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Summary record of the 3301st meeting

Topic:
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77. Mr. SABOIA (Vice-Chairperson) said that the Planning Group would be composed of Mr. Nolte (Chairperson), Mr. Cafilisch, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Petrič, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Mr. Park, *ex officio*, and himself.

The meeting rose at 1 p.m.

3301st MEETING

Thursday, 19 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

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

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

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to congratulate the Special Rapporteur on his detailed and comprehensive second report (A/CN.4/690), which dealt with a topic whose relevance could not be underestimated. The regrettable frequency with which crimes against humanity occurred in today's turbulent and dangerous world called for strong measures, legal or otherwise, aimed at preventing such crimes and punishing their perpetrators. A convention on crimes against humanity, solely by virtue of its existence, would help to stir the conscience of humankind and promote efforts to that end. His conviction about the need for the Commission to deal with the topic in a serious and profound manner was strengthened by, among others, cases of crimes against humanity in his own country, Mozambique. In that connection, he would strongly recommend that the Special Rapporteur should consult the report entitled "Summary of Mozambican refugee accounts of principally conflict-related experience in Mozambique", also known as the "Gersony report", which had been commissioned and published by the United States Department of State in April 1988.

2. In general, he agreed with the six new draft articles proposed by the Special Rapporteur in his second

report. Draft article 5, which dealt with criminalization under national law, was of crucial importance, since, as stated by the Special Rapporteur in paragraph 15 of his second report, the prosecution and punishment of persons for crimes against humanity must operate at the national level to be fully effective. Furthermore, as other Commission members had correctly pointed out, clearly established measures to criminalize and punish crimes against humanity under national law were also necessary in order to abide by the fundamental criminal law principles of *nullum crimen sine lege* and *nulla poena sine lege*.

3. With regard to the wording of draft article 5, paragraph 2, he agreed that the most appropriate language to use was that of article 28 of the Rome Statute of the International Criminal Court. The Statute had become a landmark in the history of treaties and a yardstick against which to measure other legal instruments that aimed to punish the perpetrators of heinous crimes. It was therefore important that, whenever possible, the Commission should adhere to its letter and spirit. As to draft article 5, paragraph 3 (*b*), he concurred with the Special Rapporteur that the offences referred in the draft article should not be subject to any statute of limitations.

4. The issue of corporate criminal liability, to which the Special Rapporteur devoted paragraphs 41 to 44 of his second report, was an important one that warranted closer examination. While some members had argued that the matter should be left to the discretion of national legislators, he agreed with Ms. Jacobsson, Mr. Kamto and Mr. Vázquez-Bermúdez that it should be addressed in the body of the draft articles. The Commission must be guided by the object and purpose of the future convention and ensure that all impunity gaps were completely closed. He saw no reason why a corporation that had engaged in the acts defined in draft article 3¹²⁶ should escape liability under that convention; no corporate veil or indirect immunity should be allowed to cover any company that benefited from conflicts around the world. In order for the Commission to develop a more solid position on that issue, it would be helpful if a brief concept note could be prepared, together with a proposal for a draft article on corporate criminal responsibility.

5. In paragraphs 150 to 167 of his second report, the Special Rapporteur had provided an excellent overview of the all-important principle of *aut dedere aut judicare*, the core objective of which was to promote and enhance international cooperation in the fight against impunity. He therefore welcomed its inclusion in draft article 9, paragraph 1, which closely followed the so-called "Hague formula" and previous work of the Commission. He had no problem with draft article 9, paragraph 2, which was perfectly acceptable.

6. He endorsed the road map for the future programme of work, outlined by the Special Rapporteur in paragraphs 202 to 204 of his second report. The topic rested on a firm political and legal footing; any change of direction at the current juncture would be unwise. In conclusion, he supported the referral of the six draft articles to the Drafting Committee.

¹²⁶ *Yearbook ... 2015*, vol. II (Part Two), pp. 37–47.

7. Mr. MURPHY (Special Rapporteur), summing up the discussion, said that he wished to thank Commission members for their contributions to what had been an exceptional debate. Although he would not be able to do justice in his summary to all the points raised by the 26 members who had spoken, he had paid very close attention to, and kept a record of, all the views expressed.

8. Mr. Murase had begun the debate by advancing a view as to the Commission's "usual mandate" of codification and progressive development, under which it was supposedly precluded from elaborating a draft convention. However, as pointed out by other members, it seemed clear that the Commission could, if it so wished, pursue a topic by formulating draft articles with the intention that they might ultimately form the basis of a convention. Indeed, article 15 of the Commission's statute defined the expression "progressive development of international law" as meaning, in part, "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". While article 16 of the statute acknowledged that the General Assembly could refer to the Commission a proposal for the progressive development of international law, article 17 expressly contemplated the drafting of conventions without such a referral and, in any event, the statute did not preclude the Commission from pursuing such an approach on its own initiative. There was thus no basis for claiming that the Commission was proceeding improperly with regard to its mandate under the statute.

9. Likewise, the manner in which the Commission was proceeding was fully consistent with its past practice. There was precedent for a special rapporteur to submit reports that oriented the project towards a draft convention – for example, the draft articles on the law of transboundary aquifers – without prejudice to any final decision that the Commission might reach at the end of the project. There was also precedent for the Commission to submit an instrument that it had expressly called a "draft convention", and not just "draft articles", such as had been done in the case of its draft convention on the elimination of future statelessness and its draft convention on the reduction of future statelessness.¹²⁷

10. As Mr. Šturma had noted, the extent to which the project constituted codification of existing law or its progressive development depended on the particular draft article in question, not on whether the General Assembly had referred a proposal for progressive development to the Commission. For example, it was not possible to argue that the detailed notification requirements or dispute resolution requirements set forth in the Commission's 1994 draft articles on the law of the non-navigational uses of international watercourses¹²⁸ constituted codification of existing international law. For the Commission to have refrained from crafting such provisions in the belief that it was limited to codifying the law would have severely inhibited its ability to assist States in developing what had eventually taken the form of a convention on that topic.

¹²⁷ *Yearbook ... 1954*, vol. II, document A/2693, pp. 142 *et seq.*, para. 25.

¹²⁸ *Yearbook ... 1994*, vol. II (Part Two), pp. 89 *et seq.*, para. 222.

Consequently, there was no basis either for claiming that the Commission was proceeding improperly with respect to its mandate based on its past practice.

