the functioning of the International Criminal Court was based. Pursuant to that principle, national courts had priority in terms of prosecuting the perpetrators of crimes under the Rome Statute of the International Criminal Court; it was therefore essential to strengthen their capacity to carry out such prosecution.

8. Three principles established by the Commission and enshrined in the Statute should be borne in mind, including by national courts: official capacity was irrelevant to the determination of individual criminal responsibility; immunities under national or international law did not apply before the International Criminal Court; and compliance with superior orders did not exempt perpetrators from criminal responsibility.

9. Though he was aware that the draft articles were not linked in any way to the establishment of an international court, he wondered whether the Commission could ignore the legal developments brought about by the Rome Statute of the International Criminal Court. Those developments were not vague values or mere "fragments", as Mr. Murphy had described them; they constituted positive law, demonstrating that the international community had reached a new consensus on preventing and punishing the most serious international crimes.

10. The Commission could not overlook the content of various international criminal law and human rights treaties insofar as they explicitly provided for the individual criminal responsibility of agents of the State for international crimes. Similarly, it was important to take into account: the judgment of the Appeals Chamber of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*; the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000* and the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal; the resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes, which had been adopted by the Institute of International Law in 2009,[231] in particular article 3 thereof; and the Commission's own comments to the General Assembly on judicial practice, mentioned in paragraph 31 of the fifth report. Although the Special Rapporteur had been criticized for referring only to a small body of case law, in his own view, the fact that so few sentences had been handed down for crimes against humanity should be taken as a good sign.

11. In analysing the topic, it should be borne in mind that State responsibility and individual criminal responsibility were so different as to render them incomparable in the context of immunity. For that reason, the arguments put forward with regard to State immunity in the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State* were not relevant to the topic under discussion.

12. There was, of course, a close relationship between immunity and impunity. Even though immunity was

[228] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[229] See document A/1316 (footnote 228 above), para. 103.

[230] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

[231] Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), pp. 226–227; available from: www.idi-iil.org, *Resolutions*.

strictly procedural in nature, its impact when individual responsibility for international crimes was being established could not be disregarded. There were a couple of points to consider in that respect. First, history had shown that, in most cases involving international crimes, the perpetrators had been agents of the State acting in their official capacity, and it had often been States themselves that had attempted to prevent those agents from being held accountable by domestic courts, where they would not necessarily have enjoyed any form of immunity from jurisdiction. Second, there were currently some limitations on the ability to combat impunity of international criminal tribunals, particularly the International Criminal Court, before which State officials did not benefit from immunity.

13. If those two factors were taken into account, it could be argued that the immunity of State officials from foreign criminal jurisdiction did indeed represent an obstacle in the fight against impunity. The aim should be to ensure that it was not an insurmountable obstacle; in other words, that immunity did not lose its procedural character and become a "substantive bar" to the attribution of international criminal responsibility. If it did, the result would be a clash of primary doctrines: on the one hand, immunity, which protected the principle of sovereign equality among States, the proper performance of State functions without external interference and the stability of international relations; and, on the other, the prohibition of international crimes as a *jus cogens* norm and the fight against impunity as one of the fundamental values and objectives of the international community as a whole.

14. The appropriate response was therefore to adopt the "conforming interpretation" developed by international human rights tribunals in order to guarantee a balance between opposing legal values and doctrines. That interpretation led to two separate conclusions that pointed in the same direction. First, international crimes could in no way be considered to have been committed in an official capacity, and, consequently, immunity *ratione materiae* did not apply to them. Second, in serious circumstances in which the fundamental legal values of the international community were undermined, immunity should be waived.

15. He agreed with the Special Rapporteur that State practice had displayed a clear tendency to view the commission of international crimes as a justification not to apply the immunity of State officials from foreign criminal jurisdiction. For that reason, and in the light of the two conclusions that he had just highlighted, he welcomed the inclusion of draft article 7 on the non-applicability of immunity, and thought it should be referred to the Drafting Committee unconditionally. Indeed, he was strongly opposed to the imposition of any kind of restrictions on the work of the Special Rapporteur. Should there be no consensus within the Commission, the matter should be put to a vote, but he trusted that such a measure would not be necessary.

16. He noted with interest that corruption-related crimes had been included among the crimes in relation to which the immunity *ratione materiae* of State officials did not apply. He shared the Special Rapporteur's view that the suppression of corruption at the national and international levels constituted a key objective of international cooperation. If corruption had been so very different from the core crimes under international law, it would not have made sense for Mr. Murphy, the Special Rapporteur on crimes against humanity, to model his proposed draft article on mutual legal assistance on the United Nations Convention against Corruption.

17. It should be stressed that a corruption-related act could not be performed in an official capacity, since it was an illegal, *ultra vires* act carried out for the exclusive benefit of the perpetrator and to the detriment of his or her home State. Particular attention should be paid, in that regard, to the resolution on the immunities from jurisdiction and execution of Heads of State and of Government in international law,[232] adopted by the Institute of International Law in 2001, in which it was indicated that former Heads of State did not enjoy immunity from foreign criminal jurisdiction when the acts of which they were accused had been performed exclusively to satisfy a personal interest, or when they constituted a misappropriation of the State's assets and resources.

18. Even though State practice did not support the existence of a customary rule providing for an exception to immunity for corruption-related crimes, the practice stemming from national courts, international cooperation and universal and regional treaty law was reason enough for the Commission to recommend that States should establish that exception by means of a treaty.

19. He agreed with the conclusion that informed draft article 7, paragraph 2, namely that no exception to immunity *ratione personae* could be deduced from State practice. That view had been espoused by States themselves in their comments on the Commission's work on the topic. Of particular relevance was the assertion by the International Court of Justice, in the *Arrest Warrant of 11 April 2000* case, that immunity *ratione personae* from the jurisdiction of foreign courts was absolute.

20. Given the purposes of immunity in international law, and taking into account the principle of sovereign equality among States and the need to ensure the stability of international relations, on the one hand, and the fight against impunity, on the other, it had to be concluded that the immunity *ratione personae* of the members of the "troika" should be respected throughout their time in office.

21. Turning to the obligation to cooperate with international tribunals, he said that he supported the inclusion of draft article 7, paragraph 3 (*b*). As had been noted, immunity *ratione personae* from foreign criminal jurisdiction was essentially granted because of the role that the members of the troika played as representatives of the State in international affairs, which meant that it could be justified by the principle of *par in parem non habet imperium*. However, that principle did not apply with regard to international tribunals, which operated at the supranational level and therefore did not undermine the principle of sovereign equality among States. For that reason, draft article 7 had to contain some mention of international tribunals.

[232] Institute of International Law, *Yearbook*, vol. 69, Session of Vancouver (2001), pp. 742–755; available from: www.idi-iil.org, *Resolutions*.

22. He wished to conclude by asking a question that was more relevant than whether priority should be given to *lex lata* over *lex ferenda*, an issue that tended to consume the Commission's attention and was, in reality, a pretext for blocking the progress of work on the topic. Should the Commission contribute to the establishment of a rule of law that would ultimately be the responsibility of Member States of the United Nations, or risk being accused of lacking the audacity to propose something concrete in support of the fight against impunity?

23. Mr. MURASE, noting that some members had expressed the view that immunity was a procedural matter and had nothing to do with the substantive law question of responsibility, said that he did not agree. Immunity and responsibility were intrinsically linked. To describe immunity as a mere procedural matter, divorced from the question of responsibility, could not be supported by its legislative history, by doctrine or by practice. The objective of the topic of immunity should be, not to protect State officials who committed serious international crimes from prosecution, but rather, to prevent impunity for those officials, regardless of their ranking or status. The Commission's efforts should be devoted to eliminating any impediment to proceedings before national courts, including to the lifting of immunities. The draft articles on the topic should be in line with article 27, paragraph 1, of the Rome Statute of the International Criminal Court. However, draft articles 3 to 6,[233] provisionally adopted by the Commission, were diametrically opposed to what was stipulated in that provision.

24. That problem was remedied by the Special Rapporteur's fifth report and the proposed draft guideline 7 on exceptions, he was happy to note. He entirely agreed with the Special Rapporteur's approach and with her statement in paragraph 142 of the report that since international law was a genuine normative system, the Commission's development of a set of draft articles could not and should not introduce imbalances in significant sectors of the international legal order that had become among its defining characteristics. It was gratifying to see a proper balance restored by the incorporation in the draft articles of exceptions to immunity. He therefore enthusiastically supported sending draft article 7 to the Drafting Committee.

25. The International Criminal Court had some serious problems, but they were due in part to the current uncertainty in international legal rules regarding the immunity of State officials from foreign criminal jurisdiction. In those circumstances, the Commission could contribute a great deal by clarifying the exceptions to and limitations of immunity, thereby helping the Court to clear the way for its efforts to combat impunity.

26. Mr. RAJPUT said that the conclusions arrived at by the current Special Rapporteur in her fifth report were the diametrical opposites of those reached by the previous Special Rapporteur in his second report.[234] Her freedom to approach the topic in her preferred way could not be challenged, but she ought to have given detailed reasons for disagreeing with the conclusions of the previous Special Rapporteur and wanting the Commission to adopt a new and a contradictory course.

27. In the section of her report on treaty practice, the Special Rapporteur was trying to make two points: first, that there was a territorial tort exception based on treaties relating to diplomatic and consular staff, and, second, that the mere existence of treaties on certain international crimes meant that there were exceptions to immunity. However, the treaties relied upon to make the first point were on diplomatic and consular relations, an area beyond the scope of the present topic. On the second point, all the treaties criminalizing specific acts were silent on the question of immunity. The argument developed by the Special Rapporteur and some others, namely that allowing immunity would interfere with the obligation of *aut dedere aut judicare*, ignored the procedural nature of immunity. As the International Court of Justice had stated in paragraph 59 of the *Arrest Warrant of 11 April 2000* case, although various international conventions on the prevention and punishment of certain serious crimes imposed on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such an extension of jurisdiction in no way affected immunities under customary international law.

28. Paragraphs 96 to 108 of the fifth report referred to cases decided by international criminal tribunals to make the point that there were exceptions to immunity when the commission of international crimes was involved. However, to rely on such cases in drawing analogies was to compare apples and oranges. No one was denying that immunity did not exist before an international tribunal, but the scope of the present topic was limited to criminal proceedings in the national courts of a foreign State. That also applied to the references in paragraphs 123 to 140 to the past work of the Commission: again, the Commission had been concerned with immunity before international tribunals and not national courts. In paragraphs 42 to 59 of her fifth report, the Special Rapporteur referred to national legislative practice, but the material presented did not support the analysis of exceptions to immunity and raised an important and serious question of methodology: the Commission could certainly take note of a situation under domestic law and cases in national courts, but it could not interpret domestic law. Paragraphs 57 to 59 referred to laws adopted to incorporate provisions of the Rome Statute of the International Criminal Court in domestic law, but again, the legislation related to an international tribunal where immunity did not apply and did not support the claim that immunity before national courts was generally not permitted.

29. The only part of the report that could support the contention that there were exceptions to immunity when international crimes were involved was paragraphs 109 to 121, on national judicial practice. Yet even the three cases on which the Special Rapporteur laid emphasis did not support that position. In *Al-Adsani v. the United Kingdom*, the European Court of Human Rights had admitted that it was unable to discern any firm basis for concluding that, as a matter of international law, a State no longer

[233] *Yearbook … 2013*, vol. II (Part Two), pp. 43 and 47 (draft articles 3 and 4); *Yearbook … 2014*, vol. II (Part Two) and corrigendum, p. 146 (draft article 5); and *Yearbook … 2016*, vol. II (Part Two), p. 216 (draft article 6).

[234] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report of the Special Rapporteur, Mr. Kolodkin).

enjoyed immunity from civil suit in the courts of another State where acts of torture were alleged. The same conclusion had been reached in the case of *Kalogeropoulou and Others v. Greece and Germany*. Even though those were civil cases, the Special Rapporteur insisted on using them to conclude, in paragraph 95 of her report, that the prohibition against torture was defined as a *jus cogens* norm and was an absolute prohibition. As for the *Pinochet* case, it had been, not a case of prosecution in the courts of the United Kingdom, but a case of extradition. The House of Lords had been dealing, not with the position under international law, but exclusively with domestic law. The case could hardly support a blanket proposition that exceptions to immunity existed before national courts. Lastly, the case *Minister of Justice and Constitutional Development and Others v. Southern Africa Litigation Centre and Others* decided in March 2016 by the South Africa Supreme Court of Appeal had been a case under domestic law and was not an authority for stating that there were exceptions to immunity under international law. The issue of immunity *ratione materiae* had never been involved in the case.

30. The report claimed that a number of national court decisions, mostly cited in the first footnote to paragraph 114, had created a trend. As Mr. Murphy had already shown, however, of all those cases, only 11 had resulted in the rejection of immunity, and he himself had doubts even about them. The report did not mention in how many cases, and in which ones, immunity had been rejected on the grounds of *ratione materiae*, and for most of the cases, the reader was not even told whether the accused had been tried in the State of his or her nationality or a foreign State, whether immunity had been invoked and then rejected and what were the facts of the case. As Mr. Murphy had pointed out, some of the cases had been set aside on appeal. There were no cases from African or Asian courts. Was such material really sufficient? The Commission was being called upon to advise the very numerous members of the international community that the decisions of a handful of courts amounted to a "clear trend".

31. The report also did not highlight the point that immunity was a procedural question. However, the International Court of Justice had consistently held that position. In *Arrest Warrant of 11 April 2000*, the Court had emphasized that immunity from foreign criminal jurisdiction and individual criminal responsibility were quite separate concepts and that while jurisdictional immunity was procedural in nature, criminal responsibility was a question of substantive law. That view had been confirmed in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In *Jurisdictional Immunities of the State*, the Court had reaffirmed that the rules of State immunity were procedural in character, confined to determining whether the courts of one State could exercise jurisdiction in respect of another State. However, in paragraph 150 of her fifth report, the Special Rapporteur declared that the description of immunity as a mere procedural bar was difficult to support, particularly in the field of criminal law.

32. The Special Rapporteur and some members of the Commission had suggested that it should overrule the Court. Could it do that? It had done so once in the past, in *The Case of the S. S. "Lotus"*. Based on the casting vote of the President, the Court had held that Turkey could exercise criminal jurisdiction, in subversion of the right of the flag State to prosecute for incidents on the high seas. But in that case, State practice had been in favour of the flag State exercising jurisdiction. Did the Commission wish to overrule the Court once again and make an exception to the procedural nature of immunity, based on the practice of a few domestic courts?

33. There were policy reasons that made immunity procedural. What if the trial proceeded and it was then found that a State official who had been tried in another State was not guilty? What happened to the liberty of such a person in the meanwhile? Were there any assurances that the trial in a foreign country would be fair? What if the proceedings were sham? It would be too late if those answers were arrived at after the trial had been completed. At the jurisdictional stage, at best, an indicative or *prima facie* determination could be made, but in order for the trial to be fair, the preliminary conclusion must not dictate the final conclusion, which had to be based on an independent analysis of the merits of the case. There could be no presumption of a breach of *jus cogens* while there was still no final determination of violation of a *jus cogens* norm. Under such circumstances, he would be unwilling to support a proposal to overrule the *jurisprudence constante* of the International Court of Justice and thought the Commission should consider what would be the consequences if it set out upon such a course.

34. He was not sure if the distinction between *acta jure imperii* and *acta jure gestionis* was relevant to the discussion on immunity of State officials from foreign criminal jurisdiction. The concept had been developed in a different context altogether to distinguish commercial actions of the State from sovereign actions. Thus, the property of a Government-owned company could be pursued in execution of a court decision but the property where an embassy was located could not. The basis for that exception to immunity was the hypothesis that once a State entered into a contract, it waived its immunity from the commercial consequences of its actions. He was unable to understand how such a framework could be applied to individual criminal acts. In the case of *acta jure gestionis*, the act was that of the State, not of an individual. To claim otherwise would be to implicitly agree that even criminal acts were acts of the State and not of the individual, which would undermine the *ratione materiae* argument. In fact, the Supreme Court of Austria had held in the 1964 *Prince of X Road Accident Case* that acts considered to be *acta jure gestionis* were covered by immunity. Moreover, not all States applied the distinction. For example, in its judgment of 8 June 2011 in the case of *Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC (No. 1)*, the Court of Final Appeal of the Hong Kong Special Administrative Region of the People's Republic of China had not recognized that distinction, on the grounds that after the resumption of sovereignty by China, all Hong Kong laws had to be aligned with those of China, and so absolute immunity had to be recognized even in civil proceedings.

35. Turning his attention to whether there were adequate policy reasons to undo and overrule the work of the Commission and the International Court of Justice in the area

of immunity, he wished to point out that, in private international law, the doctrine of *forum non conveniens* was invoked by municipal courts to decline jurisdiction even when they had jurisdiction. The philosophy behind the *forum non conveniens* rule was that, even if a foreign court had jurisdiction, it might not be in a position to conduct an efficient trial. For instance, it could be difficult to procure evidence; most witnesses were likely to be unavailable; no site visits would be possible; and the rules of criminal procedure would be different. Moreover, in criminal trials the threshold of proof was normally higher, because the goal was a fair trial, not a conviction. However, the facts in cases of international crimes were often complex, and a foreign court would naturally face problems in accessing crucial documentary and witness evidence. If trials were started and conducted in haste, there was a greater chance of acquittal for lack of evidence, defeating the very purpose of the prosecution.

36. In the *Arrest Warrant of 11 April 2000* case cited in paragraph 61 of the report, the majority view had been that immunity did not amount to impunity and that an official could be tried either in the home State, before an international tribunal or in a foreign State, if immunity was waived. While some might feel those options were inadequate, they did ensure prosecution without compromising the stability of international relations. A number of recent examples could be cited: the removal of Hissène Habré's immunity by his own people to prevent Senegal from shielding him; the prosecution of Saddam Hussein by his own people; the prosecution by people of Bangladesh of those who had committed war crimes and genocide during the conflict in Pakistan; the prosecution by the people of Cambodia of offenders with the assistance of the United Nations. The work of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda offered further examples. There was thus no reason to deprive people of the chance to prosecute offenders themselves. Where that was not possible, an international tribunal could be created. By allowing a foreign court, which was unaware of the history, background, social construct and sensitivities of a jurisdiction, to try such cases, there was a greater likelihood of fostering animosity between States than of fighting impunity. Moreover, most such prosecutions were unlikely to lead to convictions, but would pose a risk to international relations. In 2006, French courts had initiated proceedings against Rwandan officials, with the result that diplomatic ties had been cut off until November 2009. Also in 2006, Spanish courts had initiated proceedings against Chinese officials for genocide, and again the result had been strained relations.

37. He agreed with the Special Rapporteur that impunity had to be fought, but he was not sure that draft article 7 was the correct way to go about doing that, for legal as well as policy reasons. He therefore could not support referring the draft article to the Drafting Committee.

38. Mr. LARABA said that the Special Rapporteur was to be commended on her efforts to produce an objective, impartial and balanced report on a topic that was particularly complex and sensitive. It was not certain, however, that she had achieved her objective. Many of the legal aspects covered in the report were the subject of differences of opinion and debates that sometimes went beyond the legal sphere. The most striking characteristic of the report was the gap between its content, especially in chapters II and IV, and the content of draft article 7. The Special Rapporteur had considered many aspects from both sides of the doctrinal debate on exceptions and limitations to the rules on the immunity of State officials from foreign criminal jurisdiction, and had reached the conclusion that such exceptions and limitations did exist, while acknowledging that not everyone shared her view. Unfortunately, she had failed to produce decisive arguments to provide a legal basis for her conclusion. Overall, her fifth report was characterized by a sort of judicial voluntarism that led her to minimize the legal aspects that ran counter to the conclusions she wished to reach.

39. Chapter II of the report dealt with treaty practice and legislative practice. Regarding national legislative practice, the Special Rapporteur stated in paragraph 42 that immunity of the State or of its officials from jurisdiction was "not explicitly regulated in most States" and that the response to immunity had been "left to the courts", underlining the importance she attached to case law in her approach to the topic.

40. Regarding the judicial practice of the international criminal tribunals, he said that with her insistence on the separate joint opinion of Judges Higgins, Kooijmans and Buergenthal and the dissenting opinions of Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert in the *Arrest Warrant of 11 April 2000* case heard by the International Court of Justice, the Special Rapporteur attempted to minimize the importance of the judgment. Systematic references to the separate joint opinion made it easy to forget that it was not actually a dissenting opinion, and that the judgment itself had been approved by a majority. Moreover, it was no isolated ruling. Subsequent decisions, such as the Court's judgment in *Jurisdictional Immunities of the State*, had also rejected the idea that there were exceptions to the rule of immunity.

41. In paragraph 95 of her report, on developments in the judicial practice of the European Court of Human Rights, the Special Rapporteur wrote that it did not seem possible to conclude that the Court's judgments constituted a sufficient basis for confirming that the immunity of State officials from foreign criminal jurisdiction was of an absolute nature, or that there were no exceptions to such immunity. In his own view, however, it was instructive to consider the Court's judgment in *Jones and Others v. the United Kingdom*, which had confirmed the broad applicability of the immunity of State officials. It was also worth noting that the judgment in that case had been less vigorously contested than the judgment in *Al-Adsani v. the United Kingdom*.

42. Difficulties also arose with regard to the Special Rapporteur's analysis of national judicial practice: the importance the Special Rapporteur attached to its role was reflected in paragraph 187, in which it was stated that even though the decisions of the International Court of Justice and the European Court of Human Rights were of great importance, they would "never be able to replace national courts in the process of formation of custom". According to the Special Rapporteur, therefore, the study

of national judicial practice was decisive in determining whether there were exceptions to the rule of immunity of State officials. The Special Rapporteur's decision to rely on national judicial practice to reach the desired conclusions could also be seen in paragraphs 109 to 122 and 179, 183 and 187, among others. In paragraph 179, she stated that the practice of domestic courts, "[a]lthough varied, … reveals 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". That raised the question of how to reconcile variability and clarity. Paragraph 184 (*a*) was ambiguous, because the Special Rapporteur stated that "[d]espite the diversity of positions taken by national courts in the cases analysed above, it is possible to identify a trend in favour of the exception". Again, the question was how to reconcile such diversity with the balance tipping in favour of the exceptions. Given the importance attached to the decisions of national courts—"an irrevocable element in ascertaining what a given State considers to be international law", according to paragraph 187—greater attention should have been paid to the variability and diversity of national court decisions that the Special Rapporteur herself had identified. Instead, she had proposed a draft article that did not fully reflect the true situation.

43. If draft article 7 was to be sent to the Drafting Committee, it was important to clearly identify what the objective was, as other members had already noted. Did the Commission wish to approach the topic from the perspective of *lex lata* or *lex ferenda*, or perhaps both? As things stood, he could not support draft article 7, but he was open to solutions that might be identified in a more in-depth debate and was confident that the Special Rapporteur would be able to put forward more balanced proposals that would generate a consensus.

44. Mr. PETER said that he generally agreed with the Special Rapporteur's treatment of exceptions and limitations to immunity. By and large, he was not in favour of immunities, as they placed certain categories of persons above the law and allowed criminals to escape punishment simply because of their positions. In his view, the bottom line was that everybody—without exception—should have to answer for his or her actions in court. That was the essence of the rule of law and equality before the law. That was also the essence of article 27 of the Rome Statute of the International Criminal Court, which provided that the Statute should apply equally to all persons without any distinction based on official capacity and that immunities or special procedural rules which might attach to the official capacity of a person should not bar the Court from exercising its jurisdiction over such a person. The Statute had been ratified by 124 States—almost two thirds of all Member States of the United Nations. However, the remaining States that were not parties to the Statute, or that had ratified it but had subsequently withdrawn, obviously did not support its objectives. From a democratic perspective, it was the Statute that should set the standard, not an obscure tradition or custom whose evolution, establishment and acceptance was questionable.

45. Draft article 7, paragraph 1, which was presented as an exception to the general rule of immunity, was consistent with the letter and spirit of the Rome Statute of the International Criminal Court, clearly identifying the types of crimes in respect of which immunity did not apply. Three of the crimes fell squarely under article 5 of the Statute, but the Special Rapporteur had also added torture and enforced disappearance, corruption-related crimes and crimes that caused harm to persons, including death and serious injury, or to property. Torture, enforced disappearance and crimes that caused harm to persons or to property were close to the core crimes under the Statute and could thus easily be accommodated. However, it might be difficult to justify the inclusion of corruption-related crimes, particularly since many such crimes, like petty corruption, would not necessarily be classified as serious. The reference should have been to grand corruption, which more fully corresponded to the core crimes under the Statute.

46. The fact that draft article 7, paragraph 2, provided that those who enjoyed immunity *ratione personae* during their term of office had total immunity even if they committed all the crimes enumerated in draft article 7, paragraph 1, was problematic in two regards. First, persons holding high office were in a position to influence the level of immunity they themselves enjoyed and could thus create a safety net for themselves once they took office and consolidated their power. Second, in certain developing countries, the phrase "during their term of office" was devoid of meaning since some rulers remained in office for life and some monarchs, who reigned for life, had full executive powers. While he understood that the Special Rapporteur would not be able to please everyone, it made very little, if any, sense to him that a person who had committed serious crimes could escape justice because he or she enjoyed immunity *ratione personae*. The Special Rapporteur might therefore wish to review the wording of draft article 7, paragraph 2, and draft article 4, paragraph 2, which had already been provisionally adopted by the Commission. The former made reference to immunity *ratione personae* "during their term of office", while the latter said "during or prior to their term of office".[235] Perhaps the Special Rapporteur could refresh his memory as to why acts committed by an official before assuming office were protected by immunity. If that were the case, a person could stand for office and use the newly gained status to protect him or herself from prosecution for previously committed acts. In addition, if the formulation in draft article 4, paragraph 2, was correct, why had it not been extended to draft article 7, paragraph 2?

47. It had been proposed that draft article 7 not be sent to the Drafting Committee and be held in abeyance pending the consideration of procedural issues when the Special Rapporteur submitted her next report. No substantive reasons had been given for that proposal other than an obscure precedent by the Commission some years previously. He agreed with other members that the proposed course of action made no sense. Logic dictated that the Commission should begin with the substance and then move on to procedural matters to guide that substance, and not the other way round.

[235] See *Yearbook … 2013*, vol. II (Part Two), p. 47 (para. 2 of draft article 4).

48. He had noticed a tendency among special rapporteurs to avoid dealing with issues that were contrary to their points of view. He therefore hoped that the Special Rapporteur would address the issues raised during the debate with sincerity. In conclusion, he recommended that the new draft article prepared by the Special Rapporteur should be forwarded to the Drafting Committee.

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

[Agenda item 1]

49. The CHAIRPERSON drew attention to the revised programme of work for the last week of the first part of the session, which included an additional plenary meeting on the topic of immunity of State officials from foreign criminal jurisdiction. If he heard no objection, he would take it that the Commission wished to adopt it.

It was so decided.

The meeting rose at 1 p.m.

3364th MEETING

Friday, 26 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

Fifth report of the Special Rapporteur (*continued*)

1. Ms. ORAL said that she appreciated the methodology, detail and comprehensiveness of the fifth report on the topic. She noted that debates during the current session had focused on three main issues: first, the nature of the Commission's work; second, whether the Special Rapporteur had demonstrated the existence of a rule of customary international law supporting any exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; and third, the arguments for and against the Commission's endorsement of such an exception.

2. On the first issue, the question had been raised as to whether draft article 7 constituted existing law or new law. In that regard, she agreed with Mr. Jalloh that it had not been the practice of the Commission to characterize its work as falling into either the codification or the progressive development of international law. Nonetheless, the Commission must, of course, undertake its mandate cautiously and conscientiously.

3. On the second issue, it was clear from the review of national legislation and judicial practice contained in the report that the law was settled with regard to the immunity *ratione personae* of Heads of State and some other high-ranking officials, but not settled in respect of their immunity *ratione materiae* from foreign criminal jurisdiction. It was indeed questionable whether there was adequate support for concluding that customary law permitted any exceptions to immunity *ratione materiae* from foreign criminal jurisdiction. Although a number of national criminal and civil cases would seem to point to a trend in that direction, there was no standard for actually determining what constituted a trend in that area of legal practice. The judgments of international courts also failed to provide any clear guidance on the matter. The case concerning the *Arrest Warrant of 11 April 2000* had dealt with the extension of immunity *ratione personae*, not functional immunity, to a Minister for Foreign Affairs. The cases concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* and *Jurisdictional Immunities of the State* had dealt with the immunity of States, not the immunity *ratione materiae* of individuals. Indeed, in the latter case, the International Court of Justice had stated that the question of whether and, if so, to what extent, immunity might apply in criminal proceedings against a State official was not in issue. Since the decisions of the European Court of Human Rights cited in the report had dealt mostly with civil damages, they too failed to shed any light on the legal status of immunity *ratione materiae* in relation to foreign criminal jurisdiction.

4. On the third issue, while the principle of sovereign equality and non-interference in internal affairs, together with the need to ensure the stability of international relations, were policy arguments in favour of immunity, they had to be weighed against the international interest in ensuring accountability and preventing impunity for the most serious international crimes. In that respect, she shared Mr. Jalloh's view with regard to the impact of atrocity crimes on peace and security. Indeed, the 124 States parties to the Rome Statute of the International Criminal Court had explicitly recognized in the preamble thereto that grave crimes threatened the peace, security and well-being of the world. Although sovereign equality was an important principle that had been acknowledged in the Charter of the United Nations and many other instruments, she, like Mr. Hmoud, believed that the protection of fundamental human rights was an equally important tool for preserving peace and avoiding war and that justice was not incompatible with respect for the obligations arising from international law.

5. On the question of procedure, although she concurred with Mr. Huang that substantive justice should not be at the expense of procedural justice, she feared that immunity had been elevated to a higher legal status in

[*] Resumed from the 3360th meeting.

the hierarchy of legal norms than it merited. Procedural justice was associated with fundamental rules of justice which were non-derogable, whereas article 27 of the Rome Statute of the International Criminal Court demonstrated the derogable nature of immunity. Even if immunity did not apply to certain crimes, that should not deprive the offender of procedural justice, which meant putting in place adequate procedural safeguards to ensure that prosecutions were based on proper evidence. At the same time, a strengthening of substantive justice through accountability and the prevention of impunity might provide a compelling reason for lifting or recognizing an exception to a derogable procedural rule such as immunity *ratione materiae* when *jus cogens* rules had been violated. Another reason for permitting a limited exception to immunity *ratione materiae* was that such immunity was perpetual, unlike immunity *ratione personae*, which was restricted to a person's term of office.

6. In paragraph 57 of his second report, the previous Special Rapporteur had noted that the viewpoint that grave crimes under international law could not be considered as acts performed in an official capacity, and not therefore subject to immunity *ratione materiae* from foreign criminal jurisdiction, had become "fairly widespread".[236] That opinion was supported by paragraph 155 of the judgment of the International Tribunal for the Former Yugoslavia in the case *Prosecutor v. Anto Furundžija*, by the findings of the Supreme Court of the United States and the Court of Appeals for the Fourth District in the case concerning *Samantar v. Yousuf*, those of a United States district court in *Xuncax* et al. *v. Gramajo* and by paragraph 212 of the judgment of the European Court of Human Rights in *Jones and Others v. the United Kingdom*. She therefore considered that the development of an exception to immunity *ratione materiae* in criminal cases for the most serious international crimes or violations of *jus cogens* rules was merited, especially as delegates to the Sixth Committee had supported that approach. On the other hand, the concern that an exception to immunity *ratione materiae* could be abused must be addressed by devising rules of procedure to preclude that danger.

7. She supported draft article 7, paragraph 1 (*a*), although she wondered why other serious international crimes had been omitted. Since the crimes mentioned were not defined in the draft articles, she wished to know if reference would be made to a specific source, such as existing conventions. Corruption was an extremely serious crime but, as it stood, subparagraph (*b*) was too broadly drafted. She could accept subparagraph (*c*), despite the fact that it was based on civil law. The need for draft article 7, paragraph 2, was questionable, since its subject matter was covered in the draft articles which had already been provisionally adopted. In principle, she could agree with the proposal that a general "without prejudice" clause should be drafted for the draft articles as a whole. In conclusion, she recommended the referral of draft article 7 to the Drafting Committee.

8. Mr. GROSSMAN GUILOFF said that the topic was of central importance because the determination of limitations and exceptions to immunity might help to achieve the vital balance between the rules on immunity from foreign criminal jurisdiction, which recognized the sovereign equality of States, and the principles of international criminal law and international humanitarian law, which gave rise to a common interest in rejecting impunity.

9. The decisions of international bodies had a bearing on the development of thinking on the topic. In the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had set forth clear criteria for distinguishing between immunity and impunity. To that end, it had established that the immunity of a Minister for Foreign Affairs was procedural in nature, applied solely to his or her term in office and was restricted to acts *juri imperii*. In addition, Judges Higgins, Kooijmans and Buergenthal had been of the opinion that serious international crimes could not be regarded as official acts. The practice of treaty monitoring bodies was also of relevance. For example, in the *Suleymane Guengueng* et al. *v. Senegal* case, the Committee against Torture had adopted a decision confirming that a State party had an obligation to prosecute or extradite a former Head of State who had been charged with the offence of torture. In the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the International Court of Justice had in turn stressed that the prohibition of torture had become a peremptory norm and that alleged perpetrators should not go unpunished. It had thereby upheld the findings of the British House of Lords in the *Pinochet* case that General Pinochet did not enjoy immunity *ratione materiae* for torture or conspiracy to torture, findings which had marked a turning point in legal theory. However, in examining the precedent established by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State*, the Special Rapporteur had rightly distinguished between its character *obiter dictum* and its application to the topic under consideration, since the case concerned State immunity and not individual criminal immunity.

10. In the chapter of the report on the study of practice, the Special Rapporteur should not only have given greater attention to the rejection of immunity for war crimes, she should also have included an analysis of regional rules regarding immunity, since they were a source of useful material. In proceedings before the Inter-American Court of Human Rights in the cases of *Velásquez-Rodríguez v. Honduras*, *Barrios Altos v. Peru*, *La Cantuta v. Perú*, *Gelman v. Uruguay*, *Gomes Lund* et al. *("Guerrilha do Araguaia") v. Brazil*, *Almonacid-Arellano* et al. *v. Chile*, *Mapiripán Massacre v. Colombia* and *Goiburú* et al. *v. Paraguay*, the effective protection of human rights had been given priority in proceedings concerning extradition for serious violations of those rights. Similarly, consideration should be given to the decisions of the Supreme Court of Chile in *Fujimori* and of the Supreme Court of Argentina in the *Arancibia Clavel* and *Priebke* cases, which had concerned foreign citizens whose extradition had been requested for murder or torture. All those cases were indicative of a development of customary law regarding immunity and the passive nationality principle in the inter-American human rights system. The Commission should also examine the contribution of United Nations treaty monitoring bodies to the development of rules on immunity.

[236] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report of the Special Rapporteur, Mr. Kolodkin), p. 413.

11. In the report, the Special Rapporteur had correctly identified the scope of the immunity *ratione personae* of certain State officials on the basis of customary law and treaty law and she had rightly noted that some State officials enjoyed *ratione materiae* for acts *juri imperii*. Although the International Tribunal for the Former Yugoslavia had maintained the doctrine that acts of State could not give rise to foreign criminal responsibility on the part of those acting on behalf of the State, the time had come to examine a departure from that rule, namely exceptions to immunity for serious breaches of international humanitarian law, including in States where the alleged crimes had not been committed. To that end, the Commission could base its work on the respective provisions on penal sanctions of the 1949 Geneva Conventions for the Protection of War Victims and article 87, 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) of 8 June 1977. Further support for the lack of immunity for international crimes could be found in the 2009 Institute of International Law resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes[237] and in the article cited in in the footnote to paragraph 215 of the report, which suggested that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment might serve as a model for treaty-based exceptions to immunity. In his paper entitled "When may senior State officials be tried for international crimes? Some comments on the *Congo v. Belgium* case",[238] Professor Cassese had likewise referred to various court decisions where immunity had not been an obstacle to prosecution.

12. The full worldwide impact of the exception to immunity *ratione materiae* established in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had become clear in the reasoning of Lords Browne-Wilkinson, Saville of Newdigate, Millett and Phillips of Worth Matravers in the *Pinochet* case. Leaving aside purely formal legal arguments, the all-important question was whether former or serving State officials in respect of whom there was a reasonable suspicion that they had violated that ban on torture could move freely throughout 161 States under the protective mantle of immunity *ratione materiae*.

13. The *Velásquez-Rodríguez v. Honduras* case, heard by the Inter-American Court of Human Rights, also illustrated how the interpretation of a treaty—the American Convention on Human Rights: "Pact of San José, Costa Rica", in that instance—in strict compliance with the rules established by the 1969 Vienna Convention could have an impact on the question of impunity and immunities. The International Court of Justice and regional courts had been unanimous in stressing that human rights treaties should be interpreted in the light of their object.

14. In his view, it seemed that the existence of a trend towards exceptions to immunity *ratione materiae* in the case of international crimes could not be denied.

15. The norms, developments and values to which the Special Rapporteur referred could not be disregarded as merely aspirational goals. A way had to be found to reconcile them with the principles of immunity that ensured the equality of States, while recognizing that, in accordance with the *erga omnes* principle, the violation of peremptory norms was a matter of concern to all.

16. While it was a valuable exercise for the Commission to provide as much clarity as possible in its work with a view to assisting States, it was not necessary to seek to distinguish between *lex lata* and *lex ferenda* in every single case. What was necessary was that the Commission proceed with due caution so as to ensure that all interests were considered and respected. In that connection, he fully agreed that it was important to prevent abuse of the exercise of criminal jurisdiction for political ends; there were ample opportunities for that and other issues to be discussed within the Commission, and they would, he was sure, be duly taken into account by the Special Rapporteur.

17. Turning to draft article 7, he supported its referral to the Drafting Committee. In that context, he would welcome further clarification from the Special Rapporteur regarding the non-inclusion of the crime of aggression in the list of crimes in respect of which immunity did not apply. Similarly, the content of the crime of corruption should be defined more precisely. Although the territorial exception had been applied mainly in the field of civil law, he was in favour of maintaining its inclusion in the draft article, since it was supported by international practice, on the basis of territorial jurisdiction. He had been surprised by the argument that paragraph 3 should not be referred to the Drafting Committee because it might interfere with ongoing proceedings and would therefore be interested to know the basis for that argument.

18. Mr. CISSÉ said that he wished to thank the Special Rapporteur for her detailed and well-researched report, which, though a little long, was highly readable in its treatment of a complex and politically sensitive topic.

19. The law of immunities in relation to the criminal responsibility of State officials was quite settled, as could be seen from the consistent case law, both national and international, which had contributed significantly to the crystallization of customary international law applicable to the regime of immunity of State officials from foreign criminal jurisdiction. The major principles of international law concerning, in particular, the distinction between immunity *ratione personae* and immunity *ratione materiae*, along with their respective legal implications, were largely not questioned. Indeed, that regime had not undergone any major changes, even though dissenting opinions were at times voiced by judges and writers against the mechanical application of that distinction in the context of serious international crimes, such as crimes against humanity, war crimes and genocide. Support also existed among some jurists for the inclusion of other crimes, such as torture, aggression, enforced disappearance and corruption among the most serious international crimes for which immunity could not be granted.

20. The question before the Commission was whether State practice, as described and analysed by the Special

[237] Institute of International Law, *Yearbook*, vol. 73, Parts I and II, Session of Naples (2009), pp. 226–227; available from: www.idi-iil.org, *Resolutions*.

[238] A. Cassese, "When may senior State officials be tried for international crimes? Some comments on the *Congo* v. *Belgium* case", *European Journal of International Law*, vol. 13, No. 4 (2002), pp. 853–875.

Rapporteur in her fifth report, met the criteria of generality, consistency and uniformity needed to attain the status of a customary rule applicable *erga omnes*. Paragraph 42 of the report concluded that immunity of the State or of its officials from jurisdiction was not explicitly regulated in most States and that the response to immunity had been left to the courts. In the light of that conclusion, there could be no doubt that a customary rule did not exist, inasmuch as it was recognized that at the domestic level there was too great a variability in practice, both legislative and judicial. Accordingly, in the absence of established State practice and, therefore, of the possibility of codification, the Commission should engage in progressive development and in its work take into account the emerging, new challenges faced by the international community, including transnational crimes, such as crimes against humanity and war crimes, that were often perpetrated with the blessing and complicity of certain high-ranking State officials who were always quick to invoke immunity in order to protect themselves from prosecution. Immunity could not and must not be accorded as if it were a *carte blanche* for such persons.

21. If the goal was to combat impunity and arbitrariness, care should be taken not to extend the exception to immunity *ratione personae* beyond the troika, namely the Head of State, the Head of Government and the Minister for Foreign Affairs, to other State officials. He was in favour of providing protection for the troika, but only in the form of immunity *ratione personae* and for the sole purpose of preventing anarchy in inter-State relations and diplomatic incidents. Immunity did not mean impunity, since even those who enjoyed immunity *ratione personae* could be tried by foreign courts once they had left office.

22. It was important to recall that the question of substantive immunity, examined in the present report, went hand in hand with that of procedural immunity, which would be the subject of a future report. In any event, jurisdictional immunity only acquired meaning and scope when the scope of the applicable law was clearly defined. The question that arose was whether the applicable law in relation to immunity from foreign criminal jurisdiction was a matter of *lex lata* and/or *lex ferenda*. What balance did the report strike between the two? The answers to those questions were to be found in draft article 7, paragraphs 1 and 2.

23. Paragraph 1 of draft article 7 stated that immunity did not apply in relation to genocide, crimes against humanity, war crimes, torture and enforced disappearances. It would be appropriate to indicate that the immunity referred to in the paragraph was immunity *ratione materiae*. He, like several other members, was of the view that the crime of aggression should be added to the list. He would also add to the list of crimes the destruction of world cultural heritage and terrorism, as long as senior State officials were directly or indirectly implicated in those crimes.

24. Paragraph 2 of draft article 7 stated that paragraph 1 did not apply to persons who enjoyed immunity *ratione personae* during their term of office. In his view, that paragraph did not create new law, nor seek to do so. In fact, it merely faithfully reflected customary international law, under which persons enjoying immunity *ratione personae* enjoyed absolute immunity, even in relation to war crimes and crimes against humanity.

25. The debates within the Commission on the immunity of State officials from foreign criminal jurisdiction had highlighted the serious nature and importance of the issue for the proper functioning of inter-State relations. The challenge facing the Commission was to find an acceptable balance between conservative and progressive trends in international law regarding jurisdictional immunity and the international criminal responsibility of State officials. Draft article 7 seemed to have reconciled those two trends, inasmuch as elements of *lex lata* were to be found in paragraph 2 and elements of *lex ferenda* in paragraph 1. To his mind, codification and progressive development of international law could not or should not be seen as two opposing, completely separate functions. Technically, there was nothing wrong with having, in a single multilateral instrument, both codification and *lex ferenda* provisions; the United Nations Convention on the Law of the Sea provided a good example in that regard.

26. The expression "corruption-related crimes" in paragraph 1 (*b*) of draft article 7 did not seem appropriate because it gave the impression that corruption itself was not a criminal offence. That wording could cause confusion because no definition was given of what constituted corruption-related crimes; for example, money-laundering could be considered a crime related to corruption. The phrase should therefore be reworded to read: "crimes of corruption and related offences".

27. Unlike some members of the Commission, he considered that crimes of corruption should be mentioned in draft article 7. Such crimes, which deprived States of much-needed essential resources, were sufficiently serious to be raised to the rank of crimes in relation to which immunity could not apply. If it was accepted that corruption did not constitute an official act performed by a State official, then there could be no obstacle to its being considered an exception to immunity *ratione materiae* applicable to the high-ranking officials of the foreign State once they had left office. It was part of the Commission's mandate to progressively develop international law and it would be right for it to propose a text to the international community that made corruption a crime for which no immunity could be granted.

28. He was not in favour of the proposal of some speakers to refer to the crime of corruption in the commentary to draft article 7, rather than in the body of the text. Such an approach could be seen as downplaying the serious scourge that was corruption. A large majority of States had adopted laws on corruption and established administrative and judicial institutions to prevent the crime and punish its perpetrators. At the regional and subregional levels in Africa, for example, legal instruments had been adopted to address the matter. At the multilateral level, treaty provisions had been adopted and implemented to combat corruption, notably the United Nations Convention against Corruption.

29. In his view, the Commission needed to engage in progressive development, while striking a balance,

admittedly a delicate one, between the principle of the sovereign equality of States and the imperative of combating impunity. In doing so, it would have made the wise, progressive and unambiguous choice to stand on the side of the rule of law, national and international, and justice rather than on the side of impunity.

30. In the light of the foregoing, he recommended the referral of draft article 7 to the Drafting Committee.

31. Mr. JALLOH asked Mr. Cissé how he envisaged ensuring that, when individuals were prosecuted in foreign national courts for corruption, which constituted one of the classic economic crimes, illicitly acquired assets could be recovered by the victim State. He raised that question because an immunity exception had been proposed for economic crimes of that nature, and asset forfeiture was sometimes ordered in respect of individuals convicted of such offences. And, in some cases, where such offences were prosecuted in the national courts of third States, the proceeds of the crime belonged to the sovereign people of the victim State whose wealth had been taken and stashed in distant foreign jurisdictions that might have no legal claims or proper basis to retain such wealth.

32. Mr. CISSÉ said that it was a question of political will on the part of the international community and relevant actors. Under the United Nations Convention against Corruption, for example, when foreign financial institutions were unable to clearly identify the economic beneficiaries of funds deposited in an account, such funds could be recovered by the State from which they originated.

33. Mr. HUANG said that the observations that he would make on the Special Rapporteur's fifth report were further to the preliminary comments he had made at the previous session. The topic under consideration was an important and sensitive one, and the report had given rise to great interest and heated debate. It was now time for the Commission to decide whether to refer draft article 7 to the Drafting Committee. In that regard, he wished to set out four lines of reasoning why in his view the draft article should not be referred to the Committee for the time being.

34. Before doing so, he wished to comment on two matters. First, he wished to commend Mr. Murphy on his detailed and well-researched statement, in which he had put forward many convincing arguments for not supporting draft article 7. Second, he had been shocked at the previous meeting when he had heard a statement by a colleague, in which the latter, among other things, attacked African leaders as a whole and the basic political systems of African countries. While Commission members could agree or disagree with one another in debates, they should not violate basic principles of international law by, for example, interfering in the internal affairs of States under cover of combating impunity.

35. His first line of reasoning concerned the importance of decision-making by consensus. As there was no consensus among Commission members, he could not support the referral of draft article 7 to the Drafting Committee at the current stage. It was extremely important for the Commission to adhere to the spirit of consensus at the beginning of a new quinquennium. Since its establishment nearly 70 years previously, the Commission had, as a matter of principle and as a key rule of procedure, operated on the basis of consensus when dealing with substantive issues. It should continue to uphold that valuable tradition. The referral of draft articles to the Drafting Committee was vital to the work of the Commission, since the Drafting Committee not only provided guidance regarding the direction of the Commission's work, but also laid the foundations for the widest possible acceptance of the outcome of the Commission's work by the international community. Therefore, when referring draft articles to the Drafting Committee, the Commission should not rush into a making a final decision when there were still significant differences of opinion among its members. The desirability of ensuring the widest possible consensus should always be kept in mind. For controversial issues, consultations should be conducted with a view to reaching a consensus. If agreement could not be reached, it was best to postpone decision-making until a suitable solution had been found.

36. With regard to draft article 7, divergent views had been expressed both in the Commission and in the Sixth Committee. Fundamental and significant differences of views continued to exist among Commission members. Since the Commission was unable to agree on whether to refer the draft article to the Drafting Committee, further deliberations and consultations were needed, and every effort should be made to reach a consensus. Although some Commission members might suggest that the referral of the draft article should be put to a vote, it seemed to him that such a course of action would not be conducive to narrowing the differences of opinion in the Commission. Instead, those differences would be exposed to the Sixth Committee and to the general public. It was questionable whether that was desirable.

37. His second line of reasoning concerned respect for the different views and positions of Member States. As a number of Member States had strongly objected to the expansion of exceptions to immunity of State officials, he did not support the referral of draft article 7 to the Drafting Committee. International law was created essentially on the basis of consensus among States. Indeed, one of the basic features of the international law-making process was the fact that international treaties and customs were brought into existence by the very States that would be bound by them. Therefore, the progressive development of international law and its codification were inevitably diplomatic and pragmatic in nature, rather than academic and dogmatic. That fact should never be ignored by the Commission if it hoped to achieve its objectives.

38. The Commission's object was to promote the progressive development of international law and its codification, principally by preparing draft articles on subjects which had not yet been regulated by international law or with regard to which the law had not yet been sufficiently developed in the practice of States, and by undertaking the more precise formulation and systematization of rules of international law in fields where there had already been extensive State practice, precedent and doctrine. States played an essential role at every stage of that process. Although the Commission was technically independent, its work should always be carried out in close cooperation

with the political authorities of States and under the political guidance and supervision of the General Assembly. For that reason, the Commission should respect the views and positions expressed and upheld by Member States in the Sixth Committee.

39. In the Sixth Committee, delegations had observed that the topic involved fundamental principles of real practical significance for States and that the Commission should proceed cautiously and accurately. In fact, a number of States had consistently and repeatedly expressed their concerns about the proposition that serious international crimes constituted an exception to the immunity of State officials from foreign criminal jurisdiction. They pointed out that customary international law did not support such an exception and that there was a lack of political will to develop one. Many States agreed with the conclusion reached in 2010 in the second report of the former Special Rapporteur, Mr. Kolodkin, that there was in contemporary international law no customary norm or trend toward the establishment of such a norm and that further restrictions on immunity, even *de lege ferenda*, were not desirable, since they could impair the stability of international relations. That conclusion had been based on an in-depth analysis of relevant existing norms of international law and State practice and had laid a solid foundation for the Commission's consideration of exceptions to immunity. The Commission should take into account the concerns and different views expressed by Member States. Unless there had been major breakthroughs in international practice since 2010, it was imperative to adhere to the principle of immunity of State officials from foreign criminal jurisdiction. Exceptions to that principle must be supported by sufficient State practice and should not be expanded at will.

40. His third line of reasoning concerned adherence to the fundamental principles of international law. As the proposed expansion of exceptions to the immunity of State officials eroded and deviated from the fundamental principles of international law, he did not support the referral of draft article 7 to the Drafting Committee. Those principles, as reflected in the Charter of the United Nations, were the cornerstone of just and equitable international relations. As a subsidiary organ of the General Assembly, the Commission was fully committed to upholding those principles, including the principles of sovereign equality and non-intervention in the internal affairs of other States, which were both of critical importance to the stability of international relations. States enjoyed their rights on the basis of independence and on an equal footing and assumed their obligations and responsibilities on the basis of mutual respect. They must at all times honour international obligations regarding the immunity of States, their property and officials. Violations of those obligations were not in conformity with the principle of sovereign equality and might contribute to the escalation of tensions. An example of such a violation was the exercise by a State of its national criminal jurisdiction over a foreign official without the consent of the State to which the official belonged.

41. It was well known that the immunity of State officials was also rooted in State immunity, which was not a privilege or a benefit that one State gave to another, but an intrinsic right based on the principle of sovereign equality. Given the lack of universal State practice and *opinio juris*, the ill-considered establishment of exceptions to immunity would put the principle of sovereign equality in jeopardy and subordinate it to other rules. The abusive exercise of universal jurisdiction in recent years had also caused concern among the international community. For example, some Western countries frequently invoked so-called "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 in the courts of Western countries. The inappropriate development of exceptions to immunity would facilitate the abusive exercise of universal jurisdiction. Recently, more and more countries had announced their support for 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 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), adopted in 2014, reflected the concerns of African States in that regard. That development reflected a trend which the Commission could not ignore in its work on the topic under consideration.

42. In her fifth report, however, the Special Rapporteur had considerably expanded the rules on exceptions to immunity of State officials. Draft article 7 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 human rights violations, 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. Putting aside the question of whether those developments corresponded to State practice, if numerous exceptions to immunity were allowed, they would inevitably have a serious impact on the principles of sovereign equality and non-intervention in the internal affairs of other States. It seemed to him that draft article 7 had gone too far in that regard, and he therefore could not support it.

43. His fourth line of reasoning concerned consistency of methodology and the high standard of the Commission's work. Owing to the inconsistency in the methodology used in the report and the lack of evidence to support the proposed expansion of exceptions to immunity, he did not support the referral of draft article 7 to the Drafting Committee.

44. As with other topics, the consideration by the Commission of the immunity of State officials from foreign criminal jurisdiction was closely related both to the codification of existing law, *lex lata*, and to the progressive development of new law, *lex ferenda*. However, in her fifth report, the Special Rapporteur had inappropriately shifted the focus of the Commission's work on the topic to the latter, which had resulted in a loss of balance and a departure from the systematic, ordered and structured

working method that the Special Rapporteur had herself proposed and that had been approved by the Commission. The Special Rapporteur had not given due attention to the basic principles of international law and customary international norms, in particular the principles of sovereign equality and non-intervention in the internal affairs of other countries, or to the decisions of the International Court of Justice and national judicial practice. She had determined to restrict the application of immunity through the expansion of exceptions to immunity, as a way of resolving the so-called "issue of impunity". However, that approach was wrong. It not only represented a departure from the direction that the Commission had set for its consideration of the topic, but was also unlikely to obtain support from the majority of the members of the international community.

45. In addition, there was some confusion over basic concepts, such as international and domestic crimes, criminal and civil jurisdictions, universal, international and domestic jurisdictions, and third State jurisdiction, as well as State immunity, the immunity of officials and diplomatic immunity.

46. The Special Rapporteur had emphasized the issue of impunity many times in her report. However, as many other colleagues had correctly noted, impunity 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. Immunity from jurisdiction was merely a procedural rule and did not absolve State officials from their substantive responsibilities; it did not lead to the commission of international crimes, nor did it facilitate impunity. There were many causes of impunity, most of which were political in nature. Measures to eliminate impunity should start at the political and domestic levels, instead of attempting to negate, remove or restrict the long-established international law principle of the immunity of State officials from foreign criminal jurisdiction. He believed that impunity therefore should not be invoked as grounds for restricting immunity.

47. In conclusion, he agreed with many of the comments and suggestions made by other Commission members, in particular those made by Mr. Murphy. He fully endorsed Mr. Murphy's observation that even the existence of a "trend" had not actually been established in the report; that no consensus among States had been demonstrated; and that draft article 7 was supported neither by national case law and legislation nor by international case law and treaty practice. Thus, he did not believe that draft article 7 was ready to be submitted to the Drafting Committee at the current session.

48. As to the future workplan, given the differences of opinion among its members, and in a spirit of cooperation and compromise, he proposed that the Commission work towards a comprehensive solution, which could include the following elements: deferring for the time being the final decision regarding the referral of draft article 7 to the Drafting Committee; setting up an open-ended working group to conduct informal consultations; requesting the Special Rapporteur to prepare a commentary to draft article 7 for consideration by the Commission at the following session; and considering the issue of limitations or exceptions to immunity in the context of the issue of the procedural safeguards to immunity, which would be dealt with in the Special Rapporteur's sixth report.

49. Lastly, he wished briefly to touch on a related topic, namely the extradition of fugitives, in order to show that efforts to combat impunity depended on judicial and law enforcement cooperation among States. In recent decades, the Chinese authorities had stepped up their efforts to secure the return of Chinese fugitives who had fled the country. Over the previous three years, thousands of Chinese fugitives, most of whom were former State officials, had been returned from more than 100 foreign countries. In all of those cases, extradition had been secured through traditional mutual assistance rather than the exercise by a foreign State of its national criminal jurisdiction. The obstacle to the extradition of fugitives was not the failure by States to exercise their national criminal jurisdictions, but a lack of willingness on their part to offer judicial and legal assistance. In 2015, the Chinese authorities had released a list of the 100 most wanted Chinese fugitives, of whom around 60 remained in hiding in countries that were unwilling to return them to China. The key issue at stake was thus political willingness among States to cooperate and to bring fugitives to justice.

50. Mr. TLADI said that he wished to stress that article 46A *bis* of the Statute of the African Court of Justice and Human Rights as amended by the Malabo Protocol and article 27 of the Rome Statute of the International Criminal Court were irrelevant to the debate, as those provisions were each directed at a particular institution, namely the African Court of Justice and Human Rights and the International Criminal Court, respectively. With regard to draft article 7, he wished to clarify that, while he did not agree with some aspects of the Special Rapporteur's methodology and did not support paragraph 3, he believed that paragraph 1 (*a*) should be referred to the Drafting Committee.

51. Mr. GÓMEZ ROBLEDO, responding to Mr. Huang, said that "consensus" was not defined in any international instrument. The great powers had invented the concept in the 1970s to prevent the so-called "automatic majorities" of the "Third World". It was not mentioned in either the Charter of the United Nations or in the rules of procedure of the General Assembly. The rules of procedure of some international conferences stipulated that participants should make efforts to reach the broadest possible agreement, but, if all such efforts failed, a vote could be held. The great advances in international law, including the United Nations Convention on the Law of the Sea, the 1969 Vienna Convention and the Rome Statute of the International Criminal Court, had been achieved through a vote, a fact that in no way undermined the authority and value of those instruments. Even the International Court of Justice regularly held votes. He was by no means suggesting that the Commission should automatically resort to voting, and he had full confidence in the Chairperson's abilities to ensure that a consensus was reached by other means, but the option of holding a vote should nevertheless be available. Indeed, to grant each Commission member a vote would be the clearest possible reflection at an individual level of the principle of sovereign equality,

which was important to all members. He stressed that votes should be held only as a matter of last resort.

52. Mr. RAJPUT said that the Commission had traditionally sought to build a consensus among its members, and it would be regrettable if it were regularly to resort to holding votes. The starting point of a debate could not be that there was a majority view and that there should therefore be a vote and the minority should be ignored. Every effort should first be made to understand and give due consideration to all members, whether majority or minority.

53. Mr. HUANG said that the spirit of consensus was not only an important tradition, but was also essential to the Commission's work. He was not necessarily opposed to voting, but he believed that the Commission should first seek to build the broadest possible consensus through formal or informal consultations.

54. Mr. PETER said that it was important to bear in mind the status of the various international instruments that had been mentioned in the debate. The Malabo Protocol, for example, had been adopted by the African Union in 2014, but it had been signed by only nine States and had yet to be ratified by a single State.

55. Mr. MURASE said that he wished to recall that the Commission was a subsidiary organ of the General Assembly and thus followed the latter's rules of procedure, which allowed it to hold votes on important issues. The so-called "consensus rule" did not give veto power to minority groups. While the Commission should make every effort to reach a consensus before resorting to a vote, it should nevertheless have the option of doing so. He noted that, in previous decades, the Commission had often held indicative votes, and it should in his view continue that practice.

56. Mr. HASSOUNA said that, in the practice of both the General Assembly and the Commission, consensus had never been equated with unanimity. In the past, the Commission had on occasion resorted to a vote when, despite its best efforts, it had been unable to reach a consensus. Perhaps the Commission could discuss the issue in the Working Group on methods of work, which would meet during the Commission's current session.

57. Mr. RUDA SANTOLARIA said that he agreed with other Commission members that the fifth report of the Special Rapporteur addressed elements of both *lex lata* and *lex ferenda*. In its work on the topic, the Commission should approach the codification and progressive development of international law in an integrated manner, rather than treat them as two separate categories.

58. As rightly noted by the Special Rapporteur in paragraph 142 of her report, international law should be seen as a system that struck a balance between, on the one hand, traditional, fundamental considerations, such as ensuring respect for the sovereign equality of States and the need to preserve the smooth functioning of international relations, and, on the other hand, the need to give consideration to the progress made in recent decades in the areas of international human rights law, international humanitarian law and international criminal law. He was convinced that the Commission was capable of rising to the challenge of preserving and consolidating what had gone before, while at the same time addressing the complex and changing contemporary situation with a spirit of open-mindedness.

59. With regard to immunity for the troika, he highlighted the importance of the judgment of the International Court of Justice in the *Arrest Warrant of 11 April 2000* case, which clearly indicated that immunity *ratione personae* fully protected the members of the troika against any act of authority of another State which would hinder them in the performance of their duties, with no distinction being drawn between acts performed in an official capacity and those performed in a private capacity. Such immunity lapsed when the official ceased to hold office. As indicated in paragraph 67 of the report, the judgment itself restricted the scope of the Court's consideration to the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs in the discharge of his or her functions. It was therefore not possible to apply the finding in that case to State officials who were not members of the troika.

60. Likewise, as noted in paragraph 85 of the report, the International Court of Justice's decision on the merits in its judgment in *Jurisdictional Immunities of the State* referred to the jurisdictional immunity of the State *stricto sensu* when the State acted *jure imperii*. In his view, it was important to distinguish between State immunity *stricto sensu* in situations involving the bringing of civil actions against a State before the courts of another State and the immunity of State officials from foreign criminal jurisdiction. With regard to the latter, a distinction should, in turn, be made between members of the troika, who enjoyed immunity *ratione personae* during their term of office, and State officials or former State officials, including former Heads of State, Heads of Government and Ministers for Foreign Affairs, who enjoyed immunity *ratione materiae* in relation to acts performed in an official capacity. The Special Rapporteur highlighted those distinctions in her fourth report,[239] as well as in paragraphs 153 and 154 of her fifth report, in which she drew attention to the fact that a single act could give rise to two different types of responsibility—international, for the State, and criminal, for the individual—and to the existence of two types of immunity—of the State and of State officials, with their respective legal regimes.

61. In alluding in paragraph 87 of its judgment in *Jurisdictional Immunities of the State* to the *Pinochet* case, which had been tried in the United Kingdom, the International Court of Justice stressed that the distinction between the immunity of a State official and that of the State had been emphasized by several judges in *Pinochet*. It also mentioned that, in its judgment in *Jones v. Ministry of the Interior of Saudi Arabia and Another*, the House of Lords further clarified that distinction, with Lord Bingham of Cornhill describing the distinction between criminal and civil proceedings as "fundamental to [the *Pinochet*] decision".[240]

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[239] *Yearbook … 2015*, vol. II (Part One), document A/CN.4/686 (fourth report).

[240] *Jones v. Ministry of the Interior of Saudi Arabia and Another*, p. 729, para. 32.

62. Moreover, in paragraph 91 of its judgment in *Jurisdictional Immunities of the State*, the Court emphasized that it was addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State was not in issue in the judgment. The conclusions reached by the principal judicial organ of the United Nations were therefore consistent with those presented by the Special Rapporteur in her fifth report with reference to limitations and exceptions to immunity *ratione materiae* of State officials from foreign criminal jurisdiction.

63. It was also important to point out that jurisdictional immunity was essentially procedural in nature. It was therefore fitting, in keeping with the arguments set forth in the case law of the International Court of Justice and that of other courts, to draw a distinction between immunity from jurisdiction and the responsibility of State officials. The distinction was clearly illustrated by the fact that members of the troika, once they had completed their term of office, no longer enjoyed immunity *ratione personae* and were subject to their immunity being restricted to acts performed in an official capacity—a point clearly described by the Special Rapporteur in paragraphs 148 and 149 of her report.

64. Nevertheless, as indicated in paragraphs 150 to 152 and 205 of the report, a situation could arise whereby immunity *ratione materiae* was, in practice, no longer purely procedural if no alternatives to foreign criminal jurisdiction were available and, owing to the invocation of such immunity, efforts to prosecute State officials suspected of involvement in the commission of horrendous international crimes were impeded. Should that happen, immunity would acquire a substantive scope and lead to the *de facto* impunity of the perpetrators of such crimes and the inability to combat flagrant violations of *jus cogens*. Such a situation would distort the meaning of immunity and the obligation set forth in various treaties to punish those responsible, irrespective of their official position.

65. The Special Rapporteur highlighted a clear tendency, one that was reflected in resolutions of the Institute of International Law. It was significant that, in its 2001 resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law,[241] a distinction was drawn between the treatment to be afforded to serving Heads of State and Heads of Government and that to be afforded to former Heads of State and former Heads of Government. Article 13, paragraph 2, of the resolution restricted the scope of the immunity from jurisdiction of former Heads of State to acts performed in the exercise of official functions, stipulating that they could be prosecuted and tried when the acts alleged constituted a crime under international law, or when they were performed exclusively to satisfy a personal interest or when they constituted a misappropriation of the State's assets and resources. Article 1 of the 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes indicated that, for the purposes of the resolution, the term "international crimes" meant serious crimes under international law such as genocide, crimes against humanity, torture and war crimes, as reflected in relevant treaties and the statutes and jurisprudence of international courts and tribunals.

66. He agreed with what was said in paragraphs 170 to 175 of the report to the effect that the practical consequences of exceptions and limitations to immunity *ratione materiae* were similar to the non-application of such immunity. He nonetheless considered the conceptual distinction to be important.

67. In his view, it was possible to speak of exceptions with regard to international crimes, and he subscribed to the arguments made by the Special Rapporteur in paragraphs 124 and 125 of her fourth report, as well as to those made by the previous Special Rapporteur in paragraphs 60 and 61 of his second report.[242] In her fourth report, the Special Rapporteur rightly pointed out that such crimes were committed using the State apparatus, with the support of the State, and that the participation of State officials was an essential element of the definition of some forms of conduct characterized as international crimes. That was the case, for example, in article 1, paragraph 1, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article II of the Inter-American Convention on the Forced Disappearance of Persons; and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

68. However, he was of the view that corruption-related crimes fell into the category of limitations to immunity *ratione materiae*. He therefore agreed with the view that corruption-related crimes should not be considered official acts, since, although they involved State officials, the purpose of such crimes was to derive a personal benefit or profit.

69. With regard to proposed draft article 7, he agreed with the list of international crimes set out in paragraph 1 (*a*), in respect of which immunity *ratione materiae* did not apply, as well as with the use of that expression. He agreed with previous speakers who had advocated the inclusion of the crime of apartheid in the list. However, he had serious doubts about the advisability of including the crime of aggression. Because of its particular characteristics, it would be better to consider the crime of aggression within the framework of the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression. In that regard, what was decided at the next Assembly of States Parties to the Rome Statute of the International Criminal Court, in accordance with articles 15 *bis* and 15 *ter* of that instrument, would be crucial.

70. He agreed with the inclusion of corruption-related crimes in paragraph 1 (*b*) of draft article 7. He was of the view that there should be a policy of zero tolerance for corruption, which, among other things, affected the poorest members of the population in particular. Noteworthy in that regard were the judgment of the Supreme Court of

[241] Institute of International Law, *Yearbook*, vol. 69, Session of Vancouver (2001), pp. 742–755; available from: www.idi-iil.org, *Resolutions*.

[242] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report of the Special Rapporteur, Mr. Kolodkin), p. 414.

Chile of 11 July 2007 in the *Fujimori* case and an earlier decision handed down by courts in the United States of America in the 1960s in response to a request for the extradition of former Venezuelan President Marcos Pérez Jiménez. He could accept the scope of the "territorial tort" exception in paragraph 1 (*c*), and he agreed with the content of paragraph 2. With regard to paragraph 3, he agreed with other speakers that consideration could be given to a "without prejudice clause" applicable to all the draft articles. At the same time, he concurred with the view that the obligation to cooperate should be focused on the International Criminal Court and international tribunals established by decision of the Security Council. Lastly, he believed that, in its future work on the topic, the Commission should give careful consideration to the procedural aspects of immunity in an effort to prevent political manipulation or any abuse. On the basis of those comments, he was in favour of referring draft article 7 to the Drafting Committee.

71. Mr. ARGÜELLO GÓMEZ said that there appeared to be general agreement that there was a category of crimes, classified in general terms as international crimes, that were identified as such because they had consequences that were different from those of other crimes. Draft article 7 addressed one such consequence, namely the fact that the perpetrator of an international crime was not protected by immunity from criminal jurisdiction.

72. In developing the topic of jurisdictional immunity, the logical sequence was first to identify the crimes that fell into the category of international crimes and thereafter to determine the manner in which jurisdiction over such crimes was to be exercised. Thus, the only matter for the Commission at the current stage was to identify the crimes in respect of which immunity did not apply. In that connection, he had heard no speaker deny that the crimes set out in draft article 7, paragraph 1 (*a*), were international crimes.

73. In his view, there was no need, in the draft article, also to address the rules of procedure for implementing exceptions or to analyse possible exceptions to the exceptions to immunity. That said, he was aware of the concerns of some Commission members that those exceptions could be used for political ends. That was precisely the balance that the Commission had to strike: to prevent impunity, while ensuring that the non-application of immunity did not become a political weapon. In that regard, there were countries where the power to prosecute was the prerogative of the executive branch and thus no criminal proceedings could be brought without a decision to that effect by the executive, which was of course a political authority. Ultimately, however, if the Commission was going to develop mechanisms to avoid the use of those exceptions for political ends, that matter should perhaps be dealt with in separate draft articles.

74. Regarding paragraph 1 (*a*) of draft article 7, consideration should be given to whether the list of international crimes was exhaustive. He recalled that, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice had found that undue use of force, in other words aggression, was prohibited by customary international law. Accordingly, he saw no reason why aggression or the unlawful use of force should not be included in the list of international crimes.

75. With regard to paragraph 1 (*b*), corruption was a complex issue and perhaps the one that was most likely to be politically manipulated; its inclusion in draft article 7 should therefore be considered very carefully. Furthermore, the text was somewhat ambiguous: it should be made clear the reference was to large-scale corruption that affected the State official's country of origin. The fact that paragraph 1 (*c*) referred to State officials who committed a crime in the territory of the forum State did not seem to be consistent with the objective of draft article 7, which was to address crimes committed outside the forum State. The issue should perhaps be dealt with in a new draft article in a different section.

76. In paragraph 3, only subparagraph (*a*) was necessary for the purposes of the draft article, unless in subparagraph (*b*) the intention was to indicate that States that were not parties to the international courts or tribunals concerned should nevertheless comply with the obligation to cooperate with them. If that was its intention, he would not, in principle, support that provision. In conclusion, he was in favour of referring draft article 7 to the Drafting Committee.

77. Mr. OUAZZANI CHAHDI said that the issue addressed in the report was a delicate one that the Commission should approach with caution. Its difficulty lay in the fact that it entailed satisfying a variety of requirements, such as respecting the sovereign equality of States and the stability of international relations, protecting human rights and combating impunity, since the immunity of State officials should not be invoked to escape prosecution. It was precisely in that regard that the question of exceptions and limitations came into play. In dealing with that topic in her fifth report, the Special Rapporteur had drawn on legal writings and case law and had conducted a study of State practice. She had also taken into account the previous work of the Commission and the views of States in the Sixth Committee. The fifth report must be seen as falling into the category of the progressive development of international law.

78. In chapter II of her report, the Special Rapporteur cited, in the context of treaty practice, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and the 1969 Convention on Special Missions. In paragraphs 24 and 173 of her report, she concluded that those conventions did not define exceptions applicable to residual immunity *ratione materiae* as regards criminal jurisdiction. The only limitation to immunity provided for in the Vienna Convention on Diplomatic Relations, which marked the beginning of the codification of certain aspects of diplomatic law, was a declaration of *persona non grata*. A study of those conventions showed that the subject of limitations and exceptions to immunity concerned both the codification and progressive development of international law, since not everything had been codified in Vienna in 1961.

79. In his view, only the Convention on Special Missions related directly to the report, since its article 21 provided that the Head of State, Head of Government, Minister for Foreign Affairs and other persons of high rank, when they took part in a special mission of the sending State, were to enjoy in the receiving State the facilities, privileges and immunities accorded by international law. Other conventions cited by the Special Rapporteur contained provisions on immunity but not on exceptions and limitations.

80. As to national laws, the Special Rapporteur acknowledged in paragraph 44 of her report that attention should first be drawn to the fact that national laws regulating jurisdictional immunity were very few in number and, in addition, usually referred basically to immunities of the State. In paragraph 54 of her report, she cited the Repression of Serious Violations of International Humanitarian Law Act that had been adopted in Belgium in 1993 and amended in 1999 and again in 2003 following the *Arrest Warrant of 11 April 2000* case. However, that law concerned a special case, as did the International Crimes Act of 2003 of the Netherlands, cited in the following paragraph. It seemed difficult to draw conclusions solely on the basis of those two cases.

81. As far as judicial practice was concerned, the Special Rapporteur referred essentially to the case law of foreign criminal courts. However, the Special Rapporteur also referred to international case law, given the potential influence that the latter could have at the national level. In that regard, only the *Arrest Warrant of 11 April 2000* case was of direct relevance because, as the Special Rapporteur indicated in paragraph 66 of her report, in that case the Court set out a model of immunity from foreign criminal jurisdiction of Ministers for Foreign Affairs which had become the benchmark.

82. It was difficult to regard the dissenting opinions of the judges cited by the Special Rapporteur in paragraph 68 and subsequent paragraphs of her report as being on a par with the decisions of the International Court of Justice itself. However, he supported the Special Rapporteur's reasoning and conclusions with regard to *Jurisdictional Immunities of the State* in paragraph 74 and subsequent paragraphs. With regard to national judicial practice, the summary she provided in paragraph 121 of her report was also interesting.

83. As to chapter III of her report, and in particular paragraph 170 and subsequent paragraphs, which dealt with the concept of limitations and exceptions to immunity, the explanations provided by the Special Rapporteur should be developed further. Any limitations and exceptions to immunity should be clearly identified and defined in order to facilitate their utilization by States; regrettably, that had not been done in the report.

84. With regard to draft article 7, like other Commission members, he would like to know what criteria the Special Rapporteur had used as a basis for the list of international crimes that she proposed. He agreed with previous speakers that the list should include the crimes of aggression and apartheid. As to corruption, the commentary to that draft article should perhaps explain that it concerned large-scale corruption and provide further details.

85. He agreed that it was very important to specify in paragraph 2 that paragraph 1 did not apply to persons who enjoyed immunity *ratione personae* during their term of office, since immunities were accorded to such persons precisely in order to ensure the effective performance of their functions, as pointed out by the International Court of Justice in the *Arrest Warrant of 11 April 2000* case.

86. In conclusion, he was in favour of referring draft article 7 to the Drafting Committee.

The meeting rose at 12.55 p.m.

3365th MEETING

Tuesday, 30 May 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

Fifth report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

2. Speaking as a member of the Commission, he said that the principle of individual responsibility for international crimes was one of the great achievements of the post-war era, in response in particular to the wars of aggression and unprecedented atrocities by Nazi Germany. Progress in the development of a functioning multilevel system for the prosecution of the perpetrators of such crimes had been achieved with the establishment of the international criminal tribunals for Rwanda and for the former Yugoslavia, the International Criminal Court, other international and hybrid tribunals and national prosecutions. Nonetheless, international crimes continued to be committed on a shocking scale and existing national and international legal and cooperation mechanisms remained unsatisfactory. The Commission's work on the topics of crimes against humanity and immunity of State officials from foreign criminal jurisdiction were part of the international effort to provide a clearer and stronger legal framework for the fight against impunity. He supported the modern project to develop individual

responsibility for international crimes, but he also supported international law in general. He endorsed the Special Rapporteur's systemic approach in the sense that the law needed to be developed in a way which served and balanced all the values and interests enshrined in it. He believed that individual responsibility for international crimes must be implemented in such a way as to safeguard sustainable international cooperation and peaceful relations between States.

3. In that context, the basic principle of international law that safeguarded sustainable international cooperation was the sovereign equality of States, one of the most important aspects of which was that the courts of one State could not, as a general rule, sit in judgment of another State, thus ensuring that the judgments of national courts were respected by other States. A perception of bias could, however, easily occur if the courts of one State adjudicated claims involving official acts by another State. The International Court of Justice and other courts had recognized on numerous occasions that, in such cases, claims must be dismissed, regardless of their possible merits. Otherwise, there would be a risk of mutual recriminations between the two States concerned, challenges to the objectivity of the prosecutors and the judiciary of the forum State, and potential retaliation that would endanger peaceful relations and cooperation between States.

4. Of course, the principle of State immunity was not absolute, but the issue was where the balance and limits lay exactly, and who determined them. There was no easy answer, but the balance between two fundamental principles must ultimately be determined by the rules of customary international law. An effort was made in the report to identify the pertinent rules of customary international law. However, that was not the only relevant dimension of the issue, since, as the Special Rapporteur had rightly pointed out, the Commission's role was not limited to identifying existing law, but also to contributing to the progressive development of new international law. He would address both dimensions, first by commenting on the analysis of relevant practice in the report, and, second, by discussing whether more general legal or policy considerations should affect the conclusion drawn based on that analysis.

5. According to the report, the relevant practice established an exception to the general rule of immunity of State officials for official acts in cases where it was alleged that a State official, through an act performed in his or her official capacity, had committed an international crime. It was argued that, even if that conclusion was not accepted, practice revealed a "clear trend" in that direction. However, he agreed with the members who had presented detailed analyses of why reference could not be made to a settled practice that would support the exceptions proposed by the Special Rapporteur or the existence of a trend.

6. Regarding national judicial practice, he did not agree with the assertion in paragraph 121 of the report that "with regard to immunity *ratione materiae*, it can be concluded that the majority trend is to accept the existence of certain limitations and exceptions to such immunity". First, the identification of a "majority trend" obviously depended on which decisions were counted. The Special Rapporteur relied on certain cases which were irrelevant, such as those in which an official invoked immunity against the State for which he or she served or had served, including the *Fujimori*, *Hailemariam* and *Adamov* cases. Cases in which a court had relied on a limitation of immunity provided for by a treaty should also be excluded, such as *Bouzari*, *Pinochet*, *Jones v. Ministry of the Interior of Saudi Arabia and Another*, and *Fang v. Jiang Zemin*, in which the courts had denied immunity *ratione materiae* on the grounds that the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment showed that States parties to the Convention had agreed to lift immunity with respect to criminal proceedings. Limitation of immunity by treaty did not reflect the state of customary international law.

7. The identification of a majority trend obviously also depended on which cases were counted as forming part of the minority. The footnotes to paragraph 118 of the report referred to certain cases that denied an exception to immunity *ratione materiae* with respect to international crimes. There were, however, more such cases, such as the decision by French prosecutors not to prosecute former United States Secretary of Defence, Donald Rumsfeld,[243] and the suit against the former President of China, Jiang Zemin, before the Supreme Court of New South Wales, Australia, in which the immunity of the former Head of State had been upheld.[244] The report should have counted only those decisions in which the State of the official concerned had actually unsuccessfully invoked the immunity *ratione materiae* of one of its officials, which would have made clear that there was neither a significant number nor a majority of national court decisions in favour of an exception that would include international crimes.

8. In addition, the national court judgments cited in support of the proposition that there was an exception to immunity for international crimes, or its emergence in customary international law, were based on very different reasoning, which unfortunately had not been critically analysed in the report. While some cases had invoked *jus cogens* as a basis for an exception, others had held that certain acts, in particular international crimes, could not be considered as acts performed in an official capacity. The Special Rapporteur seemed to argue that, taken together, the individual judgments, with their different and sometimes questionable reasoning, added up to a group of cases that ultimately contributed to establishing an exception to a rule of customary international law, or at least to a trend towards its emergence. However, two or more weak arguments did not add up to a convincing argument.

9. For those reasons, and those given by others, it was clear that the proposed exceptions to immunity for international crimes did not reflect settled customary international law. While there might have been a trend in the past, that was no longer the case. The *Pinochet* judgment of the House of Lords had indeed sparked a debate 20 years previously, and there had been several judgments

[243] See the letter of 16 November 2007 from the District Prosecutor of the Paris High Court (*Tribunal de Grande Instance*) (available from: www.fidh.org/IMG/pdf/reponseproc23nov07.pdf), and the letter of 27 February 2008 from the Office of the Prosecutor of the Paris Court of Appeal (available from: https://ccrjustice.org/sites/default/files/assets/Rumsfeld_FrenchCase_%20Prosecutors%20Decision_02_08.pdf).

[244] *Zhang v. Jiang Zemin and Others*, decision of 14 November 2008.

by national courts that could be interpreted as reflecting a "trend" towards the recognition of exceptions to immunity for core crimes. However, such decisions had soon been countered by others that called the trend into question. Indeed, the majority of the national court decisions cited in the report had been rendered before international and national courts had come to the conclusion that some of the arguments on which previous judgments were based did not reflect rules of customary international law. For example, in the case concerning *Jurisdictional Immunities of the State*, the International Court of Justice had stated that norms of *jus cogens* possessed a substantive character which, as such, did not contradict the rules on immunity of States, which were of a procedural character. That reasoning necessarily also applied to immunity *ratione materiae* of State officials. The European Court of Human Rights had consolidated its jurisprudence in *Oleynikov v. Russia*, according to which the rules of international law on immunity constituted inherent limitations of the right of access to justice. The House of Lords of the United Kingdom, in the *Jones v. Ministry of the Interior of Saudi Arabia and Another* case, had also explained the reasons for the continued existence of rules on immunity. The court decisions of the past 10 years did not reveal a trend; on the contrary, international and national courts had reinforced the reasons for maintaining immunity, even for core crimes. It seemed that the Special Rapporteur's policy preference had led her to downplay more recent countervailing developments. The Commission should be transparent in accurately describing the current state of affairs, and not nourish the illusion that the world was still living in the late 1990s or the early twenty-first century.

10. He agreed with the Special Rapporteur that it was necessary to look at the international legal system as a whole and assess whether developments in the field of international criminal law called for exceptions to immunity *ratione materiae*. However, the project of international criminal justice had thus far been carefully crafted by treaties and specific decisions in order to ensure acceptance by States. From the point of view of a systemic approach, that should also be the case with respect to the immunity of State officials. It was also necessary to fully assess the importance of the principle of sovereign equality in relation to international criminal law. Fortunately, States often voluntarily renounced aspects of their sovereign rights and entered into treaties by which they accepted foreign decisions as a way of enhancing cooperation. Nevertheless, they could not be expected to accept a decision by a foreign court that an official act by one of their officials justified prosecution, if that had not been agreed beforehand. It was therefore not surprising that States had already reacted strongly and jeopardized bilateral relations in such cases. He was concerned that more and stronger tensions would arise between States should the proposed draft article 7 be adopted by the Commission and then applied as law by national courts without additional acceptance by States in the form of a treaty.

11. He was not convinced that the goal of preventing impunity would justify such tensions; rather, future tensions might, in practice, lead to a two-tier system of justice, under which stronger States would be able to shield their officials from prosecution, while weaker States would not. Such a situation would risk exacerbating the problem currently faced, whereby African States complained that the International Criminal Court was selectively concentrating its efforts on Africa. Suspicion of unequal treatment could undermine the whole cause of international criminal justice. Did the Commission really want to incur that risk? He agreed with other members that exceptions to immunity were inextricably connected with procedural safeguards, which were an essential element of a systemic approach. Thus, exceptions could not properly be addressed without knowing the procedural rules that would apply to them.

12. Since the exceptions for core international crimes proposed by the Special Rapporteur did not reflect settled customary international law, he wondered whether the Commission could at least indicate that the law was unclear and that it had a mandate to pursue both the codification and progressive development of international law. The question of what the existing law was could then be left open, and the Commission could propose an exception that was based, at least in part, on a policy preference in favour of an exception. One member had argued that it was the practice of the Commission not to distinguish clearly between codification and progressive development, but that had been at a time when the Commission was still mainly elaborating treaties, for which it did not make a great difference whether a proposed rule reflected existing customary law or would be new law. The negotiating States would, after all, decide what to include in a treaty and whether to accept the treaty. However, in the context of the current topic, the Commission did not seem to be elaborating a treaty. Any views it expressed on existing law might be used by national and international courts, which needed to know what the existing law was. The Commission therefore needed to be transparent about whether it was stating existing law or proposing new law. The Commission had not yet taken a clear position on whether it was proposing a draft treaty or not but, assuming it was, it would have to think carefully about whether a treaty with draft article 7 as proposed would be widely ratified. The Commission must carefully consider the implications and possible safeguards of the draft article prior to its adoption. Since the proposed exceptions in draft article 7, paragraph 1 (*a*), did not reflect settled customary international law, the Commission needed to clearly state the unsettled nature of the law and address the question of what was the desirable new law through progressive development.

13. He would be in favour of the Commission taking the bold step of proposing a treaty in which States agreed to waive immunity for their officials for core crimes, thus enabling the prosecution of all alleged offenders and strengthening the fight against impunity. That would clarify the situation and remove any concerns arising from sovereign equality for the parties to such a treaty. States had already waived their immunity under the Rome Statute of the International Criminal Court, but that waiver did not apply to procedures not covered by the Statute. If the Commission did not want to risk asking States to accept exceptions to immunity *ratione materiae* by way of a treaty, it should try to propose a solution that would take into account, within the framework of the existing law, the common interest that all international crimes, including those committed by State officials, needed to be punished.

14. In that spirit, he wished to make a constructive proposal, based on the duty to prosecute. It was not a stretch to say that there existed a duty, based on customary international law, to prosecute core international crimes. Although the Commission had not addressed the question in its work on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", the International Court of Justice, ICRC and the General Assembly had confirmed the customary duty to prosecute the crime of genocide, war crimes and crimes against humanity. States could not avoid that duty by invoking immunity for the benefit of their officials. Other States had a legitimate interest in playing a role in ensuring that a State that invoked immunity *ratione materiae* for the benefit of one of its officials would actually prosecute the official if there was enough evidence to open an investigation, subject to procedural safeguards. The Commission should therefore propose an alternative for States that resulted in some form of pressure to prosecute their own officials for core international crimes, which might be called the obligation to "waive or prosecute". The Commission should remind States that there existed a duty to prosecute core international crimes, and that the purpose of the rules on immunity was not to enable impunity. States needed to exercise their right to invoke the immunity of their officials for official acts in a way which did not deny the need to prosecute core international crimes, and should therefore have to choose between either waiving the immunity of their officials before the courts of a foreign State, or undertaking to fulfil their obligation to prosecute their own officials. Such an obligation to waive or prosecute could follow a paragraph reminding States of the generally accepted limitations and exceptions to immunity, including waiver and what the Special Rapporteur called the "territorial tort exception".

15. On that basis, he proposed that draft article 7 read:

"*Limitations and exceptions*

"1. Immunity shall not apply:

"(*a*) if the State of the official waives immunity, either in a specific case or through a treaty;

"(*b*) in the case of alleged crimes that cause harm to persons … when a crime is alleged to have been committed in the territory of the forum State and the State official is present in said territory at the time that such a crime has been committed.

"2. The State of the official shall either waive immunity or submit the case for prosecution before its own courts in relation to the following alleged crimes:

"(*a*) genocide, crimes against humanity, war crimes, and torture;

"(*b*) [possible other crimes].

"3. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

"4. [Without prejudice clause]."

16. That formulation offered an appropriate and fair compromise between the requirements of the principle of sovereign equality and stable international relations, on the one hand, and the requirement for accountability and the need to prevent impunity for core international crimes, on the other. It was in line with the framework formulated by the International Court of Justice in its judgment in the case concerning the *Arrest Warrant of 11 April 2000*. Thus, States in which an alleged offender was arrested or prosecuted could seek assurances when another State invoked its immunity with regard to the alleged offender that the allegations would be submitted for prosecution in the State of which the alleged offender was an official. Such a solution admittedly carried the risk that the State invoking immunity might not undertake proper investigations, but that risk was inherent in all comparable mechanisms based on *aut dedere aut judicare*.

17. It was clear to him and some other members that there was little evidence to support the Special Rapporteur's proposition that there was growing evidence in the other direction, and that there were powerful policy reasons for exercising caution. The Special Rapporteur had referred in her introductory statement during the current session to the question posed by Mr. McRae at the sixty-eighth session, namely on which side of history the Commission wished to stand. However, experience had shown that it was important to be modest and cautious when attempting to look into the future, not to rely on unspecified assumptions about the past, not to underestimate the staying power of certain classical principles and practices, and not to act prematurely and inadvertently produce counterproductive effects. Even if it were true that, as one member had suggested, it was unthinkable that the customary regime of immunities would have remained untouched by the quarter of a century of developments that had taken place in international criminal law, it was not clear that an exception like the one proposed in the report would follow from there.

18. In conclusion, he could not support simply sending draft article 7 to the Drafting Committee. The Commission needed to clarify and agree on certain basic parameters of its further work on the proposal contained in the fifth report, based on the plenary debate. Given the divergence of views among the members of the Commission on an extraordinarily important question, if work continued on the basis of such disagreement, the authority of the Commission's work on the topic and more generally would be jeopardized. In accordance with the definition of consensus adopted by the Commission at its previous session, it was necessary to make every effort to achieve general agreement.

19. Mr. TLADI said that Mr. Nolte criticized the draft proposed by the Special Rapporteur for not reflecting practice and yet his own proposal envisaged the territorial tort exception and the State's duty to prosecute core international crimes. Surely those exceptions reflected Mr. Nolte's own policy preferences rather than actual practice?

20. The CHAIRPERSON, speaking as a member of the Commission, said, in reply to Mr. Tladi's question, that if there was a duty to prosecute, States implicitly had a choice to prosecute or waive immunity. That choice was

arguably the implication of *lex lata*. As for the "territorial tort exception", the concept needed to be elaborated more precisely but, in his view, the core concept could be considered as customary international law.

21. Mr. JALLOH said that he shared Mr. Nolte's concern about the possible instability in international relations that might result from having many exceptions to immunity. However, such matters could be dealt with in due course under the appropriate procedural mechanisms. He saw no reason to forestall the discussion on draft article 7 when the Commission knew the Special Rapporteur's next report would address such mechanisms. The Commission could then turn its attention to the balance between the principle of sovereignty and the widespread call for accountability, including the accountability of those in the most powerful positions.

22. Mr. HASSOUNA commended Mr. Nolte on an analytical and thoughtful statement that summarized the views of many members and highlighted the difficulty in reaching a consensus on limitations and exceptions to immunity. Nonetheless, he did not agree with his conclusion that the draft article should not be referred to the Drafting Committee. After all, past experience had shown that the Drafting Committee was the very place where diverging views could be reconciled and a consensus reached. He wondered if Mr. Nolte had some other kind of procedure in mind.

23. Mr. ŠTURMA said that Mr. Nolte's views were very similar to his own, particularly with regard to the application of an exceptional waiver of immunity in relation to core crimes and the "territorial tort exception". He too, however, was concerned about how the Commission would proceed with its work on the topic.

24. Mr. SABOIA, noting that Mr. Nolte's thoughtful intervention had been made as an individual member of the Commission, said the discussion seemed to be shifting to issues that should properly be discussed in the debate after the summing-up by the Special Rapporteur, when the Commission would take a decision on how to proceed. He was concerned about the lack of procedural clarity in the current discussion.

25. The CHAIRPERSON said that he agreed with Mr. Saboia that it was necessary to distinguish between his intervention as a member of the Commission, on the one hand, and the debate on how to move forward after the summing-up of the Special Rapporteur, on the other. He had understood some of the previous interventions as addressing the proposal on how to move forward which he had made in his statement as a member, but he also fully agreed with Mr. Saboia that any reactions to his statement should not pre-empt the general debate of the Commission regarding the decision to be taken.

26. Ms. LEHTO said that while she welcomed Mr. Nolte's statement, in the light of Mr. Saboia's remarks, she would prefer to state her views after hearing the Special Rapporteur's summing-up of the debate.

27. Ms. ORAL said that she wished to thank Mr. Nolte for his analytical and objective statement, but she wondered whether making textual proposals in plenary session was a new practice.

28. Mr. RAJPUT said he agreed with Mr. Saboia that the Special Rapporteur should be heard before the debate continued. Yet, he did not agree with Mr. Hassouna that difficulties in reaching a consensus should be left for the Drafting Committee to resolve. It was important that members who had strong reservations about the proposed draft article should be allowed to express their concerns, and there should be engagement and debate regarding their views before the draft article was referred to the Drafting Committee, especially when they were contesting the very foundations of the draft article.

29. Mr. RUDA SANTOLARIA said he agreed with Mr. Saboia that the Commission should first listen to the summary by the Special Rapporteur before further discussing the way forward. He did not believe that the differences of opinion among members should be a reason for not referring the draft article to the Drafting Committee, which in the past had been able to strike a balance between diverging views on various topics.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could not recall one occasion in her six years as a member of the Commission when a debate on the procedure to be followed had taken place before the Special Rapporteur had summed up the debate and made a proposal. The Chairperson was of course entitled to express his view as a member of the Commission on whether to refer the draft article to the Drafting Committee; however, the current debate, in which the Commission was discussing that question solely on the basis of a proposal made by an individual member, was a highly unusual departure from standard practice.

31. The CHAIRPERSON, replying to Mr. Saboia's comment, said that members had simply responded to the statement he had made as a member of the Commission, which had included a proposal for the way forward. He completely agreed that it was important not to pre-empt the debate that would follow the summary by the Special Rapporteur. He had certainly had no intention of "forestalling" a discussion on exceptions, as Mr. Jalloh seemed to think.

32. In speaking as a member of the Commission, he had done what other members had done, which was to formulate a proposal and respond to comments on it. As Chairperson, he was obliged to give the floor to those members who wished to speak in the mini-debate, but it had not been his intention to pre-empt the general debate. In fact, he had very carefully chosen his words in saying that he could not accept to "simply" send draft article 7 to the Drafting Committee. As he saw it, the Committee had a choice between addressing the topic as a matter of *lex ferenda*, in which case the proposal should be debated with the appropriate procedural safeguards, or as a matter of *lex lata*, which was his preferred approach. He was flexible as to the course of action to be taken, but as the Commission was speaking on a topic that directly affected courts, including national courts, it should be absolutely clear which course had been chosen.

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) summarizing the debate on her fifth report on immunity of State officials from foreign criminal jurisdiction, said that,

as was to be expected for such a controversial topic as the limitations and exceptions to immunity, the debate had been wide-ranging, with considerably more members having expressed their views than at the previous session. There had been some criticism of the length of the report, which she considered a matter for the Commission's Working Group on methods of work. There had also been criticism about the actual content of the report and its usefulness in addressing the topic. Mr. Tladi had found some parts of the report redundant, seeing them as mere repetition of the Special Rapporteur's previous analysis, summaries of the positions adopted by members of the Commission or the Sixth Committee, or subjects with no bearing on the topic under consideration, particularly the passages on the relationship between international criminal courts and national courts. She could not agree with that viewpoint, as all those questions were analysed from the perspective of limitations and exceptions to immunity with the intention of offering members of the Commission a basis on which to form their judgment. Nor did she agree with Sir Michael that the section on the systemic categorization of international crimes as an exception to immunity was of no interest to the Commission because it supposedly reproduced selected theories that were in favour of recognizing exceptions to immunity. Frankly, she thought that such assertions reflected a rather narrow view of the work of the Commission and its special rapporteurs. In fact, a majority of members of the Commission had commented on the usefulness of the contents of the report.

34. Several members had raised the question of the use made in the report of the excellent memorandum by the Secretariat on the topic[245] and the three reports submitted by the previous Special Rapporteur, Mr. Kolodkin.[246] Mr. Rajput in particular had criticized the content and methodology followed in her report, claiming that she had moved away from some of the lines of reasoning of her predecessor without explanation. However, if, as a new Special Rapporteur, she had distanced herself from draft articles that had been adopted by the Commission—not just from the individual work of her predecessor as Special Rapporteur—she would have needed to justify her approach, and that was not the case. Mr. Kolodkin himself had pointed out that what mattered were the arguments that he had put forward in his second report and those that she had put forward in the fifth report. She agreed to some extent with him that there had been no new elements to justify a change of approach to the topic since he had completed his third report six years earlier. In fact, the problem was that in the 10 years since the Commission had started work on the topic, there had been no discernible trend in one direction or the other, and the debates had produced no general agreement on whether to accept or to reject the existence of limitations and exceptions to immunity.

35. A majority of members of the Commission had said that the fifth report provided an important study of practice and a good basis for further work. Many of them had found the analysis of both international and national judicial practice useful, remarking on such issues as the weight to be given to the judgments of international courts in identifying rules of international customary law. Other members, however, had maintained that only international judicial practice was relevant, as it alone was consistent and coherent and offered an unequivocal assertion of the existence of limitations and exceptions to immunity. That view had been called into question by other members, who agreed with the Special Rapporteur that the judgments of the International Court of Justice and the European Court of Human Rights deserved a closer reading, especially since they dealt solely with immunity *ratione materiae* or else referred exclusively to immunity of the State, although they did not rule on the immunity of State officials from foreign criminal jurisdiction. It should be added that in the most recent cases, notably in the judgment of the European Court of Human Rights in *Jones and Others v. the United Kingdom*, there had been a noticeable shift in the law that States should follow closely.

36. She took note of the references to the case law of the Inter-American Court of Human Rights drawn to her attention by two members of the Commission.

37. Most members agreed there was a need to analyse national judicial practice as it related to the topic, but she noted the position of a minority of members who found such practice irrelevant as it was very limited, spread over a long period of time and inconsistent, and also because it concerned both civil and criminal jurisdiction. She wished to stress, however, that the proceedings of national courts ought to be analysed precisely because they were at the heart of the problems addressed under the present topic. After all, if national judicial practice was really so irrelevant, it was difficult to understand why States repeatedly stressed the importance of the topic of immunity of State officials and studied the work of the Commission so closely. She could not see, therefore, how it could be dismissed as irrelevant.

38. Leaving aside the comments on the form in which national judicial practice was cited in the report, its inclusion had enabled members of the Commission to check the cases cited and form their own judgment on them. The comments of some members on the cases included in the study of practice should be seen in that light. The task of carefully analysing each such case would be best left to the Drafting Committee.

39. She acknowledged the comments on the lack of references to case law in certain regions of the world, notably Africa and Asia, and on the need to analyse some issues mentioned in the report in greater detail. She thanked Mr. Nguyen in particular for his efforts to provide additional information on judicial decisions related to immunity in Asia, and welcomed the offer from other members to provide further information on such decisions elsewhere.

40. Several members of the Commission had expressed the opinion that the analysis of national legislative practice in the report was not relevant, since all the laws on

[245] 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).

[246] Reports of the first Special Rapporteur, 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).

immunity considered in it referred to State immunity and none of them established limitations or exceptions to immunity. Nonetheless, she believed that the study of those laws was relevant for several reasons: first, they made it possible to differentiate between State immunity and immunity of State officials, which, as a rule, was not regulated other than for Heads of State; second, the analysis demonstrated that not even State immunity was considered to be absolute, and exceptions had been established; and, third, it illuminated the so-called "territorial tort exception". She wished, moreover, to draw attention to a point not raised in the debate: article 23 of Organic Act No. 16/2015 of 27 October 2015, the Spanish law governing immunity of Heads of State, Heads of Government and Ministers for Foreign Affairs, recognized an exception to immunity *ratione materiae* in the case of genocide, crimes against humanity, war crimes and enforced disappearances.

41. A second criticism levelled by some members was that the analysis of the laws implementing the Rome Statute of the International Criminal Court was irrelevant, as they simply dealt with the implementation of international treaty obligations. That was an incorrect interpretation, in her view. The Statute contained no obligation to adopt national legislative measures, other than those establishing cooperation mechanisms with the International Criminal Court. Any law of a more general scope that was designed to implement the Statute at the national level was freely and voluntarily adopted by the State party concerned and had no other purpose than to enable the State party to benefit from the principle of complementarity, since if the State party did not incorporate the crimes set forth in the Statute into national law, or if it did not establish its jurisdiction over such crimes, it could never challenge the exercise of jurisdiction by the International Criminal Court. Nevertheless, the fact was that States parties were adopting implementing legislation, which led to the conclusion that States considered that national courts should be the first to exercise jurisdiction over those horrendous crimes. Viewed in that light, the way in which the implementing legislation dealt with the immunity of State officials from foreign jurisdiction was certainly relevant to the Commission's work. Such legislation was an example of treaty-based practice adopted by a State under no obligation to do so. The same could be said of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which had been referred to a number of times during the debate.

42. Some members of the Commission had argued that it was necessary to take into account other forms of State practice, in particular the decisions of public prosecutors and of authorities that had the power to launch criminal investigations, on the one hand, and diplomatic procedures, on the other. That practice tended to be confidential, however, which made accessing it extremely difficult, if not impossible. For that reason, she had serious doubts over whether it could be considered relevant for the purposes of the topic. In any event, negative practice, consisting of silence or omission, was not helpful in identifying a custom or trend. Her comments did not apply to other forms of diplomatic practice, such as statements before the Sixth Committee and other bodies, which she had duly borne in mind in her report.

43. Although her analysis of the distinction between limitations and exceptions had been broadly welcomed, two main criticisms had been expressed. The first was that it was impossible to draw a clear distinction, rendering the analysis irrelevant. The second was that it was inconsistent to establish a distinction in the report, but then propose a draft article containing a simplified formula which referred only to the non-applicability of immunity.

44. With regard to the first point, she wished to emphasize that most members of the Commission shared the view that the analysis in the report was useful and necessary. Distinguishing between exceptions and limitations was not a purely theoretical exercise; it had important practical implications and was closely related to the perception of international law as a legal system rather than a jumble of norms. If only the concept of limitations was retained, the Commission would be pointing towards the existence of a stand-alone legal regime in which nothing outside of immunity was relevant. If only the concept of exceptions was retained, the Commission might run the risk of thinking that it could leave aside matters closely linked to the regime of immunity, such as the value of stable international relations or the need to ensure that certain State officials were able to perform their functions of international representation unimpeded. In short, it was only by analysing both concepts that the Commission could be sure that it had taken into consideration all relevant legal norms, principles and values.

45. However, the methodological need to conduct that analysis did not preclude the Commission from seeking pragmatic solutions to any problems that might arise in its consideration of the topic. With that in mind, the title of draft article 7 was "Crimes in respect of which immunity does not apply". The words "does not apply" offered a pragmatic solution to a genuine problem, namely the lack of consensus over whether international crimes could be viewed as acts performed in an official capacity. Despite that lack of consensus, a number of members of the Commission, and some States and domestic courts, had concluded that international crimes that offended the conscience of humankind invariably formed either a limitation or an exception to immunity. The title of draft article 7 covered both possibilities, a fact that should be mentioned in the commentary to avoid any confusion or misunderstanding. She wished to highlight that the Commission had embraced a similar pragmatic proposal in the draft articles on jurisdictional immunities of States and their property.[247] Consequently, she did not believe that distinguishing between the concepts of limitations and exceptions was incompatible with the concept of the non-applicability of immunity, which had, moreover, been endorsed by numerous members of the Commission.

46. The issue of whether there existed a customary rule that established limitations or exceptions to immunity had been one of the most controversial to be debated by the Commission. One group of members held that there was no custom or trend in that regard. A second group had reservations about the existence of a custom, but considered that there was a practice showing a trend in favour of

[247] *Yearbook … 1991*, vol. II (Part Two), pp. 13 *et seq*., para. 28.

exceptions. The two points of view related to international crimes and were, in part, different to the views expressed with regard to corruption-related crimes and the territorial tort exception. Her conclusions on the matter were based on the Commission's work on the topic of the identification of customary international law, and she wished to point out that the commentaries to draft conclusions 2, 3, 4, 8, 10 and 14,[248] among others, which had been provisionally adopted in relation to that topic, supported the arguments advanced in her fifth report.

47. The fact that several members had noted a clear trend in favour of exceptions to immunity raised the question of what was meant by the word "trend". While it did not imply an existing norm, or *lex lata*, it did point to an emerging norm, or *lex ferenda*, to which certain States were contributing.

48. The description of the practice analysed in her report as being either *lex lata* or *lex ferenda* was open to debate, and it was precisely the Commission's role to do so. However, the assertion that there was no trend, and therefore no element of *lex ferenda* to be considered by the Commission, was not supported by practice, unless it could be claimed that all the domestic courts that had recognized some form of limitation or exception had been wrong or, worse still, had acted outside, or in violation of, international law. The consequences of such a claim warranted a more detailed analysis than had been carried out during the debate by those members of the Commission who had denied the existence of a trend.

49. Some members had referred, in their statements, to "new law". Setting aside other considerations, she found it difficult to accept the use of that expression as the basis for the Commission's work without any kind of clarification. A couple of questions sprang to mind. Was new law opposed to existing law, or based on it? Was it law that did not yet exist, that was in the process of being formed or that was to be established independently of practice? It was also unclear whether the expression "new law" meant that draft article 7 not only did not exist as a norm but also bore no relation to existing law and was of no technical or legal value. If that was the case, she could not share the view that the Commission's sole task should be to define a "new law" governing the system of limitations and exceptions to immunity.

50. Rather, the debate within the Commission should focus on whether there was any *lex lata* and, if so, whether it was well defined. A concurrent effort should be made to identify whether it was possible to speak of *lex ferenda* that would enable the Commission to propose solutions to a problem that was of interest to States, on the basis of elements that could be found in practice and supported through a systemic analysis of international law. That, in her view, was the approach favoured by most members of the Commission.

51. The relationship between codification and progressive development had also been the subject of fierce debate within the Commission. She wished to draw attention, in that regard, to the fact that, as with other draft texts prepared by the Commission, the draft articles on the immunity of State officials from foreign criminal jurisdiction contained some norms that represented codification and others that constituted progressive development. It did not seem in keeping with the Commission's mandate to refer systematically to progressive development as a means of reducing the scope or value of certain proposals. Neither codification nor progressive development was of lesser or greater technical and legal value.

52. The systemic categorization of limitations and exceptions to immunity—which, to her surprise, had been met with alarm and rejection by some members of the Commission—had merely been an attempt to apply to the topic at hand, in a consistent and non-contradictory manner, the Commission's mandate to progressively develop and codify international law.

53. It was clear that the decision of whether to engage in codification or progressive development could not be based on mere preference. There were technical and legal rules that indicated when one or the other was more appropriate. Even though codification required proof of the pre-existence of a norm, progressive development could not be viewed as a simple proposal that was not backed up by precedents or previous practice.

54. The statements made by members during the debate revealed that the majority preference was for the Commission's work to strike a balance between respect for sovereign equality and the need to prevent immunity from acting as a barrier to accountability for the most serious international crimes.

55. She fully agreed with the general opinion expressed with regard to the importance of dealing adequately with the procedural aspects of immunity. The reasons for that were many, and included the need to avoid any risk of politicization and the need to ensure respect for internationally established procedural safeguards, a concern that was addressed in paragraph 247 of her report.

56. She did not doubt the importance of studying procedural aspects in order to have a complete picture of the immunity of State officials from foreign criminal jurisdiction. Since that immunity was exercised before the courts of the forum State, the Commission was obliged to analyse elements such as who could invoke immunity, who should assess the applicability of immunity, and when and why. Some members of the Commission had mentioned that those issues had been dealt with in the third report by the previous Special Rapporteur, Mr. Kolodkin. However, it should be recalled that Mr. Kolodkin had analysed the procedural aspects of immunity at the end of his work, after having examined issues such as the absence of immunity and exceptions thereto. As had been noted, he had done so with good reason. After all, should the Commission not analyse the substantive aspects of limitations and exceptions to immunity before making decisions with regard to procedural mechanisms? Since that approach had been approved by the Commission in 2011, she did not see why it should no longer be considered valid. Was it because the possibility of establishing limitations or exceptions to immunity was looming on the horizon of the Commission's work?

[248] See *Yearbook … 2016*, vol. II (Part Two), pp. 61 *et seq.*, para. 63.

57. She had placed great importance on the procedural aspects of immunity since the outset of work on the topic, not least because she believed that it was essential to have a comprehensive idea of what was meant by "immunity from jurisdiction". For that reason, in her second report,[249] she had proposed definitions of two concepts that, in her opinion, were key to dealing correctly with the topic of immunity: "immunity" and "jurisdiction". At that time, however, some members of the Commission had been opposed to the adoption of definitions on the grounds that the two concepts had never previously been defined by the Commission and that such definitions were, in any case, unnecessary, as the meaning of the concepts was clear. While she respected that viewpoint, she did not agree with it. The result of those objections had been that the proposed definitions had been before the Drafting Committee since 2012. Although it would undoubtedly have been useful to deal in greater detail with procedural issues at that time, she did not think that it was methodologically admissible to do so at the current session, when the Commission was addressing issues related to limitations and exceptions to immunity.

58. The analysis of the procedural aspects of immunity should cover not only the invocation or waiver of immunity and the question of when immunity should apply, which had been mentioned by some members of the Commission, but also communication between the authorities of the forum State and the State of the official, and the mechanisms for international cooperation and judicial assistance that could be used with a view to maintaining a balance between the various legal values and principles at stake, and to establishing "without prejudice" clauses applicable to cases of abuse and politicization that could arise in practice. The Commission had requested information on those matters from States in 2016, but, to date, only six States had responded. It was also vital, in her view and in that of several members of the Commission, to address the need to ensure respect for due process at all times.

59. Every one of the elements that she had mentioned would need to be analysed in her sixth report. In that connection, she invited the Commission to hold informal consultations on the topic during the second part of the current session, once it had concluded its consideration of the fifth report. She would be happy to circulate an informal document for that purpose.

60. She had taken careful note of the alternative proposal for draft article 7 put forward by Mr. Nolte. Although she could not endorse it in the context of the current debate within the Commission, as it did not really relate to limitations and exceptions to immunity, she did think that it contained interesting elements that the Commission could consider when it turned its attention specifically to the procedural aspects of immunity.

61. She hoped to have clarified her stance and future intentions with regard to procedural issues. However, she could not agree with those members who had called for limitations and exceptions to immunity, on the one hand, and the procedural aspects of immunity, on the other, to be addressed jointly.

62. Turning to the comments that had been expressed concerning draft article 7, she said that most members of the Commission were in favour of retaining paragraph 1, although there were differences of opinion about what should be included in the list of crimes in respect of which immunity did not apply. A few members had voiced doubts over the paragraph, and one had remained silent about it, having indicated that it should not be referred to the Drafting Committee.

63. Regarding draft article 7, paragraph 1 (*a*), most members had spoken in favour of including genocide, crimes against humanity, war crimes, torture and enforced disappearances, on the grounds that they represented the "hard core" of the most serious crimes that concerned the international community as a whole. Some members had drawn attention to the difference between genocide, crimes against humanity and war crimes, on the one hand, and torture and enforced disappearances, on the other, but had nevertheless supported the inclusion of the last two, which were the subject of international treaties and constituted special categories of crimes against humanity.

64. At both the current and previous sessions, there had been calls for the list of crimes in draft article 7, paragraph 1 (*a*), to be expanded by including, among others, apartheid, the crime of aggression, piracy, enslavement, human trafficking, the destruction of cultural property and terrorism. Each proposal merited a separate response.

65. It had not been her intention, in formulating her proposal for draft article 7, to downplay the gravity of the crime of apartheid, particularly given its historical significance in the second half of the twentieth century, in Africa above all. Bearing in mind the comments made by a number of members of the Commission, she had no problem with adding it to the list of crimes in respect of which immunity did not apply.

66. She continued to have reservations about including the crime of aggression in the list. The reasons that she had given in her report remained valid and had been supported by some members of the Commission. Moreover, the risk of politicization was especially high, as the crime of aggression was, by definition, a crime of leaders. Again, her intention had not been to downplay the gravity of the crime, but its inclusion might spark a political debate—within the Commission and, above all, in the Sixth Committee of the General Assembly—that could colour the overall treatment of limitations and exceptions to immunity. Consequently, she considered that the crime would be better addressed in the commentaries, but she would leave the decision in the hands of the Commission.

67. The other crimes referred to by certain members should be approached from a different perspective, in that, strictly speaking, they were not so much international crimes—with the exception, perhaps, of piracy and enslavement—as transnational crimes. While it was true that they had a treaty basis and that some of them were covered by the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), there was no practice involving those crimes in relation to immunity. For that

[249] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/661 (second report).

reason, she had serious reservations about including them in the draft article, as it did not seem possible to draw a parallel between them and the international crimes that had been included. Her reasoning could be incorporated in the commentary to the draft article, if the Commission considered it useful.

68. Some members of the Commission had mentioned the possibility of drafting a broadly worded general clause that referred only to crimes of concern to the international community, so as not to establish a set list of crimes that might need to be expanded in the future. She fully understood the proposal and could not help but sympathize with the intention behind it. However, she did not think that it was the most appropriate solution for the topic at hand or for achieving the goal of providing States with clear guidance as to the crimes in respect of which immunity did not apply. In addition, an open reference might have the undesired effect of engendering politicization.

69. Other members of the Commission had commented on the need to provide a precise definition of some of the crimes listed in draft article 7, paragraph 1 (*a*). She considered that it would be best to do so in the commentaries. The task would be facilitated by the fact that there were precedents in treaty practice. The Commission could draw on its work on crimes against humanity, and on the Statute, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of All Persons from Enforced Disappearance.

70. Various comments had been made on corruption-related crimes covered in draft article 7, paragraph 1 (*b*). A sizeable group of members had rejected or had reservations about mentioning corruption-related crimes in the list of crimes to which immunity did not apply, whereas a few members had expressed support for retaining the reference in the draft article, sometimes with qualifications. Their reason for not including corruption-related crimes was that treaties dealing with such crimes did not provide for exceptions to immunity. However, another group of members had expressed the opinion that corruption caused serious harm to States and society, which had repercussions on international relations, and that therefore the category of crimes should be included.

71. Nonetheless, the need for a clearer definition of "corruption-related crimes" had been recognized and several members had emphasized the fact that corruption was an issue that was easily manipulated, including for political ends. She shared those concerns: as indicated in her report, the cases in which national courts had dealt with so-called "corruption-related crimes" mainly involved the large-scale corruption or "grand corruption" referred to by several members. If the Commission decided that immunity would not apply in the case of corruption-related crimes, the concept of large-scale corruption would need to be explained in the commentary. In any event, since crimes of corruption always entailed an act for the personal gain of the official in question and could not be qualified as an act performed in an official capacity, the perpetrators would not be granted immunity. In fact, it was a typical case of limitation to immunity, which had been included in the draft article in order to clarify certain issues.

72. With regard to the "territorial tort exception" described in draft article 7, paragraph 1 (*c*), a few members had asserted that it was a typical means of ensuring the immunity of the State from civil jurisdiction, whose main purpose was to shield the State from responsibility in the event of harm. However, it was worth noting that the exception had also applied to diplomatic officials and officials on special mission who enjoyed personal immunity; thus, it did not relate exclusively to State jurisdiction. Other members had focused on the territorial aspect to reinforce the validity of the exception, some of whom had mentioned the special case of foreign military activities in the territory of a State, which had not been covered in her report. Nonetheless, most members had indicated that they were in favour, in a more or less qualified way, of incorporating the "territorial tort exception".

73. The wording of the "territorial tort exception" was drawn from the second report of the previous Special Rapporteur, Mr. Kolodkin. Her intention when including it in draft article 7 was that examples of practice which were still relevant, such as acts of sabotage or espionage, should be taken into account; obviously, it was not to establish the non-applicability of immunity in relation to minor offences, such as traffic offences, as one member had implied. All those elements would be given due consideration in the Drafting Committee with a view to defining more clearly the terms of the "territorial tort exception".

74. Several members had raised the issue of the different legal bases underpinning each of the situations in respect of which immunity did not apply, or rather, to what extent the Commission was engaging in codification and progressive development. From the study of practice in the report, it was clear that the situations described in the three subparagraphs of draft article 7, paragraph 1, required different treatment.

75. While there had been broad support for draft article 7, paragraph 2, two members had been against the idea of the non-applicability of limits and exceptions in respect of officials who enjoyed immunity *ratione personae* during their term of office. Although she fully understood their arguments, aimed at strengthening the fight against impunity, she did not believe that the Commission had much leeway, since the trend in both international practice and doctrine was clearly towards the enjoyment of the full scope of immunity *ratione personae*. Moreover, it was a very special rule that ceased to be effective as soon as the term of office of the officials concerned (Heads of State, Heads of Government and Ministers for Foreign Affairs) ended. She was also aware that the situation would never apply to persons who held permanent office, such as monarchs, unless they abdicated or were dethroned, and that it could have the effect of allowing certain persons to hold on to office. Frankly, she did not believe that the Commission had the power to draw up an instrument to prevent such a situation, unless it appealed to States to consider withdrawing the immunity of members of the troika who had committed the crimes listed in draft article 7, paragraph 1, in particular in subparagraph (*a*). However, the withdrawal of immunity fell outside the regime applicable to limitations and exceptions to immunity and would be taken up in her next report.

76. Paragraph 2 of draft article 7 struck an appropriate balance between the protection of the principle of sovereign equality, the stability of international relations and the fight against impunity, as noted by many members; it should therefore be retained in the draft article. She could not concur with the minority view that the paragraph should be deleted and the draft article should be limited to immunity *ratione materiae*, without any reference to the troika.

77. Paragraph 3 had also received broad support among members, who deemed it appropriate to retain a "without prejudice" clause so as to define the relationship between the draft article and other international instruments with regard to the applicability of limitations and exceptions to immunity. The paragraph had been drafted in response to the undeniable fact that the immunity of State officials from criminal jurisdiction could be affected by other international legal regimes. The "without prejudice" clause was modelled on that contained in draft article 1, provisionally adopted by the Commission in 2013.[250]

78. Practice revealed that there could be some interaction between different immunity regimes applicable in two national courts or else in a national court and an international criminal court, and thus guidance should be provided on how to resolve any possible conflict of rules. The wording of paragraph 3 could not, under any circumstances, be interpreted as giving preference to the provisions of draft article 7, or as a means of indirectly introducing into the draft article the rules on immunity contained in the constituent treaty of an international tribunal. The "without prejudice" clause would oblige States to take into consideration both instruments and a conforming and harmonized interpretation thereof. In response to the two members who had raised doubts about the type of international tribunal in question, she said that the interaction would normally take place between criminal courts.

79. In view of the foregoing, like other Commission members, she considered that paragraph 3 formed an important part of draft article 7 and should be retained. Nonetheless, several members had suggested that the paragraph might be redrafted as a "without prejudice" clause applicable to the whole set of draft articles. She did not fully understand Mr. Tladi's strong opposition to the paragraph on the basis that it might prejudge an ongoing litigation. It could also be argued to the contrary that failure to include such a reference might prejudge the final outcome of the litigation. Mr. Tladi's concern could be dealt with in a commentary.

80. As to the future workplan, in her sixth report she intended to address the procedural aspects of immunity she had outlined previously, in connection with which informal consultations could be held during the second part of the current session, if appropriate. Thereafter, the outcome would be revised, in accordance with the Commission's established methods of work.

81. In conclusion, she said that she had endeavoured to reflect, in a balanced way, all the views expressed in the Commission, especially on the central issues of greatest concern during the debate. If she had not succeeded in her task, she expressed the hope that members of the Commission would inform her accordingly, at a later date. She recommended that the Commission refer draft article 7, as contained in the fifth report, to the Drafting Committee, on the understanding that the Drafting Committee would consider all the comments made during the plenary debate.

82. The CHAIRPERSON said that he would take it that the Commission wished to refer draft article 7 to the Drafting Committee, taking into account all the comments made during the debate.

