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Summary record of the 3132nd meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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5. Sir Michael WOOD, endorsing the statements of Ms. Jacobsson and Mr. Candiotti, said that it would be wise to hold a meeting of the Planning Group the following week. It was important that all members should be aware of the procedure that special rapporteurs had to follow and it was also vital to plan the work for the quinquennium, as the Commission had made clear in paragraph 378 of its report to the General Assembly on the work of the Commission's sixty-third session (A/66/10).³⁶ Members might wish to refresh their memories as to what had been agreed in that respect in 2011.

6. Mr. GÓMEZ ROBLEDO said he believed that, as a new member of the Commission, he would benefit greatly from a meeting of the Planning Group at the earliest opportunity.

7. The CHAIRPERSON suggested that the Planning Group should meet on Friday, 18 May.

It was so decided.

The meeting rose at 10.15 a.m.

3131st MEETING

Friday, 18 May 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

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

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

[Agenda item 1]

The CHAIRPERSON announced that the Bureau had adopted the programme of work for the following week, copies of which had just been distributed to members.

The meeting rose at 10.05 a.m.

3132nd MEETING

Tuesday, 22 May 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau,

Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

1. The CHAIRPERSON welcomed Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, and invited her to brief the Commission on the latest legal developments in the United Nations. He also welcomed Mr. Hans Corell, former Legal Counsel, who had come to observe the proceedings.

2. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs and United Nations Legal Counsel), after congratulating the new members of the Commission on their election, said that there had been a number of significant developments in the Sixth Committee during the sixty-sixth session of the General Assembly. In its resolution 66/98 of 9 December 2011, entitled "Report of the International Law Commission on the work of its sixty-third session", the Assembly had provided policy guidance for the Commission's work. The Sixth Committee continued to look to the Commission for its valuable contribution towards the progressive development and codification of international law.

3. At its sixty-third session, the Commission had completed its work on the draft articles on the responsibility of international organizations³⁷ and on the effects of armed conflicts on treaties³⁸ and commentaries thereto; the General Assembly had therefore taken note of both sets of articles, annexed them to resolutions³⁹ and commended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. It had also decided to revert to those items at its sixty-ninth session with a view to examining, *inter alia*, the question of the form that might be given to the articles.

4. Regarding the Commission's work on the topic "Reservations to treaties", which had included the adoption of draft guidelines and commentaries thereto in the Guide to Practice on Reservations to Treaties,⁴⁰ she recalled that the Assembly had decided that, in order to have a fuller debate, consideration of the topic should be resumed at its sixty-seventh session,⁴¹ once all the relevant documentation had become available.

5. As for the other topics currently on the Commission's programme of work, the Assembly had recommended in

³⁷ *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88.

³⁸ *Ibid.*, paras. 100–101.

³⁹ General Assembly resolutions 66/100 and 66/99 of 9 December 2011, respectively.

⁴⁰ *Yearbook ... 2011*, vol. II (Part Three) and vol. II (Part Two), para. 75.

⁴¹ General Assembly resolution 66/98, para. 5.

³⁶ *Yearbook ... 2011*, vol. II (Part Two), pp. 176–177.

resolution 66/98 that the Commission should continue its work on them, taking into account the observations of Governments. The topical summary of the debate in the Sixth Committee on the Commission's report (A/CN.4/650 and Add.1) contained a detailed account of the views expressed.

6. The Sixth Committee had also considered two items deliberated previously in the Commission, namely "Nationality of natural persons in relation to the succession of States",⁴² on which the Commission had completed its work in 1999, and "The law of transboundary aquifers",⁴³ completed in 2008.

7. Concerning the first item, she recalled that at its fifty-first session the Commission had adopted draft articles on nationality of natural persons in relation to the succession of States and commentaries thereto and had recommended to the General Assembly that it should adopt them in the form of a declaration.⁴⁴ The draft articles had been annexed to General Assembly resolution 55/153 of 12 December 2000, and the Assembly had reverted to the item at two subsequent sessions to consider the final form the articles should take. In its resolution 66/92 of 9 December 2011, the Assembly had emphasized the value of the articles in providing guidance to the States dealing with issues of nationality of natural persons in relation to the succession of States, in particular concerning the avoidance of statelessness, and had decided that, upon the request of any State, it would revert to the question at an appropriate time, in the light of the development of State practice in those matters.

8. Concerning the second item, she recalled that at its sixtieth session the Commission had adopted draft articles on the law of transboundary aquifers and commentaries thereto and had proposed a two-step approach⁴⁵ that would consist of the General Assembly's annexing the draft articles to a resolution, which it had done in its resolution 63/124 and, subsequently, the possible elaboration of a convention. The Sixth Committee had focused chiefly on the final form that might be given to the draft articles, and in its resolution 66/104 of 9 December 2011 it had encouraged States to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles, and had also encouraged the International Hydrological Programme of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to offer further scientific and technical assistance to the States concerned. The Sixth Committee was expected to consider the item again at its sixty-seventh session.

9. She wished to inform the Commission briefly of recent developments in the field of the administration of

justice at the United Nations. The Sixth Committee had recently considered some amendments to the statutes of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. In its resolution 66/107 of 9 December 2011, the General Assembly had approved the amendments to the rules of procedure of the United Nations Appeals Tribunal, as set out in the annex to that resolution; however, it had decided not to approve the amendment to article 19 (Case management) of the rules of procedure of the United Nations Dispute Tribunal, contained in annex I of the Secretary-General's report on this topic.⁴⁶

10. The Sixth Committee had also considered the code of conduct for the judges of the Dispute Tribunal and the Appeals Tribunal, prepared by the Internal Justice Council. On the recommendation of the Sixth Committee, the General Assembly had, by its resolution 66/106 of 9 December 2011, approved the code of conduct, which was set out in the annex to the resolution.

