

Provisional

For participants only

18 September 2016

English

Original: French

International Law Commission

Sixty-eighth session (second part)

Provisional summary record of the 3316th meeting

Held at the Palais des Nations, Geneva, on Thursday, 7 July 2016, at 10 a.m.

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Present:

Chairman: Mr. Comissário Afonso

Members: Mr. Al-Marri
Mr. Caflisch
Mr. Candioti
Mr. El-Murtadi
Ms. Escobar Hernández
Mr. Forteau
Mr. Gomez-Robledo
Mr. Hassouna
Mr. Hmoud
Ms. Jacobsson
Mr. Kamto
Mr. Kittichaisaree
Mr. Kolodkin
Mr. Laraba
Mr. Murase
Mr. Murphy
Mr. Niehaus
Mr. Nolte
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Saboia
Mr. Singh
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Mr. Wako
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10 a.m.

Cooperation with other bodies (agenda item 13)

Visit by representatives of the Council of Europe

The Chairman welcomed the representatives of the Council of Europe, Mr. Rietjens, Chair of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, and Ms. Requena, Head of the Public International Law Division and Treaty Office of the Directorate of Legal Advice and Public International Law and Secretary to CAHDI. Noting that the Commission attached great importance to its long-standing cooperation with the Council of Europe and that the visit by representatives of the Council enabled it to keep abreast of developments in areas of common interest, he invited them to take the floor.

Mr. Rietjens (Committee of Legal Advisers on Public International Law (CAHDI)) said that he welcomed the opportunity that he had been given, for the second year running as Chair of CAHDI, to inform the Commission of the main achievements and future work of CAHDI. Since the term of office of the Chair of CAHDI was limited to two years, the next election would be held at the fifty-second meeting of CAHDI, which would take place on 15 and 16 September 2016 in Brussels. The tradition of inviting representatives of CAHDI to present its work reflected the Commission's interest in the activities of CAHDI, which, since its inception more than 25 years previously, had worked to promote the development of public international law.

The conference celebrating the fiftieth meeting of CAHDI had been held on 23 September 2015, on the eve of the meeting. Entitled "The CAHDI contribution to the development of public international law: achievements and future challenges", its purpose had been to take stock of the many contributions that CAHDI had made to the development of international law since its creation in 1991. Held in the presence of most of the former Chairs and Vice-Chairs of CAHDI, several of whom were current members of the Commission, it had enabled proposals to be formulated concerning the future work of CAHDI. Its proceedings would be published in collaboration with Brill Nijhoff Publishers in September 2016.

CAHDI brought together the legal advisers of the Ministries of Foreign Affairs of the 47 member States of the Council of Europe, its 5 observer States and the 4 observer States of CAHDI, as well as numerous international organizations, including the United Nations. Its varied and enriching composition enabled it to carry out its activities while taking into account trends in international law beyond the Council of Europe. CAHDI was a forum for coordination, but above all for discussion, reflection and advice, whose biannual meetings enabled all participants to share information on topical issues, to exchange experiences and national practices, and to ensure regular monitoring of the items on its agenda. In addition, the level of representation and the commitment of the delegations gave great credibility to its work.

He would begin by presenting the activities of CAHDI that contributed to the development of international law in general, followed by those that could contribute more specifically to the Commission's work, and finally those that might have implications for other United Nations entities and other international organizations, such as the European Union.

Regarding the first point, CAHDI held very detailed, pragmatic discussions about topical issues that often arose in its members' respective ministries. For example, there had, for several years, been a legal vacuum with regard to the immunity of State-owned cultural property on loan abroad temporarily, even though "legal vacuum" was not the right term, given that immunity was guaranteed by the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had been adopted in 2004 but had not yet entered into force. Indeed, on numerous occasions, State-owned cultural property on loan had been seized or had been the subject of an attempted seizure at the request of private creditors as a means of enforcing judgments. To address the issue, which arose very frequently in practice, a declaration recognizing the customary nature of the pertinent provisions of the United Nations Convention had been elaborated within CAHDI. It was a

legal document that, while non-binding, reflected a common understanding of *opinio juris* based on the fundamental rule according to which some types of State-owned property — cultural property on display — enjoyed immunity from all measure of constraint. According to the declaration, State-owned cultural property that was loaned temporarily to another State could not be subjected to any measure of constraint, such as attachment, arrest or execution. To date, the declaration had been signed by the foreign ministers of 16 States members of the Council of Europe, the most recent signatory having been Mr. Lavrov, on behalf of the Russian Federation. During CAHDI meetings, several other States had expressed a desire to sign the declaration, and it was to be hoped that a practice would develop to counter the attempted attachment of such property.