11. Finally, the 2012 topic proposal that had been adopted by the Commission in 2013 had stated quite explicitly that the Commission's objective was to draft articles for what would become a convention on the prevention and punishment of crimes against humanity.¹²⁹ Governments' reactions to the proposal in 2013, 2014, and 2015, as had been noted by Mr. Tladi and Mr. Wako, had been largely positive with regard to the objective. In any event, the fact remained that, each year, for the past three years, the General Assembly had taken note of the Commission's work on the topic, and neither the General Assembly nor any State had indicated that the Commission was operating outside its mandate.¹³⁰

12. Differing views had been expressed in the debate as to whether, in the current project, the Commission was mostly codifying customary international law or mostly progressively developing the law. When engaging in progressive development, there was value in analysing existing treaties on matters other than crimes against humanity to determine whether they could serve as useful models for crafting the Commission's draft articles. Mr. McRae had suggested that such an approach might be problematic, since there was no objective basis for deciding what should and should not be included in the draft articles. While that might be correct to a degree, the Commission could take guidance from the standard provisions repeatedly used by States in widely adhered-to treaties that dealt with other crimes, since that would shed light on the kinds of rights and obligations that States embraced when seeking to prevent and punish criminal behaviour. The consistent use or absence of a particular provision in treaties to which the vast majority of States had adhered gave the Commission an objective basis for action in the context of the current project. With that in mind, he would pursue Mr. Forteau's suggestion that members of the Drafting Committee be provided with a document that connected each of the proposed draft articles to existing provisions in other treaties.

13. Mr. Cafilisch and Mr. Tladi had indicated a preference for the topic to address genocide and war crimes, as well as crimes against humanity, while several other members, including Mr. Hmoud, Mr. Singh and Sir Michael Wood, preferred, as he himself did, to retain the scope that had been decided upon by the Commission in 2013.¹³¹

14. Mr. Hassouna had asked how the Commission's project related to the initiative launched by Belgium, the Netherlands and Slovenia in November 2011, and Mr. Petrič had proposed that the Special Rapporteur be in contact with relevant officials in those countries. In that regard, he could report that he had met with lawyers from the Ministry of Foreign Affairs and the Ministry of Justice of the Netherlands in The Hague in November 2015

¹²⁹ *Yearbook ... 2013*, vol. II (Part Two), annex II, p. 99 *et seq.*

¹³⁰ See General Assembly resolutions 68/112 of 16 December 2013, 69/118 of 10 December 2014 and 70/236 of 23 December 2015.

¹³¹ *Yearbook ... 2013*, vol. II (Part Two), pp. 78–79, para. 170, and annex II, p. 99 *et seq.*

to discuss the matter. Although no draft text associated with the initiative had yet been produced, his impression was that the latter was both broader and narrower than the Commission's project. It was broader in that it would cover the crime of genocide and war crimes, but narrower in that it would focus exclusively on extradition and mutual legal assistance. Thus, as he understood it, the initiative would not, for instance, seek to impose an obligation on States to criminalize the conduct in question, to establish jurisdiction over offenders or to address issues of prevention. As noted in the first footnote to paragraph 15 of his first report,¹³² a resolution on that initiative had been presented before the United Nations Congress on Crime Prevention and Criminal Justice in April 2013 but had been withdrawn after extensive debate in the Committee of the Whole, where several delegations had raised "serious concerns" regarding the competence of the Congress in that matter. Although it was unclear whether there was a better forum in which to pursue that initiative, he, along with the Netherlands officials, took the position that, rather than being competitors, they were united in a search for ways to improve inter-State cooperation with a view to preventing atrocities.

15. If the Commission decided to formulate commentaries to the draft articles, he would do his best to accommodate members' proposals in that regard. Every member who had taken the floor on the topic had been in favour of referring the six draft articles to the Drafting Committee. At the same time, most had expressed ideas for improvements, which he had carefully noted and which could significantly inform the drafting process.

16. With regard to draft article 5, Mr. Huang had argued that the Commission should not focus on the adoption of national legislation. Yet such a focus figured prominently in the topic proposal that the Commission had approved in 2013, and so, in his view, the Commission was past the point of saying that this was not something that it should do. Indeed, several members had applauded the approach taken in draft article 5, paragraph 1, of listing a series of "modes" of liability, without trying to regulate in detail exactly how those modes should operate at the national level. Mr. Hmoud, Mr. Kolodkin, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Tladi, Mr. Vázquez-Bermúdez and Mr. Wisnumurti had all seemed to endorse the approach of recognizing that national legal systems worldwide already had rules, jurisprudence and doctrine surrounding such concepts as "committing" an act, "attempting to commit" an act and "participating" in an act and that the Commission should not be trying to micromanage such matters. The approach tracked that taken in other treaties dealing with crimes, which essentially set down basic rules that States must follow, while at the same time allowing them to shape those rules within their existing legal systems. Mr. Petrič had nicely captured that approach with the phrase "harmonization yes, uniformity no". Other members, including Mr. Forteau, Mr. Singh and Sir Michael Wood, had stated a preference for more detailed language in draft article 5, paragraph 1, perhaps borrowed from the Rome Statute of the International Criminal Court. His own sense,

however, was that some of the detail contained in the Statute had been included precisely because an entirely new institution was being created which did not already have a backdrop of rules, jurisprudence, and doctrine and which therefore had to be regulated in greater detail. In any event, while it was true that the Commission should avoid any conflicts with the Statute, it should not assume that all the detailed rules set forth therein could or should be grafted onto national legal systems, which had long-standing rules of their own.

17. That said, a balance clearly needed to be struck; some draft articles should be very detailed. Draft article 5, paragraph 2, which was drawn verbatim from the Rome Statute of the International Criminal Court, was such an article. He had initially considered having a more general provision on command responsibility but had ultimately concluded that there was value in pressing States to modernize and harmonize their laws on that issue. Most of the members who had spoken appeared to agree with that approach.

18. With respect to draft article 5, paragraph 3, several members had been in favour of including a reference to an "order of a Government"; doing so would improve the current text. Various suggestions had been made by, among others, Ms. Escobar Hernández, Mr. Niehaus and Mr. Wisnumurti, for merging or splitting parts of draft article 5. While he remained of the view that the current structure was correct, those suggestions could be considered by the Drafting Committee, if the draft article were referred to it.