11. The General Assembly had decided to continue its review of effective remedies for resolution of disputes by non-staff personnel, such as individual contractors and consultants. It had requested the Secretary-General to report to it at its sixty-seventh session on a proposed mechanism for expedited arbitration procedures for non-staff personnel, as well as on a mechanism to address possible misconduct of judges (resolution 66/237 of 24 December 2011, para. 38).

12. The Assembly had also assessed the operation of the new administration of justice system and had indicated its interest in continuing to monitor developments in the jurisprudence of the Dispute Tribunal and the Appeals Tribunal and to examine specific issues such as compensation for moral damages. The tribunals were entering their third year of operation.

13. To date, the Dispute Tribunal had issued more than 560 judgments, and the Appeals Tribunal more than 180 judgments.⁴⁷ The judgments of the Appeals Tribunal had addressed fundamental issues such as the role of judicial review and the standard of proof required in establishing disciplinary measures. For example, the Appeals Tribunal had ruled that since disciplinary cases were not criminal, the United Nations should not follow the jurisprudence of the International Labour Organization (ILO) Administrative Tribunal, which required that disciplinary charges must be proved beyond reasonable doubt. Instead, the Appeals Tribunal had held that when termination was a possible outcome, misconduct must be established by clear and convincing evidence. The Appeals Tribunal was also continuing to clarify other important principles, including those governing the award of compensation.

14. Those developments would have a significant impact on the evolution of United Nations administrative and management policies and on the advisory functions of the Office of Legal Affairs, with the Office's General Legal Division playing a critical role in that regard.

⁴² General Assembly resolution 55/153 of 12 December 2000, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48.

⁴³ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54.

⁴⁴ *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 44.

⁴⁵ *Yearbook ... 2008*, vol. II (Part Two), p. 19, para. 49.

⁴⁶ A/66/86.

⁴⁷ The judgments can be consulted on the following web page: www.un.org/en/oaj/unjs/jurisprudence.shtml.

15. Turning to other activities carried out by the Office of Legal Affairs over the past year, she said that the Office of the Legal Counsel had been very busy with the international tribunals. Her Office had a long history of involvement in the establishment and operation of international criminal tribunals, and she was pleased to note that, having made so much progress in fulfilling their mandates since their establishment in the 1990s, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda were now concluding their work and preparing to close.

16. Pursuant to Security Council resolution 1966 (2010) of 22 December 2010, substantial progress had been made towards the start-up of the Mechanism for International Criminal Tribunals. The General Assembly had elected the 25 judges of the Mechanism, and the President, Prosecutor and Registrar had been appointed. It was expected that the Mechanism's Rules of Procedure and Evidence, an information access and security policy for the archives and records and headquarters agreements with the Governments of the Netherlands and the United Republic of Tanzania, the Mechanism's host countries, would be finalized soon. The Office of the Legal Counsel had been at the centre of that pioneering work.

17. One of the significant developments at the International Tribunal for Rwanda in 2011 had been the decision to refer a case to Rwanda for trial.⁴⁸ The referral of cases to national jurisdictions was a key element of the Tribunal's completion strategy and was consistent with the notion that States were primarily responsible for the prosecution of serious international crimes. In practical terms, the decision might encourage the referral of the cases of the six low-level fugitives to Rwanda.

18. With the arrest of Ratko Mladić and Goran Hadžić in 2011, the International Tribunal for the Former Yugoslavia no longer had any fugitives; all 161 indicted persons had been brought to justice. While the trials of Ratko Mladić⁴⁹ and Radovan Karadžić⁵⁰ would be conducted by the International Tribunal for the Former Yugoslavia, appeals in those cases, if any, would be dealt with by the Mechanism, in accordance with Security Council resolution 1966 (2010).

19. In April 2012, the Special Court for Sierra Leone had convicted Charles Taylor, the former Liberian President, of planning, aiding and abetting war crimes and crimes against humanity.⁵¹ It had been a historic moment for international criminal justice, as the first conviction of a former Head of State by an international criminal tribunal since the Nuremberg Tribunal. However, Charles Taylor was not the first Head of State to commit international crimes

while in office, and he would not be the last one to be held accountable for his crimes in a court of law. That judgment sent a strong and unequivocal message that no one was above the law. It was a victory in the fight against impunity and a true testament to the fact that an era of accountability had arrived. It was expected that an appeal, if any, would be completed by the end of the year, at which point the Special Court would make way for the Residual Special Court for Sierra Leone, established by agreement between the United Nations and the Government of Sierra Leone.⁵²

20. Unlike the other tribunals, the Extraordinary Chambers in the Courts of Cambodia had not quite reached the completion stage. In its first appeal judgment, delivered in February 2012, the Supreme Court Chamber had confirmed the conviction of Kaing Guek Eav, alias Duch, for crimes against humanity and had extended his sentence from 35 years to life imprisonment. With the completion of the *Kaing Guek Eav alias Duch* case, the focus had shifted to the second trial, which had started in November 2011 and involved the four surviving senior leaders of the Khmer Rouge regime.⁵³ In view of the advanced age of the accused, the judges had taken a novel approach, splitting the trial into several phases that would be heard successively. Many commentators considered it to be the most significant international criminal trial under way in the world. Two other cases that continued to generate much controversy were at the investigation phase. Two international co-investigating judges had resigned in quick succession, and there was serious concern that such developments could eventually lead to a lack of accountability for the suspects concerned. However, the United Nations remained committed to ensuring that impunity for the crimes committed during the period of Democratic Kampuchea would not be tolerated.

21. In June 2011, the Special Tribunal for Lebanon had confirmed the indictment of four individuals allegedly involved in the attack that had killed former Lebanese Prime Minister Rafiq Hariri and 22 others, and had issued warrants for their arrest.⁵⁴ As efforts to locate and arrest the four accused had been unsuccessful to date, the Special Tribunal would try them *in absentia* later in the year. The Prosecutor was also examining four other related attacks to determine whether sufficient evidence existed to file an indictment. The initial three-year mandate of the Special Tribunal had expired in February 2012. Pursuant to the terms of the annex to Security Council resolution 1757 (2007) of 30 May 2007 (art. 21), the Secretary-General, after consulting with the Government of Lebanon and the Security Council, had extended the mandate of the Special Tribunal for an additional three years.