83. Mr. MURPHY said that he wished to thank the Special Rapporteur for her summary of a rich and complicated debate; he appreciated the time constraints that she had faced summarizing a debate that had lasted a week. However, with respect, he did not consider that her summary neutrally captured the range of views expressed. To a certain extent, it was a continuation of the arguments she had put forward in her fifth report, without a substantive response to the criticisms levelled by some members. He did not wish to reopen the debate, but would give a few examples of what he meant. First, the argument was not that national judicial practice was irrelevant; it was relevant but did not support the text proposed in draft article 7. Upon examination, there was virtually no case law that supported various aspects of draft article 7 and there was no case that supported draft article 7 as a whole. Likewise, the argument was not that national legislation was irrelevant; what was relevant was the fact that only a few States had national laws that supported draft article 7. More significantly, the vast majority of States did not have national laws that supported draft article 7. In his view, the Special Rapporteur had not taken on those arguments and attempted to rebut them in her summary. He also had the impression that most members did not consider that draft article 7 reflected customary international law. He suggested that it would be helpful if the Commission acknowledged that, based on the debate where diverse views had been expressed, there was no consensus in plenary session that draft article 7 reflected customary international law. If the Commission could reach an agreement on that issue, it would be easier for members to endorse the referral of the draft article to the Drafting Committee.

84. Mr. HMOUD, speaking on a point of order, said that it was the first time since he had been a member of the Commission that another member had raised substantive points following the closure of a debate by a Special Rapporteur, and it would merely serve to prolong the decision-making process. The Chairperson had proposed that draft article 7 be referred to the Drafting Committee and action should be taken on his proposal, in accordance with the relevant rules of procedure of the General Assembly.

85. The CHAIRPERSON said that, in accordance with the rules of procedure of the General Assembly, if members wished to take the floor to discuss a proposal, they had the right to do so. On the other hand, they should not comment on or discuss the Special Rapporteur's summary of the debate.

[250] *Ibid.*, vol. II (Part Two), p. 39 (draft article 1).

86. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), speaking on a point of order, endorsed Mr. Hmoud's comments. She had not wished to interrupt Mr. Murphy since all members had a right to have their views heard. Nonetheless, in accordance with the Commission's established procedure, it was the Special Rapporteur who should have the last word on the substance of a topic. To her recollection, it was the first time ever that a member had reopened the debate to challenge the Special Rapporteur's arguments. Of course, Mr. Murphy had the right to question the conditions for the referral of a proposal to the Drafting Committee, but, under no circumstances should he have used that opportunity to counter the arguments of the Special Rapporteur when a proposal was already before the Commission. All members had had the opportunity to state their views during the debate and it was the Special Rapporteur's responsibility to summarize that debate and put forward a proposal on the basis of which members should take their decision.

87. Mr. SABOIA, speaking on a point of order, said that he concurred with Mr Hmoud's view. Furthermore, he wished to point out that, in terms of procedure, if the Commission was going to take any decision it should be on the first proposal made by the Chairperson to refer draft article 7 to the Drafting Committee and not on Mr. Murphy's proposal.

88. The CHAIRPERSON said that there was no second proposal; the only proposal under discussion was his original proposal regarding the referral of draft article 7 to the Drafting Committee.

89. Mr. RAJPUT said that he did not wish to reopen a substantive debate as the Special Rapporteur had already expressed her views, though some members did not share those views. However, he wished to seek clarification regarding the Special Rapporteur's summary before a decision was taken to refer draft article 7 to the Drafting Committee. The Special Rapporteur had made very clear her position that draft article 7 did not constitute a "new law". However, at one point, it seemed that she had referred to "custom" as well to a "trend" and had then said that she would like to revert the position she had taken in the report. If the Commission was expected to endorse the Special Rapporteur's proposal to refer draft article 7 to the Drafting Committee, then it wished to know whether draft article 7 reflected customary international law or an emerging trend.

90. Mr. HMOUD, speaking on a point of order, said that if members insisted on reopening the debate they could propose it as a point of procedure, otherwise the Commission should take action on the Chairperson's proposal.

91. Mr. SABOIA, speaking on a point of order, said that he endorsed Mr. Hmoud's comments.

92. Mr. TLADI said that he agreed with those members who had spoken about the procedural aspects of the discussion. Mr. Murphy had raised a substantive point and a procedural point. Mr. Murphy's procedural point, rather, procedural proposal, was that the Commission should decide in plenary session that it was not taking a position on whether draft article 7 reflected customary international law. However, as had been pointed out, members had had an opportunity to express their views, and whoever wished to know what those views were should refer to the relevant summary records and determine for themselves whether there was agreement within the Commission on the matter.

93. Mr. SABOIA, speaking on a point of order, proposed, in accordance with the rules of procedure of the General Assembly, that the Chairperson should close the debate and that the Commission should take a decision immediately on the matter under discussion. If his motion was carried, it would take precedence over the list of speakers and any other matter.

94. The CHAIRPERSON, noting that Mr. Saboia insisted that the Commission take a decision before the remaining members on the list of speakers were allowed to take the floor, said that a vote, by a show of hands, should be held to decide on his original proposal, namely whether draft article 7 should be submitted to the Drafting Committee.

95. Sir Michael WOOD, speaking on a point of order, said it was his understanding that Mr. Saboia had proposed the closure of the debate. Thereafter the Commission could take a decision on the Chairperson's proposal to refer draft article 7 to the Drafting Committee.

96. The CHAIRPERSON invited members to indicate by a show of hands whether they were in favour of Mr. Saboia's proposal to close the debate.

97. Mr. HMOUD, speaking on a point of order, said that he was not certain whether the intent of Mr. Saboia's proposal was to close the debate on the item under discussion, in accordance with rule 119 (*d*) of the rules of procedure of the General Assembly, and sought clarification in that regard.

98. Mr. SABOIA said that his proposal was to close the debate on the proposal to refer draft article 7 to the Drafting Committee.

99. The CHAIRPERSON invited the Commission to take a vote on that proposal.

A vote was taken by a show of hands.

100. The CHAIRPERSON said that according to the vote, 20 members were in favour and 3 members were against the proposal, with 1 abstention.

101. Sir Michael WOOD, speaking in explanation of position before the decision on referral, said that as he had stated previously in plenary session, he was not in favour of referring draft article 7 to the Drafting Committee; however, if the Commission should decide to refer the draft article, he would not block the consensus. In his view, that could not be interpreted as taking any position on the question of whether draft article 7 represented existing law. On that understanding, he would not object to the consensus to refer the draft article to the Drafting Committee.

102. The CHAIRPERSON, speaking as a member of the Commission, said that his vote was based on procedural considerations. The issue was so important that the Commission should have taken more time and made every possible effort to achieve consensus. In his view, 10 minutes of debate was not enough. For that reason, he had not been in favour of the proposal to close the debate; his vote did not relate to the substance of the original proposal.

103. Mr. RAJPUT expressed support for those comments as the reason for his vote against closing the debate.

104. The CHAIRPERSON said he would take it that the Commission wished to refer draft article 7 to the Drafting Committee, taking into account all the comments made during the debate on the topic.

It was so decided.

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

[Agenda item 1]

105. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of immunity of State officials from foreign criminal jurisdiction was composed of the following members: Ms. Escobar Hernández (Special Rapporteur), Mr. Argüello Gómez, Mr. Cissé, Ms. Galvão Teles, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

The meeting rose at 1.10 p.m.

3366th MEETING

Thursday, 1 June 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

Crimes against humanity (*continued*)[**] **(A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)**

[Agenda item 6]

Report of the Drafting Committee

1. Mr. RAJPUT (Chairperson of the Drafting Committee), introducing the report of the Drafting Committee on the topic of crimes against humanity (A/CN.4/L.892), said that the Drafting Committee had devoted 10 meetings to the consideration of a draft preamble, draft articles and a draft annex relating to the topic. It had examined the seven draft articles and the draft preamble initially proposed by the Special Rapporteur in his third report (A/CN.4/704), together with a number of reformulations proposed by the Special Rapporteur in response to suggestions made or concerns raised during the debates in plenary meetings and in the Drafting Committee. At the current session, the Drafting Committee had provisionally adopted five draft articles, a draft preamble and a draft annex.

2. The Drafting Committee had studied the draft preamble after examining the substance of the entire set of draft articles and the draft annex. The draft preamble comprised nine paragraphs based on a revised text submitted by the Special Rapporteur. The first and second paragraphs borrowed language from the Rome Statute of the International Criminal Court. The third paragraph, which had been added by the Special Rapporteur further to the plenary debate, reflected the fact that the prohibition of crimes against humanity was a peremptory norm of general international law, as had been recognized by the International Court of Justice in its judgment in *Jurisdictional Immunities of the State*. The fourth paragraph encapsulated the draft articles' primary purpose, namely the prevention of crimes against humanity. The fifth paragraph, which likewise borrowed language from the Rome Statute of the International Criminal Court, linked the prevention of crimes against humanity to the fight against impunity. The sixth paragraph, which had been proposed by the Special Rapporteur, stemmed from the suggestion that the draft preamble expressly refer to the Statute, since the definition of crimes against humanity set forth in draft article 3 reproduced article 7 of the Statute. Although the language of the seventh paragraph was based on wording in the preamble to the Statute, the Drafting Committee had eschewed the phrase "those responsible for" crimes against humanity, since it might conflict with the presumption of innocence. The eighth paragraph referred to national measures and international cooperation, as two further means of ensuring the effective prosecution of crimes against humanity. The ninth paragraph was a reminder that the rights of victims, witnesses, alleged offenders and others must be respected throughout the fulfilment of the obligations set forth in the draft articles.

3. As the Drafting Committee had altered the order of several draft articles, that had affected their numbering. The only change made to draft articles 1 to 4 had been the deletion of the words "or control" from draft article 4, paragraph 1 (*a*), for the sake of consistency with the formulation used for references to territory in all the other draft articles. That was not, however, a substantive modification.

4. The Drafting Committee thought that draft article 12 (*Non-refoulement*) was best placed after draft article 4 (Obligation of prevention), since the *non-refoulement* of persons could effectively prevent their exposure to crimes against humanity; this draft article thus became draft article 5. The principle set forth in that draft article was embodied in numerous treaties specifically addressing

[*] Resumed from the 3363rd meeting.

[**] Resumed from the 3354th meeting.

other forms of harm. The commentary would explain that paragraph 1 was without prejudice to other *non-refoulement* obligations deriving from treaties or customary international law. The purpose of paragraph 2 was to indicate that the "substantial grounds" referred to in paragraph 1 included the general human rights situation in the territory in question.

5. As the draft article on *non-refoulement* had become draft article 5, what had previously been draft articles 5 to 10 had been renumbered 6 to 11. Throughout the text, the phrase "offences referred to in draft article 5" had been amended to read "offences covered by the present draft articles". Certain internal cross references had been adjusted owing to the renumbering of those draft articles.

6. In draft article 12 (Victims, witnesses and others), States were called upon to take the necessary measures to protect the rights of victims, witnesses and other persons affected by the perpetration of crimes against humanity. In order to secure greater consistency with draft article 8 (Investigation), in paragraph 1 (*a*) of draft article 12, the reference to "any individual who alleges that a person has been subjected to a crime against humanity" had been replaced with the phrase "any person who alleges that acts constituting crimes against humanity have been or are being committed". In paragraph 1 (*b*), victims had been added to the list of persons to be protected. Members of the Drafting Committee had suggested that elements of article 68 of the Rome Statute of the International Criminal Court be incorporated into the commentary to the draft article. The adjective "Protective" had been added in order to clarify what kind of measures were meant in the final sentence.

7. When discussing whether the term "victims" should be defined in draft article 12, the members of the Drafting Committee had noted that most international instruments dealing with victims contained no definition and, in practice, the term had been construed in different ways, depending on factors such as the nature of the harm, the occurrence of indirect harm, or the connection of family members to the person directly harmed. They had therefore concluded that the question of precisely which persons were victims should be determined by the standards of national legal systems, and the phrase "subject to its national law" had thus been changed to "in accordance with its national law" in paragraph 2. At the same time, they had agreed that the commentary should draw on existing case law and the views of treaty bodies in order to provide guidance as to the range of persons who might be deemed to be victims of crimes against humanity. They were also of the view that it was useful to specify that the reparation referred to in paragraph 3 could be for material and moral damages, a position already reflected in article 24, paragraph 5, of the International Convention for the Protection of All Persons from Enforced Disappearance. The adjective "other" underscored the fact that the list of forms of reparation was only indicative. The expression "as appropriate" had been added in order to emphasize that crimes against humanity might be perpetrated by either a State or non-State actors. As the capacity of a responsible State to provide full compensation to all victims might be limited, particularly if the State was struggling to rebuild itself in the aftermath of a crisis, the commentary would make it clear that the appropriate type of reparation, whether individual or collective, could be determined only in the light of the context. The Drafting Committee had slightly modified the order of the forms of reparation listed and had added the phrase "cessation and" before "guarantees of non-repetition", as that was the standard wording for that form of reparation.

8. After debating whether draft article 13 (Extradition) should be modelled on long-form or short-form provisions on extradition, the Drafting Committee had concluded that more detailed provisions, such as article 16 of the United Nations Convention against Transnational Organized Crime and article 44 of the United Nations Convention against Corruption, would provide suitable guidance on all the relevant rights, obligations and procedures in relation to extradition for crimes against humanity, especially as those provisions were well understood by States. The Committee had agreed, however, that certain modifications should be made to the long-form model to tailor it to the context of crimes against humanity, and also that the commentary should make it clear that the entire article was to be read in the light of the *aut dedere aut judicare* obligations laid down in draft article 10. The commentary would likewise provide guidance as to the factors to be taken into consideration by a State when it was confronted with multiple requests for extradition.

9. Paragraph 1 was modelled on the provisions of existing international instruments such as article 8 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Drafting Committee had also discussed whether that paragraph should refer to draft article 3 or 6, or to both, in order to encompass all extraditable offences. As explained earlier, the decision had been taken to use the phrase "offences covered by the present draft articles" throughout the draft articles on the understanding that the commentary would explain that it referred to both the definition of crimes against humanity in draft article 3 and the criminalization of the offences under draft article 6. The exclusion of the "political offence" exception had been retained in paragraph 2. Paragraph 4 (*a*) had been amended in keeping with the logic of paragraph 3 and with the generally accepted approach taken in the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. Members considered that change necessary in order to provide judges with a clear text when they had to interpret and apply the future convention. Paragraph 4 (*b*) had been adopted as originally proposed, on the understanding that the commentary would explain its scope. As far as paragraph 6 was concerned, although the members of the Committee had agreed that the reference to the minimum penalty requirement in the original text was inappropriate and unnecessary in the context of crimes against humanity, they had decided to retain the reference to the grounds upon which the requested State might refuse extradition, on the understanding that the commentary would give examples of acceptable and unacceptable grounds for refusal. The original paragraphs 7, 9 and 13 had been deleted as unnecessary for the purposes of the draft article. The text of what had become paragraph 8 was based on the provisions of the United Nations Convention against Transnational Organized Crime

and the United Nations Convention against Corruption. Although the Drafting Committee had noted that nothing in the draft articles actually obliged a State to extradite an alleged offender, paragraph 9 was important because it stressed that States should not comply with any request for extradition made on grounds that were impermissible under international law. The Drafting Committee had altered the list of grounds contained in the Special Rapporteur's original proposal in the light of similar provisions contained in the Rome Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance. The commentary to paragraph 10 would highlight the significance of the expression "where appropriate".

10. Moving on to draft article 14 (Mutual legal assistance), he explained that the Special Rapporteur had suggested that the text originally proposed be restructured to take account of the views expressed by Commission members during the plenary debate. For that reason, the original draft article had been divided in two and the subheadings had been removed. The first half of the original text had been retained. It dealt with the general obligations in respect of mutual legal assistance that were binding on every State, irrespective of whether it had a mutual legal assistance treaty with the requesting State. The second half, which had been turned into a draft annex, applied when a request for mutual legal assistance was made and the two States in question were not bound by a mutual legal assistance treaty.

11. In paragraph 2 of the draft article, the Drafting Committee had decided to add "and other" after "judicial" to reflect the possibility of initiating administrative proceedings against legal persons, as contemplated in draft article 6, paragraph 7. The Drafting Committee had agreed with the Special Rapporteur's proposal to include in paragraph 3 elements that had been mentioned during the plenary debate, such as testifying by videoconference, obtaining forensic evidence and identifying and locating alleged offenders, victims, witnesses and others. In paragraph 3 (*a*), the term "as appropriate" had been added in order to address the privacy concerns of victims and witnesses. Paragraph 4 had been adopted as originally proposed, on the understanding that the commentary would explain that "bank secrecy" also meant the secrecy of similar financial institutions. Paragraph 7 had been deleted on the grounds that it was unnecessary and that its content would serve as the basis for the commentary to paragraph 6. In the new paragraph 7, the Drafting Committee had added the phrase "except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance" so as to leave no room for doubt that the instrument offering the highest level of assistance should apply.

12. In paragraph 8, which addressed the relationship between draft article 14 and the draft annex, minor drafting changes had been made for the sake of clarity. In the last sentence, the word "strongly" had been deleted in order to avoid placing too much emphasis on recourse to the application of the draft annex.

13. The draft annex itself consisted of 20 paragraphs, namely a new introductory paragraph and paragraphs 10 to 28 of the original draft article 13. Paragraph 1 established that the provisions of the draft annex applied to requests made pursuant to draft article 14 by States that were not bound by a treaty of mutual legal assistance. The remaining paragraphs of the draft annex, which addressed the various stages of the request procedure, had been adopted without substantive amendment, although the references to the "instrument of ratification, acceptance or approval of or accession to the present draft articles" had been deleted from paragraphs 2 and 3, since it was the Commission's practice to leave such formulations to be added by States at a later stage. Furthermore, paragraph 6 had been adopted on the understanding that the commentary to the draft annex would emphasize that States must act in good faith when executing requests, and paragraph 8 had been adopted on the understanding that the commentary would clarify the scope of the various grounds on which mutual legal assistance could be refused.

14. During the plenary debate, several Commission members had proposed the deletion of the original draft article 15, which addressed the event of a conflict between the rights or obligations of a State under the draft articles and its rights or obligations under the constitutive instrument of a competent international criminal tribunal. The Special Rapporteur and the Drafting Committee had agreed that the draft article was not necessary, for several reasons: no actual conflict had been identified; concerns had been raised about giving blanket priority to obligations arising with respect to all future international criminal tribunals; a rule that gave priority to international proceedings might conflict with the principle of complementarity, which provided for some deference to national proceedings; and the standard conflict rules under international law could be applied in the unlikely event of a conflict. For those reasons, the Drafting Committee had decided not to retain the provision.

15. The Drafting Committee had also decided not to retain the original draft article 16, which addressed federal State obligations. Although such a provision could be found in a number of treaties, the issue was already covered by article 29 of the 1969 Vienna Convention. Furthermore, the issue was related to that of reservations to treaties, which, the Commission had decided, should be addressed in the final clauses of the future convention to be negotiated and adopted by States.

16. The Drafting Committee had debated whether it was appropriate for the Commission to propose a provision on dispute settlement. While the Commission usually left dispute settlement clauses to be drafted by States, it had previously proposed such clauses when engaged in the preparation of a draft convention, notably in the case of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons.[251] The Drafting Committee had concluded that, in view of the nature of the topic, the proposal of a dispute settlement clause was appropriate; that clause appeared as draft article 15 (Settlement of disputes).

17. Paragraph 1 of the draft article had been retained as originally proposed, as it was a provision that could

[251] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, pp. 312 *et seq.*, chap. III, sect. B.

be found in a number of existing treaties, including the United Nations Convention against Corruption. However, the Drafting Committee had decided not to retain the Special Rapporteur's original proposal for paragraph 2, which had given precedence to arbitration over dispute resolution by the International Court of Justice and had been considered inappropriate in the context of crimes against humanity. The text ultimately adopted was a new formulation that was not found in existing treaties but was based on article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 2 stipulated that a State could submit a dispute that was not settled through negotiation directly to the International Court of Justice without first submitting it to arbitration. Nevertheless, since the draft articles encompassed a very broad range of obligations that could give rise to very different types of dispute, the parties to a dispute could still submit it to arbitration, if they so agreed. The provisions of paragraphs 3 and 4, which were common in existing treaties, such as the United Nations Convention against Corruption and the International Convention for the Protection of All Persons from Enforced Disappearance, allowed States to opt out of the dispute settlement provision contained in paragraph 2, and thus might be of particular interest if States ultimately decided not to allow reservations to the substantive provisions of a future treaty.

18. In his summing-up of the plenary debate, the Special Rapporteur had noted that the dominant view in the Commission was that the issue of amnesty should not be addressed in the draft articles, at least for the time being, but that it should instead be addressed in the commentary. As the draft articles had been referred to the Drafting Committee on that basis, the Special Rapporteur had provided the Drafting Committee with four proposed paragraphs for the commentary to be associated with draft article 10 (*Aut dedere aut judicare*). Several members of the Drafting Committee had suggested improvements to those paragraphs, and all members had been invited to provide further input prior to the submission of those paragraphs for editing and translation. The possibility of requesting the Secretariat to conduct a study on the issue had been discussed, but it had been decided that the matter should not be pursued at the current stage.

19. The Special Rapporteur had also noted in his summing-up that there were conflicting views in the Commission with regard to whether and how to address the issue of immunity in relation to the topic. The Special Rapporteur had suggested that the issue be discussed in the Drafting Committee to see whether a consensus could be reached. Regrettably, owing to a lack of time, the Drafting Committee had been unable to consider the issue in substance. However, it had noted that the issue was currently being discussed in the context of the topic of immunity of State officials from foreign criminal jurisdiction and had expressed the view that it would be prudent to avoid any conflict with that topic. The issue would be discussed further during the second part of the current session.

20. Mr. HMOUD said that, in considering the *non-refoulement* obligation set out in draft article 5, paragraph 1, the Drafting Committee had discussed the distinction between the wording "to another State" and "to territory under the jurisdiction of another State" and had decided to retain the latter wording, as originally proposed in the Special Rapporteur's third report.

21. Mr. GROSSMAN GUILOFF said that he would appreciate clarification regarding the decision not to request the Secretariat to conduct a study on the issue of amnesty, as he did not recall that the Drafting Committee had taken that decision.

22. Mr. MURPHY (Special Rapporteur) said that, according to his recollection, Mr. Grossman Guiloff had been in favour of requesting the Secretariat to conduct a study on the issue of amnesty, but some other members of the Drafting Committee had not wished to request such a study at the current time. Although no formal vote had been held, he believed that the Chairperson of the Drafting Committee had indicated that the Committee would not recommend that the Commission make such a request.

23. Mr. GROSSMAN GUILOFF said that, in the light of Mr. Murphy's helpful explanation, it could perhaps be noted in the statement by the Chairperson of the Drafting Committee that some members had not been in favour of requesting the Secretariat to conduct such a study and that the Chairperson, not the Drafting Committee, had consequently decided that the matter should not be pursued at the current time.

24. Mr. RAJPUT (Chairperson of the Drafting Committee) said that, as far as he recalled, the decision not to request the Secretariat to conduct a study on the issue of amnesty at the current stage had been the outcome of the discussion held in the Drafting Committee. However, if necessary, a sentence could be added to his statement to explain that, while one member had insisted that the Secretariat be requested to conduct such a study, the Drafting Committee had ultimately decided otherwise.

25. Mr. JALLOH said that it had been the Commission's intention that the issue of amnesty be discussed in the Drafting Committee. The members of the Drafting Committee had indeed been presented with and invited to react to relevant paragraphs proposed for the commentary, and a number of members had made suggestions on those paragraphs. However, there had ultimately been insufficient time in which to consider the issue. Moreover, he did not recall a decision having been taken with regard to a study by the Secretariat. The issue of immunity had not been discussed at all in the Drafting Committee, but some members had discussed it in informal consultations with the Special Rapporteur. The view had been expressed that sufficient time should be set aside for the Commission to discuss the issue during the second part of the current session.

26. Mr. GROSSMAN GUILOFF said that he would prefer not to be described as having insisted that the Secretariat be requested to conduct a study on the issue of amnesty. He was concerned simply that the statement by the Chairperson of the Drafting Committee did not accurately reflect the events of the meeting at which the matter had been discussed. He proposed that the passage relating to the decision not to request the Secretariat to conduct such a study be deleted from the statement.

27. Mr. PARK said that, according to his recollection, it had been decided in the Drafting Committee that, owing to a lack of time, the consideration of the paragraphs proposed for the commentary would be continued during the second part of the current session.

28. Ms. ESCOBAR HERNÁNDEZ said that there had been insufficient time in which to discuss the issues of amnesty and immunity in the Drafting Committee. With regard to amnesty, she did not recall that a decision had been taken on the possibility of requesting a study. Indeed, the issue of amnesty had not been discussed at all: the Special Rapporteur had simply proposed relevant paragraphs for the commentary and had invited the members of the Drafting Committee to offer suggestions, which some members had done. With regard to immunity and the irrelevance of official capacity, she did not recall that the question of the need to avoid a conflict between the topic of crimes against humanity and the topic of immunity of State officials from foreign criminal jurisdiction had been raised in the Drafting Committee. Towards the end of the meeting in question, she had asked how the issue of immunity would be dealt with going forward, but no substantive discussion had taken place. Nevertheless, the Chairperson of the Drafting Committee had noted that the work of the Committee would be continued during the second part of the current session, and the Special Rapporteur had made great efforts to find a mutually acceptable solution.

29. Sir Michael WOOD said that it was for the Chairperson of the Drafting Committee to amend his statement as he saw fit, if at all, before it was uploaded to the Commission's website.

30. Mr. TLADI said that, while he agreed in principle that it should be the Chairperson of the Drafting Committee who decided whether to amend the statement, it was especially important to ensure the accuracy of such statements now that they were uploaded to the Commission's website.

31. The CHAIRPERSON asked whether, as a way of resolving the problem, the Chairperson of the Drafting Committee might consider deleting the sentence referring to the question of whether the Secretariat should conduct a study on the issue of amnesty.

32. Mr. RAJPUT (Chairperson of the Drafting Committee) said that he would have to consider that request carefully, as he wished to avoid setting a precedent whose effect would be to impinge on the prerogatives of future chairpersons of drafting committees. The wording of his statement clearly indicated that the issue of immunity with respect to the topic of crimes against humanity, which the Drafting Committee had not had time to consider during the first part of the current session, would be discussed in detail during the second. Although that paragraph of the statement noted that it would be prudent to avoid any conflict with the topic of the immunity of State officials from foreign criminal jurisdiction when considering that issue, that did not mean that the adoption of such an approach would preclude the consideration of the issue in the Drafting Committee.

33. Mr. SABOIA said that it was slightly contradictory for the statement to say that the issue of immunity could not be considered in substance in the Drafting Committee, while subsequently indicating that a substantive point relating to that issue had been noted in the Committee. He did not recall that this substantive point had been raised at the Drafting Committee meeting in question, and in any case it was unclear why that particular point was cited.

34. Ms. ESCOBAR HERNÁNDEZ said that at no time during the meetings of the Drafting Committee had any discussion been held on the issue of immunity in relation to crimes against humanity or on the relationship between that issue and the topic of immunity of State officials from foreign criminal jurisdiction.

35. Mr. RUDA SANTOLARIA said that he could confirm that the Drafting Committee had had time for only a brief discussion of the draft commentary submitted in connection with the pending issue of amnesty, and had not had time to discuss immunity. The issue of immunity was very important, as shown by the references in the plenary debate to the question of the irrelevance of official status to the accountability of State officials for crimes against humanity.

36. Mr. JALLOH said that a dozen or so Commission members—of whom some were interested in immunity and some were interested in the irrelevance of official capacity—had held informal consultations and reached agreement on a specific proposal. The proposal, which did not relate to immunity *per se*, had been shared informally with the Special Rapporteur, and it was the understanding of the members involved that it might be possible to set aside time during the second part of the current session in order to discuss the proposal in the Drafting Committee.

37. Mr. GROSSMAN GUILOFF said that he had only wanted account to be taken of the concern he had raised, which amounted to no more than a detail, and that the Commission should move forward on the substance of the topic at hand.

38. Mr. MURPHY (Special Rapporteur) said that the point made by Mr. Tladi and Sir Michael concerning the posting of the statement by the Chairperson of the Drafting Committee on the Commission's website was important to bear in mind. The question of whether the statement should indicate that it had been decided not to pursue the matter of a Secretariat study on amnesty should perhaps be left to the discretion of the Committee Chairperson.

39. Mr. RAJPUT (Chairperson of the Drafting Committee) said that he would alter his statement in the two places in which its wording had posed a problem for certain Commission members, although he still held the view that, in principle, Drafting Committee chairpersons should have full discretion as to the content of their statements.

40. The CHAIRPERSON invited the Commission to adopt the texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading (A/CN.4/L.892).

Draft preamble

The draft preamble was adopted.

Draft articles 1 to 13

Draft articles 1 to 13 were adopted.

Draft article 14

41. Mr. PETER said that, in his view, draft article 14, without the draft annex introduced by paragraph 8, was sufficient; paragraph 8 and the draft annex should therefore be deleted. Indeed, the draft annex was so extensive that it risked overshadowing the main topic of the future convention. Moreover, some of the provisions it contained might be perceived by sovereign States as intrusive, and the level of detail of those provisions might dissuade States from ratifying the future convention. To his mind, the wording of a convention should be more general.

42. In the event that the Commission wished to retain the draft annex, he would like to point out that he was uncomfortable with its paragraph 12 (*b*), which stipulated that a State could provide a foreign State with information that was not available to its own people. In addition, in paragraph 20 of the draft annex, he objected to the provision according to which the costs of executing a request should be borne by the requested State; in his view, it was the requesting State that should bear those costs.

43. Mr. MURPHY (Special Rapporteur) said that there had been a robust discussion in the plenary debate regarding the relative merits of the long-form versus the short-form provisions in relation to both extradition and mutual legal assistance. Members in the Drafting Committee had gravitated towards the long-form approach, considering it to be of great value to the many States that did not have bilateral treaties on mutual legal assistance and therefore lacked guidance on such questions as where to direct a request for mutual legal assistance, how such a request should be formulated and how the receiving State should react to the request.

44. Mr. Peter's concern seemed to relate to the way in which the draft articles might be perceived, yet part of the rationale for placing those more detailed provisions in an annex had been to separate them from the main draft articles, thereby addressing that concern. Moreover, although some States might be put off by the inclusion of such an annex, there was, in fact, a reasonable possibility that many States would be attracted by it, as there was widespread agreement on the need to develop extradition and mutual legal assistance procedures in the context of crimes against humanity. Nevertheless, if the draft articles were submitted to a diplomatic conference, States would always have the option of deleting the draft annex and draft article 14, paragraph 8, if they so wished. In his view, it would be easier for States to delete those provisions than to devise procedures along the lines of those set forth in the draft annex. Consequently, he considered the text as it currently stood to be appropriate.

45. Paragraph 12 (*b*) of the draft annex reproduced a provision that appeared in several international conventions, such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, and was a useful provision in the context of crimes against humanity. He was aware of a situation in which one State had transmitted to investigators from another State who were looking into possible crimes against humanity classified information in the form of satellite imagery and high-altitude aerial photographs, which had ultimately allowed the investigators to find the remains of a large number of victims. That process might have been delayed if the information had had to be declassified and made public. If subparagraph (*b*) was deleted, there was a risk that States might not consider the possibility of providing such assistance to each other. That would be unfortunate because such assistance could prove to be extremely valuable.

46. With regard to paragraph 20 of the draft annex, the Drafting Committee had been provided with a list of treaties that contained provisions similar to the one set out in that paragraph. The reason that the requested State was, by default, required to absorb the ordinary costs of executing a request for mutual legal assistance was that such requests tended to be processed through States' regular police and judicial authorities—in other words, through existing institutional infrastructures for serving documents or receiving and transmitting information. Trying to calculate the cost of those relatively routine tasks could become complicated in the context of ordinary requests for mutual legal assistance. On the other hand, if those expenses were of a substantial or extraordinary nature, States were required to consult each other in order to determine the terms and conditions under which the request would be executed and the manner in which the costs would be borne, leading perhaps to some form of burden-sharing between the two States. It was a standard provision and should not prove problematic.

47. Mr. PETER said that he could agree to retaining paragraph 12 (*b*), since it did not compel requested States to provide classified information but left it to their discretion to do so if they deemed it appropriate. However, he was still concerned about paragraph 20, which was too categorical in assigning the costs of executing a request to the requested State, thus making the receipt of a request appear burdensome. Perhaps a less direct formulation could be found.

48. Mr. MURPHY (Special Rapporteur) said that the exact same wording was found in conventions such as the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, and had not caused any problems for the thousands of requests that had been sent and received by States under those conventions. He would prefer to retain that language, as it was well known to the government bodies concerned, and any changes might introduce uncertainty and confusion. It should be borne in mind that the Commission was adopting the draft articles on first reading; any concerns expressed by Governments could be taken into account in the Commission's second reading of the draft articles.

49. Mr. HASSOUNA said that one way to address Mr. Peter's concern about the wording of paragraph 20 might be to change the word "shall" in the first sentence to "should", to make the provision more flexible.

50. Mr. MURPHY (Special Rapporteur) said that he was reluctant to use the word "should" because it was not

used elsewhere in the draft articles. It would represent a substantive change, since it would mean that the issue of cost was not resolved in the draft articles. Moreover, it would imply that a State could refuse to fulfil a request for assistance unless it received funding from the requesting State; that would be inappropriate and could impair the provision of mutual legal assistance.

51. Sir Michael WOOD said that he, too, had initially found it surprising that the assisting State was expected to bear the costs, but had discovered that this was the usual practice; for example, the British authorities had borne considerable costs in connection with the *Pinochet* case. The provision on costs was standard and had many precedents, but was also flexible, as it concerned only ordinary costs and allowed States to agree on a different arrangement if they so wished.

52. Mr. CISSÉ said that the wording of paragraph 20 was very clear. Any problems concerning costs were forestalled by the inclusion of the phrase "unless otherwise agreed by the States concerned" in the paragraph.

53. The CHAIRPERSON suggested that the cost question addressed in paragraph 20 be raised separately from the question of adopting draft article 14 as a whole.

It was so decided.

Draft article 14 was adopted.

Draft article 15

54. Ms. ESCOBAR HERNÁNDEZ said that, while she had joined the consensus on draft article 15 in the Drafting Committee, she had serious reservations about paragraphs 3 and 4 of the draft article. In her view, the Commission should not propose an optional jurisdiction clause of the kind contained in those paragraphs.

Draft article 15 was adopted.

Draft annex to the draft articles

55. Mr. OUAZZANI CHAHDI proposed that wording be added to indicate that the draft annex was an integral part of the draft articles.

56. Mr. MURPHY (Special Rapporteur), recalling that this proposal had been made in the Drafting Committee, said that the Committee had decided that the wording of paragraph 1 of the draft annex, "This draft annex applies in accordance with draft article 14, paragraph 8", was sufficient to establish a direct connection between the draft annex and the draft articles themselves.

57. Mr. CISSÉ said that he shared Mr. Ouazzani Chahdi's view. Paragraph 1 of the draft annex indicated that the draft annex applied in accordance with draft article 14, paragraph 8, but did not expressly link the draft annex to the draft articles as a whole. There should be an indication, perhaps in a preamble, that the draft annex had the same status as the draft articles themselves.

58. The CHAIRPERSON, speaking as a member of the Commission, said that the wording of draft article 14, paragraph 8, "The draft annex to the present draft articles shall apply to requests made pursuant to this draft article", strongly connected the draft annex to the draft articles. The Drafting Committee had been mindful of the need to separate the material in the draft annex from the main body of the text to ensure that technical matters would not overshadow the substantive provisions of the future convention, in line with the concerns expressed by a number of Commission members.

59. Mr. HASSOUNA said he agreed with Mr. Ouazzani Chahdi and Mr. Cissé that the status of the draft annex should be clarified somehow, either in the commentary or elsewhere.

60. Mr. MURPHY (Special Rapporteur) said that all the Commission members agreed that the draft annex applied in the context of requests arising in respect of the draft articles. Paragraph 1 of the draft annex referred to draft article 14, paragraph 8, which clearly stated that the draft annex applied to requests made pursuant to that draft article, and draft article 14, paragraph 1, referred to mutual legal assistance "in relation to the offences covered by the present draft articles". The draft annex was thus strongly connected to the draft articles as a whole. He would nevertheless be willing to draft language for inclusion in the commentary that would clearly spell out the connection between paragraph 1 of the draft annex, draft article 14, paragraph 8, and the draft articles as a whole, as proposed by Mr. Hassouna.

61. Mr. RUDA SANTOLARIA said he agreed that the connection between the draft annex and draft article 14, paragraph 8, was clear. It should be recalled, however, that wording to the effect that an annex was an integral part of a convention was normally included in the final provisions of the convention. The Commission had left the drafting of final provisions to be carried out by States, in line with its usual practice. States could thus decide at a subsequent stage to include such wording in the final provisions of the future convention.

62. Sir Michael WOOD said that he agreed with Mr. Ruda Santolaria. For example, the final clauses of the United Nations Convention on Jurisdictional Immunities of States and Their Property included a statement that the annex to the Convention formed an integral part of the Convention. For the moment, the Commission could include appropriate wording in the commentary, as it did not deal with final clauses.

63. Mr. PETER said that he was pleased to hear from the Special Rapporteur that there might be another opportunity to raise the issue of costs. It could easily be foreseen that, if a request for legal assistance was sent to a developing country of modest means, the prospect of providing cooperation and bearing the costs would be unattractive to that country. In paragraph 20 of the draft annex, he would prefer the wording "The costs of executing a request shall be agreed upon by the States concerned". However, he would not insist on that wording.

64. Mr. VÁZQUEZ-BERMÚDEZ said that international legal cooperation was based on the principle of reciprocity between States, which informed their day-to-day actions.

States that fulfilled requests for assistance in one context might submit such requests in another. As part of that practice, the ordinary costs of such cooperation were borne by the requested State. Cases involving exceptional situations would require agreement between the States concerned.

65. Mr. JALLOH said that, while Mr. Peter had raised a significant concern about developing countries, the Commission must also be aware of the usual State practice. In the commentary, it might be desirable to acknowledge the challenges faced by some States and to reiterate that paragraph 20 of the draft annex made allowance for alternative arrangements agreed upon between the States concerned.

66. Mr. GROSSMAN GUILOFF said that he shared Mr. Peter's concern, and pointed out that the United Nations engaged in capacity-building in order to prepare developing countries to fulfil requests for legal assistance. He also recognized, however, that paragraph 20 of the draft annex reflected a practice that had not caused problems. It was important to acknowledge that "ordinary costs" might be politically difficult for some countries to meet and that those costs varied from one country to another, depending in part on the size and complexity of each country's legal system. However, the provision operated as part of the effort to ensure that countries had the will to undertake proceedings for the crimes addressed in the draft articles. As currently worded, paragraph 20 preserved countries' sovereignty to have an adjudicatory process that was not tainted by "foreign money", although requests of an extraordinary nature would require consultations on the question of costs.

67. The CHAIRPERSON said that the wording of the second sentence of paragraph 20 did not present a great risk, as it referred to "expenses of a substantial or extraordinary nature", which were defined by each State according to its own criteria. If a State considered such expenses to be substantial, it could opt to negotiate a different arrangement for meeting them.

The draft annex to the draft articles was adopted.

68. The CHAIRPERSON said he took it that the Commission wished to adopt, as a whole, the texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on first reading (A/CN.4/L.892).

It was so decided.

69. Mr. PETER asked whether the Commission's adoption of the draft would preclude any further changes to the draft articles or the draft annex.

70. Mr. MURPHY (Special Rapporteur) said that the Drafting Committee would resume its discussions on the issue during the second part of the sixty-ninth session. The main objective was to discuss the matter of immunity and official capacity, as the matter of amnesty had already been addressed. Members would have the opportunity to provide input on the commentary, and it was possible that the Drafting Committee would decide to include new text.

71. Mr. LLEWELLYN (Secretary to the Commission) said that when the Commission adopted draft texts in the absence of commentaries, the adoption was understood to be provisional. The draft articles in final form, incorporating any changes made during the second part of the session, and the commentary would be adopted definitively at the end of the second part of the session, when the Commission adopted its report to the General Assembly.

Programme, procedures and working methods of the Commission and its documentation (*continued*)[*] (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

72. Mr. HASSOUNA (Chairperson of the Working Group on methods of work) said that the Working Group on methods of work was composed of the following members: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Nolte and Mr. Valencia-Ospina as Chairperson and Vice-Chairperson, respectively, of the Commission.

The meeting rose at 12.45 p.m.

3367th MEETING

Friday, 2 June 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Jalloh, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Protection of the atmosphere (*concluded*)[**] (A/CN.4/703, Part II, sect. B, A/CN.4/705, A/CN.4/L.894)

[Agenda item 5]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the third report of the Drafting Committee, on the topic "Protection of the atmosphere", as contained in document A/CN.4/L.894.

[*] Resumed from the 3354th meeting.

[**] Resumed from the 3359th meeting.

2. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the report contained three preambular paragraphs and one draft guideline. The Drafting Committee had devoted four meetings—on 18, 19, 22 and 29 May 2017—to its consideration of the draft guidelines referred to it by the Commission.

3. He wished to pay tribute to the Special Rapporteur, Mr. Murase, whose mastery of the subject, constructive spirit and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the members of the Drafting Committee for their valuable contributions to a successful outcome and to the secretariat for its invaluable assistance.

4. At its 3359th meeting on 17 May 2017, the Commission had decided to refer draft guidelines 9, 10, 11 and 12, as contained in the Special Rapporteur's fourth report (A/CN.4/705), to the Drafting Committee, taking into account the debate in the Commission. The Special Rapporteur, when summing up the debate, had suggested reformulations of the proposed draft guidelines, taking into account the various comments made in the plenary, in particular to streamline the draft guidelines into a single guideline.

5. To that end, the Drafting Committee had before it a working paper containing the proposals made by the Special Rapporteur in his summing-up. After an initial round of comments concerning the structure of the draft guidelines, the Special Rapporteur had prepared a revised working paper, which had constituted the basis of discussions in the Drafting Committee. That proposal had sought to restructure the draft guidelines further, by presenting, in one paragraph, aspects of the interrelationship between the rules of international law relating to protection of the atmosphere and other relevant rules of international law, particularly the rules of international trade and investment law, the law of the sea and international human rights law. It had grounded the interrelationship in the 1969 Vienna Convention and in customary international law. The proposal had contained a separate paragraph relating to the interpretation and application of relevant rules of international human rights law with respect to persons belonging to vulnerable groups. Additionally, the proposal had reflected, in three separate preambular paragraphs, other elements concerning the close interaction between the atmosphere and the oceans, the situation of small island States and low-lying States, and the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere.

6. Following discussions, the Drafting Committee had decided to split the first paragraph proposed by the Special Rapporteur in his revised working paper into two separate paragraphs, one dealing with existing rules and one dealing with the development of new rules. It had also revised the language of the second proposed paragraph, which had become the third paragraph of draft guideline 9.

7. Draft guideline 9 contained three paragraphs that sought to reflect the relationship between rules of international law concerning the atmosphere and other relevant rules of international law. Paragraphs 1 and 2 were general in nature, while paragraph 3 emphasized the protection of groups particularly vulnerable to atmospheric pollution and atmospheric degradation. As the current topic dealt with atmospheric pollution and atmospheric degradation caused by humans, activities in other fields of the law had a bearing on the atmosphere and its protection. Draft guideline 9 highlighted the various techniques in international law for addressing tensions between legal rules and principles, whether they related to a matter of interpretation or a matter of conflict. In preparing the formulation, the Drafting Committee had drawn on the report of the Commission's Study Group on fragmentation of international law.[252]

8. Paragraph 1 of draft guideline 9 provided that "[t]he rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts". The paragraph dealt with identification of the relevant rules as well as their interpretation and application. It was formulated in the passive voice in recognition of the fact that the process of identification, interpretation and application involved not only States but also international organizations, as appropriate.

9. The reference to "including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law" reflected the concern within the Drafting Committee to capture, on the one hand, the practical importance of those three areas to the atmosphere, and, on the other, the risk of overlooking other fields of law, which might be equally relevant. The phrase "including *inter alia*" represented the agreement in the Drafting Committee reflecting that "without prejudice" categorization and indicated that the list of relevant fields of law was not exhaustive.

10. The phrase "should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations" drew upon the conclusions of the Study Group on fragmentation of international law.[253] The paragraph applied to rules arising from treaty obligations and other sources of international law. That was indicated by the term "identified", even though some members of the Drafting Committee had questioned the need for such a specification.

11. The first sentence of paragraph 1 also made specific reference to principles of "harmonization and systemic integration", which had been accorded particular attention in the Commission's conclusions in the fragmentation study. As noted in the conclusions, "harmonization" entailed that when several norms bore on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations. Moreover, systemic integration denoted that, whatever their subject matter, treaties were a creation of the international legal system and should be interpreted against the background of other international rules and principles.

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[252] *Yearbook … 2006,* vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

[253] *Ibid.*, vol. II (Part Two), pp. 177–184, para. 251.

12. The phrase "and with a view to avoiding conflicts" signalled that avoiding conflicts was among the principal purposes of the paragraph. While some members had suggested placing that phrase at the beginning, the Drafting Committee had decided to retain it at the end of the sentence, as that better reflected the nuance that the guidelines had more than one purpose.

13. The second sentence of paragraph 1 sought to locate the paragraph within the relevant rules set forth in the 1969 Vienna Convention, including article 30 and article 31, paragraph 3 (*c*), and the principles and rules of customary international law. The phrase "principles and rules of customary international law" covered such principles and rules of customary international law as were relevant to the identification, interpretation and application of relevant rules.

14. In contrast to paragraph 1, paragraph 2 dealt with the situation where States wished to develop new rules. It provided that "States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner". The paragraph signalled a general desire to encourage States, when engaged in negotiations for the creation of new rules, to take into account the systemic relationships that existed between rules of international law relating to the atmosphere and rules in other legal fields.

15. Paragraph 3 highlighted the plight of those who found themselves in vulnerable situations because of atmospheric pollution and atmospheric degradation. It had been reformulated to make direct reference to atmospheric pollution and atmospheric degradation. It provided that "[w]hen applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous people, people of the least developed countries and people of small island and low-lying States affected by sea-level rise".

16. The reference to paragraphs 1 and 2 captured both the aspects of identification, interpretation and application, on the one hand, and development, on the other. At the end of the first sentence, the phrase "special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation" underlined the broad scope of the consideration to be given to the situation of vulnerable groups, covering both aspects of the topic, namely atmospheric pollution and atmospheric degradation. It had been considered appropriate to omit a reference in the text to "human rights" or even to "rights" or "legally protected interest". The second sentence of paragraph 3 gave examples of groups that might be in vulnerable situations, although the phrase "may include, *inter alia*" indicated that those examples were not necessarily exhaustive. The commentary would develop the examples mentioned in the sentence, as well as others, including local communities, migrants, women, children, persons with disabilities, as inspired by the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change, and also older persons.

17. Some members had registered reservations not only with respect to the various guidelines initially proposed by the Special Rapporteur, but also regarding the reduction of the issues into a single guideline. Some members had expressed concern regarding the scope of the draft guideline, in particular the absence of any reference to purpose, for example protecting the atmosphere or achieving sustainable development.

18. The title of the draft guideline was "Interrelationship among relevant rules" to indicate the relationship between rules of international law relating to the atmosphere, on the one hand, and various other rules of international law, on the other.

19. Turning to the three preambular paragraphs, he said that preambular paragraph 3 *bis* would be placed after the third preambular paragraph of the text of the preamble already provisionally adopted by the Commission.[254] It acknowledged the physical relationship that existed between the atmosphere and the oceans. The Drafting Committee had not made any changes to the text proposed by the Special Rapporteur. Given that the relationship between the atmosphere and the oceans was cyclical and varied, the preambular paragraph simply noted as a factual matter the close interaction between the atmosphere and the oceans.

20. Preambular paragraph 4 *bis* would be placed after the fourth preambular paragraph of the text of the preamble already provisionally adopted by the Commission. It read: "*Also aware*, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise". That preambular paragraph was linked to the persons and groups in vulnerable situations referred to in draft guideline 9, paragraph 3. The words "in particular" were intended to acknowledge specific areas without necessarily foreclosing the list of potentially affected areas. The original proposal by the Special Rapporteur had included references to delimitation, potential loss of statehood and environmental migration. The Drafting Committee had decided to offer a shorter and more streamlined text with the phrase "due to sea-level rise". Such an approach had been considered appropriate, since the draft guidelines did not provide any guidance on how those three complex questions should be addressed in relation to the topic in a preambular paragraph.

21. The sixth preambular paragraph would be placed after the fifth preambular paragraph of the text of the preamble already provisionally adopted by the Commission. It read: "*Noting* that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account". The Drafting Committee had not made any changes to the text proposed by the Special Rapporteur. It would be recalled that the Commission had addressed considerations of intra- and inter-generational equity in draft guideline 6 on equitable and reasonable utilization of the atmosphere.[255]

22. In conclusion, he expressed the hope that the Commission would be in a position to provisionally adopt the

[254] See *Yearbook … 2016*, vol. II (Part Two), p. 173 (draft preamble).

[255] *Ibid*., p. 177 (draft guideline 6).

three preambular paragraphs and draft guideline 9, as presented.

23. The CHAIRPERSON invited the Commission to adopt the three preambular paragraphs and draft guideline 9, as provisionally adopted by the Drafting Committee.

Preambular paragraphs

The preambular paragraphs were adopted.

Draft guideline 9

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

24. Mr. VÁZQUEZ-BERMÚDEZ said that, in the English version, the reference should be to "indigenous peoples" rather than "indigenous people", in line with the United Nations Declaration on the Rights of Indigenous Peoples,[256] among other documents.

25. Mr. PARK said that, although he had no objection to adopting paragraph 3, it seemed that the Drafting Committee, of which he had been a member, had missed an inconsistency between draft guideline 9, paragraph 3, and preambular paragraph 4 *bis*. The former referred to "people of small island and low-lying States affected by sea-level rise" whereas the latter mentioned "low-lying coastal areas and small island developing States", which was quite different. The issue was both a formal and a substantive one. During the discussions in the Drafting Committee, the choice of terminology for preambular paragraph 4 *bis* had been considered at length, based on a proposal by Ms. Oral, but less attention had been paid to draft guideline 9, paragraph 3. Perhaps it would be possible to resolve the issue during *toilettage* or in the plenary.

26. Mr. MURASE (Special Rapporteur) said that, as preambular paragraph 4 *bis* referred to questions related to sea-level rise and draft guideline 9, paragraph 3, referred to human rights, albeit not explicitly, the context in each case was different. Considerable time had been spent in the Drafting Committee discussing which terms to use in preambular paragraph 4 *bis*, and in the end it had been decided to opt for constructive ambiguity in the form of "low-lying coastal areas". He was not in favour of reopening the debate on the matter at the current stage; he could, of course, reflect the points raised in the Drafting Committee in the commentaries that he would be drafting before the second part of the session.

27. Mr. NGUYEN said that he shared the concern raised by Mr. Park about the difference between the terms "low-lying coastal areas" and "low-lying States", and was not convinced by the Special Rapporteur's reasoning in relation to the different contexts. Small-island States, low-lying States and low-lying coastal areas of coastal States were facing the same consequences of migration, food shortage and land loss caused by sea-level rise. Those were human rights issues. He therefore proposed that draft guideline 9, paragraph 3, be amended to refer to "low-lying coastal areas", which covered both low-lying States and low-lying coastal areas of States.

28. Ms. ORAL said that she agreed with Mr. Park about the inconsistent use of terminology. The terminology in draft guideline 9, paragraph 3, did not reflect the standard language used, including that of the Paris Agreement under the United Nations Framework Convention on Climate Change itself, on which the Drafting Committee had drawn. As currently drafted, draft guideline 9, paragraph 3, could be somewhat confusing, and should perhaps be amended during *toilettage* to ensure consistency.

29. Mr. TLADI said that the points raised by Mr. Nguyen, Ms. Oral and Mr. Park, with which he tended to agree, could not simply be resolved during the *toilettage* process.

30. Mr. RAJPUT (Chairperson of the Drafting Committee) said that, before turning its attention to the preambular paragraphs, the Drafting Committee had not had the occasion to consider draft guideline 9, paragraph 3, at length, and had not revisited it at a later stage. He agreed that the matter went beyond mere *toilettage*. The term "low-lying coastal areas" had been introduced deliberately in the preamble by consensus of the Drafting Committee because it was quite broad. The Special Rapporteur might therefore consider reproducing the language used in the preamble in draft guideline 9, paragraph 3. The end of the last sentence of paragraph 3 would then read: "indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small-island developing States affected by sea-level rise".

31. Mr. MURASE (Special Rapporteur) said that he supported the proposal made by Mr. Rajput.

32. The CHAIRPERSON, noting that the phrase "due to sea-level rise" was used in preambular paragraph 4 *bis*, while "affected by sea-level rise" was used in draft guideline 9, paragraph 3, asked whether the terminology should perhaps be harmonized and, if so, which expression should be used.

33. Mr. TLADI said that there was a difference in context, inasmuch as preambular paragraph 4 *bis* referred to the special situation of States themselves, while draft guideline 9, paragraph 3, concerned the impact of sea-level rise on people. He therefore saw no need to change the language in question.

Paragraph 3, as amended, was adopted.

Draft guideline 9 was adopted.

34. The CHAIRPERSON said he took it that the Commission wished to adopt the report of the Drafting Committee on the protection of the atmosphere, as a whole, as contained in document A/CN.4/L.894.

It was so decided.

[256] General Assembly resolution 61/295 of 13 September 2007, annex.

35. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare the commentaries, for inclusion in the Commission's report on its sixty-ninth session.

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

[Agenda item 1]

36. The CHAIRPERSON drew attention to the proposed programme of work for the first two weeks of the second part of the Commission's sixty-ninth session, to be held from 3 July to 4 August 2017. If he heard no objection, he would take it that the Commission wished to adopt the programme, as proposed.

It was so decided.

37. After the usual exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-ninth session closed.

The meeting rose at 10.55 a.m.

[*] Resumed from the 3365th meeting.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-NINTH SESSION

Held at Geneva from 3 July to 4 August 2017

3368th MEETING

Monday, 3 July 2017, at 3.05 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Programme, procedures and working methods of the Commission and its documentation (*concluded*)* (A/CN.4/703, Part II, sect. G)

[Agenda item 9]

1. The CHAIRPERSON, after welcoming the participants in the International Law Seminar, drew attention to the publication, in English, of the ninth edition, volumes I and II, of *The Work of the International Law Commission*.[257] At the start of every quinquennium, the Codification Division updated the publication, which was intended to provide a general introduction to the work of the Commission and to bring together the principal relevant instruments. Multilateral conventions and texts finalized by the Commission were reproduced in volume II of the publication.

Jus cogens[258] (A/CN.4/703, Part II, sect. C,[259] A/CN.4/706[260])

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

2. The CHAIRPERSON invited the Special Rapporteur on the topic "*Jus cogens*" to introduce his second report (A/CN.4/706).

3. Mr. TLADI (Special Rapporteur) said that he shared the frustration expressed by Mr. Murase during the first half of the session about the treatment he had received from the Secretariat concerning the length of his fourth report on the protection of the atmosphere (A/CN.4/705).[261] His own report, on *jus cogens*, was 47 pages long—well within the 50-page limit. Yet, like Mr. Murase, he had received an email requesting him to shorten his report and informing him of the costs associated with editing documents, as if his reports were a burden on the Secretariat. He wished to express his profound dissatisfaction and to state that he hoped never again to receive such a communication.

4. His second report on *jus cogens* consisted of three substantive sections: previous consideration of the topic, criteria for *jus cogens* and proposals. In the context of the previous consideration of the topic, three areas were worth highlighting. First, there had been general agreement on the need to change the title of the topic. Second, the Commission had been uncharacteristically united in rejecting draft conclusion 2.[262] Although he had agreed

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* Resumed from the 3366th meeting.

[257] *The Work of the International Law Commission*, 9th ed., vols. I–II (United Nations, Sales No. E.17.V.2).

[258] 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, para. 286). At its sixty-eighth session (2016), the Commission considered the first report of the Special Rapporteur (*Yearbook … 2016*, vol. II (Part Two), p. 191, para. 98, and *ibid.*, vol. II (Part One), document A/CN.4/693 (first report)).

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

[260] Reproduced in *Yearbook … 2017*, vol. II (Part One).

[261] See the 3349th meeting above, p. 10, para. 17.

[262] For draft conclusion 2 proposed by the Special Rapporteur in his first report, see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

to withdraw it, he now wondered whether that was the right decision. The text merely stated the basic principle that *jus cogens* norms were an exception to the general rule that rules of international law were *jus dispositivum*. That distinction was ubiquitous in State practice, the decisions of international courts, academic writings and the work of the Commission itself, and it was unclear why it should be controversial. He therefore intended, in a future report, to reintroduce the draft conclusion, perhaps somewhat reformulated.

5. Third, the greatest divergence of views, both in the Commission and in the Sixth Committee, concerned draft conclusion 3,[263] in particular paragraph 2, which set forth three basic characteristics of *jus cogens* norms: they protected the fundamental values of the international community; they were hierarchically superior to other norms; and they were universally applicable. He remained stunned that any member of the Commission would question those basic points—the vast majority had endorsed draft conclusion 3 and agreed to refer it to the Drafting Committee.

6. In an upcoming report, which would deal with miscellaneous issues, he would put forward a proposal on whether an illustrative list of *jus cogens* norms should be elaborated. He would particularly welcome the views of the new members of the Commission on that question.

7. His second report focused on the criteria for the identification of *jus cogens* and took article 53 of the 1969 Vienna Convention as the basis for finding such criteria. In defining *jus cogens*, article 53 stipulated that the definition was for the purposes of the Convention itself. However, it was not accurate to suggest, as had been done in the past, that it implied that the scope of the Commission's topic was limited to treaty law. Article 53 contained two cumulative criteria: the norm in question must be a norm of general international law and it must also be accepted and recognized as one from which no derogation was permitted. That two-criteria approach was captured in draft conclusion 4.

8. Having identified the two criteria to be used in the identification of *jus cogens* norms, the Special Rapporteur, in his report, proceeded to assess the content of the first criterion, which was addressed in draft conclusion 5. The concept of "general international law" as set out in article 53 referred to rules of international law that were applicable to all. Customary international law constituted the most typical example of norms of general international law, and most authorities made an explicit link between customary international law and *jus cogens*. Draft conclusion 5, paragraph 2, thus stated that customary international law was the most common basis for the formation of *jus cogens*. That meant, not that the process of such formation was the same as that for the formation of customary international law, but that customary international law could be elevated to the status of *jus cogens*. Calls had been made for the consideration of the relationship between *jus cogens* and customary international law, but in his view, draft conclusion 5, paragraph 2, served to do just that.

9. Some authors had suggested that customary international law might be the exclusive way through which a norm became peremptory. However, general principles of law, within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, clearly constituted a part of general international law. While there was a dearth of actual practice, it would be strange to construe the phrase "general international law" as excluding general principles of law. The latter therefore needed to be mentioned in the draft conclusions, but in less absolute terms than in the reference to customary international law. Accordingly, draft conclusion 5, paragraph 3, provided that general principles of law "can also serve as the basis" for *jus cogens* norms.

10. Treaties were not usually generally applicable. While treaty law was normally not accepted as the basis for *jus cogens* norms, it could be relevant for the identification of *jus cogens* norms. Moreover, it was generally acknowledged that a treaty rule could embody a rule of general international law. Draft conclusion 5, paragraph 4, therefore stated that a treaty rule "may reflect a norm of general international law capable of rising to the level of … *jus cogens*".

11. Draft conclusions 6 to 9 concerned the second criterion, namely that the norm in question "must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Draft conclusion 6 set out the general context, with paragraph 1 serving as a reminder that not all norms of general international law were *jus cogens*: they became *jus cogens* when they met the criterion of acceptance and recognition. Paragraph 2 emphasized that what was relevant for that purpose was the opinion of the community of States as a whole—the collective attitude of States, not the attitudes of States individually.

12. With the general context having been set out in draft conclusion 6, draft conclusion 7 concerned the question of whose acceptance and recognition was involved. It was clear from the records of meetings of the United Nations Conference on the Law of Treaties that the drafters of article 53 of the 1969 Vienna Convention had intended States to have a decisive role in the identification of a norm as one of *jus cogens*. The decisions of international courts and tribunals, moreover, had continued to link the identification of *jus cogens* norms to States. Thus it was the views of States, when taken together, that were relevant to the identification of such norms, and that was the idea reflected in draft conclusion 7, paragraph 3. Paragraph 2 of the draft conclusion emphasized the central role of the international community of States, while not denying the influence that other entities might have in the identification of rules of law.

13. For a norm to qualify as *jus cogens*, it had to be accepted and recognized as having a particular quality, namely, that no derogation from it was permissible. However, the most important aspect was not the mere fact that derogation from the norm was impermissible, but rather that the impermissibility of such derogation was accepted and recognized. That aspect had been referred to in the literature as *opinio juris cogentis*. The particular nature of acceptance and recognition for the purposes of *jus cogens*

[263] For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *ibid*.

was expressed in draft conclusion 8, paragraph 1. However, evidence of such acceptance and recognition had also to be provided, a fact that was the subject of paragraph 2.

14. The nature of the materials that could be offered as evidence was covered in draft conclusion 9. In his report, the Special Rapporteur concluded that a norm is acceptance and recognition as one from which there could be no derogation, which could be discerned from a wide variety of materials. Those materials were similar to those that could be used as evidence of acceptance as law. The idea that the relevant materials could take a variety of forms was reflected in draft conclusion 9, paragraph 1, and a list of materials, inspired by materials that could serve as evidence of acceptance as law, was contained in paragraph 2.

15. Judgments and decisions of international courts could serve as secondary evidence of acceptance and recognition of a norm as not being susceptible to derogation, and that was reflected in draft conclusion 9, paragraph 3. The work of the Commission itself—which contained the most authoritative list of norms that constituted *jus cogens*—as well as scholarly writings and the work of expert bodies could provide context for assessing the weight of primary materials. The role of the secondary materials was reflected in draft conclusion 9, paragraph 4.

16. In paragraph 90 of the report, it was proposed that the name of the topic be changed to "Peremptory norms of international law", a proposal on which there had virtually been consensus at the previous session. One of the important reasons advanced had been the need for consistency with article 53 of the 1969 Vienna Convention, but for that purpose, the word "general" should be included. The title would thus be "Peremptory norms of general international law (*jus cogens*)".

17. Although it had been suggested at the previous session that the draft conclusions went too far—or, alternatively, not far enough—the truth was that they reflected practice, the decisions of international courts and tribunals and the weight of doctrine. He hoped that members of the Commission would allow themselves to be led forward in that direction.

The meeting rose at 3.45 p.m.

3369th MEETING

Tuesday, 4 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (*continued*) (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

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 *jus cogens* (A/CN.4/706).

2. Mr. MURASE said that he wished to thank the Special Rapporteur for his well-researched report on a difficult, theoretical topic. Some of the assumptions made and conclusions drawn in the report were, however, problematic. The Special Rapporteur highlighted three descriptive and characteristic elements of *jus cogens* norms that were seemingly excluded from the normative criteria for identifying such norms, namely, that they protected "fundamental values", were "hierarchically superior" and were of "universal application". The three characteristics were not properly defined and were used almost interchangeably, which rendered the Special Rapporteur's arguments circular. Moreover, the Special Rapporteur did not give any concrete examples related to the formation and identification of *jus cogens*, and it was difficult to understand the arguments that he put forward on an extremely abstract level.

3. Although no one had openly objected to *jus cogens*, there appeared to be widespread scepticism towards it. In the report, the Special Rapporteur essentially stated that *jus cogens* norms: (*a*) reflected and protected fundamental values for the international community as a whole; (*b*) were hierarchically superior norms of general international law from which no derogation was permitted; and (*c*) were accepted and recognized as *jus cogens* norms by the international community of States as a whole. The Special Rapporteur stressed that the International Court of Justice and other courts and tribunals, including domestic courts, referred to those three concepts. Unfortunately, however, such courts and tribunals, in referring to *jus cogens* norms, did not elaborate on the meaning of "general international law", "hierarchical superiority", "fundamental values", "acceptance and recognition" or "international community (of States) as a whole". The courts did not have to explain their judgments, and the implicit message in the report was that the judgments should be accepted unquestioningly. However, until the substantive contents of relevant notions were laid bare, the Commission would be unable to free itself from the circular arguments advanced in the report.

4. He had doubts about introducing the concept of "fundamental values" in international law, given that it was extralegal and fell outside the Commission's mandate to codify and progressively develop international law. The domestic law of a nation was grounded in a particular basic value that it had chosen and that constituted the essence of its basic constitutional norm. International law, by contrast, was based on a multitude of value systems. Each State had its own system, and, in principle, there were no uniform values in the international community of sovereign States.

5. Nevertheless, there had to be certain fundamental public policy values in order to prove the existence of *jus cogens*, which was a difficult task for a positivist international lawyer. He wondered whether that was the reason why the Special Rapporteur had not included fundamental values among his normative criteria for identifying *jus cogens*, and had instead referred to them merely as "descriptive" elements, despite also noting that the idea that *jus cogens* norms reflected and protected fundamental values of the international community was a "predominant theory". In his own view, fundamental values were key to the identification of *jus cogens* norms and should not be considered as simply descriptive.

6. In the Commission's commentaries to the draft articles on the responsibility of States for internationally wrongful acts,[264] mention had been made of the "vital interests of the international community"[265] and of the "fundamental character"[266] of peremptory norms, whereas the expression "fundamental values" had been avoided. It might be appropriate to insert the language from those commentaries in draft conclusion 4 as normative criteria for identifying *jus cogens*.

7. The question arose as to what was meant by the term "general international law", as the report provided no definition. In draft conclusion 5, paragraph 1, it was stated that such law had "a general scope of application", but the same was true of customary international law. Indeed, many experts viewed the expressions "general international law" and "customary international law" as synonymous. It was important for the Special Rapporteur to prove that norms of general international law were hierarchically superior to other norms of international law, yet he failed to do so in the report. In paragraph 51, he referred to the conclusions of the work of the Study Group on fragmentation of international law, but the Study Group had not taken a position on the definition of "general international law";[267] in fact, it had asserted that there was "no accepted definition".[268]

8. In paragraph 43 of his second report, the Special Rapporteur stated that "[t]he most obvious manifestation of general international law is customary international law". He personally did not believe, however, that the Special Rapporteur's intention was to equate the two. The Special Rapporteur further stated that treaty law, as *lex specialis*, was not itself general international law. If general international law was not either customary international law or treaty law, did that mean that it was a third source of international law? Was it a part of positive international law, or more akin to natural law? Natural law was, by definition, a higher law, but was it possible to contemplate a higher law within the realm of positive international law?

9. Paragraph 18 of the report indicated that the Special Rapporteur did "not intend to resolve the natural law versus positive law debate or adopt one approach over the other". In his own opinion, however, the Commission could not even begin to discuss the topic until the Special Rapporteur had decided which approach to take. If the Special Rapporteur was a proponent of the positivist school, he should find ways to place the concept of a "higher law" within the confines of positive international law.

10. Though interesting, the two-step process for the emergence of *jus cogens* norms proposed by the Special Rapporteur was somewhat artificial. It was not clear from the report whether what the Special Rapporteur had in mind was a sociological process involving the formation of a *jus cogens* norm, or simply a process of legal reasoning. If it was the former, an empirical study was needed to demonstrate the process, which seemed to involve double counting the materials used to identify customary international law. If it was the latter, the Special Rapporteur should explain why, as a logical consequence, a particular rule had to be elevated from a normal customary rule to a *jus cogens* rule. After all, it had never been proved that there was a hierarchy in positive international law, nor had it been demonstrated that international law had the same pyramidal structure as domestic law. The theory of the hierarchy of laws formulated by Hans Kelsen did not apply to international law, as it was based on the equality of sovereign States.

11. With that in mind, it was difficult to accept the Special Rapporteur's reference to the "general principles of law" mentioned in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, principles that he considered to be a "source of international law". Unless the Commission adopted a natural-law approach to the topic, those principles should be regarded as stemming from domestic law.

12. His own interpretation of Article 38, paragraph 1, was that the general principles of law referred to in subparagraph (*c*) could not be a source of international law, unlike treaties and customary international law, which were mentioned in subparagraphs (*a*) and (*b*). Subparagraph (*c*) had to be interpreted meaningfully, in accordance with the principle of effectiveness, so that it did not overlap with subparagraphs (*a*) and (*b*). Consequently, the general principles of law had to be regarded as stemming from domestic law, and as commonly applicable among the parties. In that scenario, the elevation of a given domestic-law principle to *jus cogens* would require a three-step process: the first step would be from domestic law to a general principle of law; the second would be from a general principle to customary international law; and the third would be from normal customary law to *jus cogens*. That was, however, too artificial an argument.

13. Although the Special Rapporteur had mentioned that the drafters of what had become article 53 of the 1969 Vienna Convention had considered general principles of law to be part of general international law, the fact was that the reference to general principles of law had ultimately been dropped, because of the lack of a common understanding of them and the possibility of confusion. He believed that the Commission should refrain from

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[264] The draft articles adopted by the Commission 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.

[265] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 56 (para. (7) of the commentary to draft article 12).

[266] *Ibid.*, p. 111 (para. (4) of the commentary to Part Two, chapter III, of the commentary to the draft articles).

[267] See *Yearbook … 2006*, vol. II (Part Two), pp. 177–184, para. 251.

[268] *Ibid*., p. 179, footnote 976.

addressing general principles of law in its consideration of *jus cogens*. In any event, draft conclusion 5 required a great deal of substantiation and justification.

14. He also had misgivings about the expression "accepted and recognized by the international community of States as a whole". The Special Rapporteur referred to the "opinion" of the international community in draft conclusion 6, paragraph 2, and to the "attitude" of States in draft conclusion 7, paragraph 1, but opinions could change and attitudes were always ambiguous.

15. It seemed that, in the Special Rapporteur's view, acceptance and recognition demanded a far lower level of commitment from States than consent, yet *jus cogens* obligations imposed a heavy burden on States that should logically require a much stronger manifestation of agreement than "normal" treaties or customary norms. Draft conclusion 7, however, provided that "[a]cceptance and recognition by a large majority of States is sufficient" and that "[a]cceptance and recognition by all States is not required". He personally would favour a more balanced formula requiring the consent of virtually all States in order for a *jus cogens* norm to be identified as such.

16. In draft conclusion 9, paragraph 2, the Special Rapporteur enumerated materials that might provide evidence of *jus cogens*. Those materials were, however, the same as the ones used to identify a normal customary rule. If the Commission wished to prove that such a rule had been elevated to the status of *jus cogens*, it would have to use qualitatively different materials in order to avoid double counting.

17. He had no problem with changing the name of the topic to "Peremptory norms", followed by "*jus cogens*" in parentheses, but he did have some reservations about the reference to "international law". In his first report,[269] the Special Rapporteur had focused entirely on *jus cogens* in the context of the law of treaties, which was why he himself had stated that the topic should have been named "*Jus cogens* in the law of treaties". However, if the Special Rapporteur intended to deal with the topic from the perspective of State responsibility too, he personally would be in favour of a title that included the words "in international law" or "in general international law", after the meaning of "general international law" had been clarified.

18. The Special Rapporteur stated in his second report that the issue of State responsibility would be dealt with in the context of the effects or consequences of *jus cogens*. He himself believed that the law of State responsibility should be considered not only in the context of effects and consequences but also from the perspective of the criteria for, and definition and content of, *jus cogens*. For example, unlike the law of treaties, the law of State responsibility did not necessarily require hierarchical superiority in order for a norm to qualify as *jus cogens*. Moreover, the effect of violating a *jus cogens* norm under the law of treaties was simply to render any agreement among the parties responsible null and void. Under the law of State responsibility, meanwhile, the effect was more far-reaching and included reparations and countermeasures. The Special Rapporteur and the Commission would thus need to elaborate an integrated concept of *jus cogens* that covered both branches of international law.

19. He supported the referral of the draft conclusions to the Drafting Committee, which he hoped would give full consideration to the views expressed in the plenary.

20. Mr. RAJPUT said that *jus cogens* was a rule of international law that was emotive as well as practically important. From one perspective, it was the way to uphold fundamental values of the international community, even if some States or other actors wanted to act differently. From another perspective, though, any rule of law that was declared to be *jus cogens* trumped State consent. However much some academics decried the consensual nature of international law, it was a characteristic that could not be undermined and that continued to define contemporary international relations. The consensual nature of international law not only ensured compliance with, and the acceptability of, legal norms but also protected smaller and weaker States by giving them an equal role in determining and shaping the legal principles that regulated the international legal order. If the approach adopted in declaring a norm to be *jus cogens* was excessively flexible, with insufficient support in State practice, it would inevitably allow recalcitrant States to deny the existence of international obligations, particularly treaty obligations, with regard to which the consent of the States concerned was clear and direct. At the same time, an overly rigid approach might make the identification of *jus cogens* norms impossible. Any work on *jus cogens* therefore had to strike the right balance between flexibility of identification and the consensual nature of international law. He wished to congratulate the Special Rapporteur for achieving that objective in his well-researched second report.

21. The origins of the doctrine of *jus cogens* were attributed to natural-law traditions, but the doctrine was well accepted and recognized in doctrinal international law and was, accordingly, applied in practice. The practice of the International Court of Justice and other international courts and tribunals had confirmed the presence, content and application of *jus cogens* in international law. Despite the distinction between the natural-law origin of *jus cogens* and doctrinal practice, he agreed with the Special Rapporteur's decision not to engage in the debate concerning natural law and doctrinal law. The concept of *jus cogens* should be dealt with as it was, in particular as reflected in literature and in State and judicial practice.

22. While he did not wish to reopen past debates, he believed that there was an inescapable link between draft conclusion 3,[270] which had been proposed in the first report, and the outcome of the second report, particularly draft conclusions 4 to 8. The Special Rapporteur had made it clear in paragraph 3 of his second report that the report's purpose was "to consider the criteria for *jus cogens*", while draft conclusion 3 was entitled "General nature of *jus cogens* norms". The Special Rapporteur

[269] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693 (first report).

[270] For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *ibid*., para. 74.

appeared to want draft conclusion 3 to reflect the general nature of *jus cogens* norms, and draft conclusions 4 to 8 to reflect the criteria for identifying such norms. Although the theoretical distinction between the two concepts was comprehensible, its practical use was unclear. A provision on the general nature of *jus cogens* might simply serve to create confusion. If the criteria for identification were established in draft conclusions 4 to 8, and the consequences of treaties or actions contrary to *jus cogens* norms were to be presented in the third report, was a draft conclusion 3 on the general nature of *jus cogens* norms needed? In practical terms, when an adjudicating or other body dealing with a *jus cogens* norm had to make a decision regarding its existence, should it look at the nature, the criteria, or both? The content of draft conclusion 3, paragraph 1, was not textually very different from that of draft conclusion 4 (*a*), though draft conclusion 3, paragraph 2, did contain an important reference to the normative superiority of *jus cogens* norms. That reference could be inserted in the preamble, if the Special Rapporteur chose to have one, but if the Commission wanted it to be reflected in the text, it could be included in the third report.

23. While it was to be understood that draft conclusion 4 set out the elements for identifying *jus cogens* norms and draft conclusions 5 to 8 elaborated on each of those elements in turn, the link between the content of draft conclusion 4 and the descriptions provided in draft conclusions 5 to 8 should be made explicit. For example, draft conclusion 4 (*a*) could be redrafted to read: "It must be a norm of general international law, as elaborated in draft conclusion 5." Similar changes could be introduced for the other draft conclusions.

24. He agreed with the Special Rapporteur regarding the content of draft conclusion 4, which very successfully captured the philosophy of article 53 of the 1969 Vienna Convention and the Commission's work on State responsibility for internationally wrongful acts. He did have one technical drafting proposal aimed at reducing verbosity, namely that, in the *chapeau*, the words "To identify a norm as one of *jus cogens*" should be replaced with "To identify a *jus cogens* norm". He endorsed the description of criteria for *jus cogens* contained in paragraphs 31 to 39 of the report, and in particular the fact that the first two elements of article 53 of the 1969 Vienna Convention—namely that the relevant norm should be a norm of general international law and that it should be accepted and recognized as one from which no derogation was permitted—were appropriate criteria for identifying *jus cogens* norms.

25. Although he agreed that customary international law and general principles of law could constitute the basis of a *jus cogens* norm, he did not agree that a treaty rule could not do so or could do so only in a subsidiary manner. In draft conclusion 5, the Special Rapporteur appeared to establish a hierarchy of sources of *jus cogens* in descending order from customary international law to general principles of law and then to treaty rules, while also placing a differing emphasis on each. Such a hierarchy was not necessary, as in order for a norm to be declared as *jus cogens*, it must exist in and be developed to a sufficiently advanced degree in each of the three sources.

26. In stating his reasons for such a hierarchy in paragraphs 40 to 59 of his report, the Special Rapporteur had indicated that, in the conclusions of the work of the Study Group on fragmentation of international law, which had been adopted by the Commission in 2006, the Study Group had observed that there was no accepted definition of the term "general international law". However, the Special Rapporteur then went on to rely upon the discussion on *lex specialis* in the 2006 report of the Study Group[271] to suggest that the jurisprudence of international courts and tribunals excluded treaty law from the purview of general international law. Since the discussion in that report was in the specific context of *lex specialis*, it would be wrong to argue that general international law excluded treaty law. Such an assertion would have serious repercussions for the understanding of general international law as such. Since there was no agreed definition of the expression "general international law", it might be appropriate to interpret it in the light of article 31, paragraph 3 (*c*), of the 1969 Vienna Convention, which used the phrase "any relevant rules of international law applicable". The spirit represented there seemed more appropriate, since it included all sources of international law.

27. The role of treaty rules in initiating the process of the creation of a *jus cogens* norm could not be relegated to a secondary or tertiary status, as was done in draft conclusion 5, because those rules represented the clearest statement of the views of States and conveyed direct consent, unlike customary international law and general principles of law, which conveyed tacit consent. In fact, certain *jus cogens* norms had originally been treaty norms, but had become *jus cogens* norms due to their general acceptability and embodiment in other sources, such as customary international law and general principles of law. That had been the case, for example, with the rule outlawing the use of force, which had been enunciated in two treaties before finally being embodied in the Charter of the United Nations. In that development, treaty law had played the largest role. The prohibition of piracy had also started as a treaty rule and remained one, even after its recognition as a *jus cogens* norm, having been embodied in a succession of treaties from 1443 to 1958, and having ultimately been incorporated into the United Nations Convention on the Law of the Sea in 1982.

28. He did not agree with or find appropriate the Special Rapporteur's interpretation, set out in paragraph 55 of his report, that the Commission's commentary to article 50 of the draft articles on the law of treaties[272] excluded the possibility of the creation of a *jus cogens* norm through treaty law. In his own view, the last two sentences of paragraph (4) of the commentary to article 50 were an affirmation that a new *jus cogens* norm replacing an existing one would emerge through a multilateral treaty. Although that affirmation related to the replacement of an old *jus cogens* norm, he saw no reason why the same test should not be applied to the creation of a new one.

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[271] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

[272] 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.* For the commentary to draft article 50, see *ibid.*, pp. 247–249.

In its work on the law of treaties, the Commission had, in fact, laid emphasis on the possibility of a *jus cogens* norm originating in treaty law.

29. Moreover, the International Court of Justice and other courts and tribunals had suggested that, in order to constitute *jus cogens*, a norm must have developed to a sufficient degree in all three sources, namely, customary international law, general principles of law and treaty rules. That methodology was expressed in paragraph 99 of the Court's judgment in *Questions relating to the Obligation to Prosecute or Extradite*, in which it considered that the prohibition of torture was part of customary international law and had become a peremptory norm (*jus cogens*). Four elements emerged from the Court's description of the basis for that prohibition that could be viewed as criteria for the formation of *jus cogens*. They were: "widespread international practice and … *opinio juris*"; "numerous international instruments of universal application"; "introduced into the domestic law of almost all States"; and "regularly denounced within national and international fora". While the fourth element could be one of the forms of evidence mentioned in draft conclusion 9, custom, treaty and general principles were all equally important for draft conclusion 5. The requirement for a *jus cogens* norm to have originated in a treaty rule was also illustrated by the finding of the International Tribunal for the Former Yugoslavia in its judgment in the *Prosecutor v. Anto Furundžija* case, in which it concluded: "It should be noted that the prohibition of torture laid down in human right treaties enshrines an absolute right, which can never be derogated from" (para. 144).

30. The findings by the Court and the Tribunal had not been intended to lay down the criteria for the identification of *jus cogens* norms; however, since that was precisely the Commission's task, it might be appropriate for it to examine those findings, since they used language that closely resembled the kind that might help the Commission to meet its objectives. On the assumption that a norm must be present in all three sources—namely treaty law, customary international law and general principles of law—in order for it to constitute a norm of general international law, draft conclusion 5 should confer the same stature on all three sources.

31. He agreed with the Special Rapporteur that merely establishing that a norm was a norm of general international law was insufficient for it to constitute evidence of *jus cogens*. The norm also had to satisfy the requirements of acceptance and recognition, since, otherwise, the distinction between *jus dispositivum* and *jus cogens* was meaningless. Of the draft conclusions that related to acceptance and recognition, draft conclusion 6 did not seem to achieve much, other than to reiterate that there had to be acceptance and recognition by the international community as a whole. The statement in draft conclusion 6, paragraph 2, that the requirement of recognition required "an assessment of the opinion of the international community of States as a whole" was, in his view, problematic and gave rise to a number of questions: What constituted an opinion? How was it to be assessed? Was it related to evidence contained in draft conclusion 9? Or did it require something more or something less? Furthermore, given that draft conclusion 8 addressed acceptance and recognition, draft conclusion 6 was perhaps unnecessary and could be deleted. Draft conclusion 8 could then be moved up to take the place of draft conclusion 7. In order to make draft conclusion 8 more comprehensive, the words "by States" in paragraph 2 should be replaced with the phrase "and recognized by the international community of States as a whole".

32. Although he agreed that there was a need for draft conclusion 7, its contents needed to be reconsidered, as paragraph 3 indicated that acceptance and recognition by all States was not required, even though, in identifying the criteria for *jus cogens*, draft conclusion 4 (*b*) referred to acceptance and recognition by "the international community of States as a whole". Moreover, the title of draft conclusion 7 contained the word "whole", but the need for consent was subsequently limited in paragraph 3 of that draft conclusion to a "large majority of States". To his mind, the word "whole" meant the entire international community, not just a large majority of States. If acceptance and recognition were required from only a "large majority of States", then *jus cogens* norms would be no different than customary international law, evidence of which also required a large majority. It could not be that the only distinction between *jus cogens* and customary international law was the absence of the persistent objector. Furthermore, a declaration by the Commission that a large majority was sufficient might create excessive flexibility, making it easy both to declare a norm as *jus cogens* and for States to wriggle out of binding legal commitments. The agreement of the entire international community was needed; a potential *jus cogens* norm could not achieve acceptance and recognition unless it was completely universal and no derogation from it was permissible. That requirement might slow down the process of the creation of *jus cogens* norms, but it did not make the goal unachievable, as was illustrated by the evolution of the prohibitions of slavery, torture and the use of force into *jus cogens* norms.

33. He agreed with the overall framework of draft conclusion 9, noting that the only area requiring elaboration was paragraph 2, where there was a reference to "resolutions adopted by international organizations". Perhaps it could be clarified that those resolutions were to be adopted by the member States of the organizations concerned. The word "unanimous" should also be added.

34. It might be unwise for the Commission to provide an illustrative list of *jus cogens* norms, since doing so would be tedious and time-consuming. Indeed, each item on the tentative list would have to be discussed at great length, pass the tests that the Commission would devise as part of the outcome of its work on the topic and require a separate report, which would make such a task unmanageable. The Commission had decided against including any examples of rules of *jus cogens* in article 53 of the 1969 Vienna Convention for several reasons, including the consequences of such an enumeration and the time it would take to provide the list. Those reasons remained valid in relation to the present topic. Rather, the Commission should agree on the methodology for identifying *jus cogens*, and once it had the formula right, the authority competent to determine whether a norm constituted *jus cogens* would simply apply the formula in order to determine whether the norm in question had achieved that status.

35. He supported the Special Rapporteur's proposal in paragraph 5 of his report to change the title of the topic to "Peremptory norms of general international law (*jus cogens*)" and agreed with him that the new title was consistent with the Commission's work on the law of treaties.

36. He did not fully understand the purpose of the last sentence of paragraph 15 of the report, relating to disputed State practice, and hoped that the Commission did not want to rely on State practice that was under dispute or discredited in some other manner. Lastly, he was in favour of referring all the draft conclusions to the Drafting Committee.

37. Mr. PARK said that he agreed with the Special Rapporteur's basic approach of taking article 53 of the 1969 Vienna Convention as the starting point for the identification of the criteria used to determine whether a norm had reached the status of *jus cogens*. Although he had no objection to the Special Rapporteur's proposal to change the name of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)" or to "Peremptory norms of general international law (*jus cogens*)", which the Special Rapporteur seemed to prefer, it was not always clear what was meant by the term "general international law". For that reason, it might be useful to revisit the scope of applicability of "general international law" when the Commission discussed the existence of regional *jus cogens*.

38. At its sixty-eighth session, the Commission had not finalized its discussion of draft conclusion 3, paragraph 2, which stated, *inter alia*, that norms of *jus cogens* protected the fundamental values of the international community and were hierarchically superior to other norms of international law. Although he agreed in part with the Special Rapporteur's view, expressed in paragraph 30 of his second report, that *jus cogens* reflected the "fundamental values of the international community", it was unclear whether, in the practice of States and courts, that was a consistently accepted view. Moreover, the meaning of the term "fundamental values" needed to be clarified, since there was a high risk that States might interpret it differently. It was also worth considering whether it was really necessary to refer to "fundamental values" in order to describe the general nature of *jus cogens* norms. Most importantly, article 53 of the 1969 Vienna Convention did not mention the term "fundamental values" but defined *jus cogens*, or a peremptory norm of general international law, as a norm accepted and recognized by the international community as a whole as a norm from which no derogation was permitted.

39. In his opinion, State practice in that regard was still not entirely consistent, despite the Special Rapporteur's reference in paragraph 20 of his report to "countless separate and dissenting opinions and scholarly writings in support of the idea that *jus cogens* norms protect the fundamental values of the international community". Such opinions and writings did demonstrate that the idea had broad support, but they did not imply that it was consistently accepted without question by the main domestic and international tribunals. As he had indicated in his statement on the topic at the Commission's sixty-eighth session, the international legal order had not been formed out of a single State's domestic legal system but rather was based on diverse cultural, religious, political and economic regimes.[273] It might therefore be too hasty to conclude that international and domestic practice shared the same basic ideas. It would be more objective to refer to such practice as moving towards full acceptance of the notion that *jus cogens* norms reflected fundamental values of the international community, but without clear consensus as yet; as a result, the Special Rapporteur should perhaps use less absolute terms.

40. Even though the Study Group on fragmentation of international law established by the Commission, as noted in paragraph 23 of the second report of the Special Rapporteur, had already concluded that *jus cogens* norms were hierarchically superior to other rules, international courts and tribunals had not always upheld the hierarchical superiority of *jus cogens* norms over all other norms. For example, with regard to how the hierarchical superiority of *jus cogens* affected certain procedural aspects, the International Court of Justice, in its judgment in the case concerning *Jurisdictional Immunities of the State*, had concluded that the rules of State immunity were procedural in character and were confined to determining whether or not the courts of one State might exercise jurisdiction in respect of another State (para. 93). As noted by Judge Cançado Trindade in his dissenting opinion, the separation between the procedural and substantive aspect of law was problematic. The Special Rapporteur should thus further examine that controversial issue in order to establish clearly the hierarchical superiority of *jus cogens*.

41. Another example of international case law that did not support the conclusion that the hierarchical superiority of *jus cogens* norms was beyond question was the judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, in which the International Court of Justice had found that the fact that a norm at issue in a dispute had the character of a peremptory norm of general international law (*jus cogens*) could not, of itself, provide a basis for the jurisdiction of a court to entertain that dispute (para. 64). Moreover, in the case of *Al-Adsani v. the United Kingdom*, the European Court of Human Rights had been unable to discern a firm basis for concluding, as a matter of international law, that a State no longer enjoyed immunity from civil suit in the courts of another State where acts of torture were alleged, despite its finding that the prohibition of torture had achieved the status of *jus cogens*. Those examples highlighted the need for the Special Rapporteur to examine the jurisdictional issues relating to *jus cogens* in order to ensure the effectiveness of the draft conclusion in providing guidance to States.

42. With regard to the general structure of the draft conclusions proposed by the Special Rapporteur, the criteria for establishing *jus cogens* were set out in six different draft conclusions numbered from 4 to 9, with draft conclusion 4 establishing the legal basis and the others serving to complement it. Despite its logical nature, such a methodology was complicated and redundant. Rather than setting out the main and secondary criteria in six distinct draft conclusions, it might make more sense to combine the secondary criteria contained in draft conclusions 5

[273] See *Yearbook … 2016*, vol. I, 3316th meeting, p. 227, para. 59.

to 9 with the main criteria set out in draft conclusion 4. Another option would be to leave draft conclusion 5 as it currently stood and merge the secondary criteria set out in draft conclusions 6, 7, 8 and 9. That would simplify the definition of *jus cogens* and the criteria to be used for identifying it, while avoiding repetition and overlap. A further simplification might be to reference some of the secondary criteria in the footnotes or commentary.

43. In addition, although draft conclusions 6, 8 and 9 addressed important aspects of acceptance and recognition as a criterion for the identification of *jus cogens*, their contents, as well as that of draft conclusion 7, seemed to overlap in many respects. It might therefore be appropriate to combine all four draft conclusions into a comprehensive provision that would explain the nature of the acceptance and recognition criterion as well as the actors involved and the evidence required for such acceptance and recognition, and that would also clarify how it was to be distinguished from other forms of acceptance and recognition. Another option would be to combine draft conclusions 6 and 8 in one provision, with draft conclusion 8, paragraphs 1 and 2, for example becoming draft conclusion 6, paragraphs 3 and 4, and to place draft conclusion 9 in a footnote or the commentary in order to specify what materials had to be presented as evidence, since it was questionable whether a separate provision on the subject was required.

44. Commenting specifically on draft conclusion 4, he said that, while he agreed with the two criteria set forth therein, the "two-step process" referred to in paragraph 40 of the second report called for further discussion, if the Special Rapporteur held that the elevation of a norm of general international law to the status of *jus cogens* resulted from practice. Although in theory the sequence was that described in paragraph 61, in reality it was difficult to say that the formation of a norm of general international law always preceded its elevation to *jus cogens* status because, in some cases, the two steps were either conflated or not clearly distinguishable.

45. A historical study might be necessary, but there was already no doubt that many international crimes which were currently accepted and recognized as violations of *jus cogens*, such as genocide, crimes against humanity and aggression, had not been identified until after the Second World War. The first definition of genocide had been provided in article II of the 1948 Convention on the Prevention and the Punishment of the Crime of Genocide, while article 6 (*a*) and (*c*) of the Charter of the International Military Tribunal[274] defined crimes against peace and crimes against humanity. In paragraphs 33 and 34 of its judgment of 5 February 1970 in the *Barcelona Traction* case, the International Court of Justice had found that the outlawing of acts of aggression and genocide gave rise to obligations *erga omnes*, and some scholars, such as Jochen Frowein, considered that such obligations "by their nature must also form part of *ius cogens*".[275] If that position was accepted, it was likely that the formation of customary international law and the elevation of a norm to *jus cogens* had happened simultaneously. Hence Alexander Orakhelashvili might have been right in suggesting that "the norm of general international law" requirement could be proven after the determination that the norm in question was a norm of *jus cogens*.[276]

46. However, the wording of draft conclusion 4 (*a*) and (*b*) could be retained, as it set forth the criteria for the identification of *jus cogens* rather than for the formation thereof. The commentary could simply explain that, in certain cases, the formation of *jus cogens* might not follow the sequence presented in that draft conclusion. Alternatively, a phrase could be added to the draft conclusion itself, so that the first sentence read, for example: "To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria, but not necessarily formed in such order."

47. The Special Rapporteur had indicated in his second report that non-derogation was a consequence and not a criterion of *jus cogens*, whereas other learned writers contended that non-derogability was a primary criterion. While the Special Rapporteur's approach might well be valid, it was too abstract to be accepted unanimously by lay lawyers and the international community of States, for which the final outcome was intended to serve as guidance.

48. He generally agreed with the wording of draft conclusion 5. However, paragraph 3 thereof required further discussion, primarily because it was difficult to find a case where a general principle of law had served as the basis for *jus cogens*; actual State practice could not be ignored for theoretical purposes. It was indeed questionable whether there was any State practice that supported the status of general principles of law as the basis of *jus cogens*, and it would therefore be helpful if the Special Rapporteur were to provide some concrete examples to substantiate his view. If he was unable to do so, the Commission should examine reasonable candidates for elevation to *jus cogens*.

49. One theoretical question that arose in that context was whether the fact that general principles of law recognized by civilized nations could be deemed to serve as the basis of *jus cogens* implied that municipal principles of law could also be used as its basis. It was plain from Article 38, paragraph 1, of the Statute of the International Court of Justice that there was a hierarchy of sources of international law and that subparagraphs (*a*) and (*b*) thereof should be distinguished from subparagraph (*c*), which had been included in order to avoid deadlock in the Court. That situation therefore gave rise to a theoretical issue, namely what the status of a *jus cogens* norm based on a general principle of law would be compared with one based on customary international law or treaty law, and whether there were any grounds for claiming that they were or ought to be equally peremptory.

50. Draft conclusion 6 seemed to be redundant because most of its contents were dealt with in draft conclusions 4, 7, 8 and 9. It should therefore be deleted. If there was a particular element in that draft conclusion which deserved emphasis, it could be added to draft conclusion 7, 8 or 9.

[274] For the Charter of the International Military Tribunal, see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

[275] J. A. Frowein, "*Ius cogens*", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. VI (2012), at p. 444.

[276] See A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, 2006, p. 119.

51. With regard to draft conclusion 7, the term "as a whole" merited examination. The Special Rapporteur suggested that the phrase "as a whole" signified "collective" acceptance and recognition and, in his report, he noted that the material for identifying a *jus cogens* norm was almost identical to that for identifying customary international law. However, collective acceptance by the international community as a whole was not a requirement for the formation and identification of customary international law and, as noted in draft conclusion 8, the requirement for acceptance and recognition as a criterion for *jus cogens* was distinct from acceptance as law for the purposes of identification of customary international law. In addition, paragraphs 1 and 2 of draft conclusion 7 could be combined to explain which subject had to accept and recognize a norm in order for it be *jus cogens*, and the first sentence of paragraph 2 could be deleted, since its final sentence was sufficient to explain the relevance of the attitudes of other actors.

52. As far as draft conclusion 8 was concerned, while the distinction drawn between mere law and *jus cogens* was important, the phrase "cannot be derogated from" should be modified, in order to stress further the normative nature of *jus cogens*. Moreover, it was the international community of States as a whole and not just individual States which had to accept the norm in question for it to become *jus cogens*. It would therefore be more pertinent to state, "… the norm in question is accepted by the international community of States as a whole as one which ought not to be derogated from". Furthermore, the issue of acquiescence should be discussed in that draft conclusion or elsewhere. The Special Rapporteur should comment on whether acquiescence, as a form of acceptance and recognition, might be a valid method of forming *jus cogens*.

53. The format of draft conclusion 9 could be improved. Although the idea expressed in paragraph 1 was correct, it seemed strange to leave it on its own. He also wondered whether the wording of paragraph 4 implied that the materials referred to in paragraphs 2 and 3 were the primary means of identifying *jus cogens* and whether there was any qualitative difference between the materials mentioned in paragraphs 2, 3 and 4. Paragraph 4 should also reflect the idea that the decisions of international courts and tribunals were subsidiary evidence of acceptance and recognition, along the lines of draft conclusion 13 on the identification of customary international law, which stated that such decisions were subsidiary means of determining rules of customary international law.[277]

54. While he generally agreed with the Special Rapporteur's approach to future work on the topic and the aspects he intended to address in 2018, he still considered that the Commission could provide a minimum list of *jus cogens* norms, or of candidates for elevation to that status, possibly in an annex to the draft conclusions, as such a list would be a helpful guide to future work on the topic.

55. He hoped that the Drafting Committee would make the six draft conclusions more concise by merging or deleting some of them.

56. Mr. NGUYEN said that peremptory norms played an important role in international law, having been presented in treaties and State practice, quoted in international case law and formulated in domestic law, even though the exact definition and constituent elements of *jus cogens* still required some clarification. Since the adoption of the Vienna Convention on the Law of Treaties in 1969, debates had mainly focused on the nature, substance and hierarchy of the norms of international law and the criteria for recognizing a *jus cogens* norm. The Commission's work in codifying and progressively developing the topic would therefore help to define the place of *jus cogens* within the international legal order.

57. Commenting generally on the topic, he said that article 53 of the 1969 Vienna Convention regulated the relationship between treaty norms and *jus cogens* norms. However, *jus cogens* went beyond treaty law because it was hierarchically superior, universal and non-derogable. It was applied to resolve conflicts not only with treaty norms but with the resolutions of international organizations and it extended to the law on the international responsibility of States, for instance in prohibiting the use of or the threat of the use of force in inter-State relations. The three core descriptive elements of *jus cogens* helped to distinguish it from other norms of international law. *Jus cogens* existed independently of State will in order to preserve the world's legal order. Its precedence over other norms of international law had been settled by natural law and voluntarily accepted and recognized by States. While it was only exceptionally modifiable or substitutable, it was not immutable and could evolve. Nevertheless, article 53 made it clear that any modification of a *jus cogens* norm had to be universally accepted and recognized by the international community of States as a whole, in other words by sovereign States placed on an equal footing. A non-State actor had no right to modify a *jus cogens* norm. States' acceptance and recognition of a *jus cogens* norm would depend on their own practice and attitude and on time factors. States universally recognized a pre-existing *jus cogens* norm on perceiving its existence. The criterion of universal acknowledgement was therefore akin to the *opinio juris* element of customary international law. A *jus cogens* norm arose through the elevation to that status of an ordinary norm of customary international law or a general principle of international law. He agreed with the Special Rapporteur that, while a treaty rule could not constitute a *jus cogens* norm, treaty provisions might reflect peremptory norms of customary international law that could be elevated to *jus cogens* status.

58. The question arose of whether the Charter of the United Nations could be considered a product of the creation of *jus cogens* norms by the international community. Any treaty norm in conflict with it was null and void. Only the international community of States could change a *jus cogens* norm and it was responsible for implementing such norms and preventing any treaty norms from conflicting with them. While he concurred with the suggestion in paragraph 59 of the Special Rapporteur's first report that the binding and peremptory force of *jus cogens* was best understood as an interaction between natural law and positivism,[278] he encouraged the Special Rapporteur

[277] See *Yearbook … 2016*, vol. II (Part Two), p. 77 (draft conclusion 13).

[278] *Ibid.*, vol. II (Part One), document A/CN.4/693, para. 59.

to further explore the nature of *jus cogens* and the role played by natural law therein. It would also be useful to have a summary of cases related to the implementation of *jus cogens* and to know how many treaty norms had been rejected on the grounds that they were incompatible with *jus cogens* norms.

59. Since *jus cogens* extended beyond treaty law, the criteria for *jus cogens* had to be sought in article 53 of the 1969 Vienna Convention and elsewhere. In paragraph 37 of his second report, the Special Rapporteur set out a two-step approach for the identification of *jus cogens*, namely, that the relevant norm must be a norm of general international law and that the norm of general international law must be accepted and recognized as being one from which no derogation was permitted and one which could be modified only by a subsequent norm of *jus cogens*. Non-derogation was not itself a criterion for *jus cogens* status. An analysis of article 53 could, however, also point to a three-step approach, namely that *jus cogens* must be a norm of general international law, that it must be peremptory among norms of general international law from which no derogation was permitted, and that the peremptory norm must be accepted and recognized by the international community of States as a whole. The existence of a *jus cogens* norm was independent from the will of States. The criterion of non-derogation meant that no treaty-based exceptions were permissible. The implementation of peremptory norms was realized by the acceptance and recognition of the international community of States as a whole. In turn, from a position of *jus dispositivum*, such acceptance and recognition depended on States' conscience. The Special Rapporteur was right to indicate that the fact that a *jus cogens* norm could be modified only by a subsequent norm of *jus cogens* was not a criterion but merely a consequence. However, he needed to provide some convincing arguments for the choice of a two-step or three-step approach to the identification of *jus cogens* norms.

60. Another question concerned the fact that the criteria developed by the Special Rapporteur might go beyond the aim of identifying *jus cogens* to indicate how *jus cogens* norms were created or formed, because such norms were an exception to the general rule that international law was *jus dispositivum*. At the Commission's preceding meeting, the Special Rapporteur had mentioned the formation of *jus cogens* in his introductory statement. While most of the draft conclusions proposed in the second report used the term "identification" or "identify", draft conclusion 5, paragraph 2, used the term "formation".

61. The report indicated that *jus cogens* norms protected or reflected fundamental values of the international community, but did not address the definition of those values. Most delegations in the Sixth Committee used the verb "reflect", not "protect", in that context. Statements by State representatives and the case law of the International Court of Justice and national courts and tribunals tended to invoke *jus cogens* in cases relating to human rights, the prohibition of the threat or use of force, or State immunity. While some effort was made, in paragraph 71 of the first report on the topic, to describe "considerations of humanity",[279] there were no descriptions of "fundamental values" in other domains. With regard to territorial sovereignty, the exclusive rights of States within their territory were universally accepted and recognized by the community of States; he wondered whether that would thus be considered a *jus cogens* norm. Clean air, which was related to the topic covered by Mr. Murase (Protection of the atmosphere), was a fundamental value in the environmental domain, yet some States had taken a controversial stance on the Paris Agreement under the United Nations Framework Convention on Climate Change.

62. It was clear that "protect" and "reflect" had different meanings and that the Special Rapporteur was correct to state that "*jus cogens* norms reflect and protect fundamental values of the international community". The order of the verbs in that expression should be kept consistent throughout the study.

63. Even though the term *jus cogens* was concise and commonly used, he supported the proposal to change the title of the topic to "Peremptory norms of general international law (*jus cogens*)", for three reasons: the phrase was used in article 53 of the 1969 Vienna Convention and in previous outputs of the Commission; a simple, non-technical formulation was desirable in view of the need for universal acceptance by the international community of States as a whole; and the new title clearly reflected the nature and scope of *jus cogens* as a norm of general international law, its universal acceptance by the international community, its peremptory character and its superiority over other norms, while not excluding the concepts of regional or even domestic *jus cogens*.

64. With respect to draft conclusion 4, he proposed that the first sentence be shortened and simplified, either along the lines proposed by Mr. Rajput or with wording such as "*Jus cogens* norms must meet the following criteria:". The rest of the draft conclusion could then reflect either a two-step or a three-step approach. One option would be to list two criteria: a peremptory norm among norms of general international law from which no derogation was permitted; and a norm accepted and recognized by the international community of States as a whole. The other option would be to list three criteria: a norm of general international law; a peremptory norm of general international law from which no derogation was permitted; and a norm accepted and recognized by the international community of States as a whole.

65. He proposed that the title of draft conclusion 5 refer to the sources of *jus cogens* norms, as paragraphs 2, 3 and 4 listed the sources from which such norms were drawn. It should be noted that, while a general principle of international law could become a *jus cogens* norm, not all such principles had that status. In paragraph 3 of the draft conclusion, the use of the wording "within the meaning of Article 38 (1) (*c*) of the Statute of the International Court of Justice" to refer to the general principles of law accepted and recognized by civilized nations was inconsistent with the definition of *jus cogens* as norms that were universally accepted, and could open up the possibility that domestic and regional *jus cogens* norms could be imposed on the international community of States as a whole. In paragraph 1, the definition "A norm of general international law is one which has a general scope of application" was

[279] *Ibid*., para. 71.

too simple. The definition in that paragraph should reflect the outcome of the discussions under the topic "General principles of international law", which was included in the Commission's long-term programme of work.

66. In draft conclusions 6 and 7, the recognition of a norm and the question of who recognized the norm were treated as separate criteria, but his view was that "acceptance and recognition by the international community of States as a whole" was a single criterion that could not be split. Draft conclusion 7, paragraph 1, did, in fact, assert the unity of that criterion, and was thus inconsistent with the separate treatment of the two elements in draft conclusions 6 and 7. In addition, the wording of draft conclusion 6, paragraph 1, was similar to that of draft conclusion 4, and the title of draft conclusion 8 also referred to "acceptance and recognition". To address that redundancy, he proposed that draft conclusions 6, 7 and 8 should be merged. The new draft conclusion should retain the title of the current draft conclusion 6 and should state that: (1) acceptance and recognition by the international community of States as a whole was relevant in the identification of norms of *jus cogens* from which no derogation was permitted; (2) acceptance and recognition by a large majority of States was sufficient for the identification of a norm as a norm of *jus cogens*; and (3) non-State actors had no right to accept and to recognize a *jus cogens* norm, but their attitude might be relevant in providing context and assessing the attitudes of States. Regarding the second of those points, he took note of Mr. Rajput's view that the phrase "the international community of States as a whole", not "a large majority of States", should be used; perhaps the reference to "a large majority of States" could be moved to the commentary.

67. As draft conclusion 9 was very long, he proposed that its presentation be reconsidered. Moreover, given that even the modification of a *jus cogens* norm depended on acceptance and recognition by the international community of States as a whole, as noted in paragraph 37 of the second report, he proposed that a draft conclusion on that subject should be included. Since article 53 of the 1969 Vienna Convention was the point of departure for the draft conclusions, all the factors mentioned in that article should be reflected.

68. He looked forward to the Special Rapporteur's studies on the effects of *jus cogens*, the hierarchy of *jus cogens* over other norms of *jus dispositivum* and the effect of persistent objection regarding *jus cogens*, as well as the open list of *jus cogens* norms. He was in favour of referring the proposed draft conclusions to the Drafting Committee, which should reconsider their wording with a view to consolidating and shortening them.

69. Mr. MURPHY said that he agreed with many aspects of the analysis contained in the Special Rapporteur's well-researched second report. For example, he agreed that customary international law was the principal source of *jus cogens* norms and that the sequence for the identification of a *jus cogens* norm entailed first the determination that a norm had been created and then the determination that it had been accepted and recognized as a peremptory norm. Like the Special Rapporteur, he endorsed the "double acceptance" concept whereby a norm must first be accepted and recognized as a norm of international law and then be accepted and recognized as *jus cogens*. He believed that the Special Rapporteur was correct to focus on acceptance and recognition by States, rather than other actors, and had no concerns about the proposal to change the title of the topic to "Peremptory norms of general international law (*jus cogens*)" or about the future work programme outlined in the second report.

70. His views nonetheless diverged from those of the Special Rapporteur in a number of areas. Concerning draft conclusion 3, paragraph 2, which was still pending in the Drafting Committee, he noted that the statements made in the Sixth Committee during the General Assembly's seventy-first session generally neither supported nor opposed that proposal. In his view, the paragraph was confusing because it appeared to assert that elements additional to those contained in article 53 of the 1969 Vienna Convention were necessary in order for a norm to constitute *jus cogens*. Although the Special Rapporteur indicated, in paragraph 18 of the second report, that those elements were not "additional" but only "descriptive and characteristic", that distinction was not clear, as all the elements referred to in draft conclusion 3 were in some sense descriptive or characteristic. He believed that the draft conclusion, which essentially defined *jus cogens*, should refer only to the elements identified in the 1969 Vienna Convention.

71. Another difficulty with draft conclusion 3, paragraph 2, was that the arguments contained in paragraphs 20 to 22 of the second report conflated the idea that *jus cogens* "protected" fundamental values with the idea that it "reflected" those values, yet those were two very different things. The sources supporting one concept thus could not be marshalled in support of the other. Further, the notion that *jus cogens* norms were "hierarchically superior to other norms" primarily concerned the consequences of *jus cogens*, particularly their ability to prevail over other norms with which they conflicted. Thus, that issue would best be addressed in the Special Rapporteur's future report on the consequences of *jus cogens*. Lastly, if the Special Rapporteur intended to study the possibility of non-universal *jus cogens*, as indicated in paragraph 68 of the first report, then draft conclusion 3, paragraph 2, should not assert that such norms were "universally applicable".[280] In sum, while he was willing to consider the new proposal that the Special Rapporteur was to make in the Drafting Committee, he urged the Special Rapporteur to reconsider whether draft conclusion 3 was the best place in which to address the issues referred to in paragraph 2.

72. With respect to draft conclusion 4, he agreed on the two criteria specified as necessary for the identification of a norm as one of *jus cogens*, but did not agree that the third criterion set out in article 53 of the 1969 Vienna Convention, which was that the norm must be one that could be modified only by a subsequent norm of *jus cogens*, was irrelevant for identifying a norm as *jus cogens*. In his view, it was clear from article 53 and its negotiating history that the "accepted and recognized" clause referred

[280] *Ibid.*, para. 74 (draft conclusion 3).

to two things: acceptance or recognition of a norm from which no derogation was permitted, and acceptance or recognition of it as a norm which could be modified only by a subsequent norm of general international law having the same character. Unlike the Special Rapporteur, he did not think that the third criterion came into play only after the norm was identified; rather, it was one of the means of identifying the norm, and that was why it appeared in the definition of *jus cogens* contained in article 53. The third criterion qualified the nature of the second criterion: the norm must be one that could not be derogated from but could be changed through modification by another *jus cogens* norm. The third criterion should thus be included in draft conclusion 4, either as a subparagraph (*c*) or as part of subparagraph (*b*). If that was done, it might be worth considering whether draft conclusion 4 was really necessary, as it seemed to duplicate draft conclusion 3, paragraph 1. While he thus agreed with Mr. Rajput that there was an overlap between draft conclusions 3 and 4, he would prefer to retain draft conclusion 3 and delete draft conclusion 4.

73. Draft conclusion 5 addressed the issue of where norms of general international law could be found. The discussion in paragraphs 42 and 43 of the report, concerning the definition of "general international law", was somewhat obscure. That term had been used in various ways by States, courts and scholars, with the result that a single meaning was difficult to define. In his view, the most plausible interpretation was that "general international law" referred to law that was binding on all States. That might be the intended meaning of the words "general scope of application" in draft conclusion 5, paragraph 1, but it would be clearer to state directly that the relevant norms were norms that were binding on all States. He wondered why the Special Rapporteur had included a reference to universal applicability in draft conclusion 3 but not in draft conclusion 5, where it seemed to be more relevant.

74. While he agreed that customary international law was the most common basis for the formation of *jus cogens*, as stated in draft conclusion 5, paragraph 2, he was less convinced by the claim made in paragraph 43 of the report that customary international law was a manifestation of general international law, unless it referred solely to customary international law that was not regional or special in nature. Draft conclusion 5, paragraph 3, identified "[g]eneral principles of law" as another source of *jus cogens* norms, but, as noted by the Special Rapporteur in paragraph 48 of the report, there was significantly less authority for that proposition. A central problem was that most such principles were drawn by analogy from municipal law and were viewed essentially as gap fillers for the main sources of international law; they were not of a peremptory nature. The Commission must therefore be very cautious about identifying general principles of law as a basis for *jus cogens*. If it decided to do so, it should point out, both in the draft conclusion and in the associated commentary, that this proposition was much less grounded in practice.

75. He had doubts about draft conclusion 5, paragraph 4. He agreed that treaty rules, like other factors such as resolutions of international organizations or decisions of intergovernmental conferences, could influence the development of customary international law. It was unclear, however, why the indirect influence of treaties with respect to *jus cogens* should be singled out from among those factors. A more plausible proposition was that multilateral treaties that had garnered universal or near-universal adherence, such as the Charter of the United Nations or the Geneva Conventions for the Protection of War Victims, played a unique role in helping to establish general international law. The expression "[a] treaty rule" seemed far too open-ended.

76. He had no particular concerns about draft conclusion 6, which addressed the issue of acceptance and recognition. It did, however, include considerable repetition, especially in relation to draft conclusions 3, 4 and 8. Repetition was not necessarily problematic, but it could be confusing if different terms were used in very similar provisions. At a minimum, draft conclusions 6 and 8 could be combined into a single draft conclusion addressing all aspects of acceptance and recognition.

77. In view of time constraints, he would deliver the rest of his statement at the Commission's next plenary meeting.

The meeting rose at 1.05 p.m.

3370th MEETING

Wednesday, 5 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (*continued*) (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

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 *jus cogens* (A/CN.4/706).

2. Mr. MURPHY, continuing the statement he had begun at the previous meeting, expressed general support for draft conclusion 7 but said that he was not convinced that the concept of "States as a whole" referred to collective recognition of non-derogability, as opposed to individual recognition by sufficient States to constitute

recognition by "States as a whole". States always acted individually, even in deciding on collective action. In that regard, the discussion in paragraph 77 of the Special Rapporteur's second report was unclear and unhelpful. Moreover, it was inadequate to assert in draft conclusion 7, paragraph 3, that "a large majority of States" was sufficient for the identification of a norm as a norm of *jus cogens*, since the threshold should be much higher. It would be more appropriate to refer to "a very large majority", "substantially all States" or "virtually all States".

3. With regard to draft conclusion 9, he queried the lack of reference to decisions of national courts, which were extensively referenced elsewhere in the report, and expressed the view that paragraph 3, as drafted, was incorrect: decisions of international courts and tribunals were not evidence of *jus cogens* in themselves but might serve as a subsidiary means for identifying a norm as one of *jus cogens*. He suggested that the text be amended accordingly, and that consideration also be given to altering the beginning of paragraph 2 to read: "The following materials may provide evidence of the opinion of the international community of States as a whole with regard to the acceptance and recognition …". He expressed support for submitting all the draft conclusions contained in the Special Rapporteur's second report to the Drafting Committee, on the understanding that consolidation would be welcome where possible to avoid potentially confusing repetition.

4. Mr. HMOUD said that the topic of *jus cogens* presented intrinsic difficulties in relation both to the identification of rules and to the effects thereof, as had been recognized in legal writings and by the Commission. While States had come to recognize the existence of the doctrine of *jus cogens*, especially since the adoption of article 53 of the 1969 Vienna Convention, the content of peremptory norms, the criteria for identifying them, and their effects remained inconclusive. The analytical study on the fragmentation of international law, finalized by the Chairperson of the Study Group on that topic, Mr. Martti Koskenniemi, had stated:

> Instead of trying to determine the content of *jus cogens* through abstract definitions, it is better to follow the path chosen by the [Commission] in 1966 as it 'considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals'.[footnote] That seems still the right way to proceed.[281]

5. As the Commission had decided to pursue the topic and examine the identification and effects of *jus cogens*, it seemed appropriate to consider developments in State and international practice.

6. While he supported the proposition that the Commission should not deviate from the rule set down in article 53 of the 1969 Vienna Convention, he agreed with the Special Rapporteur that article 53 was the starting point, not an end in itself. Such a stance was necessary in the light of the scope of the topic, which covered the effects of *jus cogens* not only on treaty law, but also on other sources of international law. While a restrictive approach might have been prudent in 1966, subsequent recognition of the doctrine of *jus cogens* made a more expansive approach necessary. Article 53 included an element of circularity that did not serve as useful guidance in the identification and definition of *jus cogens* and limited the practical effect of that provision, which was used to describe the consequences of *jus cogens* rules in decisions of courts and tribunals but never, for instance, to determine which rules of general international law had been elevated to the status of *jus cogens* or by what process. A rule of *jus cogens* was usually recognized as such through decisions, pronouncements and writings, rather than by the application of the elements contained in article 53.

7. In view of the inconclusiveness of article 53, the extensive examples and evidence provided in the report to underpin the existence of the characteristics of *jus cogens* were welcome, as such a description was critical to understanding *jus cogens* and its effects. Given that international courts and tribunals had taken the fundamental values of the international community that *jus cogens* norms sought to protect as the *raison d'être* for the existence of such norms, more emphasis should be placed on describing those values, even if a single definition was not envisaged. Whether such a description should be placed in the draft conclusions or the commentary thereto was a matter to be decided by the Commission, which had already referred draft conclusion 3 to the Drafting Committee.[282] The challenge was to ensure that there was no inconsistency between such a description of *jus cogens* in terms of protected values and the formal criteria for recognizing *jus cogens*.

8. While hierarchical superiority and universal recognition were characteristics of *jus cogens*, they were a consequence, rather than constituent elements, thereof. It was well established that *jus cogens* rules were superior to other norms, and article 53 of the 1969 Vienna Convention had defined the attendant effect in relation to treaties, but the consequences for other sources of law were still unclear. No judicial decisions had yet declared a rule of customary international law void or terminated as a result of a conflict with a norm of *jus cogens*. Such a possibility, along with other potential effects of the hierarchical superiority of *jus cogens*, should be explored in future reports. Universal application, as a characteristic of *jus cogens*, should be examined in terms of its effect on such concepts as regional *jus cogens* and the persistent objector doctrine. He agreed with the proposition that *jus cogens* rules were binding on all States, but were they binding on all subjects of international law? Should an international organization be bound by *jus cogens* in adopting resolutions, for example?

9. The reliance in the report on State practice and the decisions of international courts and tribunals to give content and meaning to article 53 of the 1969 Vienna Convention was the correct approach, given that there had been significant developments since its adoption and

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[281] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1, p. 78, para. 376. [The text of the footnote omitted from the quote reads as follows: "Draft articles on the law of treaties, *Yearbook … 1966*, vol. II, document A/6309/Rev.1, part II, p. 248, para. (3) of the commentary to article 50."]

[282] For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

the Commission was not confining itself to a definition of *jus cogens* that dealt only with treaty law. There was widespread recognition of the normative value of the definition contained in article 53 and its applicability beyond the law of treaties. He disagreed with the Special Rapporteur's contention that the third element of that definition—that a *jus cogens* norm could be modified only by a subsequent norm of general international law having the same character—was not a criterion for the identification of *jus cogens*. As Mr. Murphy had said at the previous meeting, both the text of the 1969 Vienna Convention and the *travaux préparatoires* seemed to indicate the contrary. The issue was important, first, because if such modification was indeed part of the criterion of acceptance and recognition, the process by which the international community of States modified a *jus cogens* norm must be determined. Second, the lack of practice or jurisprudence explaining how a subsequent norm of *jus cogens* could modify an existing norm seemed to indicate that a norm of *jus cogens*, once established, could never be reversed or modified, making the entire *jus cogens* doctrine the most rigid expression of international law. Future reports by the Special Rapporteur should tackle that issue and related matters, such as what would occur in the event of a conflict between two existing *jus cogens* norms.

10. The term "general international law", contained in the first criterion for identifying *jus cogens* under article 53, had gained acceptance in legal jurisprudence and writings but had not been authoritatively defined. It comprised rules that applied in a general manner to situations falling under the auspices of international law, with certain recognized limitations such as treaty relations, *lex specialis* and self-contained regimes. Given that the topic was not concerned with the nature of general international law but only with its relevance to the concept of *jus cogens*, the definition proposed in draft conclusion 5, paragraph 1, was appropriate. The term was often used synonymously with "customary international law", but, as recognized by both the Commission and the International Court of Justice, it also included general principles of international law, in line with Article 38, paragraph 1, of the Statute of the International Court of Justice. The relevant issue was which rules of international law were capable of becoming *jus cogens*. State practice and pronouncements by international tribunals suggested that customary international law was the sole recognized basis for the formation of *jus cogens*, which would exclude the possibility of general principles of law serving as a source for *jus cogens* rules. The report cited no evidence to the contrary. In his introductory statement, the Special Rapporteur had confirmed that the draft conclusions had been guided by practice. Introducing general principles of law as a source of *jus cogens*, while hypothetically possible, would not be based on practice but would instead constitute *lex ferenda*, which would undermine the concept and expose it to unintended vulnerabilities and uncertainties. In addition to the difficulties outlined by Mr. Murase at the previous meeting, in order for a general principle existing in municipal law to become peremptory, it must go through a series of processes that were neither defined nor identified in any material on *jus cogens*, including the Special Rapporteur's second report. No example had been provided of a general principle of law that had become *jus cogens* on its own merit without already constituting customary international law. Neither did the report explain how the international community of States as a whole could recognize and accept a general principle of law as a peremptory norm. The "double acceptance" process outlined in paragraph 77 of the report was in fact the triple process by which a general principle of law could first be recognized as a norm by civilized nations, then accepted as a norm of customary international law, and then recognized as non-derogable. If anything, the sources cited in the second footnote to paragraph 77 of the report confirmed that proposition.