19. Views on whether explicitly to address the criminal responsibility of legal persons had been about evenly split. Ms. Jacobsson had also raised the possibility of addressing the criminal responsibility of international organizations during, for example, peacekeeping operations. His own view remained that, for the purpose of answering the Commission's core concerns, it was not necessary to include the criminal responsibility of legal persons in the draft article and that doing so might render the draft articles less acceptable to States, especially given their reluctance to include such criminalization in most contemporary treaties, including the Rome Statute of the International Criminal Court.

20. The best course of action might be to stress three points in the commentary. First, that natural persons working for corporations and NGOs, including directors and managers, could be prosecuted under that article if they committed crimes against humanity. Second, that States could impose criminal responsibility or other sanctions on corporations and NGOs under their national law, if they so wished, since the draft articles did not preclude such action. Third, that precedents for such sanctions already existed in national and international law. The Drafting Committee might wish to consider such an approach.

21. Most members had supported the structure and text of draft article 6, with the amendment to paragraph 1 (b) that he had proposed in his opening statement. Some members had questioned the phrase in paragraph 1 (c) which indicated that passive personality jurisdiction

¹³² See *Yearbook ... 2015*, vol. II (Part One), document A/CN.4/680, at p. 229.

should be exercised if “the State considers it appropriate”. The formulation that he had employed was quite common in relatively recent treaties addressing crimes and it acknowledged the fact that many States did not wish to exercise such passive personality jurisdiction and even held that it was impermissible under customary international law for a State to do so. That formulation appeared to be a compromise approach that was acceptable to States; the matter could, however, be re-examined in the Drafting Committee if the draft article were referred to it.

22. The overall objective of draft article 7 was to promote the investigation of crimes against humanity and cooperation among relevant States, principally in order to ascertain whether a crime against humanity was being or had been committed and to lay the groundwork for identifying offenders, thereby allowing draft articles 8 and 9 to operate effectively. The key point to bear in mind with regard to draft article 7 was that it did not deal with State cooperation in the context of investigating and prosecuting a specific individual, but rather in the context of examining a general situation with a view to connecting specific individuals to the crimes committed. While many members, including Mr. Hmoud, Mr. Kolodkin, Mr. Murase, Mr. Saboia, Mr. Šturma, Mr. Tladi and Mr. Vázquez-Bermúdez, had considered that the overall objective of the draft article was a good one, they and others had indicated that its language could be improved. In particular, there had been concern about the use of the term “investigation” and confusion as to the exact relationship between draft article 7 and draft articles 8 and 9. Mr. Singh and Sir Michael had made the point that it was hard to deal with that subject in the abstract and that, in some situations, general cooperation might not be needed, in which case the draft article itself might not be needed. His own view was that, while context was important, the very nature of crimes against humanity was such that States in which those crimes occurred should be obliged to look into the matter, whether that action was called an “investigation” or some other term.

23. The reasoning behind paragraph 2 of the draft article had been that, since crimes against humanity would typically involve a large number of offenders, some of whom might well be foreign nationals, there was value in specifically calling for the cooperation of their State of nationality. As that kind of provision did not exist in other treaties on combating crimes, the concept and the text might be amenable to improvement.

24. It would also be useful to obtain States’ general cooperation in identifying offenders, as indicated in paragraph 3. He disagreed with Mr. Kolodkin that such cooperation would be identical to that which arose with respect to mutual legal assistance, because the latter usually referred to situations where States afforded one another assistance in connection with criminal proceedings that had already been brought against a particular offender.

25. Some light might be shed on the idea animating draft article 7 by looking at the 2016 commentary of the ICRC on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces

in the Field (Convention I),¹³³ particularly the commentary to article 49 thereof, which asserted that “each State Party must provide in its national legislation for the mechanisms and procedures to ensure that it can actively search for alleged offenders” and that “a State Party should take action when it is in a position to investigate and collect evidence, anticipating that either it itself at a later time or a third State, through legal assistance, might benefit from this evidence, even if an alleged perpetrator is not present on its territory or under its jurisdiction”. Similar action was what was at issue in draft article 7. It was nonetheless an area where caution was merited; he welcomed all the proposals that had been made for specific improvements to that draft article.

26. The few drafting suggestions made in connection with draft article 8 could be passed on to the Drafting Committee. While most members had been in favour of draft article 9, including the use of the “triple alternative”, Mr. Kittichaisaree and Mr. Saboia had felt that the title of the article could be improved. However, he himself, like Mr. Vázquez-Bermúdez, would prefer to retain a term which was widely used as a convenient shorthand for the process dealt with in the draft article. While the question of whether “hybrid” criminal courts were international or national in nature was not of great significance with regard to the draft article under consideration, it might be with respect to the issues to be covered in a third report; he was therefore grateful for some of the insights offered by members on that matter.

27. Some members had expressed interest in a provision that would address what happened when there were multiple requests for extradition. He agreed with Mr. Petrič that caution was warranted in assigning priority to any particular State in such a situation. That matter was normally left to the discretion of the requested State, as provided for in article 16 of the 1990 Model Treaty on Extradition.¹³⁴ In any event, that was an issue which could be addressed in a future report containing a draft article on extradition procedures.

28. Turning to draft article 10, he said that, although some concern had been expressed about whether it took sufficient account of article 36 of the 1963 Vienna Convention on Consular Relations, it was interesting to note that none of the approximately 20 treaties on crimes which had been concluded since 1963 and which contained a provision along the lines of draft article 10 had seen the need to replicate article 36. The approach seemed to be that, so long as basic communication with a representative of the State of nationality existed, all the protections available for consular access would fall into place under the influence of the Vienna Convention on Consular Relations and associated customary international law. While replicating article 36 was certainly a matter that the Drafting Committee could consider, he was of the opinion that there was some value in acknowledging widespread treaty practice with respect to other crimes.

¹³³ ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Cambridge, Cambridge University Press, 2016.

¹³⁴ General Assembly resolution 45/116 of 14 December 1990, annex.

29. While most of the members who had addressed the issue had expressed a preference not to include a provision prohibiting the use of a military court to prosecute a person for crimes against humanity, they had been in favour of stressing in the commentary that all courts, whether civilian or military, must accord fair treatment and a fair trial to the alleged offender and must have due regard for his or her rights.

30. As far as the future programme of work was concerned, no members had disagreed with the proposals made in paragraphs 202 and 203 of the second report, but some had suggested the inclusion of other subjects. He had taken note of those suggestions. As he had stated the previous year, he was of the view that the Commission's goal was to develop a useful, meaningful and effective series of draft articles which States and civil society would welcome because they were neither devoid of meaning nor overburdened with unattainable aspirations.