⁴⁸ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-AR11bis, decision of 28 June 2011, confirmed by the Appeals Chamber on 16 December 2011 (available from www.ictrcaselaw.org/docs/20111216-dco-0175-01-en.PDF).

⁴⁹ *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92, the decisions and judgments concerning this case are available from www.icty.org/case/mladic/4.

⁵⁰ *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18, the decisions and judgments concerning this case are available from www.icty.org/case/karadzic/4.

⁵¹ *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01, judgment of 26 April 2012.

⁵² Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone (New York, 29 July, and Freetown, 11 August 2010), United Nations, *Treaty Series*, vol. 2871, No. 50125, p. 333. Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

⁵³ Nuon Chea and Khieu Samphan (together with Ieng Sary and Ieng Thirith) were indicted on charges related to crimes against humanity, genocide and grave breaches of the 1949 Geneva Conventions in Case No. 002 before the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (www.eccc.gov.kh/en/case/topic/2).

⁵⁴ *The Prosecutor v. Salim Jamil Ayyash and others*, Case No. STL-11-01/T/TC (www.stl-tsl.org/en/the-cases/stl-11-01).

22. The Rome Statute of the International Criminal Court currently formed the centrepiece of the United Nations international criminal justice system. The tenth anniversary of the Statute's entry into force was a symbolic milestone that would be celebrated throughout the year. The event would provide an opportunity to review achievements in the field of international criminal justice over the past 10 years and, it was hoped, to serve as a reminder of the urgency for all States committed to justice to ensure continued support for the Court.

23. The International Criminal Court had issued its first judgment on 14 March 2012, convicting Thomas Lubanga Dyilo of the war crimes of conscripting children under the age of 15 years into armed groups, enlisting children into armed groups and using children to participate actively in an armed conflict that had taken place in the eastern region of the Democratic Republic of the Congo. The sentencing hearing was scheduled to begin in mid-June. While there had been some criticism of the fact that it had taken the Court over five years to complete its first trial, critics must bear in mind the issues that any new jurisdiction faced, where legal paths were unexplored and there were no precedents that might afford guidance. It was to be expected that with time the Court would accelerate the pace of its work while guaranteeing due process of law to those brought before it.

24. The International Criminal Court was currently exercising jurisdiction in respect of seven situations: the Democratic Republic of the Congo, the Central African Republic, Northern Uganda, Darfur, Libya, Kenya and Côte d'Ivoire. The Court was at the heart of the international community's efforts to ensure accountability, end impunity and strengthen the rule of law, and if the international community was serious about achieving those goals, it must support the work of the Court.

25. In response to requests from Member States and regional international organizations, the Organization was increasingly being called upon to provide financial and logistical support to non-United Nations security forces. Yet the provision of such support came with a risk that the United Nations might be implicated in violations of international law by those forces. Events in the Democratic Republic of the Congo in 2009 had proved that to be true. To manage that risk, the Secretary-General had announced in July 2011 the establishment of a human rights due diligence policy, applicable whenever any part of the Organization was contemplating or involved in the provision of support to non-United Nations security forces.⁵⁵ The Office of the Legal Counsel had played a central role in developing that policy. Under the policy, whenever a United Nations entity contemplated providing support to non-United Nations security forces, it first had to conduct an assessment of the risks involved, in particular the risk that the recipient forces might commit grave violations of international humanitarian law, human rights law or refugee law. Where

there were substantial grounds for believing that such a risk was real and it was not possible to take measures to eliminate or reduce it to acceptable levels, the United Nations entity concerned must refrain from supporting the non-United Nations security forces in question. If a United Nations entity did provide support to non-United Nations security forces, it was required by the policy to put in place measures to closely monitor the conduct of those forces. If it subsequently received information that gave it reasonable grounds to suspect that those forces were committing grave violations of international humanitarian, human rights or refugee law, it must immediately intercede with the respective command elements with a view to bringing those violations to an end. If those intercessions did not succeed and the violations continued, then the United Nations entity must suspend or withdraw its support from the forces concerned.

26. The policy had its roots in three different bodies of law. The first was Article 1, paragraph 3, of the Charter, which mandated the Organization to promote and encourage respect for human rights and fundamental freedoms. The second was the law of international responsibility, which required that an international organization should not aid or assist a State or another international organization in violating its international legal obligations. The third came into play when the non-United Nations security forces were party to an armed conflict and the United Nations became a party to that conflict precisely because the Organization was providing support to those forces. In such a situation, international humanitarian law, as reflected in common article 1 of the Geneva Conventions of 12 August 1949, required that the Organization should take such action as was in its power to ensure that the non-United Nations security forces conducted their operations in a manner consistent with their obligations under international humanitarian law.

27. Another area of concern of her Office was the question of amnesty. For over a decade, the Secretary-General had advised his envoys and special representatives negotiating peace agreements that such agreements should not contain amnesties for genocide, crimes against humanity or war crimes or for gross violations of human rights, such as summary executions, extrajudicial killings, torture, enforced disappearances, enslavement, rape and crimes of sexual violence of a comparably serious nature. The Office of the Legal Counsel had played a central role in helping to formulate and establish that policy; moreover, with the Secretariat's increasingly "joined-up" approach to mediation and mediation support, the Office was currently playing a similar role in ensuring its proper implementation.

28. On the matter of human rights vetting in the context of peacekeeping, she noted that while cases of serious misconduct, including sexual exploitation and abuse, by United Nations personnel in peacekeeping operations were rare, the cases that did arise had enormous potential to undermine the reputation and work of the Organization. When carrying out complex mandates in challenging circumstances, the Organization relied on its credibility and legitimacy in the eyes of the local population. Thus, when United Nations personnel broke local laws, they tarnished the image of the Organization and undermined

⁵⁵ See the report of the Secretary-General on the work of the Organization (A/67/1), para. 58. The text of the human rights due diligence policy on United Nations support to non-United Nations security forces is set out in the annex to the identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council (A/67/775-S/2013/110).

its efforts to carry out its mandates. The negative effect was compounded when, as was often the case, there was no real accountability for crimes committed or when accountability measures were taken remotely in the jurisdiction of a troop-contributing country, which might be far from the place where the crime had been committed and from the victims.