11. As to whether treaty law could serve as a source of *jus cogens*, he agreed that it was not a suitable basis for general international law for the reasons given in the report and because treaty rules, by their nature, applied not to all subjects of international law but to the parties to a particular treaty. Some treaties, such as the Charter of the United Nations and the Geneva Conventions for the Protection of War Victims, had become general in nature and applicability, and there was no reason not to consider them capable of becoming *jus cogens*. The prohibition on the use of force contained in the Charter of the United Nations was considered a *jus cogens* rule. Such exceptions, however, were limited. To avoid any conceptual difficulties, the proposition that a treaty could only reflect—not be a basis for—rules of general international law that could reach the status of *jus cogens* was acceptable. The limited examples of general rules of general application warranted such a conclusion, although further debate on the matter was needed.

12. While it was logical, in seeking to identify a norm as one of *jus cogens*, to consider, first, whether it was a norm of general international law and, second, whether it was accepted and recognized as non-derogable, there was no need for that sequence to be adhered to strictly. The essential point was to ensure that both criteria were satisfied separately, as acknowledged in paragraph 62 of the report and reflected in draft conclusion 4. He agreed with the Special Rapporteur that it was necessary to prove, not the non-derogability of a norm *per se*, but acceptance and recognition of such non-derogability by the international community of States as a whole. The wording of article 53 of the 1969 Vienna Convention shifted the second criterion from objectivity to subjectivity. Nonetheless, non-derogability was essentially related to the nature of the values that *jus cogens* rules sought to uphold. Interpreters would find it imperative to examine whether such values were so fundamental that they were non-derogable. Pronouncements of various international courts and tribunals, including the International Court of Justice, had dwelt on whether and to what extent particular *jus cogens* norms protected such basic values. The question remained whether, in order to establish the acceptance and recognition of the non-derogable character of a norm by the international community of States as a whole, it was necessary to determine whether each and every State had accepted and recognized that non-derogability. In his view, it was not necessary: in the context of *jus cogens*, acceptance differed from the acceptance as law required for the purpose of proving a rule of customary international law. Collective acceptance by the international community of States was what must be determined. In essence, it must

be proven that, among themselves, States had accepted and recognized the peremptory character of the norm, not whether a majority or minority of States had done so. Nor was the issue whether a single State or group of States had a power of veto. Rather, the test should be whether States had established single acceptance and recognition among themselves of the non-derogability of the norm. Draft conclusion 7, paragraph 3, should be amended to that effect.

13. In draft conclusion 7, paragraph 1, the word "attitudes" should be removed as it was neither normative nor indicative with regard to acceptance and recognition by States and was irrelevant in the context. What needed to be assessed was material proving a belief in the non-derogable character of the norm, which could be found in State evidence, treaties, resolutions of international organizations and decisions of international tribunals. Examples of such forms of evidence were given in draft conclusion 9. The hierarchy and relative weight of the various forms of evidence departed from the Commission's work on the identification of customary international law. The greater value accorded to the judgments of international courts and tribunals was welcome, but the descriptions of the value of evidence should be further considered by the Drafting Committee. Using various terms that had the same meaning could lead to confusion. The relevant material should be examined overall to determine whether acceptance and recognition by the international community as a whole could be established. While material from actors other than States might be useful in assessing acceptance and recognition by States, acceptance and recognition by non-State actors was not the issue at stake.

14. The draft conclusions contained some repetition and would need to be streamlined by the Drafting Committee. With regard to the future work programme, the Commission should provide a non-exhaustive, illustrative list of *jus cogens* norms based on its draft conclusions on the topic. Such a list would be useful to States, international courts and practitioners and would increase certainty regarding the peremptory value of certain norms. While he had no objection to discussing the legal effects of *jus cogens* on State responsibility, he urged the Special Rapporteur to ensure consistency with the articles on that subject.[283] He recommended that draft conclusions 4 to 9 be referred to the Drafting Committee.

15. The CHAIRPERSON, speaking as a member of the Commission, said that he agreed with many of the points contained in the Special Rapporteur's second report, in particular the proposition that norms of *jus cogens* could arise not only from rules of customary international law, but also from general principles of international law; that *jus cogens* could be reflected in treaties; and that a peremptory norm of general international law could only arise from a norm of general international law. He likewise agreed that one of the characteristic elements of *jus cogens* was its specific form of acceptance and recognition, which the Special Rapporteur had felicitously referred to as *opinio juris cogentis*. Nevertheless, he shared the concerns of others regarding the criteria that the Special Rapporteur had identified for determining whether a norm was one of *jus cogens*.

16. The scope of the first criterion—that *jus cogens* were norms of general international law—needed clarification. Saying that a peremptory norm of general international law could only arise from a norm of general international law was not the same as saying that a norm of peremptory international law could only be of general application. In his view, particular norms of peremptory international law, especially regional *jus cogens*, might exist. The European Court of Human Rights had sometimes referred to "fundamental European values"; other regional human rights courts might also consider certain values and principles to be fundamental to their respective systems and recognize specific peremptory norms accordingly. Rather than taking a stance on the matter, the Commission should simply leave the door open to the possibility. It would be sufficient to say that a peremptory norm of general international law could only arise from a norm of general international law. It would be inappropriate to exclude the existence of particular norms of peremptory international law without fully investigating the practice of regional systems.

17. His main concern related to the second criterion identified as a condition for *jus cogens*: acceptance and recognition of a rule of general international law as a rule of *jus cogens*, or *opinio juris cogentis*. While he agreed that such a criterion existed and that acceptance and recognition by the international community of States as a whole was decisive, the way in which the Special Rapporteur had proposed that criterion seemed to suggest that the formation of *jus cogens* from a simple rule of customary international law was easier than the formation of a simple rule of customary international law. According to draft conclusion 7, paragraph 3, "[a]cceptance and recognition by a large majority of States is sufficient for the identification of a norm of *jus cogens*". Thus, if only a "large majority of States" considered that a given rule of customary international law should become a norm of *jus cogens*, they could produce that effect simply by saying so.

18. He himself did not believe that *opinio juris cogentis* was the only requirement in order for a simple rule of customary international law to be elevated to a rule of *jus cogens*. If that were the case, then a rule of customary international law might become *jus cogens* simply because the General Assembly adopted a resolution to that effect by a two-thirds majority. Giving a hypothetical example involving the Calvo doctrine, he said that it should not be possible for a rule of customary international law to be elevated to the status of *jus cogens* simply based on the common economic or political interests of a "large majority" of States. The criteria needed to be stricter, in respect both of substance and procedure.

19. In terms of substance, any rule of general international law that was elevated to the status of *jus cogens* should have to reflect the existing fundamental values of the international community of States. He agreed with the Special Rapporteur that the Commission should not revert to theories of natural law for the identification of such fundamental values. It must point to a more generally

[283] The draft articles adopted by the Commission 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.

accepted way in which existing fundamental values could be identified. One approach might be to show that a rule was rooted in a representative number of national legal systems. If there was such a basis for a certain rule, then it would be acceptable to elevate it, by specific *opinio juris cogentis*, to the status of a rule of *jus cogens*.

20. Regarding procedure, he said that, given the extraordinarily strong legal effect of *jus cogens*, he was surprised that the Special Rapporteur considered a "large majority" sufficient to establish the requisite *opinio juris cogentis*. That was all the more surprising because, in paragraph 67 of the report, the Special Rapporteur explained that the reference to the international community of States "as a whole" had been used in article 53 of the 1969 Vienna Convention as the equivalent of "a very large majority" of States. The objective had been to ensure that the opposition of one, or a very few States, would not prevent the emergence of a rule of *jus cogens*; at the time, the framers of the Convention must have had in mind the case of South Africa as a persistent objector to the prohibition of apartheid. Thus, the existence of *opinio juris cogentis*, as proposed by the Special Rapporteur, was certainly necessary, but not sufficient, for a rule to become *jus cogens*. Moreover, by stating in paragraph 31 of his report that the formal, procedural criteria for *jus cogens* should be present before a rule or principle could be called *jus cogens*, the Special Rapporteur excluded the substantive legal nature of *jus cogens*, namely, the fact that it protected a fundamental value of the international community of States as a whole.

21. The Special Rapporteur had referred at the beginning of his report to the previous year's discussion, when the Commission had been hesitant about adopting draft conclusion 3, with its reference to the protection of fundamental values by *jus cogens* norms. The Commission's hesitation should be seen, not as expressing any doubt that norms of *jus cogens* protected fundamental values, but rather some reluctance to refer to fundamental values in the abstract without clarifying the relationship of that element with the procedural elements of *jus cogens*, in particular the core element of acceptance and recognition as *jus cogens*. In his view, the Commission should clarify that relationship now, and the characteristic of *jus cogens* as protecting fundamental values of the international community should be given a place among the criteria for identifying *jus cogens*.

22. Lastly, he agreed with the Special Rapporteur's proposal that the name of the topic be changed to "Peremptory norms of general international law (*jus cogens*)". That would also clarify the fact that the topic concerned only norms of general international law, while leaving open the possibility that there could be peremptory norms of particular international law. He did not think the question of who determined whether the criteria for *jus cogens* had been met fell beyond the scope of the topic, as suggested in paragraph 31 of the report. Regarding the proposed draft conclusions themselves, in his opinion the Drafting Committee could shorten them without sacrificing essential content.

23. Mr. HASSOUNA said that, as had been evidenced by the debate so far, the concept of *jus cogens* was a source of substantial controversy. It had been deemed an obscure term for an obscure notion as early as 1969, during the adoption of the Vienna Convention on the Law of Treaties, and that sentiment seemed to remain largely unchanged today. The reservations expressed by States in the Sixth Committee, which mainly revolved around the scope of the topic and a potential lack of practice regarding *jus cogens* norms, should be taken into account by the Special Rapporteur. That would both contribute to his aim of clarifying the concept of *jus cogens* from an international law perspective and advance the idea of international law as a law of cooperation rather than a law of coexistence, as suggested by the well-known scholar Georges Abi-Saab.

24. In paragraph 18 of his report, the Special Rapporteur stated that the criteria for the determination of whether a norm had reached the status of *jus cogens* remained those in article 53 of the 1969 Vienna Convention. Although some States considered that the characteristics typically used to describe *jus cogens*, such as "fundamental", "hierarchically superior" and "universally applicable", were additional elements not outlined in article 53 of the Convention, in his own view, the Special Rapporteur gave sufficient examples of State and judicial practice to show that those characteristics of *jus cogens* were generally accepted by States. However, the Special Rapporteur should provide more evidence of why they were merely descriptive in nature, and make clear in the commentary the distinction between those descriptive elements and the constitutive elements identified in his report.

25. The descriptive elements were intrinsically linked to whether a norm became a norm of general international law from which no derogation was permitted. Non-derogation clauses in human rights treaties could provide evidence of non-derogable norms. One non-derogable right commonly cited in treaties was the right not to be held in slavery or servitude. Even though many of the treaties containing that right had been ratified by only a few States or were regional conventions, and, in addition, many of them prohibited the suspension of similar non-derogable rights under certain circumstances, thereby qualifying their non-derogable nature, such rights were still considered by the international community to be non-derogable, precisely because certain descriptive elements—such as "fundamental", "hierarchically superior" and "universal in application"—were attached to them.

26. With regard to the first criterion for *jus cogens*, namely that it should be a norm of general international law, he said that the report did not make clear what constituted general international law. Indeed, as pointed out in paragraph 41 of the second report of the Special Rapporteur, the Study Group on fragmentation of international law had observed that there was no accepted definition.[284] The Special Rapporteur considered that the term "general" simply referred to the scope of applicability of the norms, and that customary international law, general principles of law and even treaty law could serve as the basis for, or could reflect, norms of general international law. His own understanding of the term was that it referred

[284] See the conclusions of the Study Group on fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), p. 179, footnote 976.

to all sources of law generally. Reference could also be made to the specific source of law in which the norm was established. Judge *ad hoc* Dugard, a former member of the Commission, had stated in his separate opinion in the International Court of Justice case concerning *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* that the term could include general international conventions that codified principles of international law, widely accepted judicial decisions and customary international law and general principles of law within the meaning of Article 38, paragraph 1 (*c*) and (*d*), of the Statute of the International Court of Justice (para. 16 of the separate opinion). Draft conclusion 5 could be made simpler and clearer by stating that general international law encompassed all the sources of international law outlined in Article 38, paragraph 1, of the Statute of the International Court of Justice, with no hierarchy among the sources.

27. While it might be viewed as controversial to include general principles of international law as a source of general international law norms, bearing in mind that the Special Rapporteur stated in paragraph 51 of the report that there was a dearth of practice in which general principles of law rose to the level of *jus cogens*, that lack of practice could in fact be attributed to many factors. For example, as Judge *ad hoc* Dugard stated in his opinion in the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* case, general principles of law tended to refer to rules of evidence or procedure, or were used as a legal defence. The International Court of Justice had not always found the conditions for the application of such principles to be fulfilled, because they were not always viewed as separate causes of action. A lack of practice was therefore not indicative of whether general international law could reflect general principles of law. On the other hand, if a norm of general international law was a norm applicable to all international legal subjects, it followed that a general principle of law could be a source of general international law.

28. As to the use of customary international law as a source of general international law, in his view, the work on the subject would benefit from a study on whether the term "general international law" was truly differentiated from "customary international law" in international jurisprudence and State practice, or if the two terms were treated as indistinguishable by courts and States. As the report indicated, customary international law could be used to identify norms of general international law, but that might simply be because courts used the two terms interchangeably. Commentators had suggested that the International Court of Justice simply referred to a norm as general international law so as not to go through the arduous process of identifying whether such a norm existed in customary international law by looking at *opinio juris* and State practice worldwide. A norm might thus become binding upon States without the identification of practice and *opinio juris*. That possibility raised some concern; the question of whether the term "general international law" was used to circumvent such analysis of customary international law should be analysed.

29. With regard to the second criterion for *jus cogens*, namely acceptance and recognition, he generally agreed with the Special Rapporteur that there was sufficient State and judicial practice to show that a general international norm accepted and recognized by the international community of States as non-derogable must be considered a *jus cogens* norm. He also agreed that the opinions and practice of international organizations and similar international actors could help provide context with regard to non-derogable norms of general international law. However, the existence of regional *jus cogens* had been recognized in international jurisprudence, and the Special Rapporteur should therefore further study how regional *jus cogens* norms related to the universal application of *jus cogens* norms. For example, in 1987, the Inter-American Commission on Human Rights had found that among member States of the Organization of American States (OAS) there was a recognized norm of *jus cogens* that prohibited the execution of children by the State. It might also be useful to analyse whether the "international community of States" by which *jus cogens* norms must be accepted and recognized included States that were not members of the United Nations.

30. The second report did not provide sufficient analysis and State practice to conclude that there was no need for States also to accept and recognize that a norm of *jus cogens* was one that could be modified by a subsequent norm having the same character. The plain language of article 53 of the 1969 Vienna Convention could reasonably be interpreted as requiring such acceptance and recognition. The Special Rapporteur relied only on a statement by Ireland, a case from Ontario and some legal articles to conclude that the modification element did not form part of the *jus cogens* identification criteria. Some scholars such as Sévrine Knuchel had indicated that this third element should be included among the criteria, because it acknowledged the fact that new and future peremptory norms could change existing *jus cogens* norms. The Special Rapporteur should accordingly provide additional practice and analysis to support his decision not to include the third element among the criteria for the identification of *jus cogens*.

31. With regard to changing the name of the topic, he said that although he had advocated using a different title than the one now proposed by the Special Rapporteur, he generally supported the current proposal, especially the inclusion of the word "general". The proposed new title reflected the nature and scope of *jus cogens* norms, as well as the criteria needed to identify them. As to the draft conclusions themselves, he believed that they were well thought out and well structured, though some would benefit from being condensed and made more explicit, so that they did not address issues outside their scope. Some members had proposed merging certain draft conclusions: for instance, all the content relating to acceptance and recognition of a general international norm might be covered by one draft conclusion instead of four separate ones.

32. Draft conclusion 4 was generally acceptable, although the Special Rapporteur should provide additional practice and analysis to support his decision not to include the third possible criterion relating to modification. In draft conclusion 5, paragraph 1, it was unclear what was meant by "general scope of application". In the report, the Special Rapporteur referred to *jus cogens* norms as norms

that were universally applicable and thus applicable to all States. If draft conclusion 5, paragraph 1, was meant to encapsulate that idea, then it should do so more clearly. The clarity of draft conclusion 6 could also be improved. Paragraph 1 should include a reference to the modification of a *jus cogens* norm as a criterion for identification. In paragraph 2, it would be beneficial either to change or to further define the term "as a whole" in order to expressly indicate that a vast majority of States had to accept and recognize a norm. Draft conclusion 7 could also be made more clear and concise. In particular, paragraph 1 merely stated that it was acceptance and recognition by the community of States as a whole that was "relevant". However, such acceptance and recognition was a necessary precondition for the formation of a *jus cogens* norm. Paragraphs 1 and 2 should be reformulated to indicate that it was acceptance and recognition by States alone that created *jus cogens* norms, and that the attitudes of non-State actors could not provide a basis for a *jus cogens* norm but could be relevant in providing context for the statements and beliefs of States. In draft conclusion 9, paragraph 2, it would be important to include a list of materials that could be consulted in order to find evidence of acceptance and recognition of a norm of general international law. It should also be made clear that the list was non-exhaustive, perhaps by using the phrase "including, but not limited to".

33. As to the future programme of work, he supported the Special Rapporteur's plan to consider the effects or consequences of *jus cogens*. The Special Rapporteur might also wish to look into the interaction of *jus cogens* with regional *jus cogens* norms and whether there was an obligation to exercise universal jurisdiction in the event of *jus cogens* violations. It would be useful to analyse the invalidating effect of *jus cogens* on the 1969 Vienna Convention and other treaties; whether there was an exception to the immunity of States and their officials in the event of *jus cogens* violations; and whether there were invalid amnesties and invalid statutes of limitations for *jus cogens* crimes.

34. He was in favour of an illustrative list of *jus cogens* norms being included in the commentary. It would help to substantiate the draft conclusions and serve as context for identifying potential *jus cogens* norms. Wherever it was included—in an annex, the commentary or elsewhere—the most important aspect was to clearly note that such a list was not exhaustive.

35. In conclusion, he agreed to the referral of the draft conclusions to the Drafting Committee.

36. Mr. SABOIA said that the Special Rapporteur's second report revealed a deep analysis of the relevant background material. He welcomed the solid evidence of State practice presented in support of draft conclusion 3 and reiterated his support for the draft conclusion, including paragraph 2, which embodied the notion that *jus cogens* norms protected and reflected fundamental values of the international community.

37. He also welcomed chapter II of the report, on the criteria for *jus cogens*, particularly the comments with regard to the definitional nature of article 53 of the 1969 Vienna Convention. The Special Rapporteur had rightly pointed out that taking article 53 as a basis for the criteria for *jus cogens* should not be understood to mean that the Commission could not move beyond that article even if practice so determined. Chapter II usefully shed light on the meaning of the concepts of general international law and general principles of law, as well as on the meaning of the expression "the community of States as a whole". He shared the Special Rapporteur's view that this expression reflected a collective idea rather than implying that States should unanimously uphold the elevation of a given rule of customary international law to a rule of *jus cogens*. Therefore, while supporting the thrust of draft conclusion 7, he agreed that the expression "a large majority of States", contained in paragraph 3 of the draft conclusion, might establish too low a threshold and might have to be further refined.

38. Referring to paragraph 41 of the report, in which the Special Rapporteur stated that the distinction between general international law, on the one hand, and treaty law and *lex specialis*, on the other, might preclude some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*, he said that he would be interested to know the Special Rapporteur's specific views on the matter. As for the proposals contained in chapter III of the report, he was in favour of changing the name of the topic and supported referring draft conclusions 4 to 9 to the Drafting Committee. Regarding the future work programme on the topic of *jus cogens*, a number of useful suggestions had been made in the course of the Sixth Committee's consideration of the Commission's report on its sixty-eighth session, including on the relationship between *jus cogens* and *erga omnes* rules. The possible application of the persistent objector rule to norms of *jus cogens* might also be considered. He welcomed the information that an illustrative list of *jus cogens* norms might be proposed.

39. Mr. GROSSMAN GUILOFF said that he welcomed the Special Rapporteur's second report, which provided solid support for the draft conclusions proposed for adoption. The concern that *jus cogens* might be extended to areas not foreseen at the time of its inclusion in the 1969 Vienna Convention was not new. Even at the time of the Convention's adoption, concerns had been expressed that the principle of *jus cogens* might restrict States' freedom of contract. Moreover, in the wake of the Second World War, the need to recognize the existence of an international public order had become the prevailing concern. The existence of such an order, however, presupposed that some acts simply were not to be tolerated. It was necessary, therefore, that the concept of *jus cogens* also refer to fundamental values shared by the international community.

40. The concept of an international public order itself was not necessarily clear-cut, as evidenced by the debate held in the Sixth Committee at the General Assembly's seventy-first session. Potential risks involved the misuse of the concept of *jus cogens*, based on political or ideological considerations, and certain parties' seeking to impose values that were not shared by the international community as a whole. Such risks were not inherent to the concept of *jus cogens* but rather related to its use in practice. The Commission must therefore proceed with

caution in order to avoid any arbitrary extension of the concept of peremptory norms. Such caution had clearly been exercised during the adoption of the 1969 Vienna Convention, articles 65 and 66 of which provided that a party which invoked *jus cogens* as a ground for impeaching the validity of a treaty should submit its dispute to the International Court of Justice. Thus, the Convention did not seek to impede the development of the concept of *jus cogens* with regard to an international public order, but established procedural guarantees aimed at preventing abuse of such peremptory norms. International practice supported that notion. For instance, when the Inter-American Court of Human Rights had established that slavery violated rules of *jus cogens*, it had done so not on the basis of its rejection of any specific treaty but rather with the aim of affirming the international responsibility of States for failing to comply with their obligation to prevent that practice, in accordance with established law. Long before that, in its judgment in the case concerning *Barcelona Traction*, the International Court of Justice, without mentioning *jus cogens*, had referred to the obligations of a State towards the international community as a whole as obligations *erga omnes*, thereby also linking that notion to *jus cogens*.

41. By insisting that the legal nature of a rule was crucial in determining whether it could be considered a rule of *jus cogens*, the International Court of Justice had anchored the concept of *jus cogens* in positive law. Various national courts had also confirmed the legal foundation of *jus cogens*, for example, in the case of *Filártiga v. Peña-Irala*, in which a United States federal court had established that all States had an interest in the prohibition of torture. The Special Rapporteur might wish to provide additional examples of case law in his future work. The Commission itself, in its work on the articles on the responsibility of States for internationally wrongful acts, had referred to "serious breaches of obligations under peremptory norms of general international law" in defining the term "international crime".[285] The Special Rapporteur's efforts were laudable given the difficulties in attempting to define peremptory norms both now and during the adoption of the 1969 Vienna Convention. It was important to strike a careful balance that took into consideration all the points of view expressed.

42. He supported changing the name of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)". He would welcome the Special Rapporteur's comments on the need to establish a clear definition of "general international law". Establishing such a definition would not be an easy task, but it might be useful to identify some constituent elements at the very least.

43. Draft conclusions 4 and 5 set out the essential characteristics of rules of *jus cogens*. Since the Special Rapporteur did not intend to enter into the natural law versus positive law debate—although he clearly adopted a positive law approach—the Special Rapporteur was, in his view, right to establish the criteria for *jus cogens* on the basis of article 53 of the 1969 Vienna Convention, an article which necessarily must be accompanied by State practice and international case law.

44. Specifically regarding draft conclusion 5, paragraph 4, while a treaty might "reflect" a norm of general international law capable of rising to the level of a *jus cogens* norm, the same treaty might also "establish" such a norm, if so decided by the States concerned. If such a norm were thus established by States, either explicitly in the treaty or on the basis of its interpretation under international law, international treaties should be considered an important source of law in that regard and should not be excluded. What was more, nothing in Article 38 of the Statute of the International Court of Justice ruled out treaties as a source of *jus cogens*. The Special Rapporteur's position that general principles of law could constitute a basis for *jus cogens* norms, but that treaties could not, seemed inconsistent.

45. Draft conclusion 6, together with the three draft conclusions that followed, demonstrated the complexities of the topic at hand. The Drafting Committee should further refine the Special Rapporteur's conclusions on acceptance and recognition by dealing with each separately.

46. The use of the word "attitude" in draft conclusion 7 was too vague; he urged the Special Rapporteur and the Drafting Committee to find a better solution, perhaps by stating that it was the "conduct" of States that was relevant, followed by the phrase "*opinio juris*". Paragraphs 1 and 3 of the draft conclusion should be redrafted so as to remove any redundancy. In addition, since the phrase "community of States" in paragraphs 1 and 2 appeared to correspond to the "large majority of States" referred to in paragraph 3, it would be useful to elaborate on the meaning of the latter, especially in the light of the aforementioned risks of misuse of *jus cogens*. It was not always a question simply of the number of States that accepted and recognized a norm as one that could not be derogated from; it was also important to consider the issue from a qualitative point of view. In that connection, various legal traditions and shared values should be represented. He supported the comments made by Mr. Nolte based on the example of the Calvo doctrine, although the world had changed significantly since the origin of that doctrine.

47. Draft conclusion 8 sought to distinguish ordinary *opinio juris*, based on acceptance in the case of customary law and on recognition in the case of general principles, from *opinio juris cogentis*, which exclusively related to the peremptory norms that were accepted by States as ones which could not be derogated from. The draft conclusion should be simplified so as to facilitate its understanding.

48. In draft conclusion 9, the Special Rapporteur stated that evidence of acceptance and recognition of rules of *jus cogens* could be reflected in a variety of materials and could take various "forms", both of which seemed to refer primarily to sources of international law and its manifestation in practice. Such "materials" and "forms" should be weighted differently, according to their nature. Dealing with evidence in such a way was especially important when there was a lack of extensive and consistent evidence of States' acceptance of a rule of *jus cogens*.

[285] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, chapter III of Part Two of the draft articles on the responsibility of States for internationally wrongful acts, pp. 26 *et seq.*, at p. 29.

49. He was in favour of referring the draft conclusions to the Drafting Committee.

50. Mr. ŠTURMA said he agreed with others that the idea that *jus cogens* was a part of positive international law or *lex lata* was no longer in question, but that the characteristics of *jus cogens* and the criteria for its identification and content were still the subject of disagreement. The debate thus far on the characteristics of *jus cogens* set out in draft conclusion 3, paragraph 2, namely fundamental values, hierarchical superiority and universal application, which went beyond the text of article 53 of the 1969 Vienna Convention, showed how important those characteristics were. They helped to distinguish *jus cogens* norms from other similar concepts.

51. It could hardly be denied that peremptory norms, within the meaning of article 53, protected the fundamental values of the international community. However, those underlying values alone were not sufficient to establish that a *jus cogens* norm existed. Modern positivism, unlike natural law, held that there was no direct and immediate connection between those values and peremptory norms; it was necessary to give them legal form through State practice and *opinio juris*. In other words, *jus cogens* was also a legal technique aimed at preventing the fragmentation of certain international norms, though, in his view, it was more than just that. It might help to distinguish peremptory norms such as the prohibition of genocide, torture and the use of force from other legal techniques that provided for the binding character of other rules or simply for their priority application, such as article 41 of the 1969 Vienna Convention.

52. 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 hierarchies in international law, such as that established by Article 103 of the Charter of the United Nations. The Special Rapporteur should take that point into account when addressing non-derogation as a consequence of *jus cogens*.

53. He also supported the view that peremptory norms were universally applicable. However, he believed it necessary to explore the question of regional *jus cogens* norms, of which one of the best-known examples was the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), presented by the European Court of Human Rights as an instrument of European *ordre public* (public policy). The issue could best be studied from the perspective of the relationship between *jus cogens* and the non-derogation clauses in human rights treaties. He was convinced that *jus cogens* norms must be part of general international law and universally applicable. The concept of *ordre public* was a clear example of a municipal law analogy. Although the use of such analogies by Sir Hersch Lauterpacht and others was understandable and had had certain merits at a time when the concept of *jus cogens* in international law had not yet been generally accepted, it seemed unnecessary and misleading today. Other examples of *ordre public* rules included the Covenant of the League of Nations and the United Nations Convention on the Law of the Sea. However, they were not peremptory rules of international law within the meaning of article 53.

54. He supported changing the name of the topic, as proposed by the Special Rapporteur in paragraph 90 of his report. The name should make it clear that the topic covered only peremptory norms of international law and not *jus cogens* in internal law, various kinds of *ordre public* and the like.

55. Turning to the draft conclusions proposed in the report, he said that he agreed with the two criteria for *jus cogens* set out in draft conclusion 4. However, he had serious doubts when it came to the explanation of the norms of general international law in draft conclusion 5. He agreed that, as stated in the first two paragraphs, a norm of general international law had a general scope of application and that customary international law was the most common basis for the formation of *jus cogens* norms. However, he had serious problems with the paragraph concerning general principles of law for several reasons. First, he agreed with other members that, within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, general principles of law had their origins in internal law. However, it was precisely the internal law analogy of *jus cogens* that was problematic, as he had noted previously. Second, although he did not believe it had been the Special Rapporteur's intention, general principles of law were burdened by the natural-law approach. Since the Special Rapporteur had rightly stressed the basis of *jus cogens* in positive law, he should not then introduce the concept of natural law by referring to general principles of law. Finally, as noted in paragraph 51 of the report, there was a lack of actual practice in which general principles served as the basis of *jus cogens* norms.

56. He did not propose discarding general principles completely. Nor did he agree with Mr. Rajput that, in order for a norm to be identified as *jus cogens*, it must appear in all three sources of law. Basing *jus cogens* only on general principles of law might open the door to analogies with internal law or natural law. By contrast, making the identification of a peremptory norm conditional on its appearance in all the sources would make the test too restrictive. In fact, it was more likely that a norm would first appear in the form of a general principle or in a universal multilateral treaty, such as the Charter of the United Nations, and then evolve into customary international law. He therefore proposed alternative wording that would align general principles of law and treaty rules, as both could give rise to or reflect a norm of general international law capable of becoming a *jus cogens* norm.

57. He supported the substance of the other draft conclusions but agreed with Mr. Murphy's proposal to merge draft conclusions 6 and 8 into a single draft conclusion. With regard to draft conclusion 7, paragraph 3, he supported the wording "a very large majority of States".

58. As to the future work programme, he supported the road map put forward by the Special Rapporteur. In particular, he welcomed his intention to address the effects of *jus cogens* in treaty law and other areas of international law. In his view, the main potential added value of the topic would be in clarifying the effects of peremptory norms, as

well as the hierarchy of norms. He was in favour of drawing up an indicative list of *jus cogens* norms, or at least including examples in the annex to the draft conclusions. From a methodological and practical point of view, there were a number of reasons for the elaboration of such a list. First, as had already been noted, there were different approaches to the scope of *jus cogens*. If the Commission's work was to lead to the identification of genuine peremptory norms, and the exclusion of other legal techniques aimed at non-derogation or the hierarchy of certain rules, it could hardly be done without giving examples of *jus cogens* norms. Second, the generalized elements or criteria of *jus cogens* should, in turn, be tested against at least some examples of such norms. Third, though such a list must necessarily be non-exhaustive, it might nevertheless give some theoretical and practical indications of what the Commission would identify as peremptory norms of general international law.

59. In conclusion, he recommended that the Commission refer all the draft conclusions to the Drafting Committee.

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

[Agenda item 1]

60. The CHAIRPERSON drew attention to the proposed programme of work for the remainder of the session, which, as usual, was subject to change.

61. Mr. ŠTURMA, responding to a question by Mr. VALENCIA-OSPINA, said that the four proposed draft articles on succession of States in respect of State responsibility that might be referred to the Drafting Committee were contained in paragraphs 29, 81, 111 and 132 of his first report (A/CN.4/708).

62. After a procedural discussion in which Mr. HASSOUNA, Mr. MURPHY, Mr. PARK, Mr. REINISCH, Mr. TLADI and Sir Michael WOOD participated, the CHAIRPERSON said that the Commission would follow its usual practice when it came to the topic of succession of States in respect of State responsibility, as the Special Rapporteur's report was available electronically in all six languages and would serve as the basis for the debate in the plenary, followed by discussion in the Drafting Committee.

63. Mr. OUAZZANI CHAHDI said that it was regrettable that the proposed programme of work was not available in French.

64. The CHAIRPERSON said that the Commission attached great importance to the issue of translation but, as the programme had been finalized just before the meeting, there had unfortunately not been time to translate it. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

The meeting rose at 12.55 p.m.

[*] Resumed from the 3367th meeting.

3371st MEETING

Thursday, 6 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

1. The CHAIRPERSON welcomed Mr. de Serpa Soares, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited him to take the floor.

2. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, as part of the activities of the Office of Legal Affairs during the previous year, the Codification Division had provided substantive secretariat services to the Sixth Committee during the seventy-first session of the General Assembly. The Committee had considered a total of 27 agenda items, convened four different working groups and held numerous informal consultations on draft resolutions. Upon the recommendation of the Sixth Committee, the General Assembly had eventually adopted without a vote 26 resolutions and 4 decisions.

3. In resolution 71/140 of 13 December 2016, entitled "Report of the International Law Commission on the work of its sixty-eighth session", the General Assembly had noted the completion of the first reading of two of the Commission's projects: the draft conclusions on identification of customary international law[286] and the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[287] It had also endorsed the Commission's recommendation that the first part of its seventieth session be held in New York and had taken note with appreciation of the Commission's plans to commemorate its seventieth anniversary in 2018 with events in New York and Geneva. In resolution 71/141 of 13 December 2016, entitled "Protection of persons in the event of disasters", the General Assembly had taken note of the draft articles on the protection of persons in the event of disasters,[288] presented by the Commission, and had decided to include an item on that topic in the provisional agenda of its seventy-third session.

4. At the seventy-first session of the General Assembly, the Sixth Committee's agenda had included four items

[286] See *Yearbook … 2016*, vol. II (Part Two), pp. 60 *et seq.*, paras. 62–63.

[287] See *ibid.*, pp. 84 *et seq.*, paras. 75–76.

[288] See *ibid.*, pp. 25 *et seq.*, paras. 48–49.

relating to outcomes of the Commission's work in previous years, namely "Responsibility of States for internationally wrongful acts", "Diplomatic protection", "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm" and "The law of transboundary aquifers". The Committee had established working groups on the first two of those items. While the possibility of a convention on State responsibility had gathered some momentum, the Committee had made little concrete progress on any of those agenda items and had postponed the debate on all of them by three years, until 2019. At its forthcoming seventy-second session, the Sixth Committee would once more consider two items relating to outcomes of the Commission's work, namely the draft articles on the responsibility of international organizations,[289] which the Commission had completed in 2011, and the draft articles on the expulsion of aliens,[290] which it had completed in 2014.

5. In the past year, the Office of Legal Affairs had dealt with a variety of legal issues related to United Nations peacekeeping operations. In response to the grave danger posed to United Nations personnel and to civilians in the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), which was tragically illustrated by the fact that 114 peacekeepers had been killed and nearly 150 injured in over 70 terrorist attacks since its creation in 2013, the Security Council, in its resolution 2295 (2016) of 29 June 2016, had requested MINUSMA to move to a more proactive and robust posture to carry out its mandate. The Council had emphasized that the Mission "in pursuit of its priorities and active defence of its mandate" should "anticipate and deter threats and … take robust and active steps to counter asymmetric attacks against civilians or United Nations personnel".[291] That new language did not mean that MINUSMA was mandated to engage in counter-terrorism, which continued to be the exclusive domain of the State authorities. Those adaptations in the Council mandate had, however, been reflected in revised rules of engagement for the Mission's military contingents, which had been prepared in consultation with his Office.

6. Some of the shortcomings of the United Nations Mission in South Sudan had highlighted serious challenges in implementing mandates to protect civilians in the midst of armed conflict and had called into question the effectiveness of the United Nations command and control structure *vis-à-vis* States contributing personnel to serve in United Nations operations.

7. Concerning the United Nations Mission for the Referendum in Western Sahara (MINURSO), the United Nations was still dealing with the effects of the decision by the Government of Morocco in March 2016 to expel a significant proportion of the Mission's civilian component, including its legal adviser. Such action was contrary to the principles of the Charter of the United Nations, as well as to the provisions of the status-of-mission agreement between the United Nations and Morocco. Increased tensions in the buffer strip in south Western Sahara had necessitated a greater level of support from his Office to the Department of Peacekeeping Operations and the Mission, particularly in connection with understanding the ceasefire arrangements between the parties and the role of MINURSO in monitoring and verifying them.

8. On the subject of the institutional law of the United Nations, a relationship agreement had been concluded with the International Organization for Migration (IOM), under whose terms the United Nations recognized IOM as an organization with "a global leading role in the field of migration", while recognizing that the member States of IOM, as per IOM Council resolution No. 1309, regarded it as "the global lead agency on migration".[292] According to the agreement, those two understandings were without prejudice to the mandates and activities of the United Nations, its offices, funds and programmes in the field of migration. IOM had undertaken to conduct its activities in accordance with the purposes and principles of the Charter of the United Nations and with due regard to the policies of the United Nations furthering those purposes and principles and to other relevant instruments in the international migration, refugee and human rights fields. The agreement allowed IOM to participate as a full member in various United Nations coordination mechanisms, as well as in United Nations country teams present in more than 131 countries.

9. Turning to privileges and immunities, he said that he wished first to address the Haiti cholera matter. On 17 January 2017, the decision of an appeals court in the United States on the issue of the immunity of the United Nations with respect to claims, which confirmed that the United Nations enjoyed absolute immunity from suit, absent an express waiver, had become final. Although in another case under way in a United States district court, plaintiffs were arguing that the United Nations had waived its immunity based on reports of the Secretary-General and a General Assembly resolution regarding the liability of the United Nations for third-party claims issued in the 1990s, it was the position of the United Nations that the statements in those documents, which dated back to more than 10 years before the cholera outbreak, could not constitute an express waiver in relation to any particular case. The district court had already expressed its doubt about the viability of the plaintiffs' claims, and his Office expected that this court, too, would uphold the immunity of the United Nations.

10. The United Nations also continued to face a number of other challenges to its status, privileges and immunities. In South America, for example, such challenges related to matters concerning taxation and social security, the validity of existing bilateral agreements concluded by the United Nations with the State and the status of the relationship between the United Nations and the personnel

[289] 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.

[290] 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) and corrigendum, pp. 22 *et seq.*, paras. 44–45.

[291] Security Council resolution 2295 (2016), para. 19 (*d*).

[292] See the Agreement concerning the Relationship between the United Nations and the International Organization for Migration, General Assembly resolution 70/296 of 25 July 2016, annex, art. 2, para. 1.

it engaged. On that last point, a series of labour claims had been filed against United Nations funds and programmes before Mexican courts by former locally recruited personnel. In two cases, the Mexican courts had followed the jurisprudence established by the Supreme Court and had concluded that international organizations in Mexico did not enjoy immunity from legal process in relation to labour claims brought by locally recruited persons. The Government acknowledged that this was legally incorrect and that the United Nations enjoyed immunity from every form of legal process, including in such matters. While the Government had taken several steps to assert immunity on behalf of the United Nations, it had not appeared before the courts at any stage of the proceedings.

11. Another case concerned the diplomatic immunity of a judge of the International Residual Mechanism for Criminal Tribunals. Judge Akay, a national of Turkey, had been accused of alleged crimes related to the attempted *coup d'état* of July 2016 and had been arrested in Turkey in September 2016. At the time of his arrest, Judge Akay had been serving as a member of the appeals bench in the *Augustin Ngirabatware* case, to which he had been assigned on 25 July 2016.

12. On behalf of the Secretary-General, the speaker had asserted the judge's immunity as accorded to diplomatic envoys, including immunity from personal arrest and detention and from legal process. He had noted that the Security Council had expressly decided in article 29, paragraph 1, of the Statute of the International Mechanism for Criminal Tribunals[293] that the 1946 Convention on the Privileges and Immunities of the United Nations should apply to the judges of the Mechanism. He had then reiterated the long-standing position of the Organization that the diplomatic immunity conferred under the Convention must be respected by all Member States, including the State of nationality and State of residence of the person on whom such privileges and immunities were conferred. In that regard, he had recalled that privileges and immunities were conferred solely in the interests of the Organization and were based on the fundamental principle of an independent international civil service established under the Charter of the United Nations in which there was no inequality by reason of nationality.

13. The Government of Turkey had taken the position that Judge Akay enjoyed functional immunity only and that his arrest was not related to his official functions and had continued with his criminal prosecution. On 14 June 2017, Judge Akay had been convicted on a single charge of being a member of a terrorist organization and sentenced to seven years and six months' imprisonment. The judgment was subject to appeal and review proceedings at the national level. The judge had been provisionally released under judicial supervision, with restrictions on his travel, and he would be detained again if the conviction was confirmed by a higher court. While the judge's release was a welcome development from a humanitarian perspective, the Office of Legal Affairs was considering how to react to the conviction given its inconsistency with the judge's diplomatic immunity.

14. On the subject of accountability for international crimes, it was noteworthy that, after 24 years of operation, the International Tribunal for the Former Yugoslavia was expected to complete its work by the end of 2017. There were some legal issues to resolve in the remaining months, such as the question of whether a contempt case could be transferred to the International Residual Mechanism for Criminal Tribunals under the existing legal framework if the accused persons had not been arrested before the Tribunal had finished its substantive cases. The work of United Nations-assisted tribunals was progressing, despite the funding problems faced by, for example, the Extraordinary Chambers in the Courts of Cambodia and the Residual Special Court for Sierra Leone. The experience of those two bodies had clearly vindicated the Secretariat's long-held view that funding of judicial institutions should not be left to the vagaries of voluntary contributions.

15. In the past year, the efforts of the Office of Legal Affairs had increasingly been directed towards supporting regional and domestic accountability efforts in various parts of the globe. In that regard, the Office had been providing technical assistance to the Office of the Legal Counsel of the African Union Commission for the establishment of the Hybrid Court for South Sudan. The Court would be established by the African Union, and the role of the United Nations was limited to assisting, at the request of the African Union, to facilitate the process, drawing from lessons learned from other tribunals.

16. As part of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo (FARC-EP) of 24 November 2016, the parties had agreed on a system of transitional justice and accountability that combined elements of truth, justice, reparations and guarantees of non-repetition. Under the Special Jurisdiction for Peace, which would be composed exclusively of Colombian judges, alleged perpetrators of serious crimes of international concern would be subject to judicial processes and sanction, and there would be no amnesties for war crimes and crimes against humanity. The Government and FARC-EP had invited the Secretary-General and four entities to designate members of a committee for the selection of Colombian judges and other officials of the justice component of the Agreement. The Office of Legal Affairs had been advising the Secretary-General and the Department of Political Affairs on that matter. It had also contributed in a somewhat similar fashion to the establishment of the Special Criminal Court in the Central African Republic.

17. Accountability was not limited to courts and tribunals only. In situations where there was no willingness or capacity to prosecute, other efforts could be undertaken to facilitate future prosecutions. That was precisely what was being envisaged in relation to the atrocities committed in Syria. On 21 December 2016, the General Assembly had adopted resolution 71/248, establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab

[293] See Security Council resolution 1966 (2010) of 22 December 2010, annex.

Republic since March 2011. The functions of the Mechanism included collecting, consolidating, preserving and analysing evidence of violations of international humanitarian law and human rights violations and abuses, as well as preparing files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that had or might in the future have jurisdiction over those crimes. His Office had been collaborating with the Executive Office of the Secretary-General and the Office of the United Nations High Commissioner for Human Rights and providing advice on various legal issues, including the terms of reference of the Mechanism.

18. The establishment of the Mechanism had not been without controversy. Some Member States were questioning the validity of the General Assembly resolution establishing the Mechanism, arguing that the Assembly had acted *ultra vires*. The position of his Office was that the General Assembly determined its own competence and that the Secretariat had no authority to review the legality of the actions of the other principal organs. At the time of adoption of the resolution, the General Assembly had considered the question of its competence and had decided to adopt the resolution.

19. In March 2017, the Human Rights Council had expanded the mandate of the Commission on Human Rights in South Sudan to include the collection and preservation of evidence and clarifying responsibility for alleged gross violations and abuses of human rights and related crimes.[294] The information was to be made available to transitional justice mechanisms in South Sudan, including the Hybrid Court, with a view to ending impunity and providing accountability.

20. In December 2015, an independent panel charged with reviewing sexual exploitation and abuse by peacekeeping forces in the Central African Republic had recommended a review of United Nations confidentiality practices. It had been considered crucial to determine whether such policies established a proper balance between safeguarding confidential information about victims of alleged sexual exploitation and abuse and disclosing such information to national authorities for purposes of holding accountable those responsible for such acts.

21. As a result of the panel's recommendation, the General Legal Division of the Office of Legal Affairs had been tasked with collating United Nations confidentiality policies relevant to the concerns raised by the panel and assessing how the balance between confidentiality and accountability had been struck in each one of those policies. Having found a significant number of confidentiality policies that did not all adequately address accountability, the Division had then been requested to prepare a new uniform policy on handling allegations of sexual exploitation and abuse made against United Nations personnel that would apply across the Organization. The new uniform policy was currently under consideration by senior management.

[294] See Human Rights Council resolution 34/25 of 24 March 2017, para. 16 (*b*).

22. The Division for Ocean Affairs and the Law of the Sea continued to serve as the secretariat of the United Nations Convention on the Law of the Sea and the 1995 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. Its functions included those of depositary of documents connected with the limits of maritime zones, and it serviced meetings of the Commission on the Limits of the Continental Shelf and of States parties to the Convention. The Division also provided the General Assembly, its subsidiary bodies and intergovernmental processes with substantive assistance in connection with oceans and the law of the sea.

23. The aforementioned bodies and processes included: the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (the Informal Consultative Process), the Preparatory Committee established by General Assembly resolution 69/292 of 19 June 2015: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects; and the United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, which had been held at United Nations Headquarters in New York in June 2017.

24. The accession of Azerbaijan to the United Nations Convention on the Law of the Sea in 2016 had brought the number of States parties to 168. The twenty-sixth Meeting of States Parties, held in June 2016, had, *inter alia*, adopted the biennial budget of the International Tribunal of the Law of the Sea. The twenty-seventh Meeting in June 2017 had elected 7 new members of the Tribunal and 21 members of the Commission on the Limits of the Continental Shelf.

25. In the quinquennium which had ended in June 2017, the above-mentioned Commission had examined 21 submissions concerning the outer limits of the continental shelf beyond 200 nautical miles, a 62 per cent increase over the previous quinquennium. Although the backlog of submissions had grown smaller, 41 were still pending. The Commission had issued five new recommendations over the previous 12 months and had received another submission, which had brought their total number to 82, including five revised submissions.

26. The year 2016 had seen the launching of the second cycle of the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects. While the first cycle had concentrated on establishing a baseline, the second cycle would evaluate trends and identify gaps. The second cycle was expected to yield a second global integrated marine assessment and to back other intergovernmental processes related to the oceans.

27. The CHAIRPERSON thanked the United Nations Legal Counsel for his statement, as well as for the support the Commission received from the Codification Division, and invited members to ask him questions.

28. Sir Michael WOOD expressed his thanks for the excellent assistance which the Commission received from the Codification Division. He asked whether the United Nations Legal Counsel received sufficient support from Member States with regard to the privileges and immunities of the United Nations, especially from States where cases involving the Organization's privileges and immunities had been brought before courts. He asked whether more thought had been given to the General Assembly seeking an advisory opinion in relation to the Convention on the Privileges and Immunities of the United Nations.

29. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, when in his former duties as legal adviser to the Ministry of Foreign Affairs of his own country he had been confronted with tricky cases involving States' privileges and immunities, he had usually found that national judges were prepared to explore possible solutions with him. He therefore had difficulty in accepting the argument that legal advisers to ministries of foreign affairs could do little to uphold the immunities and privileges of the United Nations in national courts because of the independence of the judiciary. The challenges to its immunities and privileges which the Organization faced in Latin America were not confined to that region. However, one particular problem was that, under the Mexican legal system, the precedent established by five concordant decisions from the Supreme Court became binding on the lower courts. The Supreme Court's position that immunity did not take precedence over labour rights conferred by the national Constitution was very hard to accept, and he might have no alternative but to refer the issue to the General Assembly and to ask for its guidance on the matter. Seeking an advisory opinion on privileges and immunities was a possibility, but he was still trying to explore other options with the national authorities. It was up to the ministries of foreign affairs in Member States to take a proactive role in protecting the privileges and immunities of the United Nations, but unfortunately they sometimes failed to do so.

30. Mr. HASSOUNA asked whether the new Secretary-General had a vision or a road map for dealing with emerging challenges such as the spread of terrorism, environmental degradation, nuclear proliferation, displacement of persons, non-compliance with international law and violations of international humanitarian law and international human rights law, and for improving the United Nations system.

31. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Secretary-General had called a town hall meeting to be held shortly to present his ideas on the reform of the United Nations over the following five years. The Office of the Legal Counsel fully supported the reform programme which, he hoped, would bring some visible benefits in the near future.

32. Mr. MURASE said that he wished to highlight the value of the Codification Division's activities in the area of teaching and disseminating international law. The Audiovisual Library of International Law[295] was most useful and he hoped that the excellent external training courses would continue for many years to come. He asked for assurances that the members of the Commission and the interns and assistants who provided them with vital support would not be affected by a travel ban when the Commission held the first part of its seventieth session in New York.

33. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, since the United Nations Regional Courses in International Law for Africa, Latin America and the Caribbean, and Asia–Pacific would henceforth be funded from the regular budget, their future was secure. They also benefited from the support of the Economic Commissions for those regions. His attendance of two Regional Courses had made him aware of the added value which derived from what was essentially a small and inexpensive programme. He trusted that his Office's excellent relations with the United States Mission to the United Nations in New York would ensure that a reasonable solution could be found to any travel difficulties that might arise in connection with the holding of the first part of the Commission's seventieth session at the United Nations Headquarters.

34. Mr. HMOUD asked whether the United Nations Legal Counsel's advice and opinion on matters relating to international peace and security was taken into consideration by the Security Council. He also wished to know whether the numerous bilateral agreements on privileges and immunities which had been concluded between the United Nations and individual States were consonant with the Convention on the Privileges and Immunities of the United Nations. Lastly, he requested information about the general policy followed by the Office of the Legal Counsel with regard to immunities and privileges.

35. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Legal Counsel had no formal role in the Security Council. The members, especially the permanent members thereof, would probably not wish to give the Legal Counsel any formal role in its work. There was, however, a very healthy tradition of informal cooperation, as some members of the Security Council were genuinely interested in ascertaining the view of the Office of Legal Affairs on a given issue, in particular because it had one of the best archives in the Secretariat and could provide insight on situations which had already occurred in the past. In the previous nearly four years, he had only twice been invited to brief formally the Security Council. On those occasions the issue had been accountability in South Sudan. In any case, all members of the Security Council had their own legal advisers.

36. His Office adopted a pragmatic approach to immunities. The Convention on the Privileges and Immunities of the United Nations provided a template, but it allowed a margin of flexibility when bilateral agreements were negotiated, in order to accommodate the specific concerns or requests of host States.

[295] Available from: https://legal.un.org/avl/.

37. Mr. GROSSMAN GUILOFF said that he, too, appreciated the outreach of the Office of Legal Affairs to academia and its assistance with the provision of teaching material in law schools. He greatly valued the Office's role in promoting accountability and other measures to counter impunity for genocide and crimes against humanity. The Office's work had helped to generate State practice and *opinio juris* that outlawed amnesty for such crimes. He therefore wished to know what further steps were being contemplated by the Office to promote accountability.

38. Mr. JALLOH asked what further cooperation was envisaged between the Office of the Legal Counsel and the African Union to clear the way for setting up the Hybrid Court for South Sudan and whether the Office might request Security Council action under Chapter VII of the Charter of the United Nations in that connection. He also requested details of the Office's practice with regard to amnesties for international crimes.

39. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that efforts by the Office of Legal Affairs to reach out as much as possible to the outside world in order to disseminate international law had resulted in the Audiovisual Library having 1.5 million views. Turning to the question on how to promote accountability, he said that he was endeavouring to support the action of national and regional authorities in that respect. His Office had been working with the African Union to prepare the legal texts needed for the establishment of the Hybrid Court for South Sudan. However, the moment of political truth had arrived because the Government of South Sudan was reluctant to engage in the process. The Security Council had clearly indicated that the African Union should lead the process and, for that reason, it was for the African Union to provide the fundamental political momentum to ensure that the 2015 Agreement on the resolution of the conflict in the Republic of South Sudan[296] was implemented. His Office had provided substantial support for the Special Criminal Court in the Central African Republic and it was still advocating the universal ratification of the Rome Statute of the International Criminal Court, although at the same time it believed that the reinforcement of regional and national capacity to deal with international crimes for which there could be no amnesty was a crucial part of the way forward.

40. Mr. RAJPUT said that, although the Commission on the Limits of the Continental Shelf had a vital function to perform in dealing with what appeared to be a never-ending succession of submissions, it did not have its own budget. He therefore wondered how States and the United Nations viewed the Commission's prospects.

41. Mr. REINISCH, putting a follow-up question to that posed by Sir Michael Wood, said that requesting an advisory opinion might offer a way of circumventing difficulties in settling a dispute between the United Nations and a State concerning privileges and immunities. He wondered if any consideration had been given to reviving the proposal to empower the Secretary-General to request such opinions more broadly with regard to issues concerning the rights and obligations of the United Nations. He noted that, in the past, that proposal had often met with resistance due to a fear that an overly proactive Secretary-General could request an advisory opinion on any issue of international law. However, that procedure might offer a means of strengthening the role of the Organization.

42. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the number of submissions to the Commission on the Limits of the Continental Shelf was expected to rise further as States became increasingly aware of the huge economic and geostrategic interest of the continental platform. Serious consideration would therefore soon need to be given by Member States in the General Assembly to whether the current institutional arrangements were adequate to meet the expected increase in the Commission's workload, particularly bearing in mind that the Commission met for a limited period only each year and under conditions that were less than optimal.

43. As to the possibility of the Secretary-General being provided with new powers to request advisory opinions, he did not recall any particular recent discussion in New York in that connection and considered it unlikely that any such development would occur in the foreseeable future. In his view, advisory opinions should in general be used sparingly as a means of clarifying international law. In a certain sense, some of the responsibility in that regard might be considered to fall on him and his Office. Although he himself did not provide formal legal opinions very often, consideration should perhaps be given to issuing such opinions on specific points of concern more frequently, since, although non-binding, a formal legal opinion by the United Nations Legal Counsel would hopefully carry some weight.

44. Mr. RUDA SANTOLARIA said that he would be interested to hear the United Nations Legal Counsel's thoughts on the role of clear legal responses in terms of meeting the very serious threats to international peace and security posed by, in particular, terrorism and violent extremism.

45. Ms. ORAL said that, in the light of recent developments, including the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and the June 2017 United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, she would like to know whether the United Nations Legal Counsel foresaw that oceans issues would continue to gain increasing importance and, if so, whether the Division for Ocean Affairs and the Law of the Sea, in particular, would have available to it the resources to respond to future challenges.

46. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that terrorism, together with climate change and

[296] Agreement on the resolution of the conflict in the Republic of South Sudan, signed at Addis Ababa on 17 August 2015, S/2015/654, annex.

migration, was indeed one of the most important challenges on the multilateral agenda. Some of the most interesting legal work relating to the fight against terrorism currently taking place in the Office of Legal Affairs concerned discussions regarding the nature of peacekeeping mandates, in particular their robustness and how far such mandates could go in support of antiterrorism activities. In particular, he had in mind the discussions concerning MINUSMA and support for the French forces of Operation Barkhane fighting terrorism in the north of Mali. As those discussions were ongoing, it was not yet clear what the final outcome would be.

47. Regarding oceans issues, he, as focal point of UN-Oceans, and his Office had been very involved in the June 2017 Operation Barkhane and the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. In his view, oceans-related matters and Sustainable Development Goal 14, in particular, would have more prominence in coming years, since, among other things, discussions in those regards were a way of keeping the closely related issue of climate change high on the multilateral agenda. In terms of resources, the Division for Ocean Affairs and the Law of the Sea was adequately funded at the current time; however, if new mandates were attributed to the Office of Legal Affairs, he would address the question of resources with Member States in an open manner.

48. The CHAIRPERSON thanked the United Nations Legal Counsel for his statement and interesting and detailed replies to members' questions.

Cooperation with other bodies

[Agenda item 11]

Statement by representatives of the Council of Europe

49. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Kaukoranta, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), 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, and invited them to address the Commission.

50. Ms. KAUKORANTA (Chairperson of the Committee of Legal Advisers on Public International Law) said that she welcomed the opportunity that was offered every year to CAHDI to present its work to the Commission. CAHDI, which was composed of the legal advisers of the ministries of foreign affairs of Council of Europe member States, as well as representatives of observer States and international organizations, held biannual meetings with a view to, among other things, discussing topical issues and promoting exchanges of national experiences and practices. In addition, CAHDI played an important role in fostering cooperation between the Council of Europe and the United Nations through, for example, meetings with the United Nations Legal Counsel and the President of the International Court of Justice.

51. An important initiative in which CAHDI had recently been involved related to the draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe. Those clauses had been prepared by the Treaty Office of the Council of Europe in order to update the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, as adopted by the Committee of Ministers of the Council of Europe in 1980, in order to take account of developments that had occurred during the previous four decades within the treaty-making process at the Council of Europe. Since 1980, treaties concluded under the auspices of the Council of Europe had become more varied not only with regard to the subject matters addressed, but also in relation to their ever wider reach beyond Europe. That global reach and transnational character of the recent Council of Europe conventions and protocols had led to an increased participation of non-member States, the European Union and international organizations. Currently, of the 221 treaties concluded within the Council of Europe, 152 were open to non-member States upon invitation by the Committee of Ministers. Since 2012, the Treaty Office had received 96 requests from non-member States to become party to Council of Europe conventions. Similarly, given a significant increase in the use of additional and amending protocols to complement or modernize existing conventions, it had become necessary to prepare specific clauses for those instruments as well. It had been felt, however, that specific model final clauses for instruments entitled "agreements" were no longer needed, as no such instruments had been drafted under the auspices of the Council of Europe since 1996. As had been the case in 1980, the draft prepared by the Treaty Office had been submitted to CAHDI, which, thanks to the invaluable experience of its members, had helped ensure that the revised version currently before the Committee of Ministers for adoption took into account the latest developments of treaty law.

52. In its capacity as the European Observatory of Reservations to International Treaties, CAHDI examined reservations and declarations subject to objection, thereby promoting and monitoring States' adherence to the rules of public international law in that field. CAHDI examined the reservations and declarations made both to Council of Europe conventions and to conventions deposited with the Secretary-General of the United Nations. In carrying out that examination, CAHDI made use of the reservations dialogue, which allowed States that had formulated a problematic reservation to have an opportunity to clarify its scope and effect and, if necessary, tone it down or withdraw it, while enabling other delegations to understand the rationale behind reservations before formally objecting to them. In that connection, CAHDI had recently noted a revival of a trend of States subordinating the application of the provisions of a convention to their domestic law; of course, such reservations were inadmissible or objectionable under international law due to reasons of legal uncertainty and also because they were contrary to the object and purpose of the treaties concerned. At its recent meetings, CAHDI had discussed the use of reservations and declarations to international treaties for highlighting the non-recognition of a State by another or because of a territorial dispute.

53. An example of the contribution of CAHDI to the development of international law was the interesting discussion currently taking place within the Committee on the question of the settlement of disputes of a private character to which an international organization was a party. The immunity of international organizations in many cases prevented individuals who had suffered harm from conduct of an international organization from bringing a successful claim before a domestic court. That immunity had been increasingly challenged on an alleged incompatibility of upholding immunity with the right of access to court. While the topic was of practical importance for the Council of Europe itself, it obviously went beyond the European regional framework and was a good example of the pioneer role of CAHDI, which acted as a testing ground for subjects which currently were more difficult to discuss at a more universal level because of the greater number of actors involved. CAHDI took full advantage of its ability to focus pragmatically on issues that could not at present be addressed in the same way within other international organizations.

54. Turning to the contribution of CAHDI to the work of the International Law Commission, she said that among the many items on the CAHDI agenda that related to the topics considered by the Commission was the Declaration on Jurisdictional Immunities of State Owned Cultural Property. The Declaration, which had been developed within the framework of CAHDI, was a non-legally binding document that expressed a common understanding of *opinio juris* concerning the fundamental rule that a certain kind of State property, namely cultural property on exhibition, enjoyed immunity from any measure of constraint, such as attachment, arrest or execution, in another State. By signing the Declaration, a State recognized the customary nature of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had not yet entered into force. In January 2017, as part of efforts to raise awareness of the Declaration beyond the boundaries of the Council of Europe, the Permanent Representatives of Austria and Czechia to the United Nations had transmitted to the Secretary-General of the United Nations a letter requesting that the Declaration be circulated among Member States for information purposes under the agenda item "The rule of law at the national and international levels" of the General Assembly.

55. In conclusion, she said that the International Law Commission and CAHDI shared a common goal of promoting the role of public international law in international relations. CAHDI would continue its work on, for instance, issues relating to treaty law, immunities, sanctions, case law relating to public international law, peaceful settlement of disputes and international criminal justice. While doing so, it would always welcome any input from or interaction with the Commission.

56. 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 the main priorities of the current Czech chairpersonship of the Committee of Ministers related to the protection of human rights of persons belonging to vulnerable or disadvantaged groups and to promoting gender equality. In that connection, particular emphasis was placed on the implementation of the recommendations of the European Commission against Racism and Intolerance and the implementation of the Framework Convention for the Protection of National Minorities and of the European Charter for Regional or Minority Languages. A further important objective of the Czech chairpersonship concerned the implementation of the recently adopted Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe for the period from 2017 to 2019.[297]

57. Turning to recent developments concerning treaty law within the Council of Europe, in particular declarations of derogation under article 15 of the European Convention on Human Rights, she said that the Governments of France, Turkey and Ukraine had extended the declarations of a state of emergency in their respective countries allowing them to derogate from certain obligations under the Convention. With regard to France, on 21 December 2016, the Secretary General of the Council of Europe had received a notification indicating that the state of emergency had been extended for a further period of six months until 15 July 2017. In relation to Turkey, the declaration of derogation under article 15 of the Convention had been transmitted to the Secretary General in July 2016 following the attempted *coup d'état* of 15 July 2016. Further declarations concerning the extension of the state of emergency had been transmitted to the Council of Europe in October 2016 and January 2017, and the declaration of derogation from certain rights had currently been prolonged until 18 July 2017. In the meantime, the first cases concerning measures taken under the state of emergency had reached the European Court of Human Rights. Applications in four cases had been declared inadmissible for failure to exhaust all domestic remedies, and so the Court had not examined the complaints on the merits. More than 11,000 applications were currently pending before the Court concerning cases arising from the failed coup attempt.

58. As a result of the close cooperation between the Council of Europe and the Turkish authorities, a national commission had been established to investigate alleged human rights violations related to, *inter alia*, dismissals, school closures and the confiscation of private property.

59. Other Council of Europe bodies had scrutinized the measures adopted by Turkey during the state of emergency. In its Opinion on Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016[298] and its Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media,[299] the European Commission for Democracy through Law (Venice Commission) had acknowledged the right of a democratically elected Government to defend itself, including by resorting to extraordinary measures. It had also emphasized, however, that

[297] Document CM(2017)54-final, adopted at Nicosia on 19 May 2017.

[298] Opinion No. 865/2016, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9–10 December 2016) [CDL-AD (2016)037].

[299] Opinion No. 872/2016, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10–11 March 2017) [CDL-AD (2017)007].

measures such as the mass liquidation of media outlets on the basis of emergency decree laws, without individualized decisions, and without the possibility of timely judicial review, were unacceptable under international human rights law.

60. On 9 June 2015, the Secretary General of the Council of Europe had been notified by the Government of Ukraine of its decision to have recourse to article 15 of the European Convention on Human Rights. Since then, the Government had, on three occasions, transmitted an updated list of localities in the Donetsk and Luhansk regions that were under the total or partial control of the Government and were covered by the derogation, which remained in place.

61. With respect to the supervision of the execution of judgments of the European Court of Human Rights, in the case of *Ilgar Mammadov v. Azerbaijan*, the applicant remained in detention despite the fact that the European Court of Human Rights had found that his deprivation of liberty violated not only article 5 but also article 18 of the European Convention on Human Rights. Following a secretariat mission in January 2017 under article 52 of the Convention, the Government of Azerbaijan had submitted an action plan to the Committee of Ministers that included the adoption of legislative measures to execute the Court's judgment in that case. However, as the Committee of Ministers had underlined in December 2016, the continuing arbitrary detention of Ilgar Mammadov constituted a flagrant breach of obligations under article 46, paragraph 1, of the Convention, and the Committee was considering referring to the Court the question of whether Azerbaijan had failed to fulfil its obligation to execute the Court's judgments.

62. Regarding recent developments concerning other Council of Europe conventions, the revised Council of Europe Convention on Cinematographic Co-production, which had been opened for signature on 30 January 2017 in Rotterdam, the Netherlands, would enter into force for those States that had already ratified it on 1 October 2017. The Council of Europe Convention on Offences relating to Cultural Property had been opened for signature on 19 May 2017 in Nicosia and had, on that occasion, been signed by six States, including Mexico, a non-member. The Convention was aimed at preventing and combating the illicit trafficking and destruction of cultural property, in the framework of the Council of Europe's action to fight terrorism and organized crime. The Convention, which was the only international treaty dealing specifically with the criminalization of the illicit trafficking of cultural property, established a number of criminal offences, including theft, unlawful excavation, importation and exportation, illegal acquisition and placing on the market. The Convention would enter into force once it had been ratified by five States, including at least three member States of the Council of Europe. The Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was the subject of ongoing negotiations, and the possibility of it entering into force by tacit acceptance was being explored.

63. Mr. VÁZQUEZ-BERMÚDEZ, noting that the Declaration on Jurisdictional Immunities of State Owned Cultural Property was viewed as expressing a common understanding, within the framework of the Council of Europe, of relevant *opinio juris*, asked how CAHDI intended to go about achieving a more global understanding of such *opinio juris*, including within the United Nations system.

64. He said that he wished to know the extent to which the Council of Europe Convention on Offences relating to Cultural Property had helped to overcome the limitations of similar instruments, most notably the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It was typically difficult, for example, to demand the restitution of cultural property that had been exported illicitly. Domestic courts tended to afford protection to holders in good faith, and the burden of proof fell on the claimant, but it was hard to prove that a clandestine excavation had taken place. He would appreciate information on how those challenges had been addressed in the negotiations and final text of the Convention.

65. Ms. KAUKORANTA (Chairperson of the Committee of Legal Advisers on Public International Law) said that the initiators of the Declaration on Jurisdictional Immunities of State Owned Cultural Property had already taken steps to have the Declaration circulated among United Nations Member States for information purposes. The Council of Europe would work to raise the global profile of the Declaration and ensure the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had not yet received the required number of ratifications.

66. 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 the Declaration had been signed by a non-member State of the Council of Europe, namely Belarus.

67. The Council of Europe Convention on Offences relating to Cultural Property had been developed in response to the use, in some countries, of the mass destruction of cultural property as a weapon of war. The Convention covered theft and sought to overcome some of the limitations of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, though she could not claim that it represented a panacea in that regard. The fact that the burden of proof in restitution cases fell on the claimant would continue to pose a significant obstacle. She would be happy to provide the Commission with a detailed report on the difficulties encountered during the negotiation of the Convention.

68. Mr. ŠTURMA asked whether CAHDI, as the European Observatory of Reservations to International Treaties, had envisaged the possibility of examining the quality of derogations under article 15 of the European Convention on Human Rights.

69. Mr. PARK, noting that the European Convention on Human Rights was not open to non-member States of the

Council of Europe, asked what criteria were used when deciding which Council of Europe conventions should be open to non-members.

70. Ms. LEHTO said that she would be grateful for information about the extent to which CAHDI referred to the Commission's 2011 Guide to Practice on Reservations to Treaties[300] and about the ratification status of the Convention on Cybercrime.

71. Mr. HASSOUNA, noting that the issue of sanctions had been placed on the agenda of CAHDI, said that he wished to know what aspects of the issue would be discussed. He would also appreciate details of whether and, if so, how CAHDI planned to strengthen its relationship with other regional bodies concerned with international law, such as the Inter-American Juridical Committee and the African Union Commission on International Law.

72. Ms. KAUKORANTA (Chairperson of the Committee of Legal Advisers on Public International Law) said that the Commission's Guide to Practice on Reservations to Treaties had provided a valuable contribution to the work of CAHDI, and that she personally had used the Guide when faced with questions of interpretation. The reservations dialogue offered an opportunity for member States of the Council of Europe to discuss outstanding reservations during meetings of CAHDI. If a reservation was formulated by a non-member State, an attempt was made to obtain information from that State prior to the subsequent meeting of CAHDI, provided that was possible within the time limit for objections. It was for the European Court of Human Rights to examine the quality of derogations under article 15 of the European Convention on Human Rights, and she did not foresee any institutional deliberations on the matter within CAHDI. The issue of sanctions had been on the agenda of CAHDI for a long time and would continue to be discussed, particularly in the light of the case law of the European Court of Human Rights and the European Court of Justice.

73. 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, in terms of opening Council of Europe conventions to non-member States, the European Convention on Human Rights was a very specific case. The general policy with regard to all other conventions, especially over the previous two decades, had been to encourage the accession of non-member States. Although she did not have comprehensive information on the ratification status of the Convention on Cybercrime to hand, she wished to inform the Commission that Chile, Senegal and Tonga were the States that had most recently acceded to the Convention, with Senegal having also acceded to the Additional Protocol thereto. The previous day, the Committee of Ministers had agreed to explore the possibility of Nigeria acceding to the Convention. In order for CAHDI to establish formal relations with other regional bodies concerned with international law, a formal request for observer status had to be submitted to the Council of Europe.

The meeting rose at 1.05 p.m.

3372nd MEETING

Tuesday, 11 July 2017, at 10.05 a.m.

Chairperson: Mr. Eduardo VALENCIA-OSPINA (Vice-Chairperson)

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (*continued*)[*] (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

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 *jus cogens* (A/CN.4/706).

2. Mr. KOLODKIN said that article 53 of the 1969 Vienna Convention was undoubtedly the starting point for examining the whole legal regime of *jus cogens*. That regime included the notion of peremptory norms, their effects within the scope of the law of treaties, the law of responsibility in the context of jurisdiction, and so on. If one was to speak of the definition or notion of the peremptory norm, article 53 merely served as a framework, and not a starting point, for considering the question of how to define peremptory norms. Draft conclusion 1[301] restricted the scope of the topic to peremptory norms of general international law, and, as had been stated in the interim report of the Drafting Committee the previous year, that was without prejudice to the possibility of the existence of regional *jus cogens*. Mr. Nolte had referred to the possible existence not only of regional *jus cogens* but also of "particular" peremptory norms. It was to be hoped that the Special Rapporteur would pursue that issue. The fact that the Commission was dealing only with peremptory norms of general international law without prejudice to the possible existence of regional or particular norms of *jus cogens* should be made clear in the draft conclusions. In that regard, he supported the Special Rapporteur's suggestion to change the name of the topic.

[300] 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 corrigenda 1–2, pp. 23 *et seq*. See also General Assembly resolution 68/111 of 16 December 2013, annex.

[*] Resumed from the 3370th meeting.

[301] For draft conclusion 1 proposed by the Special Rapporteur in his first report, see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

3. The definition of a peremptory norm of general international law adopted by the Drafting Committee in draft conclusion 2[302] reproduced the definition set out in article 53 of the 1969 Vienna Convention. Although that may have been the only possible approach, it presented certain difficulties. One lay in the Special Rapporteur's decision to use only two of the three criteria laid down in article 53 as the criteria for the identification of *jus cogens*, and to consider the means by which a *jus cogens* norm could be modified as a description of *jus cogens*, rather than as one of such criteria. Mr. Murphy's and Mr. Park's critiques in that regard deserved attention. The Drafting Committee had viewed the fact that a norm of *jus cogens* could only be modified by a subsequent norm of general international law having the same character as a key element of the definition contained in the 1969 Vienna Convention.

4. The Special Rapporteur had pointed out in his second report that the first sentence of article 53, which stipulated that a treaty was void if, at the time of its conclusion, it conflicted with a peremptory norm of international law, was not definitional but set out the consequence of a conflict between a treaty provision and a norm of *jus cogens*. Jiménez de Aréchaga had already taken the view that the definition of *jus cogens* in article 53 was based on the legal effects of a rule and not on its intrinsic nature. If that were the case—and he believed it to be so—the Commission should include the consequences of conflicts between a treaty provision and a peremptory norm of general international law as one of the criteria for identifying *jus cogens* norms. The work of the Special Rapporteur tended in that direction. As the criterion of being a norm of general international law did not on its own distinguish a *jus cogens* norm from any others, he had rightly specified the need for norms of *jus cogens* simultaneously to meet that criterion and the criterion of acceptance and recognition by the international community of States as a whole as a norm from which no derogation was permitted.

5. The question of whether it was sufficient for a norm to meet the two criteria chosen by the Special Rapporteur in order to be identified as one of *jus cogens*, distinct from all other norms of general international law, required further consideration. There might be other norms of general international law from which no derogation was permitted, including through "contracting out" by concluding an international treaty. For example, if the Charter of the United Nations were taken to contain norms of general international law, would it be permissible to conclude a treaty derogating from its provisions?

6. Another question was whether it was permissible to derogate from obligations *erga omnes*.

7. At first sight, derogation from such obligations, including by contracting out through a bilateral treaty, was not permitted. If so, then the criterion of non-derogability, even taken in conjunction with the criterion of being a norm of general international law, would not distinguish *jus cogens* norms from some other norms of general international law. More specifically, the issue must first be considered from the point of view of the relationship between peremptory norms, norms providing for obligations *erga omnes* and the obligations set out in the Charter of the United Nations, taking into account Article 103 thereof. In his view, what set *jus cogens* norms apart from all others was their invalidating effect, as provided for in articles 53 and 64 of the 1969 Vienna Convention. It was difficult to think of any other norms of general international law, including those from which it was impossible to derogate by contracting out or otherwise, that would have the same invalidating effect, including on treaties. That was precisely why the second sentence of article 53 must be read in conjunction with the first sentence thereof, and with article 64.

8. The invalidating effect of peremptory norms, not just their non-derogability, was the most important, integral and necessary criterion for their identification. As Grigory Tunkin had observed, a specific feature of an imperative norm was that it did not permit derogation by agreement between two or several States, and an agreement contravening it was invalid. Robert Kolb had also expressed a preference for defining peremptory norms by their effect, which lay in the invalidation of treaty provisions that contradicted norms of *jus cogens*. The Special Rapporteur was intending to examine the effects of peremptory norms in his third report; it would be useful if he would consider the relationship between peremptory norms and other norms of international law from which no derogation was permitted. The Commission should leave open the possibility of returning to the issue of defining peremptory norms and the criteria for identifying them at a later stage.

9. In his second report (paras. 18 to 27), the Special Rapporteur had revisited the issues of the values protected by peremptory norms and of hierarchical superiority, covered in paragraph 2 of draft conclusion 3. The universal applicability of *jus cogens* was in fact included in the definition of general international law contained in paragraph 1 of draft conclusion 5. The values and hierarchical superiority of peremptory norms were considered descriptive. Mr. Murase had rightly referred to them as extra-legal elements; as such, they should not be included in the text of the draft conclusions. If the Special Rapporteur and the Commission believed them to be particularly important, they could be mentioned in the commentary. Legally speaking, the hierarchical superiority of *jus cogens* norms was a result of their invalidating effect. Taking into account the significance of that effect in the identification of *jus cogens* norms, it could be that a second paragraph dealing with the invalidating effect of such norms should be added to draft conclusion 2. Such an addition would bring the definition into line with that contained in article 53 of the 1969 Vienna Convention and would express the concept of the hierarchy headed by *jus cogens*. Scholars had also rightly noted that the hierarchy applied to norms of international law, not the sources thereof.

10. He agreed with the concept of "double consent" applied to peremptory norms and with the Special Rapporteur's statement that the attitude of non-State actors could not constitute acceptance and recognition of peremptory norms by the international community. As many other members of the Commission had said, the international

[302] The Special Rapporteur had proposed draft conclusion 2 as draft conclusion 3 in his first report (see *ibid.*). It was renumbered by the Drafting Committee at the previous session (see *Yearbook … 2016*, vol. I, 3342nd meeting, p. 433, para. 12).

community of States as a whole should be understood as a very large majority of States, not simply a majority; as Roberto Ago had pointed out, it should also include all regions, groupings of States and, he himself would add, legal systems.

11. The Special Rapporteur had taken the view that, as general international law comprised customary international law and general principles of law, only custom and general principles could serve as sources of peremptory norms of general international law, and international treaties could not. However, to the three authors he had cited in the first footnote to paragraph 54 as espousing a different viewpoint could be added a number of others, including El-Arian, McNair, Virally and Zemanek, along with several members of the Commission, particularly Mr. Rajput and Mr. Šturma. In 1993, Tunkin had referred to the Commission's conviction that it was preparing draft articles intended to be part of general international law and to the fact that it never used the terms "general international law" and "customary international law" as synonyms. It was well known that socialist and developing countries had been the principal supporters of consolidating the category of peremptory norms in international law. For them and those who represented their doctrine, the main source of international law, including general international law, was the international treaty. That seemed to be reflected in the Commission's work from the 1960s to the 1980s. The composition of the Commission had changed many times since then, but it was only in the 2000s that it seemed to have begun equating general international law with customary international law in some contexts, as could be seen in its work on the responsibility of States for internationally wrongful acts and the fragmentation of international law. In principle, however, the Commission had never excluded treaties from the possible sources of general international law.

12. He supported Mr. Rajput's comments concerning the meaning of paragraph (4) of the Commission's commentary to draft article 50 of the 1966 draft articles on the law of treaties[303] and consequently disagreed with what the Special Rapporteur had said on the subject in paragraph 55 of his second report. The Commission had clearly recognized that a peremptory norm could be modified by an international treaty. Accordingly, it must acknowledge that a peremptory norm of general international law could be created by a treaty. In citing the principles on the use of force as an example of a norm of general international law of universal application, for example, the Commission had stated that those principles were actually laid down in the Charter of the United Nations, not reflected therein. In his view, international treaties could serve as a source of peremptory norms of general international law, in other words, they could create them directly. A treaty—specifically, a universal, norm-setting international treaty, sometimes called a general international treaty—could stipulate that its States parties could not conclude treaties that contradicted its provisions and that any such treaties would be inherently invalid.

13. The majority of the Commission seemed to consider that the "international community of States as a whole" required for the creation of a peremptory norm of general international law did not necessarily have to comprise all States: a very large majority of States would suffice. That prompted the question of why such an international community of States could not be represented by the parties to an international treaty with very wide representative participation. If the parties to a universal international treaty could establish such a hierarchy, as was provided for in Article 103 of the Charter of the United Nations, why could they not elevate a norm of universal general international law to the status of *jus cogens*? The Special Rapporteur appeared to have come close to admitting such a possibility in paragraph 75 of his report but had stopped just a step away from doing so.

14. The possibility of establishing a peremptory norm by an international treaty gave rise to another question. In his view, the formation of a norm of general international law and its acceptance and recognition as peremptory were not two necessarily sequential stages. They were to be viewed as sequential only under the hypothesis that a peremptory norm was formed from custom. If it was accepted that a peremptory norm could be created by a treaty, then it became evident that all the criteria could be fulfilled simultaneously.

15. In addition to the issues already identified by the Special Rapporteur for future work, he agreed with Mr. Park and Mr. Šturma that consideration should be given to the relationship between peremptory norms, jurisdiction and immunity. After examining the effects of peremptory norms outside the sphere of treaty law, the Commission might come up with some new reasoning about the effects of peremptory norms or their consequences, since the definition of those norms was borrowed from treaty law. He reiterated his suggestion that the Commission leave open the possibility of returning to the definition of peremptory norms and the criteria for identifying them once it had considered the effects of *jus cogens* in areas other than the law of treaties.

16. Ms. LEHTO said that the Special Rapporteur's choice of two criteria for the identification of *jus cogens*, based on article 53 of the 1969 Vienna Convention, was consistent with State practice, decisions of international courts and tribunals, scholarly views and the Commission's earlier work. In all those contexts, article 53 had been treated as a general definition of *jus cogens* for the purposes of international law, including beyond the limits of the law of treaties. Different views regarding those two criteria had nevertheless been expressed during the debate. Mr. Nguyen had proposed that they be construed as three cumulative criteria. Mr. Murphy had suggested that the criteria include the final portion of article 53, which concerned the modification of a *jus cogens* norm, a proposal echoed by Mr Hassouna, Mr. Hmoud and Mr. Kolodkin. While Mr. Nguyen's proposal seemed merely a matter of presentation, it gave rise to the question of whether presenting non-derogability as an independent criterion, and placing it before acceptance and recognition, could give the impression that non-derogability was seen as an inherent quality of *jus cogens* norms. Article 53, however, was fully anchored in the consensual view of international

[303] 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*. For para. (4) of the commentary to draft article 50, see *ibid*., p. 248.

law and made State acceptance the principal—if not the only—test of *jus cogens*.

17. It was important to recall, in that respect, that *jus cogens* was a very special category of international law, constituting fundamental norms with potentially far-reaching effects. The criteria for *jus cogens* must be strict enough to distinguish peremptory norms from other categories of international law. The first criterion presented in paragraph 39 of the second report was not relevant in that sense: that a norm capable of being elevated to the status of *jus cogens* must be a norm of general international law was a necessary precondition for that status but did not help to differentiate peremptory norms from others. Neither was it clear that the second criterion performed that function.

18. Non-derogability, which in the case of *jus cogens* was of a very particular nature, was a term used in other contexts and for other purposes, most obviously, non-derogation clauses in human rights treaties. The Human Rights Committee had noted, in its general comment No. 29 (2001) on derogations during a state of emergency, that proclamation of certain provisions of the International Covenant on Civil and Political Rights as being of a non-derogable nature could be seen partly as recognition of their *jus cogens* nature.[304] It had pointed out, however, that this was not the case for the whole list of non-derogable provisions of the Covenant, and that some provisions had been proclaimed non-derogable solely because it could never become necessary to derogate from such rights during a state of emergency. The enumeration of non-derogable provisions was thus "related to, but not identical with, the question of whether certain human rights obligations [bore] the nature of peremptory norms of international law".[305] The Special Rapporteur might wish to address the issue of non-derogation clauses in human rights treaties in his third report, when he came to consider the consequences of *jus cogens* norms.

19. The two criteria proposed did not seem to make full use of the potential of article 53 of the 1969 Vienna Convention. As pointed out by Mr. Murphy and echoed by others, a further criterion could be seen in the final portion of article 53, stating that a peremptory norm could be modified only by a subsequent norm having the same character. Adding such a requirement to the criteria would raise the threshold and underline the special nature of peremptory norms. In particular, it would be a way to highlight the fact that violations of peremptory norms, such as the practice of torture by some States, did not weaken or alter such norms, which could only be modified by the special procedure described in article 53.

20. In paragraph 18 of his report, the Special Rapporteur referred to three "descriptive and characteristic elements, as opposed to constituent elements (or criteria) of norms of *jus cogens*". It might be asked, however, whether there were any peremptory norms that were not characterized by fundamental values, hierarchical superiority and universal applicability. She echoed the view expressed by Mr. Hmoud, Mr. Nolte and Mr. Šturma that the three elements, in particular the notion that *jus cogens* norms reflected and protected fundamental values of the international community, were essential in complementing the criteria drawn from article 53. Mr. Nolte had pointed out that peremptory status must be linked to the substantive content of *jus cogens* norms and to the values they reflected. The Commission, in paragraph (2) of its commentary to what had become article 53, had likewise emphasized the importance of the content of peremptory norms, stating it was not the form of a general rule of international law but the particular nature of the subject matter with which it dealt that could give it the character of *jus cogens*. She therefore agreed with the Special Rapporteur's statement, in paragraph 76 of his second report, that the content of peremptory norms and the values that such norms served to protect were the underlying reasons for the norms' "peremptoriness", although it was the acceptance and recognition of such status by the international community of States as a whole that identified them as norms of *jus cogens*. The two were intrinsically linked: it was because of their content and the values they reflected that such norms were accepted and recognized as peremptory.

21. The concept of double acceptance presented in paragraph 77 of the report was a useful analytical tool to underline the specific nature of *opinio juris cogentis*. She agreed with the Special Rapporteur that the phrase "international community of States as a whole" meant that the acceptance or consent of States must be given, not individually, but through some collective act. As Conklin had said, the will of States as parts of the international community should not be construed as an aggregate of the particular wills of States.

22. She agreed with other speakers that the draft conclusions required some streamlining and condensing. Nevertheless, she would be in favour of adding a third subparagraph to draft conclusion 4 along the lines of the last sentence of article 53 of the 1969 Vienna Convention, which would entail consequential changes to some of the subsequent draft conclusions. As for draft conclusion 5, paragraph 1, she endorsed Mr. Nolte's point regarding the definition of the concept of general international law, which seemed to exclude the possibility of regional *jus cogens*, and she agreed that it would be better not to take a position on the issue, which the Special Rapporteur intended to address at a later stage. She had no substantive problem with the statements in paragraphs 2 to 4 of draft conclusion 5 to the effect that the three main sources of law could provide a basis for *jus cogens* and she agreed that draft conclusions 6 and 8 could be merged.

23. Regarding draft conclusion 7, she questioned the need for the second sentence of paragraph 1. In paragraph 3, the phrase "a large majority" should be amended to read "a very large majority", in line with the statement by the Chairperson of the Drafting Committee at the United Nations Conference on the Law of Treaties referred to in paragraph 67 of the report.[306] Although draft conclusion 9 was

[304] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40, vol. I), annex VI.

[305] *Ibid*., para. 11.

[306] *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), statement by Mr. Yasseen, Chairperson of the Drafting Committee, 80th meeting, p. 472, para. 12.

closely modelled on draft conclusions 11 to 14 on the topic of the identification of customary international law,[307] the Special Rapporteur had departed from those texts by highlighting the value of the Commission's work.

24. She endorsed the proposal to change the title of the topic to "Peremptory norms of general international law (*jus cogens*)" and the proposals for the future programme of work set out in paragraph 93 of the report. As for the question of whether, on what basis and in what form the Special Rapporteur should present an illustrative list of *jus cogens* norms, it would be preferable to refer to particular *jus cogens* norms in the body of the subsequent report—and ultimately in the commentaries to the draft conclusions—rather than to embark on the potentially time-consuming exercise of drawing up a list.

25. In conclusion, she said that she supported the referral of all the draft conclusions to the Drafting Committee and commended the Special Rapporteur on his work.

26. Sir Michael WOOD said that the Special Rapporteur's approach to the topic was essentially practical, as was appropriate for the Commission's work. The idea of formulating draft conclusions seemed to have been accepted, and the Special Rapporteur's intention that the draft conclusions should reflect the current law and practice on *jus cogens* and avoid entering into theoretical debates was welcome. He endorsed the proposal to change the title of the topic.

27. The topic of *jus cogens* was not easy. For many, it was a concept shrouded in mystery and controversy, the subject of a vast, largely theoretical and often contradictory literature. It was invoked by the courts, but above all in the speculations of authors, far more often than it was actually applied. There were very few rules that seemed to have been accepted as *jus cogens*. That was probably a good thing, as the scope for abuse was obvious. Even, indeed especially, the basic principle of international law, *pacta sunt servanda*, had to give way to *jus cogens*.

28. In view of the need for the Commission to be, as far as possible, consistent with itself, he appreciated the Special Rapporteur's efforts to include many references in his second report to other topics. He had briefly covered the negotiating history of article 53 of the 1969 Vienna Convention in his first report. Given that much of the debate from that period remained highly relevant to the Commission's current work, perhaps a more thorough, systematic and chronological account of the negotiating history—not only of article 53 but also of the other relevant provisions of the 1969 Vienna Convention and the 1986 Vienna Convention— might be needed.

29. Turning to the substantive issues raised by the Special Rapporteur in his second report, he said that, in paragraphs 18 to 30, the Special Rapporteur returned to his proposal—discussed extensively the year before—for a paragraph to be included in the draft conclusions, setting out what he variously described as descriptive characteristics or elements. For the reasons he and others had given, he was not convinced of the merits of such a descriptive paragraph. Nor was he convinced of the distinction that the Special Rapporteur continued to insist on, namely between "constituent elements (or criteria)" for identifying *jus cogens* and "descriptive and characteristic elements" of *jus cogens*, which might be relevant in "assessing" the criteria for *jus cogens* norms. The confusing explanations provided in the second report only confirmed his view that such a provision would not only be superfluous, but potentially harmful. No clear distinction between descriptive elements on the one hand and criteria for identification on the other was apparent from the report, and he wondered whether the Commission might not alter the meaning of article 53 of the 1969 Vienna Convention if it adopted such an approach. Any descriptive elements that might be considered helpful—and he was not convinced there were any—could be mentioned in the commentary to the draft conclusions.

30. The first criterion for identifying *jus cogens* norms was that the relevant norm should be a "norm of general international law". He tried to avoid using the terms "norm" and "general international law", but they could not be avoided in the present context. While the term "general international law" was discussed in the report, it might be worthwhile to explain in the commentary that, in the present context, the term "norm" was simply another word for "rule".

31. A more serious issue was how to clarify the meaning of the term "general international law" in the context of *jus cogens*, bearing in mind the possible wider implications. He drew attention to a footnote to the commentary to draft conclusion 1 of the text on the identification of customary international law, according to which the term "general international law" was used in various ways, including to refer to rules of international law of general application, whether treaty law, customary international law or general principles of law.[308] Also worthy of note were Mr. Kolodkin's interesting comments on the term.

32. The issue under the current topic was how the term was used in article 53 of the 1969 Vienna Convention. The Special Rapporteur seemed to conclude that it referred primarily to customary international law, and might also refer to general principles of law within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, but did not refer to treaty law, though treaty law might reflect general international law. However, he was not sure that the Commission could be so categorical. The question of whether general principles of law within the meaning of Article 38, paragraph 1 (*c*), could be general international law for the purposes of article 53 seemed to depend upon how such principles were viewed.

33. As far as treaties were concerned, it was true that they were rarely general in the sense that they could be binding on all States or virtually all States. As other speakers had observed, however, there was no reason, in principle, why treaties might not be binding in that way. It was difficult not to agree with Mr. Kolodkin's earlier

[307] *Yearbook … 2016*, vol. II (Part Two), pp. 74–79 (draft conclusions 11–14).

[308] See *ibid*., p. 62, footnote 252.

analysis in that regard. Another question, which was not addressed in the second report, was how far norms of general international law bound subjects of international law other than States. That question obviously related to the effects of *jus cogens* and might be taken up by the Special Rapporteur in a future report.

34. A clearer analysis of the second criterion for the identification of *jus cogens* than the second report provided was necessary. He shared the view of many others that the requirement that a *jus cogens* norm "may only be modified by a subsequent norm of *jus cogens*" should also be included. Such a requirement was not only a consequence of *jus cogens*, in the sense that it had to do with what happened after a *jus cogens* norm came into being.

35. One matter that might benefit from closer analysis was the meaning of the two words "accepted and recognized". The Special Rapporteur seemed to explain the phrase by reference to its use in Article 38 of the Statute of the International Court of Justice, yet the drafting history given in paragraph 67 of the report was not very illuminating in that regard. It was not easy to see why the wording of Article 38 should be relevant to the acceptance and recognition of a rule as one from which no derogation was permitted and which could be modified only by a subsequent norm of *jus cogens*. It could not simply be assumed that the terms "accepted" and "recognized" were alternatives, depending on the source concerned. Perhaps they had different meanings and were cumulative, as the ordinary meaning would suggest. For example, it might be thought that "recognition" of *jus cogens* norms as customary international law implied that silence could not suffice for that purpose, whereas it might be evidence of acceptance. It might also be asked why the term "accepted" should come before "recognized", especially since the latter appeared first in the list in Article 38. The Special Rapporteur went into some detail on the question of whether the words "accepted and recognized" referred to general international law rather than to non-derogability, but that was a non-issue since both the English and French texts clearly referred to non-derogability.

36. The expression "as a whole" in "international community of States as a whole", was not adequately explained in the report. It was by no means evident that it meant that only collective acceptance and recognition was possible rather than individual acceptance and recognition. Indeed, by referring to the potential evidence of "acceptance as law" for purposes of identification of customary international law as also relevant for *jus cogens*, the Special Rapporteur seemed to accept that individual acceptance might be relevant. He shared the view that the expression "a large majority" did not capture the requirement; whether the expression "a very large majority" did so was open to question.

37. He was not convinced that the two-step process proposed by the Special Rapporteur for the emergence of *jus cogens* norms was inevitable in every case, though it was methodologically attractive and it was how things quite often worked in practice. The reference in paragraph 40 of the report to the Commission's prior work on the responsibility of States for internationally wrongful acts did not seem to support the two-step process. Perhaps the solution would be to avoid suggesting that the two steps were successive.

38. In conclusion, he agreed that all of the texts should be referred to the Drafting Committee to be made more concise and more consistent.

39. Mr. VÁZQUEZ-BERMÚDEZ said that the Special Rapporteur was to be commended on his very succinct second report, based on extensive research and careful analysis of relevant materials. The draft conclusions he proposed would enable the Commission to make important progress in clarifying the legal nature of *jus cogens* norms and the elements for their identification. He welcomed the decision to use the 1969 Vienna Convention as a point of departure in developing the criteria for *jus cogens* norms, given that the definition and basic elements of such norms contained in the Convention were those generally accepted by States, in international and national jurisprudence and in the literature.

40. In chapter I, section C, of his report, the Special Rapporteur discussed issues arising from the debates in the Commission and the Sixth Committee concerning draft conclusion 3, paragraph 2,[309] and provided further material to support the draft conclusion. According to the latter, *jus cogens* norms protected the fundamental values of the international community, were hierarchically superior to other norms of international law and were universally applicable. Those aspects were inherent in the legal nature of *jus cogens* and explained why the international community had accepted or recognized certain rules as falling within the category of *jus cogens*: they protected, not the individual interests of a State or a group of States, but the general fundamental interest of the international community as a whole or a fundamental shared value. They were thus norms that enshrined the rights and obligations of the utmost importance to the international community, were non-derogable and could be modified only by another *jus cogens* norm. That was in line with the view expressed by the Commission in the commentary to what would ultimately become article 53 of the 1969 Vienna Convention that it was not the form of a general rule of international law but the particular nature of its subject matter that gave it the character of *jus cogens*. Aside from statements by States, there was international, national and regional jurisprudence to support that view.

41. It was generally accepted that *jus cogens* norms were hierarchically superior to other rules of international law, as was borne out by the Commission's 2006 report on fragmentation of international law[310] and various other sources referred to by the Special Rapporteur and clearly enunciated in articles 53 and 54 of the 1969 Vienna Convention. The fact that *jus cogens* norms were non-derogable and could be modified only by a norm of the same character also implied their hierarchical superiority. He

[309] For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

[310] *Yearbook … 2006*, vol. II (Part One) (Addendum 2), document A/CN.4/L.682 and Add.1.

agreed with the Special Rapporteur that such norms were universally applicable and binding on all States and other subjects of international law.

42. Referring to paragraph 18 of the report, he said that the higher rank of *jus cogens* norms in the hierarchy, instead of being a criterion for their formation or identification, was a logical legal effect of *jus cogens* norms, owing to their peremptory, non-derogable nature and the fact that they could be modified only by rules of the same character and status.

43. In chapter II of his report, the Special Rapporteur discussed the criteria for the identification of *jus cogens* norms based on the definition contained in article 53 of the 1969 Vienna Convention, which comprised three elements. Yet he employed only the first two elements, discarding the third one, namely that such norms could be modified only by a subsequent norm of *jus cogens*. He personally considered that all three elements were necessary. While he endorsed the first criterion identified by the Special Rapporteur—that the norm must be a norm of general international law—he found the analysis of the criterion in the report to be unclear, particularly the references to *lex specialis* and to rules which could be derogated from by more specific rules. In fact, the general or special character of a *jus cogens* norm was determined by its content. Moreover, under the current topic, a norm of general international law was defined as one that was binding on all States and other subjects of international law. That was apparently the intent of draft conclusion 5, paragraph 1, although it was not clear what was meant by the phrase "general scope of application".

44. The importance of the first criterion was confirmed by that fact that it was mentioned several times in relation to norms of *jus cogens* in the 1969 Vienna Convention. He expressed support for the Special Rapporteur's proposal to change the title of the topic to "Peremptory norms of general international law (*jus cogens*)" so as to fully reflect the reference to that category of norms contained in the Convention. As the Special Rapporteur stated in paragraph 51 of the report, the dearth in practice of instances when general principles of law were said to be the basis of a norm of *jus cogens* did not justify the conclusion that general principles of law could not form the basis of *jus cogens* norms. In addition to the examples given in the report, he drew attention to the 2003 advisory opinion of the Inter-American Court of Human Rights on the *Juridical Condition and Rights of Undocumented Migrants*, which stated that "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws" (para. 101 of the opinion).

45. The notion that general principles of law could constitute a basis for *jus cogens* norms was broadly supported in the literature and in previous declarations by States; State practice also largely supported the notion that customary international law could serve as a basis for the formation of *jus cogens* norms.

46. While some multilateral treaties, such as the Charter of the United Nations, were of universal or quasi-universal application and could therefore be considered general international law, most treaties were not so considered, since their provisions were binding solely on the parties. Likewise, treaty rules did not themselves generate peremptory norms of general international law; rather, what afforded them peremptory status was acceptance and recognition by the international community of States as a whole that they were rules from which no derogation was permitted and which could be modified only by subsequent *jus cogens* norms. Nevertheless, a relationship sometimes existed between rules of general international law, in particular customary international law, and treaty rules. That was why he generally supported draft conclusion 5, subject to a few amendments, including the redrafting of paragraph 4 to better reflect the potential relationships between treaty rules and *jus cogens* norms.

47. In draft conclusions 4, 6 and 8, the Special Rapporteur had included three elements of the definition of a *jus cogens* norm under article 53 of the 1969 Vienna Convention but, for reasons that were not entirely clear, he had omitted the remaining element, namely, that a *jus cogens* norm could "be modified only by a subsequent norm of general international law having the same character". He argued that the issues relating to that element emerged only after the identification of a norm as a *jus cogens* norm and could therefore not be a criterion for its identification. However, he also recognized that for the purposes of establishing criteria for the identification of such norms, those elements could not be described as legal consequences of or rules for the modification of *jus cogens* norms *per se*, but rather should be considered evidence of that which the international community of States as a whole could be shown to have "accepted and recognized". While the content of the norms was the underlying reason for the norms' "peremptoriness", it seemed that the Special Rapporteur had confused the terms "peremptoriness" and "non-derogability" or had considered them to be synonymous, and as a result had not included the limits to modifying such norms as a criterion for their identification. That approach was unfounded.

48. In his view, article 53 of the 1969 Vienna Convention maintained that "peremptoriness" referred to both non-derogability and the limitations on modifying *jus cogens* norms. While derogation from *jus cogens* norms was precluded, the modification of such norms was not, provided that such modification arose from a subsequent norm having the same character.

49. Using a broad notion of the term "non-derogability", as the Special Rapporteur did in his second report, could result in inconsistencies with the 1969 Vienna Convention. Practice suggested that non-derogability was not the only criterion for "peremptoriness". In addition, the Study Group on fragmentation of international law had suggested in its final report that non-derogability in itself did not necessarily mean that a norm was one of *jus cogens*: it was a necessary but insufficient characteristic. Furthermore, although some had observed that non-derogability as referred to in article 53 was different from non-derogability in human rights instruments, the Human Rights Committee, in its general comment No. 29, had stated that

"[t]he enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law".[311] Therefore, it was clear that non-derogability was not equivalent to "peremptoriness" and that the criteria for identifying a *jus cogens* norm should be aligned with those in article 53 of the 1969 Vienna Convention, which covered both non-derogability and limitations on the modification of *jus cogens* norms.

50. Article 53 of the 1969 Vienna Convention, as originally drafted, had contained no mention of acceptance and recognition by the international community of States as a whole, but it had eventually been amended to include those terms, by analogy with Article 38 of the Statute of the International Court of Justice. However, the words "accepted" and "recognized" should not be viewed as being used cumulatively: the former applied to *jus cogens* rules grounded in customary international law, and the latter, to *jus cogens* rules grounded in general principles of law or, where appropriate, treaty rules. To refer to any given rule of *jus cogens* as being both "accepted" and "recognized" was meaningless, and the literature devoted to the so-called "double acceptance" theory was artificial and erroneous. The evidence necessary to identify a *jus cogens* norm based on a customary norm was the same as that necessary to identify an ordinary norm of customary law, except that such evidence must demonstrate *opinio juris cogentis*. In addition, the evidence necessary to identify a *jus cogens* norm based on a general principle of law was the same as that necessary to identify a general principle of ordinary law, except that it had to show recognition of its peremptory character.

51. An ordinary rule of customary law, meaning one formed from a general practice accompanied by *opinio juris*, could be elevated to a rule of *jus cogens* if the *opinio juris* of States became *opinio juris cogentis*. However, nothing prevented a *jus cogens* norm from emerging directly, without first having constituted a rule of customary international law. Similarly, nothing prevented a general principle of law from being transformed directly into *jus cogens* if its peremptory character was recognized by the international community of States as a whole. He suggested that the draft conclusions be amended accordingly.

52. He supported the Special Rapporteur's proposals in relation to the future work programme and the referral of all the draft conclusions to the Drafting Committee.

53. Mr. JALLOH said that he welcomed the Special Rapporteur's second report, containing an in-depth analysis grounded in relevant State practice, the case law of national and international courts and the writings of highly qualified publicists. In the first part of the report, the Special Rapporteur had rightly placed emphasis on the controversies surrounding draft conclusion 3, paragraph 2, which lay out the characteristic elements of *jus cogens*. He himself supported the Special Rapporteur's ultimate finding, rooted in both practice and doctrine, that the three features identified in draft conclusion 3 were indeed the generally accepted characteristics of *jus cogens* norms and, like him, he had found the controversy around those characteristics somewhat surprising.

54. It would be useful for the Special Rapporteur to clarify the meaning of the phrase "general international law". He did not agree that there was an implicit hierarchy of sources of international law, since treaties, custom and general principles of law could all form the basis of *jus cogens* norms, in accordance with Article 38 of the Statute of the International Court of Justice.

55. Citing the former Secretary-General of the United Nations, Kofi Annan, he said that societies of all types needed to be bound together by common values. Through the development and application of value-based rules to regulate their relations, States could know what to expect of each other and act accordingly, thus creating international stability and reducing the use of violence. International law, specifically, was based on the bedrock of State consent. It enabled States to manage their differences by giving them the flexibility to adopt, amend, derogate from and even abrogate rules—the so-called *jus dispositivum*. Rules of *jus cogens* were an exception: they were rules so fundamental to the very existence of international society that States could not simply derogate from or abrogate them. In other words, their peremptory nature derived from their reflection of fundamental universal values of the international community as a whole. He did not share the views of some Commission members that *jus cogens* norms protected, but did not necessarily reflect, such fundamental values.

56. The Commission's work on the topic of *jus cogens* in the lead-up to the 1969 Vienna Convention had played a crucial role in consolidating the status of peremptory norms as part of international law. With the adoption of the Convention, particularly articles 53, 64 and 66, the notion of *jus cogens* had become a basic feature of positive international law.

57. That *jus cogens* norms reflected the values of the international community was clear from the various statements in the Sixth Committee and from the rulings of international courts. While it seemed clear that the notion of peremptory norms was no longer under credible challenge, the question of which criteria should guide its identification and content was still under debate. As correctly noted by the Special Rapporteur in his first report, the differences of view in that regard had largely flowed from philosophical differences on the foundations of *jus cogens* and its content. While the debate on naturalism and positivism could be helpful in framing the Commission's discussion, the Commission's work must be rooted in State practice. It might nonetheless be advisable for the Special Rapporteur to clarify which philosophy was guiding his work, if nothing else for the purpose of appeasing concerned States.

58. He agreed that the starting point for the elements of *jus cogens* norms was set out in article 53 of the 1969 Vienna Convention. However, it was important to go beyond the starting point and consider the effects of *jus cogens* on treaty law and on other sources of international law. Indeed, while it might have been prudent for the Commission to adopt a more restrictive approach

[311] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40, vol. I), annex VI, para. 11.

in 1996, that approach must now necessarily give way to a more expansive one. That said, in fleshing out the basic elements of article 53, appropriate emphasis must be placed on State practice and on national and international court decisions.

59. The views of the Commission's membership in 2016 as to whether it should produce an illustrative list of *jus cogens* norms had been evenly split. However, with the Commission's new composition, the same even split of views might no longer exist. So far, those in favour of providing an indicative list appeared to be in the majority. He urged the Special Rapporteur to retain his original proposal, namely to offer illustrations of *jus cogens*; in his own view, that represented the key added value of the project.

60. While he understood the methodological difficulties involved in producing a list, he did not think that long debates and detailed analysis of substantive areas of international law would necessarily be required in order simply to draw up a non-exhaustive list of sample *jus cogens* norms. The Commission had already presented a non-exhaustive list, in the commentary to article 26 of the draft articles on the responsibility of States for internationally wrongful acts: "peremptory norms [that] are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[312] That list was unlikely to be contested. In addition, the report of the Study Group on fragmentation of international law gave a list of the most frequently cited candidates for the status of *jus cogens*. In other words, the Commission had both a preliminary, non-exhaustive list and a list of prospective norms based on which it could start its work.

61. In order to make clear that it was not embarking upon the production of an exhaustive list, to the potential detriment of other candidate norms, the Commission could employ the frequently used formulation of "including, but not limited to", for example in draft conclusion 9, paragraph 2, or in the commentary thereto. He supported the views expressed by Mr. Hassouna and Mr. Park in that regard. Ultimately, the Commission must make every effort to produce at least a minimal list of examples of *jus cogens* relevant for the progressive development and codification of international law. However, if that was not feasible or not deemed desirable by the majority of the members, a compromise could be to craft a list of candidates for *jus cogens* status, rather than *jus cogens* norms *per se*.

62. He supported the Special Rapporteur's proposal to change the name of the topic to "Peremptory norms of general international law (*jus cogens*)", although the concern raised about the vagueness of the term "general international law" should be kept in mind. He shared the views expressed by Mr. Nolte in that regard, including in relation to particular or regional *jus cogens*.

63. As to the future programme of work, he supported the Special Rapporteur's proposal to examine in his third report the effects of *jus cogens*, including in relation to treaty law and other areas of international law. He endorsed the proposals by Mr. Hassouna and Mr. Kolodkin in that regard, but would also propose that the Special Rapporteur should examine whether *jus cogens* could be a source of limitations on the powers of the Security Council. The International Law Association had affirmed that peremptory norms of international law applied both to States and to international organizations. In his separate opinion[313] 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)*, Judge *ad hoc* Lauterpacht had supported the view that such norms unconditionally bound the Security Council, which must respect the core values protected by *jus cogens*, as they were non-derogable—a position that was also supported by a wealth of academic literature. It was therefore important to examine the scope and legal effects of the limitations imposed on the Security Council by the operation of peremptory norms, for example under Article 2, paragraph 4, of the Charter of the United Nations, on the use of force. Additional issues for consideration might be the interaction between *jus cogens* norms and human rights and humanitarian law.

64. The draft conclusions were generally well written and well structured and followed a logic that was easy to understand and justify. Nonetheless, a number of interesting proposals for merging some of the draft conclusions had been made, and he had the impression that at least one or two could indeed be condensed. The thrust of the entire project was to clarify the concept of *jus cogens*, but having overly long and repetitious conclusions might merely generate confusion. He agreed that the Special Rapporteur should revisit the notion of the "international community as a whole" and the threshold of a "large majority of States" and he supported referring all the draft conclusions to the Drafting Committee.

65. Mr. RUDA SANTOLARIA said that he agreed with the Special Rapporteur that *jus cogens* norms reflected the fundamental values and interests of the international community and were hierarchically superior to other norms of international law in that derogation from them was impermissible. As the Special Rapporteur noted, *jus cogens* norms were not simply norms of general international law, but must be accepted and recognized by the international community of States as a whole through *opinio juris cogentis*. Reference could be made to the fundamental values and interests of the international community when the overwhelming majority of States accepted and recognized that there could be no derogation from the norms that reflected those values and interests.

66. He fully agreed with the emphasis placed on the universal application of *jus cogens*, including the very relevant reference to the advisory opinion of the Inter-American Court of Human Rights on the *Juridical Condition and Rights of Undocumented Migrants*, in which the Court had noted that the principle of equality and non-discrimination "belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals" (para. 110 of the opinion).

[312] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85 (para. (5) of the commentary to draft article 26).

[313] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993.

He also welcomed the fact that the Special Rapporteur had taken an objective approach based on State practice and the decisions of international tribunals, rather than a positivist position or one based on natural law. He agreed with the emphasis placed on the two criteria for identification as a norm of *jus cogens*: that it must be a norm of general international law and that it must be accepted and recognized by the international community of States.

67. In that respect, as had been noted by others, it was fundamental to understand what was meant by general international law. As he understood it, it comprised customary international law and general principles of law, which were a specific source of international law. However, for a general principle of law to be considered a *jus cogens* norm, it must also be customary in nature. Indeed, as noted in paragraphs 43 to 47 of the report in relation to the jurisprudence of international and national courts, *jus cogens* norms were primarily based on customary law.

68. He agreed with the Special Rapporteur that treaty law did not qualify as *jus cogens* but that it could reflect or provide evidence of the existence of norms of customary international law that could reach the status of *jus cogens*; that was particularly relevant with respect to certain multilateral treaties. Given the close connection between both sources of international law highlighted in the report, treaties could codify existing rules of customary law, crystallize emerging rules or come to reflect a rule based on practice; nevertheless, the norm of general international law was not the treaty but rather the rule of customary international law, which must combine practice with *opinio juris sive necessitatis*.

69. In addition to being a rule of general international law, the norm must also be accepted and recognized as a peremptory norm from which there could be no derogation by the international community of States. On that point, he agreed with the Special Rapporteur and other members of the Commission that States were the subjects of international law that created *jus cogens* norms, but also that article 53 of the 1969 Vienna Convention referred to the international community of States collectively and not individually. He stressed that the acceptance and recognition of all States was not required, as that could give rise to the absurd situation in which a State or small group of States could attempt to block a widespread conviction that a particular norm of general international law was peremptory in nature. However, he agreed with certain other members that a large majority of States would not suffice; as had been noted by João Ernesto Christófolo, cited in the penultimate footnote to paragraph 67 of the report, it must be the "overwhelming majority of States".

70. He supported the proposal made by the Special Rapporteur to change the name of the topic to "Peremptory norms of general international law (*jus cogens*)". He also supported the draft conclusions, albeit with several caveats. First, as had been noted by other members, repetition could be avoided by merging some of the six draft conclusions: they could be reduced to three without affecting the substance or diluting the Special Rapporteur's arguments. In draft conclusion 5, paragraph 3, the reference to general principles of law should be more nuanced, as he had already discussed. He proposed replacing the word *actitud* in the Spanish version of draft conclusion 7, paragraph 1, with *conciencia* or *convicción*. In draft conclusion 7, paragraph 3, "large majority" should be replaced with "overwhelming majority".

71. He supported the proposed programme of work. It was important to address the way in which a *jus cogens* norm could be amended or derogated from by another *jus cogens* norm, as well as to analyse possible contradictions between *jus cogens* norms and to consider whether to refer to regional *jus cogens*, as some had suggested.

72. With regard to the possibility of drawing up an illustrative list, he agreed with Mr. Rajput that it would be most useful for the Commission to provide a methodology for identifying *jus cogens* norms. If concrete examples were cited, it would be necessary to proceed with caution, to include only those whose status as peremptory norms of general international law was absolutely clear and to avoid an overly long or descriptive list that might give the impression that it was exhaustive, which would not be in line with the evolutive nature of *jus cogens*, under articles 53 and 64 of the 1969 Vienna Convention.

73. In conclusion, he was in favour of sending the proposed draft conclusions to the Drafting Committee.

74. Mr. REINISCH said that the Special Rapporteur's excellent second report on *jus cogens* contained very useful sections on the criteria for *jus cogens*. Regarding whether the Commission should draw up an illustrative list of *jus cogens* norms, such a list, whether it was appended to the draft conclusions in an annex or included in the conclusions themselves, would be most useful and would provide exactly the kind of guidance that was expected from the Commission. The concern that the list might be seen as exhaustive rather than illustrative would not justify abstaining from such an important task.

75. Turning to the proposed draft conclusions themselves, he said that draft conclusion 4 did not appear to be particularly controversial, as it was based on article 53 of the 1969 Vienna Convention. While it clearly provided the background for the more detailed discussion of the various elements of a norm of general international law in draft conclusion 5 and of the general acceptance and recognition of non-derogability in draft conclusion 6, the relationship between draft conclusion 4 and draft conclusion 3, paragraph 1, was unclear. The ostensible emphasis of draft conclusion 4 was on "identifying" a *jus cogens* norm, but the norm thus identified appeared to be identical to the one defined in draft conclusion 3. As had already been observed by other colleagues, that overlap might lead to confusion among readers; the possibility of streamlining the two draft conclusions so that there was only one provision defining *jus cogens* should therefore be considered.

76. According to the Special Rapporteur's report, only norms of general international law could acquire the status of *jus cogens*. Draft conclusion 5 defined those as norms with "a general scope of application". Like Mr. Murphy, he wondered whether that meant that the norms applied to all States in the sense of being "universally applicable", as suggested by draft conclusion 3, paragraph 2. If so, norms

of general international law would obviously exclude regional custom or the general principles of European law to which the Court of Justice of the European Union had frequently referred when developing its fundamental rights jurisprudence. Like Mr. Nolte, he wondered whether that had really been the Special Rapporteur's intention and, if so, whether the Commission should indeed exclude the possibility of regional *jus cogens* or whether it might not be preferable to simply indicate that the work on *jus cogens* addressed only universal *jus cogens* but did not exclude the possibility of peremptory norms existing on a regional level. According to paragraph 68 of the first report,[314] the subject of whether international law permitted the doctrine of regional *jus cogens* was to be considered in the final report.

77. Draft conclusion 5, paragraph 2, provided that the most common basis for *jus cogens* was customary international law, while paragraph 3 stated that general principles of law within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice could also serve as a basis for *jus cogens* norms. While he was sympathetic to that idea, he wondered whether actual practice could be identified for that proposition. An answer to that question appeared all the more important since the Court and most domestic courts seemed to have limited *jus cogens* norms to customary law. For instance, the language of the International Court of Justice in paragraph 79 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, referring to "intransgressible principles of international customary law", left little scope for other sources to form *jus cogens* norms. Similarly, the jurisprudence cited in paragraphs 44 to 46 of the Special Rapporteur's report in most cases not only allowed for custom to be elevated to *jus cogens*, but described *jus cogens* as a form of elevated custom.

78. In his view, draft conclusion 6 was an example of the duplication that might be remedied at the drafting stage. He did not see what it contained that had not already been said in draft conclusions 3 and 4. A number of questions arose due to the distinction between *opinio juris* and a "qualified" *opinio juris* (more aptly described as *opinio juris cogentis*) required for a norm to become *jus cogens*.

79. Draft conclusion 7 raised the threshold question: how many States had to accept a norm as *jus cogens* in order for it to qualify as having gained the acceptance of the international community of States as a whole? Paragraph 3 should be clarified by a comparison of the high threshold of acceptance required for a norm to qualify as *jus cogens* with the lower threshold for the emergence of customary norms or general principles of law. It might also be prudent to clarify the fact that the required majority must be something like the "very large majority" described by the Chairperson of the Drafting Committee at the United Nations Conference on the Law of Treaties, as cited in paragraph 67 of the report. With regard to the possibility that general principles of law could attain the status of *jus cogens*, he said that it would be helpful if the Special Rapporteur could clarify whether any specific general principle of law had yet been considered to be *jus cogens* by States and, if so, how such recognition had come about. That would also be most welcome since the report gave the impression that the Special Rapporteur's extensive analysis of cases related only to customary international law.

80. Draft conclusion 8, as currently worded, did not appear to add much to illuminate the question of how the requirement of acceptance differed for *jus cogens*, customary international law and general principles of law. Instead, it merely reiterated what had already been reflected in draft conclusions 3, 4 and 6, namely that *jus cogens* norms were those that were considered to be non-derogable by States. It might be helpful to hear the Special Rapporteur's view on whether *opinio juris cogentis* should differ from regular *opinio juris* only with regard to its content or also with regard to form. In any event, a different wording might give guidance on the question.

81. Draft conclusion 9 discussed the different types of evidence of the existence of a *jus cogens* norm. The wording of the draft conclusion suggested that the pronouncements of international courts and tribunals were on the same plane as the positions of States themselves. That was somewhat in conflict with draft conclusion 7, which provided that only "the attitude of States" was relevant, as well as the status of judgments as subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

82. In conclusion, he supported sending the draft conclusions to the Drafting Committee.

The meeting rose at 1.05 p.m.

3373rd MEETING

Wednesday, 12 July 2017, at 10 a.m.

Chairperson: Mr. Eduardo VALENCIA-OSPINA (Vice-Chairperson)

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (*continued*) (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CISSÉ, commenting first on the criteria for identifying *jus cogens*, said that it might be possible to argue

[314] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 68.

that there were four criteria, including the two cumulative criteria identified in the second report (A/CN.4/706). Given that the definitional elements contained in article 53 of the 1969 Vienna Convention must be regarded as an interrelated, indivisible whole, the third criterion was the non-derogability that resulted from the peremptory nature of *jus cogens*. It was a vital element because, without it, *jus cogens* was meaningless and could not achieve its prime objective of protecting fundamental human values. Non-derogability was the element that enabled a peremptory norm to produce its full legal effects, made it a *sui generis* norm in the hierarchy of norms and distinguished *jus cogens* from and gave it precedence over *jus dispositivum* and customary law. It was therefore an independent and indeed the most decisive criterion for the identification of peremptory norms.