Since March 2014, CAHDI had been reviewing the Council of Europe conventions and, in 2016, had examined eight conventions and protocols in accordance with a decision made by the Committee of Ministers of the Council of Europe in March 2013. One of the points that CAHDI considered to be important in that regard was that some conventions, such as the European Convention on the Abolition of Legalization of Documents Executed by Diplomatic Agents or Consular Officers (European Treaty Series (ETS) No. 63), should be further promoted. Indeed, the Convention was of great practical value in that, by eliminating all authentication requirements, it made it possible to use foreign documents in the same manner as those issued by national authorities. States that had not yet ratified it had been invited to do so. Other conventions, such as the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes (ETS No. 82), might serve as proof of an international custom and were thus of value and interest in their own right. In that respect, it should be specified that, while some delegations had considered that the Convention had been supplanted by the Rome Statute of the International Criminal Court, several others had stressed that it had retained intrinsic value and could even be evidence of an international custom. A consideration of the European Convention on State Immunity (ETS No. 74) and its Additional Protocol had led CAHDI to conclude that the instruments could be regarded as a source of customary international law and that they were still relevant, although further reflection would be required upon the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

CAHDI had also observed that some Council of Europe conventions had fallen into disuse. They included the European Convention on Consular Functions (ETS No. 61) and its two protocols, which continued to be used sparingly by States, which preferred to have recourse either to the 1963 Vienna Convention on Consular Relations — a better-designed instrument in that regard — or, if necessary, to bilateral agreements. That being said, while CAHDI had examined the impact, effectiveness and implementation of those conventions, it had not expressed an opinion on their possible termination, denunciation or withdrawal, for the simple reason that it was not empowered to do so. Indeed, no committee could decide whether a convention should be terminated. It was the parties to conventions that were the “masters” of them, and it was therefore up to them to decide. Moreover, if a convention was considered obsolete, recommending that it should be widely denounced would be highly problematic from a technical and legal point of view, and not just for the depositary.

On a directly related note, at its meeting in September 2016, CAHDI would examine the draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe, prepared by the Treaty Office with the aim of updating the “Model Final Clauses” established by the Committee of Ministers in February 1980. The updating of the clauses reflected developments within the Council of Europe and the international community since 1980, particularly in terms of the type of binding legal instruments concluded within the Council of Europe over the last 35 years. Bearing in mind that, since 1980, only three agreements had been concluded, compared to 60 conventions, 28 additional protocols and 24 amending protocols, it had been felt that specific model final clauses for agreements were no longer of great interest. Rather, it now seemed appropriate to distinguish between two kinds of protocol, namely amending protocols and additional protocols. In that respect, given that the use of additional protocols had increased significantly, but that their terminology was not always tailored to their content, it had seemed necessary to develop specific model final clauses for that type of instrument, while

also drawing the attention of the drafters to the misleading or ambiguous nature of the terminology. The draft model final clauses were designed as a non-binding tool for the Council of Europe committees and expert groups tasked with producing conventions and protocols.

Lastly, CAHDI had a mandate to transmit legal opinions to the Committee of Ministers at regular intervals. Thus, it had recently issued an opinion, adopted at its fiftieth meeting, on Recommendation 2069 (2015) of the Parliamentary Assembly of the Council of Europe, entitled “Drones and targeted killings: the need to uphold human rights and international law”. It was an issue, as much political as legal, on which the international community had already commented several times. It should therefore be highlighted that there was a broad consensus on the fact that armed drones or, more specifically, armed “unmanned aerial vehicles” were not, in themselves, illegal weapons, but that their use was subject to the rules of international law governing the use of force and the conduct of hostilities, and to international humanitarian law and international human rights law. The international community had, however, expressed different views on the interpretation and application of the provisions pertaining to those areas of law. CAHDI had thus decided that any future consideration of the issue within the Council of Europe should take into account the work of the United Nations and that of the International Committee of the Red Cross. It had also emphasized its willingness to examine further the issues raised and to keep the item on its agenda, although it did not believe that the proposal by the Parliamentary Assembly of the Council of Europe to develop guidelines was the best way forward.