29. Accordingly, the Organization was trying to put in place measures to prevent the occurrence of serious misconduct, an undertaking that posed a multidimensional challenge. Such measures included ensuring that all persons who served in United Nations peacekeeping operations met the highest standards of integrity as required under the Charter. To that end, the Policy and Best Practices Service of the Department of Peacekeeping Operations was leading an interdepartmental working group to devise a policy requiring troop or police contributors to screen the personnel they provided to United Nations operations. Once that policy was implemented across the Organization, it would allow the United Nations to reserve the right to deny deployment or to repatriate peacekeepers prematurely at the expense of the relevant national authority if there were grounds to believe that a peacekeeper had committed a criminal or serious disciplinary offence or had committed an act that amounted to a violation of international human rights law or international humanitarian law.

30. In upholding the rule of law, United Nations peacekeepers must lead by example. The Secretary-General had made it clear that he would not hesitate to impose disciplinary measures or, if appropriate, to refer cases for prosecution, due process considerations being taken into account and without prejudice to the applicable privileges and immunities set forth in the 1946 Convention on the privileges and immunities of the United Nations. In addressing those issues, the Organization worked closely with the Member States concerned, which were usually the State hosting the peacekeeping operation or the State of nationality of the peacekeeper in question.

31. Operational difficulties in the implementation of the applicable rules and mechanisms had been encountered in instances where the host State's judicial institutions were weak and lacked the capacity to provide the accused with a fair trial. Practice demonstrated that cooperation among all concerned was vital to the success of existing mechanisms—in other words, cooperation between the host State, the State of nationality of the peacekeeper and the United Nations.

32. The United Nations took seriously its obligation to cooperate with the relevant authorities of the host State in order to facilitate the proper administration of justice, in accordance with the 1946 Convention, since that was a key element of the rule of law. The issue arose, for example, when host country nationals tried to avoid arrest by local law enforcement authorities by taking refuge in United Nations premises. While the Organization must cooperate with the relevant national authorities when that happened, its cooperation must be conditional on the receipt of guarantees from the host State that the individuals concerned would be afforded due process in any legal proceeding and, more generally, that they would not be subjected to torture or other serious violations of human rights.

33. The responsibility to protect was an interesting and relatively new political and legal concept that had been the subject of much discussion at the United Nations in recent years. At the high-level plenary meeting of the General Assembly held in 2005, more than 150 Heads of State and of Government had unanimously embraced the concept of “responsibility to protect” when they had declared that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”⁵⁶ and that “the international community, through the United Nations, also has the responsibility ... to help protect populations”⁵⁷ from those crimes.

34. The Secretary-General had identified three pillars of action for putting the responsibility to protect into operation.⁵⁸ Pillar one was the enduring responsibility of States to protect their populations. Pillar two was the role of the international community to assist States in protecting their populations before crises and conflicts escalated to a level where crimes were committed against the responsibility to protect. Pillar three entailed a commitment from States that they would be prepared to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter of the United Nations, if national authorities were manifestly failing to protect their populations. That commitment extended also to action under Chapters VI and VIII, as well as under Chapter VII, of the Charter and included cooperation with any relevant regional organizations, as appropriate. Of course, the concept was necessarily limited by the legal framework provided under the Charter: any decision of the Security Council to take action required the concurring votes of all permanent members. That requirement underscored the fact that the responsibility to protect did not create any additional exceptions to the prohibition on the use of force laid down by the Charter. Those exceptions were well known: acts taken in self-defence and acts authorized by the Security Council.

35. Most States had agreed that the United Nations should focus at the outset on prevention. In order to give practical meaning to that concept, then, it was necessary to work out how the Organization could best assist States in protecting their population before crises occurred, especially in situations where the Security Council would be unlikely to authorize enforcement action under Chapter VII. That challenge had yet to be met and would, of course, differ from one case to another because each situation was unique.

36. The responsibility to protect reflected a worldwide conviction that it was immoral and unacceptable for States to allow gross violations of their populations' human rights and that the international community had a responsibility to prevent such crimes. The concept of responsibility to protect had grown out of a number of important developments, the first being a recognition of the changing nature of conflict since the drafting of the Charter in

⁵⁶ General Assembly resolution 60/1 of 16 September 2005, “2005 World Summit Outcome”, para. 138.

⁵⁷ *Ibid.*, para. 139.

⁵⁸ Implementing the responsibility to protect: report of the Secretary-General (A/63/677), paras. 11–66.

1945: most current conflicts occurred within States rather than between them. It signified a broad acceptance of fundamental human rights principles, reinforced the normative context for dealing with the crimes of genocide, war crimes and crimes against humanity, and affirmed States' obligations under international law to prevent, prosecute and punish those crimes.

37. The recognition that State sovereignty—the cornerstone of international relations—entailed responsibility lay at the heart of the responsibility to protect. While States had to protect their populations from the crimes targeted by the responsibility to protect, the international community likewise had a positive obligation to help States meet their responsibilities and to take action if they failed to do so. The notion that sovereignty implied responsibility underscored the fact that sovereignty constituted the basis for a certain status and authority under international law, as well as for enduring obligations towards one's people.

38. It was important to note that, rather than detracting from the principle of State sovereignty, the notion of responsibility to protect reinforced it and highlighted the role of the State as a protector of its nationals. As the Secretary-General had stated, the responsibility to protect was “an ally of sovereignty, not an adversary”.⁵⁹ Since one of the defining attributes of both statehood and sovereignty was the protection of populations, the prevention of atrocities began at the national level. Because of its emphasis on prevention, the responsibility to protect strengthened the collective security mechanism established by the Charter and the principle that enforcement measures might be taken only in accordance with the legal framework prescribed by the Charter.

