

Document:-
A/CN.4/3299

Summary record of the 3299th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2016, vol. I

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

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

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

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

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

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

The meeting rose at 12.55 p.m.

3299th MEETING

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

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson,

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

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

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

3. The time had long passed when crimes against humanity had been considered simply as violations of moral codes. At the international level, such crimes had for decades been proscribed by customary law and many relevant judicial precedents existed at the national and international levels. That had paved the way for crimes against humanity to be incorporated into the statutes of international criminal tribunals, and ultimately the Rome Statute of the International Criminal Court, which described specific crimes against humanity in detail. It was important to question why such developments had not had greater influence on national and international law. During the consideration of the Special Rapporteur’s first report¹⁰⁵ by the Sixth Committee, at the General Assembly’s seventieth session, many Member States had advocated drafting a convention on crimes against humanity, whereas others had remained sceptical. Some positions taken, and echoed by members of the Commission, had emphasized the links between the proposed new convention and existing treaties, noting that some crimes were already recognized under the Rome Statute of the International Criminal Court. It was therefore important for the Commission to approach the topic cautiously, taking care to avoid overlap at the international level between the draft articles under discussion and other treaties, especially the Rome Statute of the International Criminal Court. Crimes against humanity were not committed with intent to destroy a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. Referring to the suggestion by some Commission members that a draft article similar to article 27 of the Rome Statute of the International Criminal Court be added, so that the draft articles applied equally to all persons, with no exemption permitted for State officials, he said that, although crimes against humanity, the crime of

genocide and other crimes were defined as serious international crimes by the international community, there was no customary international law that precluded exemption from immunity of State officials. The Commission should therefore approach the issue of immunity with caution. Furthermore, the immunity of State officials was procedural in nature, which did not exempt them from their substantive responsibility. As had been found by the International Court of Justice in its judgment in *Arrest Warrant of 11 April 2000*, measures such as prosecution before domestic courts, waivers of immunity, prosecution subsequent to a State official's period in office, and criminal proceedings before certain international criminal courts could be used, without any absence of immunity from jurisdiction, to hold State officials criminally liable. That such measures were permitted was not intrinsically linked to the issue of impunity.

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

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

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

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

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

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

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

22. Mr. WISNUMURTI said that, as indicated in paragraph 18 of the Special Rapporteur's second report, States did not regard themselves as bound under customary international law to adopt a national law expressly criminalizing crimes against humanity. It was therefore essential for the Commission to proceed to develop a convention on crimes against humanity, with, among its main objectives, the aim of preventing impunity for such crimes. Draft article 5 on criminalization under national law was one of the most important components of such a convention. There was merit in adding the act of "planning", or "instigating", a crime against humanity – terms used in the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia¹⁰⁷ and in the Statute of the International Tribunal for Rwanda¹⁰⁸ – to the list of offences set out in draft article 5, paragraph 1, as it reflected the reality on the ground, where crimes against

humanity were being or had been committed. He also supported the proposal to replace the word "inducing" in that paragraph with the more commonly used term "inciting".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38. At the seventy-first session of the General Assembly, the Sixth Committee would revert to the consideration of four items emanating from work completed by the Commission: responsibility of States for internationally wrongful acts;¹¹⁰ diplomatic protection;¹¹¹ the law of transboundary aquifers;¹¹² and consideration of prevention of transboundary harm from hazardous activities¹¹³ and allocation of loss in the case of such harm.¹¹⁴

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

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

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

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

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

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

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

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

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

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

42. Of the many peacekeeping operations with which the Office of the Legal Counsel had been involved in the last year, none had required more advice or sustained engagement than the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), which the Security Council had established in April 2014.¹¹⁵ The transitional authorities of the Central African Republic had now completed their mandate, and a new era was unfolding for the Central African authorities and for the population. The role of MINUSCA beyond the transitional period remained crucial for supporting the Government in the extension of State authority and the preservation of the country's territorial integrity.