As to the relationship between CAHDI and the International Law Commission, and to the opportunities for cooperation in the development and codification of international law, the Commission’s work was on the agenda of CAHDI meetings and was the subject of productive discussions for all participants. CAHDI had also always had the privilege of welcoming a member of the Commission for an exchange of views on ongoing activities within the Commission, and the previous year had been no exception as Mr. Singh, Chairman of the sixty-seventh session of the Commission and guest of CAHDI in September 2015, had given a very interesting presentation on the Commission’s recent activities. The ensuing exchange of views had been highly appreciated by all members of CAHDI. In addition, CAHDI followed the Commission’s work closely and, as far as possible, endeavoured to contribute to it in the context of recurrent discussions on specific topics or of conferences that might be relevant to it.

Among the regular topics on the agenda of CAHDI, “law and practice relating to reservations and interpretative declarations concerning international treaties” and “immunities of States and international organizations” were the subject of discussions during which the Commission’s work was frequently mentioned. With regard to the first topic, at each of its meetings, CAHDI, in its capacity as a European observatory of reservations to international treaties, analysed a list of reservations and/or declarations that might give rise to objections. It was a model recognized both within and outside the Council of Europe. Moreover, CAHDI examined reservations and declarations to Council of Europe and United Nations conventions. Its observatory role, which it had performed for over 16 years, had proved effective because, on the one hand, it helped States to position themselves in relation to a problematic reservation and to act accordingly, regardless of whether they were members of the Council of Europe, and, on the other, it contributed to the withdrawal of some ambiguous reservations. On the latter point, he noted the re-emergence of a trend that he considered to be very problematic and even worrying, namely that of States subjecting the application of the provisions of a convention to their domestic law, an approach that was prohibited under international law on account of the legal uncertainty that it caused during the implementation of the convention in question by the parties.

Concerning immunities, the immunity of State officials was increasingly discussed, even though the CAHDI database focused on the immunities of States and international organizations. To clarify the situation, CAHDI had adopted an opinion on Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe, entitled “Introduction of sanctions against parliamentarians”. Its consideration of the topic had led it to recall existing legal texts within the Council of Europe, decisions that had already been

made by the Committee of Ministers and the International Law Commission's ongoing work. In that regard, he wished to extend warm thanks to Ms. Escobar Hernández for her valuable insights into the Commission's work on the immunity of State officials from foreign criminal jurisdiction. As to the general matter of the rights of members of the Parliamentary Assembly, it had been recalled that, to date, the legal situation of members travelling in an official capacity to and within the member States of the Council of Europe was governed by the Statute of the Council of Europe (ETS No. 1) and by the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2) and its Protocol (ETS No. 10). The General Agreement already afforded special protection to members of the Parliamentary Assembly, since article 13 recognized their rights when attending an official meeting in a member State, while articles 14 and 15 contained provisions related to the immunities that they enjoyed. Those immunities were also mentioned in article 3 of the Protocol to the General Agreement, which extended them to cover representatives of the Parliamentary Assembly and their substitutes at any time when they were attending, or travelling to and from, meetings of committees and sub-committees of the Parliamentary Assembly. Consequently, the Committee of Ministers had repeatedly called upon the member States to give full effect to the privileges and immunities provided for in the above-mentioned instruments. Moreover, the "blue passport" issued pursuant to the Council of Europe Protocol since the 1970s would be replaced in 2016 by a Council of Europe *laissez-passer*, which would be issued to members of the Council of Europe institutions (the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe), to judges at the European Court of Human Rights and at the Administrative Tribunal, to members of monitoring committees, including the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Committee of Social Rights, and to Council of Europe staff. Regarding the specific issues raised in Recommendation 2083 (2016), CAHDI had underlined that the Commission was currently examining the topic of immunity of State officials from foreign criminal jurisdiction and had observed, in that regard, that, in the provisionally adopted draft articles, the term "State official" meant "any individual who represents the State or who exercises State functions". Even though the definition included "the legislative ... functions performed by the State", CAHDI had noted that the Commission had excluded "persons connected with ... international organizations" from the scope of the draft articles. In addition, it had pointed out that the Commission dealt only with the issue of immunity from foreign criminal jurisdiction. It had also considered that the responsibility for imposing restrictive measures on particular individuals, whether they were foreign parliamentarians or not, rested with the States and international organizations that had adopted those measures. It had further noted that, with respect to the restrictive measures of the European Union, the Court of Justice of the European Union provided judicial protection to persons addressed in such measures. As to the restrictive measures adopted by the United Nations, it had been recalled that the procedures for listing and delisting had been improved. Lastly, CAHDI had considered that, if it accepted the Parliamentary Assembly's proposal to carry out a feasibility study on the matter, it would be going beyond its mandate as that field did not fall within its competence.