39. Some people might therefore wonder what was new. The “added value” of the responsibility to protect was that it encapsulated the moral and legal imperatives of the international community in relation to the four crimes at which it was aimed. It was potentially a powerful vehicle for an important political process, whereby political pressure might accompany technical and material assistance in an effort to help States exercise their responsibilities. It placed pressure not only on national Governments, but also on actors in the international community. It reflected a marked shift in perspective. While some would argue that the responsibility to protect had no normative effect, others held that it was an enabling new norm and that, while not an obligatory norm that imposed binding new duties, it did confer additional responsibility, which included taking action.

40. When the responsibility to protect had been invoked in respect of Libya, the Security Council had, in the preamble to its resolution 1970 (2011) of 26 February 2011, recalled Libya's “responsibility to protect its population”. The international community, acting through the United Nations and other multilateral and bilateral bodies, had taken a series of measures under pillars two and three to help protect the civilian population from what were described by the Security Council as “widespread and systematic attacks ... [which] may amount to crimes against humanity” (*ibid.*), thus placing the attacks within the framework of crimes

against the responsibility to protect. The steps taken had ranged from diplomatic approaches, the imposition of sanctions and referral of the situation to the International Criminal Court to the authorization by the Security Council, under its resolution 1973 (2011) of 17 March 2011, of “all necessary measures to protect civilians and civilian populated areas under attack” (para. 4). The international community's action in Libya had been swift, multifaceted and targeted, and the most explicit and robust application of the responsibility to protect so far.

41. It was arguably premature to pass judgment on the success of actions taken by the international community in Libya in the context of the responsibility to protect. The intervention by the North Atlantic Treaty Organization had been criticized for going beyond the limits of the Security Council's authorization and had fed concerns that the responsibility to protect had been and might be used again for “political considerations”—that is, to accomplish “regime change” or to legitimize interference in the internal affairs of States. Others, meanwhile, had contended that the limits set by the Security Council had not been exceeded, that the protection of civilians in Libya had required the drastic action taken and that many thousands of lives had been saved by the intervention.

42. With thousands dead and many more injured, the grave situation in Syria had risen to the top of the international agenda and had become a true test of the responsibility to protect. States and the international community, acting through the League of Arab States and the machinery of the United Nations, had sought to provide assistance and apply pressure through efforts under pillars two and three. The Secretary-General had repeatedly called upon the Syrian authorities to stop the violence, and he continued to remind Syria of its responsibilities. The League of Arab States and the United Nations Human Rights Council and General Assembly had been very engaged and vocal with regard to the situation in Syria.

43. The Security Council had adopted two resolutions on Syria. In its resolution 2042 (2012) of 14 April 2012, it had called for the urgent, comprehensive and immediate implementation of all elements of the Joint Special Envoy's six-point proposal (which appeared in the annex). In resolution 2043 (2012) of 21 April 2012, the Council had decided to establish a United Nations Supervision Mission in Syria for an initial period of 90 days (para. 5). Since the Mission had to reach its authorized maximum strength without further delay, deployment was continuing apace.

44. Although it was too late to prevent bloodshed in Syria, the challenge for the international community was to find ways of preventing a further escalation in the conflict. The responsibility to protect served not only to underscore the responsibilities of States *vis-à-vis* their populations, but also to bring pressure to bear on the international community and to mobilize it into helping States to meet those obligations, possibly by taking collective action when States failed to do so. The Syrian authorities had thus far largely disregarded their responsibilities, but the international community had not: it was mobilized and while much more remained to be done, it was relying strongly on the doctrine of the responsibility to protect.

⁵⁹ *Ibid.*, para. 10 (a).

45. Turning to the activities of the Division for Ocean Affairs and the Law of the Sea, which performed multiple functions under the United Nations Convention on the Law of the Sea, she said that the Division supported the uniform and consistent application not only of the Convention and its two implementing agreements, but also of other relevant agreements and instruments. The Division successfully assisted the General Assembly in its annual review of issues connected with ocean affairs and the law of the sea, issues that had acquired special significance in view of the forthcoming United Nations Conference on Sustainable Development to be held in Rio de Janeiro in June 2012.

46. As universal participation in the Convention was important if there was to be a single, coherent, legal regime of the oceans, it remained a priority for the General Assembly. Accordingly, in its resolution 66/231 of 24 December 2011, on oceans and the law of the sea, the Assembly had reiterated its call to all States to become parties to the Convention and its implementing agreements. The Secretary-General had likewise encouraged the 34 Member States that had not yet become parties to the Convention to accede to it. Cambodia had announced its intention to ratify the Convention in the near future. To commemorate the thirtieth anniversary of the opening for signature of the Convention, the General Assembly had decided to devote a two-day debate to the Convention in December 2012, and the Secretary-General had been requested to organize activities to mark the occasion.

47. In September 2011, the first workshop in support of the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects, had been held in Chile, with a second workshop held in China in February 2012. The outcome of the workshops had been presented by the host countries at the third meeting of the Ad Hoc Working Group of the Whole on the Regular Process, in April 2012.

48. In the context of fisheries, the General Assembly had reviewed its resolutions 61/105 of 8 December 2006 and 64/72 of 4 December 2009 relating to bottom fishing, a practice that could negatively affect vulnerable marine ecosystems and the long-term sustainability of deep-sea fish stocks. A two-day workshop had been held in New York in September 2011 to discuss the implementation of those resolutions, and those discussions had then been taken into account by the Assembly when it had decided on additional urgent actions to regulate bottom fisheries in areas beyond national jurisdiction. Those actions were listed in resolution 66/68 of 6 December 2011, on sustainable fisheries (chap. X).