2. The fourth criterion, which might be described as the "equivalence of norms", stemmed from the portion of the sentence in article 53 which recognized that the norm in question could be modified only by a subsequent norm of general international law having the same character. Thus, if the new norm did not have the same character, it was void because it conflicted with the old peremptory norm. He therefore concurred with Mr. Murphy that this clause constituted a further criterion for the identification of *jus cogens*. That fourth criterion was as fundamental as the first three because, in the event of a conflict between peremptory norms, it would enable domestic or international courts to determine the norms which could be qualified as *jus cogens*. That criterion was well founded, because the first sentence of article 53 stated that any treaty that conflicted with a peremptory norm of general international law at the time of its conclusion was void. As soon as a conflict arose between an earlier peremptory norm and the new norm, the treaty in question must be automatically declared absolutely void.

3. On closer examination, however, what appeared to be a fourth criterion was not truly independent in that it could not be separated from the third criterion, since it simply buttressed the non-derogability criterion in the event of a conflict between two peremptory norms that did not have the same character. It could therefore be inferred that the third criterion, non-derogability, was in itself sufficient to prevent the formation of any new peremptory norm that was contrary to its predecessor. In other words, the condition set by article 53 that a peremptory norm could be modified only by a subsequent norm of general international law having the same character was intrinsic to the criterion of the non-derogability of any peremptory norm of international law. For that reason, the final conclusion must be that article 53 contained three criteria for the identification of *jus cogens*, namely that the norm in question was a norm of international law, that this norm was accepted and recognized by the international community and that it was non-derogable owing to its peremptory character.

4. While the Commission had been right to examine only *jus cogens* norms of international law in the report under consideration, and while he accepted that, if norms of *jus cogens* deriving from municipal law conflicted with them, international *jus cogens* norms would prevail, that approach would lead to a fragmentation of that branch of international law. As he took a monistic view of international law, according to which municipal and international law formed a whole and the two orders, albeit distinct in some respects, had points of contact, he was in favour of a comprehensive study of *jus cogens* deriving from both municipal and international law. The Commission's future debates on the topic would gain in value if a study was conducted on the relationship between municipal and international peremptory norms, because they shared the goal of protecting fundamental human rights and fundamental human values.

5. He proceeded on the basic assumption that the central purpose of *jus cogens* as a set of non-derogable norms was to protect the human being and that this protection was guaranteed by the State through its domestic law and by the community of States through international law. If the Commission accepted that both kinds of *jus cogens* existed, the question arose of whether the express reference in article 53 of the 1969 Vienna Convention to a peremptory norm of international law was sufficient reason to conclude that this article excluded *jus cogens* norms recognized in domestic law. In his opinion, article 53 did not draw a clear-cut distinction between two kinds of *jus cogens* that could never be reconciled, because an international court that was called upon to rule on a conflict between peremptory norms would have to refer to State practice—in other words, to domestic law.

6. One example of the vital interconnection between all the peremptory norms protecting fundamental human rights concerned murder and similar crimes. In international law, they were penalized in the context of war crimes, crimes against humanity and genocide, and no derogations were permitted from the provisions of international law covering such crimes. Similarly, in some African States, no exceptions to the prohibition on capital punishment were allowed, in view of the principle that, since all human life was sacred, the community must eschew killing a murderer as a remedy for his or her crime; spilling that person's blood would not right the wrong done to another human being. Some traditional communities in Côte d'Ivoire did not imprison their criminals, because the supreme punishment was to banish them from their community of origin. That traditional form of justice thereby recognized that no one could depart from the scrupulous observance of certain norms, which could be termed peremptory norms resting on ancestral custom. While international law embodied the notion of crimes against humanity for large-scale crimes, some traditional African societies spoke of crimes against the community in the case of murder and similar crimes, even when there was only one victim. The difference between the two legal orders was one of degree, not of nature. That analogy therefore confirmed the existence of peremptory norms of *jus cogens* in both municipal and international law. In that respect, he concurred with Mr. Park and Mr. Nguyen that peremptory norms played an important role at the national and regional levels. For that reason, it was necessary to adopt a more inclusive approach to those peremptory norms, so as to encompass customary and ancestral law, domestic law, regional law and international law. Peremptory norms of international law protecting fundamental human rights could be enriched by traditions, customs and cultures

from around the world, and they in turn could learn a great deal from international law when certain matters concerning fundamental, imprescriptible, non-derogable human rights were at stake. A more thorough study of the interaction and analogies between the peremptory norms of domestic and international law would lead to a *lato sensu* interpretation of article 53 of the 1969 Vienna Convention, which would in turn enable the Commission to gain a holistic understanding of the notion of *jus cogens*. In fact, the distinction between the two kinds of peremptory norms was more theoretical than practical.

7. The study of *jus cogens* could not be confined to treaty law, because article 53 did not deal exhaustively with *jus cogens*. Peremptory norms could be identified in all the pertinent sources in customary international law, domestic or international case law, general principles of law and the fundamental values upheld by ancestral traditions, customs and mores. There were no legal obstacles to that approach, as was shown by the fact that general principles of law had originally been principles applied in the domestic law of civilized nations before being transposed by codification into international law. It was therefore quite conceivable that some *jus cogens* norms existing in municipal law could become peremptory norms of international law.

8. Statelessness was another example of an area in which international law could and must draw on national and regional experience in order to define peremptory norms. International law did not offer a satisfactory response to some issues that directly affected the protection of human rights and that could be deemed matters covered by peremptory norms of international law. It focused on crimes that shocked the conscience of humanity, but seemed to be much more subdued when it came to situations that did not involve bodily harm. Statelessness in fact constituted a grave breach of the fundamental human right to a nationality and to citizenship. Once a stateless person had no nationality, he or she was unprotected by any State from multiple forms of abuse, discrimination and inhuman treatment. Statelessness was therefore a violation of a peremptory norm when a lawful claim to nationality was denied.

9. The example of statelessness demonstrated the difficulty of establishing a hard and fast dividing line between domestic *jus cogens* and international *jus cogens*. Indeed, article 53 of the 1969 Vienna Convention did not seek to draw any such distinction, even though it expressly referred to the peremptory norms of international law. The domestic law of States applying Roman law and common law referred to the notion of public order, which was the equivalent of the notion of a peremptory or *jus cogens* norm in international law. As the American Law Institute had recognized, a peremptory norm was like a public-order imperative in municipal systems. That notion of public order reflected the imperative nature of a number of principles, norms, rules and fundamental values which society sought to protect, as it regarded them as peremptory norms of domestic law. The notion was embodied in all the constitutions of the world and in national legislation concerning matters where the vital interests of individuals or society were at stake. In order to defend such interests, no derogation was permitted and public prosecutors had to take action whenever public order was in jeopardy. Concerning regional *jus cogens*, if the 15 States members of the Economic Community of West African States followed the example set by the authorities of Côte d'Ivoire in simplifying the conditions for granting nationality and if they harmonized their laws on statelessness in line with the Abidjan Declaration on the eradication of statelessness,[315] that might be conclusive evidence of the existence of regional *jus cogens* on statelessness.

10. Since article 53 of the 1969 Vienna Convention was extremely general, it would be incumbent upon domestic or international courts, as creators of law, to flesh out the notion of *jus cogens* by clarifying its scope, the principles applicable to it, its identification criteria, evidence of its existence and penalties for non-compliance with it. The courts would have to exercise that function prudently and progressively by relying on sources of domestic and international law and on their own case law. Thus, the establishment of a list of norms constituting *jus cogens* would be useful. Other peremptory norms such as the prohibition of slavery, apartheid, aggression, human trafficking, international terrorism, maritime piracy and statelessness could be added to the prohibition of genocide, war crimes, crimes against humanity, torture, cruel and inhuman treatment, the use of force, arbitrary detention, discrimination and *refoulement*, among others, since *jus cogens* was not set in stone. Peremptory norms must evolve in step with the progress made in expanding the protection of human beings and human life under international law. While the criteria for identifying *jus cogens* norms that were defined in the report were certainly relevant, they should be bolstered with a description of the content of a genuine peremptory norm, irrespective of whether its source was treaty law, international customary law or case law. For that reason, it was necessary to draw up a systematic list of the peremptory norms constituting domestic, regional and universal *jus cogens*, based on State practice and domestic and international case law.

11. As far as the title of the topic was concerned, it would be simpler to call it "Identification of peremptory norms of international law" because the Special Rapporteur's whole argument was confined to the identification of those norms. The term "*jus cogens*" could be defined in the introduction and should no longer appear in the title.

12. In draft conclusion 4, the elements which he had described earlier could be added to the two criteria already set forth therein, with which he agreed. The title of draft conclusion 5 should read "Sources of *jus cogens*", as the elements it contained defined the sources of *jus cogens*, which were the same as the sources of public international law. Draft conclusions 6, 7 and 8 could be amalgamated and added to draft conclusion 4, since they all dealt with acceptance and recognition as criteria for the identification of *jus cogens*. While that would certainly make draft conclusion 4 longer, it would have the advantage of covering all aspects of the criteria for the identification of *jus cogens* in a single draft conclusion, thereby avoiding repetition. The title of draft conclusion 9 should be

[315] Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness, made in Abidjan on 25 February 2015.

amended to read "Evidence of peremptory norms", since that would encompass evidence of acceptance and recognition. It might be wise to contemplate a draft conclusion on the scope of *jus cogens*, as that would offer a systematic approach to the identification of the peremptory norms of international law. In that connection, it might be possible to draw up a non-exhaustive list of *jus cogens* norms, which could be added to gradually as courts ruled on cases turning on peremptory norms.

13. Lastly, he recommended the referral of the draft conclusions to the Drafting Committee.

14. Ms. ESCOBAR HERNÁNDEZ said that she had difficulty in agreeing with the distinction made in the report between constituent elements (or criteria) of norms of *jus cogens* and descriptive elements that characterized the nature of *jus cogens*. The difference between descriptive and characteristic elements, on the one hand, and constituent elements, on the other, was insufficiently clear, except perhaps in respect of the Special Rapporteur's intention to segregate what he called the "hierarchy" of *jus cogens* norms and the substantive dimension of those norms (the values or interests of the international community as a whole) from the elements for identifying an existing *jus cogens* norm.

15. In that connection, she had serious reservations about the Special Rapporteur's separate treatment of the cumulative criteria set forth in article 53 of the 1969 Vienna Convention in order to define what constituted *jus cogens*. While the Special Rapporteur thought that they could be considered one by one, as each element fulfilled a different function, she did not fully agree that the first three elements—a norm of general international law accepted by the international community as a whole from which no derogation was permitted—could be disjoined from the fourth element – modification only by a subsequent norm having the same character—because there was insufficient justification for the proposition that the fourth characteristic had to do more with the effects of *jus cogens* than with its identification. On the contrary, it was intrinsic to the notion of *jus cogens* and, as such, should be included in draft conclusion 4, regardless of whether it might receive special attention at a later stage. Even if it was accepted that the fourth requirement was a mere effect or consequence of the definition of a norm as *jus cogens*, it would not be the sole effect. She still held that the Commission could not tackle the topic of *jus cogens* without a detailed analysis of the articles on the responsibility of States for internationally wrongful acts,[316] which referred to the consequences of a breach of a peremptory norm of general international law. In any event, she was not opposed to the Special Rapporteur's intention not to examine that fourth requirement until he dealt with the hierarchy of *jus cogens* norms.

16. Second, with reference to the notion of a norm of general international law, which was certainly of vital importance to the topic, she concurred with the Special Rapporteur that the notion of "general" should be based primarily on the general applicability of the norm, in the sense of the subjects to which it applied. However, it might be wise to qualify the use of that criterion in two ways, first by not ruling out the possible existence of regional *jus cogens*, and second by taking account of the fact that, in that specific case, general applicability might refer to applicability only in given contexts, which raised the issue of *lex specialis*.

17. The identification of a norm of general international law as a generally applicable norm was a valid approach, but would certainly have some major consequences to which some consideration should be given, in particular with regard to the kind of norms to be included in that category. While she agreed that, strictly speaking, only general or customary law rules and principles could be termed norms of general international law, she was not entirely convinced that they were the only generally applicable norms of contemporary international law, since there was no denying that, as other members of the Commission had pointed out, multilateral treaties were generally applicable, although they were not regarded as norms of general international law.

18. Nevertheless, while that conflation between the general nature and the general applicability of a norm appeared unacceptable in the abstract, she shared the basic idea expressed in draft conclusion 5, which distinguished between, on the one hand, customary rules and general principles of law as general norms capable of giving rise to a norm of *jus cogens*, and, on the other, international treaties as norms that could reflect a norm of general international law capable of giving rise to a norm of *jus cogens*. That idea should be further developed in two ways. First, a treaty rule, as an element of practice, could also generate, and not only reflect, a norm of general international law constituting *jus cogens*. Second, that generative role could also be played by other norms, such as some of the resolutions adopted by international organizations.

19. *Jus cogens* norms had an eminently substantive character stemming from the fact that they reflected and protected the values and interests of the international community. From that functional perspective, the requirement that a *jus cogens* norm should be a norm of general international law was central to the process of creating or identifying the norm. That connection was attenuated once the norm had come into existence, since at that point a *jus cogens* norm could be reflected in any legal norm without losing its character as such.

20. She shared the Special Rapporteur's view that the concept of the "international community of States as a whole" was essential for identifying the existence of *jus cogens*. The idea that a norm must be accepted by an especially large majority of States in order to be considered *jus cogens* should be emphasized more strongly, as that was one of the factors differentiating *jus cogens* from ordinary customary law. She understood the acceptance and recognition of *jus cogens* to refer not only to the fact that no derogation was permitted, but also to the requirement that the norm should be modifiable or derogable only by another norm having the same character. That, in her view, was the proper interpretation of what the Special Rapporteur called *opinio juris cogentis*, which could be formed only by the international community of States as a whole.

[316] The draft articles adopted by the Commission 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.

21. She agreed with other Commission members that some of the draft conclusions put forward in the second report were somewhat wordy and repetitive. The six draft conclusions could be reduced to five, which should cover the criteria for identifying *jus cogens*; norms of general international law; the international community of States as a whole; acceptance and recognition of norms as *jus cogens*; and evidence of such acceptance and recognition. The Drafting Committee should revise the draft conclusions with a view to clarifying and simplifying them, avoiding repetition and focusing solely on the essential elements of the issues they covered.

22. As she had stated previously, draft conclusion 4 should include, as a separate criterion, the fact that a *jus cogens* norm could be modified or derogated from only by a norm having the same character. In draft conclusion 5, paragraph 1 was unnecessary and potentially misleading, and should be deleted. It was nonetheless important to explain what was meant by "general scope of application"; the commentary would be a suitable place in which to do so.

23. The repetitiveness of draft conclusions 6, 7 and 8 made it difficult to distinguish the two issues with which they dealt: the concept of the international community of States as a whole and the concept of acceptance and recognition. While the two concepts were closely related, it would be best, in the interest of clarity, to deal with them in two separate draft conclusions, which should emphasize the subject (the international community of States as a whole) and the substance (non-derogability and modification only by a norm having the same character) of "acceptance and recognition". Those draft conclusions should avoid any reference to evidence, as that issue was addressed in draft conclusion 9, which could be simplified considerably. Some of the terms used in draft conclusion 9, such as "materials", should also be changed, as they did not seem to be in keeping with a text of that kind.

24. She agreed with the Special Rapporteur's proposed change in the name of the topic, provided that the words "(*jus cogens*)" were retained. She also found the proposed future work programme acceptable, with the reservations she had expressed previously with regard to the "effects" of *jus cogens*. Lastly, as she had stated at the Commission's preceding session, the compilation of an illustrative list of *jus cogens* norms should be a key component of the Commission's work; such a list would have great added value, regardless of the form it took in the draft conclusions. She was in favour of referring the draft conclusions to the Drafting Committee.

25. Ms. GALVÃO TELES said that her comments on the proposals put forward in the Special Rapporteur's excellent second report were based on the need to ensure consistency between the Commission's current work and its past work on the law of treaties, responsibility of States for internationally wrongful acts and fragmentation of international law. Her suggestions on the draft conclusions were intended to streamline them and did not concern points of substance.

26. The first issue she wished to raise was whether *jus cogens* norms reflected fundamental values. She shared the views that the Special Rapporteur had expressed in that regard at the Commission's sixty-eighth session, when it had discussed draft conclusion 3, paragraph 2,[317] and she agreed that *jus cogens* norms protected the fundamental values of the international community, were hierarchically superior to other norms and were universally applicable. In her view, the protection of fundamental values was the key distinguishing feature of *jus cogens* norms; it explained why they were limited in number and were non-derogable. The unique character of *jus cogens* norms resulted not from their sources but from their content and their purpose of protecting values that the international community as a whole recognized as fundamental and thus non-derogable.

27. While that view was not shared by all scholars or expressly espoused by all international courts, it was the position taken by the Commission, as shown by its work on the law of treaties, the responsibility of States for internationally wrongful acts and the fragmentation of international law. In its 1966 commentary to the draft articles on the law of treaties,[318] the Commission stated that a rule acquired the character of *jus cogens* owing to the particular nature of its subject matter[319] and that rules of *jus cogens* were of so fundamental a character that any treaty conflicting with them must be considered totally invalid.[320] In its commentary to article 12 of the articles on the responsibility of States for internationally wrongful acts, the Commission stated that the obligations imposed on States by peremptory norms necessarily affected "the vital interests of the international community as a whole".[321] Lastly, conclusion (32) of the Study Group on fragmentation of international law recognized that a rule of international law might be superior to other rules on account of the importance of its content.[322] She looked forward to receiving the Special Rapporteur's revised proposal for draft conclusion 3, which should retain the reference to the link between *jus cogens* norms and fundamental values.

28. Another issue was whether treaties should be categorized as part of general international law. There was no accepted definition of "general international law" and no unanimity in the literature as to whether such law only included customary international law or also included general principles of law and/or treaties. In paragraph (1) of its 1966 commentary to draft article 50 of the draft articles on the law of treaties, the Commission implied that general international law encompassed treaty law by stating that the prohibition, in the Charter of the United Nations, of the use of force was a rule with the character of *jus cogens*.[323]

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[317] For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

[318] 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*.

[319] See *ibid*., pp. 247–248 (para. (2) of the commentary to draft article 50).

[320] See *ibid*., p. 239 (para. (8) of the commentary to draft article 41).

[321] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 56 (para. (7) of the commentary to draft article 12).

[322] *Yearbook … 2006*, vol. II (Part Two), p. 182.

[323] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247.

Thus, multilateral treaties that had been ratified by all or nearly all States could be a source of *jus cogens*, although a treaty norm must also be recognized as non-derogable in order to be considered *jus cogens*.

29. The word "general" in the expression "general international law" referred to the scope of applicability, as noted by the Special Rapporteur, and not to the source of the norm. She therefore disagreed with the Special Rapporteur's conclusion that treaty rules *per se* should not be considered a source or basis of *jus cogens* norms. Draft conclusion 5 should be amended to indicate that widely ratified multilateral treaties could both reflect *jus cogens* norms and serve as sources of such norms. It should also characterize customary international law, general principles of law and general multilateral treaties as a "source", rather than a "basis", of *jus cogens* norms. She agreed with the two criteria laid down in draft conclusion 4 and with the indication, in draft conclusion 7, paragraph 3, that acceptance and recognition by all States was not required. In draft conclusions 7 and 9, alternatives to expressions such as "attitudes" and "materials" should be found.

30. Yet another issue was whether the consequences of *jus cogens* should be limited to treaty law or should also encompass the law of State responsibility and other fields of international law. The Commission had already addressed *jus cogens* in relation to both the law of treaties and the law of State responsibility, since *jus cogens* norms had special legal consequences in both fields. The proposal, in paragraph 93 of the report, to address the effects of *jus cogens* in other areas such as rules on jurisdiction would require further consideration.

31. Regarding the advantages and disadvantages of including an illustrative list of *jus cogens* norms, the Commission had already explored that issue in paragraph (3) of its 1966 commentary to draft article 50 of the draft articles on the law of treaties.[324] However, that commentary concerned a provision that had been intended to become, and ultimately had become, part of a treaty. In the context of the draft conclusions under discussion, such a list could provide added value. The Commission had included illustrative lists in several other contexts, such as paragraph (5) of its commentary to article 26 of the draft articles on the responsibility of States for internationally wrongful acts[325] and conclusion (33) of the Study Group on fragmentation of international law.[326] She was thus in favour of including an illustrative list based on the Commission's past work and on pronouncements by international courts and tribunals, together with a caveat that the list was not exhaustive.

32. In conclusion, she supported the Special Rapporteur's proposal to rename the topic "Peremptory norms of general international law (*jus cogens*)" and recommended that the draft conclusions be referred to the Drafting Committee.

33. Ms. ORAL said that she agreed with the Special Rapporteur that *jus cogens* constituted *lex lata*, although the topic was not free of controversy. The Commission should build upon its previous work in order to provide guidance on that very important aspect of international law. The Special Rapporteur's second report provided a good foundation for that endeavour.

34. With regard to paragraphs 20 to 30 of the second report of the Special Rapporteur, which concerned the three aspects of *jus cogens* that were dealt with in draft conclusion 3, paragraph 2 (fundamental values, hierarchical superiority and universal application), she was in overall agreement with the draft conclusion. At the core of those norms that had attained the status of *jus cogens* lay a shared set of fundamental values of the international community. That view had been expressed in years past by a number of Commission members with regard to draft article 50 of the 1966 draft articles on the law of treaties, and even earlier in the 1953 report of the Special Rapporteur on the law of treaties,[327] which referred to overriding principles of international law that could be regarded as constituting principles of international public policy. The fundamental values protected by peremptory norms had also been recognized in judicial decisions, including the judgment of the International Court of Justice in *Corfu Channel* and the judgment of the International Tribunal for the Former Yugoslavia in *Prosecutor v. Anto Furundžija*. Since it would be difficult to include the protection of fundamental values as a criterion for the identification of *jus cogens*, she supported its inclusion in draft conclusion 3, paragraph 2, as part of a general description of the nature of *jus cogens*, which could be elaborated upon in the commentary.

35. Draft conclusion 4 reiterated language from article 53 of the 1969 Vienna Convention and was somewhat repetitive in relation to draft conclusion 3, paragraph 1. She agreed with the Special Rapporteur that article 53 of the Convention should serve only as a point of departure. On the question of whether article 53 was composed of two or three criteria, Ms. Lehto and other Commission members had argued persuasively in favour of including, as a third criterion, the requirement that a norm of *jus cogens* be a norm that could be modified only by another peremptory norm. She was reluctant to do so, however, as she had found no clear evidence that States or courts took that criterion into account in identifying *jus cogens*. While she understood the need to distinguish *jus cogens* norms from ordinary norms that were also non-derogable, the content of draft conclusion 3, paragraph 2, was sufficient to serve that purpose. She therefore supported the Special Rapporteur's proposed two-criteria formulation.

36. Regarding draft conclusion 5, there was no agreed-upon definition of "general international law", as noted by the Commission's Study Group on fragmentation of international law. Given the divergence of views in that regard, she wondered whether it was necessary to adopt any definitive understanding of what sources could give rise to *jus cogens*. For the purpose of identifying *jus cogens*, it was the second of the article 53 criteria—acceptance and recognition by the international community of States as a whole—that was determinative. However, she did not disagree with the identification, in draft conclusion 5, of

[324] *Ibid.*, p. 248.

[325] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85.

[326] *Yearbook … 2006*, vol. II (Part Two), p. 182.

[327] *Yearbook … 1953*, vol. II, pp. 90 *et seq*., document A/CN.4/63.

customary international law, general principles of law and treaty law as forming part of general international law. While the Special Rapporteur, in paragraph 41 of the report, raised the possibility that the distinction made by the Study Group between general international law, on the one hand, and treaty law and *lex specialis*, on the other, might preclude rules of international humanitarian law from acquiring the status of *jus cogens*, the Study Group's conclusion (33) listed basic rules of international humanitarian law as being part of *jus cogens*. It should thus be made clear that specialized regimes could also include norms of a peremptory character. In addition, regional *jus cogens* should not be excluded.

37. She agreed that customary international law and general principles of law could serve as a basis for *jus cogens*, as set out in paragraphs 2 and 3 of draft conclusion 5. The Special Rapporteur could nonetheless have given more examples of general principles of law that could be considered *jus cogens*. As Mr. Vázquez-Bermúdez had said at the Commission's 3372nd meeting, one such example could be found in the advisory opinion of the Inter-American Court of Human Rights in *Juridical Condition and Rights of Undocumented Migrants*. In draft conclusion 5, paragraph 3, the mention of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice seemed unnecessary; it might be preferable to refer only to "general principles of law" and provide further explanations in the commentary. The topic "General principles of law" was on the Commission's long-term programme of work and would be studied further in that context.

38. Regarding treaty rules, which were referred to in draft conclusion 5, paragraph 4, she agreed with Mr. Rajput's description, at the Commission's 3369th meeting, of how a norm could progress from treaty law to *jus cogens*, although she did not share his view that *jus cogens* must be based on all three sources (treaty law, domestic law and customary international law). She also agreed with what Mr. Kolodkin had said at the 3372nd meeting, to the effect that the sequence in which the criteria for *jus cogens* were deemed to have been met was not relevant, at least in respect of treaties.

39. The meaning of "accepted and recognized by the international community of States as a whole" was perhaps the most elusive part of article 53 of the 1969 Vienna Convention, yet it was also the most important criterion for identifying *jus cogens* norms. Draft conclusions 6 to 9 thus set out the core elements in that regard. The order of those draft conclusions was a little confusing; in her view, draft conclusion 7 (International community of States as a whole) should be placed first, as the other three draft conclusions all dealt with acceptance and recognition. Some of them could perhaps be merged to provide more clarity and less repetition.

40. She supported the content of draft conclusion 8, paragraph 1, but believed that its rationale was not fully explained in the Special Rapporteur's report. From a strictly grammatical standpoint, the wording of the definition of *jus cogens* in article 53 of the 1969 Vienna Convention was different from the well-established definition of customary international law. As had been noted in the literature, the Convention's drafters could have explicitly defined *jus cogens* as norms of customary international law that were non-derogable, yet they had not. Furthermore, as pointed out by Sir Michael Wood at the Commission's 3372nd meeting, the negotiating history of the provision, in particular the words "accepted and recognized", was addressed somewhat superficially in the report. In that respect, she did not feel that the statement by the Chairperson of the Drafting Committee at the first session of the United Nations Conference on the Law of Treaties, which was quoted in paragraph 67 of the report, provided a definitive answer.

41. Judging from the language of article 53, it seemed that, unlike customary international law, on which *jus cogens* norms were largely based, such norms did not require the element of conduct or general practice. The words "accepted and recognized", which denoted the second criterion laid down in article 53, did not, therefore, refer to State practice. Rather, it was the opinion or *opinio juris cogentis* of States that was determinative, as reflected by the Special Rapporteur in draft conclusion 6, paragraph 2. Put simply, *jus cogens* did not require a double dose of customary international law.

42. As to draft conclusion 7, paragraph 3, which related to the term "international community of States as a whole", she agreed with previous speakers who had said that acceptance and recognition by "a very large majority" of States should be required, in line with paragraph 67 of the report. She also agreed that the words "as a whole" did not mean "all" States, as the emphasis was on the "international community of States" and not simply "States". The Special Rapporteur and other members of the Commission had been right to assert that the term "international community of States as a whole" referred not to the individual attitudes or opinions of States but to their collective attitude.

43. She was amenable to changing the title of the topic to "Peremptory norms of general international law (*jus cogens*)", as proposed by the Special Rapporteur, on the understanding that the words "*jus cogens*" would be retained in parentheses and that the title would not exclude norms under specialized regimes.

44. She was also agreeable to providing an illustrative, non-exhaustive list of *jus cogens* norms, on condition that the illustrative nature of such a list was made clear. To conclude, she recommended the referral of the draft conclusions to the Drafting Committee.

45. Mr. PETER said that he wished to congratulate the Special Rapporteur on his second report on the topic of *jus cogens*, which focused on the criteria or requirements for the identification of *jus cogens*. He sympathized with the Special Rapporteur and with Mr. Murase, the Special Rapporteur on the topic "Protection of the atmosphere", who had both faced pressure from the Secretariat regarding the length of their reports. It was regrettable that double standards were being applied, and he hoped that the Secretary to the Commission would look into the matter with a view to finding a permanent solution.

46. He had welcomed the inclusion of the topic on the Commission's long-term programme of work, as

it provided an opportunity for people from developing countries to contribute in an area in which they had historically been marginalized. Indeed, when the Vienna Convention on the Law of Treaties had been adopted in 1969, most countries in Africa had been in their first decade of statehood and had thus still been fumbling for direction in the international arena, as had many States in Asia, the Caribbean and Latin America.

47. Regarding the parameters of the topic, in paragraph 33 of the report, the Special Rapporteur explained that he would proceed on the basis of article 53 of the 1969 Vienna Convention, and provided five reasons for doing so. In his own view, the Special Rapporteur's approach was rather restrictive and might defeat the purpose of examining the topic in the first place. Given that the sources mentioned in paragraph 33 of the report were well known and that article 53 had been analysed extensively over the years, the purpose of preparing draft conclusions based solely on that article was unclear. He wondered whether it might be possible to look beyond the previous scholarship on the topic.

48. In paragraph 34, the Special Rapporteur declared his neutrality with regard to the topic and to article 53 of the 1969 Vienna Convention. It might well be wondered whether the Special Rapporteur's stance was realistic, whether his work would be somewhat artificial as a result, whether it was possible to be value-free and whether it would make more sense for the Special Rapporteur to take a position and then defend it.

49. In paragraph 31, the Special Rapporteur stated categorically that the issue of who determined whether the criteria for *jus cogens* had been met was "beyond the scope of the topic". The question that arose was why, having set out to identify the criteria for *jus cogens*, the Special Rapporteur would not go on to test them. The Special Rapporteur's approach was dangerous for a number of reasons. First, it might leave the door open for a State or group of States with similar cultures and histories to declare that a particular rule or principle qualified as *jus cogens* and to impose their decision on the rest of the world. Second, it might enable powerful countries to claim that their national practice was general and applied to everybody, implying that it represented an incipient *jus cogens* norm. For a topic of such importance, it made sense to indicate clearly not only the criteria for *jus cogens* but also who should determine whether those criteria had been met.

50. In paragraph 90, the Special Rapporteur proposed that, in the light of the Commission's debate during the sixty-eighth session, the name of the topic should be changed from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)". The debate in question was captured in paragraph 5 of the report, where the Special Rapporteur cited a statement by former Commission member Enrique Candioti, who had argued that the end users of the Commission's work might find the Latin term *jus cogens* unfamiliar or unclear when used in isolation. The Special Rapporteur had ultimately followed Mr. Candioti's suggestion to the letter. In any event, he personally would not stand in the way of the new name, but would prefer to concentrate on the content of the topic.

51. There appeared to be very little difference between the provisions of draft conclusion 4 and those of article 53 of the 1969 Vienna Convention. Similarly, he wondered what fundamental difference, if any, there was between draft conclusions 4 and 6. In that connection, the Special Rapporteur should specify who was expected to assess the opinion of the international community of States as a whole, as required in draft conclusion 6.

52. In draft conclusion 7, the Special Rapporteur used a number of terms loosely. The references to "the international community of States as a whole" and "a large majority of States", in particular, warranted further explanation. Were the States in question in the same geographical area? Who determined whether a State did or did not belong to a given category?

53. It would be helpful for the various types of evidence of acceptance and recognition cited in draft conclusion 9, paragraph 2, to be listed hierarchically, as they differed widely in terms of nature, form and value.

54. In introducing the report at the Commission's 3368th meeting, the Special Rapporteur had sought the views of other Commission members, particularly new members, on whether it would be advisable to compile an illustrative list of *jus cogens* norms. In his opinion, the Special Rapporteur should provide an exhaustive list of every *jus cogens* norm in existence. He could fully understand why there might be opposition to such a list. Some *jus cogens* rules might be highly contentious, or skewed in favour of a particular part of the world, which could be a source of embarrassment. In truth, that was not a problem, bearing in mind that international law had never been neutral. An exhaustive list would serve as a "balance sheet" that would allow the Special Rapporteur to plan his work with certainty, since it would indicate not only what norms qualified as *jus cogens* but also their status and how they had come into existence. The list should be drawn up as soon as possible, and should, frankly, have been prepared at the outset of the Commission's work on the topic.

55. The future work programme required further thought. Unless he was mistaken, it was the first time since 1969 that the topic had been the subject of a thorough, scientific and holistic study. Consequently, the Special Rapporteur should not rush to finish, especially as there were many outstanding issues that called for his attention. The main one was who should determine whether the criteria for *jus cogens* had been met, an issue that, in his view, did not fall outside the scope of the topic. He urged the Special Rapporteur to rethink his road map, as rushing to address the consequences of *jus cogens* before completing the groundwork would be counterproductive.

56. The Special Rapporteur had done some tremendous work, venturing into rough terrain that was full of secrets, with many members not wanting to speak their mind openly or to have things called by their names. He recommended that all the draft conclusions be referred to the Drafting Committee, which should refine them in line with the comments made by the members of the Commission. As there were many draft conclusions, with some of them expressing the same basic ideas in different words, it was clear that they needed streamlining.

57. Mr. OUAZZANI CHAHDI said that he wished to thank the Special Rapporteur for his well-documented and concise report on a topic that had given rise to numerous doctrinal discussions and had long been criticized for its natural-law connotations, lack of precision and potential effects, which, it had been feared, might be devastating for the stability of treaty relations. At the United Nations Conference on the Law of Treaties, some States had vehemently opposed the adoption of the notion of *jus cogens*, among them France, whose delegation had argued that such an imprecise concept would make disputes a permanent feature of the law of treaties.

58. Despite that opposition, and thanks to the codifying effect of the law of treaties, *jus cogens* had found its place in positive international law. It was the subject of articles 53 and 64 of the 1969 Vienna Convention, the provisions of which had been incorporated verbatim into the 1986 Vienna Convention.

59. The Special Rapporteur's point of departure for his second report had been the observations and recommendations made by some delegations in the Sixth Committee. As the Special Rapporteur noted in paragraph 11 of his report, most delegations that had commented on the scope of the topic had expressed the view that it should be broad and should cover areas beyond treaty law, including the issues of State responsibility and immunity. Other comments made during the debate in the Sixth Committee had related to the need to rely on State practice in all its forms. He wondered, in that regard, whether that practice should have included national constitutions, some of which, including the Swiss Constitution, explicitly recognized the concept of *jus cogens*.

60. The characteristics of *jus cogens* mentioned in paragraphs 20 to 30 of the report were very interesting. The Special Rapporteur stated that *jus cogens* norms protected "fundamental values of the international community", but did not explain what was meant by "fundamental values". The Special Rapporteur should clarify the term and provide additional evidence to support his statement.

61. Regarding the hierarchical superiority of *jus cogens* norms, the Special Rapporteur used the conclusions of the work of the Study Group on fragmentation of international law[328] and examples from national and international case law to substantiate his argument. A question arose as to the position that Article 103 of the Charter of the United Nations should occupy within that hierarchy.

62. The idea that *jus cogens* norms were universally applicable, in the sense that they applied to all States, should be developed further, particularly since, in principle, universality seemed to rule out the existence of regional *jus cogens*, which was recognized by some authors. Although the 1969 Vienna Convention did not provide for regional *jus cogens*, it was conceivable that highly homogeneous regional systems might produce peremptory norms specific to them. The existence of regional *jus cogens* would raise the question of how it related hierarchically to universal *jus cogens*. The Special Rapporteur should give some thought to the matter in his subsequent report.

63. Chapter II of the report concerned the criteria for *jus cogens*. He agreed, in principle, with the Special Rapporteur's interpretation of article 53 of the 1969 Vienna Convention. Concerning the first criterion, namely that *jus cogens* were norms of general international law, the Special Rapporteur, based on the work of the Study Group on fragmentation of international law and on jurisprudence, reached the interesting conclusion that customary international law was the source of many *jus cogens* norms and that customary international law rules qualified as norms of general international law. He would like clarification of the assertion, in paragraph 41 of the report, that the distinction between general international law, on the one hand, and treaty law and *lex specialis*, on the other, precluded some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*.

64. The question as to whether general principles of law, within the meaning of Article 38 of the Statute of the International Court of Justice, could be a source of *jus cogens* depended on the rank assigned to them in the hierarchy of norms. Such principles were primarily of a national character; some of them could rise to the international level because they were shared by all nations, and an international court could, in a specific case, elevate them to the rank of *jus cogens*. The 1989 Convention on the Rights of the Child, for example, was based on principles to be found in many national constitutions, such as respecting the best interests of the child or the child's right to special care and assistance from the State. He agreed with the Special Rapporteur that the phrase "general international law" included general principles of law and that multilateral treaties could also serve as a source of *jus cogens* norms.

65. He endorsed the Special Rapporteur's analysis of acceptance and recognition as the second criterion for *jus cogens*, while noting that the bar should perhaps be set higher and another formula should be found to replace the "majority of States" requirement referred to in paragraph 67 of the report and in draft conclusion 7, paragraph 3. In paragraph 73, the Special Rapporteur presented non-derogability as a consequence of peremptoriness. That raised the question of what the difference was between a criterion and a consequence. In his own view, article 53 of the 1969 Vienna Convention set out three main criteria for peremptory norms.

66. He supported the Special Rapporteur's proposal to change the title of the topic, since the current title could give the impression that the Commission's work also included *jus cogens* norms of domestic law. That said, perhaps the Special Rapporteur could include some mention of those norms in the next report.

67. He endorsed the proposal made by other Commission members to merge draft conclusions 6, 8 and 9. If a non-exhaustive list of *jus cogens* norms was drawn up, it should be included in the commentary with an indication that its purpose was to further elucidate the concept of *jus cogens*. Lastly, he was in favour of referring all of the draft conclusions to the Drafting Committee.

68. Mr. HUANG said that he agreed with the Special Rapporteur's proposal to rename the topic "Peremptory norms of general international law (*jus cogens*)"

[328] See *Yearbook … 2006*, vol. II (Part Two), pp. 177–184, para. 251.

and supported the view that its consideration should not be limited to treaty law. He concurred with the Special Rapporteur that the study of *jus cogens* should be based on State practice, and emphasized that the Commission should pay greater attention to the reservations that had been expressed by States in the Sixth Committee, at the seventy-first session of the General Assembly, about the inclusion of the topic in the Commission's programme of work because they did not consider that there was enough State practice on *jus cogens*.

69. In his first report on the topic,[329] the Special Rapporteur identified the elements of *jus cogens*, in draft conclusion 3, paragraph 2, as protection of the fundamental values of the international community, hierarchical superiority to other norms of international law and universal applicability. Those elements differed sharply from the provisions of article 53 of the 1969 Vienna Convention and introduced new elements that were problematic on two accounts.

70. First, they were not supported by State practice. In the process of identifying the core elements of *jus cogens*, nothing was more compelling and convincing than State practice. Yet the second report contained only a few examples of such practice, while the other examples of practice were drawn primarily from the judgments of international courts and tribunals. The extent to which those judgments reflected international acceptance was open to question.

71. Second, it was hard to distinguish the core elements of *jus cogens* from the criteria for *jus cogens*. In his second report, the Special Rapporteur referred to the core elements of *jus cogens* as descriptive elements, while labelling the criteria for the identification of *jus cogens* as constituent elements. Such a distinction was far-fetched and useless in practice. In paragraph 31, the Special Rapporteur noted that the criteria for the identification of *jus cogens* referred to the elements that should be present before a rule or principle could be called a norm of *jus cogens*. That implied that such elements did not exist before a rule became *jus cogens*. If universal applicability was a core element of *jus cogens*, then a rule was not necessarily universally applicable before it became *jus cogens*. Yet, in his own view, it was precisely a rule's character of universal applicability that could turn it into a *jus cogens* norm.

72. With regard to the premise that norms of *jus cogens* protected the fundamental values of the international community, the international judicial opinions cited in paragraph 20 of the report all referred to separate and minority opinions, and thus did not represent the mainstream perspective in judicial practice. In his view, the discussion of fundamental values could easily lead the Commission down the path of *jus naturale*, which the Special Rapporteur had consistently advised the Commission to avoid. Such a discussion also risked being ideologically biased; the Commission should therefore approach it with caution.

73. As to the element of hierarchical superiority, it was first necessary to clarify that the idea that general international law norms were void when they conflicted with a *jus cogens* norm referred to the effect of *jus cogens*. To infer hierarchical superiority on that basis was simply going too far. In fact, the view that any hierarchy existed in international law was not supported by State practice. Even though the concept of *jus cogens* had originated in domestic law, international law and domestic law belonged to two different legal systems, and further proof was needed in order to determine whether the theory of hierarchy in domestic law could be applied directly to international law. Even if a hierarchy did exist in international law, the statements of a few States and the judgments of some regional courts were not sufficient in themselves to demonstrate the hierarchical superiority of *jus cogens*.

74. He was in favour of including the element of universal applicability as a core element of peremptory norms of general international law. *Jus cogens* usually took the form of a rule of customary international law. Thus, in order for a rule to acquire the status of *jus cogens*, it must be agreed upon by all members of the international community. For any rule to qualify as a *jus cogens* norm, whether it was a rule of customary international law, a general principle of law or a treaty rule, it must be endowed with the core element of recognition by all members of the international community.

75. In the proposed draft conclusions, the Special Rapporteur's approach of listing the two criteria for *jus cogens*—status as a norm of general international law and acceptance and recognition by the international community of States as a whole—in draft conclusion 4, while providing detailed descriptions of those criteria in draft conclusions 5 to 9, served as an aid to understanding but was somewhat cumbersome and repetitive. He suggested that draft conclusions 5 to 8 be simplified and merged, with their core content moved to draft conclusion 4 and their non-core content moved to the commentary. Draft conclusion 9 as a whole should be moved to the commentary.

76. He generally agreed with draft conclusion 5, in which the Special Rapporteur listed the three possible sources of *jus cogens*. Unlike certain other Commission members, he saw no reason to exclude general principles of law from that list. That view was supported by the conclusions of the Study Group on fragmentation of international law, which indicated that the three main sources of international law were not in a hierarchical relationship to each other.

77. With regard to draft conclusion 7, his chief concern was about paragraph 3. Although he agreed that "international community of States as a whole" did not necessarily mean all States, the interpretation of that phrase as meaning "a large majority of States" was grossly inadequate. Indeed, that criterion was less stringent than the one required for the identification of customary international law and did not befit *jus cogens*, which had comparatively greater legal force.

78. The various forms of evidence listed in draft conclusion 9, paragraphs 2 to 4, all corresponded to the materials needed for identifying customary international law. Since *jus cogens* norms had greater legal force than customary international law, it might be necessary to set a higher and

[329] *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693 (first report).

more rigorous threshold for admitting evidence of acceptance and recognition of *jus cogens*. At the current stage of the Commission's work on the topic, it was not necessary to prepare an illustrative list of *jus cogens* norms. In conclusion, he supported the referral of draft conclusions 4 to 9 to the Drafting Committee.

79. The CHAIRPERSON, speaking as a member of the Commission, said that the Special Rapporteur's second report appeared not to have carried through to its logical conclusion the considerable thought he had put into it. Overall, the report gave the impression that the Special Rapporteur had felt compelled to answer in the affirmative a question that had been put by a former Commission member concerning whether the future Commission would use only what States had agreed to as a touchstone for its work. He himself was of the view that the Commission should display greater vision in its work on *jus cogens*.

80. In order to do so, the Commission must critically reassess whether the criteria for determining which norms had attained peremptory status should be based solely on article 53 of the 1969 Vienna Convention. The Special Rapporteur's first report on the topic treated elements derived from practice and scholarship on the same footing as elements derived from article 53 and emphasized the fluid interplay between the nature, requirements and consequences of *jus cogens*. In contrast, what the Special Rapporteur referred to in his first report as the basic elements of *jus cogens* contained in article 53 were referred to in his second report as the criteria for the identification of *jus cogens*, while the other elements, listed in draft conclusion 3, paragraph 2, were relegated to the status of descriptive elements of established *jus cogens* norms. The justification provided for that choice was lean, consisting of two slender arguments that were set out in paragraphs 32 and 33. The first argument was that States wanted it that way, and the second was that most courts, tribunals and scholars did too. Neither argument was entirely convincing.

81. Regarding the first argument, States' insistence on keeping to the definition of *jus cogens* enshrined in article 53 of the 1969 Vienna Convention seemed to be driven by the dogma that international law was made only by States. Yet the question of who decided what became law was also one of power. It was therefore not necessarily wise or productive for the Commission to unquestioningly adopt the perspective of some vocally assertive States as though it were the state of the art in international law.

82. The second argument, that most courts and tribunals, as well as most scholarly writings on *jus cogens*, regarded article 53 as setting out the definition of *jus cogens*, was equally unconvincing. The right approach to international law was not a quantitative exercise. It was also worth asking whether the reliance on article 53 stemmed from a broad agreement on its value in defining *jus cogens* or merely from the fact that it was the most prominent definition of *jus cogens* in an international legal context. Furthermore, a number of academic review articles had concluded that there was not even agreement as to which of the approaches being followed to explain *jus cogens* was the predominant one. Consequently, even if the quantitative approach was accepted and the definition of *jus cogens* contained in article 53 was declared valid, such an approach would have to be substantiated in much greater detail.

83. He could not agree with the Special Rapporteur's assertion that the decision to turn the report into a commentary on the second sentence of article 53 was without prejudice to the understanding of *jus cogens* for the purposes of the Commission's work. That was reminiscent of the idea, expressed during the debate on the Special Rapporteur's first report, that adopting the article 53 definition meant adopting a firmly consent-based understanding of *jus cogens*. That understanding was not without its difficulties. In the first report, the Special Rapporteur highlighted the concern that States that had joined in the consensus on a norm might subsequently withdraw their consent at some point after the norm had become *jus cogens*, thereby damaging the consensus.

84. In the wider context of international law, the doctrine of State sovereignty and the connected paradigm of the indispensability of State consent for the creation of international law seemed to be very much alive. The default position for many approaches to international law-making was still that no State could be bound by a rule of international law unless it had consented to be bound. Such a consensualist approach appeared to be compatible with the definition of *jus cogens* contained in article 53 of the 1969 Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". While it was sometimes argued that acceptance and recognition were merely declaratory, and not constitutive of the existence of *jus cogens* norms, that definition was most commonly interpreted as suggesting that *jus cogens* was a special kind of customary international law that required State consent (in the form of *opinio juris*) for its creation.

85. The consensualist approach nevertheless raised a number of other issues. Even if *jus cogens* was regarded as a special kind of customary international law, examples of State practice for most of the norms assumed to be *jus cogens* were either lacking or contradictory. That situation was compounded by the fact that many norms assumed to be *jus cogens* demanded the avoidance of certain acts, leading to non-events or non-practice that then had to be interpreted. To overcome that difficulty, it had been suggested that the identification of *jus cogens* be based on general principles rather than on customary international law. That approach retained the State consent element in the definition of particular norms of *jus cogens* but avoided the practice requirement. In the final analysis, however, any approach that embraced a State consent element left the rules of *jus cogens* to the discretion of States. A consent-based understanding of *jus cogens* could not provide a satisfactory explanation for the peremptory nature of *jus cogens* norms, could not distinguish *jus cogens* from other norms in international law, and ultimately remained a rather empty concept.

86. The report's focus on article 53 of the 1969 Vienna Convention made the considerations contained in the report seem ahistorical, as no information was given on anything that had happened in the field of peremptory norms prior to 1969. The report would have been more useful if

it had discussed the historical background of *jus cogens*, both in order to assess whether relying exclusively on article 53 was indeed the most desirable approach and, if that was the case, to provide the background for a comprehensive interpretation of the elements it contained.

87. He was particularly uneasy about the content of draft conclusion 7, paragraph 3; the reasoning for its inclusion that was provided in the report was fairly meagre, the only reference made being to the *travaux préparatoires* of the 1969 Vienna Convention, according to which the intention behind the phrasing chosen was to give no State the right of veto in the process of making *jus cogens*. Ultimately, it would mean that a State could be bound by a norm to which it had consistently objected. However, there was no persistent objector doctrine with regard to *jus cogens*, since universal applicability was a core element of *jus cogens* norms. That position was incompatible with the view that State consent was paramount in international law-making. To his mind, it was inconceivable that any norm should have to obtain unanimous support by all States in order to become peremptory.

88. Even if it was assumed that no State could be bound against its will, the term "large majority of States" should be clarified. The population of the five largest States in the world already accounted for roughly half of the global population. That raised the question of whether acceptance of the *jus cogens* status of a norm by a large majority of States that did not include the most populous ones was legitimate. Furthermore, it was possible for a norm on nuclear proliferation to attain a 95-per-cent acceptance rate without the agreement of any of the States possessing nuclear weapons. It was impossible to clarify those issues without looking behind the non-political façade of international law to unveil the hidden power relationships that shaped it. Those examples also illustrated why the term "large majority of States", without further qualification, made the ascertainment of *jus cogens* an arbitrary exercise. Taking the population of States into consideration would not solve the issue, as that criterion would effectively endow larger States with veto power.

89. He also questioned the merit of regarding the creation of *jus cogens* as a two-step sequence, involving first the establishment of a rule as one of general international law and then its elevation to *jus cogens* status. In view of the notable expansion of dynamic international law-making processes, subscribing to a static two-step sequence seemed counter-intuitive.

90. In paragraph 73 of his report, the Special Rapporteur emphasized that factual derogation from a norm did not prevent the norm from becoming *jus cogens*, since what should count was States' belief that the norm was non-derogable. Nevertheless, it was safe to say that, under the consent-based conception of *jus cogens*, a general congruence between the rules of *jus cogens* and the reality of State conduct with respect to them was necessary. A norm that was consistently violated by a significant number of States could not attain *jus cogens* status, even if those States still paid lip service to the norm.

91. The question of congruency pointed to another difficulty with the State consent-based approach to *jus cogens*: the interplay between State consent and the alleged capacity of *jus cogens* to protect or at least reflect fundamental values of the international community. It was not self-evident how State consent could form or shape those values, which were described in the first report as "concerned with the basic considerations of humanity";[330] whether those considerations really were defined by States was questionable. Furthermore, *jus cogens* not only had an effect on treaties but also reflected an aspirational dimension by setting goals for the treatment of individuals or for peaceful coexistence. A conception of *jus cogens* that merely reflected State practice forfeited that aspirational quality. In conclusion, he was in favour of the Special Rapporteur's proposal to change the name of the topic and of referring draft conclusions 4 to 9 to the Drafting Committee.

The meeting rose at 1.05 p.m.

3374th MEETING

Thursday, 13 July 2017, at 10 a.m.

Chairperson: Mr. Eduardo VALENCIA-OSPINA (Vice-Chairperson)

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

Jus cogens (*continued*) (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. TLADI (Special Rapporteur), summing up the debate on his second report (A/CN.4/706), said that he was grateful for the valuable comments and drafting suggestions made by the members of the Commission, as well as for their highlighting of additional materials. The draft conclusions would remain in the Drafting Committee until the full set was adopted, thus ensuring that the Drafting Committee and the Commission had a full overview of how everything fit together before particular provisions were adopted.

2. Most, if not all, of the members had expressed agreement with his proposal to change the name of the topic, although some had done so with caveats, for example that

[330] *Ibid.*, para. 71.

the Commission should revisit the title when it discussed the question of regional *jus cogens*. He had already expressed his doubts about regional *jus cogens*, but had promised to discuss the possibility in future reports. In any case, if the relevant materials were to establish the existence of regional *jus cogens*, it would not require a change of title because it would be an exception to the general rule. One member had proposed dealing with domestic *jus cogens*, but he did not support that idea, as it would require the Commission to study all legal systems to see how *jus cogens* worked in them, and it was not clear what the purpose of such an undertaking would be. Perhaps domestic *jus cogens* could be considered by the Working Group on the long-term programme of work, but it was automatically excluded under the current topic, given that article 53 of the 1969 Vienna Convention was being used as the basis of the work. However, he agreed that the Commission should certainly consider practice from a broader regional spread and diversify the sources of evidence. Another member had accepted the revised title on the understanding that the topic went beyond treaty law. Most of the authority on which the criteria and characteristics proposed in the second report were based had nothing to do with treaty law.

3. It was clear from the debate at the current session that a very large majority of members accepted the content of draft conclusion 3, paragraph 2,[331] although not all supported its retention. Many of the members had agreed that *jus cogens* norms were somehow linked to the fundamental values of the international community. One member had expressed doubt as to whether a reference in the draft conclusions was warranted since the concept did not appear in article 53 of the 1969 Vienna Convention, but that reasoning was misplaced, as the criterion for inclusion in the draft conclusions was not that it appeared in article 53 but that it was reflected in practice. Only two members had suggested that there was no practice, arguing that the report referred only to dissenting and separate opinions and scholarly writings. He drew attention to paragraphs 20 to 22 of the report, which referred to judgments and advisory opinions of national and international courts and tribunals. He did not support the view expressed by one member that the near universal reliance by domestic courts on fundamental values should be discarded because courts in different jurisdictions might attach different meanings to the same words; that would suggest that it was necessary not only to establish practice but the intention behind the practice, which was a standard that would never be met under any topic.

4. Other members had also expressed doubts about the notion of fundamental values. One, for example, had sought to reject it because domestic law could be grounded on particular basic values chosen by a nation, but international law was grounded on a multiplicity of value systems. If that distinction were correct, he did not see why the international community and its multiplicity of value systems could not produce fundamental values. Another member had expressed doubts about whether *jus cogens* could be said to "reflect" or "protect" fundamental values. They were different concepts, and it was not implied in the report that they were not; they were not mutually exclusive, however, and he tended to agree with the proposal to use the two verbs—separated by "and/or" rather than "and". He agreed with the members who had suggested that it would be helpful to clarify what was meant by fundamental values: by definition, such values were not static, as they largely related to the problems of the day, and such fluidity would best be captured in the commentary.

5. As at the previous session, the link between universal applicability and regional *jus cogens* had been made. Several members had expressed concern about envisaging the inclusion of regional *jus cogens*, but he agreed with the member who had maintained that such a notion would not be inconsistent with universal application. After all, if regional *jus cogens* did exist, it would be universally applicable within that region. His suspicion that regional *jus cogens* was not possible in legal terms derived not from some sort of tension with the notion of universal application but from other considerations that would be addressed in a future report, such as the applicability of the persistent objector doctrine. More importantly, practice incontrovertibly showed that *jus cogens* norms were universally applicable. The question raised of whether universal application meant "all States" or "all subjects of international organizations" was an important one, which he would prefer to address in the commentary. One member had seemed to misconstrue universal application as meaning that a norm must be universally accepted before it could be accepted as *jus cogens*.

6. With respect to hierarchical superiority, one member had suggested that, in some cases, international courts seemed to have actually stripped *jus cogens* of its hierarchical superiority, but that was simply not true. The cases cited would be addressed in the context of consequences, but they had little, if anything, to do with superiority. In *Jurisdictional Immunities of the State*, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* and *Al-Adsani v. the United Kingdom*, the courts had sought to specifically exclude the question of hierarchy by stating that the rules in question were not in a relationship of conflict, so that the issue of hierarchy did not arise at all. He did not agree with the members who had suggested that hierarchical superiority was more of a consequence than a characteristic. There were consequences that flowed from that characteristic, such as invalidity, but hierarchical superiority was not simply a consequence. He did agree, however, that the effects of hierarchy on other sources of international law, such as general principles and customary international law, should be addressed in future reports.

7. In general, members had found that the characteristics set out in draft conclusion 3, paragraph 2, were supported by relevant practice; however, several members had questioned their practical utility. The suggestion seemed to be that the Commission should not include the characteristics unless they had a direct effect on the criteria and identification of *jus cogens*. He did not agree with those who had suggested that the characteristics should be included in the commentary. Draft conclusions were, by nature, a mixture of normative and descriptive conclusions on the state of the law. He did not see how the Commission could justify not including in the text elements that were

[331] For draft conclusion 3 proposed by the Special Rapporteur in his first report, see *Yearbook … 2016*, vol. II (Part One), document A/CN.4/693, para. 74.

the most common and on which reliance was the most consistent in practice.

8. Some members of the Commission had called for some or all of the characteristics to be included as part of the identification criteria, arguing, *inter alia*, that they were critical to addressing the inconclusiveness of the elements contained in article 53, that they were intrinsically linked with whether a norm became *jus cogens*, that the fact that *jus cogens* norms protected fundamental values should be mentioned, that certain fundamental public policy values were necessary to prove the existence of *jus cogens* and that it would be difficult to leave fundamental values as simply descriptive. One member had asked whether there were any known norms of *jus cogens* that did not reflect those characteristics, and another had observed that fundamental values represented the substantive or material requirement for *jus cogens*, the implication being that article 53 represented the formal requirements. There was something to be said for the views expressed. In that context, he referred to paragraph 18 of the second report, which stated that "[s]uch characteristics may … be relevant in assessing the criteria for *jus cogens* norms of international law" and to paragraph 89, where it was stated that "the belief by States that particular norms reflect these characteristics" might be advanced in support of *opinio juris cogentis*. His intention had been to include such language in the commentary, but he would have no objection if the Drafting Committee decided to reflect the idea in the text itself.

9. One member had suggested that the distinction drawn between the characteristics and the criteria and the report's attempt at justifying the characteristics were unconvincing, and that the inclusion of the provision on characteristics would be superfluous and potentially harmful. However, the characteristics could be either superfluous or harmful, but hardly both—the two were mutually exclusive.

10. Concerning the natural law issue that had been raised by several members, although he found it surprising to be described as a positivist, the fact that his reports had created that impression perhaps demonstrated that he did not allow his own policy preferences to determine their content, but instead stuck to the objective evidence. With the exception of two members, all had accepted that article 53 should serve as the basis for consideration of the topic. One member believed that the Commission should be visionary and should not restrict itself to what States might have agreed to; his criticism of the two reports seemed to centre on what he termed the consent-based approach. However, the approach was not based on consent; the role of States was, of course, central, but not in the sense of consent.

11. Most members had agreed, in principle, with the two-step approach to the identification of *jus cogens*. However, one member had suggested that this approach, in particular the idea of *opinio juris cogentis*, was unnecessary, and that a simpler process would be preferable, and two others had considered that the approach might suggest a temporal element that did not always exist. That had not been his intention. The criteria for identification were without prejudice to the process by which the norms of *jus cogens* were formed, although of course there was a close correlation. One member had suggested that the two-step approach was interesting but artificial and amounted to double counting, but had not offered an alternative. The proposed approach could only be seen as double counting if the fact that the two steps were qualitatively different was ignored. In the first step, one was searching for the existence of law, most often customary international law, while in the second, what was at issue was the peremptory character of the rule or norm. It would be double counting only if, in that second stage, it were sufficient to show that a norm was accepted and recognized as having the quality of law.

12. One member had argued that the words "accepted and recognized" did not constitute a single criterion, and had seemed to take issue with the reasons cited for their inclusion in article 53 of the 1969 Vienna Convention. Did that mean that clear and incontrovertible evidence of recognition of peremptoriness was not sufficient, and that acceptance also needed to be shown? There was simply no evidence of anyone, whether in State practice or the decisions of international courts and tribunals, engaging in that interesting, but ultimately highly academic, distinction. He could not agree with the member who had suggested that the term "acceptance" applied to customary international law and "recognition" to general principles of international law: the basis for that distinction was not clear. As was noted in the report, the two words had been included in article 53 to reflect the language of Article 38 of the Statute of the International Court of Justice, but no distinction had been made as to their applicability. At any rate, those views could be reflected in the commentary.

13. One member had made a proposal for a structural reformulation of the draft conclusions based on two substantive criteria and one procedural criterion: the norm in question should be one of general international law, it should be a peremptory norm, and it should be accepted and recognized by the international community of States. Another member had made a similar proposal, based on four criteria: norms of general international law, acceptance and recognition by the international community, non-derogability, and modification only by a subsequent norm—though the last two could be merged into a single criterion. Although he was sympathetic to both proposals, he had difficulties in accepting them. First, they would require a major rewriting of article 53 of the 1969 Vienna Convention. It was clear from the text of article 53 and from the negotiating history that acceptance and recognition were meant to qualify the non-derogability requirement. Second, the approach would require the Commission to go against the grain of practice, which generally also conceived of article 53 as a two-step approach. Finally, it was not clear, under the proposed structure, what acceptance and recognition by the international community of States would refer to.

14. Noting that one member had raised the question of the difference between the criteria for *jus cogens* and the general nature of *jus cogens*, he recalled that draft conclusion 3, paragraph 1, had been redrafted essentially as a definition. Even though criteria were almost always derived from definitions, that did not obviate the need for criteria.

15. Most members had argued that acceptance and recognition by the international community of States as a whole applied to both non-derogability and modification. One member had agreed with the general idea that, structurally, proper interpretation of article 53 would include modification, but would rather it not be included in the draft conclusions, arguing that when States expressed their opinions, convictions or attitudes, they contemplated the status and character of the norm and not its future demise at the hands of a new norm. That likely explained his own reluctance to include modification when drafting the second report. However, the arguments advanced in favour of including modification were insurmountable, and the structure of article 53 was certainly compatible with that view. While courts generally only referred to the non-derogability element, as in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, it was possible that this was simply a kind of shorthand. At any rate, from a substantive perspective, the views expressed by members suggested that a norm conclusively shown to be accepted and recognized as one that was non-derogable was a norm of *jus cogens* unless separate evidence was also adduced concerning the process of its modification. As one member had noted, judicial practice from both domestic and international courts had focused on the evidence of acceptance and recognition of non-derogability. The solution would be to view the derogation and modification elements as composite parts of a single criterion. On that understanding, he accepted the views of the members of the Commission on that issue.

16. However, he did not agree with the group of members who believed that the inclusion of the modification element would make draft conclusion 4 similar to draft conclusion 3, necessitating the deletion of one or the other. The two provisions had two different objectives: one defined *jus cogens* while the other set out the relevant criteria. Merely having the definition without breaking it down into its constituent elements would not be helpful. Draft conclusion 4 illustrated the relationship between the different elements in draft conclusion 3. He could not therefore comfortably agree to the merger of the two draft conclusions. While he was generally in favour of streamlining and welcomed suggestions from members as to how to do so, it was necessary to take care not to lose essential elements of the text.

17. One member had suggested that the topic of *jus cogens* clarify the ways in which a norm could be modified. That suggestion seemed to relate mainly to the formation of a norm of general international law and to how modification could take place given the inadmissibility of practice contrary to general international law. He was not sure that the question of how to reconcile potentially unlawful conduct with the formation of a new rule should be dealt with under the topic of *jus cogens*. In any case, while the issue of modification in broader terms would certainly be covered in a future report, it was unclear whether the particular contradiction in theory should be.

18. Another member had suggested that the first sentence of article 53 of the 1969 Vienna Convention be included as a criterion for the identification of a *jus cogens* norm. While the literature commonly supported the notion that article 53 defined *jus cogens* in terms of the consequences of a norm, such assertions were usually based on the second sentence of article 53, particularly with regard to the element of non-derogation, rather than on the first sentence. In any case, even the ordinary interpretation of article 53 would serve to exclude the first sentence. It was only in the second sentence that the word "is" was used to denote that something was being defined. He therefore did not support the suggested amendment.

19. While most members had expressed agreement with the general approach to the description of *jus cogens* norms as norms of general international law, many had expressed the view that "general international law" had never been authoritatively defined. It had also been suggested that the Commission examine the meaning of the term "norm", but the usefulness of such a discussion was questionable. Furthermore, it was incorrect to consider the words "norm" and "rule" as synonymous and he would not be amenable to reflecting such an interpretation in the commentary to the draft conclusions.

20. In response to the question raised as to whether paragraph 41 of the report implied that international humanitarian law could not form part of *jus cogens*, he said that the point being made in paragraph 41 was, on the contrary, that attempting to define general international law by distinguishing it from treaty law and *lex specialis* might result in the strange and likely unintended consequence of precluding international humanitarian law rules. Hence, paragraph 42 began by stating that the word "general" in the phrase "general international law" referred to the scope of applicability. Since international humanitarian law was applicable to all States, it was not excluded from the possibility of producing *jus cogens* norms.

21. One member, while agreeing that the question in respect of general international law was to whom it applied, had suggested that the Commission strive for even greater clarity by stating that norms of general international law were those that were "binding on all States". Another member, of the same view, had had no objection to the assertion of universal application in draft conclusion 5, paragraph 1, on the understanding that regional *jus cogens* would be addressed subsequently. However, the assumption that draft conclusion 5, paragraph 1, referred to universal application was in both cases based on a misconception. There was a big difference between the contexts in which universal applicability and general applicability were used in draft conclusion 3 and draft conclusion 5, paragraph 1, respectively. Draft conclusion 3 referred to *jus cogens*, which was indeed universally applicable, whereas draft conclusion 5, paragraph 1, referred to categories such as customary international law that were not necessarily universally applicable. The persistent objector doctrine and even what the Commission referred to as "particular custom" precluded the possibility of stating, unequivocally, that general international law was applicable to all. It was important in any case to avoid creating the impression that *jus cogens* was synonymous with customary international law.

22. It had been suggested that, given the lack of a generally accepted definition of general international law, reference should be made to article 31, paragraph 3 (*c*), of the 1969 Vienna Convention. In fact, that article referred

to "any relevant rules"—thus not necessarily general rules of international law—that were "applicable in the relations between the parties", the scope of which would clearly extend to bilateral treaties and local customary international law. That could hardly be regarded as synonymous with or equivalent to general international law.

23. While several members had expressed disagreement with the report's conclusion that treaties were not part of general international law, others, with whom he agreed, had asserted that treaty rules could reflect norms of general international law but were not themselves general international law. It was worth noting that all those members who had spoken on that issue had referred to the Charter of the United Nations as an example; he assumed that they had been referring to particular provisions in it and not to the Charter of the United Nations as a whole. Yet every provision in the Charter of the United Nations to which they had referred was also customary international law; the same was true of the references made to the 1949 Geneva Conventions for the Protection of War Victims and some human rights treaties. Such references were therefore of limited use in the topic under consideration. Taking the hypothetical example that an overwhelming majority of States ratified a treaty establishing a norm that the parties declared to be peremptory, not just non-derogable, would that norm suddenly be elevated to *jus cogens* status, making it binding on non-States parties? The Commission should exercise great caution before drawing such conclusions.

24. Draft conclusion 5, paragraph 4, did not state that treaty provisions were not general international law for the purposes of *jus cogens*, but merely that such provisions could reflect norms of general international law, an objectively correct proposition reflected in the Commission's work on customary international law.

25. Responding to a suggestion that treaty law be highlighted as reliable material in identifying *jus cogens* norms, he said that while resolutions and other materials could indeed reflect norms of general international law, draft conclusion 5 did not concern evidence. Rather, it was intended to identify those recognized sources of international law that qualified as general international law and to provide some conclusions about their relationship to *jus cogens*. Since resolutions and other potential materials did not qualify as sources of law, it would be inappropriate to include them in draft conclusion 5. In addition, although he did not object to specifying that treaties of universal or near-universal participation were more likely to reflect general international law, he wondered if making such a statement might imply that bilateral and other treaties could not reflect it.

26. One member had expressed the view that customary international law, general principles of law and treaty law should all play an equal role in the identification of *jus cogens* norms and, further, that all three should exist at the same time for a norm to be elevated to one of *jus cogens*. However, such a view was not borne out by practice and doctrine. The case concerning *Questions relating to the Obligation to Prosecute or Extradite*, cited as supporting that view, did not indicate that general international law meant that all three sources must be present. While the International Court of Justice had used elements from all three sources, it was not with a view to establishing general international law.

27. Divergent views had been expressed regarding the role of general principles as an underlying legal source for a *jus cogens* norm. One member had emphasized, correctly in his view, that not all general principles were *jus cogens* norms. Another had noted that while it was possible in theory for general principles to form the basis of a *jus cogens* norm, there was no practice to support it. There could be many reasons for the dearth of practice, however. Moreover, if the Commission's work on the topic proceeded from article 53 of the 1969 Vienna Convention, then in addition to practice, the interpretation of article 53 should also be taken into account. Both ordinary meaning and drafting history supported the inclusion of general principles of law as general international law capable of rising to the level of *jus cogens*. Lastly, he agreed that the words "basis for" in draft conclusion 5 should be replaced with the words "source of".

28. Referring to one member's suggestion that general principles of law had been excluded by the Commission itself during its debate in 1963 on what would ultimately become article 53, he said that the summary records of that debate revealed that the issue had not been whether general principles formed part of general international law for the purposes of *jus cogens*, but rather, whether general principles should be considered a basis for the voiding of treaties, in other words, whether they themselves could be considered *jus cogens*.

29. The main reason advanced by those opposed to the inclusion of general principles of law was the fact that they were, by definition, domestic law principles. While it was true that most general principles were derived from domestic legal systems, once those domestic law principles were recognized as general principles within the meaning of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, they ceased to be merely domestic law principles. To become *jus cogens*, domestic principles would be subject to a series of processes that were not defined in any material on *jus cogens*. However, that was no different from customary international law: for practice to become customary international law, and thus part of general international law, it must undergo some processes, including consistency and the acquisition of the requisite *opinio*. For the purposes of *jus cogens*, it was sufficient to note that general principles could be a source of *jus cogens*. Draft conclusion 5 simply suggested that possibility and intimated that practice in that regard was minimal. The commentary, should the text be adopted, would also make that clear.

30. The notion that general principles of law on their own were *jus cogens* represented a natural law approach; however, he did not agree that his approach in draft conclusion 5, paragraph 3—namely, that general principles of law were capable of constituting general international law for the purposes of *jus cogens*—represented one of natural law. He supported the proposal to redraft draft conclusion 5 in such a way as to designate both general principles of law and treaty rules as being capable of giving rise to or reflecting a norm of general international

law that could in turn be elevated to a *jus cogens* norm. Such an amendment would in many ways resolve the differences between members on treaty law and general principles. He noted that, on the whole, members had expressed agreement with the content of draft conclusion 5, if not with the manner in which it had been drafted.

31. Draft conclusion 6 had not received any outright criticism, although some members had questioned its added value and had suggested that it might be incorporated into other provisions as part of a streamlining exercise. He found draft conclusion 6 useful, structurally; however, if the Drafting Committee preferred to delete it, he would find appropriate language, to be included in the commentary, to provide orientation on the structure of the draft conclusions concerned with the identification of *jus cogens*.

32. The main issues raised regarding draft conclusion 7 concerned the meaning of the phrase "as a whole". While a couple of members had expressed doubt about the language in the report to the effect that "as a whole" denoted the collective attitude or views of States, he tended to support the view expressed by other members that the phrase sought to inspire a sense of the collective. It was a recognition of the evolution of international law, at the time of the drafting of the 1969 Vienna Convention, from bilateralism to community interests. Nonetheless, perhaps the difference of views on that point was not crucial, since the assessment of the collective *opinio* would not preclude the consideration of the attitudes of individual States in their interaction with one another and when acting collectively.

33. He did not agree that the word "attitude" was inappropriate. The draft conclusions were a mixture of normative and descriptive characteristics of certain aspects of international law for which the criterion of normativity, which might well be relevant for draft guidelines, principles and articles, was less important. In any case, the proposal to replace the word "attitude" with "assessment" was not logical: presumably materials were assessed with a particular aim in mind, and in the report it was suggested that the assessment provided for in draft conclusion 9 was conducted with a view to determining the collective attitude of States. The suggestion to replace the word "attitude" with a phrase that would refer to practice coupled with *opinio juris* was likewise unacceptable, since that would be indicative of custom. He strongly supported the suggestion to substitute the word "conviction" for the word "attitude".

34. Observing that many members had expressed concern that the word "very" had been deleted in draft conclusion 7, paragraph 3, he said that the phrase "a large majority" had not been intended to signify a less-than-substantial majority. He would therefore be amenable to the proposal to revert to the phrase initially proposed by the Chairperson of the Drafting Committee at the United Nations Conference on the Law of Treaties.

35. With regard to draft conclusion 8, paragraph 2, he agreed that the phrase "accepted by States as one which cannot be derogated from" should be replaced with "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted" in order to better reflect article 53 of the 1969 Vienna Convention. If the Drafting Committee amended draft conclusion 4 to include a criterion regarding the modification of a norm, draft conclusion 8 would need to be amended accordingly.

36. One member had suggested that draft conclusion 8, paragraph 2, did not shed much light on the subject at hand, but simply repeated the content of draft conclusions 3, 4 and 6. That was not correct: none of the other draft conclusions emphasized that evidence must be provided or for what evidence must be provided. The question of whether *opinio juris cogentis* differed from *opinio juris sive necessitatis* not only by reason of content of the "opinion" but also by form was answered in the body of the report and in draft conclusion 8. Draft conclusion 9, paragraph 1, made it plain that it was the content that distinguished the two.

37. Overall, draft conclusion 9 had raised fewer concerns than drafting suggestions. He agreed that national constitutions should be included as evidence; the Drafting Committee might consider inserting a reference to national legislation in paragraph 2. He had no objection to inserting language in paragraph 2 to make it clear that the list contained therein was non-exhaustive. National courts could indeed serve as a subsidiary means for identifying a norm as one of *jus cogens*, hence the reference to such courts in paragraph 2, if not in paragraph 3. He was flexible regarding the suggestion to add, in paragraph 3, the qualifiers found in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, though he noted that the Commission had had a lengthy debate on that matter in the context of customary international law.

38. One member had observed, correctly, that the language of draft conclusion 9 had departed from the language adopted in the Commission's work on the topic of identification of customary international law. That had been done because of the particular relationship between *jus cogens* and the Commission's work. Draft conclusions 4 to 9 concerned the identification of *jus cogens* norms. No other body had been more influential in that respect than the Commission; the same could not be said for its work on the identification of customary international law.

39. As to the question of whether the Commission should provide an illustrative list of *jus cogens* norms as part of its consideration of the topic, a greater number of members now seemed to be in favour of providing such a list compared to during the previous quinquennium. He would take the Drafting Committee's views into account when formulating a recommendation in respect of such a list.

40. While he welcomed the feedback that he had received on both the reasoning behind and the content of the draft conclusions, one statement had seemed more *ad hominem* than the others. A Commission member had questioned his selection of article 53 of the 1969 Vienna Convention as the point of departure for his second report and had suggested that the reasons he had advanced defeated the purpose of considering the topic in the first place. The member was not alone in holding that view,

which in itself was not a problem. Rather, the problem lay with the fact that the member in question had offered no alternative point of departure or guidance on the approach to be taken. The topic of *jus cogens* was not being considered by the Special Rapporteur alone, but by the Commission as a whole; all the members would be responsible for its success or its failure. On the question of whether the Special Rapporteur should make known his position on the positive versus natural law debate, it was sufficient to say that philosophical inclinations were irrelevant, since the Commission was a collegiate body and its outcome on the topic should reflect all the members' views, not just the Special Rapporteur's.

41. In conclusion, he thanked the Commission for the enriching debate on his report and requested it to change the name of the topic, "*Jus cogens*", to "Peremptory norms of general international law (*jus cogens*)" and to refer draft conclusions 4 to 9 to the Drafting Committee.

42. The CHAIRPERSON said that he took it that the Commission wished to accede to the Special Rapporteur's requests to change the name of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)" and to refer draft conclusions 4 to 9 to the Drafting Committee.

It was so decided.

43. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" was composed of the following members: Mr. Tladi (Special Rapporteur) Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Ouazzani Chahdi, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

Succession of States in respect of State responsibility[332] (A/CN.4/703, Part II, sect. G,[333] A/CN.4/708[334])

[Agenda item 8]

First report of the Special Rapporteur

44. The CHAIRPERSON invited Mr. Šturma, Special Rapporteur on the topic "Succession of States in respect of State responsibility", to introduce his first report (A/CN.4/708).

45. Mr. ŠTURMA (Special Rapporteur), introducing his first report on succession of States in respect of State responsibility, said that the topic, while new to the Commission's work, was linked to several it had previously dealt with, including succession of States in respect of treaties, succession of States in respect of matters other than treaties, and nationality in relation to the succession of States, completed in 1974, 1981 and 1999, respectively. Its work on the responsibility of States for internationally wrongful acts had been completed in 2001. The new topic would fill a gap in both the law of succession of States and the law of State responsibility. It was also susceptible to codification and progressive development: as the International Court of Justice had observed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the rules on succession that might come into play fell into the same category as those on treaty interpretation and responsibility of States (para. 115 of the decision). In other words, the rules in question were systemic rules of general international law. In his first report, he had referred explicitly to the codification and progressive development of international law, both of which fell within the statutory mandate of the Commission. The dearth of examples of State succession made it difficult to identify customary rules on succession of States in respect of State responsibility. Nevertheless, it seemed sensible to examine State practice and propose certain rules, especially subsidiary rules, that might govern State relations and the legal consequences arising from responsibility in the event of succession of States.

46. During the discussion of the Commission's long-term programme of work in the Sixth Committee in 2016, summarized in the introduction to the report, seven delegations had supported the inclusion of the topic, two had questioned its relevance and one had taken an intermediate stance. Support had chiefly been expressed by the delegations of States that had recently experienced problems of succession, such as the Czech Republic, Slovakia, Slovenia and the Sudan. The report briefly outlined the Commission's work on State responsibility for internationally wrongful acts and the exclusion of succession from the resultant draft articles.[335] It also described the work that had led to the 1978 Vienna Convention on Succession of States in respect of Treaties (1978 Vienna Convention), the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983 Vienna Convention), and the 1999 draft articles on nationality of natural persons in relation to the succession of States.[336] Issues of succession had also arisen in the context of the 2006 draft articles on diplomatic protection.[337] The report also took account of work done outside the Commission, in particular by the Institute of International Law, which had adopted a resolution on State succession in matters of State responsibility at

[332] At its sixty-eighth session (2016), the Commission decided to include the topic "Succession of States in respect of State responsibility" in its long-term programme of work (*Yearbook … 2016*, vol. II (Part Two), p. 23, para. 36). At the present session, it decided to include the topic in its programme of work and named Mr. Pavel Šturma as Special Rapporteur on the topic (see the 3354th meeting above, p. 58, para. 47).

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

[334] Reproduced in *Yearbook … 2017*, vol. II (Part One).

[335] The draft articles adopted by the Commission 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.

[336] The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq*., paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

[337] 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.

its Tallinn session in 2015.[338] Despite the high quality of that work, the Commission should be free to take a different approach, as appropriate.

47. Chapter I of the report aimed to explain the scope of the topic and shed more light on the question of whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from the international responsibility of States. The topic should be limited to the transfer of rights and obligations arising from internationally wrongful acts, remaining within the scope and definitions contained in the articles on the responsibility of States for internationally wrongful acts. The scope of the topic would not extend to international liability for injurious consequences arising out of acts not prohibited by international law, principally because international liability provided for various kinds of primary, treaty-based obligations. Any possible question of transferring such obligations should be resolved on the basis of the rules applicable to the succession of States in respect of treaties. Work on the topic should also follow the main principles of succession of States concerning the differentiation of transfer of part of a territory, secession, dissolution, unification and creation of a new independent State. An appropriate outcome for the topic would seem to be draft articles with commentaries, a choice supported by the precedents of the articles on the responsibility of States for internationally wrongful acts and the texts that had become the 1978 Vienna Convention and the 1983 Vienna Convention, as well as the articles on nationality of natural persons in relation to the succession of States. The chapter concluded with draft article 1 on scope.

48. Chapter II dealt with general provisions. Having posed the question of whether there was a general principle guiding succession in respect of State responsibility, it briefly explained that the doctrine of State succession had generally denied the possibility of the transfer of responsibility to a successor State, but that modern international law did not support the general thesis of non-succession in respect of State responsibility. Some scholarly works, as well as the 2015 resolution of the Institute of International Law, admitted the transfer of responsibility under certain circumstances. A preliminary survey of State practice related to the topic was presented, including some judicial decisions in both early and new cases. Paragraphs 47 to 64 dealt with cases of succession in the post-decolonization context, mainly in Central and Eastern Europe. Paragraphs 65 to 82 focused on the 1978 Vienna Convention and the 1983 Vienna Convention and whether any rules set out therein were applicable to the topic. In particular, the report drew a distinction between succession of States in respect of responsibility and succession of States in respect of State debts. The latter was understood as an interest in assets of a fixed or determinable value existing on the date of the succession of States. If, however, an internationally wrongful act occurred before the date of succession but the legal consequences arising therefrom had not yet been specified, then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility. Although there were differences between State succession in respect of responsibility and State succession in respect of other areas, the basic terms should be used in a uniform manner, as reflected in draft article 2 on the use of terms.

49. The last section of chapter II dealt with the nature of the rules to be codified and the relevance of agreements and unilateral declarations. Analysis seemed to support two preliminary conclusions. First, the traditional thesis of non-succession had been questioned by modern practice. Second, the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needed to be proved on a case-by-case basis. That led to the view that in the present topic, as with the 1978 Vienna Convention and the 1983 Vienna Convention and the articles on nationality of natural persons in relation to the succession of States, the rules to be codified should be of a subsidiary nature. As such, they might serve two purposes. First, they could present a useful model for the States concerned to use and modify. Second, in the event of lack of agreement, they could present a default rule to be applied in case of dispute. In principle, an agreement between the States concerned should have priority over subsidiary general rules on succession, which was why the report focused on an analysis of the relevance of such agreements, while also bearing in mind the *pacta tertiis* rule. In that respect, there was a difference between the 1978 Vienna Convention, article 8 of which reflected the relative effect of treaties, and the 1983 Vienna Convention.

50. The situation was even more complex when it came to the present topic. On the one hand, rules on State responsibility were different from the law of treaties. On the other hand, agreements between States concerning their succession differed in nature. The report distinguished three groups of agreements. The first and largest group included devolution agreements, related mainly to the process of decolonization, which were agreements between a predecessor State and a successor State and were therefore subject to the *pacta tertiis* rule. The second group, claims agreements, were concluded between a successor State and a third State that had been affected by an internationally wrongful act committed by the predecessor State. The *pacta tertiis* rule did not apply. Such agreements were less numerous but very important because they were directly related to the transfer of obligations arising from State responsibility. The third group comprised other agreements that differed from the classic devolution agreements and claims agreements: they were more recent, having been adopted from the 1990s onwards, outside the decolonization context, and usually governing the settlement of various issues arising from the succession of States, including certain claims and liabilities. In addition, they could provide for certain administrative arrangements. That analysis had inspired him to propose draft article 3 on the relevance of the agreements to succession of States in respect of responsibility.

51. The report next addressed the relevance of unilateral acts. Unlike article 9, paragraph 1, of the 1978 Vienna Convention and article 6, paragraph 3, of the 2015 resolution of the Institute of International Law, which concluded that the obligations and rights of a predecessor State did not become the obligations or rights of the successor

[338] Resolution on State succession in matters of State responsibility, Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 711–719; available from: www.idi-iil.org, *Resolutions*.

State only by reason of the fact that the successor State had accepted them, the report was not ready to accept that conclusion quickly. Instead, it drew its conclusions from the analysis of three relevant sources and materials: certain examples of unilateral acts of States; relevant rules on State responsibility; and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,[339] adopted by the Commission in 2006. On the basis of those materials, the report presented draft article 4 on unilateral declaration by a successor State, which made a clear distinction between the transfer of rights and the transfer of obligations.

52. Chapter III set out the future programme of work on the topic. The second report would address the issues of the transfer of obligations arising from an internationally wrongful act by a predecessor State. The third report would in turn focus on the transfer of rights of an injured predecessor State to the successor State. The fourth report could address procedural and other issues, including the plurality of successor States and the possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals. Depending on progress in debating the reports, the entire set of draft articles could be adopted on first reading in 2020 or 2021.

53. Finally, he drew attention to a number of discrepancies among the various language versions of the report and requested the Secretariat to correct them as necessary.

54. Mr. MURASE said that the topic of succession of States had been of significant importance in the process of decolonization after the Second World War, which had led to the creation of many new independent States, and also in various situations during the period following the cold war, including the collapse of the Soviet Union and the former Yugoslavia. Although the topic could be viewed as having limited contemporary significance, sporadic events of secession and merger of States might still occur. In its work on the topic, the Commission should refer constantly to the 2015 resolution adopted by the Institute of International Law. It was already apparent that a number of the draft articles proposed by the Special Rapporteur were identical or substantially similar to portions of that resolution. What was the Special Rapporteur's view of the resolution—were there any points that should be changed or supplemented?

55. Draft article 1, on scope, was crucial to the draft articles as a whole. In his view, it should be expanded somewhat. The phrase "in respect of responsibility of States for internationally wrongful acts" should be further qualified. It was necessary to know whether an internationally wrongful act had occurred before its effect on State succession could be considered, and its effect on the rights and obligations of the States concerned must also be known. The expression "effect of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act" would capture the scope of the draft articles more accurately.

56. He was not sure whether issues relating to State liability should be entirely excluded from the project, as proposed in paragraph 21 of the report. The term "liability" always caused a problem since there was no corresponding term in French. In English, the term referred to the risk arising out of activities not prohibited by international law; it was understood that responsibility was engaged by a wrongful act, whereas liability might be engaged by lawful acts. It was true that a large part of international liability was treaty-based, and questions could therefore be resolved in accordance with the rules on the succession of States in respect of treaties. However, some of the important rules and principles of liability were now considered as rules of customary international law, and that should be mentioned at least in the commentary.

57. While he basically agreed that the responsibility of international organizations should not be included under the topic, there were situations where States members could incur responsibility in connection with the conduct of an international organization *vis-à-vis* third parties. Those situations were catalogued in articles 58 to 63 of the draft articles on the responsibility of international organizations,[340] which should also be mentioned in the commentary.

58. Concerning draft article 1, on scope, it was worth noting that the Institute of International Law resolution on succession applied only to the succession of States occurring in conformity with the principles of international law embodied in the Charter of the United Nations. However, many instances of State succession occurred as a result of the unlawful use of force by secessionists and outsiders. That raised the question whether there were any relevant rules of international law by which to judge the lawfulness or unlawfulness of a given succession of States. If there were rules of international law that prohibited such State succession, then perhaps they should be mentioned in draft article 1.

59. Reference should also perhaps be made to issues relating to the succession of Governments, which in some cases resembled the succession of States. The succession of Governments presupposed the continuity of the State; accordingly, there should be no problem with the automatic transfer of the rights and obligations of previous Governments. However, in some exceptional cases, similar claims might be made to a successor Government for wrongful acts committed by the previous Government *vis-à-vis* a number of third parties when the new Government had come to power in an unconstitutional manner, established a new regime or simply given a new name to the State. Article 2, paragraph 3, of the Institute of International Law resolution did not govern the situations resulting from political changes within a State, including changes in the regime or name of the State: it failed to encompass the full complexity of the issue. He cited the *Kokaryo (Guanghualiao) Dormitory* case, between Japan and the People's Republic of China, in that connection.

[339] The Guiding Principles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), pp. 161 *et seq*., paras. 176–177.

[340] 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.

60. In paragraphs 115 to 117 of the report, the Special Rapporteur shifted from discussing State responsibility to giving examples of legislation relating to the obligations, responsibility and liabilities of Governments. Those examples might well involve the succession of States, yet the Special Rapporteur used the term "organs of the predecessor State". Furthermore, it was not clear whether the cases described in paragraph 122 concerned the succession of Governments or the succession of States. A clearer distinction should thus be drawn between the devolution of State responsibility and devolution of Government responsibility.

61. With regard to draft article 2, on the use of terms, he had no objection to subparagraphs (*a*) to (*d*), which were identical to the provision on use of terms in the Institute of International Law resolution. However, he suggested that a definition of the term "internationally wrongful act" be inserted, based on that contained in article 1 (*g*) of the Institute of International Law resolution. In addition, subparagraph (*e*) referred to "the relations" that arose under international law from the internationally wrongful act of a State, but the words "the consequences" or "legal consequences" would seem more appropriate.

62. He had some problems with draft articles 3 and 4, which were essentially "without prejudice" clauses. It would make more sense for the general rules on the succession of States covering core issues, such as claims of international responsibility and the corresponding obligations for reparation, to precede such clauses. He would therefore prefer to wait for the Special Rapporteur to elaborate those general rules before considering draft articles 3 and 4. Thus he was in favour of referring only draft articles 1 and 2 to the Drafting Committee.

63. Mr. REINISCH said that Mr. Šturma was to be congratulated for having produced a substantive report in the short time since his appointment as Special Rapporteur. Nonetheless, he wished to voice his concern about the way the topic had been chosen: at the beginning of the new quinquennium, when almost a third of the Commission's members had been new. The selection of topics merited thorough discussion with a view to clarifying the purpose of the topic: whether it was to codify existing customary international law or to elaborate new rules to be adopted by States in the future.

64. In paragraph 32 of the report, the Special Rapporteur provided ample evidence from the older legal literature to demonstrate the traditional view that a successor State did not succeed to the responsibility for internationally wrongful acts of a predecessor State. That was still the prevailing view in the literature today. For instance, in *Brownlie's Principles of Public International Law*, cited in the third footnote to paragraph 31, James Crawford concluded that the preponderance of authority was in favour of a rule that responsibility for an international delict was extinguished when the responsible State ceased to exist, as liability was considered "personal" and remained with the responsible State if it continued to exist after the succession.[341] French scholarly writings supported the view that there was no customary rule postulating an automatic transfer of obligations resulting from wrongful acts of a predecessor State to a successor State, and German literature clearly endorsed the traditional rule of non-succession, often stating that there was no succession to the "personal" rights and obligations stemming from State responsibility.

65. In paragraphs 38 and those that followed, the Special Rapporteur cited a number of cases that clearly adhered to the non-succession rule. The lesson to be drawn from the award in the *Redward* case was that there was no succession to the "personal" obligation arising from State responsibility, although there might be succession to State debts. To demonstrate the existence of State succession to State responsibility, the Special Rapporteur used the arbitration in the *Lighthouses case between France and Greece* concerning a dispute between a French company and Greece, as the Ottoman Empire's successor for the territory of Crete. Most of the claims in the arbitration had invoked wrongdoing by Greece itself, not by the Ottoman Empire, although one claim had alleged an internationally wrongful act committed by the Ottoman Empire. The Permanent Court of Arbitration had decided that the Ottoman Empire had not violated international law, but had clarified that, in any event, Greece would not be responsible for an internationally wrongful act committed by the Ottoman Empire—it would be Turkey, as the continuing State of the Empire. The Court's conclusion had rested primarily on the treaties entered into by the States involved and the notion that a successor State was not liable for preceding acts that it had "absolutely nothing" to do with. In respect of some claims, Greece had been found responsible for acts committed before it had partially succeeded to the Ottoman Empire. However, the Court had held Greece liable, not for the commission of the acts of its predecessor State, but for pursuing the wrongful conduct after succession. The Court itself had argued for a nuanced approach to the issue of succession in State responsibility: it was clear that a general and absolute principle of non-succession did not exist, at least with regard to debts of a predecessor State (pp. 89 and 92 of the decision).

66. Among more recent cases, the Special Rapporteur cited the *Gabčikovo–Nagymaros Project* case as the most important decision of the International Court of Justice concerning State succession to international responsibility. In paragraph 50 of the report, he argued that "[n]otwithstanding the special agreement between Hungary and Slovakia, the Court [seemed] to recognize the succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts". However, that assertion was based on a quote from paragraph 151 of the Court's judgment which omitted an important passage. In concluding that Slovakia might be liable to pay damages for the conduct of Czechoslovakia, the Court had pointed to a special agreement between the parties that Slovakia should succeed to both the "rights and obligations relating to the Gabčikovo–Nagymaros Project".

67. It was clear from the statements of the parties in the case that the responsibility of Slovakia for acts of Czechoslovakia was not based on any general rule of succession to international responsibility. Hungary, for instance, based its arguments on an exception to the general rule of

[341] See J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, 2012, p. 442.

non-succession to responsibility, when "a successor State, by its *own* conduct, has acted in such a way as to assume the breaches of the law committed by its predecessor".[342] Although the Court had not addressed that issue in its judgment, it had noted that Slovakia, while still a constituent part of Czechoslovakia, had played a significant role in the events leading to the decision about the fate of the project. The only conclusion to be drawn from the Court's decision was thus that it was possible for a State to freely decide to assume the consequences of internationally wrongful acts by a predecessor State.

68. In paragraph 54 of the report, the Special Rapporteur referred to the judgment of the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, as the most recent pronouncement in favour of the argument that the responsibility of a State might be engaged by way of succession. In the case, Croatia had argued that the alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide that had occurred before 27 April 1992—the date of notification by the Federal Republic of Yugoslavia of succession to the Socialist Federal Republic of Yugoslavia—were attributable to Serbia due to its succession to the responsibility of the Socialist Federal Republic of Yugoslavia. The Court had not found a violation of the Convention on the Prevention and Punishment of the Crime of Genocide, and thus had never decided whether the acts of the Socialist Federal Republic of Yugoslavia were attributable to Serbia through succession to State responsibility. Accordingly, while it was true that the Court had not dismissed the argument of Croatia on State succession regarding State responsibility, it had not entertained the substance of the argument, favourably or unfavourably.

69. Having chaired the arbitration in the context of the United Nations Commission on International Trade Law case of *Mytilineos Holdings SA*, mentioned in paragraph 60 of the report, he agreed that it was an interesting case. However, no argument could be derived from that tribunal's award in the sense that a State would succeed to State responsibility obligations incurred by a predecessor State.

70. What could be derived from the decisions discussed by the Special Rapporteur in his report was a default rule of non-succession to State responsibility. The only clearly established exception to that rule appeared to be that succession occurred where a successor State voluntarily assumed secondary obligations arising from internationally wrongful acts committed by the predecessor State or when it endorsed or continued the wrongful conduct. Other exceptions to the default rule might exist, as suggested by the work of the Institute of International Law. However, neither the latter, nor the fact-sensitive approach to establish responsibility of successor States argued for by some scholars, suggested that a rule of succession to State responsibility had evolved.

71. Domestic courts had also generally relied on a default rule of non-succession to State responsibility. Two notable cases were the 1990 *Mwandinghi* case before the Namibian High Court, concerning atrocities committed by South African forces before Namibian independence, and the 2002 Austrian Supreme Court decision in *S. v. Austria* affirming the rule of non-succession in respect of compensation claims relating to the Second World War, which was, however, not relevant because the Russian Federation was recognized as a continuator State of the Soviet Union.

72. Given the prevailing view that there was no succession to international responsibility and the affirmation of that non-succession rule in international practice, it appeared that the Commission's project should be purely one of progressive development, guided by the position of the Institute of International Law that responsibility had to remain with at least some successor State: otherwise no responsibility could be claimed. The proposition was worth discussion, even though it contradicted the existing law and the prevailing view that responsibility stemming from the commission of an internationally wrongful act was a highly "personal" obligation of the State, which like "political" or "personal" treaty obligations did not automatically transfer to a successor State.

73. The Special Rapporteur had clearly provided convincing reasons as to why there could not be any State succession to State responsibility, including with the statements in paragraph 32 of his report that "responsibility *ex delicto*" was "not transferable from a wrongdoer to a successor" and concerning the "highly personal nature" of claims and obligations that arose for a State towards another State as a result of a breach of international law. Moreover, the fact that an exception might exist in cases where a State had declared an intention to succeed to the rights and obligations of its predecessor State, as mentioned in paragraph 33, was merely an acknowledgment that successor States might endorse and accept the consequences of State responsibility. It could not serve as an indication that a new rule had emerged whereby successor States had to succeed to obligations arising from the responsibility of their predecessor States. Also noteworthy in that connection was the statement in the commentary to article 11 of the draft articles on the responsibility of States for internationally wrongful acts to the effect that "if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it had assumed responsibility for it".[343] Such responsibility did not result from State succession but from the successor State's own continuation and endorsement of a wrongful act.

74. Even Professor Marcelo Kohen, former Rapporteur for the Commission on State Succession in Matters of International Responsibility of the Institute of International Law, argued that only three situations had already been established as relevant to succession to State responsibility: acts committed by an insurrection movement leading to the creation of a new State; wrongful acts having a continued character both before and after the date of State succession; and acts allowing for diplomatic protection committed against the predecessor State. In regard to other areas, he acknowledged that the International Court of Justice had left the question open and gave no guidance towards the solution.

[342] *Reply of the Republic of Hungary, 20 June 1995*, vol. I, p. 175, para. 3.163.

[343] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 52 (para. (3) of the commentary to draft article 11).

75. Consequently, to adopt rules stipulating State succession in State responsibility would erode the existing core principles of State succession law. States might well be willing to adopt such new rules; however, it should be made clear from the outset that this was the Commission's intention. It was highly misleading to label the exercise as a codification task when it was a clear example of progressive development. Given the Commission's disappointing experience with its previous codification and progressive development endeavours in the field of State succession, it was questionable whether the project would be widely accepted. The statement in paragraph 24 of the report that the succession of States in respect of State responsibility was a topic of general international law where customary international law had not been well established in the past still rang true. He was not suggesting that the Commission's task should be limited to codifying international law: the task relating to progressive development was equally important. Nevertheless, before embarking on an exercise to establish rules *de lege ferenda*, it would have been advisable for the Commission to consider what such rules might look like—an exercise more suited to a study group.

76. Therefore, he could not recommend the referral of the four draft articles in the first report to the Drafting Committee. Further reflection on the actual purpose of the topic was needed.

The meeting rose at 1 p.m.

3375th MEETING

Friday, 14 July 2017, at 10.05 a.m.

Chairperson: Mr. Eduardo VALENCIA-OSPINA (Vice-Chairperson)

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

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 succession of States in respect of State responsibility (A/CN.4/708).

2. Mr. MURPHY said that, at the outset, he would like to express agreement with several positions taken by the Special Rapporteur in his report. First, he agreed that the Commission should seek to maintain harmony with its prior work, and in particular with the two Vienna Conventions on succession of States, namely the 1978 Vienna Convention and the 1983 Vienna Convention. Second, as the Special Rapporteur indicated, the studies of the International Law Association and of the Institute of International Law were important reference points that should be fully considered, but that should not necessarily be followed if the Commission's judgment led to other conclusions. Third, like Mr. Murase, he agreed that the Commission should exclude the responsibility of international organizations from the scope of the current project. Finally, he agreed with the Special Rapporteur's decision to move forward with the project through the formulation of draft articles with commentaries thereto, rather than some other form of final product.

3. Regarding draft article 1, he agreed that it was necessary to start with an article that addressed the scope of the current project, in accordance with the Commission's usual practice. That said, its text might be somewhat improved in the Drafting Committee. Unlike Mr. Murase, however, he would prefer that the scope of the project did not include State liability or issues relating to succession of Governments, as those issues would take the Commission too far from its principal task.

4. Regarding draft article 2, he agreed with the definitions provided in subparagraphs (*a*) to (*d*) of the terms "succession of States", "predecessor State", "successor State" and "date of the succession of States", which were essentially borrowed from the relevant Vienna Conventions. He was not convinced, however, of the need for subparagraph (*e*), which attempted to define the term "international responsibility". That term had not been defined in prior draft articles of the Commission, including its draft articles on the responsibility of States for internationally wrongful acts[344] and its draft articles on the responsibility of international organizations.[345] The report did not explain why it was critical to define such a term in the present draft articles. He was not persuaded that it was necessary or desirable to do so and would prefer that the matter should be addressed in the commentary, as had been done in prior work. For the same reason, little was to be gained by trying to define "internationally wrongful act", as had been suggested by Mr. Murase.

5. With respect to draft article 3, he agreed with Mr. Murase that it was problematic to deal with draft articles 3 and 4 without first addressing an important, antecedent question, namely: what was the general rule that applied in respect of the transfer of responsibility to a successor State, both in terms of rights and obligations?

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[344] The draft articles adopted by the Commission 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.

[345] 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.

6. The report noted that the general rule articulated in scholarly writings was that there was no transfer of responsibility from a predecessor State to a successor State, at least with respect to obligations. At the same time, the report appeared strongly to suggest that contemporary practice pointed in an opposite direction: that today there might well be automatic transfer of responsibility from a predecessor State to a successor State. Yet, the report took no definitive position as to which view was correct, nor did it advance any draft article that articulated the general rule one way or another.

7. Not resolving the content of a general rule made it difficult—although perhaps not impossible—to determine how best to write draft articles 3 and 4, because those articles were essentially trying to explain when it was that there might be divergences from the general rule. Draft article 3 was focused on the possibility of a bilateral agreement setting forth a special rule that governed in a particular situation, while draft article 4 was focused on the possibility of a unilateral declaration by a successor State setting forth a special rule that governed in a particular situation. Knowing the content of the general rule would help in determining how best to characterize those divergences.

8. Perhaps scholars were right that there was no succession of States in respect of State responsibility. If so, then draft article 3 would indicate the circumstances under which succession of responsibility might be agreed upon by treaty, while draft article 4 would indicate the circumstances under which a successor State might accept succession of responsibility through a unilateral declaration, such as an acceptance of succession of obligations.

9. Alternatively, perhaps scholars were wrong, and there was now a general rule favouring succession of States in respect of State responsibility. If so, then draft article 3 would indicate when it was, through treaties, that agreement might be reached limiting or eliminating such succession, while draft article 4 would indicate whether a State through a unilateral declaration could affect such succession, such as by renouncing a succession of rights. Or perhaps the general rule was somewhere between those two positions, such as automatic succession of obligations, but not of rights.

10. If, despite that difficulty of not first knowing the general rule, the Commission decided to send draft article 3 to the Drafting Committee, then he wished to make the following remarks. The essential concern of paragraphs 1 and 2 was the effect of agreements concluded by a predecessor State and a successor State upon third parties. Those two paragraphs were unnecessarily complicated and might be collapsed together in a more succinct fashion. For example, language along the lines of the following might be appropriate:

> "A predecessor State and a successor State may conclude an agreement providing that rights or obligations in respect of an internationally wrongful act of the predecessor State devolve upon the successor State, but such agreement does not necessarily affect the rights or obligations of another State or subject of international law."

11. The purpose of paragraph 3 was somewhat unclear from its text. Based on the discussion in the first report, paragraph 3 appeared to be trying to clarify the difference between devolution agreements, on the one hand, and claims or other agreements, on the other hand. Unlike devolution agreements, which were concluded exclusively between the predecessor or successor States and did not involve third States as a party, a claims agreement or other agreement concluded by a successor State with a third State could result in enforceable rights and obligations as among those States.

12. Paragraph 3 might not be necessary since it was just restating basic rules of treaty law. However, if there was a desire to retain the paragraph, it might be reformulated to be more direct in terms of what was being said. Thus, the text could perhaps read: "The rights and obligations arising from a claims or other agreement between a successor State and a third State are binding as between the parties to that agreement."

13. While he had no substantive problem with the content of paragraph 4, which indicated the existence of the *pacta tertiis* rule, it was, in his view, unnecessary. Paragraph 4 was essentially restating what was said in paragraphs 1, 2 and 3. It might therefore be better placed in the commentary.

14. Draft article 4 was focused on unilateral declarations of successor States, which was an important issue, but one that probably should not be tackled without knowing the general rule on succession of States in respect of responsibility. If that draft article was referred to the Drafting Committee, his principal concern would be with the final clause of paragraph 2. That clause was a partial statement of the criteria necessary for a unilateral declaration to be legally binding, referring solely to the criterion that the unilateral declaration must be "stated in clear and specific terms". Yet the Commission's work on unilateral declarations included other requirements: first, that the statement should be made by someone with the authority to make such statements; second, that the declaration could not conflict with a peremptory norm of international law; and, third, that when assessing the legal effect of a unilateral declaration, account must be taken of the content and context of, and reaction to, the unilateral declaration.

15. Accordingly, the final clause of draft article 4, paragraph 2, could be altered to take account of all relevant criteria for unilateral acts to be regarded as legally binding. Thus, that clause might instead read: "unless its unilateral declaration is legally binding in accordance with the rules of international law applicable to unilateral acts of States". Adding such a phrase would likely eliminate the need for draft article 4, paragraph 3.

16. He had no concerns with respect to the future programme of work or timetable, as envisaged by the Special Rapporteur.

17. In conclusion, he supported sending draft articles 1 and 2 to the Drafting Committee but suggested that the Special Rapporteur consider holding back draft articles 3 and 4 until the plenary had had an opportunity to debate fully the general rule on succession of States in respect of responsibility, with respect both to the successor State's rights and obligations.

18. Mr. NGUYEN said that the issue of State continuity and succession, especially with regard to the obligations and responsibilities of a successor State, was a vast subject that encompassed, among other things, treaties, State property, nationality, and public and foreign debts, as well as rights and obligations arising from internationally wrongful acts. In its previous work on the topic of succession of States, which had resulted in the 1978 Vienna Convention and the 1983 Vienna Convention, the Commission had decided to leave the issue of rights and obligations arising from internationally wrongful acts for possible future development. However, despite the emergence of new States during the 1960s as a result of decolonization processes and a wave of dissolution of States during the 1990s in Central and Eastern Europe, there had been long periods during which the emergence or disappearance of a State had been rare. Indeed, the rarity of such events posed difficulties in identifying a unified and clear trend of State practice and, consequently, establishing rules and principles of international law governing the succession of States in respect of responsibility. He therefore highly appreciated the Special Rapporteur's efforts to provide a comprehensive view of general State practice and the legal basis and nature of State succession in respect of State responsibility.

19. He particularly agreed with the proposed methodology for analysing the topic. In paragraph 13 of the report, the Special Rapporteur stated that the definitions contained in the draft articles on the responsibility of States for internationally wrongful acts and in the 1978 Vienna Convention and the 1983 Vienna Convention were applicable to the present topic. However, those definitions should take into account the new global political and legal settings. For example, the case of Hong Kong under the policy of "one State, two regimes" was an exceptional case of transfer of rights from the predecessor State to the successor State. In the case of Timor-Leste, there had been a transitional period of transfer of rights and obligations from the predecessor State to the successor State via the United Nations provisional administration.

20. In determining whether there was a general principle guiding the succession of States in respect of State responsibility, the Special Rapporteur seemed to have paid more attention to the views of authors and scholars than to actual State practice in that area, which, in his view, was of prime importance to the topic at hand. When the Special Rapporteur referred to State practice, he gave more attention to cases in Europe than to those in other regions. For instance, five pages of the report were devoted to cases of succession relating to Central and Eastern Europe during the 1990s, while barely one page was given over to cases in Latin America and Asia. The Soviet Union was mentioned in the report as a case of State succession, but it received relatively little attention despite its relevance to the topic. Furthermore, many other relevant cases were absent from the report, such as those relating to Algeria and Viet Nam.

21. As the Special Rapporteur rightly pointed out, various situations involving the succession of States, such as the transfer of a part of a territory, secession, dissolution, unification and the creation of a new independent State, should be examined in order to categorize the different responsibilities arising from such scenarios. In fact, if the Commission failed to establish sufficient evidence of State practice or *opinio juris* on the succession of States in respect of State responsibility, the outcome of its work would be no different from that of the two earlier Conventions on State succession. Owing to the scarcity of State practice in the field under consideration, every instance thereof should be taken into account. Therefore, the Special Rapporteur should consider addressing other classic instances of succession of States when preparing his second report, especially cases where internationally wrongful acts done by the predecessor State concerned a violation of customary international norms, *jus cogens* or international law in general.

22. The topic under consideration had been extensively analysed by the Institute of International Law. However, he agreed with the Special Rapporteur that the work of the Institute, which was a private codification body and different from the Commission in terms of legitimacy and authority, should not limit the latter's work on the topic.

23. Regarding draft article 1 on the scope of the topic, the general language in which it was couched might confuse rather than enlighten readers. In particular, the word "effect" failed to convey adequately the focus of the topic, namely the legal rights and obligations arising from internationally wrongful acts. Moreover, since the issue of State succession usually involved a predecessor State transferring its legal rights and obligations arising from internationally wrongful acts to one or several successor States, the draft article failed to make clear which State bore the responsibility referred to and towards whom, and whether responsibility towards international organizations was also included. In paragraph 22 of the report, the Special Rapporteur stated that the scope of the topic would not include questions of the succession in respect of the responsibility of international organizations. However, the scope should cover situations where States members of an international organization incurred responsibility in connection with the conduct of an international organizations *vis-à-vis* third parties, as Mr. Murase had indicated at the previous meeting.

24. Regarding draft article 2, most of the terms defined therein were identical to the corresponding terms as defined in the 1978 Vienna Convention and the 1983 Vienna Convention and in the Institute of International Law resolution on State succession in matters of State responsibility. However, consideration should be given to whether the word "replaced" as used in subparagraphs (*b*), (*c*) and (*d*) was appropriate, since, in practice, as noted by the Special Rapporteur in paragraph 71 of the report, there were cases of succession, such as transfer of territory or separation of part of the territory, where the predecessor State was not replaced in its entirety by the successor State. The case of Hong Kong in 1997 seemed not to be covered by draft article 2. State succession was, in fact, the change of sovereignty over a territory or part of a territory. As for subparagraph (*e*), which defined the term "international responsibility", he supposed that, when referring to "the relations which arise under international law", the Special Rapporteur meant "the legal relations which arise under international law". However, in his view, the term should clearly signify the consequences in terms of rights and

obligations arising from the internationally wrongful conduct of a State rather than a general legal relation arising from internationally wrongful acts, since, as currently formulated, it might be misunderstood as also including an indirect legal relation with respect to injured third-party States.

25. He had two comments regarding draft article 3. First, in line with his earlier suggestion, it should be made clear in the commentaries that the obligations referred to in paragraph 1 concerned general obligations arising from an internationally wrongful act that violated a commitment made under a treaty, a customary norm, a *jus cogens* norm or other rules of general international law. Accordingly, other examples supporting practice in that regard should be addressed and analysed on an equal basis. Second, the term "[a]nother agreement" in paragraph 3 should specify the parties to such agreement and whether the agreement was only between the predecessor and successor State or whether it was between those two States and any other third States concerned. The first sentence of paragraph 3 should also specify the subject of such "another agreement" to be the acceptance by the third party of the succession of States in respect of responsibilities under a particular treaty or the agreement to modify the scope of responsibilities of a succession State under such treaty.

26. In conclusion, he was in favour of sending draft articles 1 and 2 to the Drafting Committee for consideration.

Protection of the environment in relation to armed conflicts[346] (A/CN.4/703, Part II, sect. D)[347]

[Agenda item 4]

27. The CHAIRPERSON suggested, on the basis of consultations with the Bureau, that the Commission establish a working group on the topic "Protection of the environment in relation to armed conflicts" to consider how to proceed with that topic.

28. Mr. GÓMEZ ROBLEDO asked whether the proposed working group would also consider the draft commentaries prepared for the current session by the previous Special Rapporteur, Ms. Jacobsson.

29. The CHAIRPERSON said that the Bureau's position was that the working group would, in particular, reflect on the way forward regarding the topic. However, it would be for the working group, once it had been established, to assess the current situation. It was his understanding that the text of the commentaries as submitted by Ms. Jacobsson to the secretariat was not yet ready for consideration by the working group.

30. Mr. LLEWELLYN (Secretary to the Commission) said that Ms. Jacobsson had submitted what she had described as an incomplete and unedited first draft of the commentaries. In her estimation, they were not a basis on which the working group could work substantively. Nevertheless, the draft would be circulated to the members of the working group, and it would be for the chairperson of the working group and the working group itself to determine how to move forward.

31. The CHAIRPERSON said that he wished to draw the attention of members, in particular those who had been recently elected to the Commission, to chapter X of the report of the Commission on the work of its sixty-eighth session,[348] which provided a clear overview of work on the topic to date.

32. If he heard no objection, he would take it that the Commission wished to establish the Working Group on protection of the environment in relation to armed conflicts.

It was so decided.

33. The CHAIRPERSON suggested, on the basis of the same consultations with the Bureau, that Mr. Vázquez-Bermúdez be appointed Chairperson of the Working Group on protection of the environment in relation to armed conflicts.

It was so decided.

The meeting rose at 10.50 a.m.

3376th MEETING

Tuesday, 18 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

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

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report of the Special

[346] For the history of the work of the Commission on the topic, see *Yearbook … 2017*, vol. II (Part Two), chap. X, sect. A, p. 146.

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

[348] *Yearbook … 2016*, vol. II (Part Two), pp. 185 *et seq.*

Rapporteur on succession of States in respect of State responsibility (A/CN.4/708).

2. Mr. HASSOUNA said that he welcomed the Special Rapporteur's report on a complex topic for a number of reasons. It was especially timely in view of events in Eastern Europe over the last few decades and the increasing number of secessionist movements worldwide. The issue was no longer politically divisive, as borne out by the growing body of relevant State practice and general support by Member States and private organizations for the topic. The Commission had addressed various related aspects of international law since it had selected the topic in 1949, but codification gaps remained. It now had the opportunity for further codification and progressive development in the area.

3. Draft articles would be an ideal form for the outcome of the Commission's work on the topic if the Special Rapporteur sought to establish a coherent set of principles that could one day form the basis of an international convention. On the other hand, draft guidelines seemed better suited for the purpose of presenting a useful model for States to follow and a default rule to be applied in cases of dispute. He agreed with the Special Rapporteur not only that the rules on the succession of States in respect of State responsibility should be of a subsidiary nature, but also that States typically preferred to have freedom to negotiate the conditions of succession. The flexibility of draft guidelines would respond more adequately to the unique circumstances that sometimes arose in cases of State succession. That said, it would likely be best to discuss the form of the outcome of the Commission's work only once the Special Rapporteur had done more substantive research.

4. He supported the Special Rapporteur's overall approach to the scope of the topic, including his choice to exclude the responsibility of international organizations. However, given that rules and principles of liability could exist in customary international law and treaty law, it might be advisable not to completely rule out the exploration of such liability at the early stages of the Commission's work on the topic. At the very least, the issue could be addressed in the commentary. He agreed with other members that the Commission should not explore the succession of Governments, as that would likely overburden the topic. The relationship between the current topic and the Commission's work on the topic of provisional application of treaties should be clarified. In addition, the Special Rapporteur should explore how the current topic related to the right of self-determination—a concept that had assumed growing importance in international relations—since that right could constitute a legal basis for the creation of new States. The Special Rapporteur might therefore consider including a "without prejudice" clause in the commentary to underline that close relationship.

5. Draft article 1 should include a provision similar to article 6 of the 1978 Vienna Convention to make it clear that the draft articles applied only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations. That same provision found further support in article 2 of the resolution on succession of States in matters of international responsibility[349] adopted in 2015 by the Institute of International Law.

6. He welcomed the fact that the definitions in draft article 2 took as their basis established international law. However, he suggested that the title of the definition contained in draft article 2 (*e*)—"international responsibility"—be replaced with the more specific title "international State responsibility". The phrase "the relations" in the same provision should either be replaced with "the legal consequences" or clarified in the commentary. He proposed including two additional definitions for the terms used elsewhere in the draft articles—"devolution agreement" and "unilateral declaration". The latter could be attributed the same definition as that contained in Guiding Principle 1 of the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.[350] Definitions for the terms "international responsibility" and "internationally wrongful act" would best be included in the commentary so as not to overburden the text of the draft articles.

7. Regarding draft articles 3 and 4, the Special Rapporteur did not explicitly articulate the substance of a general principle that guided the succession of States in respect of State responsibility; further, it was unclear whether modern State practice existed to the extent that the traditional general rule of non-succession had been sufficiently challenged. However, as currently drafted, neither draft article was dependent on the resolution of that issue. Rather, the draft articles simply illustrated the established ways in which responsibility had been transferred with regard to State succession. As such, they could be considered by the Drafting Committee, on the understanding that the Special Rapporteur would take up the issue of the existence of a general rule of non-succession in a future report and propose a new article as appropriate.

8. The cases cited in the report illustrated that even if there was a general rule of non-succession, it was not absolute and was instead subject to various exceptions that found support in State practice. In several of those cases, the Court had not made any pronouncement on State succession in respect of State responsibility, but instead had taken note of agreements between the States regarding the transfer of State responsibility. If the theory of non-succession was firmly established in general international law, then surely it would have made a pronouncement. More specifically, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Croatia had argued that the Federal Republic of Yugoslavia had made a unilateral declaration that accepted the treaty obligations of the predecessor State, thereby succeeding to the latter's international responsibility. That confirmed the view that actions by successor States, like unilateral declarations, could transfer State responsibility—a practice reflected in draft articles 3 and 4.

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[349] Resolution on State succession in matters of State responsibility, Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 711–719; available from: www.idi-iil.org, *Resolutions*.

[350] The Guiding Principles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), pp. 161 *et seq*., paras. 176–177.

9. It was important to conduct more detailed research on cases outside of Europe. African practice, for instance, was varied, but there appeared to be a trend of successor States accepting responsibility for the obligations arising out of acts by predecessor States contingent upon agreements being concluded by the parties. For instance, courts in Belgium and France had issued judgments on the question of State responsibility in the context of the independence of the Congo and Algeria, respectively. In more recent cases, it had been debated what obligations South Sudan had towards third parties regarding resources from the Nile River, or whether South Sudan needed to negotiate with the Sudan only. The need to negotiate was covered in draft articles 3 and 4.

10. His last general comment on draft articles 3 and 4 was that in its examination of the topic, the Commission should bear in mind the words of Professor Marcelo Kohen that State succession should not be a pretext for creating a situation of impunity.

11. Turning to specific amendments, he suggested that in draft article 3, paragraph 3, the meaning of the phrase "full effects" be clarified. He further suggested that certain elements of the Commission's 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations should be taken into account in draft article 4. He therefore proposed that the phrase "unless the other State or other subject of international law who committed the internationally wrongful act" be added at the end of draft article 4, paragraph 1, and that the end of draft article 4, paragraph 2, be amended to read "unless its unilateral declaration is made by an authority vested with the power to do so and stated in clear and specific terms".

12. Lastly, he proposed the addition of a new draft article that would explicitly emphasize the subsidiary nature of the rules. Article 3 of the resolution on State succession in matters of international responsibility adopted by the Institute of International Law could serve as a useful model in that regard.

13. He applauded the Special Rapporteur's intention to pursue a more nuanced approach regarding the classification of the different types of State succession. He suggested that he propose guidelines on identifying the existence or non-existence of continuator States and consider whether there was a difference between the dissolution of a centrally organized State and of a federally organized State, respectively. He was in favour of referring all the draft articles to the Drafting Committee.

14. Mr. HMOUD said that he welcomed the Special Rapporteur's report, which provided a useful introduction to the core issues surrounding the succession of States in respect of State responsibility. Nevertheless, the report might have focused more on the purpose of the Commission's work on the topic and on such issues as the topic's relationship with the 1978 Vienna Convention and the 1983 Vienna Convention. Furthermore, State succession did not appear to be established as a distinct field of international law; the lack of widespread acceptance of the two Conventions was indicative in that regard. The same could be said of the Commission's draft articles on nationality of natural persons in relation to the succession of States,[351] which were described in the report as "largely followed in practice". There was no proof provided in support of that statement. To the contrary, the General Assembly, in its resolution 55/153, had taken note of the draft articles and invited Governments to take them into account "as appropriate" (para. 3). The General Assembly had then regularly deferred the item until 2011, when it had decided that it would revert to the issue "at an appropriate time, in the light of the development of State practice".[352] While the Commission's work on the topic had better prospects of acceptance than the 1978 Vienna Convention and the 1983 Vienna Convention, the topic could not be said to have generated significant interest among Member States in the Sixth Committee; such lack of interest was understandable considering the limited practice in the field and its application to the international community in general.

15. The Commission would do well to study further the topic's relationship to the Commission's draft articles on the responsibility of States for internationally wrongful acts.[353] If the outcome of the Commission's work on the current topic was to be a set of special rules, the aforementioned articles on the responsibility of States would be considered the general rules on the matter. One such general rule was article 2 of the draft articles on the responsibility of States for internationally wrongful acts, which made responsibility of the State for an internationally wrongful act conditional on the conduct in question being attributed to that State. There was little or no discussion in the report of the element of attribution in cases of State succession, even though that was a key factor in determining whether there was a rule of negative or positive succession to State responsibility. The Commission, in its commentary to the draft articles on the responsibility of States for internationally wrongful acts, had considered it unclear whether a new State succeeded to any State responsibility of the predecessor State. In the context of the discussion of the articles on attribution, including on acts of insurrectional or separatist movements, the commentary did not provide any indication that there was an exception to the requirement of attributing the wrongful conduct to the State committing it.