43. The extremely volatile situation and the weakness of critical State institutions had led the Security Council to give MINUSCA a very strong mandate, *inter alia*, to protect civilians and to end the impunity of perpetrators of human rights violations, by arresting and detaining suspects at the Government's request in areas where national security forces were not present or operational. The mandate to adopt such urgent temporary measures had been

expressly qualified by the Council as exceptional, without creating a precedent and without prejudice to the agreed principles of United Nations peacekeeping operations. It was expected that an advance team of internationally recruited experts would arrive in Bangui towards the end of 2016 in order to assist the special criminal court that was to be established under Central African legislation to investigate those crimes and bring the perpetrators to justice. As he had explained in 2015, the United Nations would provide logistical support and technical assistance, but would not directly appoint staff to serve in the court.

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

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

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

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

46. The Office of Legal Affairs had continued to provide daily support to the international and United Nations-assisted criminal tribunals that strove to secure accountability for international crimes. The International Tribunal for Rwanda had concluded its judicial work and all its remaining functions had been transferred to the International Residual Mechanism for Criminal Tribunals, which would try the eight remaining fugitives indicted by the International Tribunal for Rwanda, once they were arrested. The International Tribunal for the Former Yugoslavia had almost completed its final trials. Appeals, if any, in the *Prosecutor v. Radovan Karadžić* and *Prosecutor v. Vojislav Šešelj* cases would be heard by the Residual Mechanism. In December 2015, the Extraordinary Chambers in the Courts of Cambodia, which had reached their peak workload, had been placed on a more secure footing thanks to a subvention granted by the General Assembly. The Special Tribunal for Lebanon, which was distinct in jurisdiction and nature from the other international and United Nations-assisted criminal tribunals, was continuing the trial in absentia of five accused in the *Ayyash, et al.* case. As for the Residual Special Court for Sierra Leone, the Office of the Legal Counsel had been devising a future financing

arrangement for the Court, in close consultation with the members of the Oversight Committee, since voluntary contributions were plainly not a sustainable means of financing a judicial institution.

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

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

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

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

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

52. Mr. TLADI thanked the Legal Counsel for his Office's support for the United Nations Regional Courses in International Law, which were much appreciated in Africa. He was also grateful for the attention that the Office of the Legal Counsel was paying to the issue of sexual exploitation, which jeopardized the credibility of United Nations peacekeeping operations. In that connection, he wondered

whether some answers to that very difficult issue might be found in the Sixth Committee's debates on the criminal accountability of United Nations officials and experts on mission.

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

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

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

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

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

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

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

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

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

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

63. Mr. PETRIČ said it was a matter of concern that the International Tribunal for the Former Yugoslavia would soon be concluding its mission and that hundreds of cases would now be transferred to the national courts of Bosnia and Herzegovina, where there was serious reason to believe that they would not be dealt with properly. It was important to leverage the experience built up by the staff members who had worked for the Tribunal for almost 20 years; perhaps they could provide assistance to the national courts of Bosnia and Herzegovina so as to ensure that outstanding cases were handled independently and efficiently.

64. Mr. HMOUD said that he wondered when, in the context of a multidimensional peacekeeping operation in which troops used force and the situation evolved into an armed conflict, the protection afforded under the Convention on the Safety of United Nations and Associated Personnel ceased to apply.

65. Ms. ESCOBAR HERNÁNDEZ said that she shared the Legal Counsel's concerns about the problems faced by international organizations in connection with locally recruited personnel, although she also understood Mr. Forteau's position. The regime of immunities continued to be essential in contemporary international law, but it was necessary to take account of the major developments that had taken place over the last three decades. Spain had recently adopted Organic Law 16/2015 on the jurisdictional immunities of foreign States and international organizations, article 35 of which struck a good balance in that it generally recognized the right to immunity but provided for limitations in respect of particular issues under private law and employment law. Immunities did not apply if an organization could not prove that it had an equivalent dispute settlement mechanism. However, if the organization did have such a mechanism, immunity was absolute. Given that the United Nations had the mandate to establish an alternative dispute settlement mechanism, there should be no problem in that regard.