31. Mr. Petrič had encouraged consultations with experts in the area of criminal law and procedure. The workshop that he himself had organized in Nürnberg in November 2015 had been designed in part to accomplish that objective; the guidance that he had received on that occasion was reflected in the proposals contained in his second report. His hope was that a workshop to be held in Singapore in December 2016 would serve a similar purpose.

32. In conclusion, he hoped that, in the light of views expressed by members, the Commission would be in a position to refer all six proposed draft articles to the Drafting Committee.

33. Mr. KAMTO said that, although he was aware that it was the Commission's tradition not to reopen the debate on a topic after the Special Rapporteur's summing up, he wished to raise an issue of fundamental importance, on which he would like the Commission to take a clear decision. The Special Rapporteur, having acknowledged that members' opinions were evenly split on whether to include a provision explicitly dealing with the criminal responsibility of legal persons, had nevertheless maintained his position that it was unnecessary to do so. The main objections to the inclusion of such a provision that had been put forward during debates in plenary meetings had not been legal or technical; rather they had been of a political nature, or had centred on advisability. The basic contention that States would not accede to a convention containing a provision to that effect disregarded the fact that some States had actually been calling for one. As Special Rapporteur on the topic "Expulsion of aliens", he had bowed to the wishes of certain members who had been opposed to adopting a human rights approach to the subject. When members' views were divided, it was up to the Special Rapporteur to suggest a genuine compromise which, in the case of a draft article on the subject in question, could possibly take the form of the wording proposed by Mr. Vázquez-Bermúdez. He therefore requested a vote on the matter.

34. Sir Michael WOOD, supported by Mr. PETRIČ and Mr. TLADI, said that Mr. Kamto had raised an

important point. The views expressed during the debate had clearly been divided. He suggested that the Special Rapporteur be requested to include the issue at hand in his next report, in order that, at the next session, the Commission in its new composition might take a decision based on detailed information compiled in the light of what had been said at the current session and the Special Rapporteur's considered recommendation. It would be preferable not to take a decision at the current session in the heat of the moment.

35. Mr. HMOUD said that he supported Sir Michael's proposal. The Commission had not really discussed the issue at length; it would be preferable to have some kind of report on the matter before considering it further. As he had indicated previously, it would be helpful to have the opportunity to consider options other than criminal sanctions, for example civil and administrative sanctions. However, it was important to bear in mind that, under the definition of crimes against humanity set out in draft article 3, individuals acting on behalf of non-State actors who committed such crimes could be held criminally responsible for those acts.

36. The CHAIRPERSON suggested that the Special Rapporteur prepare a concept paper and a draft article in line with the wording proposed by Mr. Vázquez-Bermúdez, which the Commission could discuss at the current session.

37. Mr. FORTEAU said that the Special Rapporteur had already dealt with the issue under discussion in paragraphs 41 to 44 of his second report and that the Drafting Committee therefore had enough material to adopt a position on it. That said, the question of the criminal responsibility of legal persons went beyond the scope of the aspects of the topic examined during the current session – since those paragraphs examined solely the obligation to criminalize crimes against humanity – and covered the entire set of draft articles. Moreover, he was uncertain as to whether the question arose solely in respect of corporations, since the current commentary to draft article 4 indicated that, while States could commit crimes against humanity, they could not be held criminally responsible therefor. Consequently, it might be worth examining the subject of criminal responsibility of legal persons which concerned the topic as a whole, after the adoption of the draft articles on a first reading, at which point the Commission would have a better idea of the scope which it wished to give to the draft convention.

38. Mr. KAMTO said that the Commission should not try to dismiss such a difficult issue after the second report had devoted a number of pages to it and several members had referred to it in their statements. Of course, the Commission was perfectly entitled to defer the debate until the following year. It was not, however, being asked to develop a whole set of new or specific rules. In the past, Mr. Forteau and Mr. Saboia had provided examples showing that legal persons could bear criminal responsibility. He therefore failed to understand why the Commission was reluctant to address the matter. Since legal persons could not be exempt from a *jus cogens* rule, the

Commission could not decline to deal with cases where a legal person in the form of a corporation committed, or was an accessory to the commission of, a crime against humanity. He would have liked the Commission to decide at the current session to ask the Special Rapporteur to prepare a specific report on the issue with a view to drafting a provision.

39. Mr. HMOUD said that, as the term “legal person” might include registered charities, consideration would also have to be given to the question of whether criminal measures could be applied against such organizations. It should also be borne in mind that the point at issue was the attribution of an act to an individual who was subject to the proposed instrument and not the attribution of an act to a State.

40. Mr. MURPHY (Special Rapporteur), supported by Mr. FORTEAU and Mr. KOLODKIN, said that, although he was perfectly prepared to address the issue of corporate criminal responsibility in a future report or in a concept paper, it would be preferable to allow the Drafting Committee to consider various approaches in an effort to find one on which the Commission could agree. A possible solution might be to include language along the lines suggested by Mr. Vázquez-Bermúdez, or to deal with the subject in the commentary.

41. The CHAIRPERSON said that his preference would be for a brief concept paper and a short draft article to be prepared at the current session. In any case, serious consideration needed to be given to the points raised in paragraphs 41 to 44 of the second report.

42. Mr. SABOIA said that, although he had not referred to the issue in his statement during the plenary debate, he agreed with others that, in the particular case of the current draft articles and in certain regions, it was important that the question of the criminal responsibility of legal persons be addressed. He supported the course of action proposed by the Chairperson; a concept paper, to be discussed first briefly in the plenary, would provide a clearer basis for the Drafting Committee to consider the matter.

43. Mr. HASSOUNA said he agreed that it was an extremely important issue that had not been addressed in sufficient detail in the second report. In his view, the best way forward would be for the Special Rapporteur to develop a concept paper for consideration in the Drafting Committee. If the Drafting Committee was unable to come up with a solution, the matter could be reviewed in the plenary.

44. Mr. McRAE said that, although he could see merit in both of the proposed approaches, his problem with bringing the matter directly to the Drafting Committee was that it was a very small group and not sufficiently representative to ensure a balanced debate. He would therefore support the idea of preparing a concept paper or collecting further information before taking a decision on such an important issue.