16. It would have been useful for the report to elaborate on the issue of attribution of the wrongful act in relation to succession of States, especially with regard to its relationship with articles 2 and 11 of the draft articles on the responsibility of States for internationally wrongful acts; the latter article involved the assumption of responsibility by the State to the extent that it acknowledged and adopted the conduct as its own. Although the Special Rapporteur, in his report, stated that development over the previous 20 years had led to the reconsideration of the previously unquestioned rule of non-succession, it was not

[351] The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq*., paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

[352] See General Assembly resolution 66/92 of 9 December 2011, para. 4.

[353] The draft articles adopted by the Commission 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.

clear what those developments were, either in doctrine or in practice. The authors cited in the report provided solid arguments in favour of non-succession and of the notion that predecessor and successor States had different legal personalities. However, the report stated that none of the reasons given was wholly relevant, because they could not discard a possible transfer of at least some obligations of States arising from international responsibility and that, as a rule, they did not take into consideration new developments and changes of the concept of State responsibility. That seemed to be a circular argument and, in any case, was not supported by practice or the existence of an alternative doctrine. He agreed with other members that nothing in case law, the articles on the responsibility of States for internationally wrongful acts, practice or doctrine allowed the Commission to conclude that the rule on non-succession had been replaced by a rule on succession of the successor State by the predecessor State. The report should have dealt with such concepts and should have proposed a general rule on non-succession with possible exceptions or limitations on the basis of general international law and as recognized by doctrine.

17. A State might assume responsibility from a predecessor State for various reasons, mainly political: while more apparent in the context of decolonization, it was the case for virtually all agreements on the transfer of rights and obligations in the context of succession. It did not indicate that such a transfer was premised on a sense of legal obligation arising from a rule of general international law. States assumed obligations by agreement or by unilateral acts so as to settle political disputes, achieve independence or secure friendly relations and avoid conflict with other States. As with any other agreement, an agreement on succession involving State responsibility must be applied in good faith within the framework of the relevant rules of the 1969 Vienna Convention and, where applicable, the 1978 Vienna Convention.

18. The report did not indicate what the default rule would be in the event that no agreement was reached in a case of succession. It was critical, for the purposes of the topic, to determine the current default rule under general international law. It was one thing to state that no rule existed and another to state that the issue was nuanced and should be approached on a case-by-case basis. In the second proposition, a default rule might indeed exist, but exceptions or other rules might need to be taken into account. Even if the Commission agreed that a default or subsidiary rule should be progressively developed, it should be based on practice or on an emerging trend, which the report did not indicate existed. On the contrary, it seemed that the traditional doctrine of non-succession should be the default rule that could be overridden if a special rule, whether in an agreement or treaty, existed or an exception was to be applied. Care should be taken not to confuse treaty provisions with an emerging trend.

19. While the *pacta tertiis* rule contained in articles 34 to 36 of the 1969 Vienna Convention applied to succession agreements, it should be read in the context of the creation of new rights and obligations towards a third State. If such rights and obligations applied prior to an agreement that merely transferred existing rights or obligations, the rule would not be relevant. In that sense, draft article 3, paragraph 4, correctly provided that the rules set out in the draft article were without prejudice to applicable rules of the law of treaties, including the *pacta tertiis* rule. That rule, however, would only come into play if new rights and obligations arose from a devolution agreement or other agreement on succession, in which case the issue of third State consent and the presumed assent of that State would become relevant.

20. While the distinction drawn in the report between classical devolution agreements, claims agreements and other "hybrid" agreements was useful in explaining succession agreements, he questioned its relevance in establishing a subsidiary rule on the effect thereof. It might be best suited to explaining the various succession situations in order to deduce rules on succession where no agreement existed. It would be sufficient to state that, where an agreement on succession existed, it must be applied in good faith in accordance with the general rules of treaty law. In that sense, only the "without prejudice" clause in draft article 3, paragraph 4, was needed. The preceding three paragraphs were unnecessary and could sow doubt as to the legal value of such agreements, particularly with regard to succession agreements arising over the previous two decades. The "without prejudice" clause also made the unsupported difference in treatment of devolution agreements and other agreements in those three paragraphs unnecessary. Despite the Special Rapporteur's intention to tackle clauses on sharing responsibility and apportioning rights and obligations on the merits of each case, general draft conclusions could serve as useful guidance for States on how to share and apportion responsibility.

21. The report cited a number of examples of unilateral State acts relevant in the context of State succession, along with article 11 of the draft articles on the responsibility of States for internationally wrongful acts and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. While relevant, it was not clear how the instruments cited had become the basis for the result set out in draft article 4. Under that article, the rights and obligations of a predecessor State could not be assumed by a successor State only by reason of unilateral declarations by the latter assuming such rights or consenting to such obligations. From the examples given in the report, the opposite could be concluded. The negative formulation of the first two paragraphs of draft article 4 reflected neither the propositions in the Guiding Principles nor the practice cited in the report. Further explanation of the legal basis for the assumption of rights was needed, perhaps by analogy with private law principles on the transfer or assignment of rights. The requirement contained in draft article 4, paragraph 2, for unilateral declarations to be clear and specific was based on Guiding Principle 7 but did not address other acts of State whereby the successor State unilaterally assumed the wrongful conduct of a predecessor State or continued that conduct and adopted it as its own. Unlike a declaration, such an act did not have to be clear and specific in its terms: instead, the assumption of responsibility was presumed nonetheless. The draft articles should therefore also deal with unilateral acts of States other than declarations as a source of assumption of State responsibility.

22. With regard to draft articles 1 and 2, he expressed support for the suggestion that an internationally wrongful act be defined on the basis of article 2 of the draft articles on the responsibility of States for internationally wrongful acts. Although the issue of attribution ran counter to the development of a doctrine of succession of responsibility, it was nevertheless a core rule of responsibility that should not be avoided. The door should also be left open to amending the definitions of predecessor and successor States and to including a definition of the term "continuator State". The definitions of predecessor and successor States must be grounded in the context of succession of State responsibility in terms of the transfer of rights and obligations. The definition of international responsibility proposed in draft article 2 was taken from the Commission's commentary to the draft articles on the responsibility of States for internationally wrongful acts. However, he suggested that instead of the statement "means the relations which arise under international law", the words "covers international legal relations" might be used. In terms of scope, he favoured including the issue of the rights of international organizations as an injured party and proposed that, in draft article 1, the words "the effect of a succession of States" be changed to "the legal consequences of a succession of a State". He recommended that all four draft articles be referred to the Drafting Committee, while noting that further discussion was needed on the rule of non-succession with a view to adding a conclusion in that regard.

23. Mr. GROSSMAN GUILOFF said that the Special Rapporteur was to be commended for having produced a quality report in such a short period of time based on recent doctrine and practice. The topic covered an area ripe for codification and progressive development by the Commission, as supported by the majority of delegations that had commented on the issue within the Sixth Committee. The report nevertheless took account of the contrary views and doubts about its relevance expressed by some. In his view, the topic was relevant and would fill a gap, as topics in related areas of the Commission's work had already been the subject of codification and development and there was a need for a coherent normative framework covering all aspects of State responsibility, including succession of States. The International Law Association and Institute of International Law had tackled the subject, with the latter stressing the need for codification and progressive development in the area of State succession and State responsibility. He agreed with the Special Rapporteur's suggestion that the outcome of the Commission's work take the form of draft articles and with the methodology adopted, though he echoed concerns at the predominantly European focus of the report. He also welcomed the decision to restrict the topic to State responsibility for internationally wrongful acts, which should frame the debate, and to concentrate on secondary rules of international law. There were sound legal reasons why the issue of succession of Governments, while important, had also been excluded.

24. The report suggested that the current state of international law was best reflected by the theory of non-succession, but pointed out that some scholars had questioned that theory. It was regrettable that the report did not elaborate on the new developments and changes in the concept of State responsibility that might have prompted them to do so. The source cited in that regard appeared to refer to the break-up of the Soviet Union and the former Yugoslavia and related debates, subsequent to which the theory of non-succession had not been rejected in State practice or judicial decisions, including judgments of the International Court of Justice. Mr. James Crawford's description of the partial rebuttal of the theory of non-succession doubtless carried weight and lent credence to the Special Rapporteur's view that the theory was no longer adequate, but the fact remained that it had neither been questioned for most of the twentieth century nor replaced. Perhaps the new trend only applied to certain types of succession and certain topics and did not affect the general principle. He asked whether the different types of succession identified in paragraph 25 of the report would affect the general conclusions to be drawn and whether early work on the topic might need to be reconsidered in the light of future consideration of the effects of succession of States on other subjects of international law. In any event, he endorsed Mr. Hassouna's comment that State succession should never be used as a pretext for impunity.

25. Drawing attention to the fact that there was no single word in Spanish to express the difference between responsibility for internationally wrongful acts and responsibility for acts not prohibited by international law ("liability"), he suggested that the scope of the draft articles be clarified by adding the words "for internationally wrongful acts" to the title of the topic. The Commission must be cautious in analysing the State practice and judicial rulings described in the report, which might refer only to certain types of succession and topics and which had been interpreted in various ways by scholars. Mr. Reinisch, for example, had questioned the Special Rapporteur's interpretations of the rulings in the arbitration in the *Lighthouses case between France and Greece* and the *Gabčíkovo–Nagymaros Project* case. Such concerns should be taken into account. The Commission could not ignore the controversy surrounding State and judicial practice relating to the topic. The efforts of the Special Rapporteur to ensure consistent drafting and use of terminology in the report, as reflected in draft article 1, which was closely based on the draft articles on the responsibility of States for internationally wrongful acts, were to be commended. The Special Rapporteur had allowed for the possibility of adding further definitions to draft article 2 as work on the topic progressed; consideration should be given to including a definition of the term "another subject of international law", which appeared in draft article 3. While it might be possible to do without specific definitions and refer instead to general international law, it seemed more appropriate to be explicit. Basing the definitions used on the 1978 Vienna Convention and the 1983 Vienna Convention, despite the fact that they had not been widely ratified, also contributed to a harmonized approach across the whole field of State succession.

26. In paragraph 93 of the report, the Special Rapporteur expressed his intention to deal with the issue of non-State entities, among other things, at a later stage. A detailed analysis of agreements involving such entities was needed to see if any general conclusions could be drawn. The Special Rapporteur had referred to subsidiary rules serving as a model for agreements on succession.

What would be the nature of such rules, and would any of them apply automatically in the absence of a succession agreement? Such questions should not be left pending. Echoing the concerns expressed regarding the need to clarify the legal sense of draft article 3, he emphasized the importance of identifying the current state of international law and any exceptions in practice as the starting point for considering the topic; he would welcome the Special Rapporteur's views in that regard. He agreed that the text of draft article 3 could be simplified by the Drafting Committee. The first paragraph was worrying in its apparent restriction on States' freedom of contract, while the third and fourth paragraphs simply restated general rules of the law of treaties. That was a valid approach if it meant that the resultant draft articles were self-contained, but the drafting must aid comprehension, not create confusion.

27. Draft article 4, which dealt with the important and complex issue of unilateral declarations by successor States, could benefit from simplification. There also seemed to be a discrepancy between the third paragraph, which referred to rules of international law, and the second, which required only a "clear and specific" unilateral declaration in order for a successor State to assume its predecessor's obligations. Although the draft article should reflect the Commission's previous work on unilateral declarations of States, the Commission should be cautious in the legal value it ascribed to such declarations so as not to inhibit normal inter-State relations and dialogue. He expressed support for the proposed future programme of work and for referring the four draft articles to the Drafting Committee.

28. Ms. GALVÃO TELES said that she shared the view expressed by several other members that it would have been preferable to discuss the inclusion of the topic, which had only been added to the long-term programme of work at the previous session, in the agenda for the current session with the newly composed Commission. Although she understood that the work of the Commission carried on from one quinquennium to the next, it was important to ensure that the active agenda was balanced and that topics addressed different issues of international law that met the current needs of States. Depending on the topic and the purpose of its study, due consideration should also be given to the final outcome of the work of the Commission. Certainly, it would be helpful to have further discussions before more specific and active work was pursued, particularly when it was decided to move a topic from the long-term programme to the current programme of work.

29. Commending the Special Rapporteur on having prepared his first report in such a short space of time, she said that it raised important issues of a general nature, and it might be premature to begin a drafting exercise before they were discussed in full. Nevertheless, she agreed with the Special Rapporteur that the fact that private associations, such as the Institute of International Law and the International Law Association, had dealt with a topic in no way prevented the Commission from doing the same and arriving at different conclusions. On the contrary, the fact that such institutions had also studied a subject was a reason for the Commission to consider it itself, taking such previous work into account, even if it departed from it in terms of outcome.

30. An important part of the Commission's task was to ensure consistency with work on previous topics that touched on similar issues, as was the case with the topics of State succession and State responsibility. However, it might be too early to fully measure the impact of the draft articles on the responsibility of States for internationally wrongful acts, since they had not become a convention, although they might generally be considered as customary law. The same applied to the conventions on State succession, which had not yet entered into force and on which there did not seem to be an overall agreement as to which provisions were rules of customary law. Thus, it was always a challenge to replicate previously successful work of the Commission, and attempting to do so did not necessarily guarantee an equally successful outcome, especially on such a complex topic as succession of States in respect of State responsibility. Just like any other State succession issue, context played a very important role and, since the extraction of general rules through codification resembled progressive development, it might be difficult for States to accept some of the outcomes, especially when the issue of whether a general rule in favour of succession or non-succession could be established based on State practice was still to be debated.

31. Several important issues needed to be clarified. The scope of the topic should be the succession or transfer of rights and obligations stemming from internationally wrongful acts and not State responsibility *per se*. As had been the case for the Commission's work on treaties, the exercise should encompass all types of succession—including regarding newly independent States—even if that might lead to different solutions, particularly when there might or might not be a continuing State. The principles or rules that the draft articles would seek to identify or establish would be of a subsidiary nature, as the Special Rapporteur rightly noted in paragraph 86 of the report, since States would continue to prefer to resolve such matters essentially through unilateral undertakings or bilateral or multilateral agreements.

32. Bearing in mind those general comments, if the Commission was to embark on a drafting exercise at that stage, draft article 1 should define in more precise terms the scope of the draft articles, in line with paragraphs 19 and 20 of the report, which mentioned "the transfer of rights and obligations arising from internationally wrongful acts". Draft article 2 could include a more complete list of terms, covering all types of State succession, including in regard to newly independent States. However, the definition of international responsibility seemed to be out of place there and should be addressed in connection with the scope of the draft articles in draft article 1 and its commentary. Draft articles 3 and 4 could be merged and should focus on affirming the subsidiary nature of the draft articles before addressing the relevance of agreements and unilateral declarations.

33. In conclusion, she said that although it might be advisable to defer the work of the Drafting Committee until the topic could be given more thorough consideration, if a consensus emerged, she would support referring the draft articles to the Drafting Committee, taking into account the remarks made in the plenary debate.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

Statement by representatives of the African Union Commission on International Law

34. The CHAIRPERSON welcomed the representatives of the African Union Commission on International Law (AUCIL), Ms. Gueldich, Mr. Iyana and Ms. Kalema, and invited them to address the Commission.

35. Ms. KALEMA (African Union Commission on International Law) thanked the International Law Commission for its invitation to AUCIL to brief the Commission on its work and to share experiences on matters of common interest. As a young institution, AUCIL greatly valued its cooperation with the Commission. AUCIL, an independent advisory organ of the African Union, had been established in 2009 and had begun work in 2010. Its objectives were to strengthen and consolidate the principles of international law, to remain at the forefront of international legal development, and to work towards maintaining standards in important areas of international and African Union law. AUCIL was composed of 11 members with recognized competence in international law from different regions of Africa, serving in their personal capacity. Mr. Ebenezer Appreku, a member who had contributed a great deal to the work of AUCIL, had passed away in 2016. AUCIL headquarters were currently in Addis Ababa, although there was the possibility of events being hosted by another member State in order to enhance the visibility of the African Union and its work. As AUCIL had a mandate to undertake activities relating to the codification and progressive development of international and African Union law, it had much in common with the Commission. The second aspect of its mandate, which was currently being developed, was to encourage the teaching, study, publication and dissemination of literature on international law, in particular the laws of the African Union.

36. According to its statute, AUCIL was responsible for the codification of international law through the formulation of rules of international law in fields where there had already been extensive State practice, precedent and doctrine on the African continent. In addition, AUCIL had the task of considering mechanisms for making evidence of customary international law more readily available, through the collection and publication of documents concerning State practice and the decisions of national and international courts on questions of international law. Although there had not been many such publications to date, AUCIL was currently working on developing an African digest of international law, to be published in 2018. Its purpose was to restore historical records of the views and practices of African Union member States, based primarily on international sources, African Union sources from the past 50 years, and national sources, including State papers, diplomatic correspondence and judicial decisions. AUCIL also assigned members as special rapporteurs to undertake studies on areas of interest either on its own initiative or at the request of the African Union Assembly or Executive Council. To date, it had completed five studies; a further 12 studies were ongoing.

37. Ms. GUELDICH (African Union Commission on International Law) said that the fruitful cooperation between the two commissions provided AUCIL with the opportunity to learn and enhance its view of international law in a global context. AUCIL aimed to carry out in-depth studies on topics of interest to Africa through the prism of international and African Union law, bearing in mind the need to accelerate regional integration—the main objective of the Agenda 2063[354] adopted in 2015 by the Governments of the African Union—and to enlighten African decision makers on the legal implications of such integration.

38. In addition to codification and development, AUCIL worked on the teaching, study, publication and dissemination of international law. As part of those activities, AUCIL had organized the first international law seminar for African universities in Accra in 2016, in close cooperation with the African Institute of International Law and the Codification Division of the Office of Legal Affairs of the United Nations. AUCIL also provided regular financial contributions to the United Nations Regional Course in International Law, which benefited from the political support of the African Union and the expertise of some of its members, who taught in the Course. AUCIL was also conducting a study on promoting the teaching, study and dissemination of international law and African Union law on the African continent, under the leadership of Ms. Kalema. It was a very ambitious study that aimed to identify the gaps and challenges faced by African universities in that field and to make recommendations for optimization and exchange of experiences.

39. AUCIL had published the first edition of its *Yearbook* in 2013 and was about to publish the second, which would cover the period from 2012 to 2016 and include the new strategic plan. Two issues of its *Journal of International Law* had been published, the second covering the work of the second and third AUCIL Forums on International Law on the themes of the law of regional integration in Africa and codification of international law at the regional level in Africa, respectively. Other themes discussed at the annual Forums, which were held in different cities on the continent and served as a platform for the exchange of views on international law, were Africa and international law, challenges of ratification and implementation of treaties in Africa, and the role of Africa in the development of international law. The theme for the 2017 Forum was the legal and socioeconomic consequences of immigration, refugees and internally displaced persons in Africa, which was particularly topical and of interest to the international community as a whole. The challenges faced by countries over the previous five years in particular had raised urgent humanitarian issues, but also political, economic and especially legal ones, and the traditional solutions to such problems were no longer sufficient. The Forum would provide a unique opportunity to review applicable international law and identify any gaps and the possible evolution of the rules of international law.

* Resumed from the 3371st meeting.

[354] African Union Commission, *Agenda 2063: The Africa that We Want*, September 2015; available from the website of the African Union Commission: https://au.int/.

40. Possible forms of cooperation between AUCIL and the Commission included reciprocal visits and attendance at each other's sessions, exchanges on similar topics under consideration by both commissions between the special rapporteurs, interaction with similar regional international law institutions to discuss contemporary issues of international law, and the organization of joint seminars and conferences on international law. AUCIL regularly invited the Commission members to attend its Forums and covered the associated costs. Cooperation between the secretariats of the two commissions might also be enhanced with a view to building the capacity of the AUCIL secretariat in terms of archive management, preparation of materials, meetings and reports, website maintenance and the establishment of a research database. AUCIL, which did not have a permanent secretariat, faced many challenges, and it would welcome the opportunity to draw on the experience of the Commission's secretariat to improve its work. AUCIL would be open to any proposals concerning possible cooperation.

41. Mr. VÁZQUEZ-BERMÚDEZ said that he welcomed the information provided on the many activities conducted by AUCIL under its mandate on the codification and progressive development of international law, including various studies, some of which related to draft model laws. He asked what the criteria were for selecting the topics for study and whether the studies had resulted in any texts, such as model laws.

42. Mr. HASSOUNA said that the regular visits by representatives of AUCIL were important for the Commission. He welcomed the fact that AUCIL held its annual Forums in different cities in its member States—a good way of raising awareness and disseminating information about the work of the organization and international law. The Commission was currently considering possible topics for its long-term programme of work and would welcome input from AUCIL. He noted with interest that AUCIL had undertaken a study on delimitation and demarcation of boundaries in Africa; the topic had been proposed for inclusion in the long-term programme of work and thus the Commission would benefit from any information AUCIL might wish to provide. The Commission would also appreciate AUCIL input on regional international law, which would be particularly helpful for the topics of identification of customary international law and peremptory norms of general international law (*jus cogens*). He applauded the idea of increased cooperation between the two bodies through participation in meetings and training seminars. He had had the opportunity to participate in the AUCIL Forum in 2015 on the theme of challenges of ratification and implementation of treaties in Africa and had enjoyed useful exchanges, including on the topic of provisional application of treaties.

43. Ms. KALEMA (African Union Commission on International Law) said that topics for study were mostly selected based on the decisions of policy organs, like the Assembly of the African Union. However, AUCIL could also take the initiative and recommend topics that required study according to the needs of member States or proposals submitted. The five studies completed were pending approval by the Executive Council. They concerned, *inter alia*, a draft model law for the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, a preliminary study on the research and juridical basis of reparation for slavery and a preliminary report on the study, findings and recommendations on the harmonization of ratification procedures in the African Union. The latter had been proposed by the policy organs because of the considerable delays in ratification procedures in some member States.

44. Ms. GUELDICH (African Union Commission on International Law) said that although there were no guidelines on the selection of topics, factors such as the originality of the topic and the African Union's ultimate objective of regional integration were taken into consideration. Most of the studies undertaken resulted in agreements and dealt with priority issues for the African region such as peace and security, combating terrorism and the illicit arms trade, water resources management, food security, refugees and internally displaced persons. AUCIL focused on topics of regional concern, rather than those of universal concern like the Commission. AUCIL was a young organization and still had much work to do. Regional integration posed certain challenges as some member States lagged behind others; without the necessary political will, their integration would be difficult to achieve.

45. The CHAIRPERSON said that for an organization that was only seven years old, AUCIL had been very productive so far, which augured well for the future.

46. Mr. PETER said that, first, AUCIL was to be commended on its selection of topics for study, which touched on the real problems of Africa, such as territorial boundaries, terrorism, natural resources and the incorporation of treaty provisions into domestic legislation. However, looking at the list of ongoing studies, he was concerned that some rapporteurs had undertaken too much work and suggested that their workload might need to be shared.

47. Second, the United Nations, especially the Codification Division, had been making great efforts to disseminate international law in Africa, for example through seminars and training courses organized in Accra and Addis Ababa. However, Africa could not always expect the United Nations to organize such events and he therefore asked what the African Union was doing in that area. He nonetheless endorsed the Chairperson's comment regarding how much AUCIL had achieved in only seven years, compared with the Commission's almost 70 years of activities.

48. Ms. GALVÃO TELES said it was striking that the expected outcome of many of the topics covered by AUCIL were studies. She asked whether that was useful and whether any of the studies were likely to become conventions. She would welcome more information on the purpose and format of the annual Forums, including whether they were open to civil society.

49. Ms. ESCOBAR HERNÁNDEZ said that the clear presentations by the AUCIL representatives had highlighted potential areas of cooperation between the two bodies. The African digest of international law was an ambitious project and she would appreciate more information on its intended format and purpose. She asked how the data would be organized and whether it would be

an official African Union archive or a resource for public consultation. She assumed that the purpose of the digest was not only to collate information on the views and practices of member States, but also to influence the development of international law from an African perspective. In that connection, she asked how AUCIL studies and its other output were published.

50. Ms. KALEMA (African Union Commission on International Law) said that the purpose of the digest was to establish an archive of information on State practice relating to international and African Union law. It was intended to be a useful tool for African Union delegates, government officials and lawyers in their work; a considerable amount of information had been issued since the African Union's establishment but it was currently dispersed. It was hoped that several editions of the digest would be published.

51. Some of the studies undertaken by AUCIL would become conventions, while others would become draft model laws to help member States incorporate treaties into domestic law. It was not only the United Nations that was funding and spearheading activities relating to the dissemination of international law, the African Union contributed too. The United Nations had been a very good partner, but, gradually, with increased resources and capacity-building, African institutions would play a greater role in such activities. The African Union, other institutions based in Africa and elsewhere and some Commission members had already contributed to relevant training courses and seminars.

52. Older AUCIL members tended to have a heavier workload as rapporteurs than newer members. An effort was made to balance their respective workloads as the risk of overload was that studies might not be completed.

53. Ms. GUELDICH (African Union Commission on International Law) said that rapporteurs were not overburdened; however, sometimes their mandates expired before the studies were completed so volunteers were required to step in. That explained why some rapporteurs were responsible for more studies than others. An effort would be made to ensure a more equitable distribution of work in the future.

54. The themes of the annual Forums were proposed during the ordinary sessions of AUCIL and chosen by consensus. An invitation for contributions was subsequently posted on the organization's website and was open to a broad public that encompassed teachers, students, lawyers, international jurists, representatives of civil society and partner organizations. The purpose of the Forums was to enhance the visibility of AUCIL and to raise awareness of the need to accelerate regional integration. The Forums provided an opportunity to discuss problems and propose solutions that would help African decision makers on matters relating to international law. The annual Forums usually lasted two days and were held after the organization's second ordinary session towards the end of the year, in different locations.

55. As to the publication of its output, initially AUCIL had been somewhat overambitious in trying to publish an edition of its *Journal* every two years, when it had not had the necessary resources or capacity to do so. It had therefore established a five-member editorial committee, which would issue clear guidelines on future publications; invitations for contributions would be posted on the related website. It was not only AUCIL studies that would be published but also all AUCIL texts useful for students and jurists, as well as articles by researchers and leading experts in international law.

56. Mr. GROSSMAN GUILOFF asked how effective the draft model laws prepared by AUCIL were in promoting the implementation of treaty law and customary law in African Union member States.

57. Mr. OUAZZANI CHAHDI asked how information was collected from member States on the harmonization of ratification procedures and whether it was through questionnaires or by other means during seminars and forums.

58. Ms. KALEMA (African Union Commission on International Law) said that questionnaires were sent to member States to collect information on State practice; however, their responses were not always received as quickly as expected. There was no record of how effective the draft model laws were, although she was certain member States used them and found them helpful.

59. The CHAIRPERSON thanked the AUCIL representatives for their interesting presentations and said that the Commission looked forward to continued and improved cooperation with AUCIL in the future.

The meeting rose at 1.05 p.m.

3377th MEETING

Wednesday, 19 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Crimes against humanity (*concluded*)* (A/CN.4/703, Part II, sect. A, A/CN.4/704, A/CN.4/L.892 and Add.1)

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)*

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the part of the report of

* Resumed from the 3366th meeting.

the Drafting Committee on the topic "Crimes against humanity", as contained in document A/CN.4/L.892/Add.1.

2. Mr. RAJPUT (Chairperson of the Drafting Committee), introducing the fourth report of the Drafting Committee for the sixty-ninth session of the Commission, on the topic of crimes against humanity, said that he had introduced an earlier report of the Drafting Committee on the same topic (A/CN.4/L.892) during the first part of the session, on 1 June 2017. That report had reflected the discussions in the Drafting Committee and the consequential text of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee, all of which had subsequently been adopted by the Commission.

3. In the statement that he had made at that time, it had been expressly mentioned that the Drafting Committee had concluded its deliberations based on the draft preamble and draft articles proposed by the Special Rapporteur. The question of whether the draft articles should contain a provision on "immunity" had been raised in the Special Rapporteur's report, discussed in the plenary and referred to the Drafting Committee for consideration. However, owing to a lack of time, the issue had been postponed until the second part of the Commission's session, while other provisions had been adopted by the Drafting Committee and had thereafter been adopted by the plenary based on the previous report. Consequently, the Drafting Committee had been convened on 6 July to give thorough consideration to the topic of immunity.

4. The further report that he was introducing at the current meeting, as contained in document A/CN.4/L.892/Add.1, contained the text, as provisionally adopted by the Drafting Committee, of an additional paragraph, namely paragraph 4 *bis*, to be inserted in draft article 6.

5. He paid tribute to the Special Rapporteur, Mr. Murphy, whose mastery of the subject 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, and the secretariat for its assistance.

6. During the discussions in the Drafting Committee, three alternatives had emerged. First, views had been expressed that a provision on immunity should not be added. Second, views had been expressed that such a provision should be included, although no specific proposal in that regard had been discussed. Third, views had been expressed that, while the question of immunity should not be addressed at all, a different issue should be addressed, by including a provision on the irrelevance of a person's official position for purposes of substantive criminal responsibility in the context of allegations of the commission of crimes against humanity. The third alternative had found favour with the majority of the members of the Drafting Committee.

7. Accordingly, the Committee had decided to work on the basis of a proposal by the Special Rapporteur, which had subsequently been adopted as paragraph 4 *bis*, as formulated in the report under consideration.

8. The Drafting Committee had noted that the inability to assert the existence of an official position as a substantive defence to criminal responsibility before international criminal tribunals was well established in international law. The rule had been expressly reflected in the Charter of the International Military Tribunal[355] and had appeared in a number of subsequent key instruments, including the Commission's own draft code of crimes against the peace and security of mankind, adopted in 1996.[356] A recent confirmation of the rule was to be found in article 27, paragraph 1, of the Rome Statute of the International Criminal Court. The inability to use one's official position as a substantive defence to criminal responsibility was also addressed in article IV of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Some members of the Drafting Committee had initially expressed the view that such a provision might not be necessary, since it was such an entrenched principle of international criminal law. However, the majority view within the Drafting Committee had been that not having the provision might introduce inconsistency in relation to the aforementioned treaties and instruments. Therefore, an express provision in that regard was desirable.

9. Accordingly, for the purpose of the draft articles on crimes against humanity, the inclusion of paragraph 4 *bis* was to be understood as meaning that an alleged offender could not raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 4 *bis* had no effect on any procedural immunity that a foreign State official might enjoy before a national or international criminal jurisdiction, which continued to be governed by conventional and customary international law. Further, the decision to include paragraph 4 *bis* was without prejudice to the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction".

10. Having agreed to base its work on the proposal of the Special Rapporteur, the Drafting Committee had focused on the formulation and location of the text. As to the former, it had considered a suggestion to make it also explicit in the text that official position would not, in and of itself, constitute a ground for reduction of a sentence handed down for a crime against humanity. The Drafting Committee had decided not to include such specification in the text, as it had been adequately covered by paragraph 6 of the same draft article. According to that paragraph, States were required, in all circumstances, to ensure that crimes against humanity were punishable by appropriate penalties that took into account their grave nature. Such language should be understood as precluding an alleged offender from invoking his or her official position as a ground for reduction of sentence.

11. The Drafting Committee had also considered several suggestions for locating the provision elsewhere, including higher up in draft article 6, possibly even as a component of paragraph 1, or as a self-standing draft article located either earlier or later in the draft articles. In

[355] For the Charter of the International Military Tribunal, see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

[356] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

the end, however, the Drafting Committee had accepted the Special Rapporteur's assessment that the provision was best located in draft article 6, as part of the logical sequence following paragraph 3, which dealt with command responsibility, and paragraph 4, which dealt with the unavailability of superior order defence. New paragraph 4 *bis* would accordingly complete the set of provisions dealing with the legal impermissibility of certain substantive defences.

12. The legal basis for including the provision, to which he had alluded earlier, as well as the question of relationship with the Commission's ongoing work on immunity of State officials, would be addressed in the corresponding commentary.

13. As the draft commentaries to the draft articles adopted in early June 2017 were currently in translation, the Drafting Committee had not proposed a renumbering of the new and subsequent paragraphs in draft article 6. Instead, should the Commission decide to adopt the recommendation of the Drafting Committee to include paragraph 4 *bis* in draft article 6, the Secretariat would introduce the necessary adjustments in the Commission's final report, including renumbering the paragraphs in the draft article and making any corresponding adjustments in the commentaries.

14. He hoped that the plenary would be in a position to adopt draft paragraph 4 *bis* of draft article 6, as presented.

15. Mr. JALLOH said that he had been a member of the Drafting Committee on crimes against humanity and that the latter had had several interesting formal and informal discussions on whether the Commission should take a position on the question of immunity or support a clause on irrelevance of official capacity. He had not wished to stand in the way of the Drafting Committee's consensus, but he had had some serious reservations about the decision by the Committee as a whole to proceed with a draft article only on irrelevance of official capacity. Those reservations concerned two key points. First, the Commission's project in respect of crimes against humanity had been predicated on the argument that the Commission would help fill a large gap in international criminal law, considering that the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the 1949 Geneva Conventions for the Protection of War Victims dealt respectively with the crimes of genocide and war crimes. The Commission had relied heavily on the Rome Statute of the International Criminal Court for the purposes of the project, including adopting verbatim its definition of the crime contained in article 7, which was widely said to be narrower than the customary international law definition. He had therefore been concerned that the Commission, by not taking a position on the question of immunity along the lines expressed in article 27 of the Rome Statute, which addressed both irrelevance of official capacity and substantive immunities from criminal responsibility, might produce a draft text for consideration by States that did not complement that instrument to the desired extent. Second, even though the clause in article 27 of the Rome Statute providing for the removal of immunities, which was applicable to the 124 States parties, applied vertically in respect of national systems *vis-à-vis* the International Criminal Court, a compelling argument had been made according to which the fact that those States had accepted the removal of immunities ought to be relevant to the Commission's consideration. The Pre-Trial Chamber of the International Criminal Court had, in a recent judgment involving the failure by South Africa to arrest the allegedly fugitive Sudanese President Mr. Al-Bashir, suggested that there were article 27 implications for States parties at the horizontal level, *vis-à-vis* one another. In that regard, it was apparent that the States parties to the International Criminal Court at least were comfortable waiving or removing the immunities of their officials in respect of core crimes, including crimes against humanity. Although that admittedly applied to proceedings before the Court itself, there were consequences at the horizontal level as well, since other States parties could, in principle, also pursue investigations of crimes against humanity in fulfilment of their duties to investigate and prosecute such offences in other States parties irrespective of where and by whom they were committed. He expressed concern that the position adopted by the Drafting Committee could undermine the regime established by the International Criminal Court, which presupposed that, at the national level, countries would take steps to prosecute, and that only when they were unwilling or unable to do so as per article 17 of the Rome Statute would the Court's jurisdiction take effect. If that was true, and it was known from practice that the State of nationality of the suspect was typically reluctant to pursue its own officials for such crimes where the officials had committed or incited the commission of crimes against humanity, then the issue of immunity beyond irrelevance of official position to criminal responsibility was very relevant indeed for the effective investigation and prosecution of heinous crimes against humanity at the national level. In any event, even apart from arguments about more effectively complementing the Rome Statute system at the *inter partes* prosecution level, the Commission had a unique opportunity to recommend to States an exception removing immunity for crimes against humanity, which—because of their grave nature—ought to be prosecutable in national courts irrespective of whether they were committed by a State official or not. That it had chosen not to do so in its current draft articles on crimes against humanity, even as part of the progressive development of international criminal law, was highly regrettable.

16. Mr. PETER said that he wished to thank the Special Rapporteur for not standing in the way of including a provision on irrelevance of the official position of persons accused of crimes against humanity, which he had supported. He had raised the possibility of including such an important provision in the form of a conspicuous, stand-alone draft article with a view to ensuring conformity with the Rome Statute of the International Criminal Court, which the entire project was supposed to support. He had been concerned about the vague nature of the wording of the paragraph indicating that each State should take "the necessary measures" to give effect to the provision, since it allowed States too much latitude in its interpretation. He would have preferred wording indicating that each State should ensure implementation of the provision. While the Special Rapporteur had replied that such provisions were generally formulated in that way, he had found the argument unconvincing, since the Commission was not prevented from drafting a provision differently as long as it made that clear. While he would have been happier if such considerations had been taken into account, he would not stand in the way of the Commission adopting the proposed wording.

17. Ms. ESCOBAR HERNÁNDEZ said that she aligned herself with the consensus of the Drafting Committee and wished simply to place on record that the decision adopted by the Drafting Committee not to include a clause on immunity in the draft articles on crimes against humanity had no bearing whatsoever on, or implications for, the Commission's position in respect of other current projects, in particular the topic of immunity of State officials from foreign criminal jurisdiction, whose draft article 7—which had also been adopted by the Drafting Committee—included crimes against humanity as one of the exceptions to the application of immunity *ratione materiae*.

18. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph 4 *bis* of draft article 6.

It was so decided.

19. The CHAIRPERSON said that he took it that the Commission wished to adopt the report of the Drafting Committee on crimes against humanity contained in document A/CN.4/L.892/Add.1.

It was so decided.

20. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare commentaries, for inclusion in the report of the Commission on its sixty-ninth session.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

21. The CHAIRPERSON invited the Commission to continue the debate on the Special Rapporteur's first report on "Succession of States in respect of State responsibility", contained in document A/CN.4/708.

22. Ms. LEHTO said that the Commission had already worked extensively on both State succession and State responsibility. The present topic was also linked to other topics taken up by the Commission, including diplomatic protection and unilateral declarations. The Special Rapporteur could therefore draw on the Commission's earlier work, which, as he noted, had already proved to be a successful method for the Commission to advance other topics.

23. The Commission had in the past shown little appetite for the question of State responsibility in the context of State succession. The 1978 Vienna Convention explicitly excluded issues of international responsibility from its ambit, and the 1983 Vienna Convention contained a general safeguards clause to the same effect. The articles on the responsibility of States for internationally wrongful acts[357] had famously left open the question of whether there could be such a thing as succession to responsibility.

24. The position taken in the 1978 Vienna Convention and the 1983 Vienna Convention was understandable, as, at the time of their adoption, the Commission's work on State responsibility had been ongoing and nowhere near completion. The comments of the last Special Rapporteur on the topic of State responsibility, Mr. Crawford, in 1998, when he had denied the possibility of succession to responsibility, and in 2001, when the relevant commentary had characterized the issue as "unclear", might nevertheless be interpreted as indicating a certain opening and, possibly, recognition of the complexity of the issue.

25. Most academic texts no doubt still subscribed to the traditional non-succession theory, but there had been some academic interest and studies on the issue of succession relating to questions of responsibility. The Special Rapporteur and others had mentioned that the International Law Association and the Institute of International Law had recently studied the connections between State succession and State responsibility. That did not yet amount to a trodden path, however, and the Commission's future work on the topic could no doubt make a useful contribution to the law of State succession.

26. Some concern had been expressed about the potential reach of the topic. However, the Special Rapporteur's indication of his ambitions seemed quite appropriate in view of the novelty of some of the questions. The subsidiary nature of the rules he intended to propose and his emphasis on agreements between the States concerned could also be said to reflect the lessons learned regarding the role of the 1978 Vienna Convention and the 1983 Vienna Convention during the last wave of State succession, in Central and Eastern Europe.

27. The two Conventions had not been widely ratified at that time—nor were they at the present time. In particular, the 1978 Vienna Convention had not been recognized as representing existing law in the area of State succession. In the context of German unification, for instance, its provisions had been deemed "unpracticable", and recourse had been made to older concepts and principles. Later, the International Law Association's resolution on aspects of the law on State succession[358] had also pointed out that the classification of different types of State succession adopted by the two Conventions did not fully correspond with international practice.

28. In the absence of a more authoritative codification, however, the provisions of the Conventions had been widely used as practical guidelines by States undergoing political and territorial transformations in the 1990s. Reference could, in that respect, also be made to recommendations of the Arbitration Commission of the Conference on Yugoslavia—the "Badinter Commission"—to the successor States of the former Yugoslavia, calling on them to resolve all aspects of the succession by agreement, while drawing inspiration from the rules of the 1978 Vienna Convention and the 1983 Vienna Convention.[359]

[357] The draft articles adopted by the Commission 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.

[358] International Law Association, *Report of the Seventy-third Conference held in Rio de Janeiro, Brazil, 17–21 August 2008*, London, 2008, resolution No. 3/2008.

[359] See *Opinion No. 9 of the Badinter Commission of 4 July 1992*, ILR, vol. 92, pp. 203–205, at p. 205, para. 4.

29. In practice, most of the issues related to that wave of State succession seemed to have been resolved in negotiations between the States concerned. Along those lines, the Special Rapporteur affirmed in paragraph 86 of his report that the rules to be codified should present a "useful model" that could be used and also modified by the States concerned, and that could serve as a default rule if the States were unable to come to an agreement.

30. In chapter II, section A, of his report, the Special Rapporteur considered the question of whether there was a general principle guiding succession in respect of State responsibility. His answer seemed to be that succession was possible in certain cases and that the theory of non-succession was no more the absolute rule. The Institute of International Law had reached the same conclusion. What those cases of possible succession might be would be the subject of the Special Rapporteur's second report in 2018, which would address the issue in terms of the transfer of obligations, and of his third report in 2019, which would focus on the transfer of rights. The previous year's syllabus contained three hypotheses that did not directly answer the question, but that might provide some indications.

31. First, the syllabus stated that "the continuing State should, in principle, succeed not only to the relevant primary obligations of the predecessor State but also to its secondary (responsibility) obligations".[360] That assumption did not seem to be problematic, as, in cases of continuity, there was no change of sovereignty. Second, it stated that "a newly independent State should benefit from the principle of a clean slate … but it could freely accept succession with respect to State responsibility".[361] That principle was consistent with the 1978 Vienna Convention and with the preceding work of the Commission on succession to treaties. Those two statements were basically uncontroversial. The syllabus added that "in the case of separation (secession), the successor State or States may also assume responsibility, in particular circumstances".[362] Judging from that assertion, the Special Rapporteur was clearly not proposing an automatic rule of succession to replace the rule of non-succession.

32. The main policy reasons advanced in support of the possibility of succession in respect of rights and obligations arising from an internationally wrongful act and against a general rule of non-succession were mainly related to the need to ensure stability in international legal relations and to protect the interests of injured States. They were also related to reparation of damage suffered by groups or individuals as a result of human rights violations. In either case, the remark of the Institute of International Law seemed pertinent: non-succession as a "clean-slate" rule applicable to all cases of State succession in the field of international responsibility would mean that the consequences of illegal action were simply erased.

33. While chapter II, section B, of the report covered both older and newer cases of State succession, it seemed clear that the essential point of reference had been provided by the events of the past 20 years. Developments were thus fairly recent, and practice was not very extensive. As Mr. Nguyen had pointed out, the relevant practice cited in the report was mostly related to the cases of State succession in Central and Eastern Europe in the 1990s. Those cases, such as the *Gabčíkovo–Nagymaros Project* case and the two cases of the International Court of Justice concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* were not, however, without interest for the present topic.

34. She agreed with the Special Rapporteur's conclusion in paragraph 64 of the report that a distinction should be made between cases of dissolution and unification, where the original State had disappeared, and cases of secession, in which there was a continuator State. In 2008, the International Law Association had also pointed out that the existence or not of a continuator State was a key issue at stake.

35. As for the question of whether any of the rules of the 1978 Vienna Convention and the 1983 Vienna Convention applied, she agreed with the systemic approach proposed by the Special Rapporteur in paragraph 68 of the report. In particular, it made sense to use the relevant definitions of the two Vienna Conventions, as had been done in the Commission's 1999 draft articles on nationality of natural persons in relation to the succession of States.[363] It was also important to address certain issues of delimitation, as was done, for instance, in paragraph 73 of the report, with regard to the distinction between the applicability of the rules on succession of States in respect of treaties and in respect of responsibility for internationally wrongful acts and, in paragraphs 79 and 80, as to when to apply the rules concerning the succession of States with regard to debts, and when to identify the rules under that topic.

36. She generally agreed with the Special Rapporteur's remark in paragraph 72 that the concept of universal succession was not useful and that it was better to look separately at different legal relations affected by a change of sovereignty.

37. In her view, draft article 1 would benefit from being made clearer. She agreed with Mr. Murase that the scope should be limited to succession to obligations or rights arising from internationally wrongful acts. As the Institute of International Law had pointed out, the relevant question was not whether there was succession of States with respect to responsibility *per se*, but instead whether there was succession to the rights and obligations arising from internationally wrongful acts committed or suffered by the predecessor State.

38. As for draft article 2, she supported using the definitions of the 1978 Vienna Convention and the 1983 Vienna Convention, but, like Mr. Murphy, she questioned the need to define international responsibility. Appropriate references to the general rules codified in the articles on the responsibility of States for internationally wrongful acts could be included in the commentary.

[360] See *Yearbook … 2016*, vol. II (Part Two), annex II, p. 243, para. 5.

[361] *Idem*.

[362] *Idem*.

[363] The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq*., paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

39. Regarding draft article 3, it was not quite clear what was meant in paragraph 3 by the words "[a]nother agreement". Furthermore, it was unclear whether the references to treaty law in paragraphs 3 and 4 were necessary or whether they could be discussed in the commentary. Mr. Murphy had made some interesting drafting proposals in that regard.

40. With regard to draft article 4, it should be ensured that paragraph 2 was in line with the Commission's work on unilateral declarations.

41. She supported the Special Rapporteur's proposed programme of future work on the topic. Nevertheless, she agreed with Mr. Hassouna that there might be cause to reconsider the final form of the work in the light of the content of the draft articles proposed.

42. She supported sending the draft articles to the Drafting Committee. Noting that some colleagues had expressed the view that draft articles 3 and 4 should be held back at the current stage, as they seemed to contain safeguard clauses applicable to general rules that had not yet been proposed, she said that she would prefer to hear from the Special Rapporteur why he thought those draft articles could be considered as self-standing provisions. It would then be for the Drafting Committee to decide whether to continue their consideration in 2018.

43. Mr. PARK said that he would like to thank the Special Rapporteur for his first report, which should be read in conjunction with the syllabus for the topic. He agreed that the scope of the topic should be limited to the transfer of rights and obligations arising from internationally wrongful acts and should exclude issues of international liability for injurious consequences arising out of acts not prohibited by international law and the question of succession in respect of the responsibility of international organizations.

44. Regarding international liability, if the question was considered solely from the standpoint of the consequences arising from an act—namely the obligation to repair it—there would be no need to separate the responsibility for a wrongful act from the liability entailed by it, because the consequences arising from the two would not necessarily differ. There were, however, considerable theoretical and practical differences between the two, and to extend the scope of the topic to include the consequences of liability would certainly complicate the Commission's task.

45. As to the question of succession in respect of the responsibility of international organizations, it should be noted that an international organization might become entitled to claim reparation from a State that had committed an internationally wrongful act against it. In addition, there were situations in which the acts of an international organization *vis-à-vis* a third party engaged the responsibility of a member State. Those aspects should be included in the Commission's discussion of the topic.

46. Another concern which related to the clarification of the scope of the topic was the exact form of the obligations and rights that could be transferred in the event of succession. Article 34 of the draft articles on the responsibility of States for internationally wrongful acts indicated that full reparation for the injury caused by the internationally wrongful act should take the form of restitution, compensation and satisfaction. The focus of the first report, however, was primarily on compensation, namely the protection of acquired rights and debts, which could potentially be covered by the 1983 Vienna Convention. It was unclear whether other forms of reparation, namely restitution and satisfaction, could be transferred. The Commission's discussion of the topic should consequently focus more clearly on the issue of the forms of the rights and obligations of States arising from international responsibility.

47. There were two aspects to that question. One was the transfer to the successor State of the obligations of the predecessor State to cease the act in question, to offer appropriate assurances and guarantees of non-repetition and to make full reparation for the injury caused by the internationally wrongful act. The other aspect was the transfer to the successor State of the right to claim reparation for such injury. The question also arose as to whether the successor State was entitled to take countermeasures, which, according to article 49 of the articles on the responsibility of States for internationally wrongful acts, an injured State could only take against a State which was responsible for an internationally wrongful act.

48. In order to orient the Commission's work on the topic, it was necessary to state that the rules it codified were of a subsidiary nature. His preference would therefore be for that to be clearly enunciated in a separate clause or draft article.

49. At the current stage of the Commission's work, the most important matter for it to address was whether there were general rules on the succession of States in respect of State responsibility that applied to different types of State succession, including those in which a predecessor State continued to exist or, on the contrary, ceased to exist, or those in which several States succeeded a predecessor State.

50. In his view, the Commission had two possible, but opposite, options. The first was to adhere to the traditional rule, according to which a successor State did not succeed to the responsibility for internationally wrongful acts done by a predecessor State, and then to attempt to identify the exceptions to that rule. Under that option, the starting point would be article 1 of the draft articles on the responsibility of States for internationally wrongful acts, which provided that every internationally wrongful act of a State entailed the international responsibility of that State. The second option was to depart from the traditional rule of non-succession and to seek to determine whether there were general rules that supported the succession of States in respect of State responsibility in each different type of State succession.

51. The Special Rapporteur seemed to suggest that the traditional theory of non-succession had evolved and had become more nuanced in certain contemporary cases. In his own view, it was too soon for the Commission to settle on either the automatic succession of responsibility or the non-succession of responsibility as a premise for its discussion.

52. However, there were two reasons why he had some doubts about the above-mentioned second option. First, there was no customary international law postulating an automatic transfer to a successor State of the obligations arising from the wrongful acts of a predecessor State. In his view, customary international law on the subject was not yet well developed, and the Special Rapporteur had admitted as much in paragraph 85 of his report, where he stated that any general customary norms of international law crystallized and were established only slowly in that area. However, that was not because of the lack of State practice as a whole, but because State practice was inconsistent and reflected the particularities of the various State succession contexts.

53. Second, it was not possible to clearly identify the approach to the matter in relevant judicial practice. In contrast to the decisions handed down in two notable cases, namely *Robert E. Brown* and *Redward*, the decision in the arbitration in the *Lighthouses case between France and Greece* was considered by some to favour succession with respect to responsibility in certain circumstances. Moreover, in *Gabčíkovo–Nagymaros Project* and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the International Court of Justice had examined the possibility of the transfer upon succession of the obligations and rights arising from State responsibility. However, neither of those cases could be clearly identified as having demarcated the succession of State responsibility. In paragraph 50 of his report, regarding the *Gabčíkovo–Nagymaros Project* case, the Special Rapporteur concluded that the Court seemed to recognize succession in respect of secondary (responsibility) obligations and secondary rights resulting from wrongful acts. In his own view, the Court had not clearly recognized the obligations of Slovakia resulting from the transfer of secondary obligations arising from the responsibility of Czechoslovakia, but instead had noted the effect of the special agreement concluded between the parties in respect of rights and obligations relating to the *Gabčíkovo–Nagymaros Project* case.

54. Categorizing State succession was not an easy task, and careful consideration must be given to the matter before the overall approach to the topic was outlined. In several parts of his report, the Special Rapporteur regarded unification as a category of State succession. The 1978 Vienna Convention and the 1983 Vienna Convention referred to the "uniting of States", while the draft articles on nationality of natural persons in relation to the succession of States had renamed the category "unification of States". The 2015 Institute of International Law resolution on State succession in matters of State responsibility, on the contrary, referred to the categories "merger of States" and the "incorporation of a State into another existing State" rather than to the term "unification of States".[364]

55. The incorporation of a State into another existing State applied to the unification of Germany, where the legal personality of the Federal Republic of Germany had remained, while that of the German Democratic Republic had been extinguished. In such cases, the State responsibility of the dissolved State and that of the remaining State which became the successor State must be treated differently. By contrast, the merger of States that resulted in the disappearance of both predecessor States and the establishment of the new legal personality of the successor State—as illustrated by the example of Yemen in 1990—must be treated differently from the incorporation of a State into another existing State. Those two types of unification should be analysed separately.

56. The suggested timeline for the future programme of work on the topic seemed feasible. Special consideration, having regard to both reality and theory, should be given to two questions in particular: the extent to which the passage of time affected claims submitted by a successor State in which it invoked rights that had been transferred to it by its predecessor State; and the means available to a successor State for implementing reparation for injury caused by its predecessor. In the course of such considerations, the transfer of obligations relating to compensation must be distinguished from succession of debt.

57. Sir Michael WOOD said that his remarks on the Special Rapporteur's first report would be preliminary in nature. Before giving more considered views, he needed to study in more depth than had been possible so far such State practice and case law as there was in the report, as well as the literature. While the first report provided some helpful references to practice, case law and doctrine, the Commission did not yet have an in-depth or systematic account of the materials, which was an important precondition for taking forward a new topic. As the Special Rapporteur had himself said when introducing the report, chapter II of the report presented only a "preliminary survey of State practice related to the topic … including some judicial decisions" and focused mostly on "cases of succession in the post-decolonization context, mainly in Central and Eastern Europe".[365] Mr. Reinisch had raised some valid questions about the conclusions sought to be drawn from the materials, and especially the cases, in the first report.

58. He would therefore be interested to know the Special Rapporteur's plans for making such materials available. For example, did the Special Rapporteur intend to propose that the Commission request States to provide it with an account of their practice and case law on the matter, in good time for him to take it into account in his second report? That would be in accordance with the Commission's usual practice upon taking up a new topic. Had he considered whether there was anything that the Commission could usefully request from the Secretariat by way of a study? What plans did he have for making such materials available to the Commission, in his second report or otherwise?

59. He would also like to know the Special Rapporteur's assessment of the recent work of the Institute of International Law on the topic, which had culminated in the resolution on State succession in matters of State responsibility adopted by the Institute at its 2015 Tallinn session.

60. Unfortunately, the *travaux préparatoires* of the Tallinn resolution gave little indication of the materials that the Institute had taken into account, although there were

[364] See articles 13 and 14 of the resolution on State succession in matters of State responsibility, Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 711–719; available from: www.idi-iil.org, *Resolutions*.

[365] See the 3374th meeting above, p. 231, para. 48.

quite a few references to authors. The Institute's resolution seemed to be based on policy rather than on practice. Its preamble stated, somewhat obscurely, that the Institute bore in mind "that cases of succession of States should not constitute a reason for not implementing the consequences arising from an internationally wrongful act". That seemed to be stated more directly in paragraph 53 of Professor Kohen's final report, in which he had noted that:

> a fundamental goal that guides this report is to prevent situations of State succession from leading to an avoidance of the consequences of internationally wrongful acts, particularly in the form of the extinction or disappearance of the obligation to repair, by virtue of the mere fact of the State succession. This purpose excludes *per se* the doctrinal and old case law perception of a general rule of non-succession.[366]

61. Irrespective of the merits or otherwise of that policy, the fact remained that it was policy. The Commission would no doubt discuss those issues under the topic. However, since it was policy, above all, the Commission needed to know what States thought of that matter.

62. Other speakers in the debate had raised some very pertinent questions that would need to be considered in depth. Was the project to be an exercise in codification? Was that feasible given the available practice? Or was it to be an exercise where the Commission sought to propose new law to States?

63. The topic was undoubtedly complex and controversial. It was complex because it lay at the crossroads of two difficult areas of international law: responsibility and succession. It was controversial because it concerned a question that arose rarely, but often in wholly exceptional circumstances—often of great tension—and there was relatively little practice to guide States. Indeed, it might be that there were no rules of international law governing State succession to the rights and obligations arising from State responsibility. If so—and like the Institute—the Commission might find that it simply had to propose such rules as it considered to make good sense and good policy. That was all the more reason to seek the views of States at a very early stage.

64. It might turn out that States had resolved the matter case by case, or indeed preferred to leave matters unresolved. So, the Commission's conclusion might be that there was no rule of succession and that was what States were happy with. That seemed to have been a widely held view until the recent past. He was yet to be convinced that there had been such a dramatic and clear change as the Special Rapporteur claimed in his report. Certainly, the change of heart that the Special Rapporteur attributed to Mr. Crawford between 1998 and 2001 hardly seemed determinative. The real question was what State practice showed. To the extent that there was practice from regions other than Europe, it needed to be studied, assuming that the aim was to codify existing customary international law, as the report seemed to suggest. As Mr. Nguyen had put it the previous week, the Special Rapporteur seemed to have paid more attention to the views of authors and scholars on issues regarding succession of States than to actual State practice in that area.

65. There was much in the report with which he agreed. Regarding the scope of the topic, he agreed with the Special Rapporteur that it should not cover succession to liability for lawful acts; that issue could be covered in the commentary. Nor should it cover succession in respect of international organizations. Furthermore, he agreed that draft articles seemed to be the appropriate form for the Commission's outcome on the topic.

66. In his report, the Special Rapporteur dealt at some length with agreements concerning succession, including devolution agreements and unilateral declarations on succession. He tended to agree with other speakers that this was not the best way to start the topic and that the Commission should first tackle the basic rule: succession or non-succession. In any event, as the report and draft articles 3 and 4 showed, that was a particularly complex part of a complex topic. For that reason, he would prefer draft articles 3 and 4 to be held in abeyance for the time being. As others had already suggested, the Commission needed to deal at an early stage with the central question of what general rule, if any, applied to State succession in respect of rights and obligations arising from State responsibility. He trusted that the Special Rapporteur would address that all-important question in his second report.

67. The Special Rapporteur seemed to attach importance to the statement of the International Court of Justice in paragraph 115 of its 2015 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* to the effect that it considered that the rules on succession that might come into play in that case fell into the same category as those on treaty interpretation and responsibility of States referred to in an earlier judgment. In other words, the Court was saying that such rules would be rules of general international law to which the Court might refer when determining whether a State had breached its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide and were thus within its jurisdiction under article IX of that Convention. Since it had found that Croatia had not established genocide, the Court had not needed to consider whether Serbia had, in fact, succeeded to the responsibility of the Socialist Federal Republic of Yugoslavia on account of acts alleged to have taken place before 1992. That case did indeed suggest that there might be rules on State succession to State responsibility, but it said nothing about the substance of any such rules.

68. He welcomed the fact that the Special Rapporteur was planning to follow the terminology that had been used by the Commission in earlier related topics. There was a particular need to clarify that the topic concerned responsibility for internationally wrongful acts, and not to refer to tort or delict.

69. An important question, which might go beyond terminology, was the suggestion that the topic was not concerned with succession to State responsibility as such, but with succession to rights and obligations arising from State responsibility. That distinction, which had been made by the Institute of International Law, was a very fine one, and one that was not apparent from the title of the Commission's topic. The Commission should perhaps consider reviewing the title, since the words "in respect of" were not entirely clear. In any event, he agreed with

[366] M. Kohen, "State succession in matters of State responsibility", Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 511 *et seq.*, at p. 534.

other Commission members who had suggested that draft article 1 could and should be made clearer on that point.

70. On the other hand, he disagreed with Mr. Murase that the Commission should consider succession of Governments, as that would have no basis in international law and would run counter to the Commission's consistent approach to questions of succession.

71. Like Mr. Murphy, he was not convinced of the need to define international responsibility in the draft articles, and he did not find the text proposed by the Special Rapporteur in that regard particularly helpful.

72. He was not convinced that the draft articles proposed in the report, in particular draft articles 3 and 4, should be referred to the Drafting Committee before the Commission had had time to consider the materials to which he had referred at the beginning of his statement.

73. Mr. TLADI said that, while he supported the inclusion of the topic under consideration on the agenda, he agreed with Mr. Reinisch that the Commission needed a more transparent process for deciding how topics were chosen.

74. His comments would necessarily be of a preliminary nature, as he had not had enough time to study the subject in any depth.

75. A first report on any topic should explain why it was important. While it was true that there was a gap between the work which the Commission had done in the 1970s on State succession and the articles on the responsibility of States for internationally wrongful acts, which it had adopted in 2001, it was unclear how significant that lacuna was and what approach the Commission intended to adopt in order to fill it, given the limited amount of existing State practice in that area. It was therefore necessary to clarify whether the Commission was engaged in the codification or the progressive development of the subject matter. His own initial impression was that the Commission had insufficient material to engage in a codification exercise.

76. Although the above-mentioned articles on the responsibility of States for internationally wrongful acts did not address the question of responsibility in the event of succession, they were relevant to the Commission's current work. For example, paragraph (3) of the commentary to draft article 11 noted that the inference might be drawn that, if a successor State endorsed and continued a wrongful act, that article would apply. Obviously, the grounds for such responsibility would be the conduct of the successor State, a principle which was consistent with the decision in the arbitration in the *Lighthouses case between France and Greece*, to which the Special Rapporteur had referred. Although the report seemed to suggest that Greece had been held liable as the successor State, it was plain from the section of the decision quoted in paragraph 41 that Greece was responsible because it had adopted the illegal conduct of Crete. Moreover, the Court had found that Greece had not only endorsed the breach of the concession contract between the Ottoman Empire and the French company, but had continued it after its union with Crete. Cases like that, where the State responsibility of a successor State stemmed from its own conduct, must be clearly distinguished from cases of responsibility by virtue of succession.

77. Despite the fact that it was not very common, the type of case on which the Commission should focus was that identified in paragraph 80, where the wrongful act occurred before the date of succession, and responsibility was not assumed by the successor State through the application of other existing rules of international law.

78. As for the approach which the Commission should adopt, he tended to share earlier speakers' assessment of the material presented in the report. The Special Rapporteur seemed to accept that the traditional rule of international law, the "clean-slate" or non-succession principle, applied to succession in relation to State responsibility. The acceptance of that proposition would essentially mean that, if any draft article was proposed which deviated from that rule, clear and unambiguous evidence of practice in support of such a departure would have to be provided. If, on the other hand, the Commission sought to progressively develop the law on the succession of States in respect of State responsibility, some practice, even if uneven, plus good policy reasons, would suffice.

79. In the interests of consistency, it might be wise to consider whether that basic principle, which was embodied in the 1978 Vienna Convention and the 1983 Vienna Convention, ought not to be tailored to the succession of States in respect of State responsibility and adopted. Yet the fact that, as several learned writers had noted, both Conventions upheld that principle might also lead to the conclusion that evidence not only of clear and unambiguous State practice, but also of decisions of international courts and tribunals, would have to be adduced in support of any shift away from it.

80. However, it would seem from the first report that the Special Rapporteur intended to proceed on the assumption that practice and doctrine did support some sort of transition from the non-succession principle towards an unspecified new position and that some judicial decisions possibly warranted that shift.

81. In his own opinion, the decision in the arbitration in the *Lighthouses case between France and Greece* concerned the responsibility of Greece for its own acts and was not predicated on the acquisition of responsibility through State succession. The paragraph of the judgment in the case concerning the *Gabčíkovo–Nagymaros Project*, to which the Special Rapporteur referred as an authority for some kind of shift, was not in fact confirmation of the proposition that general international law did contemplate succession in respect of State responsibility, because the International Court of Justice had apparently reached its conclusion regarding State succession in that case on account of the special agreement between the parties to the case, under the terms of which it had been agreed that Slovakia was the sole successor State of Czechoslovakia in respect of the rights and obligations relating to the Gabčíkovo–Nagymaros Project. Similarly, the judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* could not be taken

as clear evidence of any acceptance of a shift away from the non-succession principle, since the Court had not addressed the question of succession in that decision.

82. He was in favour of sending draft articles 1 and 2 to the Drafting Committee. However, it would be advisable not to refer draft articles 3 and 4 until the Special Rapporteur had clarified the point of departure for the Commission's consideration of the topic. He would not, however, stand in the way of a consensus on that matter.

Cooperation with other bodies (*continued*)

[Agenda item 11]

Statement by the Secretary-General of the Asian–African Legal Consultative Organization

83. The CHAIRPERSON welcomed Mr. Gastorn, Secretary-General of the Asian–African Legal Consultative Organization (AALCO) and invited him to take the floor.

84. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that, at the fifty-sixth annual session of AALCO, which had been held in Nairobi in May 2017, member States had hailed the Commission's immense contribution to the progressive development and codification of international law.

85. AALCO was an international organization working in the field of international law that tried to articulate the legal concerns of its member States from Asia and Africa. It currently comprised 47 member States, and a number of observer States and international organizations attended its meetings. As an advisory body, it played a vital role in promoting interregional cooperation and the exchange of information and views on matters with an international legal dimension. As a forum for legal consultation, it had greatly enhanced solidarity among its member States and had made an outstanding contribution to the emergence and concretization of a number of alternative ideas and practices in the field of international law that reflected the particular concerns of the developing world.

86. One of the functions of AALCO, that of studying the subjects which were being considered by the Commission, had made it possible to forge a close relationship with the latter. Indeed, the experience and expertise of Commission members meant that their presence at AALCO annual sessions was invaluable. For that reason, AALCO would do its best in future to arrange its annual sessions at a time when Commission members could attend them. The need to enhance cooperation and strengthen the relationship between AALCO and the Commission had again been stressed at the annual session held in Nairobi.

87. He explained that the verbatim records of the half-day special meeting held in the current year on some selected items on the agenda of the International Law Commission, which he had made available to the members of the Commission, were still only provisional as they had not yet been approved by member States.

88. The three agenda items of the Commission which had been considered during the fifty-sixth annual session were protection of the atmosphere, *jus cogens* and immunity of State officials from foreign criminal jurisdiction. Members had, however, been free to make comments on other agenda items.

89. Many delegations had commended both the work of the Special Rapporteur on protection of the atmosphere and the draft guidelines on a matter that they regarded as a pressing issue for the international community as a whole. Several delegations had drawn attention to the interrelationship between that topic and other fields of international law, such as international trade law, investment law, the law of the sea and human rights law. One delegation had observed that the Special Rapporteur's decision to investigate the interrelationship between the law of the atmosphere and other fields of international law was of special relevance in view of the entry into force of the Paris Agreement under the United Nations Framework Convention on Climate Change in November 2016. Another delegation had noted that, as the effective protection of the atmosphere greatly depended on scientific knowledge, collaboration among scientists and the establishment of regional and international mechanisms to help developing countries to exchange information and conduct joint monitoring was welcome. Some delegations had held that, in dealing with the topic, the Commission must bear in mind developing countries' special circumstances and real needs. One delegation had added that this approach would be consistent with other international instruments such as the 1972 Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"),[367] the 1992 Rio Declaration on Environment and Development[368] and the aforementioned Paris Agreement under the United Nations Framework Convention on Climate Change. It had also been observed that the draft guidelines basically complied with the understanding reached in 2013[369] and fairly objectively reflected the outcome of the relevant studies on the issue. Hope had also been expressed that the Commission would examine international practices under regional mechanisms in a comprehensive manner and would pursue its efforts to make headway with the topic. It had been contended that the Special Rapporteur's task was neither to fill existing gaps in the legal framework regulating protection of the atmosphere nor to provide a descriptive list of the existing principles of international environmental law, but that in fact the final outcome of the Commission's work on the topic should reflect a balance between those two approaches.

90. With regard to draft guideline 3, one delegation had recognized the importance of the obligation to protect the atmosphere through the effective prevention, reduction or control of atmospheric pollution and degradation and had underlined the significance of including an obligation to conduct environmental impact assessments in States' domestic law in order to ensure that activities under their jurisdiction complied with international standards. Another delegation appreciated the fact that the Commission had

[367] *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.

[368] *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 1, annex I.

[369] See *Yearbook … 2013*, vol. II (Part Two), p. 78, para. 168.

undertaken the analysis and discussion of the obligations to prevent, reduce or control transboundary atmospheric pollution and global atmospheric degradation. The view had been expressed that, as the Paris Agreement under the United Nations Framework Convention on Climate Change contained a reference to the "common concern of humankind" in its preamble, the Commission should reconsider the wording of the third paragraph of the preamble to its draft guidelines.

91. Many delegations had commended the work of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction and her careful analysis of limitations and exceptions to that immunity in her fifth report on the topic (A/CN.4/701). One delegation believed that immunity was procedural in nature and came under a category of rules that was entirely different to the substantive rules that determined the lawfulness of an act. Some delegations had argued that the immunity of State officials from foreign criminal jurisdiction while they performed official acts was a direct consequence of the principle of sovereign equality and was recognized by international law as a means of protecting sovereignty and ensuring peaceful international relations. One view which had been expressed was that the legal status of a Head of State was governed by diplomatic law, which was a branch of international law, and that, since international law recognized the principle of the sovereign equality of States, all sovereign Heads of State deserved similar international treatment. The Head of State, as the highest authority of the State, had autonomy and decision-making power and the State must bear all the consequences of that person's actions and administrative steps, because the Head of State was the highest representative of a State. The rules of international law clearly established that the Head of State had to be protected against arrest and detention in all circumstances. For that reason, State authorities could not arrest or detain the Head of State in that person's own State or in another State. Most case law agreed that a Head of State present outside his or her own State in his or her official capacity enjoyed full criminal immunity for acts carried out in an official or personal capacity and was therefore completely exempt from the criminal jurisdiction of the host State. While it had been noted that, for countries that had not ratified the Rome Statute of the International Criminal Court, the immunity of their Head of State was governed by customary international law, one delegation had expressed the opinion that it was impermissible for a non-signatory of the Statute to take measures that violated the rights of a Head of State. Hence the immunity of a Head of State before national courts was absolute even if that person had committed international crimes.

92. Another delegation had been of the view that the immunity of State officials from foreign criminal jurisdiction stemmed from customary international law, while another had held that immunity *ratione materiae* in respect of acts performed in an official capacity must be guaranteed to all State officials while they were in office and thereafter. Attention had been drawn to the fact that the immunity of State officials from foreign criminal jurisdiction in foreign courts and international criminal bodies were two different issues and, for that reason, it was questionable whether the theories and practices of the latter could be copied indiscriminately when determining the rules applicable to the former.

93. One delegation had maintained that there were no exceptions to immunity *ratione personae* and that the evidence of the three exceptions to immunity *ratione materiae* proposed by the Special Rapporteur was flimsy, as it rested on a few dissenting opinions to judgments of the International Court of Justice and on civil cases before some national courts and international judicial bodies such as the European Court of Human Rights. With regard to crimes in respect of which immunity did not apply, it was contended that a distinction had to be made between "crimes of international law" and "international crimes" and that, while it was impossible to overstate the importance of the fight against the former, it was the latter which were widely accepted by the international community as being determined by international law. Another delegation had expressed the view that the question of exceptions and limitations required further study because the report did not provide sufficient evidence that the three categories of limitations and exceptions it proposed were already established in international law. One delegation had agreed with the methodology used by the Special Rapporteur and with the title of draft article 7 (Crimes in respect of which immunity does not apply) given the normative implications of the phrase "limitations and exceptions".

94. The Commission had been advised to proceed cautiously when deciding whether it should focus on the codification or the progressive development of the topic, owing to concerns related to the highly complex and politically sensitive nature of the issue of exceptions. A further concern had been that the relationship and fundamental difference between immunity *ratione personae* and immunity *ratione materiae* had been insufficiently analysed and required further study. One delegation had considered that exceptions to criminal jurisdiction called for further debate and that the notion of "acts performed in an official capacity" must be clarified. It had also been of the opinion that careful consideration should be given to the view that international crimes should not be deemed acts performed in an official capacity and that they should be defined more clearly. Another delegation had contended that evidence of sufficient State practice would have to be supplied in order to support the argument that the "crimes of corruption" to which draft article 7, paragraph 1 (*b*), referred were a serious international crime similar to the other international crimes listed in that draft article. To that end, it would be necessary to determine whether acts of corruption could be termed "acts performed in an official capacity" and therefore came within the scope of immunity *ratione materiae.*

95. Comments had also been made on *jus cogens*, as well as on the identification of customary international law, provisional application of treaties, protection of the environment in relation to armed conflicts and crimes against humanity.

96. The CHAIRPERSON thanked Mr. Gastorn for his statement and invited members of the Commission to put questions and to offer comments.

97. Mr. PARK, noting that AALCO was an intergovernmental organization, asked whether the statements by AALCO member States contained in the verbatim records of its annual sessions could be considered to be serious statements representing, for example, the *opinio juris* of

those States and, in that connection, whether any differentiation was made according to the seniority of the officials making such statements.

98. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that it was the usual practice of AALCO to publish the verbatim records of the proceedings of its annual sessions on its website. As an intergovernmental organization, AALCO represented the views of its member States, and therefore the statements of those States should, in his view, be considered to be serious statements.

99. Mr. HUANG said that he was pleased to note that AALCO had conducted a range of meaningful training programmes in the field of international law, including a long-term training programme in cooperation with the Government of China. He particularly welcomed the Secretary-General's comments on a very important and controversial topic on the Commission's current programme of work, namely the immunity of State officials from foreign criminal jurisdiction. Divergent views had been expressed on the topic within both the Commission and the Sixth Committee of the General Assembly, and diverse views continued to exist among Commission members on the issue of whether serious international crimes constituted an exception to the immunity enjoyed by State officials under customary international law. Noting that, according to the verbatim record of the fifty-sixth annual session of AALCO, seven delegations from AALCO member States had voiced their concerns and views on the topic, it would be helpful if the Secretary-General could provide further information on that issue, in particular on the position of AALCO as a whole and on whether there was any State practice of AALCO member States supporting the establishment of an exception to the immunity of State officials. Such information would be a very useful and timely contribution to the discussions taking place within the Commission. He also encouraged all Commission members to read carefully the statements made on the topic by AALCO members, in particular that of the delegation of Japan.

100. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that it was hoped that AALCO would organize further meetings on the topic of immunity of State officials from foreign criminal jurisdiction with a view to revisiting issues on which there remained divergent views among member States and to possibly developing a common position on the matter. Any development in that regard would be communicated to the Commission in a timely manner.

101. Ms. ORAL said that she wished to thank the Secretary-General for his informative presentation, which had highlighted the value of AALCO for the work of the Commission. As an organization with 47 member States, AALCO had been very influential in international law and, in particular, in providing a balance that was so necessary from the developing world's perspective. In that connection, she would be interested to know whether cooperation between AALCO and the Commission regarding information on State practice could be further strengthened.

102. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that work was ongoing to make State practice on topics of interest available to the Commission and that he would strive to ensure that the matter was given the attention it deserved.

103. Mr. HMOUD said that he would welcome information on plans for developing the work of AALCO in the years to come and an update on legal research and training activities promoted by the Organization.

104. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO was indeed active in the fields of capacity-building, legal research and training. It was, for example, currently continuing to cooperate with the Government of China in conducting an annual training course on various international law issues that was attended by legal officers from AALCO member States. Several memorandums of understanding had been concluded with research institutions and universities in member States with a view to further developing training and legal research activities. In addition, AALCO carried out in-house training at its headquarters in New Delhi with the participation of various experts on international law, and a number of studies were produced annually on selected topics of international law under the auspices of the AALCO Centre for Research and Training.

105. Mr. HASSOUNA, welcoming the Secretary-General of AALCO on his first visit to the Commission, said that he wished to commend him on his willingness to engage with the Commission on topics of mutual interest. In recent years, AALCO had played an important role in seeking to coordinate the position of its member States on questions relating to the codification and progressive development of international law. The distribution of the verbatim record setting out the position of member States as expressed at the Organization's most recent annual session was a good way to show Commission members what had been achieved in that regard. It was important to bear in mind, however, that the record of those proceedings was of a provisional nature; it would be wise, therefore, not to treat it as a final record and not to quote States on that basis. Many of the issues addressed by AALCO member States at the session had also been a matter of debate within the Commission. However, he wished to point out that, when Commission members expressed a position, they did so in their capacity as independent experts and that they did not reflect the position of their national Governments.

106. It had been unfortunate that some Commission members who had been invited to participate in the half-day meeting on the Commission's work organized at the 2017 annual session of AALCO had been unable to do so because it had coincided with the start of the Commission's session in Geneva. He hoped that it would be possible to find a way for members to attend such meetings in the future. Regarding training, he asked whether AALCO cooperated in that area with the United Nations, in particular the Codification Division, which ran training programmes for different regional areas.

107. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that AALCO did indeed cooperate with the Codification Division, and arrangements for further joint training efforts were being developed.

108. Mr. MURASE said that he very much appreciated the fact that, at its 2017 annual session, AALCO had devoted a half-day session to topics under consideration by the Commission. Noting that its current membership of 47 States represented only half of the total number of Asian and African countries, he asked whether there was, for instance, any possibility of inviting Pacific Island States to join the Organization.

109. Mr. JALLOH asked whether there was any possibility of the annual sessions of AALCO being held earlier in the year, for example in January or February, as that would allow for the verbatim record of proceedings to be published in time for the views expressed by States within the framework of AALCO to be taken into account by Commission members in their interventions during the Commission's session. Noting that a meeting had been organized by AALCO in Malaysia in 2015 on the identification of customary international law, with the participation of Sir Michael Wood, and that other special rapporteurs were interested in participating in such events, he said that it would be helpful if further seminars could be held as part of increased cooperation efforts, in particular on topics for which a full set of draft articles had been adopted by the Commission. Lastly, noting that in 2015 the AALCO secretariat had published a note on its website seeking comments from member States on new topics on the Commission's agenda, he wondered whether there had been any discussions within AALCO with a view to suggesting possible future topics. Given the membership of AALCO, it would be very helpful for the Commission to hear member States' views in that connection both within the framework of AALCO and also, perhaps in a coordinated manner, within the Sixth Committee of the General Assembly.

110. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that one of his main activities as AALCO Secretary-General was to consider ways to increase the Organization's membership. Currently, efforts were being made to increase the representation of African States, in particular francophone States, since only 14 of the Organization's current members were from Africa, as well as that of Central Asian countries. It was the Organization's intention to extend invitations to the Pacific Island States, whose membership would be an asset in terms of their jurisprudence on various issues, including the law of the sea.

111. Although the exact timing of the annual sessions of AALCO was to a large extent determined by the host country, it was his Organization's intention that they should, as far as possible, take place before the Commission's sessions. He reiterated the critical importance to AALCO of the presence of Commission members at its annual sessions. As to proposing new topics for inclusion on the Commission's long-term programme of work, members of the AALCO Eminent Persons Group were actively exploring possibilities in that regard.

112. Mr. VALENCIA-OSPINA said that the work of AALCO, as reflected, for example, in the records of its proceedings, was immensely valuable to the Commission in the preparation of its drafts. AALCO also played an important role in later stages of the Commission's work, for example within the framework of diplomatic conferences. In that connection, he recalled that the Commission had recommended 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,[370] for which topic he had been the Special Rapporteur. He would therefore be interested to know whether that recommendation was the subject of discussion within AALCO in terms of coordinating the position of member States with a view to the debate in the General Assembly on the matter due to take place in 2018.

113. Mr. VÁZQUEZ-BERMÚDEZ, referring to topics on the current programme of work of AALCO, said that he would like to know what specific aspects of the law of the sea it was dealing with, in particular whether there had been any coordination between member States regarding the negotiations in New York on protection of the marine environment in areas beyond national jurisdiction with a view to developing a binding instrument. He would also be interested to know what developments had taken place within AALCO in terms of its work on international law in cyberspace.

114. Mr. GASTORN (Secretary-General of the Asian–African Legal Consultative Organization) said that, although AALCO itself did not directly engage in discussions in the General Assembly, it organized consultations in that connection among its member States to allow them to share experiences with a view to reaching a common position on various issues. Following discussions within AALCO on the subject of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, a study had been developed that raised critical issues that were under consideration during the ongoing discussions in New York.

115. The CHAIRPERSON thanked the Secretary-General of AALCO for the valuable information he had provided on his Organization and for his responses to the various questions put by Commission members.

The meeting rose at 1.05 p.m.

3378th MEETING

Thursday, 20 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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[370] The draft articles on the protection of persons in the event of disasters and the commentaries thereto are reproduced in *Yearbook … 2016*, vol. II (Part Two), pp. 25 *et seq*., paras. 48–49.

Immunity of State officials from foreign criminal jurisdiction (*concluded*)* (A/CN.4/703, Part II, sect. E, A/CN.4/701, A/CN.4/L.893)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. RAJPUT (Chairperson of the Drafting Committee) introduced the titles of Parts Two and Three and the titles and texts of draft article 7 and annex provisionally adopted by the Drafting Committee, as contained in document A/CN.4/L.893, which read:

PART TWO

IMMUNITY *RATIONE PERSONAE***

…

PART THREE

IMMUNITY *RATIONE MATERIAE***

…

Article 7. Crimes under international law in respect of which immunity ratione materiae *shall not apply*

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(*a*) crime of genocide;

(*b*) crimes against humanity;

(*c*) war crimes;

(*d*) crime of apartheid;

(*e*) torture;

(*f*) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Annex

LIST OF TREATIES REFERRED TO IN DRAFT ARTICLE 7, PARAGRAPH 2

Crime of genocide

Rome Statute of the International Criminal Court, 17 July 1998, article 6;

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

Rome Statute of the International Criminal Court, 17 July 1998, article 8, para. 2.

Crime of apartheid

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, article II.

Torture

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, para. 1.

Enforced disappearance

International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

* Resumed from the 3365th meeting.

** The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

2. The Drafting Committee had devoted seven meetings, from 30 May to 7 July 2017, to the consideration of draft article 7, as proposed by the Special Rapporteur in her fifth report (A/CN.4/701). It had also considered a number of suggested reformulations and a proposed annex, presented by the Special Rapporteur in response to suggestions made and concerns raised in the course of its work. The Drafting Committee had provisionally adopted draft article 7, together with an annex to the draft articles, on 7 July 2017. He paid tribute to the Special Rapporteur, Ms. Escobar Hernández, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee.

3. Before focusing on the details of the draft article, members of the Drafting Committee had made general comments on the text as a whole, which had helped to contextualize the work. The comments had related, *inter alia*, to the structure of the draft article and its relationship to existing and future draft articles on the topic; the scope and nature of the crimes referred to in paragraph 1 of the draft article and their possible definition; and the scope of paragraphs 2 and 3. Comments had also addressed the distinction between limitations on and exceptions to immunity, including the question of to what extent the crimes listed constituted "acts performed in an official capacity".

4. The Drafting Committee had proceeded on the general understanding that the outcome of its work was without prejudice to, and took no position on, the question of whether the text of draft article 7, or any part thereof, codified existing law, *lex lata*, or whether the result constituted an exercise in progressive development, *lex ferenda*. Indeed, some members of the Drafting Committee had underlined the fact that their participation was without prejudice to the fundamental problems that they had with the text. The view had been expressed that the Drafting Committee was essentially embarking on a policymaking exercise, as opposed to seeking the codification or progressive development of the law. Some members would have preferred the draft article to be retained within the Drafting Committee until 2018 and considered together with any proposals on procedural aspects to be made by the Special Rapporteur. However, other members had considered that the time was right for the Drafting Committee to proceed with the issue.

5. Second, the Drafting Committee had agreed that the procedural aspects of immunity of State officials from foreign criminal jurisdiction were closely related to the question of limitations and exceptions, as well as to the draft articles as a whole. Procedural aspects would be addressed the following year in the sixth report of the Special Rapporteur. In its work during the current session, the Drafting Committee had stressed the importance, for the draft article under consideration and for the draft articles as a whole, of procedural safeguards and guarantees. That concern was reflected in a footnote that the Drafting Committee had decided to insert in the text.

6. The report of the Drafting Committee contained in document A/CN.4/L.893 included the text of the draft article together with an annex, as provisionally adopted by the Drafting Committee. Paragraph 1 of draft article 7 consisted of a *chapeau* and six subparagraphs. The Drafting Committee had decided to make it explicit in the *chapeau* that the limitations and exceptions set out in the draft article had a bearing solely on immunity *ratione materiae*, reflecting a desire by members to be as specific as possible when dealing with matters in the sphere of criminal law. The Drafting Committee had underlined the restricted application of the limitations and exceptions by placing draft article 7 within Part Three of the draft articles, which dealt with immunity *ratione materiae*.

7. The Drafting Committee had considered that, since paragraph 1 explicitly limited the scope of draft article 7 to immunity *ratione materiae*, the reference to immunity *ratione personae* in paragraph 2 as originally proposed by the Special Rapporteur had become superfluous and could be deleted. The commentary would further emphasize the fact that the limitations and exceptions listed in draft article 7 did not apply with respect to immunity *ratione personae* and would clarify that those limitations and exceptions were applicable to officials who enjoyed immunity *ratione personae* and whose term of office had come to an end.

8. The desire for specificity had also informed the Committee's decision to include the phrase "from the exercise of foreign criminal jurisdiction" in the *chapeau*, so as to indicate that immunity did not apply to the crime itself, but to the exercise of foreign criminal jurisdiction. The placement of the phrase directly after the words "immunity *ratione materiae*" corresponded to the wording of draft articles 3 and 5.[371]

9. After considering various options, the Drafting Committee had decided to retain the phrase "shall not apply", as originally proposed by the Special Rapporteur. The term "shall" had been preferred over "should", "will" or "does", as it was considered most appropriate. It corresponded to wording used in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, particularly articles 10 and 11 thereof. The Drafting Committee had entertained the possibility of starting the paragraph with the phrase "State officials do not enjoy". Although that would have reflected the language used in draft article 6, paragraph 1,[372] members had expressed concern that such wording could be interpreted as excluding from the scope of draft article 7 former State officials, to whom the limitations and exceptions set out therein were also intended to apply. The Drafting Committee had decided against including the phrase "cannot be invoked", which would have introduced procedural elements into the text. Draft article 7 did not deal with procedural questions of invocation, but rather with substantive issues of applicability: it identified types of activity to which immunity *ratione materiae* did not apply. The Drafting Committee had replaced the phrase "in relation to" with "in respect of" in order to harmonize the text of the *chapeau* with the proposed title of the draft article.

10. After some debate, the Drafting Committee had decided to include the phrase "crimes under international law" in paragraph 1 to highlight the fact that draft article 7 related only to crimes that had their foundation in the international legal order and that were defined on the basis of international law, rather than domestic law. The phrase reflected wording used previously by the Commission, for example in the 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[373] (Principles I to III and V to VII), the 1954 draft code of offences against the peace and security of mankind[374] (article 1) and the 1996 draft code of crimes against the peace and security of mankind[375] (article 1, para. 2). The commentary would emphasize the fact that the phrase "under international law" related to "crimes".

11. The Drafting Committee had debated extensively whether paragraph 1 should list specific crimes and, if so, what crimes ought to be included and whether or how they ought to be defined. Some members had favoured a general reference to "the most serious crimes recognized under international law", or a similar formulation, instead of listing specific crimes, leaving the scope of the paragraph open and allowing it to incorporate new developments in international law, in particular in international criminal law. The commentary would then have specified which "serious crimes" fell within the scope of the paragraph. Other members had been of the view that a reference to "serious crimes" was too vague. They had preferred the inclusion of a detailed list of crimes, noting that criminal law demanded specificity. That was the position to which the Drafting Committee had eventually agreed. Further, it had been decided to list the crimes *seriatim*, in individual subparagraphs, rather than to group them together in a single subparagraph.

12. The discussion had then turned to the crimes to be included in the draft article. Members had considered whether there was a need to agree first on an underlying theory, basis or criterion or criteria on which certain crimes would be included and others not. In the final analysis, the preponderance of views had favoured the

[371] *Yearbook … 2013*, vol. II (Part Two), p. 43 (draft article 3); and *Yearbook … 2014*, vol. II (Part Two) and corrigendum, p. 146 (draft article 5).

[372] *Yearbook … 2016*, vol. II (Part Two), p. 162 (draft article 6).

[373] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[374] *Yearbook … 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

[375] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

inclusion of genocide, war crimes and crimes against humanity, as the core crimes contained in the Rome Statute of the International Criminal Court and prohibited in customary international law. To some members, their prohibition constituted *jus cogens*. A suggestion to refer to the "crime of genocide" rather than simply "genocide", had been adopted by the Drafting Committee, in order to mirror the wording used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Rome Statute of the International Criminal Court.

13. Some members had reiterated that the Drafting Committee ought to justify its selection on the basis of a set of predetermined criteria, for example crimes that could only be committed by Governments, crimes whose prohibition concerned peremptory norms of international law (*jus cogens*), crimes listed in the Rome Statute of the International Criminal Court, or crimes that were subject to a conventional *aut dedere aut judicare* regime. It was noted that all possible theories had their shortcomings. Some members had stressed the need to adopt a more pragmatic approach, based upon what might be acceptable to States. In that regard, the Special Rapporteur had clarified that the crimes had been selected on the basis of their status in treaties and in practice. The fifth report had accordingly proposed the inclusion of torture and enforced disappearance. Some members had argued that those crimes fell within the scope of crimes against humanity and that their inclusion in draft article 7 was superfluous. Other members had maintained that crimes against humanity were subject to a threshold, as they had to be committed as part of a widespread and systematic attack directed against a civilian population. Those members had maintained that acts of torture and enforced disappearance might not always reach such a threshold.

14. The same had been said of the crime of apartheid, the inclusion of which had been supported by some members. A view had been expressed that the crime of apartheid was a "historical" crime and that its inclusion was unnecessary. Some had viewed apartheid as covered under crimes against humanity. However, the majority had felt that apartheid should be mentioned separately. Some members had questioned why apartheid should be included, but not slavery or human trafficking as a modern form of slavery, since both were also the subject of international conventions.

15. Ultimately, the prevailing view within the Drafting Committee had been to include torture, enforced disappearance and apartheid as separate crimes. For historical reasons, it had listed the crime of apartheid immediately after the core crimes, followed by torture and enforced disappearance. It had also decided to refer to enforced disappearance in the singular, in line with the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

16. Members had debated whether to include the crime of aggression. Some members had expressed their strong support for its inclusion. They considered the crime of aggression to be the supreme international crime and had pointed to its inclusion in earlier work of the Commission in the field of international criminal law, such as the 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the 1954 draft code of offences against the peace and security of mankind and the 1996 draft code of crimes against the peace and security of mankind. Members had also referred to the pending activation of the Amendments to the Rome Statute of the International Criminal Court on the crime of aggression adopted in Kampala by the Assembly of States Parties to the Rome Statute of the International Criminal Court and had suggested that any decision on inclusion should be postponed until 2018. It had been asserted that the crime of aggression was not necessarily more political than other crimes included in the list, such as war crimes and crimes against humanity, which were often perpetrated by political leaders.

17. Other members had expressed reservations regarding the inclusion of the crime of aggression, noting that national courts were not necessarily well placed to prosecute all crimes falling under the jurisdiction of an international court. Members had also raised concerns about the political nature of the crime of aggression and the potential for abuse were it to be included as a crime to which immunity *ratione materiae* did not apply. Furthermore, it had been pointed out that there was no practice of national courts in prosecuting the crime of aggression. In the end, the Drafting Committee had decided not to include the crime of aggression, but had suggested that the Special Rapporteur should reflect the various viewpoints on the issue in the commentary. Such a course of action would afford States an opportunity to comment on the matter.

18. In her fifth report, the Special Rapporteur had proposed including corruption as a crime to which immunity did not apply. Several members had supported that proposal, pointing out that corruption, particularly wide-scale or "grand" corruption, severely affected the stability and security of States and societies. Those members had drawn attention to the close link between corruption and official acts. In their view, the dividing line between public and private acts was very difficult to draw in cases of corruption, as the crime was typically committed on the basis of official authority or under cover of authority by individuals taking advantage of their public position. Members had also noted that corruption was already the subject of various treaties, including the 2003 United Nations Convention against Corruption.

19. Other members had questioned the inclusion of corruption, arguing that it could never constitute an official act or be performed in an official capacity, as it was always committed with the objective of private gain. In their view, corruption was already excluded from the domain of immunity *ratione materiae* on the basis of draft article 6, paragraph 1. The view had also been expressed that corruption was not an international crime, as it did not derive its criminal character from international law. Rather, it was a crime under domestic law that often required transnational cooperation for its effective prevention and punishment. In that regard, it had been recalled that the United Nations Convention against Corruption did not actually define corruption, but rather called for measures to prevent and combat it more effectively. There were many crimes dealt with in treaties that did not qualify as "crimes under international law". In the end, the Drafting Committee had decided not to include the crime of corruption in draft article 7, even though it

had underscored its seriousness. Its exclusion signified only that it was a crime to which immunity did not apply.

20. The Drafting Committee had received several other suggestions for crimes to be included, including slavery, human trafficking, child prostitution and child pornography, piracy and terrorism. Upon reflection, it had decided not to incorporate them into draft article 7, but that was no reflection upon their severity.

21. The Drafting Committee had discussed whether it should refer to modes of perpetration or ancillary crimes, such as attempting to commit an international crime, aiding and abetting, and complicity. Ultimately, it had considered that immunity was a preliminary issue that typically arose before questions of modes of liability were dealt with. It had therefore deemed it unnecessary to refer to the issue.

22. The Drafting Committee had extensively debated whether draft article 7 or the commentary should include definitions of the crimes listed. Various suggestions had been made, such as including the definitions in the text or in the commentary or not providing any definitions at all. Several members had emphasized that the crimes listed must be defined according to international law, otherwise it would result in confusion before domestic courts, and that domestic judges should not be left any discretion to interpret the relevant crimes according to national law. For that reason, it was felt necessary for the definitions to be part of the text of the draft article, rather than the commentary.

23. In order not to overburden the text, the Drafting Committee had decided not to include definitions of the crimes listed in paragraph 1 directly in the draft article but in an annex, ensuring that they would be read as part of the text. The exercise had been inspired by the Commission's work on what had become the Rome Statute of the International Criminal Court and on the articles on the effects of armed conflicts on treaties.[376] Paragraph 2 provided the link between paragraph 1 and the annex. It confirmed that the crimes listed in paragraph 1 must be understood according to international law, in particular their definition in the treaties enumerated in the annex to the draft articles. The phrase "For the purposes of the present draft article" indicated that the draft article and the annex did not provide definitions of the crimes for the purposes of criminal prosecution, but only for determining whether immunity *ratione materiae* applied. It also made clear that the references to treaty definitions in the annex were without prejudice to the status of the crimes under customary international law.

24. The words "the crimes under international law" reflected the wording of the *chapeau* of paragraph 1. The phrase "mentioned above" referred to the crimes listed in paragraph 1. The phrase "are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles" emphasized that national judges or prosecutors must interpret the crimes listed as defined in international law, not as defined in their respective domestic legal systems.

25. The Drafting Committee had decided to limit the list of treaties in the annex to international or universal conventions and not to include regional instruments. For each of the crimes listed in draft article 7, paragraph 1, the annex identified the relevant provision in one or two treaties that defined the crime. Some members had suggested including references to all treaties that provided definitions of the crimes, in order to be as comprehensive as possible and demonstrate wide participation in the treaties and wide acceptance of the definitions. Other members had maintained that participation was irrelevant for the purposes of the annex, as it was concerned only with definitions. They had also pointed out that definitions varied among treaties, which might be confusing to domestic judges and prosecutors. For those reasons, the Drafting Committee had decided to refer only to the most pertinent treaties.

26. With regard to the crime of genocide, the Committee had listed both article 6 of the Rome Statute of the International Criminal Court and article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, on the understanding that the definition of genocide in the two instruments was identical. It had also referred to the Statute for the definitions of crimes against humanity and war crimes, contained in article 7 and article 8, paragraph 2, thereof, respectively. The Committee had considered that the Statute provided the most modern definition of such crimes, particularly war crimes. It had noted that the Statute contained the most up-to-date list of war crimes and incorporated "grave breaches" of the 1949 Geneva Conventions for the Protection of War Victims and 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), war crimes under customary international law, including crimes committed in non-international armed conflict, and war crimes flowing from other treaties on international humanitarian law.

27. Owing to the concern regarding the threshold for certain crimes, the Rome Statute of the International Criminal Court had not been listed as relevant for the definition of the other crimes (apartheid, torture and enforced disappearance). In those cases, the annex listed the pertinent provisions of the relevant international conventions: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention for the Protection of All Persons from Enforced Disappearance.

28. In her fifth report, the Special Rapporteur had proposed including a version of the "territorial tort" exception as a ground for the non-application of immunity *ratione materiae*. It had been pointed out that the United Nations Convention on Jurisdictional Immunities of States and Their Property did not contain such an exception for crimes, and that in any case the exception could not apply to acts *jure imperii*. Some members had considered the provision superfluous, since it would only cover acts not performed in an official capacity. Some members had expressed the view that it was not an issue covered by exceptions because immunity would not arise,

[376] The draft articles on the effects of armed conflicts on treaties adopted by the Commission and the commentaries thereto 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.

and there was no need to create an exception to something that did not exist. The Drafting Committee had not, therefore, incorporated the proposed provision into draft article 7. Instead, the commentary would clarify that, to the extent that such acts were subject to the principle of territorial sovereignty, they did not enjoy immunity *ratione materiae*.

29. Another proposal made in the fifth report was the inclusion of two "without prejudice" clauses in what had originally been paragraph 3 of the draft article. The Drafting Committee had decided that, if they were to be included, the clauses ought to apply to the draft articles as a whole. To that end, it had been decided to take the clauses out of draft article 7 and to consider them together with other procedural aspects at the Commission's next session. They might, for instance, be placed in a separate draft article.

30. At the outset of its deliberations on draft article 7, the Drafting Committee had acknowledged the need to consider the close relationship between the question of limitations on and exceptions to immunity and the procedural aspects of immunity, which would be addressed in the Special Rapporteur's sixth report. In addition to a reference to the issue, to be included in the commentary to draft article 7, the Committee had contemplated several ways to reflect that need in the text thereof. It had eventually agreed to do so in a footnote, in preference to other suggestions, such as the inclusion of a placeholder or safeguard clause in the *chapeau* of draft article 7. It had been noted that none of the draft articles adopted so far contained a placeholder or safeguard clause. The Drafting Committee had also decided against explicit reference to particular procedural mechanisms, such as waiver of immunity. Members had been of the opinion that to do so would mix substantive and procedural aspects of limitations on and exceptions to immunity, which they would prefer to deal with in separate draft articles.

31. The footnote read: "The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session." The reference to "provisions and safeguards" indicated that the procedural aspects of immunity were not restricted to the question of limitations on and exceptions to immunity, but affected the draft articles as a whole. To underline that, the Drafting Committee had attached the footnote to the headings of Part Two, on immunity *ratione personae*, and Part Three, on immunity *ratione materiae*, rather than to the title of draft article 7, "Crimes under international law in respect of which immunity *ratione materiae* shall not apply". Draft article 7 would be placed within Part Three.

32. Some members of the Drafting Committee had been opposed to transmitting draft article 7 back to plenary at that time, for a number of reasons. They were firmly of the view that it did not reflect existing law and wanted that to be clearly acknowledged; they considered that the provision should only be forwarded together with procedural safeguards, given the serious risk of abuse; and they did not support the proposal, even as one of new law.

33. The CHAIRPERSON explained that the commentary to draft article 7 would be issued in all six languages during the final week of the Commission's session. The Commission's usual practice in such cases was to consider adopting the text of the draft article provisionally, pending final adoption, together with the commentary, as part of its report to the General Assembly. He took it that the Commission agreed to that course of action.

It was so decided.

34. The CHAIRPERSON asked whether the Commission wished to adopt the report of the Drafting Committee on immunity of State officials from foreign criminal jurisdiction, contained in document A/CN.4/L.893.

Explanations of vote

35. Mr. KOLODKIN said that draft article 7 was a construction based on quasi-legal theoretical premises, neither having a basis in nor reflecting existing international law, nor did it reflect any real, discernible trend in State practice or international jurisprudence. If, as appeared to be the case, the aim was to develop customary international law, it was neither progressive nor desirable development. Nothing prevented the Commission from explaining that, cognizant of the state of *lex lata* in the field, it had nevertheless decided to propose—to those States that were willing to entertain the possibility of prosecuting one another's officials for international crimes—a model draft article to be included in a treaty or treaties that they might wish to conclude. It seemed, however, that the Special Rapporteur and the majority of the Commission aspired to a much more far-reaching outcome. He did not share those ambitions.

36. Of greater concern was the fact that the draft article and the way in which the Commission intended to present it to the General Assembly invited unilateral actions—actions which were contrary to international law, had a very slim potential of contributing to the fight against impunity and the protection of human rights and might be genuinely detrimental to inter-State relations. The real test would be States' reaction to draft article 7, but he firmly disagreed with the proposal to adopt it.

37. Mr. MURPHY said that, like Mr. Kolodkin, he could not join the consensus on the adoption of draft article 7. The essential problem was that the exceptions identified in the draft article were not grounded in existing international law, nor could it be said that there was a trend towards such exceptions. The Commission was proceeding with draft article 7 even though there was only a handful of national laws and cases and no global treaties or other forms of State practice supporting such exceptions. As had become very clear in the Drafting Committee, there were no legal criteria for inclusion in or exclusion from the list of crimes that appeared in the annex to draft article 7. The list was purely an expression of the policy preferences of some members, largely grounded in the Rome Statute of the International Criminal Court, which many States had not ratified, and which said nothing about the immunity of State officials from prosecution in national courts. Nonetheless, the Special Rapporteur and some members of the Commission were unwilling to acknowledge that draft article 7 was a proposal for entirely new law, not codification or progressive development of

international law. As a result, adopting draft article 7 at that stage, especially without having established procedural provisions and safeguards, risked unleashing confusion and abuse in national legal systems.

38. What had happened in the Drafting Committee further demonstrated that draft article 7 was not based on existing law: the Special Rapporteur had claimed that there was existing practice and a trend to support the exceptions related to corruption and territorial crime, but those exceptions had now disappeared from the draft article. On the other hand, she had argued that there was insufficient practice and no trend to support an exception for apartheid, yet such an exception now appeared in the draft article. The fifth report cited no national law or national or international case law supporting an exception to immunity *ratione materiae* in a national criminal proceeding for the crime of apartheid. Nor was there any treaty containing such an exception: the International Convention on the Suppression and Punishment of the Crime of Apartheid was silent on the issue. If no treaties, national laws or national or international case law were needed to provide support for the listing of a crime in the annex to draft article 7, one wondered why other serious crimes that were addressed in treaties, such as slavery and human trafficking, were not included in that list. He encouraged the members of the Commission not to vote to adopt draft article 7, but rather to send it back to the Drafting Committee for further work in 2018 in conjunction with the issue of procedural provisions and safeguards.

39. Sir Michael WOOD said that, having opposed the substance of the draft article in the plenary debate, he had made his position on draft article 7 clear in the Drafting Committee. He was of the firm view that the text did not reflect existing international law or a trend, was not desirable as new law and should not be proposed to States. If it was nevertheless proposed, the Commission must make it clear that it was a proposal for new law, and not codification or progressive development of existing law. The materials cited by the Special Rapporteur in her report simply did not support draft article 7. He was therefore opposed to the plenary provisionally adopting draft article 7. It should be sent back to the Drafting Committee for review in the light of the procedural provisions and safeguards to be proposed in the Special Rapporteur's sixth report in 2018. If, however, the Commission did proceed to provisionally adopt the draft article, there was no consensus to do so and it would be necessary to proceed by way of a vote.

40. Mr. HUANG said that the report by the Chairperson of the Drafting Committee faithfully reflected the fact that it had decided to provisionally adopt draft article 7 in spite of the strong opposition expressed by several members. Such a hasty decision went against the fine tradition of the Commission. He fully agreed with Mr. Kolodkin, Mr. Murphy and Sir Michael Wood, and wished in turn to express his strong opposition to the Drafting Committee's decision regarding draft article 7.

41. The number of members for or against a proposition could not serve as the only basis for decision-making. Currently, it seemed that more members were in favour of draft article 7 than against. However, the views of the minority should also be given due attention, particularly when it came to such an important topic. The reasons for opposing draft article 7 were not merely related to technical matters or wording, but to certain fundamental issues on which some members had different views from the Special Rapporteur. In the light of that substantive division, it would be reckless to proceed on the basis of majority rule; instead, the Commission should do its utmost to seek consensus. If a consensus could not yet be reached, the Commission should temporarily put the issue aside and come back to it later.

42. He recalled that article 8 of the Commission's statute provided that "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". In his opinion, that was a requirement for both the composition of the Commission and its work. The members, of course, served in their individual capacity, not on behalf of their Governments, but their views on specific legal issues could reflect the views of the civilization and legal system they represented. The Commission could not ignore the representative nature of opposing voices. Three of the four members representing the Group of 7 major advanced economies were against it, and the fourth's views were not in line with his Government's. All four members representing Permanent Members of the Security Council were opposed to it, as were at least 6 of the 11 members from the Group of 20, whose population, territory and gross domestic product accounted for 67 per cent, 60 per cent and 90 per cent of the world totals, respectively. It was abundantly clear from that analysis which of the "for" and "against" camps was the most representative.

43. Just the day before, the Commission had heard from the Secretary-General of the Asian–African Legal Consultative Organization, which represented 47 countries, that of the seven Government representatives that had spoken on the issue, none had supported the views expressed in the Special Rapporteur's fifth report. Was the Commission, a subsidiary body of the General Assembly, going to go against the position of so many Member States? Against that backdrop, he would find it difficult to accept the controversial adoption of draft article 7, still less its submission to the Sixth Committee—something which would no doubt provoke vehement criticism.

44. He was also dissatisfied with the methods of work in the Drafting Committee. During the consideration of draft article 7, time pressure had repeatedly been cited as a reason to push forward. However, time pressure should not be used as an excuse for haste; a solid outcome always carried much greater weight than the speed of the work. The more important the topic, the more time was needed for a thorough discussion: focusing on immediate results was counterproductive. An immature draft article that was rushed through adoption would undoubtedly be rejected in international practice. It was precisely for that reason that the Commission had consistently adopted a consensus-based approach to important and controversial topics. It had patiently sought appropriate solutions, sometimes at the expense of efficiency, to ensure that the final outcome was able to stand the test of time and that controversial issues were not simply passed on to the Sixth Committee or the public.

45. Draft article 7 was a critical article and, if not handled properly, risked undermining the draft articles as a whole, to the detriment of inter-State relations. Consequently, many members, himself included, had repeatedly stressed the need for prudence. Regrettably, those warnings had not been heeded. Given the major controversy in the Commission over draft article 7 during the first half of the session, more in-depth deliberations should have been continued in the second half. Now, the major differences of opinion had not disappeared. The Drafting Committee should have reviewed the exceptions set out in draft article 7 individually, but instead had opted to review them as a package. Despite his repeated requests, no basic selection criteria had been given that would ensure that the exceptions were not chosen at the whim of the members.

46. Both the re-elected and newly elected members should refuse to be led by their own subjective preferences and should seek an appropriate balance between the codification and progressive development of international law. The Commission's rigorous scholarship and scientific approach, for which it had won the respect of the international community, should not be abandoned. Regrettably, that rigorous scholarship and scientific approach had not been apparent during the consideration of draft article 7. The provisions were too far removed from the practice of States, and the specific wording did not stand up to scrutiny. Specific crimes, such as genocide, crimes against humanity and war crimes, were cited in certain subparagraphs, while in others, acts, such as torture and enforced disappearances, were mentioned. Torture was obviously a different concept from the crime of torture.

47. Substantive provisions should be considered in conjunction with those on procedures and safeguards, as international law required both procedural and substantive justice. International criminal justice must be achieved, but must follow the proper procedures. Justice without the necessary safeguards was not dependable. Immunity was part of the procedural rules, and its unique value lay in procedural justice. Any mandatory expansion of the exceptions to immunity could easily turn the procedural safeguards of immunity into empty formats, leading to factual injustice.

48. In conclusion, he believed that the conditions were not yet in place for the adoption of draft article 7 and was firmly opposed to its submission to the General Assembly. He agreed with others that draft article 7 should be considered together with the procedural safeguards that would be presented in the sixth report.

49. Mr. RAJPUT (Chairperson of the Drafting Committee), speaking in his personal capacity as a member of the Commission, said that he was unable to support the adoption of draft article 7. His views, which were strictly personal and expressed in the tradition of the complete independence of the members of the Commission, should not be classified into any geographical or political grouping. It was clear from the statements in plenary that there was neither support in State practice nor any trend, since there was an inconsequentially small number of cases from domestic jurisdictions and no examples of domestic legislation or treaties. The Drafting Committee's conclusions had been based simply on preferences and choices rather than legal or policy reasons, as was evident from the fact that serious international crimes such as terrorism, slavery and human trafficking were not mentioned in the list of exceptions. The exercise embarked upon by the Drafting Committee went beyond the mandate and functions of the Commission. He was therefore compelled to disagree with the adoption of draft article 7.

50. Mr. PETRIČ said that the topic was clearly a sensitive and important one. In such cases, the Commission's usual practice was to proceed *festina lente*, or to make haste slowly. There was no urgent need to take a decision on the topic now, as the Commission still had four years left in its current composition, sufficient time to come up with a more consensual proposal to present to States. As a member of the Commission, he spoke in his individual capacity and never on behalf of his Government: he did not wish his views to be assigned to any particular group. The Commission was producing a work of codification with the ambition that it would one day become an international instrument ratified by States. As such, the Commission must bear in mind States' need for extreme clarity on the matters covered in the draft articles, particularly with respect to exceptions. That clarity had not yet been achieved. Particularly for crimes with a political dimension, such as corruption, clarity on exceptions was vital. He proposed that the Special Rapporteur and the Commission members give the list of exceptions further consideration in the intersessional period so as to lay the foundations for a more productive discussion at the next session. Given the very serious objections raised, he did not support the provisional adoption of draft article 7 at that stage.

51. Mr. GÓMEZ ROBLEDO said that the Commission should now proceed to a vote, rather than entering into a second debate, which would be inappropriate at that stage. He had been very surprised by Mr. Huang's characterization of the work of the Commission. According to article 8 of the Commission's statute, "the persons to be elected to the Commission should individually possess the qualifications required" and "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". The Commission should allow itself to be guided by the main legal traditions represented by the members and not the political groups to which their Governments belonged. The General Assembly would obviously review the Commission's work, perhaps with greater interest than in other years, and would send its comments for further work on the topic, which would continue for the rest of the quinquennium.

52. Mr. HUANG, speaking on a point of order, said that his comments appeared to have been misunderstood. He recognized that members served on the Commission in their personal capacity and that the majority of members were in favour of draft article 7.

53. Mr. RUDA SANTOLARIA said that he agreed with Mr. Gómez Robledo that the proper procedural approach had been followed with respect to draft article 7. The text had been discussed in plenary, where many useful comments had been made, and it had then been referred to

the Drafting Committee, where a fruitful discussion had taken place. It was now time to submit the text to States and see what their opinions might be. He was in favour of the adoption of draft article 7.

54. The CHAIRPERSON, speaking as a member of the Commission, said that he was opposed to the adoption of draft article 7. Neither of the two main objections to the text that he had outlined in an earlier statement to the plenary[377] had been adequately addressed. First, the exceptions to immunity *ratione materiae* formulated in the draft article were not based on customary international law, nor had it been established that there was any trend to that effect. There had been no effort in the Drafting Committee to agree that the commentary would clarify the character of draft article 7 as expressing *lex lata* or *lex ferenda*, existing law or new law. Even if it was sometimes difficult to make such distinctions, the Commission needed at least to make an effort to do so. That was particularly important when the outcome of its work was not merely addressed to States, but also to national courts, as in the present case. National courts needed to apply existing law, *lex lata*, and they were often not sufficiently experienced to distinguish existing law from proposals for new law. It was therefore necessary for the Commission to be as clear as possible; otherwise, the draft article risked being misleading.

55. Second, the crucial relationship between any possible exceptions to immunity *ratione materiae* and the procedural safeguards that would ensure that such exceptions were not abused had not been sufficiently recognized. The draft article should only be adopted in conjunction with procedural safeguards. It should therefore have been retained in the Drafting Committee until the Commission's next session.

56. Everyone agreed that the questions addressed in draft article 7 were very important. He had made a constructive proposal to reconcile the requirements deriving from the principle of sovereign equality with the goal of ending impunity for international crimes, thereby trying to bridge the differences between members of the Commission. That proposal had not been explored.

57. For those reasons, he could not agree to the adoption of draft article 7.

58. Mr. OUAZZANI CHAHDI said that, given the sensitive nature of the matter, he proposed that the meeting be suspended to facilitate consultations among the members of the Commission.

The meeting was suspended at 11.35 a.m. and resumed at 11.50 a.m.

59. The CHAIRPERSON, noting that informal consultations had been held during the suspension of the meeting, invited the Commission to carry out a roll-call vote, by alphabetical order, on the adoption of draft article 7 (A/CN.4/L.893).

In favour: Mr. Argüello Gómez, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez.

Against: Mr. Huang, Mr. Kolodkin, Mr. Laraba, Mr. Murphy, Mr. Nolte, Mr. Petrič, Mr. Rajput, Sir Michael Wood.

Abstaining: Mr. Šturma.

Number of members present and voting: 30.

Draft article 7 (A/CN.4/L.893) was adopted by 21 votes to 8, with 1 abstention.

Explanations of vote

60. Mr. TLADI said that although he had voted in favour of draft article 7, he wished to register his extreme displeasure that the Drafting Committee and the Commission had not been able to see their way clear to including the crime of aggression in the list of crimes for which immunity was inapplicable. There was no legal reason whatsoever that other crimes should have been included, yet aggression, a crime that had featured in the work of the Commission since 1950, had been excluded. If the criteria by which crimes had been included concerned their *jus cogens* nature, there was no question that the crime of aggression ought to have been included. In 1966, it had been the sole example given by the Commission of what might constitute a *jus cogens* norm. Furthermore, the International Court of Justice had referred to it countless times as one with *jus cogens* status. If the criterion by which crimes were included was gravity, there was, again, no question that the crime of aggression ought to have been included. Both the General Assembly and the Commission had described aggression as the gravest of all crimes against peace and security throughout the world. He could see no legal or logical reason why the crime of aggression had been singled out for exclusion. The only rationale that he could see—and that was why he had felt duty-bound to make his explanation of vote—was that it was a crime that was most likely to be committed by the powerful. The Commission had just taken the decision that the most powerful ought to be beyond the reach of justice. He regretted that the Commission had decided to perpetuate the double standards and inequity that so many had complained about.

61. Mr. ŠTURMA said that he had abstained during the voting in order to express his dissatisfaction over the regrettable division in the Commission and its work. He was deeply convinced that exceptions to State immunity *ratione materiae* needed to be progressively developed. He hoped that, after longer debate, it would be possible to overcome at least some of the deep divisions within the Commission. He still supported exceptions and hoped that after further debate, draft article 7 could be adopted in a form acceptable to most members of the Commission.

62. Mr. HMOUD said that he had voted in favour of draft article 7 even though, like Mr. Tladi, he would have preferred aggression to be included among the crimes to which immunity did not apply. Although it could be an act of State,

[377] See the 3365th meeting above.

it was a criminal act committed by an individual. In that sense, it was no different from other crimes of international concern committed by individuals when exercising governmental authority such as crimes against humanity or war crimes. He looked forward to seeing next year's report on procedural guarantees, as that might allay the concerns of members who had voted against draft article 7 because of the premise that there was a lack of procedural guarantees associated with the draft article. Its adoption was only provisional: when it came up for consideration on first reading, the Commission would have had a chance to hear the reactions of the international community, including States in the Sixth Committee and other actors.

63. Mr. JALLOH said, with respect to draft article 7, that he had not been convinced by the explanations given by the Special Rapporteur in her fifth report on immunity (A/CN.4/701) as to why she wished to exclude the crime of aggression. The other core crimes enumerated in the Rome Statute of the International Criminal Court, namely genocide, crimes against humanity and war crimes, had been included in the list of exceptions contained in draft article 7, but, arguably the most serious crime known to international law, the crime of aggression, had been excluded. The crime of aggression had been incorporated in the Charter of the International Military Tribunal,[378] under which defendants from 12 States had been found guilty in trials conducted by the International Military Tribunal. The judgment of the International Military Tribunal, dated 30 September 1946, stated that "[t]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[379] In General Assembly resolution 3314 (XXIX) of 14 December 1974, a definition of aggression had been adopted by consensus by Member States of the United Nations. The crime of aggression had been included in article 8 *bis* of the Statute. A sufficient number of States parties had ratified the Amendments on the crime of aggression adopted in Kampala for the Assembly of States Parties in New York in December 2017 to be scheduled to decide whether to activate the crime of aggression for the purposes of prosecutions before the International Criminal Court. About 40 States were also reported to have passed domestic legislation prohibiting the crime of aggression. Several instruments developed by the Commission referred to the crime of aggression, including Principle VI (*a*) of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[380] article 2, paragraph 1, of the 1954 draft code of offences against the peace and security of mankind, article 16 of the 1996 draft code of crimes against the peace and security of mankind and article 20 (*b*) of the 1994 draft statute for an international criminal court.[381] All those examples demonstrated the grave nature of the crime of aggression for States and the rest of the international community.

64. Against that backdrop, he wished to register his deep disappointment over the deep divisions within the Commission. Members were entitled to give their views, but some statements had effectively suggested, inadmissibly, that individual members were working against the interests of the leaders of their own States and that other members should follow the lead set by the members from the major Powers, as measured by political and economic might. Such a political argument, essentially that might made right and that right should become law, was highly regrettable. In many ways, by implicitly downgrading the status of the crime of aggression as "the supreme international crime" and creating a bifurcated system implying that some offences listed in the Rome Statute of the International Criminal Court were more important than others through their sole exclusion from the list of crimes in respect of which immunity *ratione materiae* would not apply, the Commission was reinforcing the argument that in international law, which was supposed to be a system where all were equal, there were double standards. He hoped that, when draft article 7 was considered at the next session, the Commission would take a decision that complemented the fledgling system of international criminal law anchored around the International Criminal Court, rather than undermined it.

65. Mr. MURASE said that he, too, wished to express dissatisfaction over the fact that the crime of aggression had not been included in draft article 7; he endorsed the arguments just given in favour of its inclusion.

66. Mr. CISSÉ said that, although he had voted in favour of the adoption of draft article 7, he wished to indicate his dissatisfaction over the fact that grave crimes such as slavery, corruption, human trafficking, piracy and international terrorism had not been included in the list in paragraph 1, and that not a single legal explanation had been given as to why apartheid and enforced disappearance had been included.

67. Mr. HASSOUNA said that he had voted in favour of the adoption of draft article 7. On procedure, he considered that the Commission had worked correctly by debating the text fully in plenary, referring it to the Drafting Committee for further discussion and bringing it back to plenary, where the majority of members had endorsed the Drafting Committee's report and supported draft article 7. On substance, however, he would have strongly supported the inclusion of the crime of aggression, for the reasons presented by previous speakers.

68. Mr. OUAZZANI CHAHDI said that he had voted in favour of draft article 7 but was disappointed at the politicized climate surrounding the discussion and deplored the fact that the crimes of aggression and corruption had not been included in the list of exceptions to immunity.

69. Mr. PARK said that he had voted in favour of the adoption of draft article 7 but, like other members of the Commission, he believed that the crime of aggression should have been included among the exceptions listed in the text.

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[378] For the Charter of the International Military Tribunal, see the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.

[379] International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 22, Nuremberg, 1949, p. 427.

[380] *Yearbook … 1950*, vol. II, document A/1316, p. 376, para. 109.

[381] The draft statute for an international criminal court adopted by the Commission in 1994 is reproduced in *Yearbook … 1994*, vol. II (Part Two), pp. 26 *et seq*., para. 91.

70. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had voted in favour of the adoption of draft article 7, convinced that it reflected the position of the Commission and that both the Commission and the Drafting Committee had acted entirely within the Commission's mandate, namely to promote the codification and progressive development of international law. She asserted that the Commission's own procedure for dealing with proposals for draft articles had been strictly followed: (*a*) the plenary had debated the report submitted by the Special Rapporteur and had decided by consensus to refer draft article 7 to the Drafting Committee, noting that the latter should take into account all the comments made by members; (*b*) the Drafting Committee had considered the draft article in detail, analysing both the observations made in plenary and the various comments expressed in the Drafting Committee by its members; and (*c*) on the basis of that work, the Drafting Committee had adopted draft article 7 and had decided to send it to the plenary for its approval. Lastly, all the Commission members who had participated in the Drafting Committee, including those who had reserved their position on draft article 7, had done so in an active and constructive manner with a view to finding a formulation that would reflect the consensus of the Commission on the matter. Furthermore, the members who had considered it necessary to do so had reserved their position with a view to expressing it in the plenary.

71. She emphasized that a spirit of collegiality had inspired the whole process and, for that reason, she regretted that, ultimately, some members of the Commission had not been able to join the consensus and had requested a vote, exercising a legitimate right of all Commission members. In any event, that did not detract from either the quality or the validity of the work of the Commission.

72. Lastly, she reiterated her conviction that the Commission should deal thoroughly with procedural issues, including the necessary procedural guarantees and safeguards to prevent politicization and possible abuse in the exercise of criminal jurisdiction. As confirmation of that conviction, she recalled that, at her request, the Commission had already held informal consultations on that subject and that her sixth report would be devoted to procedural questions.

73. Mr. NGUYEN said that he had voted in favour of adopting draft article 7. However, he wished to express his deep regret that the crime of aggression had not been included in the list of exceptions to immunity, even though that crime had more serious and negative consequences for many countries than other crimes, such as the crime of apartheid. As to the legal basis for its inclusion, the crime of aggression had been incorporated into the main international law instruments.

Report on informal consultations on procedural provisions and safeguards

74. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that informal consultations on immunity of State officials from foreign criminal jurisdiction had been held on 18 July 2017 under her chairpersonship. The consultations had been open to all Commission members and had been based on an informal concept paper that she had prepared on procedural provisions and safeguards. The concept paper dealt with three main issues: (*a*) the concept of jurisdiction and its scope, as well as other matters traditionally linked to procedural aspects, such as the moment when immunity should be considered, invocation of immunity and waiver of immunity; (*b*) the procedural safeguards that must be established to ensure the balanced treatment of immunity, in particular from the standpoint of the relationship between the forum State and the State of the official, including questions relating to communication between the forum State and the State of the official, the potential for the exercise of jurisdiction by the State of the official or an international criminal jurisdiction, and mechanisms to facilitate international cooperation and legal assistance; and (*c*) the procedural safeguards that must be established in respect of the official concerned, including fair trial guarantees and rights of the defence.

75. The informal consultations had underlined the importance of procedural provisions and safeguards in the overall scheme of the topic under consideration. She was grateful to all members that had participated in the consultations for their comments and observations, of both a general and a specific nature, which she had noted for the purpose of preparing her sixth report.

76. Lastly, she proposed that a paragraph on the informal consultations be added to the Commission's annual report.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

77. Mr. KOLODKIN thanked the Special Rapporteur on succession of States in respect of State responsibility for his interesting first report (A/CN.4/708) and his attempt to approach the topic in a balanced manner. Only about 10 delegations had taken part in the Sixth Committee's discussions on the topic in 2016, with three of them stating that the Commission's work would help to fill gaps in international law. The question that arose, however, was whether such gaps actually existed.

78. The Special Rapporteur himself, in paragraph 19 of his report, referred to "the question" of whether there were rules of international law governing the transfer of obligations and rights arising from the international responsibility of States for internationally wrongful acts. That would suggest that the Commission's task must be to study State practice and other evidence in order to determine whether such rules existed. However, in the same paragraph, the Special Rapporteur went on to say that his reports would delve into the rules on State succession "as applicable in the area of State responsibility". That would seem to indicate that he was already of the view that such rules existed.

79. That point was further confirmed by the Special Rapporteur's thesis that the outcome of the topic should be either codification or both codification and progressive

development of international law. It was clear that codification was possible only if norms of customary international law existed in the field under consideration. The Commission needed to know from the very start which exercise was to be undertaken. Having read the report, he was still not clear about what the Special Rapporteur was intending to codify. He gave examples of court decisions which he saw as attesting to a trend towards revision of the general rule of non-transfer to successor States of responsibility for internationally wrongful acts. However, there were varying interpretations of those court decisions; many writers were of the view that they did not provide grounds for positing a trend towards non-succession of responsibility.

80. The Special Rapporteur also gave examples of agreements on devolution as proof of movement away from the rule of non-succession of responsibility. However, he provided no background information on such agreements or analysis of the relevant texts. If parties to such agreements concluded them proceeding from the existence of an international law norm which provided for transfer of responsibility upon succession, then such agreements evidenced the existence of such a norm or, at least, of a tendency to its emergence. However, such agreements might be concluded for a wide variety of reasons and not out of a conviction that a subject of law having suffered harm from a predecessor State should receive compensation for such harm, or that the successor State should receive compensation for harm caused by the violation of international law by a predecessor State. Those agreements could be viewed as exceptions to the rule of non-succession.

81. As it seemed to him, therefore, the most plausible candidate for codification would be a rule on non-succession and exceptions to that rule. There was no justification for codifying a rule on transfer of responsibility, since there was no evidence of its existence. Nevertheless, the Special Rapporteur seemed inclined to go in the latter direction, even though it would constitute progressive development of international law or the formulation of new law. He himself had no objection to that, although the question was whether States would be in favour. The Commission must focus on the views of States, since it was a subsidiary organ of the General Assembly, in contrast to the Institute of International Law, which could work out legal positions on the basis of the views prevailing therein at the time. The form to be taken by the outcome of the Commission's work also had a bearing on the question of whether codification of existing law or development of new law was involved. He was not against the formulation of draft articles. However, the fact that the Commission's previous work on the succession of States had taken that form was not sufficient justification for such an exercise now: the door should be left open to other possible end results.

82. He was not convinced that liability for acts not prohibited under international law should be excluded from the scope of the topic. The approach might be to begin with work on succession in respect of responsibility for internationally wrongful acts, and then to take up liability for acts not prohibited by international law. He agreed with other members of the Commission that the scope should be limited to cases of succession that took place in accordance with international law. He questioned whether the scope should include continuity of States. Cases in which the responsibility of a predecessor State that continued to exist was entailed, but in which the successor State was not involved, did not fall within the purview of the topic: they were not cases of State succession. That aspect of the scope of the topic should be mentioned in draft article 1, or else in the commentary thereto. As Mr. Park had noted, it was also necessary to decide whether countermeasures should be covered.

83. The Special Rapporteur, following the lead of the Rapporteur of the Institute of International Law, proposed speaking, not of the transfer of responsibility, but of the transfer of rights and obligations. He himself questioned whether there was an objective foundation for such a change. It seemed to be a fairly artificial construct, perhaps to evade the hypothesis of a close link between responsibility and the legal personality of the State. If the Special Rapporteur truly adhered to such a distinction, there should be a stronger basis for it in the commentary. Further elucidation was needed in other areas as well: for example, the Special Rapporteur referred to the importance of distinguishing between negotiated and contested (revolutionary) secession, but gave no indication of why that was important and what was the distinction.

84. Concerning the draft articles themselves, he noted the proposal in paragraph 26 of the report that the first focus of work on the future text be general provisions on State succession, stressing in particular the priority of agreement. Draft articles 3 and 4, on the relevance of agreements to succession of States in respect of responsibility and on unilateral declarations by a successor State, respectively, should accordingly be taken up at a later stage of the work, after a fuller analysis of such agreements and of unilateral acts relating to various scenarios of succession had been carried out.

85. With those comments, he had no objection to the referral of the draft articles to the Drafting Committee, on the understanding that they would remain there pending further elaboration on the basis of further work by the Commission on the topic.

86. Mr. VÁZQUEZ-BERMÚDEZ said that he welcomed the Special Rapporteur's decision to limit the scope of the topic to the transfer of rights and obligations arising from internationally wrongful acts; as he pointed out in paragraph 23 of his report, that did not preclude the possibility of addressing at a later stage certain issues such as how the rules on succession with respect to State responsibility applied to injured international organizations or injured individuals. In considering the topic, the Commission should rely on its previous work, such as its articles on the responsibility of States for internationally wrongful acts;[382] the relevant provisions of the 1978 Vienna Convention and the 1983 Vienna Convention; the practice of States and international and domestic case law; and the literature, in particular, the report of the

[382] The draft articles adopted by the Commission 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.

International Law Association on its seventy-third conference[383] and the resolution on State succession in matters of State responsibility,[384] adopted by the Institute of International Law in 2015.

87. Regarding draft articles 3 and 4, it would be advisable not to address the relevance of devolution agreements, claims agreements, other agreements and unilateral declarations and other acts, without first clarifying the general rules relative to succession and responsibility. That was especially important in the light of the Special Rapporteur's suggestion that the traditional, absolute principle of non-succession of rights and obligations in the case of succession of States was being replaced by other rules arising out of recent practice. However, that principle was central to the entire set of draft articles; a more robust analysis of the relevant material and more research on State practice and case law were thus warranted. In particular, the factors to be considered in relation to responsibility in different situations of succession should be clarified. As pointed out in the arbitral tribunal decision in the *Lighthouses case between France and Greece*, a multitude of concrete factors affected whether the principle of succession could be deemed a general rule.

88. The Special Rapporteur was taking what he called a realistic approach that warranted making a distinction between cases of dissolution and unification, where the original State disappeared, and cases of secession, where the predecessor State remained; he also distinguished between negotiated secession and contested or revolutionary secession. However, the relevance of other factors and support of their existence in practice, case law and the literature should also be studied so as to facilitate a deeper analysis of the factors applicable to questions of responsibility in various situations. In particular, the reasons for the transfer of rights and obligations needed to be clarified in order to work out a general rule. He was in favour of referring draft articles 1 and 2 to the Drafting Committee and, although he was not opposed to the referral of draft articles 3 and 4, he thought it might be preferable to postpone it in order to take into account the Special Rapporteur's second report on the topic.

The meeting rose at 1.05 p.m.

3379th MEETING

Friday, 21 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

1. Mr. RUDA SANTOLARIA said that he wished to commend the Special Rapporteur for his clear and coherent report (A/CN.4/708), which contained many useful references. In the future, however, it would be useful if, in deciding whether to transfer a topic from the long-term programme of work to the current one, the Commission held a more open exchange of views about the advantages and disadvantages of doing so. While he appreciated the work done by the Special Rapporteur in such a short period of time, it might have been more appropriate for the latter to have taken a more preliminary approach to the topic, focusing on the issue of whether a general rule existed on the succession of States in respect of State responsibility for internationally wrongful acts or whether any trend along those lines could be identified, rather than to have formulated draft articles, even on a provisional basis.

2. In general, he agreed that the Commission's consideration of the topic could be of interest to States and would complement the Commission's earlier work on the succession of States. However, he wished to make a few observations based on the Special Rapporteur's indication, in paragraphs 31 and 84 of his report, that the relationship between the succession of States and international responsibility remained largely neglected in international legal scholarship and that situations of succession of States were relatively infrequent and that cases involving State responsibility were even more so; that the transfer of rights or obligations arising from State responsibility was at issue only in certain cases of succession of States; and that the situation might differ in cases of negotiated succession and contested succession.

3. In view of those circumstances, and considering the small number of ratifications of the 1978 Vienna Convention and the 1983 Vienna Convention, it did not make sense to insist yet again that the outcome of the Commission's work should be a set of draft articles, given the high probability that history would repeat itself. In his view, the outcome should take the form of a set of guidelines to which States could refer in cases of State succession in respect of State responsibility for internationally wrongful acts.

4. He agreed with the Special Rapporteur that the previous consideration of the issue by private institutions, including the International Law Association and the Institute of International Law, could be useful and informative, but that it did not condition, limit or prejudge the manner in which the Commission would deal with the

[383] International Law Association, *Report of the Seventy-third Conference held in Rio de Janeiro, Brazil, 17–21 August 2008*, London, 2008.

[384] Resolution on State succession in matters of State responsibility, Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 711–719; available from: www.idi-iil.org, *Resolutions*.

subject. At the same time, he was in favour of limiting the scope of the topic to the succession of States in respect of State responsibility for internationally wrongful acts, and excluding from it international liability for injurious consequences arising out of acts not prohibited by international law, as well as matters of succession in respect of the responsibility of international organizations. He supported Mr. Grossman Guiloff's proposal to change the title in order to reflect that understanding.

5. He shared the view that it was necessary to study a greater number of cases in order to confirm or deny the existence of a general rule, identify a trend or establish differences between various types of State succession in respect of State responsibility for internationally wrongful acts. Accordingly, he subscribed to the comments made by several other Commission members about the need to consider the practice of States on continents other than Europe. That would be important for the purposes of the realistic approach advocated by the Special Rapporteur, which, as noted in paragraph 64 of the report, warranted a distinction between cases of dissolution and unification, where the original State disappeared, and cases of secession, where the predecessor State remained, and should also take into account the fact that negotiated secession created better conditions for agreement on all aspects of succession, including those aspects related to potential international responsibility for internationally wrongful acts. The need to review more examples of practice was further confirmed by the Special Rapporteur's statement, in paragraph 83 of the report, that the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needed to be proved on a case-by-case basis.

6. He agreed with the Special Rapporteur's use of the relevant terms and definitions contained in the 1978 Vienna Convention and the 1983 Vienna Convention and in the draft articles on nationality of natural persons in relation to the succession of States.[385] Like Mr. Murphy, he was in favour of replicating those instruments' definitions of "succession of States", "predecessor State", "successor State" and "date of succession of States". He also supported Mr. Hmoud's proposal to add the term "continuator State".[386] He agreed with the Special Rapporteur that the adoption of certain terms did not imply that all or most rules of these two Conventions were applicable to the topic under consideration.

7. The various types of agreements on State succession between the States concerned, to which the Special Rapporteur referred in the report, were highly relevant for the Commission's consideration of the topic. However, he shared Mr. Hmoud's view that, in attempting to reach a conclusion in that regard, the Commission should refer in general to the priority of such agreements and to the need to interpret and apply them in accordance with the relevant rules of international law. Similarly, he agreed with the Special Rapporteur on the relevance of unilateral acts of successor States, whose effects were governed by the applicable rules of international law. He was in favour of referring the Special Rapporteur's proposals to the Drafting Committee.

8. Mr. PETER said that there were several reasons why the succession of States in respect of State responsibility was an important topic for the Commission to consider. The first was that its development would serve to complete the series of outputs that the Commission had produced previously on other aspects of State succession, which was a core area of public international law. He agreed with the Special Rapporteur that this was a normal and largely successful approach that the Commission had taken in the past. Unlike the other aspects of State succession with which the Commission had dealt, the succession of States in respect of State responsibility had direct implications for persons, both natural and juridical, and consequently also had practical value.

9. He supported the views expressed by Mr. Nguyen at the Commission's 3375th meeting, to the effect that, in discussing State practice, the Special Rapporteur paid significantly more attention to European countries than to those in other regions, such as Asia and Latin America.[387] That had resulted in the marginalization of developing countries; Africa, in particular, was virtually ignored, given that the word "Africa" appeared only once in the entire report, even though the African continent had been a major victim of colonialism and had witnessed many succession processes.

10. In paragraph 96 of his report, the Special Rapporteur indicated that the devolution agreements concluded between the United Kingdom and its former dominions and territories were examples of treaties between a predecessor State and a successor State under the *pacta tertiis nec nocent nec prosunt* rule, meaning that they were binding on the parties only and did not create obligations for third States. Those agreements emphasized two main elements: the inclusion of a bill of rights in the constitution of the new State and the full adoption of the inheritance principle, as opposed to the clean slate principle, in State succession in order to ensure continuity. A few brave countries, however, had rejected continuity. Tanganyika, for instance, had opted for the formula which had come to be known as the Nyerere doctrine of State succession. That doctrine had been followed by other African States such as Botswana, Burundi, Kenya, Lesotho, Malawi, Swaziland and Uganda. Over time, it had been the subject of discussions and academic writings, but the Special Rapporteur did not refer to it even in passing in his first report.

11. Apart from ignoring the developing States generally and Africa in particular, the Special Rapporteur did not refer to actual cases relating to succession in respect of international responsibility in Africa, including well-publicized cases involving Algeria, Egypt, Ghana, Madagascar, Namibia and South Africa. In the report, only Egypt was given a certain amount of coverage in relation to its union with Syria to create the United Arab Republic. Namibia was referred to in passing in paragraph 117, where article 140 of its Constitution was cited as an example of legislation that could be interpreted as

[385] The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

[386] See the 3376th meeting above, p. 242, para. 22.

[387] See the 3375th meeting above, p. 237, para. 20.

acknowledging the conduct of the organs of the predecessor State. However, the context in which the Constitution of Namibia had been formulated and the role that the United Nations had played in its independence were not explained in the report.

12. To do justice to the African continent, at least two cases, involving Algeria and Ghana, ought to have been included in the report. In short, Africa had contributed considerably to the development of the theory and practice of State succession and should have been given fair treatment in the report. He hoped that the Special Rapporteur would rectify that oversight in future reports by demonstrating a global outlook that extended beyond Europe.

13. Another area in which Africa offered examples that could enrich the Special Rapporteur's research on the topic was the unification of States. The Special Rapporteur referred to the example of the United Arab Republic, but there were other examples that had legal and political implications relating to issues of State succession: the union between the Republic of Tanganyika and the People's Republic of Zanzibar in 1964 to form the United Republic of Tanzania, which was the only such union still in existence in Africa, and the union between the Gambia and Senegal in 1982 to form the Senegambia Confederation.

14. Turning to the draft articles, he noted that draft articles 1 and 2 were patterned after articles 1 and 2 of both the 1978 Vienna Convention and the 1983 Vienna Convention. If the Commission's aim was to develop articles for a third convention on the theme of State succession, then the Special Rapporteur had been right to adopt that approach. It made sense to support the two draft articles as they currently stood, given that innovation at the current juncture was unnecessary.

15. Draft articles 3 and 4, on the other hand, were independent provisions that had to be weighed on their own merits. The research and analysis on which they were based was extremely weak and insufficient. Neither draft article possessed the required depth, and the examples selected to support them were from only a few chosen parts of the world. In order to do justice to the topic, the Special Rapporteur should start over and address some of the issues that Commission members had raised.

16. He was concerned that the Special Rapporteur's proposed future programme of work might be misleading and problematic, in particular with regard to the indication that his third report—to be introduced at the seventy-first session of the Commission—would focus on the transfer of the rights or claims of an injured predecessor State to its successor State. In his own view, the Special Rapporteur should address the procedure for the determination of such claims before even contemplating their transfer. Failing that, the process amounted to a purely technical exercise not based on adequate reflection. More importantly, the Special Rapporteur's proposal focused only on cases involving an injured predecessor State, not cases involving an injured successor State. The interests of predecessor and successor States should be addressed equally in the third report, or the successor State should be given equal weight and attention in a separate report, if that was considered necessary.

17. Historically, predecessor States had generally succeeded in avoiding responsibility. In some cases, they were still in denial more than 100 years after the succession of States, even when they had committed serious crimes, some of which could be considered core crimes. In cases where predecessor States had committed atrocities during the colonial era, they sometimes attempted to distinguish their responsibility from that of the colonial regimes that they had established and backed, and from whose actions they had benefited for years. In order to produce a balanced report, the Special Rapporteur should therefore address the question of the responsibility of predecessor States.

18. The topic of succession of States in respect of State responsibility touched on the rights of individuals and their companies, corporations or other institutions that could be affected by the process of State succession. Responsibility had to lie with either the predecessor or the successor State, and the assignment of responsibility was determined not by logic or common sense, but by the politics of international law-making. The Special Rapporteur was therefore brave to take up the topic, and should strive for balance in his research, analysis and presentation. The sources used in the preparation of his reports should be included in a bibliography, in keeping with the Commission's practice.

19. He was in favour of referring draft articles 1 and 2 to the Drafting Committee. However, draft articles 3 and 4 required additional work in order to strike a better balance among the sources of case law and practice on which they were based, and were thus not ready to be referred to the Drafting Committee.

20. Mr. RAJPUT said that he had some reservations about the inclusion of the topic in the programme of work, both because it might have been wiser to apply the Commission's limited resources to address some more pressing issues with a wider impact on the international community as a whole and because it was doubtful whether the general principles proposed in the report really did exist in the field of succession of States in respect of State responsibility. Furthermore, he questioned whether any value could be added by conjuring up practice when, in reality, the matter had been resolved in the past through simple consensual arrangements between the entities concerned. In fact, after reading the report, he concluded that non-succession was the rule.

21. The report could have been more clearly structured. The draft articles which followed each explanatory section did not seem to be an outcome of the discussion in that section. For instance, draft article 2 (Use of terms) had nothing to do with chapter II, sections A and B; it was only chapter II, section C, that really provided the background for that draft article. In reality, the discussion in chapter II, sections A and B, was more closely related to section D of that chapter, which provided the background for draft article 3. Unilateral declarations could have formed the subject of a separate section. A more organized structure would have made the report easier to read.

22. While it would be wise to be consistent with the 1978 Vienna Convention and the 1983 Vienna Convention on

matters relating to the succession of States, that quest for harmony should not be taken too far and the provisions drawn from those instruments should be adapted to the context and demands of the topic under consideration. For example, it should be made clear that draft article 1 dealt with rights as well as obligations, since the draft articles covered both State succession and State responsibility. Draft article 1 could nonetheless be referred to the Drafting Committee.

23. He had no objection to draft article 2 (*b*) and (*d*), but he had difficulty with (*a*) and (*e*). Paragraph (*a*) repeated, word for word, article 2, paragraph 1 (*b*), of the 1978 Vienna Convention, where territoriality was the sole test for succession. However, territoriality was not the only test for succession in that Convention, because article 6 added the test of legality. As the Commission did not know whether the Special Rapporteur planned to have a separate legality test in the draft articles, or whether he proposed to include it in paragraph (*a*), it was premature to refer draft article 2 (*a*) to the Drafting Committee. It should be revisited once the situations it was intended to cover had been clarified. If, however, the Commission did decide to send it to the Drafting Committee, the Special Rapporteur should explain whether he intended to encompass all or most of the situations covered by the 1978 Vienna Convention. Regarding paragraph (*e*), the mere fact that "international responsibility" had not been defined in the past did not mean that there was any need to embark on such a complex and controversial exercise in the context of the draft articles under consideration; hence it was not necessary to define "international responsibility".

24. He said that he took issue with the three conclusions drawn in paragraph 83 of the report, namely that the rule of non-succession was questioned in modern State practice; that this did not mean, conversely, that there was always an automatic succession of responsibility; and that responsibility in specific kinds of succession was transferred on a case-by-case basis. His own understanding of State practice and literature was that non-succession to responsibility was still the rule, unless the entities concerned agreed to other arrangements.

25. In order to establish that non-succession was no longer a rule, the Special Rapporteur had relied on State practice, the literature and judicial decisions, including the 1956 decision in the *Lighthouses case between France and Greece*, whereas several earlier speakers had put forward compelling arguments to show that those decisions did not suggest that there had been any change in the non-succession rule. In paragraph 39 of his report, the Special Rapporteur contended, on the basis of a passage in the Restatement (Third) of the Foreign Relations Law of the United States,[388] that the position had changed. The contents of the Restatement were not based on State practice. The conclusions in the Restatement were based on an entry in an encyclopedia and related to shareholder rights under domestic law. The conclusions on which the Special Rapporteur rested his thesis concerned shareholder rights in domestic law, did little to prove that the rule of non-succession had changed and were scarcely a reason to upset the settled case law of international courts and tribunals.

26. He disagreed with the Special Rapporteur's interpretation of paragraph (3) of the commentary to article 11 of the articles on the responsibility of States for internationally wrongful acts.[389] The sentence quoted at the end of paragraph 123 of the report suggested that two things were necessary in order to infer responsibility. First, the wrongful act should be continuous, meaning that it should start before the date of succession and continue during and beyond it. Second, the succeeding State should endorse and continue the situation. That was not a situation of succession in respect of responsibility *per se*, but one where the succeeding State bore responsibility because it had participated in the commission of the wrongful act. Furthermore, the requirement of endorsement showed that responsibility also had a consensual basis.

27. Chapter II, section B, of the report discussed several instances of State practice which, however, demonstrated that the rule was that of non-succession in the absence of agreement to the contrary. In the case of the United Arab Republic, State responsibility had been assumed only in relation to some private British and French corporations' claims arising from the nationalization of the Suez Canal. It was not an example of circumstances where succession in respect of responsibility had been accepted for all acts of the predecessor State, but one where succession in respect of responsibility had been the outcome of an arrangement between the entities concerned; thus, no general conclusion could be drawn from it. In the case of Panama, the claims of succession had related solely to a fire in the city of Colón and had been limited to nationals of the United States; the case had not concerned general responsibility or the nationals of other States. The situations involving the cession of the Tarapacá region by Peru to Chile, the reunification of Germany and the disintegration of the Socialist Federal Republic of Yugoslavia had not been very different. In fact, the opinions of the Badinter Commission which were cited in the report did not appear to support the position that there were general rules of international law that regulated succession in respect of State responsibility. That Commission had expressed the view that some principles of international law were related to State succession, but none of the situations with which it had dealt had involved succession in respect of responsibility. It had been silent on the existence of rules of international law in relation to succession to State responsibility and had commented only on succession to property, archives and debts, which were matters covered by the 1983 Vienna Convention. In its Opinion No. 13, it had not apportioned responsibility for war damage and had made it clear that this was something that should be decided by mutual agreement between the parties, expressing the view that the rules applicable to State succession and the rules of State responsibility fell within two distinct areas of international law.[390]

[388] American Law Institute, *Restatement of the Law Third: the Foreign Relations Law of the United States*, vol. 1, St. Paul, American Law Institute Publishers, 1987.

[389] The draft articles adopted by the Commission 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.

[390] See *Opinion No. 13 of the Badinter Commission of 16 July 1993*, ILM, vol. 32, No. 6 (November 1993), p. 1591.

28. The fundamental point to remember with reference to the Indian Independence (Rights, Property and Liabilities) Order, 1947, which was mentioned in paragraph 46 of the report, was that it had been passed by the British Parliament, not by India. It did not relate to succession in respect of responsibility, but to the granting of independence to the Dominions of India and Pakistan. Neither the Order nor the Indian Independence Act, 1947, had been passed with any involvement of Indians. As a matter of fact, the Act had been repealed when the Constitution of India had entered into force on 26 January 1950.

29. The decisions of Indian courts, which were not cited directly in the report but were indirectly referred to through the mention of scholarly works in the second and third footnotes to paragraph 46, had concerned former princely States, which were actually provinces and not States in international law. Reliance on those cases was therefore misguided, as none of them had related to succession in respect of State responsibility. Since they had pertained to the responsibility of State entities for municipal torts and breaches of domestic law, relying on those cases would surreptitiously introduce municipal torts into the draft articles, which was probably not what the Special Rapporteur intended.

30. In his own opinion, the existing rule of international law was non-succession to responsibility, which meant that the Commission had entered the domain of policy choices, with the risk that the choices made might be unacceptable to States. Despite his substantial reservations about the contents of the report, he did not have any serious objections to draft article 3 as such, if the intention was to propose guidelines or model principles. However, he agreed with Mr. Murphy that this draft article should not be referred to the Drafting Committee until the Commission had seen the draft articles which the Special Rapporteur intended to propose on specific instances of succession. He also concurred with Mr. Murphy that draft article 4 should not be sent to the Drafting Committee at the current stage.

31. Mr. HUANG said that, first, the way in which the Commission selected topics for inclusion on its agenda merited review. In recent years, the Commission had relied too much on the personal interests or professional background and expertise of its members. It was easily swayed by some non-governmental academic groups, primarily the International Law Association and the Institute of International Law, while it neglected the practical needs of the international community. It paid insufficient attention to whether there was enough State practice in a given area to support either codification as customary international law or progressive development, whether the possible outcome of its work had any practical value as a guide, or whether that outcome could form the basis of a convention or a legally binding instrument. As a result, its studies were too much akin to purely academic research and, as such, had been criticized by States Members of the United Nations.

32. Although the almost unprecedented speed with which draft articles had been produced after the topic had been chosen and the Special Rapporteur had been appointed was, of course, due to the latter's diligence and efficiency, there was a danger that the Commission, in its haste, might have overlooked some important issues. Some thought should therefore be given to the questions raised by Mr. Reinisch at the Commission's 3374th meeting. As many members of the Commission, especially those who were newly elected, were insufficiently acquainted with its previous work on the subject of succession, and as many delegations in the Sixth Committee in 2016 had expressed opposition to the topic's inclusion in the long-term programme of work, or had considered that it was of no practical significance, the Commission should reflect on whether it might be premature to start work on the subject.

33. Second, the scope of the topic must be strictly defined and a clear distinction must be drawn between succession of States and succession of Governments, which were two quite different legal concepts that should not be confused. At the Commission's 3374th meeting, Mr. Murase had referred to the *Kokaryo (Guanghualiao) Dormitory* case, which was a typical example of the succession of Governments. It would be advisable for the Special Rapporteur to focus solely on the succession of States in respect of State responsibility and not to expand his study to encompass the succession of Governments.

34. Third, the "one country, two systems" arrangements in Hong Kong and Macao did not involve succession of States. The same was true of the return of Hong Kong from Britain to China and the return of Macao from Portugal to China. There had been many cases in the past where part of a State's territory had been occupied by or ceded to another State. Some cases had been settled, others had not, but none should form the subject of research under the topic. He asked the Special Rapporteur to confirm his acceptance of that position.

35. Fourth, the general rules governing the succession of States in respect of State responsibility must be established on the basis of a broader approach to State practice. Draft articles 3 and 4 were related to the effect of agreements or unilateral acts on the succession of States in respect of State responsibility. He agreed with Mr. Murase and Mr. Murphy that those two draft articles were of limited practical significance in the absence of clear general rules on the matter and that they applied only in certain special circumstances. Unless general rules were determined first, the special rules would have no foundation or point of reference. The codification and development of international law had to go beyond factual statements and draw conclusions, or even make judgments, in order to give clear guidance to States on specific issues.

36. The Special Rapporteur's first report set out two positions: the conventional view that the responsibility of one State could not be transferred to another, and the new, diametrically opposite view. The top priority when embarking on the topic was therefore to determine which of those two views reflected general rules of international law by examining the wealth of State practice in the area of State succession; examples included the break-up of the Union of Soviet Socialist Republics, the Socialist Federal Republic of Yugoslavia and the Czech and Slovak Federative Republic in the 1990s and the independence processes of countries in Africa, Asia and Latin America.

The first report was not comprehensive, because the cases cited came mainly from Europe. He hoped that the Special Rapporteur would extend his study of the relevant State practice to other regions, legal systems and civilizations, because the general rules of international law on the topic had to be established on the basis of global practices.

37. In the light of the lack of agreement on the need to consider the topic, or of any clear and general rules on the succession of States in respect of State responsibility, he would prefer not to refer the four draft articles to the Drafting Committee at that juncture.

38. Mr. MURASE said that, although he was not suggesting that the succession of Governments should be included in the topic, he thought that some reference should be made to such situations. The *Kokaryo (Guanghualiao) Dormitory* case referred to by Mr. Huang concerned the property rights, not the responsibility, of a predecessor Government. It might be argued, however, that if property rights were understood to be transferred to a successor Government, the same was true of responsibility. The situation resembled that of State succession. In the case in question, the Japanese Supreme Court had referred the matter back to the Kyoto District Court, which was still waiting to receive the views of the Government of the People's Republic of China.

39. He recalled that the members of the Commission served in their individual capacity as experts. They should work with complete independence from any Government, especially their own. For example, he was a member of the Japanese Prime Minister's panel on security issues, yet he still retained the capacity to be critical of his own Government when necessary; that should be the practice among all Commission members. He appreciated the fact that his Government respected his independence as a member of the Commission, and he hoped that the other Commission members enjoyed similar independence in relation to their Governments.

40. Mr. CISSÉ said that, while the Special Rapporteur's first report on succession of States in respect of State responsibility drew on a wealth of different sources of law, its analysis was largely confined to a particular geographical area, namely Europe, and gave virtually no consideration to other parts of the world, such as Africa.

41. The report indicated that the scope of the topic would be determined by its title, "Succession of States in respect of State responsibility", but the Special Rapporteur's further elaborations in that regard, especially in paragraph 20 of the report, indicated that the topic would concern, more specifically, the responsibility of States for internationally wrongful acts. His own view was that, in the context of State succession, those two aspects of the topic were not mutually exclusive. On the contrary, they were closely related, as both types of responsibility could entail international obligations arising from State succession. The Special Rapporteur should focus on identifying and analysing those obligations and defining the conditions in which they were enforceable.

42. The aim of the Commission's work on the topic thus was not to determine the international responsibility of States in the context of State succession, but to determine the international obligations of the predecessor State that could arise from a succession of States. Unlike some of the other Commission members, he advocated the in-depth consideration of international responsibility as part of the topic, because State succession covered more than just the responsibility of States for internationally wrongful acts. At the Commission's 3378th meeting, Mr. Kolodkin had put forward pertinent arguments in favour of considering both types of responsibility: international liability for acts not prohibited by international law and international responsibility for internationally wrongful acts.

43. International responsibility did not necessarily arise from an internationally wrongful act. In the African context of colonization, decolonization and independence, the issue of State succession had generally arisen in terms of succession to colonial borders. When the African States had gained independence in the 1960s, they had faced the question of whether to inherit the artificial borders that colonialism had left in its wake or to wipe the slate clean and rethink those borders. In his view, wisdom and pragmatism had won out over emotion, as the principle of State succession to colonial borders and of the inviolability of borders had been largely accepted and applied by the African States thanks to the Cairo Declaration adopted by the Organization of African Unity, the predecessor to the African Union.[391]

44. More than 50 years after the African States had become independent, another issue had arisen in relation to the succession of States: that of succession to archives concerning the colonial borders. In 2013, France had officially handed over to the African Union copies of French archives concerning the African borders established during the colonial period. Those archives, dating from 1845 to 1956, related to 45 border treaties involving 20 countries in West, North and East Africa. With that unprecedented act, France, as a predecessor State, had freely fulfilled an international obligation towards the African successor States. That example bore out the hypothesis that international responsibility did not necessarily involve responsibility for internationally wrongful acts. Rather, the predecessor State's unilateral and voluntary decision to hand over long-held colonial archives seemed to show that the case was one of international liability for an act not prohibited by international law. In that case, the succession of States had given rise to the performance of an international obligation that was not the consequence of an internationally wrongful act, namely the transfer of colonial archives from a predecessor State to the successor States.

45. The succession of States in respect of State archives was an aspect of the topic that merited the Commission's close attention. The Special Rapporteur should explore that issue and should broaden the scope of his research to include other parts of the world, in particular Africa. Questions concerning State archives had arisen in the Sudan, in places where unmarked colonial borders were a potential source of conflict and in relation to African maritime boundaries, some 70 per cent of which had yet to be determined. The handover of colonial archives would

[391] See, in particular, resolution AHG/Res.16 (I) adopted on 21 July 1964 by the First Ordinary Session of the Assembly of Heads of State and Government held in Cairo from 17 to 21 July 1964.

shed light on such border issues, which were of great political and social sensitivity. The omission of that aspect of the topic from the Special Rapporteur's report seemed unjustified, as archives could help to establish historical facts and, more specifically, could provide evidence of internationally wrongful acts for which successor States might seek compensation or other reparation.

46. In conclusion, he recommended that all the draft articles should be referred to the Drafting Committee.

Cooperation with other bodies (*continued*)*

[Agenda item 11]

Statement by the representative of the Inter-American Juridical Committee

47. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the Inter-American Juridical Committee (IAJC), as one of the principal organs of the OAS, served as an advisory body to the OAS on juridical matters, promoted the progressive development and the codification of international law, studied juridical problems related to integration and sought to harmonize the legislation of the different member States, bearing in mind their various legal systems and traditions.

48. The IAJC had held two regular sessions in 2016, at which it had adopted two reports concerning, respectively, principles and guidelines on public defence in the Americas and electronic warehouse receipts for agricultural products. The reports had been prepared and adopted in response to mandates from the OAS General Assembly.

49. The principles and guidelines on public defence established that access to justice was a fundamental human right that was not limited to ensuring admission to a court, but applied to the entire process. They also referred to the role of public defenders in preventing and reporting torture and in assisting victims of torture. It was emphasized that public defenders must be independent and enjoy functional, financial and budgetary autonomy and that public defender services should encompass legal assistance in all jurisdictions, not just criminal jurisdiction. Lastly, the principles provided that States had an obligation to remove obstacles that might impair or limit access to public defender services and that cost-free State-provided legal counsel services should be offered to all persons.

50. The IAJC had also adopted a set of principles for electronic warehouse receipts for agricultural products, as a means of addressing the lack of access to credit among many agricultural producers in the Americas. Warehouse receipt systems enabled producers to delay the sale of their products until after the harvest, when prices were generally more favourable, and also to gain access to credit by borrowing against the products in storage. Given the importance of agriculture as an engine of economic growth and development in the region, he hoped that the OAS General Assembly and Permanent Council would adopt those principles.

51. Also in 2016, the IAJC had adopted a resolution on international protection of consumers. By that resolution, the Committee recognized the challenges that individual consumers faced in their cross-border dealings, and accordingly expressed the intention to focus its efforts on mechanisms for online settlement of disputes arising from cross-border consumer transactions.

52. At its ninetieth regular session, held in March 2017, the IAJC had concluded its consideration of the immunity of States and had begun to consider new reports on the immunity of international organizations, the law applicable to international contracts, representative democracy and mechanisms for enhancing the implementation of the Inter-American Democratic Charter, application of the principle of conventionality, and online arbitration arising from cross-border consumer transactions. In exercise of its authority to undertake studies at its own initiative, the IAJC had introduced two new agenda items: one on non-binding international agreements and one on the validity of foreign judicial decisions.

53. At its eighty-ninth regular session, held in October 2016, the IAJC had included in its agenda the two new mandates adopted by the OAS General Assembly: "Conscious and effective regulation of business in the area of human rights" and "Protection of cultural heritage assets". Concerning the first of those items, the IAJC had prepared a compilation of good practices, legislation and jurisprudence, together with options for moving forward with such regulation, including the proposed guidelines concerning corporate social responsibility in the area of human rights and environment in the Americas that the IAJC had adopted in 2014. The IAJC report on the protection of cultural heritage assets included an analysis of regional and universal legal instruments on that topic, proposals for further developing national implementing legislation and recommendations on inter-State cooperation mechanisms for facilitating regional implementation of those instruments, in particular the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador). It also put forward a suggestion that a user's guide be developed for the implementation of both treaties and soft-law instruments, including strategies for the recovery and restitution of cultural heritage assets, which were part of the region's identity.

54. At its forty-seventh regular session, held in June 2017, the OAS General Assembly had adopted a resolution[392] on a model law on the simplified stock corporation, which provided for a hybrid form of corporate organization that made the incorporation of small businesses and microenterprises less costly and cumbersome, building on the experience of Colombia in that area. The adoption of such laws by States could help to promote economic and social development. While the resolution did not impose substantive obligations on States, it clearly called upon them to "adopt, in accordance with their domestic laws and regulatory framework, those

* Resumed from the 3377th meeting.

[392] OAS resolution AG/RES.2906 (XLVII-O/17) of 20 June 2017.

aspects of the model law … that are in their interest". The OAS General Assembly had also agreed to follow up on States' implementation of the recent mandates on cultural heritage assets, conscious and effective regulation of business in the area of human rights, and electronic warehouse receipts for agricultural products.

55. As the views of the OAS policy organs were of paramount importance for the work of the IAJC, feedback and dialogue were essential. The IAJC workplan was based on the input it received from member States, *inter alia*, by means of a questionnaire. That feedback had been vital to its effort to develop new items for inclusion in its agenda. In 2016, it had met with the OAS Secretary General to discuss topics of interest in the field of international law. The Secretary General had expressed particular interest in the Inter-American Democratic Charter, especially its article 20 and the concept of "government"; regulations concerning political parties; protection of children from sexual harassment and sexual violence; and cybersecurity issues, with a view to penalizing Internet fraud, especially at the transnational level. Further feedback had been provided to the IAJC during meetings with legal advisers to the OAS member States.

56. The IAJC had also sought to provide its members with opportunities to discuss matters of private international law and to meet with experts from the region. Valuable feedback had been received from various associations dealing with private international law, in particular the American Association of Private International Law.

57. In October 2016 the IAJC had conducted its forty-third annual international law course, which had been attended by 35 participants, 15 of whom had been awarded OAS scholarships. The distinguished legal experts who had served as lecturers included former IAJC Chairperson Fabián Novak Talavera and Judge Antônio Augusto Cançado Trindade of the International Court of Justice.

58. In conclusion, he said that the IAJC greatly valued its interactions with the Commission and would be pleased to welcome any Commission members who wished to visit the headquarters of the IAJC. Its next regular session would be held in Rio de Janeiro from 7 to 16 August 2017.

59. Mr. VALENCIA-OSPINA said that the IAJC and the International Law Commission had a long-standing history of cooperation. Article 26 of the Commission's statute went so far as to cite by name the Pan American Union, the predecessor to the OAS, when giving examples of intergovernmental organizations for the codification of international law with which the Commission should hold consultations. Clearly, the Commission had long held the inter-American system in high regard. Noting the personal ties between the members of the two bodies, he said that their history of cooperation had provided an excellent example that had been followed for the development of constructive relations with other regional bodies, including those whose representatives had visited the Commission during the current session. The two bodies shared a mandate to promote the progressive development and the codification of international law.

60. Among the topics taken up by the IAJC, representative democracy was of particular importance, especially in the light of recent developments in the Americas. In addition, issues related to immunity were clearly of interest to the Commission, which had submitted a set of draft articles on jurisdictional immunities of States and their property to the General Assembly in 1991.[393] That draft had in 2004 given rise to the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Commission was currently considering the topic "Immunity of State officials from foreign criminal jurisdiction". The IAJC too had a long history of consideration of the topic of immunity. A draft convention had been produced in 1986 but had never come to fruition as a treaty, and yet, as the IAJC Chairperson had just reported, the Committee had only recently concluded its work on the subject. He asked what the final outcome of its work had been: had the IAJC reworked the 1986 draft or had it decided to discontinue its consideration of the topic owing to the existence of the United Nations Convention?

61. The Commission had begun to study the topic of immunity of international organizations in 1949. After years of consideration, it had decided, and the United Nations General Assembly had agreed, that it should suspend its consideration of that topic. The IAJC, on the other hand, had continued to consider the subject. He asked what the future prospects were for its work in that area.

62. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the countries of the Americas were increasingly interested in issues related to the immunities of international organizations, particularly the issue of immunities *vis-à-vis* the right to justice, especially in the field of labour law. The IAJC Rapporteur on the subject had already submitted two reports, and a third report was expected in August 2017. The aim was to produce a guide on the topic that would be useful to the States of the region. In respect of immunity of States, the IAJC had started from the question of whether it was possible to revive the draft inter-American convention on jurisdictional immunity of States. For the time being, the issue was not thought to be very pressing; although the United Nations Convention had not been ratified by many of the States of the region, the principles it put forward were being implemented. The approach of the IAJC was to complement, rather than duplicate, the work of other bodies, taking into account the specificities of the countries of the region.

63. Mr. VÁZQUEZ-BERMÚDEZ said that he appreciated the work of the IAJC in disseminating inter-American law and international law in the Americas. He had been invited by the OAS Secretary of Legal Affairs to serve as a lecturer for the next annual OAS international law course, to be held in Rio de Janeiro. Representative democracy had been identified by the OAS as one of the four pillars of its action, along with human rights, multidimensional security and integral development. He asked what form the IAJC outputs in that area would take. For example, might it produce a set of recommendations for enhancing the effective implementation of existing

[393] The draft articles on jurisdictional immunities of States and their property and the commentaries thereto are reproduced in *Yearbook … 1991*, vol. II (Part Two), pp. 13 *et seq*., para. 28.

instruments, including the Inter-American Democratic Charter and the Charter of the Organization of American States? What questions were likely to be taken up by the Committee in the future?

64. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the IAJC agenda included an item on the strengthening of representative democracy, in particular through the strengthening and implementation of mechanisms for safeguarding democracy, with a focus on chapter IV of the Inter-American Democratic Charter. It was understood that those efforts must not involve a modification of the Charter itself, as the wording of that instrument had been formulated in a highly sensitive process. The agenda item had first been suggested by the former OAS Secretary General, José Miguel Insulza, who had drawn attention to the Charter's lack of provisions on preventive measures. As Rapporteur for the topic, he had produced three reports and had noted that the OAS Secretary General was empowered by the Charter of the Organization of American States to play a more active and effective role in terms of preventive measures for defending representative democracy. His preliminary proposal was to strengthen early warning and monitoring mechanisms. The work was not easy, however, because within the IAJC there was no consensus on the subject. Some members considered that such mechanisms could interfere in the internal affairs of States. He hoped nonetheless that the Committee would be able to make some progress as it continued its debate on the issue.

65. The topics that would be on the IAJC agenda in the future were determined largely through its interactions with the member States and the OAS policy organs. That ensured that the agenda was practical, not merely academic, and provided some benefit to the OAS and its member States. Among the topics that would be taken up in the near future were cybersecurity, consumer protection, immunity of international organizations and the legal validity and effects of non-binding international agreements.

66. Mr. RUDA SANTOLARIA asked how the IAJC intended to approach the work in relation to the nature, effects and use of non-binding international agreements. The subject had apparently emerged as an important topic in the discussions between the IAJC and legal advisers of the ministries of foreign affairs of the OAS member States.

67. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that the IAJC had recently appointed a Rapporteur for the topic, Mr. Hollis, who was due to present his first report in August 2017.

68. Ms. ESCOBAR HERNÁNDEZ, noting the immense variety of work done by the IAJC, including its activities in the field of private international law, said that the Commission had never focused on that area owing to its concentration on public international law. The question of non-binding international agreements went well beyond the context of the Americas and was of interest to all the States and legal advisers of the world. Did the IAJC intend to discuss the question of the type of persons or bodies that could enter into such agreements? In relation to the work of the IAJC on the protection of cultural property, she asked whether any applicable universal agreements that dealt with the issue outside the context of armed conflict, such as the Convention on the Protection of the Underwater Cultural Heritage and other conventions adopted by the United Nations Educational, Scientific and Cultural Organization, had been taken into account.

69. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that in his own country, Chile, various State subdivisions and regional bodies had concluded non-binding international agreements, and the question of the legal nature and effects of those agreements had indeed arisen. That matter featured prominently in the discussions on the topic. The protection of cultural heritage was a major concern for the peoples of Latin America, who felt the need to protect their cultural property from illicit export and theft. The IAJC had discussed the Convention on the Protection of the Underwater Cultural Heritage referred to by Ms. Escobar Hernández and had adopted a resolution calling explicitly for its ratification by all the States of the region. It had also urged the OAS member States to ratify the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador). In addition, the user's guide that he had mentioned in his presentation would include the principles set forth in the Convention on the Protection of the Underwater Cultural Heritage.

70. Mr. GÓMEZ ROBLEDO said that, in the interest of ensuring that the Committee's model legislation on protection of cultural property in the event of armed conflict reflected the latest developments in that area, the IAJC might wish to note that the most recent instrument in that regard was the Council of Europe Convention on Offences relating to Cultural Property, signed in Cyprus in May 2017. That instrument was intended to prevent and punish criminal offences related to trafficking in cultural property and had been adopted to replace a similar treaty signed in Delphi in 1985, which had never entered into force. In comparison with the Convention on the Protection of the Underwater Cultural Heritage, the Council of Europe text was much more advanced, as it provided for the return of cultural property as one of the possible forms of redress. Mexico, as an observer to the Council of Europe, had signed the treaty.

71. In the light of the role of the IAJC as an advisory body not only to the OAS policy organs but also to the member States, he wondered whether the IAJC had been requested to provide a legal opinion regarding the denunciation by the Bolivarian Republic of Venezuela of the Charter of the Organization of American States. That denunciation was unprecedented; even Cuba, which did not participate in the OAS, nonetheless remained a member. The denunciation of the Charter must have raised questions regarding which of the State's obligations under inter-American treaties subsisted and which did not. Had the IAJC taken up such questions?

72. Mr. SALINAS BURGOS (Chairperson of the Inter-American Juridical Committee) said that he appreciated the information on the recently adopted Council of Europe Convention, which was obviously relevant and

should be taken into account in the work of the IAJC on the protection of cultural property. As for the question of requests for legal opinions, the Committee had held discussions with the OAS Secretary General on legal aspects of the Inter-American Democratic Charter but had not yet received any specific requests for an opinion on that subject or on the denunciation of the Charter of the Organization of American States. He would not be surprised if the IAJC soon received such a request.

The meeting rose at 1 p.m.

3380th MEETING

Tuesday, 25 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

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 protection of the environment in relation to armed conflicts.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on protection of the environment in relation to armed conflicts) said that the Working Group would be composed of Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia and Sir Michael Wood.

3. The CHAIRPERSON said that an additional plenary meeting would be held that afternoon to conclude the debate on the topic of succession of States in respect of State responsibility. He proposed that the Bureau meet on Wednesday or Thursday of that week in order to prepare for the final week of the session and the adoption of the report.

4. Ms. ESCOBAR HERNÁNDEZ said that she had expressly called for an urgent meeting of the Bureau to discuss issues related to the content of the chapter on immunity of State officials from foreign criminal jurisdiction.

5. Mr. VALENCIA-OSPINA proposed that the Bureau meet the following day so that it would still have time to hold another meeting that week if necessary.

6. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission agreed that the Bureau meet on Wednesday, 26 July.

It was so decided.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

7. The CHAIRPERSON invited the Commission to resume its consideration of the Special Rapporteur's first report on succession of States in respect of State responsibility (A/CN.4/708).

8. Mr. LARABA said that, since the Special Rapporteur had stressed that his first report was preliminary in nature—despite the fact that it included four proposed draft articles—his own comments should also be seen as preliminary. During the debate in the Sixth Committee in 2016, several States, including Austria, Slovakia and Slovenia, had drawn attention to the complexity of the topic, although they supported its inclusion in the Commission's programme of work. That complexity was reflected in the first report in the sense that the Special Rapporteur's general approach to the topic was somewhat difficult to grasp. He agreed with the view expressed by Ms. Brigitte Stern that any reflection on international responsibility and succession of States would necessarily be immersed in the tensions and controversies of international law. It echoed the observations made by Mr. Georges Abi-Saab in 1987 that the succession of States raised questions related to the distribution of values, something which international law had traditionally avoided. Referring to the statement in paragraph 85 of the report that succession of States was of a highly political nature, in particular if contested, he questioned whether there were any cases of succession that were not contested. All cases were obviously contested and negotiated and involved political issues, whether they were explicit or implicit in the relations between the States and/or entities involved. However, the Special Rapporteur seemed to suggest that successions took place in a peaceful context and involved only technical matters. A more detailed and broader examination of State practice, which might reveal the contrary, should be carried out as soon as possible. Now that time had passed, it might be possible to debate issues related to the succession of States that had caused such tensions more calmly.

9. Furthermore, the report was based on an unconvincing and unfounded premise. The Special Rapporteur's thesis essentially centred on two propositions which, when read together, were problematic. In paragraph 83, the Special Rapporteur concluded that the rule of non-succession had been questioned by modern practice, but that did not mean that the opposite thesis—automatic succession in

* Resumed from the 3370th meeting.

all cases—was true. Taken literally, those views seemed to suggest that there was a grey area or even a legal vacuum. It was clear that the only way to proceed was to research the practice and views of States. In that regard, he welcomed the proposals made by Sir Michael Wood. The Special Rapporteur seemed to expect the reader to accept his premise as a starting point, even though he had not studied State practice in any depth.

10. The Special Rapporteur's first argument—which was indisputable—was that the topic had been excluded from previous work concerning the succession of States and the law of responsibility on account of its complexity. Given the importance attached to it by the Special Rapporteur, the second argument necessitated a more detailed analysis. The Special Rapporteur relied on two quotations by Mr. James Crawford. In his 1998 report, Mr. Crawford had written that a new State did not, in general, succeed to any State responsibility of the predecessor State.[394] However, according to the commentary to article 11 of the 2001 articles on the responsibility of States for internationally wrongful acts, it was unclear whether a new State succeeded to any State responsibility of the predecessor State with respect to its territory.[395] In paragraph 10 of his report, the Special Rapporteur described that change in wording as a "partial rebuttal" of the 1998 position, and in paragraph 35 said that the development of views on whether a new State succeeded to any State responsibility of the predecessor State was well documented in Mr. Crawford's shift from a refusal in 1998 to a partial acceptance in 2001.

11. That point of view was questionable, as it was based on a forced reasoning of Mr. Crawford's words. An analysis of the minor drafting change in question did not lead to that conclusion. A comparison of the two paragraphs from 1998 and 2001 revealed considerable similarities in content, as both relied on the arbitration in the *Lighthouses case between France and Greece*. Nevertheless, there were no new legal elements or case law that would justify such a development. Furthermore, due importance should be assigned to the words "in general" in the 1998 quotation, which provided for the possibility of the hypothesis of succession. In substance, the same idea was captured in the expression "it is unclear whether a new State" in the 2001 quotation. The use of the negative formulation reflected the fact that no definite conclusion could be reached, but also suggested the possibility of conduct that would support the hypothesis of succession. That formulation also euphemistically confirmed the rule of non-succession because, if it was not clear that there was succession "in general", it meant there was none. Both the 1998 and 2001 quotations took into account situations in which the successor State agreed to succeed to the responsibilities or assumed them without formally accepting them. However, there was certainly no rebuttal of the rule of non-succession and acceptance of the rule of succession.

12. It was difficult to conclude that the development of views on the issue was demonstrated in Mr. Crawford's writings. Even if that were the case, a drafting change by an author would not be sufficient to support the arguments presented, as State practice was the only determining factor. In fact, the Special Rapporteur himself did not seem to dispute that point, since he stated in paragraph 33 that the view had become more nuanced, to the extent that succession was admitted in certain cases; elsewhere he described both the rebuttal of the rule of non-succession and the acceptance of the rule of succession as "partial". He questioned the relevance of the sources cited by the Special Rapporteur, in the antepenultimate footnote to paragraph 33 of his report, in support of the theory of succession. For example, the view expressed by Ms. Stern, namely that it could be said that the rule of non-succession, although frequently mentioned in the literature, was not as well established as it seemed, was very cautiously worded. Moreover, the Hague Academy of International Law course given by Mr. O'Connell in 1970[396] was cited in that footnote to support theory of succession, whereas in three other footnotes,[397] Mr. O'Connell's 1967 work[398] was cited to support the theory of non-succession. Those differences in position reflected the nuances in Mr. O'Connell's thinking rather than any evolution in his views; like most of the other authors cited, he tended to ask questions rather than make affirmations on such a sensitive issue. Most of the other sources cited were from the 1990s, a time when other authors supported the theory of non-succession. Had the Special Rapporteur adopted a more logical and rigorous approach, he would have noted the nuances and ambiguities in the literature examined, and would not have argued, as he did in paragraph 33, that points of view had evolved. Such nuances were due to the complexity, diversity and rarity of practice.

13. Both the analysis of practice and the bibliography of the report were incomplete. It was not clear what was understood as practice in the report. For example, in paragraph 24, it was stated that it was time to assess new developments in State practice, while in paragraph 37 reference was made to a preliminary survey of State practice. However, in the following paragraphs, the Special Rapporteur analysed case law related to succession rather than State practice. The title of chapter II, section B, of the report ("Different cases of succession") drew attention to the diversity of such practice. Nonetheless, the Special Rapporteur had conducted only a partial examination of the cases, and had provided no explanation for the exclusion of the particularly important period in the history of the succession of States in Africa. That matter would no doubt be remedied in the next report. In paragraphs 64 and 85, the Special Rapporteur briefly and cryptically addressed the difference between contested and negotiated successions, of which there were many, as shown by the practice. The history of his own country—Algeria—was an obvious and almost caricatured example of such a succession. He endorsed the distinction drawn by the Special Rapporteur between cases in which the predecessor State disappeared and those in which it continued to exist.

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[394] See the first report on State responsibility, *Yearbook … 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7, pp. 1 *et seq*., p. 54, para. 279.

[395] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 52 (para. (3) of the commentary to draft article 11).

[396] D. P. O'Connell, "Recent problems of State succession in relation to new States", *Collected Courses of the Hague Academy of International Law, 1970-II*, vol. 130, pp. 95–206.

[397] See, in the report under consideration, the first footnote to paragraph 32 and the second and third footnotes to paragraph 33.

[398] D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I, Cambridge University Press, 1967.

14. The Special Rapporteur also drew a distinction between early cases and cases of succession in Central and Eastern Europe in the 1990s by following a historical and descriptive approach that did not reveal much about State practice. Although the Special Rapporteur had stressed that his report was preliminary in nature, there were some glaring omissions in the bibliography. For example, there was no reference to the work of Mr. Bedjaoui, the Special Rapporteur on the topic of succession of States in respect of matters other than treaties, who had provided a detailed analysis of the practice of succession of States in Africa, Asia and Latin America. Nor was there any reference to Mr. Bedjaoui's 1970 course on the succession of States at the Hague Academy of International Law,[399] despite the fact that it had been published in the same compilation of courses as Mr. O'Connell's. It would be useful in the next report to contrast different points of view, such as those of Mr. Bedjaoui and Mr. O'Connell, particularly based on an examination of State practice.

15. He endorsed the proposal to present the outcome of the work on the topic in the form of draft articles with commentaries and the text proposed for draft articles 1 and 2. However, he had reservations about draft articles 3 and 4, and believed that it would be preferable to wait for a more in-depth examination of State practice before taking them any further. As for the future programme of work, the Special Rapporteur should clarify the theme for the next report and should ensure that the focus was on State practice in all regions and the analysis of such practice in the literature. He was in favour of referring draft articles 1 and 2 to the Drafting Committee and further examining the issues raised in draft articles 3 and 4.

16. Mr. OUAZZANI CHAHDI said that the Special Rapporteur was to be commended on his first report, which drew on the Commission's earlier work in connection with the 1978 Vienna Convention, the 1983 Vienna Convention as well as its 1999 draft articles on nationality of natural persons in relation to the succession of States[400] and 2006 articles on diplomatic protection.[401] He agreed with the Special Rapporteur that the outcome of the topic should be both codification and progressive development of international law in order to supplement the law on succession of States. Some delegations in the Sixth Committee had supported the project on the basis that it would fill some of the gaps remaining as a result of the Commission's earlier codification work. He endorsed the suggestion made to amend the title of the topic. As to the form the outcome of the topic should take, he agreed with the Special Rapporteur's proposal, in paragraph 28 of the report, that draft articles with commentaries would be appropriate; the topic was the continuation of work in connection with the 1978 and 1983 Vienna Conventions and might even result in a new convention.

17. Noting that the topic had taken on renewed importance with the recent creation of several new States, he drew attention to the central question posed by the Special Rapporteur: whether a guiding principle of non-succession of State responsibility existed. The Special Rapporteur had largely relied on the literature and case law in answering that question, and it was to be hoped that the focus would turn to State practice in future reports, with a view to considering the situation both where the predecessor State continued to exist and where it did not.

18. The analogy with internal law referred to in paragraph 32 of the report did not seem to be consistent with the Commission's earlier work on the succession of States. In its first report on succession of States and Governments in respect of treaties, Sir Humphrey Waldock had observed that municipal law analogies, however suggestive and valuable in some connections, had always to be viewed with some caution in international law, for an assimilation of the position of States to that of individuals as legal persons might in other connections be misleading even when it was suggestive.[402] Succession in respect of the responsibility of international organizations, which was mentioned in paragraphs 22 and 23 of the report under consideration, was not directly relevant to the matter at hand. As other members had pointed out, the report concentrated on cases of succession in Central and Eastern Europe. More recent examples of succession in Africa and Asia, such as South Sudan and Timor-Leste, merited greater attention.

19. The three types of succession agreements identified by the Special Rapporteur included devolution agreements, although he had not specifically defined them. Their purpose was primarily to enable the succession of treaties concluded by the predecessor State, but they also gave an indication of the views of States on customary law governing the succession of States in respect of treaties. In paragraph 96 of his report, the Special Rapporteur had stated that such agreements were clearly subject to the *pacta tertiis* rule. However, analysis of some such agreements revealed that they could be framed as declarations with respect to bilateral or multilateral treaties, usually concluded by the predecessor State, and could be extended to the territory of the successor State by means of the extension of territory or "colonial" clause. That gave rise to the question of what would become of those treaties when the successor State achieved independence. In its earlier work, the Commission had taken the view that the question could not be entirely separated from the issue of the effects of such treaties on third States, which had rights and obligations under treaties with which devolution agreements purported to deal, and that it was accordingly important to consider how the general rules of international law concerning treaties and third States applied to devolution agreements, which involved determining the intention of the parties to such agreements. In future reports, it would be useful for the Special Rapporteur to examine how the application of the *pacta tertiis* rule to devolution agreements and other agreements between predecessor and successor States had evolved.

[399] M. Bedjaoui, "Problèmes récents de succession d'États dans les États nouveaux", *Collected Courses of the Hague Academy of International Law, 1970-II*, vol. 130, pp. 455–586.

[400] The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq*., paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

[401] 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.

[402] See *Yearbook … 1968*, vol. II, document A/CN.4/202, p. 91 (para. (4) of the commentary to article 1).

20. The 1956 Protocol between France and Morocco,[403] cited in paragraph 97 of the report, was not a true devolution agreement. The Moroccan authorities had effectively made a declaration under article 11 of that treaty to the effect that Morocco would assume the obligations arising from international treaties that France had concluded on its behalf or from international acts concerning Morocco to which it had not objected. It was on that basis that the Government of Morocco had rejected a Franco-American agreement of 1950 concerning United States Air Force bases in Morocco, which had been concluded against its wishes and the country's laws.

21. With regard to the draft articles, he expressed the view that both their form and their content should be reviewed in terms of the definitions and concepts used. Draft articles 1 and 2 could be referred to the Drafting Committee, where consideration could be given to the title of draft article 1.

Cooperation with other bodies (*concluded*)

[Agenda item 11]

Statement by the President of the International Court of Justice

22. The CHAIRPERSON welcomed Judge Ronny Abraham, President of the International Court of Justice, and invited him to address the Commission.

23. Judge ABRAHAM (President of the International Court of Justice), welcoming what would be his last opportunity to address the Commission before his term of office ended, said that his visits to the Commission had been some of the most memorable moments of his time as President of the Court. Over the past year, the Court had faced a heavy workload that looked set to continue, with six new cases having been filed. In addition to numerous procedural orders, it had handed down seven substantive rulings, although none of them had involved decisions on the merits of a case: they all related either to competence, admissibility or provisional measures. As such, their impact on the interpretation and clarification of international law was limited.

24. The Court had seen an increasing tendency in recent years for claimants to request provisional measures. Over the previous 12 months, provisional measures had been ordered in three cases. Such a high figure served to confirm that tendency. Orders indicating provisional measures to be taken were never *res judicata*, and consequently contained little substantive case law, but were based on clear criteria developed by the Court. Three cumulative criteria must be satisfied for provisional measures to be indicated: the Court must *prima facie* be competent to examine the merits of the case; the rights for which the claimant sought protection must be plausible; and there must be an imminent risk of irreparable harm to the rights claimed. The Court's most recent orders were fully in line with those criteria. If the Court was called upon to consider any element of the merits in a case in deciding whether provisional measures should be indicated, it did so prudently and on a strictly *prima facie* basis.

25. In accordance with article 32, paragraph 1, of the Rules of Court, he had not presided in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* by virtue of his nationality. The Court had partially upheld the claimant's request for provisional measures in that case, ruling on 7 December 2016 that France must guarantee the protection of the premises presented as housing the diplomatic mission of Equatorial Guinea in France. The substance of the case concerned the protection of buildings used for diplomatic purposes and the immunity from criminal jurisdiction claimed by certain political figures, specifically the Vice-President of Equatorial Guinea.

26. On 19 April 2017, the Court had also partially upheld the claimant's request for provisional measures in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*, indicating that the Russian Federation must take certain measures in respect of Crimea. It had, however, dismissed the claimant's request for provisional measures to be indicated in respect of the situation in eastern Ukraine, as it did not consider the rights claimed by Ukraine in that regard to be sufficiently plausible.

27. In the *Jadhav* case, in its order of 18 May 2017, the Court had indicated to Pakistan that it must take "all measures at its disposal" to prevent the execution of an Indian national, Mr. Kulbhushan Sudhir Jadhav, pending final judgment of the Court (para. 61). The case resembled the *LaGrand* and *Avena* cases, and the Court had cleaved closely to its previous case law in that regard. It was worth noting that provisional measures in the *Jadhav* case had been indicated exceptionally quickly in view of the particular urgency of the circumstances. Despite the fact that the parties had been invited to make oral observations, rather than simply written, the order indicating provisional measures had been issued less than two weeks after the proceedings had been instituted. The process usually took several months, although the Court made every effort to accelerate proceedings when necessary.

28. The Court had delivered judgments concerning preliminary objections in four cases, three of which were closely linked. On 24 April 2014, the Marshall Islands had filed separate applications against India, Pakistan and the United Kingdom, which had all been heard as cases entitled *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. The three cases shared many common elements. On 5 October 2016, the Court had upheld the preliminary objections raised by India, Pakistan and the United Kingdom, finding that it lacked jurisdiction based on the absence of a dispute between the parties in their respective cases. In *Maritime Delimitation in the Indian Ocean*, the Court had rejected the first and second preliminary objections raised by Kenya and found that it had jurisdiction to entertain the application filed by Somalia, which it also found admissible, in a judgment of 2 February 2017. The case raised certain points of interest, particularly with regard to how the Court had determined its

[403] Protocol between France and Morocco, signed on 28 May 1956 at Rabat, *American Journal of International Law*, vol. 51, No. 3 (July 1957), pp. 676–682.

competence and to the United Nations Convention on the Law of the Sea, that went beyond its existing case law.

29. Of the six new cases filed with the Court, one had been joined to an existing case. The *Land Boundary in the Northern Part of Isla Portillos* case was closely connected to *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, already pending before the Court. Joint hearings had taken place in July 2017; a judgment was expected in late 2017 or early 2018. Two separate cases had been filed by Malaysia, respectively applying for the Court to revise, and requesting it to interpret, its judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*. The Court had yet to decide whether the two cases should be joined. It seemed that such a situation had never previously arisen. The application for revision of the 2008 judgment, while unusual, was provided for under Article 61 of the Statute of the International Court of Justice. Apart from the *Jadhav* case and the case on the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* already referred to in the context of provisional measures, the remaining new case involved a request for an advisory opinion by the General Assembly under Article 65 of the Statute of the International Court of Justice. On 22 June 2017, the General Assembly had adopted resolution 71/292, in which it requested the Court to give an advisory opinion on certain questions relating to the Chagos Archipelago, touching on issues of decolonization. The Court had fixed time limits for the presentation of written statements and comments on those statements by Member States of the United Nations and the Organization itself. Once that process had been completed, the Court would be able to decide how to organize the oral submissions, perhaps taking the proceedings in the request for an advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* as a model.

30. With 19 cases pending, the Court's current workload was exceptionally large. The situation called for special efforts to ensure that rulings were delivered in a reasonable time, meeting the legitimate expectations of the parties involved. The Court might reflect on how some procedures could be simplified or shortened so as to make the most efficient use of its time and manage its caseload effectively, avoiding spending excessive time on procedural matters.

31. Mr. RAJPUT asked whether, in view of its increasing workload and the need to streamline procedures, the Court had given any consideration to formalizing guidance on the admissibility of evidence, either in the Rules of Court or in its Practice Directions.

32. Judge ABRAHAM (President of the International Court of Justice) said that the Court had no plans to amend its Rules or Practice Directions substantively at present; rather, it sought to tackle each case in as rational and expedient a manner as possible. The current Rules of Court and Practice Directions enabled it to refuse offers of evidence from a party if they were seriously late or delayed. Above all, it was important to safeguard the rights of parties to present evidence.

33. Mr. MURPHY said that he would welcome further details of the procedure to be followed in the request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and how closely it would resemble the approach taken in the advisory opinion hearings on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. He also enquired about the possibility of appointing judges *ad hoc* in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* proceedings, given that the entities principally concerned—Mauritius and the United Kingdom—were both Member States of the United Nations, unlike in the case on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.

34. Judge ABRAHAM (President of the International Court of Justice) said that the similarities between the proceedings in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* were limited to their division into two phases: oral and written. As to the appointment of judges *ad hoc*, it was provided for in the Rules of Court, but had occurred only rarely in advisory proceedings, and thus far the issue had not yet been raised in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* case. If it were, two questions would need to be answered: whether the right applied *ratione materiae* and whether the States involved wished to exercise it. He emphasized that the appointment of judges *ad hoc* was a right, rather than an obligation.

35. Mr. HASSOUNA said that, in the past, the Court had not always explicitly stated its reasons for not ruling on a given matter, whether in the context of an advisory opinion or a contentious case. It would be interesting to know the reasons for such reserve, for instance, whether it was in order to adopt a neutral stance in controversial situations, such as the request for an advisory opinion on whether the unilateral declaration of independence of Kosovo was in accordance with international law.

36. Judge ABRAHAM (President of the International Court of Justice) said that the Court could refuse to render an opinion or to consider a case only on the basis of a legally valid reason. There were a number of legal or factual reasons for which the Court might choose not to issue a judgment in a contentious case, such as if the Court considered that it did not have jurisdiction over a given matter or that there were sufficient grounds to issue a judgment without the need to rule on a specific aspect of a case. While the latter could be especially frustrating for observers such as academics, it was a question of using the Court's resources wisely and not prolonging proceedings unnecessarily.

37. In advisory proceedings, the Court was obliged to answer questions as they were presented: it could neither expand the question nor answer it partially. The interpretation of the question was a delicate matter; moreover, the Court had discretionary power to refuse to deliver an advisory opinion if it considered that doing so would be inappropriate. Although it had never exercised that

power since 1946, it had not renounced it either. That very point had even been debated before the Court, for instance in the advisory proceedings relating to the unilateral declaration of independence of Kosovo, where some States had maintained that the Court should not deliver an opinion; the same was likely to happen in respect of the request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

38. The CHAIRPERSON said that occasional dissatisfaction in the world of academia with the lack of explicit reasoning in the Court's rulings was often mitigated by interesting individual opinions issued by judges on the Court—an option that was not always available in domestic courts.

39. Judge ABRAHAM (President of the International Court of Justice) said that although individual opinions usually sought to clarify a position taken by the Court in a judgment, they also sometimes shed light on a position that was shared by a majority of judges, but that had not been explicitly expressed in the judgment in question. In any case, it was important to recall that such opinions reflected only the positions of individual judges.

40. Responding to a question by Mr. GÓMEZ ROBLEDO, he said that in cases of great urgency, the Court could indeed shorten the oral proceedings and take action solely on the basis of written proceedings.

41. Mr. JALLOH said that it would be interesting to know what factors were behind the recent increase in requests for the indication of provisional measures. With regard to the General Assembly's request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, he would like to know whether the Court's recent order inviting States Members of the United Nations to present statements on the question to the Court could be extended to international organizations.

42. Judge ABRAHAM (President of the International Court of Justice) said that although it was difficult to speculate on the reasons for any State practice, one factor that might be driving the trend regarding provisional measures was the Court's finding, in the *LaGrand* case, that orders indicating provisional measures were legally binding. As for the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* proceedings, the Court's invitation had been extended only to States Members of the United Nations and the Organization itself. That said, if other international organizations considered that they were able to furnish useful information on the question, they could request permission to do so.

43. Mr. VÁZQUEZ-BERMÚDEZ said that he would appreciate more detailed information on the Court's conclusion, in the three cases brought by the Marshall Islands against India, Pakistan and the United Kingdom, that it lacked jurisdiction since it could not be demonstrated that a dispute existed at the time that the applications had been submitted. Referring to the assertion, in the judgments, that the evidence must demonstrate that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant, he said that he would welcome Judge Abraham's comments on whether the Court's finding in those cases was expected to have a bearing on the threshold of evidence required in future cases.

44. Judge ABRAHAM (President of the International Court of Justice) said that the Court's findings in the cases concerning the Marshall Islands crystallized and clarified its recent case law. The need to prove the existence of a dispute on the date of the institution of proceedings was now a settled principle and when referring a case to the Court, States would undoubtedly be more careful to produce sufficient evidence in that regard. The application of that principle—whether or not a respondent was aware, or could not have been unaware, of a given dispute—must continue to be analysed on a case-by-case basis. In the cases involving the Marshall Islands, the points of contention had been both the principle, which was still contested by some parties, and its application in the specific cases in question.

45. Mr. PARK said that he would be interested to know Judge Abraham's personal views on the fragmentation of international law, especially with regard to potential conflicts of jurisdiction between the International Court of Justice and other tribunals. For instance, he wondered whether, and if so to what extent, the Court, in considering the recent request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, would refer to other international courts' rulings in related cases, such as in the matter of the *Chagos Marine Protected Area (Mauritius v. United Kingdom)* referred to the Permanent Court of Arbitration.

46. Judge ABRAHAM (President of the International Court of Justice) said that, for various reasons, he would prefer not to comment further on the proceedings in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. However, generally speaking, a distinction should be made between conflict of jurisdiction, or competence, and conflict of case law. Despite the large number of international courts and tribunals and the fact that several such instances could be competent to hear a given case, conflict of jurisdiction did not pose a serious risk. States could refer a given case to the court of their choice. Moreover, it was fairly unlikely that two courts would declare themselves competent to hear the same case at the same time; rules existed to prevent such situations. In that connection, there were some interesting developments arising out of the Court's judgment in the case concerning the *Maritime Delimitation in the Indian Ocean* on the competence of the Court and that of the arbitral tribunals provided for under the United Nations Convention on the Law of the Sea.

47. Conflict in case law involved situations where two or more courts considered different cases and contradicted each other's decisions on a particular question. Generally, there was no hierarchy between international courts and tribunals and none had the authority of *res judicata* over the others. Consequently, none was bound

to conform to the decisions of the others in cases that raised similar issues. However, based on the practice, it was clear that the international courts endeavoured not to contradict one another. In fact, as a general rule, international judges sought to ensure consistency in international law by referring to decisions made by other courts. For instance, when the International Court of Justice had issued its judgments in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and, subsequently, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, it had referred to the rulings of the International Tribunal for the Former Yugoslavia and had abstained, on all but one point, from taking positions that would appear to contradict those rulings. It had established a presumption in favour of those positions and, as mentioned in the judgment of the latter case, they "must be taken into account". The arbitral tribunals set up under the United Nations Convention on the Law of the Sea also tended to rely heavily on the case law of the International Court of Justice.

48. Mr. MURASE asked whether it was necessary for the Court to elaborate on its existing rules of evidence, especially in view of the increasing number of environmental law cases that were fact-intensive and science-heavy and thus required the assessment of a considerable amount of evidence. During a lecture at an academy of international law in China, students had been disappointed when Mr. Alain Pellet had implied that the Court did not have any standard of proof or rules of evidence beyond those relating to the late submission of evidence. As rules of evidence seemed to be the core of the procedural rules for any court of law and many PhD dissertations were being written on the subject, he would be interested to hear Judge Abraham's views on the subject.

49. Judge ABRAHAM (President of the International Court of Justice) said he did not believe that it was necessary for the Court to establish new rules of evidence; the current rules were sufficient for the Court to gather all the necessary information and take decisions on each case it heard in a pragmatic way. It was true that the area of environmental law had expanded in recent years, the number of contentious cases was likely to increase in future, and that in cases in environmental and other areas of law technical and scientific evidence played an important role. However, under the Statute of the International Court of Justice and its Rules, the Court had at its disposal all the necessary tools to obtain complete information on each case. Instead of or in addition to examining the expert opinions of the parties, the Court could decide that an expert opinion was necessary on a particularly technical or scientific subject and appoint more than one expert to conduct a related enquiry. For instance, in the recent case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, a group of experts had been appointed to examine a certain part of the coastline in question. Perhaps what Mr. Alain Pellet had meant was that the Court was not bound by rigid rules that must be uniformly applied, but followed a pragmatic approach and took its decisions on a case-by-case basis, with which he could only but agree.

50. Ms. GALVÃO TELES said one important point that Judge Abraham had failed to mention was that in *Maritime Delimitation in the Indian Ocean*, the Court had analysed the legal status of the memorandum of understanding between the two parties and had decided that it was in fact a treaty between the two States. It was a significant decision by the Court and for States parties, which increasingly had recourse to such instruments since they regarded them as non-binding.

51. The relationship between the Court and the Commission had always been very close and they frequently referred to each other's work. However, she wondered whether the fact that draft articles submitted by the Commission to the General Assembly were now less likely to become conventions and that the Commission's output was more likely to take another form might alter the working relationship between the two bodies.

52. Judge ABRAHAM (President of the International Court of Justice) said that he had not mentioned the Court's decision regarding the legal status of the memorandum of understanding because it had not been a controversial decision. There had been no individual or dissenting opinions on the subject and the parties had disputed the interpretation of the memorandum more than its legal status. It was, nonetheless, good to remind Governments and their officials that just because they called a document a memorandum of understanding did not mean that it was not legally binding. As all lawyers were well aware, it was not the title but the contents of a document that determined its legal significance.

53. The Court attached great importance to the Commission's work and output, but whether that led to a convention was a secondary issue. What was important for the Court was the Commission's role in clarifying customary international law and to be able to refer to the Commission's work insofar as it reflected that area of international law. Thus, even a set of draft articles that was not intended to become an international treaty could still be of the utmost importance to the Court and its case law. A prime example were the 2001 articles on the responsibility of States for internationally wrongful acts.[404]

54. Sir Michael WOOD said that it could sometimes be quite difficult for the parties to a case to find an appropriately qualified person who was willing to sit as a judge *ad hoc*. One obstacle was posed by the Court's current Practice Directions, according to which a person who had acted as counsel in one case could not be nominated as a judge *ad hoc* for another case for a period of three years thereafter. Similarly, a person who had been a judge *ad hoc* could not appear as counsel for three years. Although those Practice Directions had been established for a good reason, he wondered whether any consideration might be given to lifting the restrictions in future. In addition, he would welcome more information on the staff that provided legal assistance at the Court and on traineeships and internships.

[404] The draft articles adopted by the Commission 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.

55. Judge ABRAHAM (President of the International Court of Justice) said that there was no talk of reviewing the Court's Practice Direction relating to the appointment of judges *ad hoc* for the time being. From the Court's perspective, States did not seem to have noticeable problems in finding and nominating judges *ad hoc*, although it did not see the full picture and the real obstacles that States might encounter in the process leading up to their appointment.

56. Judges usually had two assistants, one of whom was a university student selected under the University Traineeship Programme and who remained at the Court for one academic year. Students tended to be from North American universities because those universities had the funds to defray the students' costs; however, an effort had been made in recent years to diversify the pool of universities participating in the Programme. In addition, each judge had a law clerk who was recruited through a regular competitive exam and had a two-year contract that was renewable once only.

57. There was also a legal service in the Registry that provided assistance to the Court in its general judicial and legal work, but the legal experts employed there were not assigned to a specific judge. The President of the Court had a third assistant who was basically a private secretary.

58. The different forms of assistance provided to judges were a fairly recent development. In 2005, there had been only 7 university trainees assisting 15 judges and, until 2000, judges had worked alone except for assistance provided by the legal service of the Registry. The Court encouraged the widest possible selection of applicants in terms of nationality, language and legal background. However, it always chose the best candidates, many of whom would move on to great careers in international law.

59. Mr. CISSÉ said that in the *Dispute concerning delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* before the International Tribunal for the Law of the Sea, Côte d'Ivoire had requested that provisional measures be prescribed requiring Ghana to suspend all ongoing oil exploration and exploitation operations and to refrain from granting any new permit for oil exploration and exploitation in the disputed area. Nonetheless, while in its order of 25 April 2015 the Tribunal's Special Chamber had prescribed that Ghana undertake no new drilling activity (para. 102), it had effectively allowed the party to continue its ongoing exploration activities. He had never really understood the rationale behind the Special Chamber's order and asked whether Judge Abraham could shed some light on the matter.

60. Judge ABRAHAM (President of the International Court of Justice) said that he could not answer that question as, first, the dispute was still pending before the Tribunal. The judgment on the merits would be issued shortly and should clarify the parties' differing interpretation of the order prescribing provisional measures: Côte d'Ivoire believed that Ghana had not fully complied with the provisional measures by continuing certain ongoing activities, whereas Ghana held that such activities were allowed under the order. Second, he sat as a judge *ad hoc* for the Special Chamber—a task he had accepted before his election as President of the Court. It had been a worthwhile experience as interaction between international tribunals fostered greater understanding and helped to avoid the fragmentation of international law.

61. Mr. GROSSMAN GUILOFF asked what the main challenges were for the Court in adapting to the current reality characterized, *inter alia*, by information overload, the transnational character of disputes and a proliferation of jurisdictions.

62. Mr. LARABA said he would appreciate clarification of Judge Abraham's comment in connection with the cases on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that the positions of the International Tribunal for the Former Yugoslavia "must" be taken into account.

63. Judge ABRAHAM (President of the International Court of Justice) said that it would be hard to explain the challenges that lay ahead in the short time available. The Court was certainly aware of the need to adapt its working methods to a constantly changing situation and it regularly reflected on such matters. It would continue to make adjustments and introduce reforms, but not attempt a general overhaul of the international judicial system. Changes could not be made to the Statute of the International Court of Justice, but its Rules and Practice Directions were regularly reviewed.

64. He would use the word "must", but not in the sense that the Court was legally bound to refer to decisions of the International Tribunal for the Former Yugoslavia. An international judge could live in a bubble and simply ignore the case law of other courts; however, that would be ill advised from the standpoint of judicial policy. As far as possible, judges should try to ensure consistency between the decisions of different courts and tribunals.

65. The CHAIRPERSON thanked Judge Abraham for his clear but also subtle replies and informative statement.

The meeting rose at 1 p.m.

3381st MEETING

Tuesday, 25 July 2017, at 3 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

First report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the first report on succession of States in respect of State responsibility (A/CN.4/708).

2. Ms. ESCOBAR HERNÁNDEZ said that the excellent first report immediately went to the heart of the topic, with draft articles 3 and 4 embodying some fundamental positions on the succession of States in respect of State responsibility. The fact that the Special Rapporteur had relied on the Commission's earlier work on State succession, along with that of the International Law Association and the Institute of International Law, did not in any way diminish the value of the report. Nevertheless, while the latter clearly mapped out the approach to be adopted to the topic and its outcome, it prompted some doubts with regard to both its methodology and its substance.

3. Turning first to methodology, she noted that, apart from its brief discussion of the Commission's earlier work and of the usefulness of the topic, the report was in no way preliminary in nature, as it set the scene for the Commission's deliberations with what was essentially an in-depth analysis of how the Special Rapporteur wished to define the scope of the topic and a preliminary version of what he thought should be some general provisions. Although that was a valid approach, which would enable the Commission to tackle substantive issues immediately, a more detailed preliminary examination of scope and methodology might have been useful.

4. Second, she had her reservations about the statement that the outcome of the topic should be both codification and progressive development. In view of the State practice described in the report, it seemed premature to contend that there was sufficient material for codification at that juncture, although at a later stage, in the light of the evidence which the Special Rapporteur intended to supply, it might be possible to conclude that the topic lent itself to both aspects of the Commission's terms of reference.

5. Third, she was unsure that the outcome should be draft articles. Although she agreed with the Special Rapporteur that it would, generally speaking, be wise to retain a form similar to the Commission's previous work on State succession, that should not prevent members from reflecting on whether draft articles would be the best guarantee of the effectiveness of the Commission's labours, particularly in view of the fact that few States had ratified the two earlier conventions.

6. As for the content of the report, first it was obvious that the practice examined by the Special Rapporteur was necessarily limited, because succession of States was not a daily occurrence. However, it was equally clear that the subject should be studied from a universal perspective and not one restricted to certain regions, even though they were where the most recent examples of succession had taken place. The following reports should therefore look at practice in Africa, Asia and Latin America with a view to deciding whether any general principles did exist.

7. Second, given the great diversity of the State succession processes that had taken place in the twentieth century, the Special Rapporteur was right in holding that it was necessary to adopt a flexible approach which took account of various aspects related to the different possible forms of succession: (*a*) post-colonial or otherwise; (*b*) with the survival or disappearance of the predecessor State; (*c*) through secession, transfer of part of a territory, the unification of two pre-existing States or the break-up of one State into several States; or (*d*) whether it was negotiated or contested. That differentiated approach should, however, be more clearly reflected in the Special Rapporteur's treatment of the topic so as to identify the consequences that the various types of succession might have on the applicable rules on State succession in respect of responsibility and to show whether, despite the wide variety of situations, a general subsidiary rule could possibly be formulated that would apply to all of them. Unfortunately, the Special Rapporteur did not seem to have applied that criterion of diversity in his first report and the methodology that he had adopted in principle did not bring out all the possible consequences. It was to be hoped that the Special Rapporteur would bear that concern in mind in his future reports.

8. Third, it was a moot point whether a study of the nature of the rules to be codified and the relevance of agreements and unilateral declarations, the subject of chapter II, section D, was entirely helpful at that stage. Although the conclusions drawn by the Special Rapporteur were quite valid, it might have been more useful to examine those matters after a detailed investigation of practice regarding State responsibility in relation to each type of succession. That research would have provided a wider overall view of practice, which would have made it possible to determine not only the existence or non-existence of a general rule, but also to identify the instruments chosen by States in each actual set of circumstances. The reason for the subsidiary nature of the rules set forth in draft articles 3 and 4 would then have been plainer.

9. Although she concurred with the Special Rapporteur on the scope of the topic as defined in draft article 1, it might have been helpful to include an explicit reference in the text to States' obligations and rights arising from responsibility. Even if the word "effect" covered both aspects, it would be advisable to avoid any ambiguity in interpretation. While the Special Rapporteur was right to limit responsibility to that for internationally wrongful acts and to exclude succession in respect of the responsibility of international organizations, it would be wise to eliminate any possible ambiguity and to make clear that the transfer of obligations ensuing from liability for transboundary harm caused by acts not prohibited by international law in no way affected the origin and nature of an international norm the breach of which constituted an internationally wrongful act and might therefore give rise to international responsibility.

10. Lastly, consideration should be given to the inclusion of a clause limiting the scope of the text to succession in conformity with international law and in

accordance with the principles contained in the Charter of the United Nations, along the lines of article 6 of the 1978 Vienna Convention and article 3 of the 1983 Vienna Convention. Such restrictive wording might be controversial, but there was no obvious reason to exclude it from the draft articles. If a decision were taken not to include it, it would be essential to explain why the Commission had altered its position.

11. In draft article 2, in addition to the definitions already contained therein, with which she broadly agreed, it might be advisable to define "newly independent State", as had been done in the two above-mentioned Vienna Conventions, "internationally wrongful act", "devolution agreement", "claims agreements", "other agreements" and "unilateral declarations".

12. As far as draft article 3 was concerned, it was difficult to determine its nature, because the rules that it contained could be interpreted as general rules which should apply in all circumstances. However, it was equally certain that they referred exclusively to the situation where the issue of responsibility had been regulated through a treaty, in other words circumstances which could be encountered in practice, but which were not the sole or most usual situation. It was true that paragraphs 1, 2 and 3 rested on rules of treaty law and that their purpose was to safeguard the applicability of the *pacta tertiis* principle. However, the last sentence of paragraph 3 and the whole of paragraph 4 seemed unnecessary, as they merely referred to the applicability of the relevant rules of treaty law and might cause some confusion in terms of their relationship to paragraphs 1 and 2. It might therefore be a good idea to revise the wording of the above-mentioned paragraphs by inserting in the first two the phrase "unless so agreed by the third State concerned" and to amend the first sentence of the third paragraph to read "produce full effects between the States parties". That new wording, which could be considered by the Drafting Committee, would make it possible to delete paragraph 4 and to give a detailed explanation in the commentary of the reasons underpinning that draft article as a whole.

13. There was no good reason to reverse the order of the reference to obligations and rights in draft article 4. On the contrary, the order should be the same as in draft article 3 in order to avoid any undesirable interpretation. The effects of a unilateral declaration would indeed differ depending on whether they stemmed from succession to a right or to an obligation. Lastly, it might be possible to delete paragraph 3 and to include its content in the commentary to the draft article.

14. Although the programme of work proposed by the Special Rapporteur was generally acceptable, it was questionable whether some of the matters listed in the penultimate sentence of paragraph 133 could be termed simply "miscellaneous issues" and be relegated to a fourth report along with procedural issues. They all merited in-depth treatment at the same time as the central issues that were to be addressed in 2018 and 2019.

15. She recommended the referral of the draft articles to the Drafting Committee, on the understanding that the Committee would take account of all the opinions expressed at plenary meetings, both those of a substantive nature and those of a procedural character, in particular with regard to when each draft article should be considered by the Drafting Committee.

16. Mr. ŠTURMA (Special Rapporteur), summing up the debate, said that the number and content of statements made during the debate were indicative of a great interest in, and the relevance of, the topic. Some members had expressed concern about the way in which the topic had been chosen at the beginning of the new quinquennium and had been of the view that it ought to have been discussed by the newly constituted Commission. On the other hand, other members had maintained that consideration of the topic was justified in order to fill the gap left by the Commission's earlier work on State responsibility and succession of States. It would not be proper for him during the current plenary meeting to respond to the comments questioning the Commission's decision to take up the topic, but he was prepared to do so at a meeting of the Working Group on methods of work, which was an appropriate forum.

17. Some members had pointed out that it was necessary to clarify whether the purpose of the Commission's work was to codify existing rules or to progressively develop new ones that States would have to follow. Other members had been of the opinion that the Commission could fill existing gaps in the codification of the rules on succession of States in respect of State responsibility.

18. The current topic encompassed the progressive development of international law and its codification. State practice and case law were unevenly developed in various areas and with regard to some kinds of succession of States. It could, however, already be said that both practice and case law seemed to be sufficiently developed with regard to wrongful acts committed by an insurrection movement which led to the creation of a new State, wrongful acts that had started before and continued after the date of succession, and the transfer of the right of a State to exercise diplomatic protection in the case of wrongful acts committed against nationals of the predecessor State. His second report would probably identify a general rule that where the predecessor State still existed, it would continue to be the sole responsible State, unless an agreement or a unilateral declaration provided otherwise.

19. Most speakers had agreed that the outcome of work on the topic should take the form of draft articles accompanied by commentaries. One member had pointed out that the 1978 Vienna Convention and the 1983 Vienna Convention set a precedent in that respect, but others had held that the fact that few States had become parties to the Conventions suggested that draft guidelines might be more suitable as they allowed greater flexibility. His own preference was for draft articles, because work on the topic might include not only codification but also the development of new norms. Experience had shown that, although the two above-mentioned Conventions had not been in force at the time of the dissolution of Czechoslovakia, both successor States had used the principles embodied in the Conventions for their succession. That meant that even if draft articles or conventions were not yet binding for the States concerned, they might serve as

a model for those States' bilateral agreements. The proposed subsidiary or residual nature of general rules and the relevance of agreements and unilateral declarations would afford sufficient flexibility to permit the draft articles' adaptation to a variety of situations.

20. Many members had agreed with him that the work of private bodies, such as the Institute of International Law and the International Law Association, should be taken into account, but should not impede or limit the Commission's research into the topic. One member had contended that the Commission should constantly refer to the Institute's resolution on State succession in matters of international responsibility[405] and had asked how the Special Rapporteur's approach differed from that of the Institute. On the basis of the first report, it was possible to say that the work done thus far differed in at least three respects: the methodology as reflected in the structure of the draft articles and the programme of work; the greater relevance of agreements; and the greater relevance of unilateral declarations. That answer might be interpreted as recognition of a more subsidiary or residual role of any general rules on succession or non-succession.

21. Regarding the case law cited in the report, some members had pointed out that most of the examples provided as evidence for a departure from the traditional rule of non-succession were misguided. For example, concerning the arbitration in the *Lighthouses case between France and Greece*, members had observed that the Permanent Court of Arbitration did not hold Greece liable for the wrongdoings of the predecessor State, but for continuing the unlawful acts of the Ottoman Empire. The report did not question that point, as the continuing wrongful act was certainly the recognized hypothesis. It only noted that a part of the wrongful act committed before the date of succession could not be simply attributed to the successor State, as the autonomous Government of Crete under the Ottoman Empire had been different from the Government of Greece.

22. With respect to the *Gabčíkovo–Nagymaros Project*, some members had stated that, while the report cited that case as an example of a departure from the rule of non-succession, the International Court of Justice had accepted that Slovakia would be liable for the internationally wrongful acts of its predecessor and would receive compensation from Hungary only on the basis of the agreement between the parties. Indeed, the report did not deny the role of the special agreement. However, several issues of succession and responsibility were not resolved by the agreement and they remained the object of dispute. For example, Hungary, while acknowledging that Slovakia could not be deemed responsible for breaches of treaty obligations and obligations under customary international law attributable only to Czechoslovakia, which no longer existed, had argued that such breaches created a series of secondary obligations, namely, the obligation to repair the damage caused by wrongful acts and that those secondary obligations were not extinguished by the disappearance of Czechoslovakia. In other words, it was not the responsibility of Czechoslovakia as such but the secondary obligations created by wrongful acts that continued after the date of succession.

23. Regarding the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, it had been noted by some members that, since the International Court of Justice had not found a violation of the Convention on the Prevention and Punishment of the Crime of Genocide, it had never decided whether the acts of the Socialist Federal Republic of Yugoslavia were attributable to Serbia through succession to State responsibility. He agreed that the Court had not found that Serbia had succeeded to responsibility; it had only examined acts that had occurred both before and after the date of succession and admitted a possibility of transfer of obligations.

24. As to the *Mytilineos Holdings SA* arbitration, he thought, like Mr. Reinisch, that it was not only an interesting case but also relevant in the sense that it seemed to support the view that the continuator State bore sole responsibility and that there was no transfer of responsibility to the successor State.

25. As to the 2002 decision of the Austrian Supreme Court mentioned by Mr. Reinisch, that decision had dealt with a claim for compensation for expropriation brought against Austria by an Austrian citizen who, following his arrest in 1952 by soldiers of the Soviet occupying Power in Austria, had been sentenced to 25 years' imprisonment and had had his property confiscated. The claimant had argued that Austria, by waiving any claims against the Allied Powers on behalf of all Austrian citizens in accordance with article 24 of the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria, had acted in a manner that amounted to expropriation. The Supreme Court had not dwelt on a possible customary rule on succession, but had simply referred to the doctrinal view of the late Professor Seidl-Hohenveldern. If any conclusion could be drawn from the case, it would probably relate to the specific nature of military occupation and the special nature of the end of the Soviet Union, of which the Russian Federation was generally considered to be the continuator State, not a successor State. That possibility had at least been admitted by the Austrian Supreme Court in the so-called *Russian Embassy* case, in which the Court had found the customary rules on State succession in respect of property to be uncertain.

26. To put it in more general terms, he did not question statements to the effect that State practice was not clear and that cases could be interpreted in different ways. He could even accept that cases of non-succession were more frequent than cases of succession. He only disagreed with the old doctrine or fiction of the highly personal nature of State responsibility that seemed to exclude, on an *a priori* basis, any possible transfer of rights and obligations arising from internationally wrongful acts. First, that fiction was based on a private law analogy, stemming from Roman law, or on a criminal law analogy. Second, a State—at least a modern State, not an absolute monarchy—was very different from natural persons, and any personalization in that regard was misleading. Historically, even treaties were considered as binding between

[405] Resolution on State succession in matters of State responsibility, Institute of International Law, *Yearbook*, vol. 76, Session of Tallinn (2015), pp. 711–719; available from: www.idi-iil.org, *Resolutions*.

monarchs only while they lived, which excluded any automatic succession; that was not the case in modern international law, however. Third, the doctrine of the highly personal nature of State responsibility had been developed many decades previously, before the completion of the codification of State responsibility and the codification of diplomatic protection. However, those draft articles on the responsibility of States for internationally wrongful acts[406] that had been adopted by the Commission had been drafted in an objective fashion and did not support the view that State responsibility was personal or punitive in nature. The rules on diplomatic protection had clearly abolished the continuing nationality requirement, thus making possible a transfer of rights under certain conditions. Those new developments should also be analysed and reflected in the law on succession.

27. Noting that some members had observed that the report devoted more attention to the views of authors than to actual State practice relating to State succession, he agreed that there was a need for more in-depth research in that connection than it had been possible to include in his short preliminary report. Future reports would contain more detailed analysis of such practice.

28. He fully agreed with those members who had pointed out that most of the cases of State practice considered in his first report concerned European States and that he should seek to include more examples from other regions in future reports. Although the first report was not intended to be exhaustive, it might be seen as underestimating non-European practice and case law. He was therefore grateful to colleagues who had brought valuable references to his attention.

29. As had been suggested by Sir Michael Wood, he intended to propose that the Commission request States to provide it with examples of relevant practice and case law and ask the Secretariat to undertake a study on the topic.

30. Turning to the scope of the topic, he said that many members had agreed that the question of international liability for injurious consequences arising out of acts not prohibited by international law should not be included in the topic. Some others had, however, expressed reservations in that regard, noting, for example, that rules and principles of liability could exist in customary and treaty law. In his view, at the current stage of work, the topic should be limited to rights and obligations arising from wrongful acts. That was, however, without prejudice to a possible study on succession of States in respect of consequences of lawful acts that the Commission might wish to take up at a later stage.

31. Almost all speakers had agreed that the scope of the topic should not include the question of succession in respect of the responsibility of international organizations. Some had noted, however, that work on the topic should refer also to situations where member States incurred responsibility in connection with acts done by international organizations *vis-à-vis* third parties. He agreed with both views. In fact, as indicated in the future programme of work, issues that might be addressed included issues of succession in respect of responsibility of States for wrongs caused to other actors, namely international organizations, and responsibility of member States in connection with acts of the organization.

32. He agreed with the many members who had considered that the question of succession of Governments should not be included in the topic. Changes of Governments, even changes of regimes, were different from State succession.

33. Some members had pointed out that the French and Spanish words used to translate the English term "responsibility" were problematic, inasmuch as they also denoted "liability". Any possible ambiguity in that regard could be avoided by making the title of the topic more explicit by referring to "internationally wrongful acts".

34. With regard to draft article 1, many members had indicated that, in the interests of clarity, it should specify that the scope of the topic concerned succession of States "in respect of rights and obligations arising from internationally wrongful acts". He would provide an amended proposal to that effect for consideration by the Drafting Committee.

35. Draft article 2 on use of terms seemed to be generally acceptable to members. However, a number of proposals had been made regarding the inclusion of further terms, such as "internationally wrongful acts", "devolution agreements", "unilateral declarations" and "other subjects of international law". As indicated in the report, definitions of other terms would be added in the course of future work, possibly including not only terms such as devolution agreements and unilateral declarations but also claims or other agreements. At the same time, it had been proposed that a definition of the term "international responsibility" not be included. He could agree to that proposal and instead explain in the commentary both the concept of State responsibility and the concept of internationally wrongful acts.

36. In view of concerns raised by Mr. Rajput about the definition of "succession of States", he wished to make clear that draft article 2 (*a*) served only for definitional purposes and that it did not take any position on the issue of legality. That was indeed a substantive issue, which he would address in the second report.

37. As to the general rule on State succession, some members had pointed out that the only exception to the rule of non-succession might occur when the successor State voluntarily agreed to assume the responsibility of the predecessor State or when it endorsed the latter's wrongful acts. Other members had underlined that there was insufficient State practice to reject the traditional rule of non-succession.

38. Many members had emphasized the need to define the general rule before sending draft articles 3 and 4 to the Drafting Committee. He did not agree with Mr. Murase, who had stated that those draft articles were essentially "without prejudice" clauses: they referred not only to

[406] The draft articles adopted by the Commission 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.

forms—agreements and unilateral acts—but also to substance, since they underlined the subsidiary nature of the draft articles.

39. Some members had underlined that, as currently formulated, draft articles 3 and 4 were not dependent on a resolution of the issue of whether there was a general principle guiding succession in respect of State responsibility. As had been noted by one member, those draft articles could apply to both non-succession and succession situations as a default rule. They would, of course, serve different purposes. He wished to make clear that in future reports he had no intention of replacing a general rule of non-succession with a general rule of succession. He did not believe there was automatic succession in all situations. Instead, future reports would propose a set of rules for different categories of succession. In the case of the default rule of non-succession, agreements and unilateral declarations could still provide for the transfer of certain rights and obligations. In the case of the possible rule of succession, agreements could provide both for limitation and for distribution of rights and obligations among several successor States, if appropriate.

40. In his view, it was useful to have such general provisions in draft articles 3 and 4 at the beginning of the draft because they avoided the need for repeated references to agreements and unilateral agreements in each succeeding draft article.

41. He fully agreed with those members who had noted the need for a stand-alone draft article underlying the subsidiary nature of the draft articles. It was in fact his intention in that connection to propose either a new draft article or a new introductory paragraph for draft article 3.

42. He also agreed with those members who had observed that draft article 4, paragraph 2, should more clearly refer to all the relevant conditions set out in the Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.[407] Although it had been his intention to cover other conditions, in addition to the reference to "clear and specific terms", he could agree to replacing the general reference to rules of international law applicable to unilateral acts of States with more specific language.

43. Many members had expressed support for the future programme of work. In his view, the programme was, and should remain, flexible enough to accommodate new research and the results of debates in the Commission. As had been suggested by Ms. Escobar Hernández, certain questions could be addressed at an earlier stage than the fourth report.

44. The debate had shown that most speakers were in favour of sending the draft articles to the Drafting Committee, while some would prefer to refer only draft articles 1 and 2. Mr. Huang, Mr. Reinisch and Sir Michael Wood were against referral of the draft articles. His clear preference would be to send draft articles 1 and 2 to the Drafting Committee to enable it to start work on them that week. He also preferred to send draft articles 3 and 4 to the Committee but with the understanding that they would stay within the Drafting Committee until the following session, when members of the Commission would have a clearer picture of residual rules on non-succession and succession to be proposed in the second report.

45. Mr. REINISCH said that, as the Special Rapporteur had explicitly referred to the hesitation he had expressed with regard to sending the draft articles to the Drafting Committee, he wished to make clear that he would join the consensus, if one emerged, regarding the proposal made by the Special Rapporteur to keep draft articles 3 and 4 in particular within the Drafting Committee.

46. The CHAIRPERSON said that he took it that the Commission wished to refer draft articles 1 to 4 to the Drafting Committee, taking into account the comments and suggestions made in the plenary and with the understanding that draft articles 3 and 4 would stay within the Drafting Committee until the following session, when members of the Commission would have a clearer picture of residual rules on non-succession and succession to be proposed in the second report.

It was so decided.

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

[Agenda item 1]

47. Mr. RAJPUT (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of succession of States in respect of State responsibility was composed of the following members: Mr. Šturma (Special Rapporteur), Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Park, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Vázquez-Bermúdez, Sir Michael Wood and Mr. Aurescu (Rapporteur), *ex officio*.

The meeting rose at 4 p.m.

3382nd MEETING

Wednesday, 26 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

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[407] The Guiding Principles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), pp. 161 *et seq*., paras. 176–177.

Peremptory norms of general international law (*jus cogens*)[408] (*concluded*)[*] (A/CN.4/703, Part II, sect. C, A/CN.4/706)

[Agenda item 7]

INTERIM REPORT OF THE DRAFTING COMMITTEE[409]

1. Mr. RAJPUT (Chairperson of the Drafting Committee) introduced the titles and texts of draft conclusions 1, 2, 3, 4, 5, 6 and 7, as provisionally adopted by the Drafting Committee, which read:

"*Draft conclusion 1. Scope*

"The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*).

"*Draft conclusion 2 [3 (2)]. General nature of peremptory norms of general international law (*jus cogens*)*

"Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

"*Draft conclusion 3 [3 (1)]. Definition of a peremptory norm of general international law (*jus cogens*)*

"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.

"*Draft conclusion 4. Criteria for identification of a peremptory norm of general international law (*jus cogens*)*

"To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

"(*a*) it is a norm of general international law; and

"(*b*) it is accepted and recognized by the international community of States 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.

"*Draft conclusion 5. Bases for peremptory norms of general international law (*jus cogens*)*

"1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).

"2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

"*Draft conclusion 6. Acceptance and recognition*

"1. The requirement of 'acceptance and recognition' as a criterion for identifying a peremptory norm of general international law (*jus cogens*) is distinct from acceptance and recognition as a norm of general international law.

"2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

"*Draft conclusion 7. International community of States as a whole*

"1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).

"2. Acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.

"3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form a part of such acceptance and recognition."

2. The Drafting Committee had held three meetings on the topic, from 13 to 20 July 2017. It had been able, within the time allocated to it, to complete the work left over from the previous year and to consider the Special Rapporteur's proposals for draft conclusions 4 to 8, referred to it in July 2017. Owing to lack of time, the consideration of the Special Rapporteur's proposal for draft conclusion 9 had been deferred to the next session of the Commission, in 2018. Consistent with the approach taken the previous year, the Special Rapporteur had recommended that the draft conclusions remain in the Drafting Committee until the full set had been adopted, so that the Commission would be presented with a full set of draft conclusions before taking action. His own statement, accordingly, was presented in the form of an interim report, intended to provide the Commission with information on the progress made in the Drafting Committee so far.

3. Draft conclusion 2 had originally been proposed by the Special Rapporteur as a second paragraph for draft conclusion 3. A minority of members had continued to express doubts about the legal basis and purpose of the paragraph. The Drafting Committee had considered a

[*] Resumed from the 3374th meeting.

[408] At its 3374th meeting, on 13 July 2017, the Commission decided to change the name of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)" (see the 3374th meeting above, p. 230, para. 42).

[409] Meeting document (distribution limited to the members of the Commission).

proposal for it to be included in a new combined text of draft conclusions 6 and 8. Other suggestions had been to postpone the consideration of the provision with a view to examining it in conjunction with either draft conclusion 7, on the international community as a whole, or draft conclusion 9, on evidence. Another proposal had been to deal with the matter in a preamble to the entire set of draft conclusions. The prevailing view had been that the paragraph should be retained in the text as a self-standing provision: the majority of members considered that it was an important provision that provided a general orientation on the provisions that followed. As to the text itself, it largely followed the one proposed by the Special Rapporteur in his first report, with a technical modification to the use of "*jus cogens*" so as to reflect the new title of the topic. The provision now also included the phrase "reflect and protect", referring to the process of identification of peremptory norms, as well as their consequences.

4. The title of draft conclusion 2 was "General nature of peremptory norms of general international law (*jus cogens*)".

5. The text of draft conclusion 3 had been adopted the previous year. With the relocation of paragraph 2 of the original draft conclusion 3 to a separate draft conclusion, the text now contained only one paragraph. The Drafting Committee had adopted the title "Definition of a peremptory norm of general international law (*jus cogens*)". Despite a suggestion that the title should be shortened to read only "Definition", consensus had been reached on the longer title: it was consistent with the terminology used in article 53 of the 1969 Vienna Convention and it followed the approach used for draft conclusion 4 of the text on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[410]

6. Draft conclusion 4 had been considered on the basis of a revised text, presented by the Special Rapporteur, which sought to address suggestions made by a number of members that, in accordance with article 53 of the 1969 Vienna Convention, the draft conclusion refer, not only to the fact that a peremptory norm was a norm from which no derogation was permitted, but also to the fact that it could be modified only by a subsequent norm of general international law having the same character. The Drafting Committee had also considered the advantages and disadvantages of the Special Rapporteur's proposal to divide subparagraph (*b*) into two separate paragraphs, with non-derogation in (i) and modification in (ii), an approach viewed by some as providing clarity. The proposal had also been made to list modification as a third criterion of identification, under a subparagraph (*c*), but the Special Rapporteur had felt that this would depart from the structure of article 53 of the 1969 Vienna Convention. The Drafting Committee had settled on keeping the two elements of derogation and modification in subparagraph (*b*): they were two aspects of the same criterion, and their separation could lead to the false impression that two separate tests would have to be satisfied to fulfil the criteria for identifying a peremptory norm of general international law.

7. In the course of its discussions, the Drafting Committee had considered the need to ensure consistency of usage, throughout the draft conclusions, of the term "a peremptory norm of general international law (*jus cogens*)"; accordingly, it had introduced that wording, to replace "a norm as one of *jus cogens*", in the *chapeau* of the draft conclusion. Following a suggestion to replace the word "show" with "ascertain" in the *chapeau*, in line with draft conclusion 2 of the draft conclusions on the identification of customary international law,[411] the Drafting Committee had decided that "establish" was the most apt in the present context. It had settled on *démontrer* in the French text, although members had noted a slight discrepancy between the two terms. Lastly, the Drafting Committee had decided to change "two criteria" to "the following criteria" in the *chapeau*, and "it must be" at the start of both subparagraphs (*a*) and (*b*) to "it is", in order to better reflect the fact that the subparagraphs described intrinsic characteristics of a peremptory norm of general international law (*jus cogens*).

8. The title of draft conclusion 4 was "Criteria for identification of a peremptory norm of general international law (*jus cogens*)".

9. Turning to draft conclusion 5, he said that the Drafting Committee had proceeded on the basis of a proposal made by the Special Rapporteur in his second report (A/CN.4/706). The draft conclusion now reflected the agreement reached by members of the Drafting Committee, after lengthy consideration, on various aspects of the initial and revised proposals. The draft conclusion consisted of two paragraphs, whereas the initial proposal had had four. The Drafting Committee had taken into account the various concerns expressed about the meaning of "general international law" and the propriety of adopting a three-tier structure, regarding the sources of peremptory norms, that included not only customary international law and general principles of law but also treaties.

10. The Special Rapporteur's proposal had included a paragraph 1, intended to make a linkage with draft conclusion 4 and to provide some clarity to the term "general international law". Different suggestions had been considered, including deleting the paragraph or moving it to what had become draft conclusion 3 (Definition of a peremptory norm of general international law (*jus cogens*)), or draft conclusion 4 (Criteria for identification of a peremptory norm of general international law (*jus cogens*)). Eventually, the Drafting Committee had decided to delete the paragraph, on the understanding that the Special Rapporteur would provide an explanation in the commentary as to what constituted general international law having a general scope of application.

11. Members had agreed about the important position of customary international law in the formation of peremptory norms of general international law. During the discussion, some members had expressed a preference for the word "source" instead of "basis" for the formation of *jus cogens* norms of international law. Nonetheless, the Drafting Committee had adopted the word "basis", out of

[410] See *Yearbook … 2016*, vol. II (Part Two), p. 93.

[411] See *ibid*., p. 63 (draft conclusion 2).

the concern that "source" was a term used in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, where no reference was made to peremptory norms of general international law. The accompanying commentary would indicate that "basis" was to be understood flexibly, so as to capture a range of ways in which the traditional sources of law might feed into the formation of *jus cogens* norms.

12. Paragraphs 3 and 4 of the initial proposal had been the subject of substantial differences of views within the Drafting Committee. The text had undergone multiple revisions, resulting in the merger of the two paragraphs. Furthermore, the Drafting Committee had decided to invert the order, placing the reference to treaty provisions before that to general principles of law. The Drafting Committee had further refined the text to read "treaty provisions", which had been deemed more appropriate than "provisions in multilateral treaties", as some members considered that peremptory norms of general international law (*jus cogens*) could also be located in bilateral treaties. However, the reference to treaty provisions and general principles of law in a single paragraph was not meant to place them necessarily at the same level. A clarification on the reasoning of the Drafting Committee on that aspect, as well as on the fact that "general principles of law" was to be understood within the meaning of Article 38, paragraph l (*c*), of the Statute of the International Court of Justice, would be provided in the commentary.

13. The title of the draft conclusion 5 was "Bases for peremptory norms of general international law (*jus cogens*)".

14. Draft conclusion 6 had been considered on the basis of a revised proposal presented by the Special Rapporteur which took into account suggestions to streamline the text. The revised proposal combined the Special Rapporteur's proposals for draft conclusions 6 and 8. The basic thrust of the initial draft conclusion was retained—namely, that the requirement of acceptance and recognition for peremptory norms was different from acceptance as law for customary international law and recognition for the purposes of general principles of law.

15. Paragraph 1 had been aligned with the new formulation of the topic title, and the earlier phrase "as law for the purposes of identification of customary international law" had been replaced by "and recognition as a norm of general international law". That had been done on the understanding that, in the commentary, a distinction would be introduced between the identification of peremptory norms of general international law and norms of general international law in general. The inverted commas around "acceptance and recognition" were meant to reflect the fact that the phrase was drawn from article 53 of the 1969 Vienna Convention.

16. The purpose of paragraph 2 was to indicate the evidence required to identify a norm as being a peremptory norm of general international law (*jus cogens*): that such a norm should be accepted and recognized as one from which no derogation was permitted and which could only be modified by a subsequent norm of international law having the same character. The formulation had been aligned with the final sentence of article 53 of the 1969 Vienna Convention.

17. The title of draft conclusion 6 was "Acceptance and recognition".

18. Draft conclusion 7 dealt with the concept of the "international community of States as a whole" for the purposes of identification of peremptory norms of general international law (*jus cogens*). The Drafting Committee had worked on the basis of a revised version of the proposal of the Special Rapporteur. Paragraph 1 largely tracked the initial proposal, except that the second sentence, which referred to the "attitude" of States, a word that had been criticized during the plenary debate, had been deleted.

19. Paragraphs 2 and 3 of the Special Rapporteur's initial proposal had been inverted, so that paragraphs 1 and 2 together dealt with the question of the majority of States required for the identification of a norm as a peremptory norm of general international law (*jus cogens*), while paragraph 3 dealt with the positions of other actors. The Drafting Committee had accepted the suggestion made during the plenary debate that the text be amended to reflect the reference by the Chairperson of the Drafting Committee at the United Nations Conference on the Law of Treaties to a "very large majority of States" as being required for the identification of a norm as a peremptory norm. The commentary would explain that the reference was not necessarily to a numerical consideration, but would also involve a qualitative assessment. The Drafting Committee had considered a proposal to delete the concluding clause, "acceptance and recognition by all States is not required", as being repetitive. However, on balance, it had decided to retain the text, as a useful clarification.

20. Paragraph 3 was a streamlined version of the Special Rapporteur's proposal for paragraph 2. Some of the drafting refinements introduced included: replacing the word "attitudes", which had been considered too vague, with "positions"; replacing "actors other than States" with "other actors"; and including a reference to the role of other actors "in providing context". Notwithstanding such amendments, the basic thrust of the provision, namely that the positions of other actors could not, in and of themselves, form a part of the relevant acceptance and recognition, had been retained.

21. The title of draft conclusion 7 was "International community of States as a whole".

22. Before concluding his report, he wished to pay tribute to the Special Rapporteur, whose knowledge of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. Lastly, he emphasized that the Commission was not, at the present stage, being requested to act on the draft conclusions: his report had been presented for information purposes only.

23. The CHAIRPERSON said he took it that the Commission wished to take note of the statement by the Chairperson of the Drafting Committee.

It was so decided.

Provisional application of treaties (*concluded*)* (A/CN.4/703, Part II, sect. F, A/CN.4/707, A/CN.4/L.895/Rev.1[412])

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)*

24. Mr. RAJPUT (Chairperson of the Drafting Committee) introduced the titles and texts of the draft guidelines on the provisional application of treaties, as adopted by the Drafting Committee and as contained in document A/CN.4/L.895/Rev.1, which read:

Guideline 1. Scope

The present draft guidelines concern the provisional application of treaties.

Guideline 2. Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Guideline 3. General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4. Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

(*a*) A separate treaty; or

(*b*) Any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or international organization that is accepted by the other States or international organizations.

Guideline 5 [6]. Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Guideline 6 [7]. Legal effects of provisional application

The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Guideline 7 [8]. Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Guideline 8 [9]. Termination upon notification of intention not to become a party

Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

Guideline 9 [10]. Internal law of States or rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 10 [11]. Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 11 [12]. Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

25. The topic "Provisional application of treaties" had been dealt with in an earlier report of the Drafting Committee (A/CN.4/L.895) that had been considered during the first part of the current session.[413] On 12 May 2017, following the introduction of that report, the Commission had adopted a set of 11 draft guidelines. At that time, draft guideline 5 had been left in abeyance, as the Drafting Committee had not had enough time to consider it. The Committee had subsequently been able to hold one further meeting, on 24 July 2017. The outcome of the work carried out at that meeting was contained in document A/CN.4/L.895/Rev.l.

26. He wished to pay tribute to the Special Rapporteur, whose constructive approach had facilitated the Drafting Committee's work. Thanks were also due to the members of the Committee, for their active participation, and the secretariat, for its invaluable assistance.

27. Regarding the proposal for a draft guideline 5 on provisional application by means of a unilateral declaration, the Drafting Committee had proceeded on the basis of a revised proposal initially presented by the Special Rapporteur in 2016. The proposal had had two components. The first had addressed the possibility of provisional application arising from a unilateral declaration, where such an outcome was envisaged in the treaty itself or was in some other manner agreed. The second had addressed the situation in which the treaty was silent, and the possibility

* Resumed from the 3357th meeting.

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

[413] See the 3357th meeting above, pp. 84 *et seq.*, paras. 50–76.

that a State could give effect to the provisional application of a treaty by means of a unilateral declaration, provided that no objection was made in that regard.

28. The prevailing view in the Drafting Committee had been that the first component could feature in the draft guidelines as an additional means by which provisional application could be agreed. The Committee had focused on a proposal to include it in the existing text of draft guideline 4, either as an additional specification in subparagraph (*b*) or in a new subparagraph (*c*). Another option that had been considered had been to incorporate it in the part of the commentary explaining the meaning of the phrase "other means or arrangements".

29. In the end, the Drafting Committee had opted for an explicit reference in the text of draft guideline 4 itself, through the addition, at the end of subparagraph (*b*), of the phrase "or a declaration by a State or international organization that is accepted by the other States or international organizations". The inclusion of the reference in draft guideline 4 meant that such a declaration had to be made within the context of an agreement between the parties. That was made clearer by the fact that the text referred to a "declaration by a State", as opposed to a "unilateral declaration", in order to distinguish between the two. There had been agreement that the possibility should be subject to acceptance, rather than to non-objection, since the latter was potentially too uncertain in practice.

30. The necessary agreement could arise in advance, for example, by means of a treaty clause or a conference resolution, thereby allowing each party, separately, the freedom to elect to apply the treaty provisionally. In the commentary, the Commission would elaborate on how such a declaration might manifest itself and make it clear that acceptance of the declaration must be explicit. It would also emphasize that the words "[i]n addition to the case where the treaty so provides" covered the situation in which the treaty was silent but the parties nonetheless agreed to provisional application by other means, including through the acceptance of a declaration.

31. An earlier version of the text had contained a reference to acceptance being "in written form", but the Drafting Committee had decided that the matter was best left to the commentary, where it would be stated that acceptance must be "express" and that most known examples were of agreement in writing. At the same time, by not referring to acceptance as having to be in writing, the draft guidelines would retain a certain flexibility and allow for other modes of acceptance.