He would conclude his presentation by speaking about some other activities that CAHDI had undertaken since its visit to the Commission the previous year to contribute to the work of other bodies involved in the development of international law. The "external dimension" of CAHDI, so to speak, was illustrated, first and foremost, by its composition. Indeed, the legal advisers of the member and observer States represented in CAHDI participated in several other bodies, some of them in the European Union and all of them in the United Nations. That enabled CAHDI to achieve legal consistency on certain issues, but also to encourage exchanges within the different organizations. CAHDI had a very important role to play in that process of exchanges, in that it served as a vital think tank for the development of international law. In that respect, it was worth mentioning the very interesting discussions that were taking place on the subject of the settlement of disputes of a private character to which an international organization was a party. It had been deemed necessary to debate the matter because the immunity of international organizations very often prevented individuals who had been harmed by the actions of an international organization from successfully claiming compensation before a domestic court. In recent years, that immunity had been increasingly called into question on the grounds that

upholding it was incompatible with the right of access to a court. Clearly, the matter exceeded the regional scope of the Council of Europe.

In 2016, CAHDI would continue to discuss contemporary issues and to propose relevant solutions, while cooperating with other actors of the international society, since cooperation was key in international law, as evidenced by the very fruitful exchanges that had taken place in March 2016 with Ms. Fernández de Gurmendi, President of the International Criminal Court, and Ms. Marchi-Uhel, Ombudsperson of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities. At its September meeting, it would have the pleasure of welcoming Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel. It was thus a forum in which member States, non-member States and international organizations held dynamic, detailed discussions on contemporary and diverse questions of international law. The discussions were fruitful and contributed to the development of legal thought and to a better understanding of different views and interpretations of law.

The interest that CAHDI took in the Commission's activities could only grow in the future, given the Commission's work on topics that were of particular concern to CAHDI. Thus, CAHDI was looking forward to the continuation of the work carried out on the topics of the immunity of State officials from foreign criminal jurisdiction and of the identification of customary international law. To conclude, he wished to thank the Commission for giving him the opportunity to present to it the recent work of CAHDI. Like his predecessors, he sincerely hoped that the close cooperation between CAHDI and the Commission would continue, and it was worth reiterating that the persons who participated in the work of CAHDI were committed to promoting the role of public international law in international relations.

Ms. Requena (Committee of Legal Advisers on Public International Law (CAHDI)) said that she would review the main developments that had taken place within the Council of Europe in the field of international law since the Commission's previous session. The Estonian presidency of the Committee of Ministers would focus on three priorities, namely: the promotion of the Internet Governance Strategy 2016-2019 and, in that context, the promotion of the Convention on Cybercrime; the Gender Equality Strategy 2014-2017; and the new Council of Europe Strategy for the Rights of the Child, which had been launched in April 2016. With regard to recent developments in terms of treaty law, particularly concerning the Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") and its protocols, it should be noted that, on 29 June 2016, the Council of Europe Secretary General had received a new declaration from the Ukrainian authorities under article 15 of the European Convention regarding certain territories. The declaration had contained an amended list of localities in the regions of Donetsk and Luhansk where some rights guaranteed by the European Convention had been suspended. The Ukrainian authorities had drawn particular attention to the need to adopt a very cautious approach in determining whether the above-mentioned regions had been under the effective control of Ukraine or of the Russian Federation. Moreover, on 20 January 2016, following a decision of 15 April 2015 in which the Committee of Ministers had expressed concern at the deterioration of the human rights situation in eastern Ukraine and Crimea, the Secretary General had announced that a delegation led by Ambassador Gérard Stoudmann would be sent to Crimea. The delegation had been tasked with examining the situation regarding human rights and the rule of law in the peninsula, which was home to 2.5 million persons whose rights were protected by the European Convention.