45. Mr. ŠTURMA said that, as Chairperson of the Drafting Committee, he would prefer not to be in the position

of having to develop a draft article only on the basis of the current debate and the four relevant paragraphs in the report under consideration, particularly as opinion seemed divided on the matter. Like the previous speaker, he would be in favour of the idea of preparing at least a short position paper, possibly incorporating the written proposal by Mr. Vázquez-Bermúdez.

46. The CHAIRPERSON asked the Special Rapporteur whether he would be able to prepare, together with Mr. Šturma, a paper for consideration by the plenary and subsequent referral to the Drafting Committee.

47. Mr. MURPHY (Special Rapporteur) said that he would be happy to assist in whatever way was useful. However, he would propose preparing the paper, based on the second report and the specific proposals made in the debate, as soon as possible for discussion in the Drafting Committee. While he was not opposed to having a further plenary debate on the issue, there was just one more plenary meeting before the Drafting Committee was due to begin work the following week, which would not allow much time for him to draft a paper. He did not understand the resistance to referring the issue directly to the Drafting Committee, particularly since many members on both sides of the argument would be in the Committee. The Commission could, of course, defer discussion of the issue until the second part of the session, although there would then likely not be enough time to incorporate whatever emerged from the debate in the annual report. Another alternative would be to include the issue in the third report and to have a full debate at the next session.

48. Mr. PETER said that, in his view, discussion of such an important issue should not be postponed; the Commission should try to develop a concept paper and possibly a draft article to inform the discussion first in the plenary and then in the Drafting Committee.

49. The CHAIRPERSON said that, as there seemed to be a consensus that the Special Rapporteur should prepare a short concept paper and a draft article, the only question was whether those texts should be discussed in the plenary or in the Drafting Committee.

50. Mr. MURPHY (Special Rapporteur) said that, in terms of timing, it would be preferable to bring the issue directly to the Drafting Committee, which might well come up with a solution so that the matter could advance at the same pace as other aspects of the draft articles.

51. Mr. KAMTO said that he supported the Special Rapporteur’s proposal. As the Drafting Committee would be reporting back to the plenary, the Commission could revisit the question if it was not satisfied with the outcome.

52. The CHAIRPERSON said that he took it that the Commission agreed to the course of action proposed by the Special Rapporteur and wished to refer the six draft articles to the Drafting Committee.

It was so decided.

Identification of customary international law¹³⁵ (A/CN.4/689, Part II, sect. B,¹³⁶ A/CN.4/691,¹³⁷ A/CN.4/695 and Add.1,¹³⁸ A/CN.4/872¹³⁹)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

53. The CHAIRPERSON invited the Special Rapporteur to introduce his fourth report on the identification of customary international law (A/CN.4/695 and Add.1).

54. Sir Michael WOOD (Special Rapporteur) said that he saw the eventual outcome of the Commission's work on the topic to be threefold: first, a set of draft conclusions with accompanying commentaries; second, a bibliography on the topic, which would include sections that corresponded broadly to the draft conclusions; and, third, a further study of ways and means for making the evidence of customary international law more readily available.

55. As he saw it, there were just two action points arising out of his fourth report: first, to decide whether to refer certain minor changes to the draft conclusions to the Drafting Committee; and, second, to consider whether to request the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available. The main action by the Commission at its current session would be to consider on first reading the 16 draft conclusions provisionally adopted by the Drafting Committee and the commentaries that he would shortly present to the Commission. He thanked the Working Group, chaired by Mr. Vázquez-Bermúdez, that had been set up to review an informal draft of the commentaries for its input, which would enable him to submit a greatly improved draft to the Commission in the coming weeks.

56. He was grateful to the Secretariat for its comprehensive and informative memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691). The memorandum first considered the text of Article 38, paragraph 1 (b) and (d), of the Statute of the International Court of Justice, as well as its *travaux préparatoires*, and then analysed the case law of various international courts and tribunals and summarized its findings in 22 specific and 3 general observations. In each case, it considered the extent to which the court or tribunal concerned had referred to decisions of domestic courts for the identification of rules of customary international law.

¹³⁵ At its sixty-seventh session (2015), the Commission considered the third report of the Special Rapporteur (*Yearbook ... 2015*, vol. II (Part One), document A/CN.4/682). It then took note of draft conclusions 1 to 16 [15] provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions of the Commission (see *Yearbook ... 2015*, vol. II (Part Two), pp. 27–28, para. 60, and document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session).

¹³⁶ Available from the Commission's website, documents of the sixty-eighth session.

¹³⁷ Reproduced in *Yearbook ... 2016*, vol. II (Part One).

¹³⁸ *Idem*.

¹³⁹ Available from the Commission's website, documents of the sixty-eighth session.

In his view, the three general observations set out in the memorandum confirmed the Commission's approach to the role of domestic court decisions, as reflected in draft conclusions 6, 10 and 13.

57. He noted that memorandums by the Secretariat were frequently a valuable part of the Commission's work on a particular topic. He would welcome it if, when appropriate, the Secretariat might be invited to introduce its own papers at a meeting of the Commission. Perhaps the matter could be considered when the Commission next took up its working methods or when the next such study was produced. He was also grateful to the Secretariat for having posted on the Commission's website copies of the written responses that had been received from Governments to the Commission's requests for information on the topic since 2014.¹⁴⁰ Only one further response had been received since the previous session – a highly informative one from Switzerland, which shed light on many aspects of the topic.

58. There continued to be a good deal of interest in the topic, not only among Governments but also among NGOs, practising lawyers and academics. He had spoken on the subject at a number of universities and had participated in various meetings at which the provisionally adopted draft conclusions had been discussed, including a meeting of the Asian–African Legal Consultative Organization's informal expert group on customary international law. In addition, a growing number of articles and books made reference to the Commission's work on the topic.

59. As to the fourth report itself, which considered the Commission's work to date and possible future steps, it was divided into four sections and an annex; a fairly extensive bibliography would appear as annex II. He would welcome suggestions for additions to the bibliography, in any language, as it would be updated as the Commission proceeded with its work. In the introductory paragraphs of the fourth report, he recalled that once again in 2015 there had been a valuable debate on the topic in the Sixth Committee. Delegations had generally commended the Commission on the work accomplished so far and had, in particular, reiterated their support for the general approach followed in the draft conclusions provisionally adopted by the Drafting Committee. They had provided a number of useful suggestions, many of which he would try to address in the draft commentaries. Others, which essentially required drafting changes, could be considered at the current session, while yet others might require more significant or complex changes, which could more appropriately be considered on second reading.