32. As to provisional application by means other than through agreement, some members had been concerned that the legal effects of unilateral acts lay outside the scope of the topic, *stricto sensu*, and should therefore not feature in the text. Others had stressed that, since the text was in the form of draft guidelines, it could provide guidance on alternative modes of agreement, regardless of how infrequently they arose. The prevailing view had been that the matter should not be addressed in the text of draft guideline 4, but could be referred to in the commentary thereto.

33. For the sake of clarity, the Drafting Committee had decided to refer, in subparagraph (*a*), to a "separate treaty" rather than a "separate agreement", since subparagraph (*b*) also dealt with agreement, albeit through other modes. The title of draft guideline 4 had been amended to read "Form of agreement" in order to emphasize the purpose of the provision. With the new wording of draft guideline 4 (*b*), there was no longer a need for a draft guideline 5 on unilateral declarations to be retained. The subsequent draft guidelines had been renumbered accordingly.

34. As to draft guideline 2, there had been a proposal to make an explicit reference to the 1986 Vienna Convention, but it had instead been agreed that the commentary would treat the 1969 Vienna Convention and the 1986 Vienna Convention as not being on the same level, as was implied by the text of draft guideline 2.

35. Draft guideline 3 had been aligned with draft guideline 6 through the addition of the phrase "between the States or international organizations concerned".

36. With regard to draft guideline 6, one member of the Commission had objected to the reference to the provisional application of a treaty as producing "the same legal effects as if the treaty were in force", arguing that it did not accurately reflect the legal position. Some members had raised a procedural objection to reopening the matter, on the grounds that the Drafting Committee was at the *toilettage* stage and that draft guideline 6 had been approved by the plenary Commission.

37. The Committee had considered an alternative formulation that would indicate that the provision was "without prejudice to draft guideline 8", but had been hesitant to introduce any such modification at that stage. It had been proposed, and the Special Rapporteur had agreed, that the issue be addressed in the commentary. If necessary, the draft provision could be reconsidered during the second reading.

38. In draft guideline 8, the word "is" had been preferred to "shall", in keeping with the style favoured by the Commission for draft guidelines. Lastly, the title of draft guideline 11 had been amended by replacing the word "regarding" with the phrase "to provisional application with". Some minor technical changes had also been made to the provision.

39. To conclude, he recommended that the Commission adopt the revised draft guidelines as presented by the Drafting Committee.

40. The CHAIRPERSON invited the Commission to adopt the titles and texts of the draft guidelines, as provisionally adopted by the Drafting Committee at the sixty-seventh to sixty-ninth sessions of the Commission and contained in document A/CN.4/L.895/Rev.1.

Draft guidelines 1 to 3

Draft guidelines 1 to 3 were adopted.

Draft guideline 4

41. The CHAIRPERSON said that the first words of subparagraphs (*a*) and (*b*) should be entirely in lower case. The word "concerned" should be inserted at the very end of subparagraph (*b*).

42. Mr. MURPHY proposed that the word "an" should be added before the second occurrence of the term "international organization" in subparagraph (*b*).

Draft guideline 4, as amended, was adopted.

Draft guidelines 5 to 8

Draft guidelines 5 to 8 were adopted.

Draft guideline 9

43. The CHAIRPERSON said that the word "a" should be inserted before the phrase "part of a treaty" in paragraphs 1 and 2.

Draft guideline 9, as amended, was adopted.

Draft guideline 10

44. The CHAIRPERSON said that the word "a" should be inserted before the phrase "part of a treaty" in paragraphs 1 and 2.

Draft guideline 10, as amended, was adopted.

Draft guideline 11

Draft guideline 11 was adopted.

45. The CHAIRPERSON said he took it that the Commission wished to adopt the report of the Drafting Committee on the provisional application of treaties, as contained in document A/CN.4/L.895/Rev.1.

It was so decided.

Farewell to Mr. Roman Kolodkin

46. The CHAIRPERSON, speaking in Russian, said that the Commission was very sorry to lose an excellent colleague and kind person in Mr. Kolodkin, who had contributed enormously to the work of the Commission and to the sense of collegiality among its members. The Commission wished him well in his future endeavours as a judge at the International Tribunal for the Law of the Sea.

47. Mr. KOLODKIN said that he had been fortunate enough to serve on the Commission and thereby to make his own modest contribution to the codification and progressive development of international law. He was thankful to all his colleagues, past and present. There had been disagreements, but they had never had an impact on their warm personal relationships. Over the years, he had forged a number of close friendships, and that was one of the things he would treasure most from his time in the Commission.

The meeting rose at 10.50 a.m.

3383rd MEETING

Monday, 31 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

Succession of States in respect of State responsibility (*concluded*)[*] (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

Report of the Drafting Committee

1. Mr. RAJPUT (Chairperson of the Drafting Committee), presenting the seventh and last report of the Drafting Committee for the sixty-ninth session of the Commission, on the topic "Succession of States in respect of State responsibility", said that the Committee had met on 25 July 2017 to consider the four draft articles proposed in the first report of the Special Rapporteur on the topic (A/CN.4/708), which the Commission had decided to refer to the Committee. He recalled that the Special Rapporteur, in summing up the plenary debate on the topic, had recommended that draft articles 3 and 4 should remain under the Drafting Committee's consideration until the Commission's next session, when Commission members would have a clearer picture of the residual rules on non-succession and succession to be proposed in the Special Rapporteur's second report.[414] Accordingly, his statement constituted an interim report on the progress made thus far by the Drafting Committee.

2. In line with the Special Rapporteur's recommendation, the Drafting Committee had considered only draft articles 1 and 2 as proposed in the Special Rapporteur's first report, together with a number of reformulations suggested by the Special Rapporteur in response to suggestions made and concerns raised during the plenary debate. The Special Rapporteur's mastery of the subject, guidance and cooperation had greatly facilitated the Committee's work.

3. The Drafting Committee had retained the English text of draft article 1, entitled "Scope", as originally proposed by the Special Rapporteur, with only one amendment: the word "effect" had been changed to "effects", to align the text with that of the corresponding articles of the 1978 Vienna Convention and the 1983 Vienna Convention. In the French version of the draft article, the title had been changed from *Portée* to *Champ d'application* for the sake of consistency with the Commission's past practice.

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[*] Resumed from the 3381st meeting.

[414] See the 3381st meeting above, p. 291, para. 44.

4. The Drafting Committee had discussed whether it might be appropriate to refer, in draft article 1, to "rights and obligations" rather than to "the responsibility of States for internationally wrongful acts". The Committee had decided to retain the latter wording, as proposed in the Special Rapporteur's report, because it reflected the title of the topic and was consistent with the 1978 Vienna Convention and the 1983 Vienna Convention. Furthermore, as was clarified in the Special Rapporteur's report, the notion of rights and obligations was implicit and did not need to be mentioned separately. The term "responsibility of States" was understood as not suggesting that the successor State was necessarily responsible for an internationally wrongful act. The commentary would clarify that understanding and would stress the importance of the concept of rights and obligations in the context of the topic.

5. The English version of the title of draft article 2, "Use of terms", had been retained as originally proposed by the Special Rapporteur, but the French version had been changed from *Définitions* to *Expressions employées* for the sake of consistency with the Commission's past practice. Subparagraphs (*a*), (*b*), (*c*) and (*d*) of that draft article, defining the terms "succession of States", "predecessor State", "successor State" and "date of the succession of States", respectively, had been adopted by the Drafting Committee as proposed in the Special Rapporteur's report. Those definitions were consistent with the ones set forth in the 1978 Vienna Convention and the 1983 Vienna Convention and in the draft articles on nationality of natural persons in relation to the succession of States.[415]

6. The text proposed in the Special Rapporteur's report also included a subparagraph (*e*) defining the term "international responsibility". However, as the Special Rapporteur had noted at the conclusion of the plenary debate, it appeared that this definition was unnecessary and that the Commission should retain only the uncontroversial definitions taken from the 1978 Vienna Convention and the 1983 Vienna Convention. In line with that suggestion, the Drafting Committee had deleted subparagraph (*e*), considering that the concepts of "State responsibility" and "internationally wrongful acts" could be explained in the commentary. Moreover, the Commission could decide to define additional terms in draft article 2 as its work on the topic progressed. Lastly, he reiterated that he had presented his report for information purposes only, as the Commission was not being requested to take action on the draft articles at the current stage.

7. The CHAIRPERSON said he took it that the Commission wished to take note of the interim report presented by the Chairperson of the Drafting Committee.

It was so decided.

Draft report of the International Law Commission on the work of its sixty-ninth session

8. The CHAIRPERSON said that, in line with its past practice, the Commission would adopt its report paragraph by paragraph. The members would need to focus on substantive issues and to show self-discipline in order to achieve the consensus on which the Commission's authority depended. They should also bear in mind the Commission's practice of not reopening a discussion on draft texts that had previously been adopted on a provisional basis.

Chapter IV. *Crimes against humanity* (A/CN.4/L.900 and Add.1/Rev.1 and Add.2–3)

9. The CHAIRPERSON said that, at its sixty-seventh and sixty-eighth sessions, the Commission had already provisionally adopted the bulk of the draft articles and commentaries thereto on the topic of crimes against humanity. He invited the Commission to consider chapter IV of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.900.

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

10. Mr. MURPHY (Special Rapporteur) said that he would like the report to reflect, either in paragraph 7 or elsewhere, the fact that the Drafting Committee had discussed the draft texts at its meeting of 6 July 2017, the outcome of which had been reported to the Commission by the Chairperson of the Drafting Committee on 19 July 2017.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

11. The CHAIRPERSON said that paragraphs 8 to 10 would be revisited once the Commission had adopted the entire chapter of the report.

C. Text of the draft articles on crimes against humanity adopted by the Commission on first reading

1. Text of the draft articles

Paragraph 11

12. Mr. MURPHY (Special Rapporteur) recalled that paragraph 4 *bis* had been added to draft article 6 during the course of the current session; the Secretariat, therefore, would insert it as a new paragraph 5 in draft article 6, and would renumber the subsequent paragraphs accordingly.

Paragraph 11 was adopted.

13. The CHAIRPERSON invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.900/Add.1/Rev.1.

[415] The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

14. Mr. MURPHY (Special Rapporteur) said that document A/CN.4/L.900/Add.1/Rev.1 reflected minor changes to the provisionally adopted commentaries that had previously been issued in document A/CN.4/L.900/Add.1. The changes mostly concerned citations and stylistic adjustments to keep the commentaries consistent. In response to a concern that had been raised by one of the newly elected Commission members, he said that the commentaries were being adopted on first reading and that further changes could be introduced on second reading.

15. Mr. JALLOH said that he had raised the issue and that he did not object to proceeding, on the understanding that concerns about incomplete citations and other more substantive aspects on how to strengthen the commentaries would be addressed on second reading. That seemed to be a sensible way to proceed, in view of the lack of time to adopt the entire annual report and to propose substantial changes to the commentary from the plenary floor. It was based on that understanding that he had not submitted detailed line-by-line proposals, but expected that this could be done during the second reading.

2. Text of the draft articles and commentaries thereto

Commentary to draft article 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

16. Mr. MURPHY (Special Rapporteur) said that paragraph (3) referred to the avoidance of any conflicts with the obligations of States in respect of international criminal tribunals. While that paragraph was useful, it was in the wrong place, as there was now a general commentary to the draft articles as a whole, contained in document A/CN.4/L.900/Add.2. He proposed that paragraph (3) be moved to the end of that general commentary, where it would become paragraph (4).

It was so decided.

The commentary to draft article 1, as amended, was adopted.

Commentary to draft article 2 (General obligation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

17. Mr. MURPHY (Special Rapporteur) said that, in the first sentence of paragraph (6), the word "however" should be replaced with "also" and the commas around it should be deleted. Further on in that same sentence, the phrase "no connection" should read "a connection".

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

18. Mr. MURPHY (Special Rapporteur) said that the second sentence of paragraph (9), which referred to the "*chapeau*" requirements set out in paragraph 1 of draft article 3, should closely track the wording of those requirements in that draft article. He thus proposed that the end of the sentence be amended to read "directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack".

19. Sir Michael WOOD said that he agreed with the proposed drafting changes. Moreover, he proposed that the phrase "committed within the context of" in that same sentence be amended to read "committed as part of".

Paragraph (9), as amended, was adopted.

The commentary to draft article 2, as amended, was adopted.

Commentary to draft article 3 (Definition of crimes against humanity)

Paragraphs (1) to (41)

Paragraphs (1) to (41) were adopted.

The commentary to draft article 3 was adopted.

Commentary to draft article 4 (Obligation of prevention)

Paragraphs (1) to (11)

Paragraphs (1) to (11) were adopted.

Paragraph (12)

20. Mr. MURPHY (Special Rapporteur) said that, at the beginning of the second sentence of paragraph (12), the words "For the latter" should be replaced with "In this instance".

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (23)

Paragraphs (13) to (23) were adopted.

The commentary to draft article 4, as amended, was adopted.

Commentary to draft article 6 (Criminalization under national law)

Paragraph (1)

21. Mr. MURPHY (Special Rapporteur) recalled that some of the paragraphs in draft article 6 would be renumbered to accommodate the insertion of paragraph 4 *bis* as the new paragraph 5. In the first sentence of paragraph (1) of the commentary, the words "to preclude any superior orders defence" should be replaced with "to preclude certain defences", since that wording encompassed both the superior orders defence—addressed in paragraph 4—and the official position defence—addressed in what would now be paragraph 5.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (23)

Paragraphs (2) to (23) were adopted.

Paragraph (24)

22. Mr. MURPHY (Special Rapporteur) said that, in the first sentence, the phrase "excluding criminal responsibility" should be changed to "excluding substantive criminal responsibility", since that wording would be consistent with that of the commentary to be adopted for the new paragraph 5 on the official position defence.

Paragraph (24), as amended, was adopted.

Paragraphs (25) to (46)

Paragraphs (25) to (46) were adopted.

Commentary to draft article 7 (Establishment of national jurisdiction)

Paragraph (1)

23. Mr. MURPHY (Special Rapporteur) said that the words "referred to in draft article 6" should be replaced with "covered by the present draft articles", in keeping with the approach taken in the other draft articles.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (11)

Paragraphs (2) to (11) were adopted.

The commentary to draft article 7, as amended, was adopted.

Commentary to draft article 8 (Investigation)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 8 was adopted.

Commentary to draft article 9 (Preliminary measures when an alleged offender is present)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 9 was adopted.

Commentary to draft article 10 (*Aut dedere aut judicare*)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

24. Mr. MURPHY (Special Rapporteur), supported by Sir Michael WOOD, said that, in the first sentence, the words "or extradites or surrenders the person" should be deleted, since the focus of the second sentence of draft article 10 was on the submission of a matter to prosecution by a State.

Paragraph (7), as amended, was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

25. Mr. MURPHY (Special Rapporteur) said that Mr. Grossman Guiloff had proposed two amendments to paragraph (10): the addition of a sentence at the end of the paragraph that would read "Since the entry into force of the 1998 Rome Statute of the International Criminal Court, several States have adopted national laws that ban amnesties and similar measures with respect to crimes against humanity", and the insertion of a footnote citing relevant national laws in nine countries, namely Argentina, Burkina Faso, Burundi, the Central African Republic, Colombia, the Comoros, the Democratic Republic of the Congo, Panama and Uruguay. He personally agreed with the proposals.

26. Mr. TLADI said that he did not object to the proposals, provided that the Special Rapporteur had checked the content of the national laws in question. He would, however, prefer to replace the word "ban" with a more formal term.

27. Mr. MURPHY (Special Rapporteur) said that he had checked the content of the national laws. The word "prohibit" could be used instead of "ban".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

The commentary to draft article 10, as amended, was adopted.

Commentary to draft article 11 (Fair treatment of the alleged offender)

Paragraphs (1) to (10)

Paragraphs (1) to (10) were adopted.

The commentary to draft article 11 was adopted.

28. The CHAIRPERSON invited the Commission to consider the portion of chapter IV contained in document A/CN.4/L.900/Add.2.

Paragraph 1

Paragraph 1 was adopted.

General commentary

Paragraph (1)

29. Mr. TLADI proposed the addition of two sentences at the end of the paragraph, which should read: "On the other hand, the view was expressed that neither the Convention on the Prevention and Punishment of the Crime of Genocide nor the Geneva Conventions for the Protection of War Victims and related Protocols established elaborate inter-State cooperation mechanisms as provided for in the present draft articles. For that reason, it was considered that other core crimes could also have been addressed in the present draft articles."

30. Sir Michael WOOD said that the word "elaborate" in Mr. Tladi's proposal should be replaced with "detailed" or a similar term.

31. The CHAIRPERSON said that it would be left to Mr. Tladi and the secretariat to finalize the wording of the proposed text to be inserted at the end of the paragraph.

Paragraph (1) was adopted on that understanding.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

New paragraph (4)

32. The CHAIRPERSON recalled that the Commission had agreed to the Special Rapporteur's proposal to move paragraph (3) of the commentary to draft article 1 to the end of the general commentary, where it had become paragraph (4).

New paragraph (4) was adopted.

The general commentary, as amended, was adopted.

Commentary to the preamble

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

33. Mr. MURPHY (Special Rapporteur) said that, in the second sentence, the words "and magnitude" should be deleted.

34. Mr. JALLOH proposed that, in the same sentence, the word "gravity" be used in place of "heinousness".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

35. Mr. PARK said that, in the second footnote to the paragraph, the words "will be" should be replaced with "was".

It was so decided.

36. Mr. PARK, noting that, in the third footnote to the paragraph, the Special Rapporteur introduced the short form of the name of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment but that, in subsequent paragraphs of the text of the commentaries, he reverted to the full name, asked what approach had been taken with regard to the style of the document.

37. Mr. MURPHY (Special Rapporteur) said that, as he understood it, the Convention should be cited in full throughout the text of the commentaries. In the footnotes, the name should be given in full on first reference, with the short form used thereafter. He would liaise with the secretariat to ensure consistency in the style of the document.

Paragraph (4), as amended, was adopted on that understanding.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

38. Mr. PARK said that the second subparagraph, beginning with the words "The ninth preambular paragraph", should form a new paragraph (10).

Paragraph (9), as amended, was adopted.

New paragraph (10)

New paragraph (10) was adopted.

The commentary to the preamble, as amended, was adopted.

Commentary to draft article 5 (*Non-refoulement*)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

39. Mr. PARK proposed that it be specified, in the second sentence, that a State's "other obligations of *non-refoulement*" concerned refugees, among others.

40. Mr. MURPHY (Special Rapporteur) said that, in paragraph (2), it was said that the principle of *non-refoulement* was commonly associated with refugees. Then, in paragraph (3), it was mentioned that the principle of *non-refoulement* had been applied to persons other than refugees in a wide range of instruments, with particular attention to the situation of torture and enforced disappearance noted in paragraphs (4) and (5). Bearing in mind the content of paragraphs (2) to (5), the meaning of the "without prejudice" clause discussed in paragraph (6) was clear. He was therefore of the opinion that no changes were necessary.

41. Mr. SABOIA said that the paragraph was drafted correctly and should be adopted as it stood.

Paragraph (6) was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

42. Mr. GROSSMAN GUILOFF said that, in the last sentence, it should be made clear that the seven elements on the non-exhaustive list drawn up by the Committee against Torture were not, in themselves, sufficient to determine whether a person's return was permissible. Those and other elements had to be assessed in relation to the specific circumstances of each case.

43. The CHAIRPERSON said that, to address that concern, the words "to be considered" could be replaced with "that need to be assessed in each individual case".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

The commentary to draft article 5, as amended, was adopted.

Commentary to draft article 12 (Victims, witnesses and others)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

44. Mr. GROSSMAN GUILOFF said that the wording of the first sentence created some confusion as to whether the "term" it referred to was "rights of victims" or "victims". Under customary international law, a victim was a person who had suffered harm, and most treaties operated on the basis of that definition without expanding upon it. As currently worded, the paragraph left the definition of "victim" to the discretion of national legal systems, which was not the Commission's intention.

45. Mr. MURPHY (Special Rapporteur) said that the point of the first sentence was that most treaties did not define the term "victim", although some exceptions and the corresponding definitions contained in those treaties were listed in the first footnote to the paragraph. In order to address the concern raised by Mr. Grossman Guiloff, he suggested that, in the second sentence, the phrase "and under customary international law" be inserted after the word "treaties". That would convey the idea that there was a backdrop of customary international law that informed the Commission's understanding in that area.

46. Sir Michael WOOD said that he supported the Special Rapporteur's suggestion. In addition, he proposed, in the first sentence, the removal of the quotation marks from the word "victims" and the replacement of the words "that term" with the words "the term 'victim'".

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

47. Mr. MURPHY (Special Rapporteur) suggested that, at the beginning of the second sentence, the word "Later" be replaced with the word "Recent".

Paragraph (8), as amended, was adopted.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were adopted.

Paragraph (12)

48. Mr. GROSSMAN GUILOFF proposed the addition, to the end of the paragraph, of a "without prejudice" clause indicating that the article did not exclude the obligations acquired by States under international law. Such a clause was necessary because some treaties set forth obligations that did not provide the sort of flexibility referred to in paragraph (12).

49. The CHAIRPERSON asked whether the "without prejudice" clause should read: "Draft article 12, paragraph 2, is without prejudice to the other obligations acquired by States under international law."

50. Mr. MURPHY (Special Rapporteur) said that he had some reservations about the words "acquired by States" and suggested that the clause be reformulated to read: "Paragraph 2 is without prejudice to other obligations of States that exist under conventional or customary international law."

51. Mr. GROSSMAN GUILOFF said that he objected to the inclusion of the word "other".

52. Mr. MURPHY (Special Rapporteur) said that the word "other" referred to the fact that paragraph 2 was setting forth an obligation, and that this obligation was without prejudice to "other" obligations of States that might be comparatively stronger.

53. Mr. VÁZQUEZ-BERMÚDEZ said that the sentence should refer only to "international law", which encompassed both conventional and customary international law.

Paragraph (12), as amended by the Special Rapporteur and Mr. Vázquez-Bermúdez, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

54. The CHAIRPERSON suggested that, in the second sentence, the words "or enact" be inserted after the words "obliges States to have", since, in the case of a civil war or other conflict, it often happened that a State did not have or could not envisage ahead of time the kind of legislation it needed in order to provide redress for victims. That point was also made in paragraphs (16) and (19) of the commentary to draft article 12.

Paragraph (14), as amended, was adopted.

Paragraphs (15) to (18)

Paragraphs (15) to (18) were adopted.

Paragraph (19)

55. Mr. JALLOH said that he had a concern about paragraph (14) that was related to paragraph (19). He was not sure that paragraph (14) reflected the flexibility to determine the appropriate form of reparation that Commission members in the Drafting Committee had wished to give States in recognition of the different circumstances in which crimes against humanity occurred. It might, in fact, be read as requiring States to do more than they were capable of doing. For that reason, he proposed that, in the penultimate sentence of paragraph (19), the word "any" be inserted before the word "capacity" and a sentence be inserted before the final sentence that would read: "The formulation of 'as appropriate' is thus intended to recognize that there is a margin of appreciation for States."

56. Mr. GROSSMAN GUILOFF said that he objected to the proposed inclusion of the word "any" before the phrase "capacity to provide substantive redress" and wondered whether the intended reference was to compensation, which was an element of redress. He proposed that the same "without prejudice" clause that had just been adopted for inclusion at the end of paragraph (12) also be added to the end of paragraph (19).

57. The CHAIRPERSON suggested, in the penultimate sentence, replacing the word "substantive" with the word "material", in keeping with the wording used in paragraph (18) of the commentary, which referred to "material and moral damages".

It was so decided.

58. Mr. PARK said that a number of members had referred to the concept of transitional justice during the plenary debate on the topic. He therefore proposed the addition of a sentence at the end of the paragraph that would read: "In the past, the so-called 'transitional justice' has also tailored the form and amount of reparation."

59. Mr. GROSSMAN GUILOFF said that he did not like the expression "so-called" because it could be interpreted as pejorative. He proposed replacing that wording with a formulation such as "the transitional justice requirements that took the form of reparative justice".

60. The CHAIRPERSON, in an attempt to reconcile the two proposals just made, suggested the wording "In the past, transitional justice arrangements have also tailored the form and amount of reparation".

61. Mr. MURPHY (Special Rapporteur), supported by Sir Michael WOOD, suggested that the second sentence might read better if the word "tailored" was replaced with the word "addressed".

62. Mr. GROSSMAN GUILOFF, referring to Mr. Jalloh's proposal, said that the term "margin of appreciation" had a specific technical meaning in the context of the European Union and had elicited strong doctrinal objection in the Western hemisphere. If the Commission used that term, it would have to define it. Perhaps the phrase "measure of discretion" could be used instead.

63. The CHAIRPERSON suggested using the expression "margin of discretion".

64. Sir Michael WOOD said that the additional sentence proposed by Mr. Jalloh seemed redundant in the light of the second sentence of the paragraph. He doubted whether it was necessary to include the word "any".

65. Ms. LEHTO said that she had a concern regarding the wording of Mr. Park's proposal.

66. Mr. JALLOH said that he endorsed the Chairperson's suggestion that the phrase "margin of discretion" should be used, but he disagreed with Sir Michael that the sentence he had proposed was an unnecessary repetition. Rather, his own view was that it would serve to emphasize the point that States were to be accorded flexibility.

The meeting was suspended at 12 p.m. and resumed at 12.20 p.m.

67. Mr. MURPHY (Special Rapporteur) suggested, following consultations with Mr. Grossman Guiloff, Mr. Jalloh, Mr. Park and Sir Michael Wood, that several changes be made to the second sentence: the phrase "must have flexibility to determine" should be amended to read "must have some flexibility and discretion to determine", and the phrase ", including those of transitional justice," should be inserted after the word "arise". In the penultimate sentence, the word "any" should be inserted before the word "capacity" and the word "substantive" should be replaced with the word "material". Lastly, he suggested the addition of a final sentence that would read: "Paragraph 3 is without prejudice to other obligations of States that exist under international law."

Paragraph (19), as amended, was adopted.

Paragraph (20)

Paragraph (20) was adopted.

Paragraph (21)

68. Mr. GROSSMAN GUILOFF, referring to the final sentence of the paragraph, said that as the Extraordinary Chambers in the Courts of Cambodia had experienced a variety of problems, including the resignation of judges, it was not a good example to which reference should be made. He therefore proposed the deletion of the final sentence.

69. Mr. MURPHY (Special Rapporteur) said that, while he acknowledged that there were some concerns about the operation of the Extraordinary Chambers in the Courts of Cambodia, throughout the Commission's work on the draft articles it had referred to the structural elements of the Chambers, in particular the agreement between the United Nations and Cambodia regarding the Chambers.[416] For that reason, it would be appropriate to mention that tribunal along with other "hybrid" tribunals, such as the Special Tribunal for Lebanon and the Special Court for Sierra Leone. However, the Commission should certainly be vigilant and not draw on any decisions of the Chambers about which it had any qualms.

70. Mr. GROSSMAN GUILOFF said that the Extraordinary Chambers in the Courts of Cambodia were being mentioned as proof of a trend, whereas they had in fact been a failure and had been widely criticized. It would therefore be better if any reference to them was put in a footnote.

71. The CHAIRPERSON, speaking as a member of the Commission, said that his understanding was that different examples would be cited to illustrate different approaches to reparations.

72. Mr. JALLOH said that he endorsed Mr. Murphy's position, especially as it was not only the *ad hoc* criminal tribunals, such as the Extraordinary Chambers in the Courts of Cambodia, that had been criticized. Many of the other tribunals had also been criticized, for various reasons, including the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda, the Special Court for Sierra Leone and even the permanent International Criminal Court. If all such criticisms were taken into account in determining the rulings of international

[416] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117.

tribunals to cite in the commentary as explanations of the legal principles contained in the commentary, the Commission would be bereft of any judicial practice to cite.

Paragraph (21) was adopted.

The commentary to draft article 12, as amended, was adopted.

Commentary to draft article 13 (Extradition)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were adopted.

Paragraph (9)

73. Mr. PARK asked whether the International Convention against the Taking of Hostages and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment could really be described as "older treaties".

74. Mr. MURPHY (Special Rapporteur) said he conceded that age might be in the eye of the beholder. He could agree to the deletion of the phrase "of the older".

75. The CHAIRPERSON, speaking as a member of the Commission, said that relative age might sometimes be important to the argument. The text seemed to argue that more recent treaties addressed the issue in a more differentiated manner than earlier treaties. While the word "older" might indeed be rather harsh, the word "earlier" would preserve the line of reasoning and still meet Mr. Park's concern.

76. Mr. MURPHY (Special Rapporteur) said that he would be prepared to amend the text to refer to "earlier treaties".

77. Mr. PARK, supported by Mr. OUAZZANI CHAHDI, said that he preferred the Special Rapporteur's first proposal, whereby the phrase "of the older" would be deleted.

Paragraph (9), with the first amendment proposed by the Special Rapporteur, was adopted.

Paragraph (10)

78. Mr. MURPHY (Special Rapporteur) said that, in the last sentence, the paragraph numbers in brackets should read "(16) to (18) and (24) to (26) below".

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (25)

Paragraphs (11) to (25) were adopted.

Paragraph (26)

79. Mr. PARK proposed the insertion of the adjectives "basic" or "fundamental human" before the word "rights" in the fourth sentence, because the unqualified reference to "rights" was rather vague.

80. The CHAIRPERSON, speaking as a member of the Commission and supported by Mr. SABOIA, said that qualification of the word "rights" might have the unintended effect of restricting the protection afforded to individuals facing extradition, because some of the rights affected might be procedural rather than basic, fundamental or human rights. Perhaps Mr. Park's concern could be addressed by replacing the phrase "a danger that their rights will be violated" with the phrase "a danger that rights, in particular their basic rights, will be violated".

Paragraph (26), as amended by the Chairperson, was adopted.

Paragraphs (27) and (28)

Paragraphs (27) and (28) were adopted.

Paragraph (29)

81. Mr. PARK proposed the insertion, in the last sentence, of the year of the adoption of the Model Treaty on Extradition and the inclusion of a cross-reference to the last footnote to paragraph (1) of the commentary to draft article 13 in the footnote to paragraph (29) of this commentary.

82. Mr. MURPHY (Special Rapporteur) said that none of the references to the Model Treaty on Extradition in the commentary mentioned the year of its adoption. Insertion of the year would create additional work for the Secretariat. Moreover, it was not customary to provide cross-references in footnotes referring to treaties. Any departure from that practice would cause the Secretariat a huge amount of additional work.

83. Mr. JALLOH said that some helpful material on competing requests for extradition was missing from paragraphs (29) and (30). During the debate in plenary meetings in May 2017, he had proposed the inclusion of some basic provisions setting out criteria drawn, *inter alia*, from article 90 of the Rome Statute of the International Criminal Court, which could be used by the relevant authorities to resolve circumstances of competing requests. However, those had not been included in the draft articles on crimes against humanity, nor were they referred to in the commentary. In his view, providing States with some guidance on how to address such requests, especially given the desire of the Commission to complement the work of the International Criminal Court at the horizontal level, was a matter which should be taken up on the second reading of the draft articles and the commentary thereto. Otherwise, it might leave an avoidable gap which could cause problems in practice.

Paragraph (29) was adopted.

Paragraphs (30) to (33)

Paragraphs (30) to (33) were adopted.

The commentary to draft article 13, as amended, was adopted.

Commentary to draft article 14 (Mutual legal assistance)

Paragraphs (1) to (21)

Paragraphs (1) to (21) were adopted.

The commentary to draft article 14 was adopted.

Commentary to draft article 15 (Settlement of disputes)

Paragraph (1)

84. Mr. MURPHY (Special Rapporteur) proposed that, in the third sentence, the phrase "can be resolved" be amended to read "are addressed".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were adopted.

85. Ms. ESCOBAR HERNÁNDEZ said that, when the draft article had been adopted, she had expressed the opinion that the inclusion of a provision on the settlement of disputes was unnecessary. She would therefore appreciate the insertion of an additional paragraph in the commentary, which should read:

> "The view was expressed according to which the draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. In addition, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide."

86. Mr. MURPHY (Special Rapporteur) proposed that the wording suggested by Ms. Escobar Hernández become paragraph (6) of the commentary.

87. Mr. JALLOH said that he endorsed the second sentence in the new paragraph proposed by Ms. Escobar Hernández for the sake of consistency with the Convention on the Prevention and Punishment of the Crime of Genocide. That had been his own position in the Drafting Committee.

88. The CHAIRPERSON asked Ms. Escobar Hernández to provide the secretariat with a written version of the paragraph she was proposing, for circulation to the members of the Commission and discussion at the following meeting.

The meeting rose at 1.05 p.m.

3384th MEETING

Monday, 31 July 2017, at 3 p.m.

Chairperson: Mr. Georg NOLTE

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

Draft report of the International Law Commission on the work of its sixty-ninth session (*continued*)

Chapter IV. *Crimes against humanity* (*concluded*) (A/CN.4/L.900 and Add.1/Rev.1 and Add.2–3)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.900/Add.2.

C. Text of the draft articles on crimes against humanity adopted by the Commission on first reading (*concluded*)

2. Text of the draft articles and commentaries thereto (*concluded*)

Commentary to draft article 15 (Settlement of disputes) (*concluded*)

2. The CHAIRPERSON said that Ms. Escobar Hernández had drafted a proposal for an additional paragraph (6) to be inserted in the commentary, which read:

> "The view was expressed according to which the draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. In addition, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Convention on the Prevention and Punishment of the Crime of Genocide."

3. Ms. ESCOBAR HERNÁNDEZ said that Mr. Jalloh had proposed a few editorial changes to the English version of the text, all of which she found acceptable, and said that it would be advisable for him to explain them to the Commission.

4. Mr. JALLOH said that he had discussed the minor changes in question with Ms. Escobar Hernández and the Special Rapporteur, Mr. Murphy, and that they had both found the changes acceptable. The first sentence should begin with the words "A view" instead of "The view", and at the beginning of the second sentence, the words "In addition" should be replaced with "On the other hand".

5. The CHAIRPERSON said he took it that the Commission agreed to the proposal to insert additional paragraph (6), as amended, in the commentary to draft article 15.

It was so decided.

The commentary to draft article 15, as amended, was adopted.

6. The CHAIRPERSON invited the Commission to consider the commentary to the annex to the draft articles.

Commentary to the annex

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Designation of a central authority

Paragraph (3)

Paragraph (3) was adopted.

Procedures for making a request

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Response to the request by the requested State

Paragraphs (8) to (15)

Paragraphs (8) to (15) were adopted.

Use of information by the requesting State

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

Testimony of person from the requested State

Paragraphs (19) to (21)

Paragraphs (19) to (21) were adopted.

Transfer for testimony of person detained in the requested State

Paragraphs (22) to (25)

Paragraphs (22) to (25) were adopted.

Costs

Paragraphs (26) to (30)

Paragraphs (26) to (30) were adopted.

The commentary to the annex to the draft articles was adopted.

7. The CHAIRPERSON invited the Commission to consider the portion of chapter IV of the draft report contained in document A/CN.4/L.900/Add.3.

Commentary to draft article 6 (Criminalization under national law) (*concluded*)

Commentary to draft article 6, paragraph 4 bis

Subheading and paragraphs (1) and (2)

8. Mr. MURPHY (Special Rapporteur) said it had been agreed that paragraph 4 *bis* of draft article 6 would be renumbered 5. The references to paragraph 4 *bis* in the commentary would be amended accordingly. Since the rest of the commentary to draft article 6 contained small subheadings, he proposed adding a subheading, "*Official position*", before paragraph (1).

9. Mr. JALLOH said that, in his view, paragraph (1) could have given more comprehensive coverage to the prior positions of the Commission on the issue of irrelevance of official capacity. Specifically, the Commission's commentary to the 1996 draft code of crimes against the peace and security of mankind,[417] as well as other instruments adopted before then, had addressed in great detail the notion that the official position or capacity of a person had no bearing on his or her criminal responsibility, nor could a person's official status be invoked as a way to seek mitigation during sentencing. In that regard, the commentary to the provision under consideration, which aimed to accomplish the same thing in relation to the draft articles on crimes against humanity, could have included additional references to materials and shown the pedigree of that notion going as far back as the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[418] and Control Council Law No. 10.[419] Further on in the commentary, the Special Rapporteur had indeed included references to article 27, paragraph 1, of the Rome Statute of the International Criminal Court, which had been the basis of the paragraph in question, but he had not mentioned the equivalent provisions of statutes for *ad hoc* tribunals such as article 7 of the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia,[420] article 6 of the Statute of the International Tribunal for Rwanda[421] and article 6 of the Statute of the Special Court for Sierra Leone.[422] He asked whether it would be possible to insert that additional information on second reading.

10. His second comment was more substantive. As currently written, the commentary as a whole seemed directed at the question of a reduction of sentence. In the past, the Commission's commentary distinguished between the question of mitigation or reduction of sentence and the use or invocation of official position as a substantive defence to criminal responsibility. During the Nuremberg trials, the convicted individuals had been denied the possibility of invoking their official positions as a mitigating factor during sentencing, as well as the possibility of claiming that their official position as State officials exonerated them from any criminal responsibility. In his view, the text under consideration conflated the two ideas. He asked whether the Special Rapporteur could address that issue by adding some of the text from paragraph (4) of the Commission's commentary to article 7 of the 1996 draft code of crimes against the peace and security of mankind, which dealt more precisely with the question. In the interest of consistency, it would also be advisable to add to the text the words "for the authorities", in line with the Commission's previous positions, as reflected in prior commentaries.

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[417] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq*., para. 50.

[418] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[419] See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, *The Medical Case*, Washington, D.C., United States Government Printing Office, 1949. Available from: www.gutenberg.org/files/54899/54899-h/54899-h.htm#axvi.

[420] 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 1933, 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).

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

[422] 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.

11. Mr. MURPHY (Special Rapporteur) said that the issues raised by Mr. Jalloh had already been addressed earlier in the current session. When the draft paragraph had been discussed within the Drafting Committee, he had circulated the commentary, more or less as it currently stood, so that all the members of the Drafting Committee could understand the intentions behind the commentary. He had welcomed their views, which had been presented both during the work of the Drafting Committee and afterwards. It was regrettable that Mr. Jalloh should for the first time signal problems with the commentary at the current juncture. The goal of the text was to indicate basic parameters, citing the trials before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East at Tokyo, the 1954 draft code of offences against the peace and security of mankind,[423] the 1996 draft code of crimes against the peace and security of mankind and the Rome Statute of the International Criminal Court, as well as the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. The goal was not to try to feature, for each of those instruments, the *travaux préparatoires* and explanatory materials. In his view, there was plenty more information that could have been included, but doing so would render the text heavy, and a balance had to be struck. He would prefer to leave the commentary as it stood. As for the issue of the distinction between mitigation and reduction of sentence, he considered that it would be better addressed under paragraph (5). If the proposal consisted in replacing the word "reduction" with "mitigation", he was open to it. However, if the proposed change went farther than that, it might raise a series of new problems.

12. The CHAIRPERSON said that, at the current stage, it would be most helpful if specific proposals were put forward.

13. Mr. JALLOH said that he had in fact raised his concerns with the Special Rapporteur, who had said that the material in question had to be sent to the Secretariat before being discussed in plenary session. He had understood that it had been impossible to make changes at that earlier stage and that he should raise any issues in the current plenary meeting. He acknowledged that the Special Rapporteur had asked members of the Drafting Committee to provide their comments at an earlier stage, but the timing had unfortunately not been right, and he had shared his concerns with the Special Rapporteur subsequently. The question of mitigation and reduction of sentence could indeed be discussed when the Commission considered paragraph (5). It was important for the Commission to ensure consistency with the language it had used in the past. Bringing the text in line with the language used in paragraph (4) of the commentary to article 7 of the 1996 draft code of crimes against the peace and security of mankind would underscore the point the Commission was trying to make, without departing from the carefully negotiated text. He expressed concern that a lack of coherence between the paragraphs in the commentary might leave readers at a loss to understand the Commission's reasoning behind a clause as important as the irrelevance of official position in determining or mitigating the criminal responsibility of a person for horrific crimes against humanity.

14. As to the Special Rapporteur's proposal, both mitigation and reduction of sentence were important concepts. It was not necessarily best in all cases to simply remove one term and replace it with another. He proposed that the Commission take a closer look at their usage when considering changes in paragraph (5). He agreed to the adoption of paragraph (1), on the understanding that such issues could be revisited on second reading of the draft articles on crimes against humanity.

15. The CHAIRPERSON expressed concern that the heading proposed by the Special Rapporteur for insertion above paragraph (1), "*Official position*", was excessively vague. He suggested instead the subheading "*Official position as a ground for excluding criminal responsibility*".

16. Mr. MURPHY (Special Rapporteur) said that while such wording would be accurate, it would not be in line with the formulations used in other subheadings, which were shorter.

17. Mr. JALLOH proposed, as a compromise, that the subheading should be worded "*Irrelevance of official capacity*", which was standard language currently used in legal instruments, or "*Official position and responsibility*", which was the heading used in the 1996 draft code of crimes against the peace and security of mankind to address the same concept.

18. The CHAIRPERSON said that he preferred the words "*Official position and responsibility*", as "*Irrelevance of official capacity*" could include aspects other than those addressed by the text.

19. Sir Michael WOOD said that he preferred to use the term "*Official position*" and that including the word "*responsibility*" in the subheading would be excessive and would risk repeating the meaning of the article. Obviously, official position was not a ground for excluding criminal responsibility. The same could be said for superior orders, but those words were used in a subheading too.

20. Mr. TLADI said that he could accept the wording "*Official position*", or, if more clarity was desired, "*Official position and responsibility*". He would not be very comfortable using "*Irrelevance of official capacity*". While that wording was common in recent instruments, the Commission had used different formulations.

21. Mr. GROSSMAN GUILOFF noted that "*Official position*" was the term of art and had been used in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and in the Charter of the International Military Tribunal for the Far East.[424] He supported its use in the current text as well.

[423] *Yearbook … 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

[424] Charter of the International Military Tribunal for the Far East, in C. I. Bevans (ed.), *Treaties and Other International Agreements of the United States of America 1776–1949*, vol. 4, Washington, D.C., State Department of the United States of America, 1968, pp. 20–32.

22. The CHAIRPERSON said he took it that the Commission would prefer to use the term "*Official position*" in the subheading preceding paragraph (1).

It was so decided.

The subheading and paragraphs (1) and (2) were adopted.

Paragraph (3)

23. Mr. GROSSMAN GUILOFF proposed adding the words "For example" at the beginning of the second sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

24. Mr. PARK said that in the third sentence, the words "any procedural immunity" should be replaced with the phrase "any procedural issues in the context of immunity".

25. Mr. JALLOH said that in relation to the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* and the decision of the International Criminal Court, the footnote to the paragraph should make reference to the opinion of Judge Perrin de Brichambaut. The decision of the Court had been unanimous, but the judges had arrived at their opinions for different reasons. The footnote should put forward the reasoning used not only by the majority.

26. Ms. ESCOBAR HERNÁNDEZ said that in the third sentence the words "or international" should be deleted. There was no reason to include a reference to immunity before international courts. The reference had perhaps been included owing to the wording of article 27, paragraph 2, of the Rome Statute of the International Criminal Court, which read "under national or international law", and its relationship with article 98, paragraph 1, of the same Statute. In her view, article 98 referred not to immunity, but to the cooperation of States parties with the International Criminal Court. That article did not bar the Court's jurisdiction; it merely prevented its application at a given moment. In the context of the paragraph under consideration, the reference to international jurisdiction was not entirely appropriate in the light of current international criminal law. The deletion of the words "or international" would thus in no way diminish the meaning of the paragraph.

27. If the proposal put forward by Mr. Park was adopted, then the meaning of the sentence would change, as procedural issues in the context of immunity clearly would include questions related to cooperation. In any case, she preferred to leave the paragraph as it stood, and simply delete the words "or international". The Commission would thus avoid taking a position on the very sensitive subject of the relationship between article 27, paragraph 2, and article 98, paragraph 1, of the Rome Statute of the International Criminal Court.

28. Mr. TLADI said that he endorsed the position taken by Ms. Escobar Hernández, but did not support Mr. Park's proposal for the addition of the words "issues in the context of" before the word "immunity", as that would lead to a slight change in meaning. He said he understood the need for balance, but the purpose of the commentary was to explain the meaning of the draft articles, and he expressed concern that the inclusion of the text proposed by Mr. Jalloh might suggest that the Commission's position was wrong. In any case, the judge's opinion mentioned by Mr. Jalloh was a minority opinion.

29. Mr. MURPHY (Special Rapporteur) said he was concerned that the amendment proposed by Mr. Park might make the text less clear, as a number of issues could arise in the context of procedural immunity. The focus of the text was the procedural immunities themselves. He supported the deletion of the words "or international". In fact, the original version of the text had not included those words, which had been added on the suggestion of a member of the Drafting Committee. While Mr. Jalloh was correct that a minority view had been expressed in the case cited in the footnote, that had also been true in many other cases cited in the text. The aim of the Commission was not to offer a comprehensive report on the minority or majority opinions, but to direct the reader's attention to the positions taken by the bodies in question. While he did not strongly object to Mr. Jalloh's proposal, he said he tended to agree with Mr. Tladi that it would be best not to include a reference to the minority opinion.

30. Mr. JALLOH said that Judge Perrin de Brichambaut's opinion had in fact been issued not in dissent; it concurred with the majority opinion. The judge's opinion differed from that of the majority on a point of law that was significant. The footnote's reference only to the majority glossed over the fact that it was important to the judge that his opinion be noted. The judge had given a different interpretation of a point of law, an interpretation on an issue that was in fact heavily debated between him and the majority, as well as outside the court, including in the academic literature. He agreed with the Special Rapporteur that the Commission should advance its own view, but that did not mean it should exclude the plausible views of others. He supported the proposal to delete "or international", by Ms. Escobar Hernández.

31. Mr. PARK asked whether the word "procedural" could be deleted before the word "immunity". Academic scholars agreed that immunity was by nature procedural. If the text used the word "procedural", then more clarification was required.

32. The CHAIRPERSON said that one reason for the use of the word "procedural" was to establish a contrast with the term "substantive defence" mentioned in the preceding sentence. In that context, the footnote to the paragraph provided an explanation when it cited the *Arrest Warrant of 11 April 2000* case.

33. Sir Michael WOOD said that he too had understood the use of the word "procedural" to be linked with the preceding reference to "substantive defence". He supported keeping the paragraph as it stood, but with the deletion of the words "or international". He agreed with Mr. Tladi that there was no need to cite a minority opinion. It would be odd to refer to a concurring opinion that took a radically different legal view in contradiction with the view of the Commission itself.

34. The CHAIRPERSON said that the text of the footnote already contained an implicit reference to the concurring minority opinion, as it referred to the existence of a majority on the Court. He took it that the Commission wished to adopt paragraph (4), with the deletion of the words "or international", as proposed by Ms. Escobar Hernández.

Paragraph (4), as amended, was adopted.

Paragraph (5)

35. Mr. JALLOH, referring to his earlier comments about the need for a clear distinction between the concepts of mitigation and reduction of sentence, proposed simply inserting the words "mitigation or" immediately before the words "reduction of sentence" in both the first and last sentences of the paragraph.

36. Mr. TLADI said that while he agreed with the substance of the proposed amendment, it would be more logical if the word order were "reduction of sentence or mitigation" so that the word "mitigation" did not qualify the word "sentence".

37. The CHAIRPERSON said that mitigating factors were normally considered prior to reduction and so mitigation should be mentioned before reduction of sentence.

38. Mr. JALLOH, endorsing the Chairperson's comment, said that, once an individual was convicted, a judge considered aggravating or mitigating factors and then handed down a sentence; reduction of a sentence could be considered at a later point. However, he understood Mr. Tladi's point and, in the interest of time, would support his proposed amendment.

39. Mr. MURPHY (Special Rapporteur) said that he, too, in the interest of time, would support Mr. Tladi's amendment.

40. Mr. GROSSMAN GUILOFF said that the qualifier "alleged" before the word "offender" was incorrect, given that the offender in the scenario presented was being sentenced and therefore had already been convicted; the word should be deleted where it appeared in the paragraph.

41. Mr. JALLOH said that he did not agree with the deletion of the word "alleged" since the individual in the given scenario could also be at the predicate stage of the consideration of mitigating factors. Removal of the term would, in such a context, be inappropriate.

42. The CHAIRPERSON said that there might well be some States where criminal law provided for a different procedure whereby mitigation and reduction of sentence could be considered simultaneously.

43. Mr. GROSSMAN GUILOFF said that he had never come across any such criminal law; in his view, the word "alleged" was a technical error and should be deleted.

44. Sir Michael WOOD said that he supported Mr. Jalloh's proposed amendment and would not oppose that made by Mr. Grossman Guiloff.

45. Mr. MURPHY (Special Rapporteur) proposed that, in the first sentence, the words "alleged offender's position" should be replaced with "official position". In the last sentence, the words "an alleged offender" should be deleted and the rest of the sentence reformulated accordingly.

Paragraph (5), as amended, was adopted.

The commentary to draft article 6, paragraph 4 bis*, as amended, was adopted.*

The commentary to draft article 6, as amended, was adopted.

Section C, as amended, was adopted.

46. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV contained in document A/CN.4/L.900.

B. Consideration of the topic at the present session (*concluded*)

Paragraphs 8 to 10

47. Mr. MURPHY (Special Rapporteur) proposed replacing, in paragraph 9, the deadline of 1 January 2019 with that of 1 December 2018. Although bringing forward the deadline by a month represented a change in the Commission's practice and would give Governments less time to submit comments and observations, such a change would make the Commission's work more efficient, not least because it would allow more time for the translation of such submissions.

48. The CHAIRPERSON said he was not opposed to the change, but wondered whether it might have implications for other special rapporteurs for other topics.

49. Sir Michael WOOD said that he would not be in favour of retrospectively changing the deadlines set with regard to other topics.

50. Mr. JALLOH said that while he appreciated the advantages that changing the deadline would represent for the Commission, especially the Special Rapporteur, whose work in that regard was important, he would prefer to retain the original date, in line with the Commission's practice. Many States, especially developing States, might find it challenging to submit their comments one month earlier. Nevertheless, he would not oppose the proposed change if the majority of members supported it.

51. Mr. MURASE said that he supported changing the deadline to 1 December 2018.

Paragraphs 8 to 10, as amended, were adopted, subject to their completion by the Secretariat and to an editorial amendment to the French text.

Section B, as amended, was adopted.

Chapter IV of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter V. *Provisional application of treaties* (A/CN.4/L.901 and Add.1–2)

52. The CHAIRPERSON invited the Commission to consider chapter V of its draft report, beginning with the portion contained in document A/CN.4/L.901.

53. Mr. GÓMEZ ROBLEDO (Special Rapporteur), introducing chapter V, on provisional application of treaties, said that a number of changes, mostly stylistic, had been made to the commentaries to the draft guidelines on the basis of members' contributions within the Working Group, in plenary meetings and through written submissions.

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 8

Paragraphs 4 to 8 were adopted, subject to their completion by the Secretariat.

Section B was adopted.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

Paragraph 9

54. Mr. PARK said it appeared that the text of the draft guidelines contained in paragraph 9 had not been updated to reflect the most recent changes adopted in plenary session.

55. Following a discussion in which Mr. MURPHY, Mr. GÓMEZ ROBLEDO (Special Rapporteur) and Mr. SABOIA participated, the CHAIRPERSON said he took it that the Commission wished to adopt paragraph 9 on the understanding that the secretariat would replace the text of the draft guidelines with the most up-to-date version thereof.

It was so decided.

Paragraph 9 was adopted, subject to the requisite changes by the secretariat.

56. The CHAIRPERSON invited the Commission to consider the portion of chapter V contained in document A/CN.4/L.901/Add.1.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session

Paragraph 1

Paragraph 1 was adopted.

General commentary

Paragraph (1)

57. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the word "expand" be changed to "clarify".

58. The CHAIRPERSON observed that it was not the Commission's usual practice to explain the weight to be given to commentaries to draft guidelines. He suggested that paragraph (1) either be redrafted to reflect the wording used in previous commentaries or be deleted altogether.

59. Mr. PARK echoed the concern expressed by the Chairperson and his suggestion that paragraph (1) be deleted.

60. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he was not convinced of the need to delete the paragraph, which gave additional guidance to the reader and did not undermine the value of the commentaries, but that he would go along with the majority view.

61. Mr. VÁZQUEZ-BERMÚDEZ suggested altering the paragraph to the effect that the commentaries should be read in conjunction with the draft guidelines, in line with previous commentaries produced by the Commission.

62. The CHAIRPERSON acknowledged the importance of the issue of how the Commission characterized its commentaries and the need for consistency in terms of approach and wording. He suggested that discussion of paragraph (1) be suspended to allow for informal consultations.

It was so decided.

Paragraph (2)

63. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the words at the beginning of the second sentence "Owing to a lack of clarity of the applicable legal regime, they" be deleted and that the first two sentences be combined and amended to read: "The purpose of the draft guidelines is to provide assistance to practitioners concerning the law and practice on the provisional application of treaties, who may encounter difficulties …". It was not the applicable regime *per se* that lacked clarity but the manner in which it had been applied. He also proposed that, in the last sentence, the words "for the progressive development of such rules" be changed to "for contemporary practice", as the aim of the draft guidelines was to reflect the practice of States and international organizations, rather than to engage in progressive development of the applicable rules.

64. Mr. PARK proposed that, as contemporary practice did not seem relevant to international organizations in all cases, the sentence instead end at the word "solutions".

65. Mr. ŠTURMA said that he would welcome clarification as to whether the words "its commencement and termination, and its legal effects", in the second sentence, were intended to refer to the provisional application of a treaty or to the treaty itself.

66. Sir Michael WOOD proposed that, in the first sentence, the word "practitioners" be altered to "States, international organizations and others concerned", with a view to making the paragraph more comprehensive and allowing for the inclusion of academics. He echoed Mr. Šturma's request for clarification of the second sentence.

67. Mr. GÓMEZ ROBLEDO (Special Rapporteur), welcoming Sir Michael's suggestion, explained that the second sentence referred to the commencement, termination and legal effects of provisional application of a treaty. Any drafting suggestions to avoid ambiguity would be welcome. He disagreed with Mr. Park regarding the last sentence of the paragraph, but suggested that the alternative wording "solutions that seem most appropriate to reflect contemporary practice" might be clearer than his original proposal.

68. Mr. GROSSMAN GUILOFF said that, if Sir Michael's proposal were accepted, the last sentence of the paragraph should be similarly amended to refer to others concerned, as well as States and international organizations.

69. Mr. MURPHY expressed support for Sir Michael's proposal and Mr. Grossman Guiloff's related amendment. In order to clarify the second sentence, the words "its commencement and termination, and its legal effects" could be changed to "the commencement and termination of such an agreement, and its legal effects". With regard to the last sentence, he had intended to make a similar proposal to that made by Mr. Park; however, he could go along with the Special Rapporteur's suggestion, in which case the words "for contemporary practice" seemed most suitable.

70. Mr. JALLOH echoed Mr. Murphy's comments regarding the last sentence of the paragraph.

71. Mr. MURASE, expressing support for Sir Michael's point that academics should not be excluded from those to whom assistance was directed, suggested that the word "practitioners" be altered to "experts".

72. The CHAIRPERSON pointed out that the Commission used the term "experts" very specifically to exclude State officials and advised against introducing such a limitation in the text under consideration.

73. Sir Michael WOOD welcomed Mr. Murphy's suggestions, with the exception of the one to alter the phrase "its commencement and termination", which would be clearer if amended to "the commencement and termination of provisional application", in line with the wording of the draft guidelines.

74. Mr. PETRIČ urged members of the Commission to keep in mind the time constraints on their work and to restrict their comments to substantive matters. In the search for consensus, due consideration should be given to the views of the Special Rapporteur, who had explored the subject in the greatest depth.

75. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he favoured Sir Michael's proposal regarding the words "its commencement and termination" and had no objection to reverting to his original amendment to the last sentence of the paragraph.

76. Sir Michael WOOD said that it might be clearer not to combine the first two sentences of the paragraph, as suggested by the Special Rapporteur, but instead to replace the words "Owing to a lack of clarity of the applicable legal regime, they" with "They may".

77. Mr. GROSSMAN GUILOFF said that the assistance provided in the draft guidelines was not intended solely for those who encountered difficulties. He proposed that the first two sentences be combined and amended to read: "The purpose of the draft guidelines is to provide assistance to States, international organizations and others concerning the law and practice on the provisional application of treaties, including, *inter alia*, the form …".

78. Mr. VÁZQUEZ-BERMÚDEZ suggested that Mr. Grossman Guiloff's proposal be followed but that the words "including, *inter alia*" be altered to "when dealing with issues, *inter alia*".

79. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he would prefer to keep the paragraph as close to the original drafting as possible. He therefore continued to favour Sir Michael's proposal.

80. The CHAIRPERSON encouraged members to discuss possible wording while the meeting was suspended to allow for a meeting of the Bureau.

The meeting was suspended at 4.50 p.m. and resumed at 5.10 p.m.

81. The CHAIRPERSON said he understood that agreement on how to word paragraph (2) had nearly been reached and proposed that discussion on the issue be left in abeyance pending the results of informal consultations.

It was so decided.

Paragraph (3)

82. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the second sentence, the word "expand" should be changed to "explain".

Paragraph (3), as amended, was adopted.

Paragraph (4)

83. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the last sentence of paragraph (4) be amended to read: "Therefore, the draft guidelines allow States and international organizations to set aside, by mutual agreement, the practices addressed in certain draft guidelines, if they deem those provisions unsuitable, in a given treaty or a part of a treaty."

84. Mr. PARK said that the word "unsuitable" was insufficiently neutral. He suggested that the words "if they deem those provisions unsuitable" be altered to "if they decide otherwise".

85. Mr. MURPHY, welcoming the wording proposed by the Special Rapporteur and amended by Mr. Park, suggested deleting the words "in a given treaty or a part of a treaty", as the reference was unclear. The word "different", being superfluous, could be deleted from the first sentence of the paragraph.

86. The CHAIRPERSON said he took it that the Commission wished to adopt the paragraph as amended by the Special Rapporteur, Mr. Park and Mr. Murphy.

Paragraph (4), as amended, was adopted.

Paragraph (5)

87. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the first sentence, the word "correct" should be changed to "consistent". In the second sentence, the word "extended" should be changed to "extensive", the words "'provisional application'," should be deleted and the words "or 'definite entry into force' as if they were equivalent" should be changed to "as opposed to 'definite entry into force'". Furthermore, a footnote, reading "See the memorandums by the Secretariat on the origins of article 25 of the 1969 Vienna Convention and the 1986 Vienna Convention (A/CN.4/658 and A/CN.4/676)", should be inserted at the end of the third sentence.

88. Mr. MURPHY suggested that, in the first sentence, the words "avoid the confusion often associated with their misuse" be altered to "avoid confusion", thereby skirting the implication that States were prone to misuse terms.

89. Mr. GÓMEZ ROBLEDO (Special Rapporteur) endorsed that suggestion.

Paragraph (5), as amended, was adopted.

Paragraph (6)

90. The CHAIRPERSON suggested that, in the first sentence, the words "formal requirements" be changed to "all domestic and international procedural requirements". He also suggested that, in the last sentence, the words "for example" be inserted after "useful purpose" and that the phrase "or the implementation of the treaty or a part of a treaty is of great political significance" be deleted, as they carried a risk of unintended consequences. Referring to treaties of political significance being applied provisionally before procedural requirements were met might raise concern among States that important and sensitive requirements could be circumvented. In Germany, for instance, any internationally binding agreement of great political significance must be ratified by Parliament. Provisional application could prove problematic in that regard.

91. Sir Michael WOOD said that the inclusion of the word "procedural" might prove too limiting; instead, he suggested referring simply to completion of "the requirements".

92. The CHAIRPERSON expressed concern that referring only to "requirements" might not be sufficiently clear. He amended his suggested change to "all domestic and international procedural or other formal requirements".

93. Ms. GALVÃO TELES suggested that changing the words "formal requirements", in the sentence as originally drafted, to "all domestic and international requirements" would be sufficient to allay the Chairperson's concern.

94. The CHAIRPERSON endorsed her suggestion.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Commentary to draft guideline 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

95. Mr. GÓMEZ ROBLEDO (Special Rapporteur) suggested an editorial amendment to the numbering of the draft guidelines in the second sentence.

Paragraph (3), as amended, was adopted.

The commentary to draft guideline 1, as amended, was adopted.

Commentary to draft guideline 2 (Purpose)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

96. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that during a Drafting Committee meeting it had been suggested that a distinction be drawn between the level of acceptance of the 1969 Vienna Convention and the 1986 Vienna Convention and that it should be reflected in the commentary. He therefore proposed that the paragraph read: "The reference to 'provide guidance' is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, as well as on the 1986 Vienna Convention to the extent that the latter reflects customary international law."

97. The CHAIRPERSON said that although doubts had been expressed about whether the 1986 Vienna Convention reflected customary international law, it was clear that the 1969 Vienna Convention might not reflect customary international law in every respect either. He therefore suggested that the words "the latter reflects" should be replaced with "both treaties reflect".

98. Sir Michael WOOD said that the 1969 Vienna Convention was international law for the parties thereto and therefore he was not sure that the reference to the extent that it reflected customary international law was appropriate. His preference was for the simpler phrase used in the original version of the paragraph "are based on the 1969 Vienna Convention and the 1986 Vienna Convention and other rules of international law".

99. Mr. MURPHY said that the problem with the original version of the paragraph was that it did not reflect the text of draft guideline 2, which seemed to refer to the 1969 Vienna Convention only. He therefore suggested that the revised version should be retained but that the last phrase "as well as on the 1986 Vienna Convention to the extent that the latter reflects customary international law" be replaced with the new sentence: "Guidance may also be found in the 1986 Vienna Convention to the extent that it reflects customary international law."

100. Mr. SABOIA, supported by Ms. ESCOBAR HERNÁNDEZ, said that the commentary to a draft guideline was not the appropriate place to give different interpretations to the Vienna Conventions and agreed with Sir Michael that it would be better to revert to the Special Rapporteur's original version of the paragraph.

101. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he had no difficulty with reverting to the original text that he had changed only in the light of suggestions made in the Drafting Committee.

102. The CHAIRPERSON said he took it that the Commission wished to revert to the original version.

It was so decided.

103. Mr. MURPHY said that the paragraph should begin with the phrase "As was stated in the general commentary", since it related to the phrase "The reference to provide 'guidance'" and not the phrase "should not be interpreted as if the guidelines were merely recommendatory". Furthermore, the Commission needed to decide on the substantive matter of whether draft guideline 2 was supposed to cover both the 1969 Vienna Convention and the 1986 Vienna Convention and, if that was not the case, it must seek a suitable formulation that did not cast aspersions on the 1986 Vienna Convention.

104. The CHAIRPERSON suggested that the paragraph be simplified to read: "The reference to 'provide guidance' is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention."

105. Sir Michael WOOD said that he could endorse the Chairperson's suggestion, but that it would make more sense to begin the paragraph "Draft guideline 2 is intended to underline …".

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft guideline 2, as amended, was adopted.

Commentary to draft guideline 3 (General rule)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

106. Mr. MURPHY drew attention to a discrepancy concerning the last footnote to the paragraph and other footnotes.

107. The CHAIRPERSON said that the matter would be followed up by the Secretariat.

On that understanding, paragraph (4) was adopted.

Paragraph (5)

108. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the first sentence read: "The second phrase, namely, 'pending its entry into force between the States or international organizations concerned', is based on the *chapeau* of article 25." The last sentence of the paragraph should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

109. Sir Michael WOOD proposed that the third sentence be simplified to read: "Furthermore, the draft guideline envisages the possibility of a third State or international organization …".

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to draft guideline 3, as a whole, as amended, was adopted.

Commentary to draft guideline 4 (Form)

Paragraph (1)

110. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed the deletion of the words "*inter alia*" in the second sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

111. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the word "expands" be replaced with "elaborates".

Paragraph (2), as amended, was adopted.

Paragraph (3)

112. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that since it had been agreed to replace the word "agreement" with the word "treaty" in the text of the draft guideline, the explanation of the word "agreement" contained in the second sentence was no longer necessary and could be deleted. The paragraph would thus read: "Subparagraph (*a*) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the principal treaty."

113. Mr. PARK questioned the appropriateness of the term "principal treaty".

114. Sir Michael WOOD proposed that the words "principal treaty" be replaced with "the treaty that is provisionally applied".

115. Mr. PARK said that the words "principal treaty" also appeared in the last footnote to the paragraph, which would need to be amended accordingly.

On that understanding, paragraph (3), as amended, was adopted.

Paragraph (4)

116. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that, in the first sentence, the words "separate instrument" be changed to "separate treaty". Furthermore, the last sentence should be reworded to read: "By way of providing further guidance, reference is made to two examples of such 'means or arrangements', namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference."

117. Mr. MURPHY proposed that the phrase "adopted by an international organization" be changed to "adopted at an international organization", to render the idea of States coming together to reach an agreement, rather than a decision being taken by an organization. He further proposed that the first and second footnotes to the paragraph be merged and that the reference in the following footnote to the resolution establishing the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization be deleted, since it was not a good example of provisional application of a treaty.

118. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he could endorse Mr. Murphy's first two proposals but not his last one. He had already discussed the last footnote to the paragraph with Mr. Murphy and the text had been amended to make clear that it concerned a resolution, adopted by a meeting of signatory States, whose purpose was to establish the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. It was not a resolution relating to provisional application *per se*, since the Treaty contained no provisional application clause. However, he wished to retain the reference to the resolution as a case *sui generis* that illustrated how, in fact, and as a result of certain decisions, parts of the Treaty were provisionally applied—a position supported by recent literature. Moreover, the Treaty was likely to continue to be provisionally applied indefinitely, since all the requirements for its entry into force were unlikely to be met.

119. Sir Michael WOOD said that he was not in favour of Mr. Murphy's proposal that the phrase "adopted by an international organization" be changed to "adopted at an international organization". The former was in line with the language used for other topics and covered the substantive point that there must be an agreement among States to provisional application by means of a resolution adopted. However, he was in favour of the proposal to delete the reference in the last footnote to the paragraph to the resolution relating to the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. It would merely confuse matters to suggest that the work done by the Preparatory Commission constituted provisional application in the sense of article 25 of the 1969 Vienna Convention and the project. Nevertheless, at some juncture, it might be useful to explain that it was an exceptional situation, but that preparatory work for the entry into force of a treaty did not amount to provisional application.

120. The CHAIRPERSON said that he too was concerned about Mr. Murphy's proposal, but suggested that "by or at an international organization" might be a solution. Likewise, he was concerned about referring to the establishment of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization in the last footnote to the paragraph as the first example of provisional application, when not all members of the Commission were in agreement. He suggested that it might be sufficient to refer to the article by Andrew Michie[425] on the provisional application of arms treaties mentioned in the footnote.

121. Mr. MURPHY said that Michie's article clearly stated that the Comprehensive Nuclear-Test-Ban Treaty was not an example of the provisional application of treaties and, in that connection, had noted that during the negotiations on the Treaty, the Government of Austria had made a proposal for a provisional application mechanism that had been rejected. Thus, while the source might well support the proposition that bilateral arms treaties had been provisionally applied, it was not relevant in the context under consideration.

122. Following further comments by Mr. MURPHY, the CHAIRPERSON and Sir Michael WOOD, the CHAIRPERSON suggested that discussion on paragraph (4) and its related footnotes be left in abeyance to allow for informal consultations.

It was so decided.

123. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that informal consultations on the matter were indeed necessary. Furthermore, he wished to underline that the information furnished by Mr. Murphy was incomplete. References by the same author that supported the opposite view could be found.

The meeting rose at 6.05 p.m.

3385th MEETING

Wednesday, 2 August 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

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

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[425] A. Michie, "The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol. 10, No. 3 (2005), pp. 345–377.

Protection of the environment in relation to armed conflicts (*concluded*)* (A/CN.4/703, Part II, sect. D)

[Agenda item 4]

Report of the Working Group

1. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group) said that the Working Group had been established at the 3375th meeting of the Commission with the primary objective of making recommendations to the plenary on how to proceed with the topic.

2. The Working Group had held two meetings, on 26 and 27 July 2017, at which it had had before it the draft commentaries prepared by the former Special Rapporteur with regard to draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee in 2016, and taken note of by the Commission also in 2016. The Working Group wished to express its deep appreciation to the former Special Rapporteur, Ms. Marie Jacobsson, for her outstanding contribution to the topic.

3. In its consideration of the way forward, the Working Group had stressed the importance of the topic. It had noted, in particular, the continuing interest of States and of bodies such as the United Nations Environment Programme and ICRC. In that connection, the Working Group had noted that substantial work had already been done on the topic and had underlined the need for its completion, maintaining and building upon the work achieved thus far. The Working Group had underscored the need to maintain momentum on work on the topic.

4. To that end, the Working Group had considered it most appropriate to recommend to the Commission the appointment of a new Special Rapporteur for the topic, preferably at the current session, to assist it in the successful completion of its work on the topic.

5. Moreover, the Working Group had noted that, in addition to aspects of the draft principles, such as terminology and the overall structure of the text, as well as the completion of the draft commentaries, there were other areas that could be further addressed. In that regard, references had been made to complementarity with other relevant branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors and overall application of the draft principles to armed conflicts of a non-international character.

6. He was grateful to all the members of the Commission who had participated in the Working Group for the enriching discussions that had taken place.

7. The CHAIRPERSON said he took it that the Commission wished to take note of the report of the Chairperson of the Working Group.

It was so decided.

* Resumed from the 3375th meeting.

8. The CHAIRPERSON said that the Bureau intended to follow up on the Working Group's proposal to appoint a new Special Rapporteur on the topic. He therefore requested, on behalf of the Bureau, that consultations take place as soon as possible so that the Commission could be in a position to take a decision on the basis of a recommendation by the Bureau before the end of the current session. He invited members to approach him or any other member of the Bureau to share their views on that important matter.

Draft report of the International Law Commission on the work of its sixty-ninth session (*continued*)

Chapter V. *Provisional application of treaties* (*continued*) (A/CN.4/L.901 and Add.1–2)

9. 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.901/Add.1. He recalled that, at the previous meeting, paragraphs (1) and (2) of the general commentary had been left in abeyance. He invited the Special Rapporteur to present any developments in that regard.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission (*continued*)

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session (*continued*)

General commentary (*concluded*)

Paragraphs (1) and (2) (*concluded*)

10. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed, on the basis of all the comments and proposals received from Commission members, that paragraph (1) be deleted and that paragraph (2), which would thus become paragraph (1), be amended in line with comments made at the previous meeting to read:

> "The purpose of the draft guidelines is to provide assistance to States, international organizations and others concerning the law and practice on the provisional application of treaties. They may encounter difficulties concerning, *inter alia*, the form of the agreement to provisionally apply a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effects. The objective of the draft guidelines is to direct States, international organizations and others to answers that are consistent with existing rules or to the solutions that seem most appropriate for contemporary practice."

11. He further proposed the addition of a footnote at the end of the first sentence of that paragraph to read: "As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries." That wording, which reflected language used in a footnote adopted by the Commission the previous year in the context of the topic "Identification of customary international law", should resolve the problems raised at the previous meeting with regard to paragraph (1).

12. The CHAIRPERSON said he took it that the Commission wished to adopt the new paragraph (1), as

proposed by the Special Rapporteur, on the understanding that the previous paragraph (1) would be deleted.

It was so decided.

The general commentary, as amended, was adopted.

Commentary to draft guideline 4 (Form) (*concluded*)

Paragraph (4) (*concluded*)

13. The CHAIRPERSON recalled that paragraph (4) of the commentary to draft guideline 4 had been deferred pending some redrafting. He invited the Special Rapporteur to introduce the proposed new text.

14. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that, to reflect the comments made by Commission members at the previous meeting, the paragraph be recast to read:

> "Subparagraph (*b*) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through 'other means or arrangements', which broadens the range of possibilities for reaching agreement on provisional application. The Commission viewed such an additional reference as confirmation of the inherently flexible nature of provisional application. By way of providing further guidance, reference is made to two examples of such 'means or arrangements', namely provisional application agreed by means of a resolution adopted within an international organization or at an intergovernmental conference."

15. He further proposed that the first two footnotes to the paragraph, which, with the addition of a new footnote in paragraph (1), would have been renumbered, be merged into a single footnote with their order reversed, as proposed by a member of the Commission who had cited the need to follow the Commission's standard editorial practice.

16. As to the last footnote to the paragraph, whose numbering remained unchanged, he proposed, following consultations with Commission members, that the second, third and fourth sentences be deleted and replaced, at the end of the footnote, with amended text relating to the establishment of the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organization that would include a reference to an as yet unpublished article by Y. Fukui, followed by a hyperlink to an online advance version.

17. Mr. MURPHY, referring to that footnote, said that, to avoid including the long hyperlink to the article by Y. Fukui, the Commission should use the formula "[vol. not published yet]", as had been done elsewhere in the footnote.

It was so decided.

18. Mr. PARK, noting that, in the revised proposal for paragraph (4), the phrase "resolution adopted within an international organization" was used instead of "resolution adopted by an international organization", asked whether the text of draft guideline 4 (*b*) itself should not also be changed accordingly.

19. Mr. MURASE said that, having read the article by Y. Fukui, he was not convinced of its relevance, as the author appeared to refer to provisional operation rather than provisional application.

20. Mr. VÁZQUEZ-BERMÚDEZ said that the language of paragraph (4) should match that of draft guideline 4 (*b*), rather than the other way around. The Commission should thus use the phrase "by an international organization", at least for the time being. The matter could be taken up again on second reading.

21. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he would be happy to accept the proposals made by Mr. Murphy and Mr. Vázquez-Bermúdez. He believed that the article by Y. Fukui should, however, be cited, as the author did refer to provisional application.

22. Mr. MURPHY said that, if the Commission decided to reproduce the language of draft guideline 4 (*b*) in paragraph (4), it should do so in full in order to capture that language faithfully.

23. The CHAIRPERSON, supported by Mr. GÓMEZ ROBLEDO (Special Rapporteur) and Mr. JALLOH, said that it was unnecessary to reproduce the language of draft guideline 4 (*b*) in its entirety. The debate within the Commission over the choice between the phrases "within an international organization" and "by an international organization" had centred on whether the Commission should remain faithful to the language of draft guideline 4 only insofar as it was cited in paragraph (4).

24. Sir Michael WOOD said that, for the sake of clarity, it would be helpful to reproduce the language of draft guideline 4 (*b*) in full, especially as doing so would ease the transition between paragraph (4) and the proposed new paragraph (5) of the commentary.

25. Mr. VALENCIA-OSPINA said that, if the language of draft guideline 4 (*b*) was reproduced in full, the reference to "two examples" in paragraph (4) would need to be changed to "four examples".

26. Sir Michael WOOD, supported by Mr. MURPHY, said that even if the full text of draft guideline 4 (*b*) was reproduced, the Commission would still be citing two examples, the first being resolutions adopted in various ways and the second being declarations.

27. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he had no objection to reproducing the language of draft guideline 4 (*b*) in full. In his view, the reference to "two examples" should be maintained.

On that understanding, paragraph (4), as amended, was adopted.

New paragraph (5)

28. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed the insertion of a new paragraph (5), which would read:

"Alike, while the practice is still quite exceptional, the Commission was of the view that it was useful to include a reference to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or a part of a treaty, in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be unequivocally accepted by the other States or international organizations concerned, as opposed to mere non-objection or tacit acquiescence which might create uncertainty. While most of existing practice is reflected in acceptance expressed in written form, the guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is express. The Commission avoided the use of the word 'unilateral' in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States."

29. He also proposed that, after the word "exceptional", a footnote be added referring to, among other things, certain paragraphs of his second and third reports[426] on the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

30. Mr. MURPHY said that, in the first sentence, the word "Alike" should be deleted, and that the paragraph should begin "While the practice …".

31. Mr. PARK said that the second sentence of the proposed new paragraph (5) was worded too strongly, particularly as it was based on only one precedent, involving the Syrian Arab Republic, which meant that the Commission risked engaging solely in the progressive development of international law. As currently worded, the paragraph failed to distinguish between the various scenarios that could arise under multilateral conventions and bilateral agreements, for example. His proposal would be to replace the words "must be unequivocally accepted" with "should be accepted".

32. The CHAIRPERSON, speaking as a member of the Commission, said that, while he agreed with Mr. Park's concern, he would prefer to replace the word "unequivocally", which set too high a threshold, with "sufficiently clearly", which would render the example involving the Syrian Arab Republic more fitting.

33. Sir Michael WOOD proposed that the word "unequivocally" be replaced with "clearly" and that, further on in the same sentence, the words "or tacit acquiescence which might create uncertainty" should be deleted.

34. The CHAIRPERSON suggested replacing, in the third sentence, the word "express" with "clear" in order to avoid any unnecessary ambiguity. With regard to Sir Michael's proposed deletion in the second sentence, he was of the view that acquiescence was different to non-objection, and that the reference to it should therefore be retained. It would be sufficient simply to delete the word "tacit".

35. Mr. JALLOH said that he was happy with the second sentence as it stood. The Commission should, in any case, avoid watering it down, which would be the effect of the deletion proposed by Sir Michael. The third sentence would be more elegant if it were recast as two sentences to read: "Most existing practice is reflected in acceptance expressed in written form. The guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is express."

36. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he had chosen the word "unequivocally" based on his interpretation of the discussion in the Drafting Committee, which was that a higher threshold was needed for the acceptance by other States or international organizations of a State's declaration that it was provisionally applying a treaty or a part of a treaty. At the same time, he was not in favour of making the requirements imposed on States more stringent in that regard and could thus agree to replacing the word "unequivocally" with "clearly". While he acknowledged that the word "tacit" in the second sentence was perhaps redundant, he preferred to retain the word "acquiescence". As to the remainder of the paragraph, he agreed with Mr. Jalloh's drafting suggestions for the third sentence and Mr. Murphy's proposal, in the first sentence, to delete the word "Alike".

37. The CHAIRPERSON asked whether the Special Rapporteur agreed, in the penultimate sentence, to replace the word "express" with the word "clear".

38. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he was not opposed to that amendment if that was what the majority of Commission members preferred.

39. Mr. MURPHY said that he would prefer to retain the word "express" because it best reflected the general understanding that had been reached among the members of the Drafting Committee.

40. The CHAIRPERSON said that his concern was that if the word "express" was retained it would not cover the case of the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, which was referred to in the footnote, since he was not sure that all States had expressly agreed to such provisional application.

41. Sir Michael WOOD, supported by the CHAIRPERSON and Mr. JALLOH, proposed that, in the penultimate sentence, the word "express" be replaced with the words "expressed clearly".

42. Mr. OUAZZANI CHAHDI proposed that, in the penultimate sentence of the French text, the word *expresse* should be replaced with the word *explicite*, which was clearer and afforded more flexibility.

It was so decided.

43. Sir Michael WOOD said that, in the second sentence, the phrase "or tacit acquiescence which might create uncertainty" was unnecessary and confusing, given that acquiescence was a well-known form of agreement. Thus, maintaining the technical term "acquiescence"

[426] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/675 (second report); and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/687 (third report).

would slightly undermine the notion that acquiescence, if it was clear, could indeed express agreement.

44. Mr. VÁZQUEZ-BERMÚDEZ proposed that the phrase "or tacit acquiescence which might create uncertainty" be deleted and that a full stop be placed after the word "non-objection".

45. Mr. CISSÉ proposed that, in order to reconcile the various viewpoints expressed, in the second sentence, the word "unequivocally" should be replaced with the words "clearly and expressly" [*clairement et expressément*]. The word "tacit" should be deleted on the reasoning that acquiescence was inherently tacit.

46. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the example of provisional application set forth in the proposed footnote, the failure by any States parties to register an objection to the provisional application of the Convention by the Syrian Arab Republic had been interpreted by the Secretary-General of the United Nations, as the depositary of the Convention, as those States parties' acceptance of such provisional application. For that reason, ending the second sentence with the words "non-objection" was sufficient.

47. The CHAIRPERSON said he took it that the Commission wished to adopt the following version of the proposed new paragraph (5):

> "While the practice is still quite exceptional, the Commission was of the view that it was useful to include a reference to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or part of a treaty in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be clearly accepted by the other States or international organizations concerned, as opposed to mere non-objection. Most existing practice is reflected in acceptance expressed in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed clearly. The Commission avoided the use of the word 'unilateral' in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States."

It was so decided.

New paragraph (5) was adopted.

The commentary to draft guideline 4, as amended, was adopted.

Commentary to draft guideline 5 [6][*] (Commencement of provisional application)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

48. Mr. TLADI proposed the deletion of the word "both".

Paragraph (2), as amended, was adopted.

Paragraph (3)

49. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that, in the second sentence, the words "both the general entry into force of the treaty itself and" be deleted.

50. Mr. PARK said that, in his view, the text that the Special Rapporteur proposed to delete was necessary and should be maintained.

51. The CHAIRPERSON said that he was concerned that the proposed deletion would introduce an ambiguity, in the sense that a treaty could enter into force for a State as an international obligation and also in domestic law on the basis of an autonomous decision by domestic legislators to apply the treaty, even if it had not yet entered into force at the international level. He therefore proposed that, in the second sentence, the words "as an obligation of international law" be inserted after the third instance of the expression "entry into force" and before the words "for that particular State".

52. Mr. MURPHY said that, as he understood it, provisional application operated only up to the point where the treaty entered into force for those States that had been provisionally applying it as between themselves, irrespective of whether it had entered into force for the other signatories. The Chairperson's proposal would, in fact, introduce a new concept that did not reflect the approach taken by the Commission to the issue in other parts of the commentary. Ultimately, the issue raised by the Chairperson's proposal was a rather tangential one; he himself would prefer that the text remain as currently drafted.

53. The CHAIRPERSON said that it was not his intention to introduce a new issue; rather, he was seeking to ensure that it was clear to the reader that the subject matter of the paragraph remained within the realm of international law and the obligations thereunder.

54. Mr. PARK recalled that, in the Drafting Committee, reference had been made to two types of entry into force: objective and subjective. That distinction seemed to be implied in the final sentence, which contained the expression "the general reference to 'entry into force'".

55. Mr. ŠTURMA said that he would be in favour of retaining the current formulation since it was clear from both the text of the draft guidelines and the commentaries that the Commission was dealing with the provisional application of treaties as a matter of international law.

56. The CHAIRPERSON said that he wished to withdraw his proposal.

57. Sir Michael WOOD said that, in the second sentence, the phrase "for that particular State or international organization" did not reflect the fact that what was meant was entry into force as between pairs of parties to a treaty. He therefore proposed that the phrase be replaced with "between the States or international organizations concerned", so as to mirror the wording of the draft guideline.

58. The CHAIRPERSON suggested that the simplest formulation in that context might be "between particular States or international organizations".

[*] The numbers in square brackets refer to the numbering of draft guidelines in documents A/CN.4/L.901/Add.1 and Add.2 discussed at the present meeting.

59. Mr. JALLOH asked whether the Special Rapporteur would consider retaining the original language of the paragraph since the phrase "the entry into force of the treaty itself" appeared in quite a few places in the project, including in paragraph (5) of the commentary to draft guideline 3, which was cross-referenced in the footnote to paragraph (3). Doing so would not only address the concern expressed by the Chairperson, but would also avoid further difficulties in terms of consistency with prior provisions and commentaries.

60. He proposed that, for reasons of style, the final sentence be recast to read: "The Commission decided to retain the general reference to 'entry into force', as already indicated in the commentary to draft guideline 3."

61. The CHAIRPERSON said that Mr. Jalloh's first proposal would reopen the whole question of whether to reinstate the original text. There did not seem to be any objection, however, to the adoption of his second proposal for recasting the final sentence.

It was so decided.

62. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. GÓMEZ ROBLEDO (Special Rapporteur), said that the best solution for replacing the phrase "for that particular State or international organization" in the second sentence seemed to be the wording used in the draft guideline itself, namely, "between the States or international organizations concerned".

63. Mr. PARK proposed that, in the second sentence, the phrase "in this draft guideline 5" should be inserted between the words "whereby 'entry into force'" and the word "refers".

64. The CHAIRPERSON said that the first sentence of the paragraph already made it clear that what was being discussed was draft guideline 5.

65. Mr. MURPHY said that Mr. Park's proposal in the second sentence gave the impression that draft guideline 5 was departing from draft guideline 3, when in fact the second sentence was indicating that it followed the formulation found in draft guideline 3.

66. The CHAIRPERSON said he took it that the Commission wished to reformulate the second sentence to read: "The reference to 'pending its entry into force' follows the formulation found in draft guideline 3, whereby 'entry into force' refers to the entry into force between the States or international organizations concerned."

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

67. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the paragraph be amended to read:

> "The concluding phrase 'as the treaty provides or as are otherwise agreed' confirms that the agreement to provisionally apply a treaty or a part of a treaty is based on a provision set forth in the treaty that is provisionally applied, on a separate treaty, whatever its particular designation, or on other means or arrangements that establish an agreement for provisional application, and is subject to the conditions and procedures established in such instruments."

Paragraph (6), as amended, was adopted.

The commentary to draft guideline 5 [6], as a whole, as amended, was adopted.

Commentary to draft guideline 6 [7] (Legal effects of provisional application)

Paragraph (1)

68. Mr. MURPHY said that, in his view, draft guideline 6 was too broadly drafted. He therefore proposed the addition, at the end of the paragraph, of a sentence to read: "The view was expressed that the draft guideline is too broad and instead should provide that the agreement to provisionally apply a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof."

69. The CHAIRPERSON, speaking as a member of the Commission, said that he was slightly concerned that the sentence proposed by Mr. Murphy seemed to imply that the draft guideline contradicted the position formulated in that sentence. He was unsure whether that was really what was intended in the draft guideline.

70. Mr. PARK said that it was his understanding that a new paragraph (5) to be proposed by the Special Rapporteur would reflect Mr. Murphy's concern; accordingly, the proposed new sentence seemed redundant.

71. Mr. MURPHY said that, while some members held that draft guideline 6, as it stood, was in harmony with what was stated in the new proposed paragraph (5) of the commentary thereto, in his own opinion the draft guideline did not reflect what was said in paragraph (5). He was prepared to amend the sentence he had proposed by replacing "provide that" with "be written to state that" in order to signal that there might be a better way to formulate the draft guideline.

72. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to raise a related point which concerned paragraph (2). The third sentence of paragraph (2) indicated that the legal effect produced by provisional application derived from the treaty or instrument chosen by the States or international organizations concerned. As that was, however, a very ambiguous sentence, he proposed the insertion, in that sentence, of the phrase "the agreement to provisionally apply" before the words "the treaty", as that would correspond more closely to what the Commission meant. The legal effect could not derive from a treaty which had not entered into force, but from the agreement to provisionally apply it. The amendment that he was proposing to paragraph (2) might obviate the need for the dissenting formulation proposed by Mr. Murphy.

73. Mr. MURPHY, supported by Mr. GROSSMAN GUILOFF, said that, while he fully agreed with the thrust of the amendment to paragraph (2) proposed by the Chairperson, it did not eliminate the problem inherent in all the paragraphs of the commentary, namely that they referred to the legal effects of a treaty or a part of a treaty that was being provisionally applied. They therefore expressly put forward an incorrect idea which made the drafting of the guideline itself problematic.

74. The CHAIRPERSON, speaking as a member of the Commission, said the draft guideline itself could be properly interpreted provided that the commentary adduced convincing arguments.

75. Sir Michael WOOD said that he agreed with Mr. Murphy that the draft guideline was too broadly drafted. He therefore proposed that, in Mr. Murphy's proposed amendment, the words "too broad" be replaced with "too broadly drafted". The draft guideline itself could perhaps be reviewed on second reading.

76. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the Commission review the wording of the whole commentary to draft guideline 6 and then return to the exact wording of Mr. Murphy's proposed sentence and decide where to put it. In fact, it expressed a viewpoint that contrasted with the rest of the commentary, which had been thoroughly discussed in the Drafting Committee. For that reason, the sentence should start with the words "A view".

77. Mr. TLADI said that it would only be fair and in keeping with the Commission's practice for the very first paragraph of the commentary to reflect Mr. Murphy's concern regarding the manner in which the text of the draft guideline was drafted.

78. The CHAIRPERSON said that the additional sentence would read: "A view was expressed that the draft guideline is too broadly drafted and instead should be written to state that the agreement to provisionally apply a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof."

Paragraph (1), as amended, was adopted.

Paragraph (2)

79. The CHAIRPERSON, speaking as a member of the Commission, said that without the amendment to the third sentence that he had proposed, the commentary could be understood to mean that a treaty which had no legal force and was not binding produced a binding effect, whereas it was not in the interest of the Commission to make such a suggestion.

80. Mr. ŠTURMA said that, while the Chairperson was right in essence, that was not the intended meaning of the somewhat infelicitous wording of that paragraph. In his view, what was meant was that such legal effect might be derived from the provision on provisional application in the treaty itself or from another instrument or agreement.

The meeting was suspended from 11.40 a.m. to 12.10 p.m. to allow for consultations on the wording of paragraph (2).

81. The CHAIRPERSON said that, after consultations, a small group of members proposed that the third sentence be supplemented to read: "Such legal effect is derived from the agreement to provisionally apply the treaty by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4."

82. Mr. GROSSMAN GUILOFF asked whether the reference should be only to the treaty or also to part of the treaty.

83. The CHAIRPERSON said that the sentence did not suggest that the legal effect was derived from the whole treaty; it implied that it might be derived from some part of the treaty.

84. Sir Michael WOOD suggested that the beginning of the fourth sentence be adapted to read: "In cases in which that agreement …".

Paragraph (2), as amended, was adopted.

85. Mr. SABOIA asked when the final version of that much-amended section of the report would be available on the Internet.

86. Mr. LLEWELLYN (Secretary to the Commission) replied that a composite advanced version of the report in English would be available on the Internet approximately two weeks after the end of the session.

Paragraph (3)

87. Mr. ŠTURMA pointed out that the reference in the footnote to the *Treaty Collection* should be to the *Treaty Series*.

Paragraph (3), as amended, was adopted.

Paragraph (4)

88. Sir Michael WOOD drew attention to the fact that, for the sake of consistency with paragraph (2), the words "or the instrument chosen" in the final sentence should be deleted.

Paragraph (4), as amended, was adopted.

New paragraph (5)

89. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed the insertion of a new paragraph (5), which would read:

> "Nonetheless, an important distinction must be made. As a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to the same rules of the law of treaties in situations such as termination or suspension of the operation of treaties provided for in section 3 of the 1969 Vienna Convention. Instead, article 25,

paragraph 2, allows for a very flexible way to terminate the provisional application of a treaty or a part of a treaty, without prejudice to the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied."

90. Mr. MURPHY said that new paragraph (5) was helpful in addressing some of the points that he had raised in the Drafting Committee. It was his understanding that the reference in the third sentence to "section 3 of the 1969 Vienna Convention" should in fact refer to "part V, section 3 of the 1969 Vienna Convention".

New paragraph (5), as amended, was adopted.

Paragraph (5)

91. Mr. MURPHY said that, in the third sentence, the word "affect" should perhaps be replaced with "modify" because, as he understood it, the paragraph addressed the question of whether provisional application of a treaty could have a consequence on the rights and obligations of the States concerned. Commission members would no doubt all agree that provisional application could not modify the rights and obligations of States, but, if he understood correctly, in its work on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission had been of the view that post-signature conduct by the States could have an effect on the interpretation of rights and obligations; if that was indeed the case, then "modify" might be the more appropriate word.

92. The CHAIRPERSON said that it had been his intention to raise basically the same issue, but to make a different proposal, namely, to insert a footnote at the end of the third sentence, which would read: "However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of that treaty under articles 31 or 32 of the Vienna Convention on the Law of Treaties." The footnote would also include a reference to the text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted on first reading.[427] He was not in favour of replacing the word "affect" with "modify" because to do so would reduce the import of the sentence; the fact that subsequent practice might affect interpretation might be an effect that did not constitute a modification.

Paragraph (5), as supplemented with a footnote, was adopted as paragraph (6).

The commentary to draft guideline 6 [7], as amended, was adopted.

Commentary to draft guideline 7 [8] (Responsibility for breach)

Paragraph (1)

93. Mr. GROSSMAN GUILOFF proposed that, for the sake of readability, the final sentence be placed before the penultimate sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

94. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed the deletion of paragraph (2).

It was so decided.

Paragraph (3)

Paragraph (3) was adopted as paragraph (2).

Paragraph (4)

95. Ms. GALVÃO TELES proposed replacing, in the first sentence, the phrase "the draft articles on responsibility of States for internationally wrongful acts of 2001" with the phrase "the 2001 articles on the responsibility of States for internationally wrongful acts", and the phrase "the draft articles on responsibility of international organizations of 2011" with the phrase "the 2011 draft articles on the responsibility of international organizations".

Paragraph (4), as amended, was adopted as paragraph (3).

The commentary to draft guideline 7 [8], as amended, was adopted.

Commentary to draft guideline 8 [9] (Termination upon notification of intention not to become a party)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

96. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the references to "draft guideline 6" be replaced with "draft guideline 5".

It was so decided.

97. Mr. GROSSMAN GUILOFF proposed that the opening phrase of the second sentence be recast to read "In accordance with draft guideline 5, provisional application continues …".

Paragraph (2), as amended, was adopted.

Paragraph (3)

98. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the paragraph be reformulated to read:

"It was not feasible to reflect in a single formulation all the possible legal arrangements that might exist if the treaty has entered into force for the State or international organization provisionally applying a treaty or a part of a treaty, in relation to other States or international organizations provisionally applying the same treaty or a part thereof."

99. Mr. JALLOH said that he would be interested to hear the Special Rapporteur's reasoning behind paragraph (3), in particular how it related to paragraphs (2) and (4). He wondered whether, for the sake of clarity, it might be preferable to delete paragraph (3), to reformulate paragraph (4) and merge it with paragraph (2), since those paragraphs were closely related conceptually.

[427] *Yearbook … 2016*, vol. II (Part Two), pp. 84 *et seq.*, paras. 75–76.

100. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he did not consider it appropriate at the current juncture for him to explain again the genesis of the draft guideline and the commentary thereto. In submitting the draft commentaries to the Working Group for its consideration, he had thought that it would have been possible to obviate the need for time-consuming discussions during the adoption process in plenary. He would not oppose the deletion of paragraph (3) if that would facilitate the adoption process, but the Commission would nevertheless at some point have to revisit the issues discussed therein.

101. Mr. JALLOH said that he shared the Special Rapporteur's concern that the Commission should not reopen issues previously discussed at the current stage. With that in mind, he saw no problem with maintaining paragraph (3) as it stood.

Paragraph (3) was adopted.

Paragraph (4)

102. Mr. JALLOH proposed that, for the sake of clarity, the words "the second instance mentioned above" in the first sentence be replaced with "the second instance mentioned in paragraph (1) of the commentary to the present draft guideline".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

103. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the first two sentences be recast to read:

> "While the 1969 Vienna Convention and the 1986 Vienna Convention envisage such an alternative agreement only being concluded between the 'negotiating' States and, where applicable, international organizations, draft guideline 8 refers more generally to 'or it is otherwise agreed'. Such a formulation would continue to refer to the States or international organizations that had negotiated the treaty, but it may also include States and international organizations that were not involved in the negotiation of the treaty."

104. Mr. MURPHY said that the third sentence would be clearer if the words "such a restriction" were replaced with "the narrow language of the Vienna Conventions", if that was what was intended.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to draft guideline 8 [9], as amended, was adopted.

105. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter V contained in document A/CN.4/L.901/Add.2.

Commentary to draft guideline 9 [10] (Internal law of States or rules of international organizations and observance of provisionally applied treaties)

Paragraph (1)

106. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that, in the second sentence, the words "it deals" be inserted after the word "specifically" and that the words "their rules" be replaced with "the rules of the organization". The final sentence should be reformulated to read: "The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations."

It was so decided.

107. Sir Michael WOOD proposed that, in the first sentence, the phrase "the internal laws of States" be replaced with "the internal law of States". That wording would reflect the title of the draft guideline and avoid the implication that only legislation was concerned. Any other occurrences of that phrase in the draft should be similarly amended.

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

108. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the second sentence be reformulated to read: "Therefore, it should be considered along with the contents of those articles and other applicable rules of international law."

109. Sir Michael WOOD, welcoming the proposal, said that the sentence might read better if the phrase "together with those articles" were used instead of "along with the contents of those articles".

Paragraph (2), as amended, was adopted.

Paragraph (3)

110. Mr. GÓMEZ ROBLEDO (Special Rapporteur) proposed that the paragraph read:

> "Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty is governed by international law. Thus, its execution by the parties cannot depend on, or be conditional by, their respective internal laws. Whatever the provisions of the internal law of a State or the internal rules of an international organization, they may not be invoked as a justification for failing to perform international obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for their breach. As indicated in draft guideline 11 [12], however, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as part of their agreement on provisional application."

111. Mr. MURPHY, referring to the first sentence, said that he did not think that the draft guideline actually stated that provisional application was governed by international law. He therefore proposed that the first and second sentences be reformulated and combined to read: "Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty cannot depend on, or be conditioned on, their respective internal laws."

112. Sir Michael WOOD proposed the deletion of the word "internal" before the words "rules of an international organization" in the third sentence.

113. Mr. JALLOH said that, in the third sentence, the word "failure" might be more suitable than "failing".

114. The CHAIRPERSON said that, while he agreed with Mr. Murphy that draft guideline 9 did not explicitly state that the provisional application of a treaty or a part of a treaty was governed by international law, he considered that it implied that statement. He therefore suggested simply replacing the word "states" with "implies" in the first sentence, with the rest of the sentence to remain unchanged. In his view, it was important to state that provisional application was governed by international law.

115. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he agreed with the proposal to replace the word "states" with "implies" and otherwise leave the first sentence unaltered, as it contained an important statement. He could accept Mr. Jalloh's proposal.

116. The CHAIRPERSON said that he himself had another proposal, namely, the insertion, in the second sentence, of the words "as a general rule" after the word "cannot", since the current formulation was, in his view, too absolute. The proposed wording would serve as an implicit reference to the important exception dealt with in draft guideline 11 [12].

117. Sir Michael WOOD said that he did not think that the word "implies" was appropriate in the context of the first sentence. In his view, that sentence should be recast to read: "Like the general rule in article 27, draft guideline 9 [10] reflects the principle that the provisional application of a treaty or a part of a treaty is governed by international law." At the end of the fourth sentence, the words "their breach" should be replaced with "the breach of such obligations", which referred back to the international obligations arising from provisional application.

118. Mr. MURPHY proposed that the first sentence be split into two sentences. The first would read: "The provisional application of a treaty or a part of a treaty is governed by international law." The second would read: "Like the general rule in article 27, draft guideline 9 [10] states that the provisional application of a treaty or a part of a treaty cannot as a general rule depend on, or be conditioned on, their respective internal laws."

119. Ms. GALVÃO TELES, referring to Mr. Murphy's proposed second sentence, said that the final phrase "their respective internal laws" should be replaced with "the internal law of the parties".

120. Sir Michael WOOD proposed that the final phrase of that sentence read: "the internal law or rules of the parties".

121. The CHAIRPERSON said that the Commission would continue its consideration of paragraph (3) at the next plenary meeting.

The meeting rose at 1 p.m.

3386th MEETING

Wednesday, 2 August 2017, at 3 p.m.

Chairperson: Mr. Georg NOLTE

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

Draft report of the International Law Commission on the work of its sixty-ninth session (*continued*)

Chapter V. *Provisional application of treaties* (*concluded*) (A/CN.4/L.901 and Add.1–2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.901/Add.2.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission (*concluded*)

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session (*concluded*)

Commentary to draft guideline 9 [10][*] (Internal law of States or rules of international organizations and observance of provisionally applied treaties) (*concluded*)

Paragraph (3) (*concluded*)

2. The CHAIRPERSON invited the Commission to consider the Special Rapporteur's new version of paragraph (3), which had been circulated to members and read:

> "The provisional application of a treaty or a part of a treaty is governed by international law. Like the general rule in article 27, draft guideline 9 [10] states

[*] The numbers in square brackets refer to the numbering of draft guidelines in document A/CN.4/L.901/Add.2 discussed at the present meeting.

that the execution of a treaty provisionally applied by the parties cannot, as a general rule, depend, or be conditioned, on their respective internal law or rules. Whatever the provisions of the internal law of a State or the rules of an international organization, they may not be invoked as a justification for failure to perform international obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations. However, as indicated in draft guideline 11 [12], the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application."

3. Mr. MURPHY proposed that, in the second sentence, the phrase "the execution of a treaty provisionally applied by the parties" be replaced with "the provisional application of a treaty by a State or international organization" and that the words "their respective" be replaced with the word "its".

Paragraph (3), as amended, was adopted.

Paragraph (4)

4. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the first sentence, the words "a violation of" should be replaced with "an inconsistency with" and that, in the last sentence, the words "would be unlawful under international law" should be replaced with "would not be in accordance with international law".

5. Sir Michael WOOD proposed deleting, in the first sentence, the phrase "and if so according to which conditions", which seemed to suggest that a State had the right to impose conditions or limitations that were not provided for in agreements for provisional application.

6. The CHAIRPERSON said that it was his understanding that a number of States had adopted internal legislation that set out conditions under which a treaty might be provisionally applied. It was therefore not merely a question of whether a State agreed to the provisional application of a treaty, but also of how it did so. Nevertheless, if the Commission did not object to the deletion, he would not oppose it.

Paragraph (4), as amended by the Special Rapporteur and Sir Michael Wood, was adopted.

Paragraph (5)

7. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, at the start of the second sentence, the words "Any other view" should be substituted for "Assuming otherwise".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

8. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the first sentence, the phrase "clarifies that the obligation flows not from the treaty itself, but from the agreement" should be replaced with the phrase "is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement".

Paragraph (7), as amended and with several editorial adjustments, was adopted.

The commentary to draft guideline 9 [10], as amended, was adopted.

Commentary to draft guideline 10 [11] (Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties)

Paragraphs (1) to (4)

9. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the last sentence of paragraph (2), the phrase "interpreted in accordance with" should be replaced with "considered along with" and that, in paragraph (4), the phrase "and, where appropriate" should be replaced with "or, as the case may be". In paragraphs (1) to (3), the references to "draft guideline 11" should be updated to reflect the current numbering of the draft guidelines.

10. Sir Michael WOOD said that he supported the amendment to paragraph (2) but that, in line with the language previously adopted by the Commission, the words "along with" should be changed to "together with".

Paragraphs (1) to (4), as amended, were adopted.

The commentary to draft guideline 10 [11], as amended, was adopted.

Commentary to draft guideline 11 [12] (Agreement regarding limitations deriving from internal law of States or rules of international organizations)

Paragraph (1)

11. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, in the last sentence, the words "while taking those limitations into account" should be replaced with "subject to limitations which derive from internal law".

12. The CHAIRPERSON said that the terms of a treaty on provisional application were often not specific regarding existing internal laws or rules. Therefore, he suggested either deleting the words "the terms of" in the last sentence or redrafting that sentence to include language to the effect that any limitations deriving from internal law needed only to be sufficiently clear in the treaty.

13. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that he was not opposed to the deletion of the words "the terms of" and would suggest inserting the words "or rules" after "subject to limitations which derive from internal law".

Paragraph (1), as thus amended, was adopted.

Paragraph (2)

14. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, at the end of the paragraph, the phrase "as can be found in some cases" should be deleted.

15. Mr. NGUYEN proposed adding, in the first sentence, the words "or a part of a treaty" after the second occurrence of the words "the provisional application of a treaty".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

16. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that, at the beginning of the paragraph, the words "The reference to the word 'right'" should be replaced with "The draft guideline". In addition, the second sentence should be reworded to read: "The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to provisionally apply a treaty or a part of a treaty."

Paragraph (4), as amended, was adopted.

Paragraph (5)

17. Mr. GÓMEZ ROBLEDO (Special Rapporteur) said that the paragraph should be changed to read: "The present draft guideline should not be construed as encouraging States or international organizations to include in the agreement on provisional application limitations derived from the internal law of the State or from the rules of the organization." In the footnote to paragraph (2), he suggested adding the following text after the first sentence:

> "See also the several examples of free trade agreements between the European Free Trade Association States and other numerous States (Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, the Republic of Korea, Lebanon, the former Yugoslav Republic of Macedonia, Mexico, Montenegro, Peru, the Philippines, Serbia, Singapore, Tunisia, the Central American States, the Gulf Cooperation Council member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: 'if its constitutional requirements permit', 'if its respective legal requirements permit' or 'if their domestic requirements permit' (www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the European Free Trade Association States and the Southern African Custom Union States, reads as follows:
>
> "Article 43 (Entry into force)
>
> "…
>
> "2. If its constitutional requirements permit, any [European Free Trade Association] State or [Southern African Custom Union] State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.
>
> "…"

Paragraph (5), as amended and subject to the requisite editorial adjustments, was adopted.

The commentary to draft guideline 11 [12], as amended, was adopted.

Section C, as amended, was adopted.

Chapter V of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter VI. *Protection of the atmosphere* (A/CN.4/L.902 and Add.1–2)

18. The CHAIRPERSON invited the Commission to consider chapter VI of its draft report, beginning with the text contained in document A/CN.4/L.902.

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 7

Paragraphs 3 to 7 were adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted, subject to their completion by the Secretariat.

Section B was adopted.

19. The CHAIRPERSON invited the Commission to consider the portion of chapter VI contained in document A/CN.4/L.902/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

1. Text of the draft guidelines, together with preambular paragraphs

Paragraph 10

Paragraph 10 was adopted.

20. The CHAIRPERSON invited the Commission to consider the portion of chapter VI contained in document A/CN.4/L.902/Add.2.

2. Text of the draft guideline, together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session

Paragraph 11

Paragraph 11 was adopted.

Commentary to the preambular paragraph beginning with the words "*Noting* the close interaction")

Paragraph (1)

21. Sir Michael WOOD proposed retaining only the first two sentences of paragraph (1). The rest of the paragraph referenced scientific papers that he was not in a position to endorse; he would prefer, in line with past practice, to retain references to United Nations documents alone.

22. Mr. MURASE (Special Rapporteur) said that the protection of the atmosphere was a science-dependent topic; without references to scientific information, the commentaries did not provide much added value. The phrase "According to a scientific study" had been included in the penultimate footnote to paragraph (1) in order to make it clear that the findings were based on input from scientists rather than from the Commission itself.

23. Mr. TLADI said that the finding referred to in the penultimate sentence—that human activities were also responsible for global warming—was an important and very basic scientific concept and he would advise against removing the reference to it.

24. Mr. MURPHY said that the fourth and fifth sentences of paragraph (1) seemed merely to repeat the content of the third sentence. In addition, it was unclear how the first two sentences in the penultimate footnote to the paragraph related to the focus of the preambular clause, namely, the interaction between the atmosphere and oceans. He also had reservations about the citation, in the first footnote to the paragraph, of an article whose title, "The importance of atmospheric deposition for ocean productivity", seemed to suggest that atmospheric deposition was a desirable phenomenon. He therefore proposed deleting the fourth and fifth sentences of paragraph (1); placing the markers for the first two footnotes to the paragraph at the end of the third sentence; and, in the penultimate footnote, deleting the content and citations before the sentence that began "See also Ø. Hov". With respect to the last sentence of paragraph (1), he proposed replacing the footnote referring to paragraphs 185 to 196 of General Assembly resolution 71/257 with a reference to paragraph 279, which specifically addressed the interaction between the atmosphere and oceans, and redrafting the last sentence to read: "In its resolution 71/257 of 23 December 2016, the General Assembly stressed the importance of increasing the scientific understanding of the oceans–atmosphere interface."

25. The CHAIRPERSON suggested that the Commission should take the time to check whether the citations in the four footnotes to the paragraph were actually relevant to the preambular clause and whether the concepts outlined in paragraph (1) of the commentary were generally accepted as undisputed. Although some scientific concepts went beyond the Commission's expertise, the topic itself required scientific support; it should be possible to find a middle ground. Perhaps the Special Rapporteur, together with those Commission members most interested, could arrive at a new formulation for the paragraph and the footnotes.

26. Ms. LEHTO said that she found the citations of scientific findings useful and not overly technical and she supported the text as proposed by the Special Rapporteur.

27. Mr. SABOIA said that he agreed with Mr. Tladi and Ms. Lehto. The commentaries and accompanying references were relevant to the topic and were not unduly scientific. Moreover, the Commission had included similar scientific references in previous documents.

28. Mr. PARK said that he had concerns about the scientific studies cited in the penultimate footnote to the paragraph, especially in the second sentence, in which "[m]any scientific analyses" were said to merely "suggest" a scientific risk. It was important to bear in mind that, once adopted, the commentaries would be considered as the work of the Commission as a whole.

29. Mr. PETER said that he supported paragraph (1) as drafted by the Special Rapporteur. The topic of protection of the atmosphere was a controversial one and required scientific background evidence; that evidence should be retained.

30. Mr. JALLOH, supported by Mr. CISSÉ, said that he agreed with Ms. Lehto. It would be odd not to include scientific evidence when dealing with a topic such as protection of the atmosphere. The scientific meetings arranged by the Special Rapporteur with scientific experts had been very useful.

31. Mr. MURASE (Special Rapporteur) said that the scientific materials cited in the commentary had also appeared in his fourth report, for which he had consulted a number of experts. As for the text of paragraph (1) itself, it was sometimes necessary to explain one concept in several ways. The sixth sentence had been included because of the definition of human activities in draft guideline 1 and the Commission's emphasis on human activities as a cause of transboundary air pollution and global degradation. The paragraph should be approved as currently drafted, with the exception of the last sentence, at the end of which a reference to paragraph 279 of General Assembly resolution 71/257 could be added; the last footnote to the paragraph should be amended accordingly.

32. Ms. ORAL said that she was in favour of including references to scientific findings. She suggested adding a reference to a recent report by the Intergovernmental Panel on Climate Change that stated very clearly that the oceans were getting warmer and that human activities were involved.

33. Mr. VÁZQUEZ-BERMÚDEZ said that paragraph (1) provided useful context for the preambular clause in question and made it clear that the findings offered in support of the draft guidelines were those of scientists and not of the Commission itself.

34. Mr. PETRIČ said there was a panoply of literature on the topic; therefore, it was somewhat surprising that the citations in the footnotes were solely English-language sources. In any case, perhaps a better text for paragraph (1), as a whole, could be found.

35. Sir Michael WOOD said that he largely supported the amendments proposed by Mr. Murphy, with the exception of the proposed retention of the third sentence. He was also in favour of mentioning the report recently published by the Intergovernmental Panel on Climate Change.

36. The CHAIRPERSON, speaking as a member of the Commission, said that the Commission could, and should, responsibly provide scientific evidence in support of its work on the topic. He agreed that the relevance of the penultimate footnote to the paragraph for the interaction between the atmosphere and the oceans was not immediately obvious. That and other points should be dealt with before the Commission could adopt a final version of the paragraph.

37. Mr. MURASE (Special Rapporteur) said that he would consult other members and provide a revised text of paragraph (1) for the Commission's consideration at a future meeting.

Paragraph (1) was left in abeyance.

Paragraph (2)

38. Mr. MURPHY suggested that, in the first sentence, the words "of the substances" should be changed to "on the state of the marine environment, including a chapter addressing, in particular, substances", since the Global Integrated Marine Assessment had covered more than just substances polluting the oceans from land-based sources through the atmosphere.

Paragraph (2), as amended, was adopted.

Paragraph (3)

39. Mr. PARK suggested that the third sentence of the second footnote to the paragraph should be deleted, because its content was already reflected in the body of paragraph (3).

40. Mr. MURPHY echoed that suggestion and added that, in the first sentence of paragraph (3), the words "greenhouse gas emissions from ships have been increasing in recent years at a high rate, contributing to global warming" should be altered to read "greenhouse gas emissions from ships contribute to global warming", especially as no source was given for that statement. He queried the reference in the second sentence to the 2000 study by IMO: it would be more appropriate to refer to the 2009 version of that study. Some of the works cited towards the end of the second footnote to the paragraph did not deal directly with emissions from ships and could be deleted.

41. Mr. MURASE (Special Rapporteur) said that the report had referred to the 2000 IMO study because it was the first in the series, but he had no objection to citing a later work.

42. The CHAIRPERSON said that the works cited in the second footnote to the paragraph were sufficiently relevant for the references to be maintained.

43. Mr. SABOIA suggested that the Commission defer to the informed opinion of the Special Rapporteur. Emissions from ships had long contributed to marine pollution. The original wording in the first sentence of paragraph (3) should not be replaced unless the Special Rapporteur agreed.

44. Mr. MURASE (Special Rapporteur) indicated that he agreed to the change proposed by Mr. Murphy.

45. The CHAIRPERSON said that he took it that the Commission wished to amend paragraph (3) as proposed by Mr. Murphy and the second footnote to the paragraph as suggested by Mr. Park.

Paragraph (3), as amended, was adopted.

Paragraph (4)

46. Mr. PARK suggested that paragraph (4) be placed between paragraphs (1) and (2) of the commentary on the next preambular paragraph beginning with the words "*Aware* also, in particular, of …", which dealt with the issue of sea-level rise.

47. Mr. MURPHY drew attention to an inconsistency between the body of the paragraph, which referred to the General Assembly, and its footnote, which cited a report of the Secretary-General.

48. The CHAIRPERSON suggested that a reference to relevant resolutions of the General Assembly be added to the footnote.

49. Mr. MURASE (Special Rapporteur) said that the text of the paragraph could instead be altered to refer to the Secretary-General. He added that, since paragraph (4) dealt with ocean acidification as well as sea-level rise, it should remain where it was in the text.

50. Sir Michael WOOD said that the section of the Secretary-General's report cited in the footnote to the paragraph quoted extensively from the 2030 Agenda for Sustainable Development.[428] Citing the latter, rather than the Secretary-General's report, would render the reference to the General Assembly in the body of paragraph (4) correct.

51. The CHAIRPERSON welcomed that suggestion and took it that the Commission agreed to amend the footnote to that effect but to leave the paragraph otherwise unaltered.

It was so decided.

Paragraph (5)

52. The CHAIRPERSON suggested that the words "forms the basis" should be changed to "forms the factual basis", in line with the second sentence of paragraph (1).

53. Mr. MURASE (Special Rapporteur) suggested the use of the word "physical" instead of "factual".

With those amendments, paragraph (5) was adopted.

Commentary to the preambular paragraph beginning with the words "*Aware* also, in particular"

Paragraph (1)

54. Mr. PARK, referring to the third and fourth sentences of paragraph (1), said that it seemed incongruous to mention specific figures for likely sea-level rise but

[428] General Assembly resolution 70/1 of 25 September 2015.

then to state that the figures remained uncertain. He suggested that the content of the third sentence be moved to a footnote.

55. The CHAIRPERSON, Ms. ORAL and Mr. CISSÉ expressed the view that there was no inherent contradiction in referring to a range of estimated figures and then stating that exact figures and rates of change remained uncertain.

56. Mr. RAJPUT suggested a textual amendment with a view to responding to Mr. Park's concern.

57. Mr. MURPHY said that, in the phrase "exact absolute figures" in the fourth sentence, the word "absolute" should be deleted to avoid tautology. Referring to the last footnote to the paragraph, he questioned the use of the phrase "an urgent problem for the law of the sea": sea-level rise was even more of a problem for those affected. As such issues were covered in the body of paragraph (1), he suggested that the footnote should begin at "See A. H. A. Soons".

58. Mr. MURASE (Special Rapporteur) agreed to those suggestions.

59. Mr. RUDA SANTOLARIA echoed those who saw no inherent contradiction in the paragraph, adding that it was important to retain the reference to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change in the third sentence of paragraph (1).

60. Mr. TLADI endorsed the view that there was no contradiction in the paragraph but supported calls to delete the word "absolute". Apart from that, the passage should remain unchanged.

61. Mr. MURASE (Special Rapporteur) said he agreed that the word "absolute" should be deleted.

62. After further discussion of terminology in which Ms. ORAL and Mr. OUAZZANI CHAHDI participated, the CHAIRPERSON said he took it that the Commission agreed to delete the word "absolute" but to otherwise leave the paragraph unaltered.

Paragraph (1), as thus amended, was adopted.

Paragraph (2)

63. Mr. PARK asked whether the phrases "the rules of law relating to the protection of the atmosphere", "the rules relating to the protection of the atmosphere" and "the law of the atmosphere" were intended to mean the same thing and suggested that the phrase "the rules of the law of the sea" be shortened to read "the law of the sea".

64. Mr. MURASE (Special Rapporteur) said that the various expressions were intended to refer to the same concept. The terminology could be unified if it was confusing.

65. Mr. OUAZZANI CHAHDI expressed the view that the phrase "the rules of the law of the sea" was clear; however, the word "rules" [*règles*] should perhaps be altered to "provisions" [*dispositions*].

66. The CHAIRPERSON pointed out that elsewhere, the Commission had used the wording "the rules of international law relating to the protection of the atmosphere", which might prove more acceptable to members.

67. Mr. RUDA SANTOLARIA welcomed that suggestion, which would bring the text into line with the wording of draft guideline 9, paragraph 1.

68. The CHAIRPERSON said he took it that the Commission agreed to amend the paragraph to align the terminology as suggested.

Paragraph (2), as amended, was adopted.

*The commentary to the preambular paragraph beginning with the words "*Aware *also, in particular" was adopted.*

Commentary to the preambular paragraph beginning with the words "*Noting* that the interests"

Paragraph (1)

69. Sir Michael WOOD suggested that, in the first sentence, the words "in the context of human rights protection", which seemed overly restrictive, be deleted or amended.

70. The CHAIRPERSON proposed the alternative wording "particularly with a view to human rights protection".

71. Mr. MURPHY suggested that the phrase instead be changed to read "in the context of protection of the atmosphere". In order to closely mirror the wording of the Paris Agreement under the United Nations Framework Convention on Climate Change of 2015 on climate change, the third sentence of the paragraph should be altered to read: "The Paris Agreement under the United Nations Framework Convention on Climate Change of 2015 on climate change, in its preamble, after acknowledging that climate change is a common concern of humankind, provides that parties should, when taking action to address climate change, respect, promote and consider, among other things, their respective obligations on human rights, as well as intergenerational equity."

72. The CHAIRPERSON, referring to the judgment of the International Court of Justice cited in the last sentence of the paragraph, suggested amending that sentence to avoid the implication that the Court's concern for intergenerational equity revolved solely around the use of nuclear weapons. He proposed the following wording: "The International Court of Justice has recognized the relevance of intergenerational considerations in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case by noting the imperative to take into account 'in particular … their ability to cause damage to generations to come'."

73. Mr. MURASE (Special Rapporteur) expressed support for the amendments to the first and last sentences of the paragraph proposed by the Chairperson.

74. Mr. PARK questioned the relevance of the Court's judgment to the topic of protection of the atmosphere,

which dealt with peacetime activities rather than the use of force.

75. The CHAIRPERSON pointed out that the international community had a common interest in survival, whether in peacetime or in time of war.

76. Sir Michael WOOD suggested that, in the first sentence, the words "in the context of human rights protection" be changed to "including with a view to human rights protection", to emphasize the fact that the issue was much broader. Turning to the last sentence, he suggested that the Chairperson's concern might be met by simply deleting the words "the unique characteristics of".

77. The CHAIRPERSON, supported by Mr. MURASE (Special Rapporteur), agreed to that suggestion. He took it that the Commission agreed to accept Sir Michael's amendments to the first and last sentences of paragraph (1) and Mr. Murphy's amendment to the third sentence.