On 24 November 2015, France had informed the Council of Europe Secretary General of its decision to derogate from certain rights set out in the European Convention in the light of the state of emergency declared following the terrorist attacks in Paris. On 26 February 2016, the French authorities had notified him that the state of emergency had been extended for a period of three months. On 26 May 2016, they had advised him that the state of emergency had been extended for a further two months. In that notification, the French authorities had drawn attention to the introduction of changes to the system of measures taken under the state of emergency. The law no longer authorized administrative searches in places when there were serious grounds for considering that they were frequented by

persons who constituted a threat to public order and safety. The French authorities had also underlined that the measures taken under the state of emergency were subject to judicial and parliamentary review.

Regarding the additional protocols to the European Convention, Protocol No. 15, which introduced a reference to the principle of subsidiarity and to the doctrine of margin of appreciation, while also reducing to four months the time limit within which an application could be made to the European Court of Human Rights following a final domestic decision, had so far been ratified by 29 States parties to the Convention and signed by 12 others. Protocol No. 16, which allowed the highest courts of the States parties to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights enshrined in the Convention or in the protocols thereto, had been ratified by 6 States and signed by 10 others. The members of the Commission should also note that, in December 2015, the Council of Europe Secretary General had decided to use his powers under article 52 of the European Convention to launch an investigation into the manner in which Azerbaijan ensured that its domestic law guaranteed the effective implementation of all the provisions of the Convention. That prerogative had been exercised on only eight occasions since the entry into force of the Convention. The aim of the investigation was to seek explanations regarding the execution of the judgment of the European Court of Human Rights in the case of *Ilgar Mammadov v. Azerbaijan*. The case concerned several violations of the European Convention suffered by the applicant, a political opposition activist who had been arrested and placed in custody in February 2013 for challenging the authorities' official version of the violent clashes that had taken place in Ismayilli on 23 January 2013. In that context, the Secretary General had sent a letter to the competent authorities asking why the interested party remained in detention. It should be noted that the Committee of Ministers, which was tasked with supervising the execution of the judgments of the Court in accordance with article 46 of the Convention, had adopted interim resolutions calling for Mr. Mammadov to be released and for his physical integrity to be protected. The Secretary General had informed the Committee of Ministers that Mr. Mammadov's counsel had brought an appeal before the Supreme Court of Azerbaijan that was still pending.

Concerning the case law of the European Court of Human Rights, the Grand Chamber had very recently delivered its judgment in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (Application No. 5809/08). The case concerned the freezing of the Swiss assets of Mr. Al-Dulimi and of the company Montana Management Inc. pursuant to Security Council Resolution 1483 (2003). The applicants had argued that their assets had been confiscated in the absence of any procedure compatible with article 6 (1) of the European Convention, on the right to a fair hearing. In its judgment, the Grand Chamber had found that none of the provisions of Resolution 1483 (2003) expressly prohibited the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level to implement the Security Council's decisions. The inclusion of individuals on the lists of persons subject to the sanctions imposed by the Security Council had led to interferences that could be extremely serious for the rights guaranteed by the Convention. In the Court's view, before taking the measures requested, the Swiss authorities had the duty to ensure that the listing had not been arbitrary. The applicants, meanwhile, should have been afforded a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. The very essence of their right of access to a court had thus been impaired and, consequently, article 6 (1) of the European Convention had been violated.

Regarding other Council of Europe conventions, the new Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism had been opened for signature on 22 October 2015 in Riga. To date, it had been ratified by 1 State and signed by 29 others. To enter into force, it had to be ratified by six States, including four members of the Council of Europe. The Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events had been opened for signature in Saint-Denis (France) on 3 July 2016. The instrument, which had to be ratified by 3 member States to enter into force, had already been signed by 14 member States. It should also be pointed out that the Protocol amending the European Landscape Convention,

which had been adopted at the 1260th meeting of the Ministers' Deputies, would be opened for signature on 1 August 2016. Lastly, the draft revised European Convention on Cinematographic Co-Production had been adopted by the Committee of Ministers on 29 June 2016 at the 1261st meeting of the Ministers' Deputies.