60. As mentioned in paragraph 12 of the fourth report, some delegations had asked whether the term "guidelines" might not be more appropriate than "conclusions", given the objective of providing practical guidance. In his view, the word "conclusion" was satisfactory, but the matter could be reconsidered on second reading if necessary. It had been suggested that draft conclusion 1 on scope could instead be taken up in a general commentary. He tended to agree with that suggestion; however, if the draft conclusions were read without the

¹⁴⁰ *Yearbook ... 2014*, vol. II (Part Two), p. 19, para. 29.

accompanying commentaries, the information contained in the current draft conclusion 1 might be lacking. Again, if deemed appropriate, such a change could be made on second reading. As reflected in paragraphs 19 and 20, the precise role of international organizations continued to be debated. It had been suggested that the reference in draft conclusion 4, paragraph 2, to the practice of international organizations, with the possible exception of the European Union, put such practice on the same level as that of States, and that the former did not contribute directly to customary international law. A suggestion had been made in that connection to delete that paragraph and either to explain in the commentary the roles that international organizations played or to deal with the matter in a separate draft conclusion. It had also been noted that the reference to international organizations was not entirely consistent throughout the draft conclusions as a whole, since in places the latter referred explicitly to State practice alone. He considered, however, that the practice of international organizations might well contribute to the creation, or expression, of customary international law. As the provisionally adopted draft conclusions made clear, that was only “[i]n certain cases”, with the practice of States being “primarily” relevant.¹⁴¹ However, he would endeavour to clarify the references to States and international organizations in the commentaries. Any more extensive restructuring would have to await the second reading.

61. As noted in paragraph 26 of the fourth report, some delegations and members of the Commission would prefer to see a separate conclusion on, or at least a specific reference in the commentaries to, the role of the Commission’s output in the identification of customary international law. It had been said that such output did not easily equate to scholarly work, given the Commission’s status and relationship with States as a subsidiary organ of the General Assembly. While he shared the understanding of the Commission’s particular relevance, he believed that the matter would be best dealt with in the commentaries.

62. As indicated in paragraph 27 of the report under consideration, the inclusion of a draft conclusion on the persistent objector rule had been supported by almost all delegations who had addressed the matter in the Sixth Committee, indicating widespread agreement that the rule did form part of the corpus of international law. As the Special Rapporteur highlighted in his fourth report, the argument that, in practice, objections by a persistent objector were rarely upheld did not undermine the principle itself. Some delegations had expressed concern that recognizing the rule in the draft conclusions might destabilize customary international law or be invoked as a means to avoid customary international law obligations. He proposed that the commentary, like draft conclusion 15 itself, emphasize the stringent requirements associated with the rule. As indicated in paragraph 29 of the fourth report, there had been some concern that a draft conclusion on particular customary international law might be seen as encouraging the fragmentation of international law. Yet it was undisputed that rules of particular customary international law existed and might play a significant role in inter-State

relations. Further guidance in the commentary as to how such rules were to be identified might thus prove useful.

63. In chapter II of the fourth report, some minor changes were proposed to the draft conclusions adopted by the Drafting Committee in 2014 and 2015. Although they could be left for second reading, he would prefer that they should be considered by the Drafting Committee at the current session. The exact changes were set out in annex I and affected the following draft conclusions: draft conclusion 3 (para. 2); draft conclusion 4: draft conclusion 6, paragraph 2; draft conclusion 9 (para. 1); and draft conclusion 12 (paras. 1 and 2).

64. The practical aspect of the topic addressed in chapter III of the fourth report – ways and means for making the evidence of customary international law more readily available – was closely related to the mandate given to the Commission in article 24 of its statute. The work done by the Commission, together with the Secretariat, in 1949 and 1950 to fulfil that mandate had been of huge practical significance.¹⁴² Although the Commission’s work continued to make an important contribution to making the evidence of customary international law more readily available, thorough enquiry into the two constituent elements of customary international law – a general practice and *opinio juris*, nevertheless posed significant challenges, which were compounded by the volume of available data – the various forms in which it was found and the absence of a common classification system to compare and contrast the practice of States and others. In addition, coverage of much of the practice remained limited, given that many official documents and other indications of governmental action were unpublished and thus unavailable. Thus, consideration by the Commission of additional ways and means for making the evidence of customary international law more readily available, taking into account the significant changes that had occurred since 1950, and perhaps making suggestions as to how those could be addressed, might assist those attempting to identify the existence and content of rules of customary international law. Several Member States had voiced support for such an undertaking during the debate of the Sixth Committee at the seventieth session of the General Assembly. He would welcome the thoughts of the Commission on whether and, if so, how the matter should be revisited. In any event, he would suggest requesting the Secretariat to prepare a memorandum on the ways and means for making the evidence of customary international law more readily available, to include the results of a survey of the present state of such evidence and suggestions for improving the process.

65. In chapter IV of his fourth report, the Special Rapporteur identified three components for the proposed future programme of work: a set of conclusions, with commentaries; a bibliography; and a further review of the ways and means for making the evidence of customary international law more readily available. If the Commission completed the first reading of the draft conclusions, with commentaries, at its current session, a second reading could take place at its seventieth session; at which

¹⁴¹ See document A/CN.4/L.869, draft conclusion 4 [5] (available from the Commission’s website, documents of the sixty-seventh session).

¹⁴² See *Yearbook ... 1949*, vol. I, chap. V, pp. 283 *et seq.*; and *Yearbook ... 1950*, vol. II, document A/1316, Part II, pp. 367 *et seq.*

time it might also consider the proposed memorandum by the Secretariat, if finalized. States should be invited to send to the Commission written comments on the draft conclusions and commentaries by 31 January 2018. He hoped that States would provide initial observations during the Sixth Committee's debate at the seventy-first session of the General Assembly, and that others, including international organizations, NGOs and academics, would also provide their views.

66. If there was no objection, he would prepare a specific proposal for the drafting of a memorandum by the Secretariat, to be considered by the Commission, so that the Secretariat could begin making the necessary preparations.

67. Mr. TLADI said that he was grateful for the opportunity to consider the commentaries to the draft conclusions prior to the adoption of the report, when members would be limited to making superficial changes, owing to time constraints. Regarding the proposed changes to the draft conclusions, the amendment to draft conclusion 3 seemed largely cosmetic; he had no objection to it. As for draft conclusion 4, although he was not opposed to replacing the phrase “contributes to the formation, or expression” with the phrase “as expressive, or creative”, he nevertheless preferred the original language. Without wishing to reopen the debate as to the relative emphasis to be given to the formation and identification of customary international law, he noted that such a change might further erode the “formation” element in the draft conclusions. While the word “creative” might serve the function of retaining whatever “formation” element remained, the meaning of the word in the context was unclear. For related reasons, he did not support the proposed changes to draft conclusion 12, paragraph 2.