Paragraph (1), as thus amended, was adopted.

Paragraph (2) and new paragraph (3)

78. The CHAIRPERSON, noting that paragraph (2) consisted of two indents, suggested that the second indent should be transformed into a new paragraph (3), with the remaining paragraphs to be renumbered accordingly.

It was so decided.

79. Mr. TLADI queried the opening phrase of paragraph (2), which read: "Given that there are as yet no decisions by international tribunals conferring customary international rights". He suggested that it be deleted.

80. Sir Michael WOOD endorsed that proposal but said that if the phrase was retained, the word "conferring", which was obviously an editorial error, should be amended to read "concerning".

81. Ms. ORAL, commenting on the second footnote to the new paragraph (3), which referred to certain recent domestic court decisions on the human rights of minors, said that the first citation would be better placed in the following footnote, which brought together several references to the literature on the public trust doctrine.

82. Mr. PARK said that he concurred with Mr. Tladi that the opening phrase was not correct. Referring to the statement on the item by the Chairperson of the Drafting Committee in 2016,[429] he said that the reason why the Commission had used the term "interests" rather than "benefits" had been to signal the integrated nature of the atmosphere. He proposed that similar language be inserted after the deletion proposed by Mr. Tladi.

83. Mr. CISSÉ endorsed Mr. Tladi's amendment to paragraph (2). With regard to Mr. Park's comment, he said that whether "interests" or "benefits" was used was more of a linguistic than a legal question.

84. Mr. MURPHY said that Mr. Tladi's amendment was fully justified, for the reasons outlined by Mr. Park; the language suggested by Mr. Park should indeed be included in the text.

85. Mr. OUAZZANI CHAHDI said that, in the reference to the decisions of international tribunals in the French text of the first sentence, the words *ne reconnaît pas* should be replaced with *ne semble pas reconnaître*.

86. Mr. TLADI said that the entire first sentence should be deleted; alternatively, wording could be included to indicate that although there had been no decisions yet by international tribunals concerning customary intergenerational rights, there had been many domestic court cases that had recognized such rights.

87. Mr. MURASE (Special Rapporteur) said that the background to the sentence was that if international courts and tribunals had referred to the notion of intergenerational rights as part of customary international law, then it would have been possible to speak of "benefits" rather than "interests"—but that was not the case. He proposed that the opening phrase flagged by Mr. Tladi, "Given that there are as yet no decisions by international tribunals conferring customary intergenerational rights" be moved to the first footnote to the paragraph, which contained the reference to the article by C. Redgwell on intra- and intergenerational equity.

88. The CHAIRPERSON suggested that paragraph (2), together with its first footnote, be left in abeyance while the Special Rapporteur conferred with interested members to find an alternative formulation.

It was so decided.

89. Mr. PARK, referring to the new paragraph (3), said that the reference in the first sentence to "'guardian' or representative of future generations" was vague and abstract. He questioned the need to retain the new paragraph.

90. Mr. MURPHY endorsed that remark. The first sentence of the new paragraph (3) indicated that it had been speculated in the literature that future generations might have some legal standing to invoke human rights. The second sentence talked about guardians representing the rights of minors. The third sentence referred to the ability of Governments to act as trustees for the management of environmental resources. The three sentences were on three completely different subjects, and the second sentence was irrelevant. He would prefer to delete the entire paragraph, but if it was retained, it should be in the form of a footnote noting a few theories and issues that had been discussed in the literature.

91. Mr. MURASE (Special Rapporteur) said he agreed with Mr. Murphy that the paragraph should be transformed into a footnote; it was true that intergenerational rights had not yet become part of customary international law.

92. Sir Michael WOOD endorsed that suggestion and pointed out that the cases on the "children's atmospheric trust" mentioned in the second footnote to new

[429] See *Yearbook … 2016*, vol. I, 3314th meeting, p. 206, paras. 59 *et seq.*

paragraph (3) were domestic law, not international law, and even as such, their authority seemed questionable.

93. Mr. RAJPUT said that the paragraph was not about international law, but about trends in domestic law. The first sentence might be problematic, but the second sentence made the useful point, not exclusively in the context of environmental law but in general, that claims could be brought on behalf of minors. The third sentence, concerning the "public trust doctrine", was likewise important. He was in favour of retaining the second and third sentences, deleting the first and adding a final sentence, to which the first footnote to new paragraph (3) would be transposed, to say that the principle of intergenerational equity had been acknowledged in the academic literature.

94. Mr. GROSSMAN GUILOFF said that he had no objection to the first sentence. The first part merely stated a fact: there were no rights-holders at present with the legal standing to invoke obligations in the context of intergenerational rights. The second part referred to what had been "suggested" in the literature, and thus merely described ongoing academic discussions.

95. Ms. ORAL supported the comments made by Mr. Rajput. The first sentence identified an important trend which was likely to continue.

96. The CHAIRPERSON said that the discussion had facilitated the identification of relevant issues. He suggested that the Special Rapporteur and any other interested members work out the wording of a new footnote and a new text of paragraph (3).

It was so decided.

Commentary to draft guideline 9 (Interrelationship among relevant rules)

Paragraph (1)

97. Mr. MURPHY proposed that, in the final sentence, the phrase "the Commission's conclusions on the work of its Study Group" be replaced with "the conclusions reached by the Commission's Study Group".

98. After a discussion in which Mr. TLADI, Mr. MURPHY, Ms. LEHTO and Mr. MURASE (Special Rapporteur) participated, the CHAIRPERSON said he took it that the Commission wished to adopt the amendment put forward by Mr. Murphy.

It was so decided.

99. The CHAIRPERSON suggested that, in the antepenultimate sentence, the words "conflicts and" be inserted before "tensions".

100. Mr. NGUYEN said that in the first sentence, for the sake of consistency, the phrase "rules of international law concerning the atmosphere" should be replaced with "rules of international law relating to the protection of the atmosphere", as had been done elsewhere.

With those amendments, paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

101. Sir Michael WOOD said that the antecedent of the third sentence, "That is indicated by the term 'identified'", should be clarified, and the final sentence should either be clarified or deleted.

102. Mr. MURPHY said that he, too, had been perplexed by those two sentences. In the first sentence, the word "Commission's" should be replaced with "Study Group's" and in the penultimate sentence, the abbreviation "etc." should be deleted.

103. The CHAIRPERSON said that in the phrase "In coordinating conflicting norms" in the fourth sentence, the word "conflicting" should be deleted, because the reference was to both norms that could be harmonized and to those regarding which conflicts were identified.

Those amendments were adopted.

104. Mr. MURASE (Special Rapporteur), responding to the questions raised earlier by Sir Michael, said that paragraph (3) focused on the identification of relevant rules, rather than on their interpretation and application. In the third sentence, the word "That" referred to the use of the word "identified" in the first sentence of draft guideline 9, paragraph 1, and to the explanation given in the first sentence of paragraph (3). The final sentence had been inserted to indicate that the identification of customary international law was a prerequisite to its application.

105. Sir Michael WOOD, having thanked the Special Rapporteur for those explanations, said that in the final sentence, the words "customary rules of interpretation" should accordingly be replaced with "rules of customary international law for the purposes of interpretation". In the second sentence, the words "It refers to" should be replaced with "The term 'identified' is particularly relevant in relation to", and the third sentence should be deleted.

106. The CHAIRPERSON, responding to a comment by Mr. MURPHY, said that the word "particularly" in Sir Michael's amendment made it clear that rules arising from treaty obligations were to be identified and also to be interpreted and applied. If he heard no objection, he would take it that the Commission wished to adopt the amendments proposed by Sir Michael.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

107. The CHAIRPERSON suggested that, in the fourth sentence, the words "traditional methods" be replaced with

the word "rules". In the fifth sentence, the word "explicit" seemed unnecessary and could perhaps be deleted.

108. Mr. OUAZZANI CHAHDI proposed deleting the phrase in parentheses in the first sentence "(hereinafter, '1969 Vienna Convention')".

Paragraph (5), as amended, was adopted.

Paragraph (6)

109. Mr. TLADI suggested adding a new sentence between the second and third sentences, to read: "Furthermore, nothing in draft guideline 9 should be interpreted as subordinating rules of international law in the listed fields to rules relating to the protection of the atmosphere or vice versa."

110. Mr. RUDA SANTOLARIA said that, for the sake of consistency, the reference to "the law relating to the protection of the atmosphere" in the last sentence should be replaced with "the rules of international law relating to the protection of the atmosphere".

111. The CHAIRPERSON suggested that, in order to improve the flow of the paragraph, the order of the second and third sentences should be inverted.

Paragraph (6), as amended, was adopted.

Paragraph (7)

112. Sir Michael WOOD said that, in the first sentence, the words "trade/investment" should perhaps be replaced with "trade", as investment was dealt with in the next paragraph. He was not convinced that the fifth sentence was necessary, since it was immediately preceded by an authoritative quotation from the Doha Ministerial Declaration and followed by references to WTO dispute settlement cases.

113. Mr. MURPHY said that he agreed with the proposal to delete the word "investment" in the first sentence. In the same sentence, he proposed deleting the final words, "in general and the atmospheric environment in particular", since the references that followed did not deal with the atmosphere *per se*. Given that the antepenultimate footnote to the paragraph cited scholarly views, he suggested the addition, in the fourth sentence, of the phrase "in the literature" between "As the concept of 'mutual supportiveness' has become gradually regarded" and "as 'a legal standard *internal* to the WTO'".

114. The CHAIRPERSON said that, traditionally, if a statement was substantiated by a footnote, the implication was that it was based on the footnote; in the present case, the footnote cited scholarly writings. It was not necessary to flag the nature of the source in the text of the commentary.

115. Mr. PARK said that he had concerns about the penultimate sentence and the controversial issue of mutual supportiveness. If the Special Rapporteur's intention was not simply to limit mutual supportiveness to international trade law, he would propose deleting the sentence. If it was maintained, however, it should be amended to read: "Mutual supportiveness in international trade law is considered by some scholars as part of the principle of harmonization …".

116. Mr. JALLOH said that he had reservations about the treatment of "mutual supportiveness" and some of the authorities cited in the footnotes, which could give rise to confusion. Given that the first sentence, which emphasized institutional and jurisprudential references to the concept of mutual supportiveness, was immediately followed by a citation from the Marrakesh Agreement Establishing the World Trade Organization, that seemed to suggest that the authority for the concept was that Agreement, which was clearly not the case. He therefore proposed deleting the second sentence.

117. The CHAIRPERSON said that, as he understood it, the Special Rapporteur had included the reference to the Marrakesh Agreement Establishing the World Trade Organization because, although it did not explicitly mention mutual supportiveness, it had been the point of departure for the development of the principle by WTO.

118. Mr. RAJPUT said that he did not agree with Mr. Jalloh and supported the formulation of paragraph (7) as it stood. The reference to "trade/investment" should be maintained in the first sentence, because one of the multilateral agreements annexed to the Agreement was on trade-related investment measures.

119. Mr. MURPHY said that he agreed with Mr. Jalloh's point. The paragraph began with the statement that there were a number of institutional and jurisprudential references to the concept of mutual supportiveness in international trade law, yet the very next instrument mentioned did not contain such a reference. Perhaps that concern and his own about the literature could be resolved by amending the first sentence to read: "In international trade law, there has emerged a concept of mutual supportiveness between the fields of trade and the environment."

120. Mr. MURASE (Special Rapporteur) said that he could agree to deleting the word "investment" in the first sentence. As to the quotation from the Marrakesh Agreement Establishing the World Trade Organization, the notion of sustainable development was always associated with the concept of mutual supportiveness in WTO texts, and he therefore would not support deleting the second sentence. He was not in favour of inserting "in the literature" in the fourth sentence, but could go along with Mr. Park's amendment to the penultimate sentence.

121. Mr. GROSSMAN GUILOFF said that, while it was important to mention investment law, an explicit justification for doing so must be provided, perhaps by referring to specific trade agreements. He proposed amending the first sentence to make it more general: "In international law, there are a number of developments related to the concept of mutual supportiveness …". He supported maintaining the reference to the Agreement but thought it should be stated clearly that the goal of mutual supportiveness was sustainable development.

122. Mr. SABOIA said that he agreed with Mr. Rajput and the Special Rapporteur about the need to keep the

reference to the Marrakesh Agreement Establishing the World Trade Organization.

123. The CHAIRPERSON proposed that paragraph (7) be left in abeyance to allow the Special Rapporteur and any interested members to prepare a new draft.

It was so decided.

Paragraph (8)

124. Mr. MURPHY proposed that the words "largely echo the WTO standard" in the second sentence be replaced with "also contain standards".

125. Mr. RAJPUT said that in the last sentence, it would be preferable to replace "Such investment tribunals" with "Some investment tribunals". The references in the second and third footnotes to the paragraph should be expanded to give specific examples of bilateral investment treaties.

It was so decided.

Paragraph (9)

126. Ms. ORAL said that, as currently formulated, the fourth sentence seemed to suggest that the definition of pollution of the marine environment in article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea expressly referred to all airborne sources of marine pollution, including atmospheric pollution from land-based sources and vessels, which was not the case. She therefore proposed rephrasing that part of the sentence to read: "which defines the 'pollution of the marine environment' … implicitly to include …".

127. Mr. PARK said that he had doubts about the references to the enforcement of rules in the last two sentences of paragraph (9), since draft guideline 9, paragraph 1, mentioned only identification, interpretation and application of rules.

128. Mr. NGUYEN said that he shared Mr. Park's concerns and proposed replacing the word "enforcement" with "implementation". In the penultimate sentence, the words "and maritime law" should be added after "applicable rules of the law of the sea". A footnote referring to the same source as the footnote to paragraph (4) of the commentary to the preambular paragraph beginning with the words "*Noting* the close interaction between the atmosphere and the oceans" should be added.

129. Sir Michael WOOD said that he agreed with Ms. Oral's point and proposed amending that part of the fourth sentence to read "in such a way as to include …". He also agreed with Mr. Nguyen but would suggest saying "effective implementation" in the last two sentences. He did not believe that an express reference to maritime law was necessary.

Paragraph (9), as amended by Sir Michael Wood, was adopted.

The meeting rose at 6.05 p.m.

3387th MEETING

Thursday, 3 August 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

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

Draft report of the International Law Commission on the work of its sixty-ninth session (*continued*)

Chapter VI. *Protection of the atmosphere* (*continued*) (A/CN.4/L.902 and Add.1–2)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VI that was contained in document A/CN.4/L.902/Add.2. He recalled that the Special Rapporteur had held consultations with a small group of interested Commission members on a number of paragraphs the adoption of which had been deferred pending some redrafting. He invited the Special Rapporteur to introduce his proposed amendments, as contained in an informal paper that had been circulated to members.

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 guideline, together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session (*continued*)

Commentary to the preambular paragraph beginning with the words "*Noting* the close interaction" (*concluded*)

Paragraph (1) (*concluded*)

2. Mr. MURASE (Special Rapporteur) said that, in response to amendments suggested by members of the group, he had merged the first two sentences, deleted the word "generally" from the third sentence and changed the phrase "that is from anthropogenic activities" to "including from anthropogenic activities", deleted the fourth and fifth sentences, added the phrase "and stressed the importance of increasing the scientific understanding of the ocean–atmosphere interface" at the end of the last sentence, merged the first two footnotes to the paragraph, and included a reference to the Intergovernmental Panel on Climate Change in the third footnote to the paragraph, which had become the second footnote to the paragraph.

Paragraph (1), as amended, was adopted.

Paragraph (4) (*concluded*)

3. Mr. MURASE (Special Rapporteur) proposed the insertion, in the footnote to the paragraph, of a reference

to paragraph 14 of General Assembly resolution 70/1 of 25 September 2015.

Paragraph (4), as amended, was adopted.

The commentary to the preambular paragraph beginning with the words "Noting *the close interaction", as amended, was adopted.*

Commentary to the preambular paragraph beginning with the words "*Noting* that the interests" (*concluded*)

Paragraph (2) (*concluded*)

4. Mr. MURASE (Special Rapporteur) said that, as agreed by the group, he had reformulated the paragraph to read:

> "The Commission opted for the term 'interests' rather than 'benefit' under the present preambular paragraph. A similar formulation was used in draft guideline 6 provisionally adopted by the Commission at the sixty-eighth session, which referred to interests of future generations in the context of 'equitable and reasonable utilization of the atmosphere'. As yet, no international court or tribunal has found that there exists under customary international law intergenerational 'rights' such that a current generation may advance rights on behalf of a future generation.[footnote] Standing to sue in some proceedings was granted on the basis of the 'public trust doctrine', which holds Governments accountable as trustees for the management of common environmental resources.[footnote]"

5. In order to incorporate a suggestion from Mr. Tladi, he had also inserted, in the footnote to the third sentence of that paragraph, citations to several of the most important domestic court cases that involved issues relating to the interests of future generations. He had furthermore rearranged the content of the various footnotes to the original paragraph so as to create two new footnotes.

6. Mr. PARK proposed that an additional footnote be inserted at the end of the second sentence of the reformulated paragraph that would refer to pages 11 and 12 of the statement made by the Chairperson of the Drafting Committee, Mr. Šturma, at the Commission's 3314th meeting, held on 4 July 2016.

It was so decided.

7. Mr. PARK pointed out that there was some repetition between the third sentence of the proposed paragraph and its footnote.

8. Mr. TLADI said that referring in the body of the paragraph to the fact that, as yet, no international court or tribunal had found that there existed under customary international law intergenerational "rights", while indicating less prominently, in the footnote to the third sentence of the proposed paragraph, that there had been many national court decisions that recognized intergenerational equity risked undermining the important principle set out in the preambular paragraph. Both statements should appear together, either in the footnote or in the paragraph.

9. Following an exchange in which the CHAIRPERSON, Sir Michael WOOD, Mr. TLADI, Mr. MURPHY, Ms. ORAL and Mr. VÁZQUEZ-BERMÚDEZ took part, Mr. MURPHY made a series of proposals for reconciling the various viewpoints expressed. First, the third and fourth sentences of the reformulated paragraph should be deleted. Moreover, the contents of the two footnotes of the text proposed by the Special Rapporteur should be merged into one large footnote that would begin with the new citation that had just been proposed by Mr. Park, to be followed by a sentence reading: "Though there are as yet no decisions by international tribunals concerning customary intergenerational rights, there have been many national court decisions, which may constitute practice for the purposes of customary international law, recognizing intergenerational equity." Next would come the references to scholarly works and to national court cases, followed by the deleted fourth sentence from paragraph (2). The footnote indicator would appear at the end of the second sentence of paragraph (2).

Paragraph (2), as amended, was adopted.

The commentary to the preambular paragraph beginning with the words "Noting *that the interests", as amended, was adopted.*

Commentary to draft guideline 9 (Interrelationship among relevant rules) (*continued*)

Paragraph (7) (*concluded*)

10. Mr. MURASE (Special Rapporteur) said that, in response to several proposals by Commission members, he had deleted the words "there are a number of institutional and jurisprudential references to" from the first sentence, as they had elicited strong controversy. The first sentence now read: "With respect to international trade law, the concept of mutual supportiveness has emerged to help that law and international environmental law, which relates in part to protection of the atmosphere."

11. Mr. MURPHY proposed that, in that sentence, the word "reconcile" be inserted after the word "help".

Paragraph (7), as amended, was adopted.

Paragraph (8) (*concluded*)

12. Mr. MURASE (Special Rapporteur) said that, following a suggestion from Mr. Rajput, he had replaced the text of the second footnote to the paragraph with references to examples of model bilateral investment treaties.

Paragraph (8), as amended, was adopted.

13. The CHAIRPERSON invited the members to consider the adoption of the remaining paragraphs of the commentary to draft guideline 9.

Paragraph (10)

14. Mr. MURPHY proposed that, in the fifth sentence, the words "obliges the parties" be replaced with the words "provides that the parties are determined" and that the words "of a certain magnitude" be added at the end of the same sentence. He also proposed that, in the following

sentence, the words "in accordance with the Convention and the Protocols to which they are party" be inserted after the words "appropriate measures".

Paragraph (10), as amended, was adopted.

Paragraph (11)

15. Mr. AURESCU proposed that the footnotes supporting the first sentence also contain references to the case law of international courts and tribunals, not only to articles of human rights treaties. Furthermore, the rights enumerated in that sentence should include the right to a healthy environment—perhaps in place of the right to private and family life—which had been developed in the case law of the European Court of Human Rights. One example that could be provided was the 1994 *López Ostra v. Spain* decision, which was the first case on the right to a healthy environment that had been decided by the Court.

16. Mr. MURASE (Special Rapporteur) said that he agreed with those proposals and could supply examples of case law from his fourth report (A/CN.4/705).

17. The CHAIRPERSON said that including a reference to the case suggested by Mr. Aurescu might be problematic because the right to a healthy environment had been developed by the Court on the basis of the right to privacy and other rights, meaning that it did not have the same textual explicitness as the other rights listed in the first sentence. Given that the Commission was in the process of adopting the report, it might be best not to supplement the text with that degree of detail.

18. Mr. MURPHY said that, if the Commission decided to cite examples of the case law of international courts and tribunals in the footnotes to that sentence, he would like to have an opportunity to see the cases in question. An alternative solution would be to replace the opening words of the sentence, "A review of the jurisprudence of international courts and tribunals and of human rights treaty bodies shows that the most commonly used 'general' substantive rights in environmental claims are", with the words "In this regard, relevant human rights are", followed by the three rights that currently appeared in the sentence. He also proposed that, in the final sentence, in order to clarify the causal link mentioned, the words "that impairs the protected right" be inserted after the word "degradation".

19. Mr. OUAZZANI CHAHDI said that, in the first sentence, it might be better to replace the expression "'general' substantive rights" with "fundamental rights" [*droits fondamentaux*].

20. Mr. MURASE (Special Rapporteur) said that the terms "general rights" and "substantive rights" were terms of art that appeared in the scholarly literature in English, and the replacement of the expression "'general' substantive rights" with "fundamental rights" might not capture that common usage.

21. The CHAIRPERSON suggested inserting the word "human", so that the expression would read "'general' substantive human rights".

22. Mr. ŠTURMA said that the point of the first sentence was that, because no specific human right to a healthy environment had been established, environmental claims before international courts and tribunals or human rights treaty bodies tended to rely on classic or traditional human rights. Yet none of those cases, including the one mentioned by Mr. Aurescu, had anything to do with the protection of the atmosphere; rather, they concerned other forms of environmental damage.

23. Mr. CISSÉ said that the terms "general rights" [*droits généraux*] and "specific rights" [*droits particuliers*] were also terms of art in French and should be maintained in the text. Perhaps a footnote could be used to explain that the first expression referred to fundamental rights.

24. Mr. SABOIA proposed that the word "'general'" before "substantive rights" be deleted, as it was unnecessary.

25. Mr. GROSSMAN GUILOFF said that the word "'general'" should be maintained, as it was used in contrast to the word "'specific'".

26. Mr. MURASE (Special Rapporteur) said that, since there appeared to be opposition to the use of the terms "'general' substantive rights" and "'specific' right" in the first and second sentences, it might be best to follow Mr. Murphy's suggestions for amending the first and final sentences. He also proposed that the word "'specific'" in the second sentence be deleted.

27. Sir Michael WOOD said that he agreed with the suggestions made by the Special Rapporteur and Mr. Saboia. It would, however, be wise to retain the word "specific" in the second sentence, but without quotation marks, in order to contrast the right to environment with the rights spelled out in the first sentence.

28. Mr. OUAZZANI CHAHDI proposed that the phrase "the most commonly used 'general' substantive rights" be replaced with "the most commonly used human rights" [*les droits de l'homme les plus souvent invoqués*], since the rights at stake were human rights.

29. The CHAIRPERSON said that the phrase proposed by Mr. Ouazzani Chahdi would make it necessary to specify sources and would give the Special Rapporteur much additional work.

30. Mr. JALLOH said that, in the light of the Special Rapporteur's explanation of the logic behind the terms "general" and "specific", the original wording of the first two sentences of the paragraph should be retained.

31. The CHAIRPERSON drew attention to the fact that the Special Rapporteur had agreed to Mr. Murphy's proposal.

Paragraph (11), as amended by Mr. Murphy and Sir Michael Wood, was adopted.

Paragraphs (12) and (13)

32. Mr. RUDA SANTOLARIA said that, for the sake of consistency, in the first sentence, the word "law" should be replaced with "rules".

33. Mr. PARK said that he endorsed the correction proposed by Mr. Ruda Santolaria, especially as he and a number of other members had queried the existence of a law on the atmosphere during the plenary debate. The reference in the second sentence to the "law on the atmosphere" should therefore also be amended. Moreover, in that sentence, it would be more accurate to say that the scope of application of human rights treaties was "*a priori* limited to the persons subject to a State's jurisdiction". In the third sentence, the phrase "the case becomes a matter of extra-jurisdictional application" was strange and should, perhaps, be recast to read "the case might become an international dispute". Lastly, he requested clarification of the last part of that sentence, which read "and thus a situation that human rights treaties cannot normally cope with".

34. Mr. NGUYEN said that he concurred with Mr. Ruda Santolaria and Mr. Park that the reference to the law on the atmosphere should be changed, because draft guideline 9, paragraph 1, referred to the "rules of international law relating to the protection of the atmosphere". In order to retain some consistency, he therefore proposed that this phrase be used in both the first and the second sentences in place of "law relating to the atmosphere" and "law on the atmosphere".

35. Mr. GROSSMAN GUILOFF said that the second sentence seemed to be comparing two different things. In human rights law, the States of victims were normally the States of origin, whereas "persons subject to a State's jurisdiction" was a different notion. Perhaps what the Special Rapporteur wished to indicate was that human rights law normally had an impact within the territory of a country. He suggested that the last part of the second sentence instead indicate that different notions had been developed in human rights law, including *erga omnes* jurisdiction, crimes against humanity, international tribunals and so forth, that had broadened the scope of application of human rights law, establishing a potentially important link to the rules of environmental law.

36. The CHAIRPERSON said that paragraphs (12) and (13) raised some very important general questions concerning the relationship between human rights law and other fields of law, which had not been extensively discussed in the Drafting Committee but deserved closer examination. He therefore suggested that the deliberations on those two paragraphs be suspended in order to enable consultations to be held among a small group of members.

It was so decided.

37. Mr. MURASE (Special Rapporteur) said it was unfortunate that further consultations were necessary. The extra-jurisdictional application of human rights law in the context of environmental protection was discussed in detail in his fourth report. It was therefore somewhat surprising that the issue had been raised at that late stage of the session. He had used the term "extra-jurisdictional application" to avoid confusion with the extraterritorial application of domestic law.

Paragraphs (14) and (15)

Paragraphs (14) and (15) were adopted.

Paragraph (16)

38. Mr. MURPHY, supported by Sir Michael WOOD, said that he was concerned about the statistics quoted in the second sentence because they very probably referred to deaths from both indoor and outdoor air pollution. It was well known that indoor air pollution was the cause of the bulk of such deaths. The sentence was therefore misleading, as it suggested that 6.5 million people were dying every year from the failure to address transboundary pollution and climate change. The simplest solution would be to delete that sentence. The next sentence would then start with the words, "The World Health Organization (WHO) has noted that …".

39. Mr. MURASE (Special Rapporteur) said that he accepted that amendment.

Paragraph (16), as amended, was adopted.

Paragraph (17)

40. Sir Michael WOOD asked what was meant by "repatriation" in the penultimate sentence.

41. The CHAIRPERSON, speaking as a member of the Commission, proposed that, in the last sentence, the phrase "other groups of people include local communities, migrants, women, children, persons with disabilities and also the elderly" read, "other groups of potentially particularly vulnerable people include …".

42. Mr. MURASE (Special Rapporteur) explained that the term "repatriation", which was not a legal term, had been drawn from World Bank and WHO documents. It covered situations such as the considerable emigration from Tuvalu to New Zealand every year and the movement of people from low-lying villages to higher ground on other islands in the Pacific Ocean. He agreed to the amendment proposed by the Chairperson.

43. Sir Michael WOOD said that repatriation normally meant the act of returning to one's country of nationality. The situation described by the Special Rapporteur sounded more like relocation.

44. Mr. RUDA SANTOLARIA said that displacement [*desplazamiento*] was a more apt term to describe forced movement within a person's home country. Forced migration occurred when someone went to a foreign country.

45. Mr. MURASE (Special Rapporteur) said that he preferred the term "displacement" to "relocation".

Paragraph (17), as amended, was adopted.

46. Mr. PARK, speaking in exercise of the right of reply, said that the Special Rapporteur had maintained that the issue of the extra-jurisdictional application of human rights law was mentioned in his fourth report and had already been debated in detail. Paragraphs (12) and (13) were taken from paragraphs 89 to 91 of the fourth report, which would be published in volume II (Part One) of the *Yearbook of the International Law Commission 2017*, whereas the commentary to the draft guidelines would be published in volume II (Part Two). The Commission was

therefore entitled to raise any questions of relevance to its work and propose any amendments it thought fit.

47. The CHAIRPERSON said it was his understanding that the Commission had the right to decide on the contents of its commentaries, notwithstanding the debate on the Special Rapporteur's report. The Special Rapporteur had merely wished to indicate that in his fourth report he had already introduced the issue referred to in the commentary, which was still a draft commentary.

Chapter VII. *Immunity of State officials from foreign criminal jurisdiction* (A/CN.4/L.903/Rev.1 and Add.1–3)

48. The CHAIRPERSON invited the Commission to consider chapter VII of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.903/Rev.1.

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 8

Paragraphs 4 to 8 were adopted.

Paragraph 9

Paragraph 9 was adopted subject to its completion by the Secretariat.

Paragraph 10

49. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) requested the addition, at the end of the paragraph, of wording that would fully reflect the progress of work. It would read: "At the 3365th meeting, the Special Rapporteur reported to the Commission on the progress of the informal consultations."

Paragraph 10, as amended, was adopted.

50. The CHAIRPERSON invited the Commission to consider the portion of chapter VII contained in document A/CN.4/L.903/Add.1. The secretariat would add a footnote to the *chapeau* of Part Two (Immunity *ratione personae*) and to the *chapeau* of Part Three (Immunity *ratione materiae*) which would be identical to the footnote relating to procedure on which the Drafting Committee had agreed. The secretariat would also add draft article 7, which had been adopted by the Commission.

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 1

51. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the annex contained in document A/CN.4/L.893 and adopted by the Commission should also be inserted in the document.

Paragraph 1 was adopted on that understanding.

52. The CHAIRPERSON drew attention to the portion of chapter VII contained in document A/CN.4/L.903/Add.2, which was available in all official languages except Chinese. He asked whether he could take it that the Commission wished nonetheless to proceed with the adoption of the document.

53. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, before the document was considered, she wished to make two general comments. First, the draft commentary reflected the position adopted by the Commission on the topic. Throughout the Commission's work on the topic, she had displayed great flexibility and had taken into consideration the various views expressed by different members, which were adequately covered in the document. Given that the Commission had already adopted a position on the topic through a roll-call vote, the results of which were recorded in document A/CN.4/L.903/Rev.1, and given that the opinions of all members, including those holding dissenting opinions on draft article 7, were reflected in detail in the summary records, which members had had an opportunity to review, she urged members to bear in mind that, in view of the short time available, the Commission should abide by the opinion of the overwhelming majority of members of the Commission and not reopen the debate on issues which had been exhaustively discussed in plenary meetings and in the Drafting Committee. In point of fact, the Commission was being asked to adopt a decision on whether the commentaries reflected the decision taken by the Commission and the substantive questions which had been debated.

54. Concerning the proposed amendments prepared by Mr. Murphy in consultation with some of the other members and circulated in document form, her view was that some of the proposals could be adopted with no difficulty, while others would need to be debated. Although she appreciated Mr. Murphy's intention to facilitate and expedite the Commission's work, she was surprised that the proposals had been circulated in writing, as she had never been asked whether that should be done. Some of the proposals under other topics had also been circulated in writing, but in every case they had been prepared by the Special Rapporteur for the topic in question, not by other members. Furthermore, it was inappropriate for the proposed amendments to have been circulated under an official symbol, with no indication either in the document or by the Chairperson that what it contained was only a proposal. In her seven-year experience as a member, that was the first time such a paper had been circulated in those circumstances, during the adoption of the Commission's report. Normally, proposals were not circulated in writing unless they had been discussed first.

55. Mr. LLEWELLYN (Secretary to the Commission) said that there appeared to have been a misunderstanding. The secretariat had been requested to circulate the proposals as an informal paper. Had the secretariat been informed of any objections on the part of the Special Rapporteur, it would not have done so. The paper bore a

symbol because it was a marked-up version of an official document; there had been no intention to misrepresent its informal nature.

56. Mr. SABOIA said that he appreciated the Secretary's explanation, but the matter was serious and the Commission must decide whether to accept the unofficial document as a basis for its deliberations. He would like to know the Special Rapporteur's opinion in that regard.

57. Mr. TLADI, supported by Mr. ŠTURMA, said that the Commission should begin its deliberations on the basis of the official document issued under the symbol A/CN.4/L.903/Add.2. The proposals set forth in the informal paper could be introduced and considered during the discussion.

58. Mr. GROSSMAN GUILOFF said that if the purpose of the paper was to expedite the Commission's work by bringing the relevant issues to the members' attention, he had no objection. Given that it bore a document symbol, however, he wondered whether it would be submitted to the Sixth Committee or circulated to anyone except the Commission members. If it was only an unofficial paper that was not for wider circulation, he would simply thank the members who had prepared it, although they should perhaps have sought the opinion of the Special Rapporteur before circulating it.

59. The CHAIRPERSON suggested that, since the paper contained proposed commentaries, the Commission should proceed to adopt them in the usual way.

It was so decided.

2. Text of the draft article, with the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session

Paragraph 1

60. Sir Michael WOOD said that the text of draft article 7, as reproduced in paragraph 1 of the informal paper, had been adjusted to reflect the text that had been adopted previously by the Commission on the report of the Drafting Committee (A/CN.4/L.893). The annex to the draft article had also been adopted and would be added to paragraph 1.

61. Mr. MURPHY said that the footnotes previously adopted under section C should also be included.

Paragraph 1, as amended, was adopted.

Commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* does not apply)

Paragraph (1)

62. Sir Michael WOOD said that he wished to propose several minor amendments to paragraph (1), some of which were intended to align the text with the version adopted previously by the Drafting Committee and the plenary Commission. The first sentence should be changed from "Draft article 7 refers to crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* does not apply" to "Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles".

63. Mr. MURPHY proposed that a third sentence be added to the paragraph to capture language from the statement made by the Chairperson of the Drafting Committee at the Commission's 3378th meeting: "The Commission proceeded in its work on the general understanding that the outcome of its work was without prejudice to, or taking a position on, the question whether the text of draft article 7, or any part thereof, codified existing law—reflecting *lex lata*—or whether the result constituted an exercise in progressive development, reflecting *lex ferenda*."

64. Mr. TLADI said, with respect to the first sentence, that the addition of the phrase "under the present draft articles" was problematic because the Commission could have adopted a similar phrase in respect of every draft article, yet it had not done so. Regarding the new sentence proposed by Mr. Murphy, his consistent position had been that the Commission should not litter the text with such language. While it might be acceptable to indicate at the outset that the topic involved both codification and progressive development, that indication should not appear in the commentary to every draft article.

65. Mr. JALLOH said that he shared Mr. Tladi's view on the phrase proposed by Sir Michael. He was also uncomfortable with the new sentence proposed by Mr. Murphy, as the Commission had for decades held the view that it should not attempt to specify whether its work on a particular topic represented codification or progressive development. Since the wording of the proposal was taken from the statement made by the Chairperson of the Drafting Committee at the Commission's 3378th meeting, that statement and the debate on the subject were captured in the summary records in any event. The debate should not be revisited in the commentary.

66. The CHAIRPERSON, speaking as a member of the Commission, said that the Commission had traditionally taken the view that it was not always clear whether a particular draft article reflected *lex lata* or *lex ferenda*. The proposed new sentence was hardly revolutionary, as it merely indicated that the Commission had proceeded on that assumption. While the proposed sentence might appear to be stating the obvious, the draft articles were addressed not only to States, but also to courts, for which the question of whether a particular provision was *lex lata* or *lex ferenda* was important.

67. Mr. SABOIA said that he shared the views of Mr. Tladi and Mr. Jalloh on the proposals made by Sir Michael and Mr. Murphy.

68. Mr. RUDA SANTOLARIA said that the first sentence of the paragraph, as adopted on the report of the Drafting Committee (A/CN.4/L.893), was already clear as it stood. The important issue of *lex lata* versus *lex ferenda* was reflected in the statement made by the Chairperson of the Drafting Committee and in the summary records of the relevant meetings. The Commission should not enter into every aspect of its discussions in the commentary.

69. Mr. VÁZQUEZ-BERMÚDEZ said that he agreed with Mr. Tladi and Mr. Jalloh that it was not necessary to add the phrase "under the present draft articles" to the end of the first sentence, as it was redundant. The proposal advanced by Mr. Murphy was also unnecessary, as the point was already expressed in the statement made by the Chairperson of the Drafting Committee. Moreover, that statement had been made under the responsibility of the Chairperson of the Drafting Committee and should not be reflected in the commentary. It was understood that the Commission was working within its general mandate of codification and progressive development; further elaboration on that point could create confusion.

70. Mr. JALLOH said that the prevailing view seemed to be that the proposed additional sentence should not be included in the commentary. His understanding of commentaries was that they were analogous to the explanations provided in court decisions, in that their purpose was to flesh out substantive provisions by offering insights into the Commission's thinking. He was hesitant to overload the commentary with unnecessary text. Moreover, he considered that the Commission's position on *lex lata* versus *lex ferenda* referred to the general unworkability of establishing a clear division between codification and progressive development, not to the question of how to categorize specific provisions.

71. Mr. RAJPUT said he agreed with Mr. Ruda Santolaria that the first sentence should be retained as adopted by the Drafting Committee and the plenary Commission. The new sentence proposed by Mr. Murphy would provide a very necessary clarification of the Commission's point of departure. In the debates, some members had expressed discomfort with the non-inclusion, in draft article 7, of certain crimes such as terrorism and slavery. To address that issue comprehensively, the Commission should state up front, in paragraph (1) of the commentary, the basis on which it had proceeded. Unlike Mr. Tladi, he was not sure whether that principle pertained to all of the draft articles; his understanding was that the Commission had discussed the genesis or nature of the provision only in relation to draft article 7. Clarifying that point would be helpful for those who would eventually implement that draft article, including courts and even Governments.

72. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to the first two amendments proposed by Sir Michael, whereby "refers to crimes" would be changed to "lists crimes" and "does not apply" would be changed to "shall not apply". The phrase "under the present draft articles", however, did not add anything to the commentary and might even cause confusion. Like most other members who had expressed an opinion, she did not agree with that proposal. The new sentence proposed by Mr. Murphy had also failed to garner much support. The Commission as a whole seemed to be in favour of adopting the paragraph on that basis and moving on.

73. The CHAIRPERSON said that three or four members had expressed support for the additional sentence proposed by Mr. Murphy.

74. Mr. GROSSMAN GUILOFF said that he agreed with Mr. Jalloh, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi and Mr. Vázquez-Bermúdez that no reference should be made to progressive development and codification in paragraph (1). There was no reason to fear that the draft article would be seen as an example of only codification, not progressive development, as the information in the documents on the topic would dispel that notion. The fact that the members' views on draft article 7 were divided was very clear, since the results of the vote that had taken place were recorded in the portion of chapter VII that had just been adopted (A/CN.4/L.903/Rev.1).

75. Mr. PETRIČ said that he agreed with Mr. Rajput that the new sentence proposed by Mr. Murphy should be included. If ever the Commission had considered something that was typical of progressive development—and a rather arbitrary form of progressive development, at that—it was draft article 7, on which the Commission had not even reached a consensus.

76. Sir Michael WOOD said that, in the light of the comment made by the Special Rapporteur, he wished to propose a compromise solution whereby the words "under the present draft articles", but not the proposed new sentence, would be included.

77. Mr. GÓMEZ ROBLEDO said that he agreed with Mr. Grossman Guiloff and other members that the position reflected in Mr. Murphy's proposed amendment was amply covered in the summary records of the Commission's debate; it was not necessary to repeat that position in the commentary.

78. Ms. GALVÃO TELES said that the wording proposed by Mr. Murphy was already in the statement made by the Chairperson of the Drafting Committee and in the relevant summary records. The issue was also addressed in paragraph (8) of the commentary, and was thus adequately reflected without the new sentence.

79. The CHAIRPERSON, speaking as a member of the Commission, said that paragraph (8) referred to the other side of the argument. The proposed new sentence specified the starting point agreed on by the Commission, which formed the minimum common ground on which the commentaries had been formulated. He had not heard any arguments that the sentence was wrong in substance. The function of the commentary was to explain the role and status of a particular draft article, and he thus supported the inclusion of the additional sentence.

80. Mr. ŠTURMA said that the proposed new sentence did not pose any substantive problems, but he preferred Sir Michael's compromise proposal to retain the suggested addition to the first sentence and not include the proposed new sentence.

81. Mr. TLADI said that the content of the proposed new sentence was not incorrect in substance, but he had long believed that the Commission should not seek to clarify whether a given proposal represented codification or progressive development because the effect would be to stop the progressive development of international law. As a matter of principle, he did not support such language because the message it conveyed was that the draft article was not to be taken seriously. Moreover, the proposed addition of the words "under the present draft articles" to

the first sentence was unnecessary, since that was already made clear by the use of the treaty language "shall not apply" at the end of that sentence.

82. Mr. PETER said that the Commission's difficulty in reaching agreement was due to the fact that the Chairperson had taken a position on the paragraph under discussion. The role of a presiding officer was to weigh the balance of opinions expressed in the discussion and try to build support for the majority position. By stating his own position, however, the Chairperson was not leading the debate in a manner that was likely to result in a consensus.

83. The CHAIRPERSON said that, while he did not wish to prolong the discussion, his role as Chairperson did not preclude him from expressing his opinion as a member of the Commission. He had, however, taken due note of the impression that he might have created, and would endeavour, as always, to be as neutral as possible and to help the Commission to achieve consensus.

84. Mr. PARK said that he did not object to the insertion of a third sentence as proposed by Mr. Murphy. Although it was unusual for a commentary to include a description of the Commission's rationale, in the paragraph in question such detail served to highlight the importance of draft article 7.

85. Mr. RAJPUT said that it would be helpful for the Commission to clarify that it was engaging in the progressive development of international law. Otherwise, an adjudicating body might infer that the list in draft article 7, paragraph 1, was intended to be a closed list. For that reason, he supported the inclusion of the additional sentence.

86. Mr. JALLOH said that the issue of codification versus progressive development had already been referred to by the Chairperson of the Drafting Committee, among others. The question was whether that idea needed to be emphasized in the commentary. In a spirit of compromise, he was willing to leave aside his substantive concerns over the proposals made by Mr. Murphy and Sir Michael, so as to enable the Commission to proceed with its work.

87. Mr. GROSSMAN GUILOFF said that, in his experience, cases involving the immunity of State officials from foreign criminal jurisdiction, in which international relations were at stake, were referred to a high court. It was therefore not accurate to claim that judges dealing with such cases would be reliant on guidance from the Commission. In his view, it was unnecessary, if not excessive, to indicate so extensively in the commentary to draft article 7 the reasons of principle underlying its content. The Commission should retain the text as it stood and be flexible in acknowledging differing opinions.

88. Mr. RAJPUT said that, in India, the rule was that cases must first be referred to the lowest level of criminal prosecution, as every criminal case was subject to an appellate procedure. Unless that procedure was followed, judicial decisions could not be confirmed, which would have obvious implications for the exhaustion of domestic remedies. It would thus be incorrect, in the case of India, to state that criminal cases were referred to the highest court.

89. Mr. GROSSMAN GUILOFF, speaking in exercise of the right of reply, said that he had actually been involved in a case in India in respect of which an extradition request had been made by Chile, where the topic of immunity had been discussed among the jurists consulted, but he would take note of the learned position expressed by Mr. Rajput and revise his own opinion accordingly. In any case, it seemed that a superior court would always end up being involved.

90. Mr. CISSÉ said that a compromise had to be reached as soon as possible to overcome the impasse in which the Commission found itself.

91. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, as she understood it, most members, herself included, were opposed to the insertion of the new sentence proposed by Mr. Murphy. On the other hand, although the proposed insertion of the phrase "under the present draft articles" at the end of the first sentence was unnecessary and added nothing, she would not stand in the way of its addition if that was how the Commission wished to proceed.

92. Mr. AURESCU proposed that the first sentence of paragraph (1) be redrafted to read: "Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply, based on the premise that international law rules on this matter may further evolve in the future." There would then be no need for the third sentence proposed by Mr. Murphy.

93. Mr. MURPHY said that his understanding of the views expressed was that those members who were opposed to his proposal for a third sentence objected to its placement rather than its content. He was prepared to withdraw the proposal in the interest of moving forward, even though it appeared to reflect the majority view of the Commission.

94. The CHAIRPERSON suggested that the Commission adopt the paragraph with the amendment to the first sentence proposed by Sir Michael. The paragraph would read: "Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2)."

Paragraph (1), as amended, was adopted.

Paragraph (2)

95. Sir Michael WOOD said that, in the first sentence, the terms "part three" and "part two" should be capitalized and the word "apply" should be used instead of "produce effects". The second sentence was not entirely accurate. One option would be to redraft it to read: "The Commission decided on this approach in view of the fact that it is widely recognized that, under customary international law, a Head of State, Head of Government and Minister for Foreign Affairs is immune from foreign criminal jurisdiction during his or her term of office, even when he or

she has been accused or suspected of having committed a crime under international law." It would be simpler, however, to delete the sentence altogether, particularly as the Commission had already dealt with the subject matter of the sentence at length in its report on the work of its sixty-fifth session.[430]

96. Mr. TLADI said that he agreed, in substance, with the changes proposed by Sir Michael. However, if the second sentence was retained and amended, it would be preferable to refer to exceptions to immunity rather than to immunity itself, as it was such exceptions that were the subject of draft article 7.

97. Mr. SABOIA, supported by Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur), Mr. RUDA SANTOLARIA and Mr. CISSÉ, said that he agreed with Sir Michael's proposal to delete the second sentence altogether.

Paragraph (2), as amended, was adopted.

Paragraph (3)

98. Sir Michael WOOD proposed that, in the second sentence, the word "established" be replaced with "indicated". The quotation in the third sentence should be completed with the addition of the phrase "during such term of office" after the words "official capacity".

Paragraph (3), as amended, was adopted.

Paragraph (4)

99. Sir Michael WOOD said that, for the sake of consistency, the words "period in office" at the end of the first sentence should be replaced with "term of office".

100. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in the second sentence, the word "foreign" should be inserted before "criminal jurisdiction".

Paragraph (4), as amended, was adopted.

Paragraph (5)

101. Mr. MURPHY said that, although it was not the Commission's normal practice, it would be useful to state, in the first sentence, that the Commission had decided to include draft article 7 "by a majority vote", thereby linking the paragraph to an earlier part of chapter VII in which the Commission noted that a vote had taken place. In the second sentence, he would be in favour of inserting the words "it is considered that" before "there has been".

102. The major issue concerning paragraph (5), however, was what to do with the three footnotes. Several members of the Commission had raised serious doubts about the accuracy of the descriptions of the cases cited in the first footnote to the paragraph, the relevance of the national laws mentioned in its second footnote and the approach to discussing international case law in its third footnote. There were, in his view, three options for addressing the problem. The first was not to include the footnotes. The second was to make a number of changes to the footnotes; for example, some members of the Commission believed that the *Pinochet* case cited in the first footnote did not directly support the content of draft article 7. The third option was to insert a series of footnotes to paragraph (8) of the commentary to enable those members to set out their rationale for opposing the adoption of draft article 7. Proposed texts for those footnotes could be found in the informal paper that had been circulated in the meeting room.

103. Mr. JALLOH said that he was opposed to specifying, in the first sentence, that the Commission had decided to include draft article 7 "by a majority vote", since there was no established practice in that regard. On the other hand, he had no objection to the addition of "it is considered that" in the second sentence. As to the footnotes, he wondered whether the concern expressed by Mr. Murphy about the first footnote was not suitably addressed in paragraph (5) by the words "even though they do not all follow the same line of reasoning".

104. Mr. PETER said that, since commentaries were supposed to be comprehensive, and since it was a fact that the Commission had voted on whether to include draft article 7, he supported Mr. Murphy's proposed amendment to the first sentence. He was opposed to deleting any of the footnotes, however, particularly bearing in mind that the Commission regularly urged States to provide it with examples of their practice.

105. Ms. GALVÃO TELES said that the Commission should follow its standard practice and that the first sentence of paragraph (5) should therefore be adopted as it stood. Regarding the first footnote to the paragraph, she agreed with Mr. Jalloh that the words "even though they do not all follow the same line of reasoning" addressed the concern expressed by Mr. Murphy.

106. Mr. MURPHY said that, unless a series of footnotes was inserted in paragraph (8) of the commentary to explain why some members had opposed the adoption of draft article 7, he would want to correct what he viewed as errors in the three footnotes to paragraph (5).

The meeting rose at 1 p.m.

3388th MEETING

Thursday, 3 August 2017, at 3.05 p.m.

Chairperson: Mr. Georg NOLTE

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

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[430] *Yearbook … 2013*, vol. II (Part Two).

Draft report of the International Law Commission on the work of its sixty-ninth session (*continued*)

Chapter VII. *Immunity of State officials from foreign criminal jurisdiction* (*continued*) (A/CN.4/L.903/Rev.1 and Add.1–3)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VII contained in document A/CN.4/L.903/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 article, with the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session (*continued*)

Commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* does not apply) (*continued*)

Paragraph (5) (*continued*)

2. Sir Michael WOOD expressed support for the amendments to paragraph (5) proposed by Mr. Murphy at the Commission's previous meeting. Paragraphs (5) and (6) and the footnotes thereto set out the views of the Special Rapporteur concerning a "discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae*", citing a large body of case law. A number of members of the Commission disagreed with the interpretation of those cases, however. In his own view, the arguments presented by the Special Rapporteur were seriously defective. The amendments proposed by Mr. Murphy sought to avoid a blanket endorsement of the arguments, while retaining the information provided and changing the text as little as possible. The statement, in the first sentence, that the Commission had decided to include draft article 7 "by a majority vote" was a simple statement of fact. It would allow subsequent explanations to be understood as representing the majority view. The inclusion of the words "it is considered that" in the second sentence was no more than a drafting change. The proposal to indicate, at the beginning of the first two footnotes, that the cases listed therein had been invoked in support of the position taken in the commentary also reflected the facts; however, he accepted, as Mr. Tladi had said, that the suggested words "on various grounds" did not need to be included in the first footnote as they duplicated the content of the third sentence of paragraph (5). If the modest changes proposed were accepted, he would be in a position to join the consensus on a paragraph with which he otherwise had serious difficulties.

3. Ms. LEHTO expressed reluctance to include the words "by a majority vote" in paragraph (5). All the information concerning the process of adopting draft article 7 was presented unambiguously in the portion of chapter VII already adopted at the previous meeting. The proposed amendment was neither elegantly drafted nor in line with the Commission's established practice of referring to the views of groups of its members.

4. Mr. RAJPUT said that the Commission should adopt the third approach suggested by Mr. Murphy at the previous meeting: inserting footnotes in paragraph (8) setting out the minority view. The changes proposed by Mr. Murphy to paragraph (5) and to its first two footnotes would go some way towards allaying his own concern at being associated with what he viewed as a flawed interpretation of the cases relied upon in those footnotes. In the Commission's practice, it seemed that there were three ways of handling dissenting views: either the members concerned agreed to join the consensus and their view was not reflected; the members felt strongly enough to want their view reflected in the commentary or elsewhere but not strongly enough to block consensus or request a vote; or the members held extremely strong views and insisted on voting, which was the situation in which the Commission now found itself. To categorize such a strongly held position simply as "a view" was highly inappropriate. Where such a serious disagreement existed, it was only fair to reflect the minority view clearly.

5. Mr. PARK suggested that it would be permissible to include a reasonable description of what had transpired within the Commission in the commentary to a draft article adopted on first reading: instead of "by a majority vote", the words "by a recorded vote" could be inserted in the first sentence of paragraph (5) as a more neutral option.

6. The CHAIRPERSON observed that there were two issues to deal with: the specifics of drafting amendments to paragraph (5) and the wider question of how the situation that had arisen within the Commission should be reflected in the commentary, in which regard Mr. Murphy had made three suggestions at the previous meeting.

7. Mr. MURPHY, agreeing with the Chairperson's analysis, said that he had refrained from making further drafting proposals until it became clear which overall approach the Commission favoured.

8. Mr. TLADI, supported by Mr. SABOIA, sought clarification as to whether accepting the proposed changes to paragraph (5) and to its first two footnotes would be sufficient to meet Mr. Murphy's concern and avoid the introduction of additional footnotes in paragraph (8), in which case he would be prepared to go along with the proposals.

9. Mr. MURPHY indicated that this was not the case.

10. Mr. CISSÉ suggested that the first two footnotes to paragraph (5) be left unaltered on the understanding that the secretariat would be requested to consult the Special Rapporteur to ensure the accuracy of all references. If that approach met the concerns expressed by Sir Michael and others, paragraph (5) could be adopted on that basis.

11. The CHAIRPERSON expressed doubt that such an approach would resolve the issue. Speaking in his personal capacity, he said that it was customary for commentaries adopted on first reading to reflect the different views expressed within the Commission. He therefore favoured retaining the first two footnotes and making the views of those who disagreed with the interpretation of the cases cited therein clear elsewhere in the text, by means of additional footnotes.

12. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the procedure by which draft article 7

had been adopted was clearly reflected both at the start of chapter VII and in the summary records of the Commission's proceedings, and that the views of dissenting members were covered in paragraph (8). Consequently, she would prefer no mention to be made in paragraph (5) of the vote; however, if the consensus was to accept such an amendment, she would favour the wording proposed by Mr. Park, which was more neutral. While members of the Commission had differed—in some cases radically—in their interpretation of the cases cited in the first two footnotes to paragraph (5), it had been generally agreed that a trend, rather than a norm of customary international law, could be identified, and that was clearly reflected in the text of the commentary. Differences of interpretation were quite common among legal experts, but it was unreasonable to imply that the first footnote to the paragraph contained errors of fact. Nevertheless, she could accept the amendments to the two footnotes indicating that the cases cited therein had been invoked in support of a specific position.

13. She had sought to structure the commentary so as to explain the Commission's overall position, the various views expressed, the reasons why draft article 7 had been adopted and what the opposition had been to its adoption. It would not facilitate the work of the Sixth Committee of the General Assembly if supporting and dissenting views were presented together, rather than clearly separated. Once a decision had been taken, the view of the majority constituted the view of the Commission and should be presented first, followed, where necessary, by dissenting views and reservations. That said, she did not favour the suggestion of adding the kind of footnotes envisaged by Mr. Murphy to paragraph (8), although that issue could be discussed in detail when paragraph (8) came up for discussion.

14. The CHAIRPERSON highlighted the fact that there was a close connection between paragraphs (5) and (8) and how the Commission opted to tackle them.

15. Mr. PETRIČ said that, while he did not oppose the idea of exceptions to immunity *ratione materiae*, he had voted against the adoption of draft article 7 in the firm belief that the exceptions it listed did not reflect the current state of international law. Given the importance of the issue, great caution and in-depth consideration were needed. It was also vital to present the views of the minority in addition to those of the majority.

16. Mr. GROSSMAN GUILOFF acknowledged the need to reflect the fact that there were strongly held minority views within the Commission, but emphasized that they in no way equated in importance to a decision of the Commission. Such views should not be reflected in paragraph (5), particularly when paragraph (8) already made multiple mentions of the strong disagreement of some members. He suggested that it would be better to include the words proposed by Mr. Park in paragraph (8), rather than in paragraph (5). He also pointed out that the Sixth Committee would be well aware of the procedures that had been followed within the Commission, particularly as everything would be reflected in the summary records.

17. The CHAIRPERSON suggested that a small group of interested members hold informal consultations on how best to approach the issue of the footnotes, which seemed unlikely to be resolved through further discussions in plenary.

18. Mr. VÁZQUEZ-BERMÚDEZ, supported by Mr. RUDA SANTOLARIA, expressed the view that the Commission should continue to examine its draft report paragraph by paragraph, coming to the question of whether additional footnotes should be inserted in paragraph (8) when it took up that paragraph. Although he saw no need to refer in paragraph (5) to the voting procedure, as it would already have been covered earlier in chapter VII, he was prepared to accept Mr. Park's amendment to the first sentence as a compromise. In the second sentence, he suggested that the words "it considered that" be added, rather than "it is considered that". With regard to the first two footnotes, he could accept the changes proposed if they were agreeable to the Special Rapporteur.

19. Sir Michael WOOD welcomed Mr. Vázquez-Bermúdez's comments, expressed support for Mr. Park's proposed wording for the first sentence of paragraph (5) and endorsed the idea that the Commission continue to consider the text paragraph by paragraph. He would strongly support the inclusion of additional footnotes in paragraph (8).

20. Mr. JALLOH echoed the comments of Mr. Grossman Guiloff and Mr. Vázquez-Bermúdez and expressed the view that the Chairperson's suggestion of informal consultations on the issue of the footnotes might enable the Commission to make progress.

21. Mr. RAJPUT expressed bemusement at the reluctance of some members to reflect the minority view in the Commission's commentary. In the interests of compromise, he was prepared to accept Mr. Park's proposed amendment to the first sentence of paragraph (5). With regard to the Chairperson's suggestion of how to proceed, he highlighted the inextricable links between paragraphs (5) and (8) and the need to consider them together, along with any footnotes. It was important to convey the fact that a number of members disagreed with the interpretation being placed on certain cases, and the appropriate place to do that was in a footnote to paragraph (8), along the lines alluded to by Mr. Murphy. Any wording should be suitably neutral.

22. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said it was clear that the Commission agreed on the need to reflect minority views in its commentary. The inclusion within her original draft of the text of paragraph (8), which had been carefully crafted, demonstrated her personal readiness to reflect such views. Moreover, she had indicated her willingness to consider amending the text on the basis of Mr. Murphy's proposals. She proposed that the Commission adopt the text of paragraph (5) itself and leave all footnotes in abeyance, on the understanding that paragraph (8) would be handled in the same way and that any and all footnotes to those two paragraphs would be considered together in due course.

23. The CHAIRPERSON took it that the Commission agreed to her proposal. The text of paragraph (5) would be adopted with the amendments to the first and second sentences suggested by Mr. Park and Mr. Vázquez-Bermúdez, on the basis of Mr. Murphy's proposed changes,

which also included an editorial amendment to combine the third and fourth sentences; the Commission would return to the footnotes to paragraphs (5) and (8) later.

It was so decided.

Paragraph (6)

24. Mr. MURPHY said that the changes he wished to propose comprised a few editorial amendments to the first sentence to make the text read more smoothly: "the Commission also took into account" should be replaced with "account was also taken of" and "are intended to operate" with "exist".

25. He also proposed the addition, at the end of the paragraph, of three new sentences, to read: "Some members of the Commission, however, stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, impunity can be avoided in situations where a State official is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed."

26. Mr. JALLOH opposed the first change, because it made the sentence more impersonal instead of a straightforward statement about how the Commission had proceeded. He also questioned the need for the lengthy addition at the end of the paragraph.

27. Ms. GALVÃO TELES said that she, too, preferred the original version of the first part of the first sentence. As to the additional sentences, she thought they made important points about the reasoning behind the opposition of some members to the Commission's majority decision, but they would be better placed in paragraph (8), where other explanations of the opposition were set out.

28. Ms. LEHTO agreed that the additional sentences should be placed in paragraph (8). It would be more user-friendly to present one line of reasoning first, and then move on to the opposing views.

29. Mr. GÓMEZ ROBLEDO agreed with the two previous speakers. He likewise endorsed the Chairperson's earlier statement that the minority view should not be given disproportionate emphasis in the commentary. While it was certainly important to recount how decisions had been arrived at, the commentaries were adopted by the Commission, not by a minority or a majority of its members, and they reflected the position of the Commission as a whole.

30. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said she agreed that the three additional sentences would best be placed in paragraph (8); she proposed that they should be discussed when that paragraph was considered. She also agreed that the first change to the first sentence was unnecessary, because the text simply described what the Commission had done. The proposal to say that the draft articles "exist", instead of "are intended to operate" within the international legal order, was illogical and objectively incorrect, since the draft articles did not yet exist, they were in the process of being developed. If it was preferable, however, one could say that they "will operate".

31. The CHAIRPERSON, speaking as a member of the Commission, said that he, too, was in favour of retaining the phrase "the Commission also took into account" at the start of the first sentence.

32. Sir Michael WOOD said that it would be better to say "shall apply" rather than "will operate."

33. Mr. CISSÉ said that in the French text, the phrase should read *destiné à s'appliquer*.

34. The CHAIRPERSON said he took it that the Commission wished to adopt the Special Rapporteur's proposal to take up the three new sentences when it came to consider paragraph (8), to retain the phrase "the Commission also took into account" at the start of the first sentence, and to replace the words "are intended to operate" with "shall apply".

It was so decided.

Paragraph (6), as amended, was adopted.

Paragraph (7)

35. Mr. MURPHY proposed the insertion in the first sentence of the words "two reasons" after "In light of the above"; the replacement in the second sentence of the word "does" with "shall"; and the transposition, in the second sentence, of "*ratione materiae*" to follow "covered by immunity" instead of "from foreign criminal jurisdiction".

With those amendments, paragraph (7) was adopted.

Paragraph (8)

36. Mr. MURPHY said he was extremely grateful to the Special Rapporteur for crafting the paragraph, which captured the views of those who had opposed the adoption of draft article 7. The amendments he was proposing did not add to the length of the text but did add several aspects of the minority viewpoint that had not been included in the original paragraph. The new paragraph would read:

> "However, some members strongly disagreed with this analysis. They opposed draft article 7, which had been adopted by vote, stating that: (*a*) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the footnotes below, it is clear that national case law, national statutes and treaty law do not support the exceptions asserted in draft article 7; (*b*) the relevant practice showed no 'trend' in favour of exceptions to immunity *ratione materiae* from foreign criminal

jurisdiction; (*c*) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by the peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits; (*d*) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (*e*) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a 'normative policy' exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for 'new law' that cannot be considered as either *lex lata* or desirable progressive development of international law."

37. The CHAIRPERSON invited the Commission to consider the new text of paragraph (8) just proposed by Mr. Murphy, with the addition, at the end, of the three sentences he had proposed for inclusion in paragraph (6), leaving the footnotes in abeyance.

It was so decided.

38. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in (*a*), contained in the second sentence, the phrase "for reasons indicated in the footnotes below" should be deleted. Footnotes should contain, not the reasoning behind arguments made in the commentary, but the documentary sources that underpinned those arguments.

39. Mr. RAJPUT proposed that the Special Rapporteur's concern be addressed in the following way: in (*a*), the words "when, for reasons indicated in the footnotes below" should be replaced with "for them"; that part of the description of the views of some members would then read "the Commission should not portray its work as possibly codifying customary international law; for them, it is clear that national case law, national statutes and treaty law do not support the exceptions asserted in draft article 7".

40. Mr. REINISCH said that the words "some members strongly disagreed" in the first sentence should be replaced with more matter-of-fact language like "some members disagreed". If, in the new version of the paragraph, the phrase originally contained in the second sentence, "a large majority of Commission members", were to be deleted, he would prefer a reference to a recorded vote to be included. The verb tenses used in (*a*) and (*b*) of the second sentence should be harmonized so that the past tense was used throughout: thus, the words "it is clear" should be replaced with "it was clear" and "do not support" with "did not support".

41. Mr. RUDA SANTOLARIA endorsed the points made by the two previous speakers. The Commission should avoid using wording that could complicate reaching a consensus. It should say "some members argued against the decision" and, instead of "strongly disagreed", simply indicate that there had been a difference of views.

42. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, for the sake of consistency, the words "exceptions or limitations" should be retained throughout the commentary rather than simply "exceptions", since the focus of her fifth report was both exceptions and limitations. That change would also apply in paragraph (9). If the additional sentences proposed under paragraph (6) were moved to paragraph (8), it would be necessary to ensure that there was no duplication.

43. Mr. MURPHY said that the phrase "exceptions or limitations" had not been included in paragraph (8) because it did not appear in draft article 7, but it was simply a matter of drafting and he did not object to its insertion throughout the commentary. He agreed with the proposals to replace the words "strongly disagreed" in the first sentence and to delete the words "for reasons indicated in the footnotes below" in the second sentence, but believed that Mr. Rajput's proposal for (*a*) would not fit in well with the remainder of the second sentence.

44. If the additional sentences he had proposed for paragraph (6) were added at the end of paragraph (8), the words "Some members" should be replaced with "These members" and "however" should be replaced with "also" in the first additional sentence.

45. Mr. TLADI said that, in the second of the three new sentences proposed for paragraph (6), the words "in the view of these members" should be inserted after "rather", to make it clear that the view being expressed was not the Commission's.

46. Mr. ŠTURMA said that, although he supported paragraph (8) as modified by Mr. Murphy, the three new sentences created some redundancies; for example, the argument concerning the procedural nature of immunities appeared in (*c*) of the second sentence in paragraph (8) and need not be repeated.

47. Mr. MURPHY said that the additional sentences were not duplicative. The distinction between substantive and procedural matters was relevant both when analysing practice and in the context of the structure of international law. Perhaps it would be helpful to add the word "first" at the beginning of the second sentence of paragraph (8), and then to add "second" at the beginning of the first sentence of the new text from paragraph (6), deleting the word "also", which would then be unnecessary.

48. Mr. JALLOH said that he had reservations about the text for reasons similar to Mr. Šturma's. Mr. Murphy's proposal helped the flow, but there would continue to be imbalances throughout the commentary between the paragraphs reflecting the majority position and those on the minority position, and that was very problematic.

The amendments proposed by Mr. Murphy and Mr. Tladi were accepted.

Paragraph (9)

49. Mr. MURPHY said that his amendments to paragraph (9) were simple drafting changes. At the beginning of the first sentence, the words "On the other hand, it should be borne in mind that these members" should be replaced with "Some members". In the second sentence, the word "however" should be deleted and "take" replaced with "took".

50. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she would rather retain the original formulation.

51. Sir Michael WOOD said that the words "On the other hand" at the beginning of the first sentence made little sense.

52. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the words *Por otro lado* ["On the other hand"] could be deleted without changing the meaning of the sentence.

Paragraph (9), as amended, was adopted.

Paragraph (10)

53. Mr. MURPHY said that, in the first sentence, he proposed replacing the words "sets out" with "lists", in line with paragraph (1) of the commentary, and adding the word "allegedly" before "committed" in the first sentence.

Paragraph (10), as amended, was adopted.

Paragraph (11)

54. Mr. MURPHY said that he proposed adding two new sentences at the end of the paragraph, to read: "Some members viewed this alleged dichotomy as unsustainable and as not reflecting the reasoning set forth in the very limited case law on this issue. For example, the *Pinochet* case in the United Kingdom turned on the existence of a treaty relationship between the two States concerned which was interpreted as involving a waiver of immunity, not on either of the two views indicated above." The intention was to indicate that, in the view of some members, the two different interpretations cited were not the only basis for decisions in that area and that other possibilities for not according immunity, such as implicit waiver, existed. He also proposed replacing "must" with "may" and "is" with "may be" in the third sentence and "various" with "some" in the fourth. A footnote referring to paragraph 60 of the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* should be inserted at the end of the third sentence.

55. Mr. GROSSMAN GUILOFF said that the paragraph was intended to describe two views—that the commission of the crimes listed in draft article 7 could not be considered a function of the State and could therefore not be regarded as acts performed in an official capacity, and the contrary view that such crimes required the presence of a State element or else must have been committed with the backing, express or implied, of the State machinery. However, the proposed introduction of the words "may" and "may be" in the third sentence confused matters and suggested that there might in fact be three views rather than two. He had no objection to mentioning the *Pinochet* case in the final sentence, but as currently formulated the sentence was problematic in several other respects.

56. Mr. JALLOH said that he agreed that the words "may" and "may be" introduced ambiguity into the text, but he was in favour of replacing "various" with "some". He had reservations about the two additional sentences being proposed, as the views of the minority of members had already been covered quite adequately, despite concerns about textual repetition. Moreover, it was not necessary to refer to the *Pinochet* case.

57. Mr. SABOIA said that he shared the views expressed by Mr. Grossman Guiloff and Mr. Jalloh with respect to the proposal to insert the words "may" and "may be" and was also in favour of replacing "various" with "some". The two additional sentences did not belong in paragraph (11), but could perhaps be added to paragraph (8), which reflected the views of the minority of members. He agreed with Mr. Gómez Robledo's earlier statement about the need for proportionality and balance.

58. Mr. MURPHY said that he understood the concerns about the introduction of "may" and "may be" and would not insist on those changes. However, he did not agree that the concerns of the minority of members should be listed solely in paragraph (8). That paragraph dealt with the broad issues raised by draft article 7 as a whole. However, the part of the commentary now being discussed related to the individual paragraphs of the draft article. It was appropriate and fair to reflect the specific differences of opinion on those paragraphs. In order to address the concerns of some members, the proposed new sentence on the *Pinochet* case could be deleted.

59. The CHAIRPERSON suggested that the proposed sentence on the *Pinochet* case be moved to a footnote.

60. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she did not support the insertion of the two new sentences in paragraph (11). That paragraph sought to explain the arguments for using the words "does not apply" in the draft article. In her view, that paragraph was not the appropriate place to include a reference to the *Pinochet* case. She agreed with other members about the importance of ensuring a proper balance when reflecting the views that had been expressed. If it was decided to keep the reference to the view of "Some members", she would suggest saying instead "A small number of members".

61. Sir Michael WOOD said that it was not clear what was meant by the statement that "Some members viewed this alleged dichotomy as unsustainable". In his opinion, it was not the dichotomy that was unsustainable but rather the views put forward in the two new sentences. He would be in favour of adopting the original version of the paragraph.

62. Mr. VÁZQUEZ-BERMÚDEZ said that, in the first sentence, the words "'does not apply'" should be replaced with "'shall not apply'".

63. The CHAIRPERSON said that he took it that the Commission wished to replace the word "various" with

"some" in the fourth sentence and to add the footnote with the reference to *Jurisdictional Immunities of the State*, but otherwise to retain the original version of the paragraph.

Paragraph (11), as amended, was adopted.

Paragraph (12)

64. Sir Michael WOOD said that the first proposed change was to replace the words "immunity from jurisdiction *ratione materiae* that might" with "immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might" in the first sentence. The second was to delete the words "legal practitioners with a reliable list" in the second sentence, since the text was not addressed to legal practitioners only.

Paragraph (12), as thus amended, was adopted.

Paragraph (13)

65. The CHAIRPERSON said that the words "'does not apply'" should be changed to "'shall not apply'".

66. Sir Michael WOOD said that the proposal was to replace the words "on this occasion" with "in draft article 7" in the second sentence.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

67. Mr. MURPHY said that the first sentence had been redrafted to read: "The expression 'crimes under international law' refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law." In the second sentence, the word "covered" had been changed to "addressed" and the phrase "at the universal level" had been deleted.

68. Mr. PARK, supported by Mr. JALLOH, said that he disagreed with the proposed changes to the first sentence, as they weakened the text compared with the original version.

69. Mr. MURPHY said that the phrase "crimes of greatest concern to the international community" was commonly associated with the preamble to the Rome Statute of the International Criminal Court and therefore only with the four crimes within the jurisdiction of the Court. His amendment to the first sentence aimed to clarify that all the crimes listed in the Commission's draft article 7 were to be viewed as crimes of greatest concern to the international community, despite not all being covered by the Statute. As indicated in paragraph (16) of the commentary, the Commission had not previously used the expression "crimes under international law" to mean "crimes of greatest concern to the international community".

70. Mr. JALLOH said that, while the phrase "most serious crimes of concern to the international community as a whole" was indeed embedded in the Statute and was in fact language derived from the preamble to the Commission's 1994 draft statute for an international criminal court,[431] the concept of "crimes under international law" had been under discussion by experts well before the Statute's adoption: the phrase had first appeared in Principle 6 of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[432] It had been repeated in the Commission's 1954 draft code of offences against the peace and security of mankind[433] and its 1996 draft code of crimes against the peace and security of mankind.[434] As formulated in those instruments, the phrase "crimes under international law" had virtually always been understood as including other crimes besides those covered by the Rome Statute of the International Criminal Court, such as crimes against United Nations and other associated personnel. Crimes under international law, as the commentaries to those instruments also made clear, were the most serious crimes of concern to the international community. Therefore, while he applauded Mr. Murphy's attempts at clarity, the original language of the first sentence seemed perfectly adequate.

71. Ms. LEHTO proposed retaining both the original text and the proposed amendment, so that the first two sentences of paragraph (15) would read: "The expression 'crimes under international law' refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community; there is a broad consensus on their definition as well as on the existence of an obligation to prevent and punish them."

72. Sir Michael WOOD said that he supported Ms. Lehto's proposal. He further recalled that the report of the Drafting Committee on the topic stated that the phrase "crimes under international law" had been included in paragraph 1 to highlight the fact that draft article 7 related only to crimes that had their foundation in the international legal order and that were defined on the basis of international law, rather than domestic law.

73. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she supported Ms. Lehto's proposed formulation. As for the comments made by Sir Michael, the primacy of international law in respect of crimes under international law was explained in detail in paragraph (16). In the interest of achieving consensus, she suggested redrafting the first sentence to the effect that the phrase "crimes of international law" referred to crimes of greatest concern to the international community that were defined under international law and on which there was broad international consensus.

74. Mr. GÓMEZ ROBLEDO proposed that, in line with the preamble to the Rome Statute of the International

[431] The draft statute for an international criminal court adopted by the Commission in 1994 is reproduced *Yearbook … 1994*, vol. II (Part Two), pp. 26 *et seq.*, para. 91.

[432] *Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

[433] *Yearbook … 1954*, vol. II, document A/2693, pp. 151–152, para. 54.

[434] The draft code adopted by the Commission in 1996 is reproduced in *Yearbook … 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.

Criminal Court, the words "as a whole" be inserted after "international community".

75. The CHAIRPERSON said that he took it that the Commission wished to adopt paragraph (15) as amended by Ms. Lehto and with the insertion of the words "as a whole" after "international community", as proposed by Mr. Gómez Robledo.

It was so decided.

Paragraph (15), as amended, was adopted.

Paragraph (16)

Paragraph (16) was adopted.

Paragraph (17)

76. Mr. MURPHY said that in the last sentence, the words "categories of", before "crimes", should be deleted. Two new sentences should be added at the end of paragraph (17); those sentences would read:

> "Some members noted, however, that only seven national laws had been identified as expressly providing an exception for immunity *ratione materiae* in national criminal proceedings for the crime of genocide, crimes against humanity, and war crimes, and that the vast majority of States have not included exceptions to such immunity in either their general criminal codes or in their legislation implementing the Rome Statute of the International Criminal Court. As for case law supporting an exception to immunity *ratione materiae* in national courts, these members noted that no international court case denying such immunity had been identified, and that only one national court case had been advanced in support of an exception for the crime of genocide, two national court cases for crimes against humanity, and five national court cases for war crimes."

77. The proposed new language was aimed at capturing the view of some members as to why the crimes in question were not substantiated by existing practice.

78. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had reservations about the proposed additions. Some of her reservations related to previously raised issues about the expression of majority and minority views. However, she appreciated the concerns of members who found themselves in the minority and wondered if it might be acceptable to add, at the end of the original paragraph, a sentence that would read "Some members held, however, that the inclusion of those crimes in draft article 7 was not supported in practice".

79. Sir Michael WOOD said that while he was not opposed to the Special Rapporteur's proposed addition, such language would require a footnote referring back to paragraph (8), where the views of some members had been explained in detail.

80. Mr. SABOIA said that he supported the additional sentence suggested by the Special Rapporteur and proposed that the supporting evidence regarding the number of national court cases be moved from the body of the paragraph to a footnote.

81. Mr. MURPHY said that he was not satisfied with either of the courses of action proposed by the Special Rapporteur and by Sir Michael. He proposed, instead, that the additional sentence read: "The view was expressed that only seven national laws, no international court case, one national court case relating to genocide, two national court cases relating to crimes against humanity and five national court cases relating to war crimes had been identified in support of these exceptions." He would prefer to include a footnote providing details of those laws and cases, but could, for the sake of consensus, be content without a footnote.

82. Mr. RUDA SANTOLARIA said that he supported the amendment proposed by the Special Rapporteur and suggested that a footnote referring to paragraph (8) and the cases cited therein also be inserted.

83. The CHAIRPERSON, speaking as a member of the Commission, said that his personal preference would be to include references to numbers of cases and laws in a footnote, rather than in the body of paragraph (17).

84. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) suggested that the Commission should, for the time being, limit itself to adopting the body of paragraph (17) and should consider the footnotes thereto once the footnotes to paragraphs (5) and (8) had been adopted.

85. Mr. MURPHY said that he did not support that proposal. All members had a right to have their views reflected wherever they chose in the commentary.

86. The CHAIRPERSON suggested that the Commission leave paragraph (17) in abeyance to allow for informal consultations on the pending issues.

87. Mr. GROSSMAN GUILOFF said that, while he supported leaving paragraph (17) in abeyance, he wished also to support Mr. Murphy's position. The expression of the views of some members, as of any minority view, need not be lengthy, but should be included, as a matter of principle. He also suggested that Mr. Murphy check the details of the sources listed in the footnotes, as they did not appear complete.

88. Sir Michael WOOD said that he agreed with temporarily suspending action on paragraph (17). Furthermore, not only was allowing the expression of separate views a principle to be upheld, so was the idea that holders of such views should be allowed to express them in whichever way they saw fit.

89. Mr. TLADI said that members should certainly be permitted to express their views in the commentary, but there also had to be an overall balance in the arguments included.

Paragraph (17) was left in abeyance.

Paragraph (18)

90. Mr. MURPHY introduced several minor drafting changes to paragraph (18).

91. Mr. TLADI proposed adding a new penultimate sentence, to read: "Furthermore, a substantial number of States have themselves criminalized the crime within their national legal systems." A new footnote at the end of that sentence could provide a survey of the existing national practice and legislation.

92. Mr. MURPHY, welcoming Mr. Tladi's proposal, suggested that the Commission, as with certain earlier paragraphs, adopt the paragraph on the understanding that the footnotes would be considered at a later stage.

93. Sir Michael WOOD said that he would be reluctant to adopt any footnote containing a list of legislation without its having first been checked for accuracy.

94. Mr. ŠTURMA said that on principle, proposals by all members should be treated equally: that also applied to footnotes.

95. Ms. LEHTO suggested replacing, in Mr. Tladi's proposed addition, the phrase "have themselves criminalized the crime within their national legal systems" with "have included the crime of aggression within their national criminal law".

96. The CHAIRPERSON said that he took it that the Commission wished to adopt Mr. Tladi's amendment, as further amended by Mr. Murphy and Ms. Lehto.

It was so decided.

The meeting rose at 6.10 p.m.

3389th MEETING

Friday, 4 August 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Hassouna, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-ninth session (*concluded*)

Chapter VI. *Protection of the atmosphere* (*concluded*)[*] (A/CN.4/L.902 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.902/Add.2.

[*] Resumed from the 3387th meeting.

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission (*concluded*)[*]

2. Text of the draft guideline, together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session (*concluded*)[*]

Commentary to draft guideline 9 (Interrelationship among relevant rules) (*concluded*)[*]

Paragraph (12) (*concluded*)[*]

2. Mr. MURASE (Special Rapporteur) said that, on the basis of consultations with a small group of members, he proposed to recast the first two sentences to read:

> "One of the difficulties in the interrelationship between the rules of international law relating to the atmosphere and human rights law is the 'disconnect' in their application. While the rules of international law relating to the atmosphere apply not only to the States of victims but also to the States of origin of the harm, the scope of application of human rights treaties is limited to the persons subject to a State's jurisdiction."

3. The main issue had been to avoid the expression "extra-jurisdictional application", which had not found favour with the Commission. To that end, he proposed that the third sentence be reworded to read: "Thus, where an environmentally harmful activity in one State affects persons in another State, the question of the interpretation of 'jurisdiction' in the context of human rights obligations arises." The second footnote to paragraph (12) would be deleted as it would become redundant, and the other footnotes would be renumbered accordingly. The fourth sentence would be deleted.

Paragraph (12), as amended, was adopted.

Paragraph (13) (*concluded*)[*]

4. Mr. MURASE (Special Rapporteur) said that the aforementioned small group had proposed that paragraph (13) be recast to read:

> "One possible consideration is the relevance of the principle of non-discrimination. It may be considered unreasonable that international human rights law would have no application to atmospheric pollution or global degradation and that the law can extend protection only to the victims of intraboundary pollution. Some authors maintain that the non-discrimination principle requires the responsible State to treat transboundary atmospheric pollution or global atmospheric degradation no differently from domestic pollution. Furthermore, if and insofar as the relevant human rights norms are today recognized as either established or emergent rules of customary international law, they may be considered as overlapping with environmental norms for the protection of the atmosphere, such as due diligence (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization (draft guideline 5), equitable and reasonable utilization (draft guideline 6) and international cooperation (draft guideline 8), among others, which would enable interpretation and application of both norms in a harmonious manner."

5. On the basis of further consultations with the group, he wished to propose that the phrase "Some authors maintain that" be added at the beginning of the second sentence in order to indicate that it was the opinion of only some authors. Consequently, at the start of the third sentence, the words "Some authors" should be changed to "They".

Paragraph (13), as amended, was adopted.

The commentary to draft guideline 9, as amended, was adopted.

Section C, as amended, was adopted.

Chapter VI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter I. *Organization of the work of the session* (A/CN.4/L.897)

6. The CHAIRPERSON invited the members of the Commission to consider chapter I of the draft report contained in document A/CN.4/L.897.

Organization of the work of the session

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

Paragraph 2 was adopted.

B. Officers and the Enlarged Bureau

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

C. Drafting Committee

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

D. Working Groups

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

E. Secretariat

Paragraph 11

Paragraph 11 was adopted.

F. Agenda

Paragraph 12

Paragraph 12 was adopted.

Chapter I of the draft report of the Commission, as a whole, was adopted.

Chapter VII. *Immunity of State officials from foreign criminal jurisdiction* (*continued*) (A/CN.4/L.903/Rev.1 and Add.1–3)

7. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.903/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 article, with the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session (*continued*)

Commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* does not apply) (*continued*)

Paragraph (19)

8. Mr. MURPHY said that some members would welcome the inclusion of wording at the end of the paragraph to reflect the view that there was very little support in case law or national laws for the non-application of immunity to apartheid, torture and enforced disappearance. The sentence capturing their doubts in that respect would read: "Some members noted, however, that no international court case, no national law for the crime of apartheid or torture, only one national law for enforced disappearance, no national court cases for either the crime of apartheid or enforced disappearance, and only five national court cases for torture had been invoked as expressly supporting an exception to immunity *ratione materiae* in national criminal proceedings with respect to these three crimes." The small group of members that had met to consider amendments to document A/CN.4/L.903/Add.2 had not discussed that issue.

9. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, since the above-mentioned proposal had never been discussed at any point by the group, it could not be regarded as a proposal that had been accepted by the group and it should therefore be deemed invalid. She drew attention to her own proposal, which read: "Some members noted, however, that the inclusion of those crimes in draft article 7 found no support in practice". As the commentary was that of the Commission to a draft article that it had already adopted, it was sufficient to reflect the fact that there had been members who considered that there was no basis in practice for the draft article. The commentary could not be transformed into a sort of reproduction of the summary record or a set of statistics.

10. The CHAIRPERSON asked Mr. Murphy whether there was a footnote to the sentence which he had proposed.

11. Mr. MURPHY said that he was intending to propose a footnote to that sentence. To the best of his knowledge, there was no rule against the inclusion of a statement to the effect that there was no national law or international case law in support of the draft article. He did not understand the Special Rapporteur's objection to capturing in a single sentence the opinion of some members of the Commission that there was a dearth of relevant practice.

12. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she wished to hear members' opinions on the wording which she had proposed and on that which Mr. Murphy had proposed.

13. The CHAIRPERSON invited members to comment on the two proposed sets of wording.

14. Mr. SABOIA said that the Special Rapporteur had made a reasonable proposal, which should be submitted to the Commission for a decision.

15. Sir Michael WOOD said that, as a compromise, a sentence like the sentence proposed by the Special Rapporteur could be included in the body of paragraph (19) and the wording proposed by Mr. Murphy could be placed in a footnote to it.

16. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that it appeared that the Commission was about to turn something that was not a commentary into a commentary. An attempt was being made to impose a viewpoint contrary to that of the Special Rapporteur and to the general stance adopted by the Commission. As a compromise, she proposed the addition of the sentence "Some members noted, however, that the inclusion of those crimes in draft article 7 found no support in practice, in national and international jurisprudence or in national legislation." That was absolutely as far as she was prepared to go.

17. Mr. VÁZQUEZ-BERMÚDEZ and Mr. RUDA SANTOLARIA said that they supported the proposal made by the Special Rapporteur and saw no need for the footnote suggested by Mr. Murphy in the non-paper.

18. Mr. PARK said that he also supported the wording proposed by the Special Rapporteur, but asked whether the sentence proposed by Mr. Murphy would be included as a footnote.

19. The CHAIRPERSON said that, under the Special Rapporteur's proposal, the sentence put forward by Mr. Murphy would not be placed in a footnote.

20. Mr. MURPHY said that, rather than there being no grounds for the inclusion of the above-mentioned crimes in draft article 7, there were few, if any, grounds for doing so, because there were some cases that could be cited.

21. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could agree to the replacement of the wording "found no support in practice" with "found little, if any, support in practice".

Paragraph (19), as amended, was adopted.

Paragraph (20)

22. Mr. MURPHY proposed that the first sentence read: "While some members of the Commission suggested that the list should include other crimes such as slavery, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of international treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them." The words "people smuggling" should be deleted because it was synonymous with human trafficking. The second clause in the sentence made it clear that the reason that some members wanted to put those crimes on the list was that they also formed the subject of a treaty.

23. Mr. RAJPUT suggested that the word "terrorism" be inserted between the words "slavery" and "human trafficking".

24. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed with the proposed changes.

Paragraph (20), as amended, was adopted.

Paragraph (21)

25. Mr. MURPHY said that paragraphs (21) to (24) should probably be deleted, because they referred to matters that were not covered by draft article 7. They alluded to corruption and the territorial tort exception. While those subjects had been discussed in the Special Rapporteur's fifth report (A/CN.4/701), ultimately, after the debates in plenary meetings and in the Drafting Committee, they had been omitted from draft article 7 for a variety of reasons. The Commission had not, however, decided on any specific criteria for excluding those matters. It might be possible to rework those paragraphs in an attempt to reach consensus on the grounds for the inclusion or exclusion of a particular crime, but that would be complicated and time-consuming. The simplest solution would therefore be to delete those paragraphs, because an explanation of sorts could be found in the report of the Chairperson of the Drafting Committee, which touched on those issues.

26. Mr. PARK said that paragraphs (21) to (24) were important and should therefore be retained. The Commission's discussion of those matters was of significance and should be reflected in the commentary.

27. Mr. SABOIA said that he, too, disagreed with Mr. Murphy. Paragraphs (21) to (24) were indeed very important. Moreover, it was traditional to refer in the commentary not only to the content of provisions that had been adopted, but also to the arguments that had led to the exclusion of certain matters from them. The history of the adoption and consideration of provisions was valuable, since it resembled *travaux préparatoires* and reference was frequently made to that process when the evolution of subjects was studied. The paragraphs in question should therefore be retained.

Paragraph (21) was adopted.

Paragraph (22)

28. Mr. TLADI said that, while he largely agreed with the views expressed by Mr. Murphy, he disagreed with the solution which he had proposed. Rather than deleting paragraph (22), it would be better to amend the text by inserting, after the third sentence, a new sentence to read: "Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7." In the last sentence, the replacement of the words "a large majority of members" with "some members" would clearly indicate that the opinion expressed in that sentence had been the view of a number of members but not of the Commission as a whole.

29. Ms. ORAL said that it would be more true to say that "many members" of the Commission held the view described in the last sentence of that paragraph.

30. The CHAIRPERSON said that it was usual in such situations to use the expression "many members". It would be unwise to engage in an exercise in grading the level of support for that view.

31. Ms. GALVÃO TELES said that she agreed with Ms. Oral. The main argument put forward in the debate in plenary session for excluding corruption from the list of crimes included in draft article 7 had been that corruption should not be considered an official act. She agreed with Mr. Saboia that it was vital to clarify in the commentary what had been retained and what had not been retained in the draft article and the arguments underpinning that choice, as that was a matter for States' delegations to consider in the Sixth Committee. In the last sentence of the paragraph, she therefore proposed replacing "a large majority of members" with "several members".

32. Mr. CISSÉ said that he supported the amendment proposed by Ms. Galvão Teles. While the general opinion had been that corruption could not be regarded as an official act, during the debate in plenary meetings and in the Drafting Committee he had drawn attention to the fact that some officials used their status as such to commit acts of corruption. It would be a good idea to reflect that argument in that paragraph.

33. Mr. RUDA SANTOLARIA said that he strongly supported the views expressed by Ms. Oral and Ms. Galvão Teles. The formula suggested by the latter was a good one. Its inclusion was very important because the draft article proposed by the Special Rapporteur had referred to one specific effect of corruption. It had been removed from the text because the majority of members had felt that acts of corruption could not been deemed official acts. Paragraph (23) addressed the concerns expressed by Mr. Cissé.

34. Mr. MURPHY asked what was meant by "'grand corruption'" and said that he thought that it would be helpful to clarify that term.

35. The CHAIRPERSON said it was his understanding that those words could possibly be regarded as an exercise in progressive development and as a means of showing the direction that such development should take.

36. Mr. CISSÉ said that several members of the Commission had commented that "'grand'", or particularly serious, corruption could undermine the interests and stability of a State. It was synonymous with transnational corruption on such a large scale that it destabilized national economies, especially those of developing countries.

37. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the term "'grand corruption'" had been used throughout debates in plenary meetings and in the Drafting Committee in order to make it plain that it did not refer to small bribes to an official to expedite the processing of a document, but to corruption that destabilized a State and caused serious harm to that State and its population. There was therefore no doubt that the phrase in brackets should be retained.

38. Mr. RAJPUT, supported by Mr. PETRIČ, said that he understood "'grand corruption'" to be corruption on a large scale.

Paragraph (22), as amended by Mr. Tladi and Ms. Galvão Teles, was adopted.

Paragraph (23)

39. Mr. TLADI said that, in the second and final sentences, the phrase "the Commission takes the view" should be amended to read "several members of the Commission take the view".

40. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no problem with Mr. Tladi's proposal but she simply wished to place on record the fact that the Commission had already decided that the acts in question were not acts performed in an official capacity.

Paragraph (23), as amended, was adopted.

Paragraph (24)

41. The CHAIRPERSON, noting that the very important question of the territorial tort exception had not been extensively discussed within the Drafting Committee and that relevant jurisprudence was nuanced, said that the Commission should be wary of making such a sweeping statement as that contained in the final sentence. He therefore proposed the addition, at the end of the paragraph, of a sentence to read: "The view was expressed that the applicable rules are more nuanced", to be accompanied by a footnote referring to the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State*. In that case, the Court had determined that, even if an act had taken place on the territory of another State, that other State did not have jurisdiction because of immunity. As currently formulated, the final sentence clearly went beyond the judgment of the Court.

42. Mr. MURPHY said that the claim made in the paragraph—that whenever a State did not consent to a particular activity in its territory, there was no immunity—was extraordinary and wholly unsubstantiated as a matter of international law. He proposed therefore that the paragraph be either deleted or amended on the basis of the proposals made by him in the non-paper circulated at the previous meeting. If members of the Commission preferred, nonetheless, to go ahead and make a claim of that type, which in his view completely undermined the entire project, they could of course do so. However, in his opinion, that would be a huge mistake.

43. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the territorial tort exception had been debated in the Drafting Committee on the basis of an amended proposal presented by her which had been developed in response to views expressed in the plenary to the effect that the proposal in her fifth report was excessively broad in terms of the scope of exceptions and that the hypothetical formulation proposed by Mr. Kolodkin in his second report[435] was more appropriate. Various members of the Committee had indicated that the issue was not the existence or otherwise of

[435] *Yearbook … 2010*, vol. II (Part One), document A/CN.4/631 (second report).

immunity but the fact that the acts in question, which basically concerned acts of espionage and sabotage, could not be considered as acts performed in an official capacity and that consequently immunity did not apply and the principle of territoriality prevailed. Under no circumstances would any rules envisaged in that regard apply to, for example, persons enjoying diplomatic immunity or other persons enjoying immunity granted to them under relevant treaties. For her part, she was not in favour of deleting the paragraph; the proposal made by Mr. Murphy in his non-paper could form a basis for addressing the matter, however. Regarding the *Jurisdictional Immunities of the State* case, the Court had not pronounced on the immunity of State officials, but on the immunity of the State in relation to a very specific type of acts, namely, acts committed within the framework of an armed conflict. Such acts were, however, not relevant in the current context, since it had been agreed that questions relating to armed forces were outside of the scope of the project. She was, nevertheless, open to the proposal made by the Chairperson in that connection.

44. Mr. SABOIA said that the Special Rapporteur's explanation, which had made clear that the paragraph was not so sweeping as Mr. Murphy feared, should meet his and others' concerns. In his view, the Commission should either adopt the paragraph as it stood or on the basis of the proposal presented by Mr. Murphy in his non-paper.

45. Mr. ŠTURMA said that, in order to allay fears such as those expressed by Mr. Murphy, it would be helpful to reflect in the commentary some of the clarifications provided by the Special Rapporteur, for example that the crimes in question concerned such acts as espionage and that the paragraph was without prejudice to the immunity enjoyed by diplomats and by members of stationed forces under status-of-forces agreements, among others. It would also be useful to include a reference to the *Jurisdictional Immunities of the State* case.

46. The CHAIRPERSON said that the implication of what Mr. Šturma had said was that, as currently formulated, the paragraph dealt with a complicated issue in an oversimplified way. For instance, the exceptions in question were not merely treaty-based exceptions, as shown by the example he had referred to. The matter addressed in the paragraph was a very important one, and the Commission should seek a formulation that would be acceptable to all. He therefore suggested that it defer adoption of the paragraph to allow interested members to formulate a proposal to that end. If he heard no objection, he would take it that the Commission wished to proceed on that basis.

It was so decided.

Paragraph (25)

47. Sir Michael WOOD proposed that the opening phrase of the first sentence be amended to read: "Paragraph 2 of draft article 7 establishes a link …".

Paragraph (25), as amended, was adopted.

Paragraphs (26) and (27)

Paragraphs (26) and (27) were adopted.

Paragraph (28)

48. Sir Michael WOOD proposed that, in the final sentence, the words "and solely for the purposes of draft article 7" be inserted after the phrase "reasons of convenience and appropriateness".

Paragraph (28), as amended, was adopted.

Paragraph (29)

Paragraph (29) was adopted.

Paragraph (30)

49. Sir Michael WOOD proposed that the words "and has the same meaning" be added at the end of the last sentence.

Paragraph (30), as amended, was adopted.

Paragraphs (31) to (35)

Paragraphs (31) to (35) were adopted.

Paragraphs (5) and (8) (*concluded*)

50. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, following a suggestion by the Chairperson at the previous meeting, a small informal group of interested members had met in order to resolve various outstanding issues relating to the footnotes to paragraph (5), which set out the position of the Commission regarding draft article 7, and to paragraph (8), which set out the views of those who had opposed its adoption, and had formulated a number of proposals to that end, which had been circulated to the Commission for its consideration.

51. Regarding paragraph (5), it was proposed that the opening phrase of its first footnote be amended to read: "See the following cases which are presented in support of such trend: …". In the second footnote, it was proposed that the opening phrase be amended to read: "In support of this position, attention has been drawn to Organic Act No. 16/2015 of 27 October, …". The third footnote remained unchanged.

52. Regarding paragraph (8), Mr. Murphy had, in his non-paper, proposed the addition of three footnotes referring respectively to national case law, national statutes and treaty law. The text of those footnotes, as amended by the informal group, was contained in the proposals circulated to the Commission.

53. The CHAIRPERSON, expressing his appreciation for the work done by the group, said that he took it that the Commission wished to adopt the proposals regarding paragraphs (5) and (8), as developed by the group and circulated in writing to the Commission.

It was so decided.

Paragraphs (5) and (8), as amended, were adopted.

54. Mr. TLADI, referring to a comment made by Ms. Escobar Hernández in connection with paragraph (23) concerning a previous decision by the Commission, said

that he had been unable to find in the previous four reports of the Commission on its work any reference to a decision by it to the effect that there was no immunity for corruption.

Paragraph (17) (*concluded*)

55. Mr. MURPHY proposed that paragraph (17) be amended in line with the amendment to paragraph (19) that had been adopted earlier.

Paragraph (17), as amended, was adopted.

Paragraph (18) (*concluded*)

56. Mr. TLADI, recalling that at the previous meeting he had proposed a footnote to accompany the new penultimate paragraph that had been adopted, said that he had circulated in writing a new restructured proposal for that footnote that took into account comments made by members, in particular regarding its length.

57. The CHAIRPERSON said that he took it that the Commission wished to adopt the amended footnote proposed by Mr. Tladi.

It was so decided.

Paragraph (18), as amended, was adopted.

58. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter VII of the draft report contained in document A/CN.4/L.903/Add.3.

59. Sir Michael WOOD said that the subparagraphs in draft article 7 should be identified consistently using either Roman numerals or letters, not both. Moreover, in paragraphs 9 and 58, for example, reference was made to the expression "does not apply", yet the language used in the draft article was "shall not apply". The Secretariat should amend the text accordingly.

60. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the Secretariat should ensure that all references were based on the text of draft article 7 as proposed in her fifth report.

B. Consideration of the topic at the present session (*concluded*)[*]

…

1. Introduction by the Special Rapporteur of the fifth report

Paragraphs 1 to 12

Paragraphs 1 to 12 were adopted.

2. Summary of the debate

Paragraph 13

Paragraph 13 was adopted.

(*a*) General comments

Paragraphs 14 to 38

Paragraphs 14 to 38 were adopted.

(*b*) Specific comments on draft article 7

Paragraphs 39 to 52

Paragraphs 39 to 52 were adopted.

(*c*) Future work

Paragraph 53

Paragraph 53 was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 54 to 62

Paragraphs 54 to 62 were adopted.

Section B, as amended, was adopted.

61. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) recalled, in relation to the adoption of chapter VII, that it was the undoubted and unquestioned practice of the Commission, when adopting draft articles with commentaries, not to include a summary of its debate in the relevant chapter of its annual report. However, that practice had not been followed in the chapter of the current report dealing with the topic "Immunity of State officials from foreign criminal jurisdiction", which included both draft article 7 and the commentary thereto and a summary of the debate. In support of the decision to include that summary, it had been argued that the Commission was dealing with an unprecedented and exceptional case, in that the consideration of her fifth report had straddled two sessions. She wished to place on record that the topic was neither unprecedented nor exceptional, inasmuch as reports on other topics had in the past been considered over more than one session, and that, on those occasions, no summary of the corresponding debate had been included, even when draft articles with commentaries had been adopted. She had not objected to the inclusion of a summary only because a member of the Commission had drawn attention to paragraph 209 of the Commission's 2016 report on the work of its sixty-eighth session,[436] in which it had been stated that a summary of the full debate would be made available after the debate had been concluded in 2017. Although that paragraph could be interpreted in more than one way, she wished to avoid any misunderstanding when the topic was considered by the General Assembly. Furthermore, she had taken into account the fact that some Commission members, in particular those new members who had joined the Commission at the current session, had conveyed to her their interest in seeing their views reflected in the Commission's report. Consequently, and although she had concerns about a number of issues contained in the summary of the debate, she had not opposed the adoption of that summary.

62. At its seventieth session, in 2018, the Commission, through its Working Group on methods of work, would need to address the issue of chapters devoted to topics and decide on the approach that it wished to take with regard to the form and content of its commentaries. In that connection, she intended to submit a paper on that issue to the Working Group.

63. The CHAIRPERSON said that paragraph 209 of the Commission's 2016 report had indeed been an

[*] Resumed from the 3387th meeting.

[436] *Yearbook … 2016*, vol. II (Part Two), p. 207, para. 209.

important factor in the decision to include a summary of the debate on immunity of State officials from foreign criminal jurisdiction in the 2017 report.

Chapter VIII. *Peremptory norms of general international law (jus cogens)* (A/CN.4/L.904)

64. The CHAIRPERSON invited the Commission to consider chapter VIII of the draft report, as contained in document A/CN.4/L.904.

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 5

Paragraphs 3 to 5 were adopted.

Paragraph 6

Paragraph 6 was adopted, subject to its completion by the Secretariat.

1. Introduction by the Special Rapporteur of the second report

Paragraphs 7 to 20

Paragraphs 7 to 20 were adopted.

2. Summary of the debate

(*a*) General comments

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

Paragraph 23

65. The CHAIRPERSON suggested that, in the first sentence, the words "as such" be added after "treaty rules should not".

Paragraph 23, as amended, was adopted.

Paragraph 24

Paragraph 24 was adopted.

Paragraph 25

66. The CHAIRPERSON, referring to the second sentence, said that it was his understanding that fundamental values were not a descriptive element of *jus cogens* and that the reference to them in the first set of parentheses should perhaps be deleted.

67. Mr. SABOIA, supported by Sir Michael WOOD, said that the three elements in the first set of parentheses constituted the essence of *jus cogens* and should not be separated; the current wording should be retained.

68. Sir Michael WOOD said that the second sentence could, in fact, be deleted altogether.

69. Mr. VÁZQUEZ-BERMÚDEZ said that, if the second sentence was deleted, the words "fundamental values, hierarchical superiority and universal application" should be inserted, in parentheses, after the reference to "paragraph 2 of draft conclusion 3" in what was currently the third sentence.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 30

Paragraphs 26 to 30 were adopted.

Paragraph 31

70. Mr. MURPHY said that, to reflect the debate within the Commission, the following sentence should be inserted at the beginning of the paragraph: "As for the bases of *jus cogens*, several members agreed that customary international law was the most common basis."

Paragraph 31, as amended, was adopted.

Paragraph 32

71. The CHAIRPERSON, speaking as a member of the Commission, proposed that, in the second sentence, the words "did constitute principles for the purposes of *jus cogens*" be replaced with "could form the basis for *jus cogens*".

Paragraph 32, as amended, was adopted.

Paragraphs 33 and 34

Paragraphs 33 and 34 were adopted.

Paragraph 35

72. Ms. LEHTO proposed that, at the end of the first sentence, the words "several members cautioned against such an approach" be replaced with "some others saw it as a useful analytical tool". The following sentence would read: "Several members pointed out, however, that the formation of *jus cogens* did not have to take two distinct steps in practice."

Paragraph 35, as amended, was adopted.

Paragraph 36

73. Mr. MURPHY proposed that the clause "As to the second criterion" be inserted at the start of the first sentence.

Paragraph 36, as amended, was adopted.

Paragraph 37

Paragraph 37 was adopted.

Paragraph 38

74. The CHAIRPERSON said that he wished to propose that, in the second sentence, the words "universal or not" be replaced with "within the scope of the topic". In the final sentence, the words "the question of the possibility of" should be added before "regional *jus cogens*".

Paragraph 38, as amended, was adopted.

Paragraph 39

Paragraph 39 was adopted.

(*b*) Specific comments on the draft conclusions

(i) General comments on the structure of the draft conclusions

Paragraph 40

Paragraph 40 was adopted.

(ii) Draft conclusion 4

Paragraph 41

Paragraph 41 was adopted with a minor editorial amendment.

(iii) Draft conclusion 5

Paragraph 42

Paragraph 42 was adopted.

(iv) Draft conclusion 6

Paragraph 43

Paragraph 43 was adopted.

(v) Draft conclusion 7

Paragraph 44

Paragraph 44 was adopted.

(vi) Draft conclusion 8

Paragraph 45

Paragraph 45 was adopted.

(vii) Draft conclusion 9

Paragraph 46

Paragraph 46 was adopted.

(viii) Title of the topic

Paragraph 47

Paragraph 47 was adopted, subject to minor editorial amendments.

(ix) Future work

Paragraph 48

Paragraph 48 was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 49 to 58

Paragraphs 49 to 58 were adopted.

Paragraph 59

75. The CHAIRPERSON suggested the deletion of the word "duly" in the first sentence.

Paragraph 59, as amended, was adopted.

Paragraph 60

Paragraph 60 was adopted.

Paragraph 61

76. The CHAIRPERSON said that he wished to propose that, in the first sentence, the words "were not part of" be replaced with "could not be part of". In the same sentence, the phrase "concluding that treaties were part of general international law" should be replaced with "concluding that a particular treaty reflected a rule of general international law".

77. Mr. TLADI (Special Rapporteur) proposed that the words "treaties were part" be replaced with "treaties, as such, could be part".

Paragraph 61, as amended, was adopted.

Paragraphs 62 to 66

Paragraphs 62 to 66 were adopted.

Paragraph 67

78. The CHAIRPERSON said that he wished to propose that, in the second sentence, the word "possible" should be inserted before "evidence", as not everything in a national constitution counted as evidence of customary international law. The content of each constitution needed to be assessed in order to determine its relevance.

79. Mr. TLADI (Special Rapporteur) said that the point made by the Chairperson was true of all evidence and that the word "possible" would therefore be superfluous.

Paragraph 67 was adopted.

Paragraphs 68 and 69

Paragraphs 68 and 69 were adopted.

Section B, as amended, was adopted.

Chapter VIII 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.906)

80. The CHAIRPERSON invited the Commission to consider chapter X of the draft report, as contained in document A/CN.4/L.906.

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 8

Paragraphs 3 to 8 were adopted.

81. The CHAIRPERSON said that, following consultations within the Bureau and among members, he understood that there was agreement that a Special Rapporteur be appointed for the topic "Protection of the environment in relation to armed conflicts" and that the Special Rapporteur should be Ms. Marja Lehto. If he heard no objection, he would take it that the Commission so agreed.

It was so decided.

82. The CHAIRPERSON said that, to reflect the decision that had just been made, two additional paragraphs should be inserted at the end of document A/CN.4/L.906.

New paragraph 9

83. The CHAIRPERSON suggested the insertion of a new paragraph 9, which would read: "At the 3385th meeting, on 2 August 2017, the Commission received the oral report of the Chairperson of the Working Group." The secretariat would finalize the wording, if necessary.

New paragraph 9 was adopted on that understanding.

New paragraph 10

84. The CHAIRPERSON suggested the insertion of a new paragraph 10, which would read: "Following consultations within the Bureau and among members, the Commission decided, at its 3389th meeting, on 4 August 2017, to appoint Ms. Marja Lehto as Special Rapporteur."

New paragraph 10 was adopted.

Section B, as amended, was adopted.

Chapter X of the draft report of the Commission, as a whole, as amended, was adopted.

85. Ms. LEHTO said that she wished to thank the members of the Commission for the confidence that they had placed in her. She counted on their support in bringing the topic to a successful conclusion.

Chapter IX. *Succession of States in respect of State responsibility* (A/CN.4/L.905)

86. The CHAIRPERSON invited the Commission to consider chapter IX of its draft report, as contained in document A/CN.4/L.905.

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

Paragraphs 6 to 10

Paragraphs 6 to 10 were adopted.

Paragraph 11

87. Mr. REINISCH proposed that, in the first sentence, the words "regime concerning" be inserted between the words "universal" and "succession". He had obtained the Special Rapporteur's approval for that proposal prior to the latter's departure.

Paragraph 11, as amended, was adopted.

Paragraph 12

88. Mr. REINISCH proposed that, as approved by the Special Rapporteur, the word "illiquid" in the first sentence be deleted but that the quotations marks around the word "'debts'" should be maintained.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 17

Paragraphs 13 to 17 were adopted.

2. Summary of the debate

(*a*) General comments

Paragraphs 18 to 21

Paragraphs 18 to 21 were adopted.

Paragraph 22

89. Mr. REINISCH proposed that, as approved by the Special Rapporteur, in the penultimate sentence, the word "general", between the words "the" and "rule", be replaced with the word "traditional".

Paragraph 22, as amended, was adopted.

Paragraphs 23 and 24

Paragraphs 23 and 24 were adopted.

(*b*) Specific comments

(i) Draft article 1—Scope

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

(ii) Draft article 2—Use of terms

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

Paragraph 29

90. Mr. LLEWELLYN (Secretary to the Commission) said that the Special Rapporteur had suggested that the word "transfer" be replaced with "compensation".

Paragraph 29, as amended, was adopted.

(iii) Draft article 3—Relevance of the agreements to succession of States in respect of responsibility

Paragraphs 30 and 31

Paragraphs 30 and 31 were adopted.

(iv) Draft article 4—Unilateral declaration by a successor State

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

(*c*) Final form

Paragraph 34

Paragraph 34 was adopted.

(*d*) Future programme of work

Paragraph 35

Paragraph 35 was adopted.

3. Concluding remarks of the Special Rapporteur

Paragraphs 36 to 42

Paragraphs 36 to 42 were adopted.

Section B, as amended, was adopted.

Chapter IX of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter XI. *Other decisions and conclusions of the Commission* (A/CN.4/L.896 and Add.1)

91. The CHAIRPERSON invited the Commission to consider chapter XI of its draft report, beginning with the text contained in document A/CN.4/L.896.

B. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. Working Group on the long-term programme of work

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

2. Work programme of the Commission for the remainder of the quinquennium

Paragraph 5

92. Sir Michael WOOD proposed that, in subparagraph (*e*), under the heading "2019", the word "text" be replaced with "principles". The same replacement should be made under the heading "2021".

93. Mr. MURPHY proposed that, in subparagraph (*g*), the word "Fifth" be replaced with "Fourth".

94. Sir Michael WOOD proposed that, in subparagraph (*i*), under the heading "2018", the word "original" be replaced with "predecessor", and under "2020", the words "the draft articles on" be inserted between the words "Completion of" and "first reading".

Paragraph 5, as amended, was adopted.

3. Consideration of General Assembly resolution 71/148 of 13 December 2016 on the rule of law at the national and international levels

Paragraphs 6 to 15

Paragraphs 6 to 15 were adopted.

4. Seventieth anniversary session of the International Law Commission

Paragraphs 16 to 18

Paragraphs 16 to 18 were adopted.

5. Honoraria

Paragraph 19

Paragraph 19 was adopted.

6. Working Group on methods of work of the Commission

Paragraph 20

Paragraph 20 was adopted.

7. Documentation and publications

Paragraphs 21 to 26

Paragraphs 21 to 26 were adopted.

8. *Yearbook of the International Law Commission*

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

9. Assistance of the Codification Division

Paragraph 29

Paragraph 29 was adopted.

10. Websites

Paragraph 30

Paragraph 30 was adopted.

11. United Nations Audiovisual Library of International Law

Paragraph 31

Paragraph 31 was adopted.

Section B, as amended, was adopted.

C. Date and place of the seventieth session of the Commission

Paragraph 32

Paragraph 32 was adopted.

Section C was adopted.

95. The CHAIRPERSON invited the Commission to consider the portion of chapter XI contained in document A/CN.4/L.896/Add.1.

A. Succession of States in respect of State responsibility

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

D. Cooperation with other bodies

Paragraphs 2 to 7

Paragraphs 2 to 7 were adopted.

Section D was adopted.

E. Representation at the seventy-second session of the General Assembly

Paragraph 8

Paragraph 8 was adopted.

Section E was adopted.

F. International Law Seminar

Paragraphs 9 to 21

Paragraphs 9 to 21 were adopted.

Section F was adopted.

Chapter XI of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter II. *Summary of the work of the Commission at its sixty-ninth session* (A/CN.4/L.898)

96. The CHAIRPERSON invited the Commission to consider chapter II of its draft report contained in document A/CN.4/L.898.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

97. Mr. MURPHY said that, in the second sentence, the date "1 January 2019" should be replaced with "1 December 2018".

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 9

Paragraphs 3 to 9 were adopted.

Paragraph 10

98. The CHAIRPERSON said that the secretariat would ensure that a sentence was added concerning the appointment of Ms. Lehto as the new Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts".

With that addition, paragraph 10 was adopted.

Paragraph 11

99. Mr. MURPHY suggested that there should be an indication of the two new topics that had been placed on the Commission's long-term programme of work.

100. The CHAIRPERSON said that the secretariat would ensure the addition of a paragraph to that effect.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

101. Sir Michael WOOD suggested that the paragraph be recast using the opening formula "The Commission continued its exchange of information with", followed by a list of the various bodies concerned.

On that understanding, paragraph 14 was adopted.

Paragraph 15

Paragraph 15 was adopted.

Chapter II of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter VII. *Immunity of State officials from foreign criminal jurisdiction* (*concluded*) (A/CN.4/L.903/Rev.1 and Add.1–3)

102. The CHAIRPERSON invited the Commission to pursue its consideration of the portion of chapter VII of the draft report contained in document A/CN.4/L.903/Add.2.

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 article, with the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session (*concluded*)

Commentary to draft article 7 (Crimes under international law in respect of which immunity *ratione materiae* does not apply) (*concluded*)

Paragraph (24) (*concluded*)

103. The CHAIRPERSON recalled that the adoption of paragraph (24) had been deferred pending consultations between Mr. Murphy, Mr. Šturma and the Special Rapporteur. He invited the Special Rapporteur to introduce her proposal.

104. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in response to amendments suggested by Mr. Murphy and Mr. Šturma, and in the light of her own view that the reference in the first sentence to "(territorial tort exception)" should be retained because it served to explain the statement that preceded it and to act as a link to draft article 7, she proposed that paragraph (24) be reformulated to read:

> "The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and to the activity carried out by the official that gave rise to the commission of the crime (territorial tort exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included

in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes such as murder, espionage, sabotage or kidnapping committed in the territory of a State in the aforementioned circumstances do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2."

105. The CHAIRPERSON recalled that he had proposed that reference be made to a decision of the International Court of Justice that related to State immunity, but his impression was that the amended version of the paragraph might be read as contradicting that decision.

106. Mr. MURPHY suggested that a footnote to paragraph (24) could be used to refer to that decision. He agreed that the amended paragraph reflected the language that had been negotiated through consultation, except for the reference in brackets to "territorial tort exception". He had proposed to delete that term because he considered it confusing, since paragraph (24) referred to a situation of crime, not tort. It was also confusing in that the territorial tort exception, as it operated in the context of State immunity, was not conditioned in the way that it was in the current context. Thus, for example, the territorial tort exception did not in any respect relate to the consent or lack of consent on the part of the State, which was very much a part of what was being discussed in paragraph (24). Furthermore, that term had not been used in the draft article itself, so it was unclear why it was useful to have it in the paragraph. Deleting the word "tort" might solve the issue.

107. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she could accept that proposal.

It was so decided.

108. The CHAIRPERSON said that he wished to propose the addition of a footnote referring to the decision of the International Court of Justice in *Jurisdictional Immunities of the State*, which was considered to be the leading case on territorial exception. The corresponding indicator would be placed after the word "*materiae*".

109. Mr. REINISCH asked whether, given that the word "tort" would no longer appear in paragraph (24), the Chairperson still considered it necessary to refer to a case that dealt with State immunity rather than criminal immunity.

110. The CHAIRPERSON said that he still considered it necessary to include a reference to that case. In fact, by removing the word "tort", the Commission had just broadened the scope of what it was stating in paragraph (24). Since the Court's decision included general considerations of immunity that might or might not apply to the field covered in that paragraph, a simple reference should be made to the case without attributing any particular view to it.

111. Mr. MURPHY proposed that the footnote indicator be placed in the fourth sentence after the words "certain crimes" so as to avoid giving the erroneous impression that such crimes as espionage and sabotage were part of the Court's decision.

112. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she shared the concern expressed by Mr. Reinisch. She proposed that the footnote be placed at the location suggested by Mr. Murphy, that it refer to the case suggested by the Chairperson and that it indicate that the reference was to an exception in the context of State immunity.

113. The CHAIRPERSON said that he would not be opposed to that proposal.

Paragraph (24), as amended, was adopted.

The commentary to draft article 7, as amended, was adopted.

Section C, as amended, was adopted.

114. Sir Michael WOOD said that, since he was acting in a case in which the territorial exception was quite central, he had been careful not to take part in the debate on that issue, either in the Drafting Committee or in the current plenary meeting.

Chapter VII of the draft report of the Commission, as a whole, as amended, was adopted.

Chapter III. *Specific issues on which comments would be of particular interest to the Commission* (A/CN.4/L.899)

115. The CHAIRPERSON invited the Commission to consider chapter III of its draft report, which was contained in document A/CN.4/L.899.

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

116. Sir Michael WOOD proposed that the traditional deadline of "31 January 2018" mentioned in the paragraph should be brought forward in time, so as to read: "15 January 2018".

Paragraph 2, as amended, was adopted.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 3

117. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) explained that the issues mentioned in paragraph 3 had been spelled out in detail in order to highlight them, given that procedural aspects were an essential element of the topic, and in order to remind States about the need to respond to that important issue. She would be grateful if the Chairperson could draw the attention of States to that issue on the occasion of his presentation to the Sixth Committee during the 2017 International Law Week.

118. The CHAIRPERSON said that he would be happy to do so.

Paragraph 3 was adopted.

B. Succession of States in respect of State responsibility

Paragraph 4

Paragraph 4 was adopted.

C. New topics

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

New paragraph 7

119. Ms. GALVÃO TELES said that, in order to link the Commission's request to States to provide it with proposals for new topics with the commemorative events to be organized by the Commission during its seventieth anniversary in New York and Geneva, as well as to provide an extra incentive for their involvement in the discussion of such new topics, she proposed the addition of a new paragraph to follow paragraph 6 that would read:

> "The Commission notes that the commemoration of its seventieth anniversary to be held during its seventieth session in New York and Geneva would provide an opportunity for an exchange of views between States and members of the Commission on possible topics that could be considered by the Commission in the future."

It was so decided.

Chapter III of the draft report of the Commission, as a whole, as amended, was adopted.

The report of the International Law Commission on the work of its sixty-ninth session, as a whole, as amended, was adopted.

Chairperson's concluding remarks

120. The CHAIRPERSON said that the sixty-ninth session had been a productive one. The Commission was submitting to the General Assembly the draft articles on crimes against humanity, which it had completed on first reading. It was also giving Member States in the Sixth Committee of the General Assembly plenty of material on which to comment in relation to the various other topics that the Commission had considered during the session. In addition, the Commission had successfully concluded the International Law Seminar, to which it attached great importance.

121. The Commission could be proud of its productivity, its creativity and the continued collegial spirit in which it worked and overcame differences of view. He noted that the session had been unusually intense and that history would tell whether the Commission had made a larger or a smaller contribution to the development of international law. Where the members of the Commission had not yet come to agreement, they had at least offered history two alternatives. He was grateful to his colleagues on the Bureau for their advice and guidance in managing the affairs of the Commission. He thanked the secretariat from the Codification Division for their extraordinary, competent assistance and the Legal Liaison Office in Geneva for their efficient assistance. He also thanked the précis-writers, interpreters, editors, conference officers, translators and other members of the conference services who had extended their assistance to the Commission on a daily basis.

Closure of the session

122. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-ninth session of the International Law Commission closed.

The meeting rose at 1.15 p.m.

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