66. On the issue of accountability for international crimes, she wondered how the Legal Counsel envisaged the contribution of the United Nations to strengthening national criminal prosecution capacity, in particular its relationship with regional organizations in the establishment of hybrid tribunals and its relationship with the International Criminal Court in achieving positive complementarity.

67. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel), responding to Mr. Murphy's comment, said that efforts would be made to compile and publish more materials, within the limited resources available. He agreed with Mr. Forteau about the importance of linguistic diversity, as using only one language led to narrow ways of thinking.

68. He had followed with interest the discussions in the various international tribunals on the link between immunity and the right to obtain a judicial determination, although none of those tribunals had taken such a progressive approach as the national courts. There was clearly a need to be more practical in that regard. In line with section 29 of the 1946 Convention on the Privileges and Immunities of the United Nations, on alternative modes of settlement of disputes, all employment contracts contained a clause providing for arbitration. Although that form of dispute settlement was indeed used, in certain cases the arbitration clause was ignored and cases were brought before the national courts on the basis of the national constitution, which was an abuse of the right to obtain a judicial determination. Very often national judges held the prejudice that the worker was always the weaker party, and the Organization was systematically found to be at fault. He would carefully examine the law cited by Ms. Escobar Hernández, although he already had some doubts about it, as it seemed to reflect a unilateral decision to change the international obligations arising under the Convention. He was aware that the discussion on the immunities of States had evolved and that a distinction was now made between absolute immunity and relative immunity for issues of employment law. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property was an important instrument; although it had not been widely ratified and had not yet entered into force, some of its principles might perhaps be emerging rules of customary international law. However, the same distinction between relative and absolute immunity did not apply to international organizations, and the International Court of Justice had adopted a very conservative position in *Jurisdictional Immunities of the State*. If States concluded that the immunity of the United Nations was no longer valid, the rules would have to be changed, bearing in mind that, as the Organization had a presence in almost every State, it would need legal officers able to represent it before national courts worldwide, which would significantly change the state of play.

69. With regard to Mr. Petrič's comments, his duty to exercise discretion as the Legal Counsel meant that it was difficult for him to comment on the work of a judicial body. The International Tribunal for the Former Yugoslavia had done very impressive work in a number of cases, as he had explained to Member States when they had complained that the process was too long and

expensive. He agreed that the experience built up over the last 20 years should not be wasted, and trusted that some of that expertise would be used in the process of ensuring accountability for international crimes. On the issue of accountability, the Office of Legal Affairs would be providing technical assistance to South Sudan and the African Union for the establishment of a hybrid tribunal, but work had just started and there were not yet any results. Work with the Government of Sri Lanka was also at a preliminary stage. With regard to Mr. Hmoud's question, it was clear that protection under the Convention on the Safety of United Nations and Associated Personnel ceased once the peacekeepers had become part of a conflict. International humanitarian law applied thereafter.

70. Ms. JACOBSSON drew attention to the views she had circulated on the importance of a gender-based perspective in ensuring the protection of persons in the event of disasters, for possible consideration by the Drafting Committee.

The meeting rose at 1.25 p.m.

3300th MEETING

Wednesday, 18 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

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

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

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the second report on crimes against humanity (A/CN.4/690).
2. Mr. ŠTURMA commended the Special Rapporteur on his excellent second report on crimes against humanity, which was very clear and well structured and contained numerous references to relevant treaty law, case law of international courts and tribunals and doctrine. As a debate had arisen on the nature of the topic and working methods, he wished to comment on those issues before moving on to the draft articles themselves. First, the topic was well within the Commission's mandate, part of which had always been to prepare draft articles for future