68. He could not agree to the proposed deletion in draft conclusion 6, paragraph 2. Both reasons advanced by the Special Rapporteur for the deletion were unconvincing. The first reason, namely that resolutions adopted by international organizations or at intergovernmental conferences were already covered in forms of evidence of *opinio juris*, could presumably apply to most of the other forms set out in the same paragraph. The second reason given, that the list was merely illustrative, could also easily apply to the other forms of practice; it was therefore not clear why that particular form was being singled out. More importantly, there was an unfortunate trend to downplay the significance of resolutions, which constituted one of the most easily identifiable and accessible forms of practice. That was particularly significant given the point raised in chapter III of the fourth report that resource constraints affected the ability of some States to compile a digest of State practice. Lastly, he did not agree with the statement in paragraph 34 of the fourth report that conduct in connection with resolutions were “more often useful as evidence of acceptance as law (*opinio juris*)”. The extent to which conduct in connection with the adoption of a resolution was more useful as practice or *opinio juris* ultimately depended on, among other things, the nature and content of the conduct in question, as well as the content of the resolution itself. He therefore opposed the proposed changes and did not support referring draft conclusion 6, if amended, to the Drafting Committee.

69. As to the proposed change in draft conclusion 9, he had a strong preference for retaining the original language, primarily on the grounds that the words “undertaken with” conveyed more forcefully the connection between practice and *opinio juris*. Notwithstanding the absence of such a notion in the draft conclusions or in the commentaries under consideration, the idea that *opinio juris* and practice must be connected was an important element of customary international law. He supported the Special Rapporteur's suggestion that the Commission revisit the issue of the ways and means of making evidence of customary international law more readily available, and that the Secretariat update its 1949 memorandum to that end. In so doing, the Commission should consider not only how to make practice more readily available, but also how to enhance its availability in a uniform manner to ensure that all practice, including that of resource-constrained States, was readily available.

70. Mr. MURASE said that several important issues remained pending and would need to be resolved before the Commission could complete its first reading of the draft conclusions and the commentaries thereto. Among other things, the Special Rapporteur's draft text provided no definition of customary international law, which seemed odd since the outcome of the Commission's work was meant to be a comprehensive set of conclusions on the topic. Nor was any reference made to the fact that customary international law, unlike treaty law, was binding on all States, without exception. Customary law could be created spontaneously and there was no way of knowing systematically when, where and how a rule of customary international law was created. That aspect should be clearly indicated as a word of caution to States. The fact that any official comment on customary international law made by a State or a State official could subsequently be used against that very State in future litigation, without warning, was yet more reason for States' legal advisers to be extremely cautious. The unwritten nature of customary international law, an aspect that was also not mentioned in the draft conclusions, provided some flexibility, but also created difficulties, for its application. For instance, many States required a statutory law to convict a criminal under the rule *nullum crimen sine lege*, on the grounds that no conviction could be made by customary law, given that it was unwritten.

71. If the draft conclusions were to be used by judges of domestic courts, the Commission should explain the status of customary international law in domestic law, another matter not addressed in the draft conclusions. It should be made clear that, since domestic constitutional systems varied with regard to the adoption or transformation of customary international law into domestic law, not all the draft conclusions were equally applicable to all States. The use of various words similar in meaning, such as “identification”, “determination”, “ascertainment” and “assessment”, was confusing. If they were to be used interchangeably, their meaning should be clarified. Similarly, since the change in title of the topic,¹⁴³ it was not clear whether the term “identification” held the

¹⁴³ At its sixty-fifth session (2013), the Commission decided to change the title of the topic from “Formation and evidence of customary international law” to “Identification of customary international law” (*Yearbook ... 2013*, vol. II (Part Two), p. 64, para. 65).

same meaning as the term “evidence”. Did it include the application of a given rule? Was “identification” an exercise to be carried out prior to application, and therefore confined to the intellectual recognition of the existence and content of a rule, or did it include a normative determination? If the process of determination was not simply an exercise of identification, but also included a subjective or inter-subjective interpretation and application of a rule of customary international law, then it necessarily concerned the question of the evidential value of State practice and *opinio juris*, which in turn raised the complex issue of the burden of proof. Generally speaking, it was unclear where the process of identification ended and where the processes of interpretation and application began. If it was not possible to provide a sufficiently clear explanation of the term “identification”, it might be better to revert to the language in the original title of the topic, “evidence of customary international law”.

72. The draft conclusions seemed to place State practice and *opinio juris* on a more or less equal footing. In reality, however, the density of State practice and *opinio juris* varied depending on the rule concerned, and there were numerous situations where State practice was precarious, conflicting or inconclusive, the *opinio juris* of States could not be clearly established, or there was a discrepancy between State practice and *opinio juris*. Furthermore, in the post-war world, *opinio juris* sometimes preceded State practice. All such situations needed to be explained if the draft conclusions were to become a useful guide to practice. While maintaining the two-element model at a theoretical level, the Commission should take a more flexible approach to the actual identification of the two elements, along the lines of section 19 of the London statement of principles applicable to the formation of general customary international law adopted by the International Law Association.¹⁴⁴ Under that approach, *opinio juris* could compensate for a relative lack of State practice, thus assuming a complementary function. Such an approach would also be in conformity with the general trend of decisions by the International Court of Justice, which in fact rarely demanded concrete evidence of either element.

73. Referring to article 15 of the Commission’s statute, he said that doctrine was particularly important for the present topic, which was predominantly theory-dependent. He hoped therefore that the commentaries would refer extensively to academic writings in footnotes; simply including a bibliography at the end of the commentaries was inadequate. As for the reference to State practice and precedent in article 15 of the statute, he continued to be critical of the excessive reliance on the case law of the International Court of Justice to support commentaries to the draft conclusions on the topic at hand. The primary function of the Court was to settle disputes between parties, and not to develop international law, while the Commission’s function was to codify and progressively develop international law for the whole world. Besides, as one writer

had pointed out, the Court did not apply any coherent methodology with regard to its application of customary international law. Given the number of unresolved issues on the topic, the Commission should not rush to finish the first reading with the current membership. That said, he had no objections to the proposed amendments to the draft conclusions, which should be referred to the Drafting Committee.