49. Despite a decrease in the rate of hijackings, piracy off the coast of Somalia continued to threaten the lives of seafarers, the safety and security of international navigation and the stability of the region. It was also worrisome to note that there had been an increase in incidents of piracy in the Gulf of Guinea in recent months. The Office of Legal Affairs had been working in a number of forums to help States address the legal aspects of the repression of piracy under international law. Its work in 2011 had focused on two principal areas, namely regional mechanisms for the prosecution of suspected pirates, including specialized anti-piracy courts and national legislation on piracy.

50. With regard to regional mechanisms, the Office of Legal Affairs, pursuant to a request made by the Security Council in its resolution 1976 (2011) of 11 April 2011, had prepared a report issued by the Secretary-General on the modalities for the establishment of specialized Somali courts to try suspected pirates,⁶⁰ both in Somalia and in the region, including an extraterritorial Somali specialized anti-piracy court sitting in another State in the region. The Bureau assessed the legal and practical considerations surrounding the establishment of such courts, including the possible participation of international personnel, as well as the projected costs.

51. In its resolution 1976 (2011) of 24 October 2011, the Security Council had decided to continue its consideration, as a matter of urgency, of the establishment of specialized anti-piracy courts in Somalia and other States in the region. On the basis of that resolution, her Office had prepared a further report for the Secretary-General⁶¹ setting out detailed proposals for the establishment of such courts. The report assessed (a) the kind of international assistance, including the provision of international personnel, that would be required to make specialized anti-piracy courts operational; (b) the procedural arrangements for the transfer of apprehended pirates and related evidence; and (c) the projected case capacity of such courts and the projected timeline for and costs of such courts.

52. In its resolution 1976 (2011), the Security Council had called on all States to criminalize piracy under their national legislation. It had also called upon international partners to assist States in elaborating counter-piracy laws. The Council had requested the Secretary-General to compile and circulate information received from Member States on the measures they had taken to criminalize piracy under their domestic law, and to prosecute and support the prosecution of individuals suspected of piracy off the coast of Somalia, as well as to imprison convicted pirates. To date, information had been received from 42 Member States.

53. The related question of the use of privately contracted armed security personnel on-board ships as a protective measure against piracy was a matter that raised a number of complex legal issues. The latter were being examined by the Contact Group on Piracy off the Coast of Somalia and by the International Maritime Organization (IMO).

54. Turning to the activities of the International Trade Law Division, she said that 2011 had been another productive year for the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model Law on Public Procurement had been revised⁶² to reflect both experience gained in its use and practice developed since the adoption of the original text in 1994.⁶³ The main

⁶⁰ S/2011/360.

⁶¹ S/2012/50.

⁶² UNCITRAL Model Law on Public Procurement, 1 July 2011. Available from www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf.

⁶³ UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (New York, United Nations, 1995). Available from www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf.

objective of the Model Law was to enhance efficiency and effectiveness in the procurement process. The Commission had also issued a publication entitled *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*,⁶⁴ which was intended to foster the uniform interpretation of the Model Law by providing information and guidance to judges on issues related to cross-border insolvency. Through its working groups, UNCITRAL was also engaged in work on a number of other topics, including transparency in treaty-based investor-State arbitration, online dispute resolution, electronic transferable records, selected concepts relating to cross-border insolvency and registration of security rights in movable assets.

55. At its forty-fifth session, to be held in New York from 25 June to 6 July 2012, UNCITRAL was expected to consider and finalize the Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement.⁶⁵ The Commission would also consider possible future work in the areas of public procurement and microfinance, as well as its role in promoting the rule of law at the national and international levels.

56. A notable development in that regard had been the establishment of the UNCITRAL Regional Centre for Asia and the Pacific, a novel yet important step that would enable UNCITRAL to provide technical assistance to developing countries. The Regional Centre had officially opened on 10 January 2012, and its key objective was to enhance international trade and development in the Asia-Pacific region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL.

57. Turning to the activities of the Treaty Section, she recalled that broad participation in the multilateral treaties deposited with the Secretary-General—the most recent of which was the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the General Assembly in its resolution 66/138 of 19 December 2011—was promoted through annual and special treaty events. The 2012 treaty event, the focus of which would be the rule of law, would coincide with the one-day plenary meeting on the rule of law at the national and international levels to be held during the high-level segment of the sixty-seventh session of the General Assembly.

58. The current scarcity of resources and difficult economic climate meant that the International Law Commission needed to reflect, as a matter of urgency, on how it could increase its efficiency, effectiveness and productivity. One key factor to be considered was the duration of the Commission's sessions, including whether the sessions should be split. The seriousness of the Organization's financial situation had compelled her to advise the Sixth Committee of the need for the Commission to manage prudently its way of doing

business. All United Nations entities would need to seek creative ways of meeting their objectives if they were to continue to operate within budgetary constraints.

59. The CHAIRPERSON thanked Ms. O'Brien, the Legal Counsel, for her statement and invited members to make comments and put questions.

60. Mr. NOLTE, referring to the responsibility to protect, asked whether his understanding was correct that while the concept did not imply any new legal duties, it did imply new political obligations.

61. Mr. HASSOUNA recalled that since 2008⁶⁶ the Commission had been invited each year by the General Assembly to comment on its role in promoting the rule of law, which was the essence of the Commission's work. He therefore wished to know whether the Commission would be invited to participate in the one-day plenary meeting on the rule of law at the national and international levels to be held during the high-level segment of the sixty-seventh session of the General Assembly. He also wished to know what the Legal Counsel expected the outcome of that meeting to be: Would it simply be another debate, such as the one held in the Sixth Committee or would the meeting lead to the adoption of new mechanisms that would give substance to the promotion of the rule of law in different regions of the world?

62. Mr. KAMTO asked what progress was being made in the prosecution in Côte d'Ivoire of the main perpetrators of the crimes committed during the period covered by the investigations of the International Criminal Court. The Court appeared to be turning into an African court *ratione personae*. He wondered what progress was being made in the investigations of situations in other continents that had previously been announced by the Office of the Prosecutor; a fundamental condition for the universality of the Court, which did not depend solely on the number of ratifications, was that there should be prosecutions in continents other than Africa.

63. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs and United Nations Legal Counsel) said that, with regard to the responsibility to protect, the distinction between a legal obligation and a political obligation was a subtle one. The concept of the responsibility to protect—especially pillar three, which encompassed Chapter VII of the Charter—did not give rise to another layer of international law or to a right of humanitarian intervention: the provisions of the Charter stipulating that the use of force required the authorization of the Security Council remained supreme. However, the concept did create a political and moral obligation. In her view, the concept implied a moral and political obligation to take action, but no legal duty to take action. She admitted, however, that the lines between the three types of obligations overlapped to some extent.

64. She was not sure what the outcome of the special General Assembly one-day plenary meeting would be.

⁶⁴ Available from www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf.

⁶⁵ UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Public Procurement (New York, 2014). Available from www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf.

⁶⁶ General Assembly resolution 63/128 of 11 December 2008, entitled "The rule of law at the national and international levels", para. 7. See also resolutions 64/116 of 16 December 2009, para. 9, 65/32 of 6 December 2010, para. 10, and 66/102 of 9 December 2011, para. 12.

Participants at the meeting were expected to be of a very high level. From the point of view of the Office of Legal Affairs, the discussion should focus on international law and the rule of law at the international level. While it had been planned that the Chairperson of the Commission would be the sole representative of the Commission at the meeting, the Codification Division could look into the possibility of broader participation.

65. With regard to the status of International Criminal Court prosecutions in connection with events in Côte d'Ivoire, she recalled that Laurent Gbagbo was currently under arrest and his trial was under way. The Prosecutor continued to have the entire situation under review; he was pursuing his investigation and had the option of looking into broader crimes than those of the former Head of State alone. Her Office worked closely with the International Criminal Court but was not familiar with the internal workings of the Office of the Prosecutor.

66. It was her understanding that the Court had situations under review other than those arising in Africa, such as the situations in Afghanistan and Colombia. As for the implied focus on Africa, it should be borne in mind that the Rome Statute of the International Criminal Court would not exist without the commitment of the African States; they had been the largest regional group to support the establishment of the Court and a significant proportion of those States were parties to the Rome Statute. Importantly, many of the investigations into situations in Africa had been self-referrals by the African States in which the situations had occurred. Only two situations in Africa—the situations in Libya and Darfur—had been referred to the Court by the Security Council. The situation in Kenya had been the subject of an investigation by the Prosecutor *proprio motu*.

67. Mr. KITTICHAISAREE asked whether the third pillar of the concept of the responsibility to protect could be understood to authorize the exercise of universal jurisdiction over perpetrators of serious crimes under international law, especially leaders of States who failed to protect their own citizens. He also wished to know if it could be understood to authorize the extradition or prosecution of such leaders.

68. On the subject of piracy, he observed that there appeared to be a discrepancy between United Nations practice and the practice of IMO. The latter organization had been insisting that Somali pirates were not terrorists because they committed crimes for private, not political, ends. However, under various international conventions to combat terrorism, such as the International Convention against the taking of hostages, Somali pirates were considered to be offenders, and the International Convention for the Suppression of the Financing of Terrorism could thus be applied to curtail their activities.

69. With regard to the rule of law, he noted that there had been much criticism of the Special Tribunal for Lebanon for adopting a definition of terrorism that did not comply with the principle of legality.⁶⁷ Another tribunal—the

Extraordinary Chambers in the Courts of Cambodia—had been badly affected by the resignations of prosecutors and judges. The rule of law appeared to be in crisis, given that the very persons and institutions trying to uphold it were themselves experiencing difficulties.

70. Mr. TLADI asked to what extent the Office of Legal Affairs, when contributing to the reports on legal matters issued by the Secretary-General, felt the need to strike a balance between providing high-quality information, on the one hand, and furnishing information that was acceptable to Member States, on the other. For example, in the matter of piracy, the issue of regional prosecution mechanisms—including specialized anti-piracy courts—had been covered in the reports in some detail, while less coverage had been given to the question of natural resources, which some States considered to be important.

71. Mr. WAKO asked whether, when a State had failed to meet its primary responsibility to protect its citizens and the Security Council had consequently called for collective action in a resolution, the inevitable result of such a resolution was regime change. On the question of piracy, he noted that in his former capacity as Attorney General of Kenya he had conducted a record number of prosecutions against pirates and therefore appreciated the work carried out on that issue by the Office of Legal Affairs. Given the length of time it took for the States concerned to put in place mechanisms such as regional courts or national legislation, those States should be assisted in their efforts both financially and in terms of human resources. He appealed to the Legal Council to that end, since conducting prosecutions placed a heavy burden on States with scant resources, such as Kenya, Djibouti, Seychelles and the United Republic of Tanzania.

72. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs and United Nations Legal Counsel), replying to Mr. Kittichaisaree, said that the international legal principles that applied to universal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) applied unchanged in the context of the responsibility to protect. The concept of responsibility to protect was neither intended to, nor did it, change any element of international law as such. In a sense, it created a moral and political obligation or duty on States to implement universal jurisdiction and the principle of *aut dedere aut judicare*.

73. She agreed that the United Nations and IMO differed in their approach to piracy; that was because the roles played by each organization were different. Nevertheless, the United Nations worked very closely with IMO, in particular through the United Nations Office on Drugs and Crime (UNODC), in order to understand and seek solutions to the common problems they faced. For instance, IMO had organized a conference in London the previous week to discuss, *inter alia*, a number of difficult legal questions such as the employment of privately contracted armed security personnel on ships. The Office of Legal Affairs considered that it was its obligation to promote relevant conventions and to ensure their implementation by encouraging States to fulfil their obligations under those instruments.

⁶⁷ Special Tribunal for Lebanon, Appeals Chamber, interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, Case

No. STL-11-01/I, paras. 145–148, for which “the Tribunal must apply the crime of terrorism as defined by Lebanese law” (para. 145).