74. Mr. MURPHY welcomed both the Special Rapporteur’s fourth report and the memorandum by the Secretariat, the latter of which confirmed the soundness of the Commission’s approach of regarding national court decisions both as a form of State practice and as a subsidiary means for determining the existence of a customary rule. He supported the proposed amendment to draft conclusion 3. As for draft conclusion 4, he continued to believe that existing State practice and jurisprudence did not support paragraph 2 as currently drafted; he therefore regarded both the original texts of paragraphs 1 and 2, and the proposed amendments thereto, as inadequate. The draft conclusion was misleading with regard to the role of international organizations in the formation of customary international law and would likely confuse the consumers of the Commission’s work. The practice of international organizations in the identification of customary international law had not featured in any judgment of the International Court of Justice or, as far as he was aware, in any other international court. The inclusion of a reference to the relevance of such practice was, in his opinion, largely a product of theorizing, built principally around the anomaly of the European Union, which had ultimately resulted in a series of unsupported assertions that presented a distorted picture of international law. A number of Member States had also expressed concerns about the approach during their debate on the topic within the Sixth Committee. He therefore encouraged the use of more cautious language in draft conclusion 4, for example, by deleting, in paragraph 1, the word “primarily” and by inserting, in paragraph 2, the word “may” before the word “also”. Doing so would allow for the inclusion of the practice of international organizations, but with stronger caveats than the phrase “In certain cases”, in paragraph 2, currently provided.

75. Regarding draft conclusion 6, he remained unconvinced by the argument made by the Special Rapporteur to support his proposed deletion, in part because “conduct in connection with resolutions” potentially embraced not just a State’s vote in favour of a resolution, but also other conduct that was fully consistent with such a vote. Even if one accepted the narrower understanding of what constituted conduct in connection with resolutions, it was not clear why the reference to “conduct in connection with treaties” should be retained. In both instances, the conduct at issue was not in the nature of “practice” for purposes of identifying customary international law. In other words, the act of ratifying a treaty seemed in the nature of *opinio juris*; for the real practice relevant to the existence of a customary rule in such a scenario, it was necessary to look elsewhere, such as to the consistency of State acts with the treaty rule, even *vis-à-vis* States who were not parties to the treaty. Therefore, if the clause in draft conclusion 6 relating to international organizations was deleted, there was a good argument for also deleting the clause

¹⁴⁴ “London statement of principles applicable to the formation of general customary international law” (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39. For the text of the London statement, see *ibid.*, pp. 712–777. Also available from the website of the International Law Association: www.ila-hq.org.

that related to treaties. He supported the referral of all the Special Rapporteur's proposed amendments to the Drafting Committee, including any others that might be made during the Commission's first reading on the basis of the discussions in the Working Group.

76. He supported the Special Rapporteur's proposal to develop both a bibliography for the topic and a document on the ways and means for finding evidence of customary international law. Noting that the Codification Division had recently begun posting the written submissions of States on the Commission's website, he said that over time an extraordinary amount of information on State practice and *opinio juris* would thus become available for all. It would be useful if the written submissions from Governments to the Commission dating back to 1947 could be retrieved from the Commission's files and also uploaded to the website. There was now an astounding amount of information available online about the activities of Governments, legislatures and courts, much of which potentially related to international practice relevant to customary international law. Therefore, the Commission might consider making it a key objective to indicate not just the best ways to make evidence of customary international law available, but also the best ways to identify the most relevant, probative and reliable evidence. The future programme of work proposed by the Special Rapporteur was clear and appeared achievable.

The meeting rose at 1 p.m.

3302nd MEETING

Friday, 20 May 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

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

Identification of customary international law (*continued*) (A/CN.4/689, Part II, sect. B, A/CN.4/691, A/CN.4/695 and Add.1, A/CN.4/872)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FORTEAU said that he wished to thank the Special Rapporteur for his fourth report (A/CN.4/695 and Add.1), which had many commendable qualities, not least of which its concision. He also wished to thank the Secretariat for its memorandum on the role of decisions

of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691), which was very useful and illuminating.

2. In chapters I and II of his fourth report, the Special Rapporteur had begun what could be referred to as a "first reading *bis*" of the draft conclusions provisionally adopted by the Drafting Committee and of which the Commission had taken note at the previous session without formally adopting them.¹⁴⁵ The Special Rapporteur was to be commended on his efforts to take account, in real time, of the observations made by Member States. At the same time, it was important not to radically change the Commission's normal procedures. At the first reading stage, the Commission should adopt what it considered appropriate to propose; it was at the second reading stage that the draft conclusions should be amended, if necessary, in the light of comments and observations made by States. The Commission should continue to follow that order if it wished to maintain its independence as an expert body.

3. He agreed with the Special Rapporteur that, in response to the observations made by certain States, the commentaries to the draft conclusions should "provide the necessary additional depth and detail". In particular, it should be ensured that sufficient examples were provided in the commentaries so that readers understood how to go about identifying customary international law in practice. He also agreed with many of the observations made by the Special Rapporteur in chapter I of his fourth report, particularly the fact that the draft conclusions aimed to assist in the determination of the state of customary international law at a particular time, and not to address the more general issue of how customary international law was formed. He also supported the Special Rapporteur's clarification in paragraph 26 of his fourth report that the particular role played by the Commission in the identification of customary international law, which extended well beyond "scholarly work", would be highlighted in the commentaries to several of the draft conclusions. Indeed, international courts and tribunals, particularly the International Court of Justice and the European Court of Human Rights, attached particular weight and particular authority to the work of the Commission, as noted by the Special Rapporteur in paragraph 44 of his report, in which he recalled that the process of codification by the Commission furnished a convenient way of discovering the actual practice of States. The commentaries to the draft conclusions would have to be very explicit on that point. Lastly, he supported the sensible statement by the Special Rapporteur to the effect that the practice of international organizations could, in itself, contribute to the formation or expression of customary international law in certain cases.

4. With regard to the amendments proposed by the Special Rapporteur in chapter II of his fourth report, since they involved only "minor" changes, he believed they could be dealt with by the Drafting Committee. The proposal in paragraph 35 was welcome, as it relaxed the definition

¹⁴⁵ See *Yearbook ... 2015*, vol. II (Part Two), p. 12, para. 15; and document A/CN.4/L.869, available from the Commission's website, documents of the sixty-seventh session.