74. The Extraordinary Chambers in the Courts of Cambodia, which was the most challenging of the hybrid courts or international tribunals, had faced a number of crises since its inception, including resignations, threats of resignations and, most recently, the possibility of a trial collapsing owing to the health concerns of one of the defendants. Investigations into certain cases had been fraught with political interference, and she had had on a number of occasions to intercede with the Cambodian Government in an attempt to stop such interference. Yet, despite those challenges and difficulties, the tribunal had been an important catalyst for the rule of law. Its importance for Cambodia was highlighted by the fact that over 30,000 people had made their way across the country to attend hearings and feel the proximity of justice. Given the very important role the tribunal had played in that respect, its current vulnerabilities and the prospect of further difficulties were matters of particular concern to her Office.

75. Replying to Mr. Tladi's question, she said that ensuring the quality of its product while meeting the expectations of Member States was one of the most difficult challenges her Office faced. The Office's response to a question related to the issue of piracy provided a good example in that regard. The Security Council had initially requested a report on the possibility of establishing an international tribunal to deal with piracy, since some States, in particular France and the Russian Federation, had expressed strong support for such a court. The Office had compiled its reports with objectivity, professionalism and integrity and had duly submitted them to the Security Council. On the basis of advice provided to it not only by her Office but also by national legal advisers, the Council had decided that it would not be desirable to set up such a tribunal. Her Office had subsequently worked very closely with the Security Council to consider various ways of improving the system of justice for dealing with piracy, such as building upon the regional and national court systems and helping them develop their capacity to counter piracy. The Security Council still had to take a decision in that regard.

76. A further illustration of the broader issue of ensuring quality of output and meeting Member States' expectations had been provided the previous week in the context of reform of the Security Council. A number of States known collectively as the Small Five group had tabled a draft resolution in the General Assembly on improving the working methods of the Security Council, which had included a provision dealing with the use of the veto. Following a request from the President of the General Assembly, the Office of Legal Affairs had prepared, within a very tight time frame, a legal advice based on a thorough analysis of all efforts to reform the working methods of the Security Council since the establishment of the United Nations. It had, in particular, considered General Assembly resolution 53/30 of 23 November 1998, which had been the catalyst for the motion by the Small Five group, with a view to determining whether it had the effect of creating a requirement for a two-thirds majority for any decision on the matter or whether, as the sponsors of the draft resolution maintained, a simple majority was required. Her Office had advised that, in the case of the draft resolution that had been submitted, it would be appropriate if the General Assembly should adopt it by a two-thirds majority. In her opinion, the advice provided by

the Office had been objective, professional and balanced; however, it had been described to the General Assembly by those who had been disappointed by the outcome as being utterly wrong and biased.

The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/650 and Add.1, sect. G)

[Agenda item 10]

77. The CHAIRPERSON recalled that, pursuant to his consultations on the approach to be taken to the work of the Commission, it had been decided to appoint a chairperson of the Working Group for the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" and a new special rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction".

78. The Bureau had proposed that Mr. Kittichaisaree should be appointed Chairperson of the Working Group for the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". If he heard no objection, he would take it that the Commission so agreed.

Mr. Kittichaisaree was appointed as Chairperson of the Working Group on the obligation to extradite or prosecute (aut dedere aut judicare).

79. The CHAIRPERSON said that the Bureau had proposed that Ms. Escobar Hernández should be appointed Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction". If he heard no objection, he would take it that the Commission so agreed.

Ms. Escobar Hernández was appointed Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction".

80. The CHAIRPERSON said that, following consultations, a consensus had been reached on the inclusion of two new topics in the programme of work of the Commission, namely "Provisional application of treaties" and "Formation and evidence of customary international law".

81. The Bureau had proposed that the topic "Provisional application of treaties" should be included in the current programme of work and that Mr. Gómez Robledo should be appointed Special Rapporteur for the topic. If he heard no objection, he would take it that the Commission so agreed.

The Commission decided to include the topic "Provisional application of treaties" in the current programme of work and to appoint Mr. Gómez Robledo as Special Rapporteur for the topic.

82. The CHAIRPERSON said that the Bureau had proposed that the topic "Formation and evidence of customary international law" should be included in the current programme of work and that Sir Michael Wood should be appointed Special Rapporteur for the topic. If he heard no objection, he would take it that the Commission so agreed.

The Commission decided to include the topic "Formation and evidence of customary international law" in the current programme of work and to appoint Sir Michael Wood as Special Rapporteur for the topic.

83. Mr. NIEHAUS (Chairperson of the Planning Group) announced that the Planning Group would be composed of the following members: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood and Mr. Šturma (Rapporteur, *ex officio*).

The meeting rose at 12.20 p.m.

3133rd MEETING

Friday, 25 May 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

The CHAIRPERSON said that the Bureau had adopted the programme of work for the following week, which had just been distributed to members. If he heard no objection, he would take it that the Commission approved it. He also wished to draw the attention of members to the provisional programme of work for the second part of the session, stressing that it should be taken to be purely provisional in nature.

The meeting rose at 10.05 a.m.

3134th MEETING

Tuesday, 29 May 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud,

Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/650 and Add.1, sect. B, A/CN.4/651, A/CN.4/L.797)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. HMOUD (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 1 to 32, which constituted the entire set of draft articles on the expulsion of aliens, provisionally adopted on first reading by the Drafting Committee, as contained in document A/CN.4/L.797, which read as follows:

PART ONE

GENERAL PROVISIONS

Draft article 1. Scope

1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.
2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

Draft article 2. Use of terms

For the purposes of the present draft articles:

- (a) "expulsion" means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;
- (b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

Draft article 3. Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

Draft article 4. Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

Draft article 5. Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.
2. A State may only expel an alien on a ground that is provided for by law, including, in particular, national security and public order.
3. The ground for expulsion shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question and, where relevant, the current nature of the threat to which the facts give rise.
4. A State shall not expel an alien on a ground that is contrary to international law.

* Resumed from the 3131st meeting.