More generally, it should be noted that the Council of Europe Treaty Office was considering an increasing number of requests by non-member States to accede to Council of Europe conventions. Indeed, 161 of the 218 Council of Europe conventions were open to non-member States and, since July 2015, the Office had recorded 15 accessions and 5 signatures by such States. The following countries had acceded to the Convention on Mutual Administrative Assistance in Tax Matters: Barbados, Brazil, China, the Dominican Republic, Israel, Jamaica, Kenya, Mauritius, Nauru, Niue, Saudi Arabia, Senegal, Singapore, Uganda and Uruguay.

Lastly, the European Commission for Democracy through Law (Venice Commission) had recently issued opinions concerning amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, and concerning Federal Law No. 129-FZ on Amending Certain Legislative Acts of the Russian Federation (Federal Law on Undesirable Activities of Foreign and International Non-Governmental Organizations). Regarding the European migrant crisis, on 2 March 2016, the Council of Europe Secretary General had sent a letter to the Heads of Government of the 47 member States of the Council of Europe calling on them to better ensure the safety and proper treatment of migrant and asylum-seeking children. The letter had been a follow-up to one that he had sent to all member States on 8 September 2015 to remind them of their obligations under the European Convention. In January 2016, the Council of Europe Secretary General had appointed Ambassador Tomáš Boček as Special Representative on Migration and Refugees, and had given him a mandate to gather information on the situation of the basic rights of migrants and refugees in Europe and to develop proposals for action. Following a mission to Greece and the former Yugoslav Republic of Macedonia, the Special Representative had, in his report (SG/Inf(2016)18), called for the Council of Europe to mobilize the resources necessary to meet the housing needs of migrants and refugees, and to ensure that they had decent living conditions.

Mr. Kittichaisaree said that he wished to know whether the theft of virtual currencies (bitcoins, for example) constituted an offence under the Budapest Convention on Cybercrime. It would also be interesting to know whether CAHDI had initiated discussions on the question of whether there existed, under international law, a right of self-defence against non-State actors such as Islamic State in Iraq and the Levant (ISIL).

Mr. Vázquez-Bermúdez asked whether, in its work on *jus cogens*, CAHDI had examined the possible existence and content of regional *jus cogens*.

Sir Michael Wood asked whether CAHDI planned to take measures to expedite the procedure for declassifying some of its documents.

Mr. Kamto said that, when alluding to the declaration recognizing the customary nature of certain provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Chair of CAHDI had stated that CAHDI hoped that a practice would develop to counter attempts to seize State-owned cultural property on display abroad. However, if the practice had not yet developed, could one really speak of a custom? Moreover, if there was a custom, was it a regional European custom or a universal custom that was binding on States that were neither represented in CAHDI nor members of the Council of Europe? As to the relationship between the Rome Statute and the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, he observed that the principle of non-applicability of statutory limitations had not been established in the Rome Statute as a principle of customary law, since the matter of whether or not it was customary in nature had not been addressed at the Rome Conference.

Mr. Gómez-Robledo said that, as he understood it, another negotiation process had begun within the Council of Europe on trafficking in cultural property. He would appreciate a progress report in that regard.

Ms. Escobar Hernández, referring to the increase in reservations and declarations aimed at subjecting the application of the provisions of a convention to domestic law, which had been mentioned by the Chair of CAHDI, asked whether CAHDI had statistics on the matter. She wished to know the number of such reservations and declarations, and whether they were of a general nature or concerned specific areas or points of law. With regard to the relationship between the settlement of disputes of a private character to which international organizations were parties and the immunity of those organizations, and to the effects of that immunity on the right of access to justice, she wished to know the views of CAHDI on the issue and whether it was carrying out work on the topic.

Ms. Jacobsson said that, as attempted attachments of State-owned cultural property were increasingly common, the work of CAHDI on the immunity of such property was most welcome and, in that respect, she endorsed the questions asked by Mr. Kamto.

Mr. Rietjens (Committee of Legal Advisers on Public International Law (CAHDI)), responding to Mr. Kittichaisaree's question about ISIL, said that CAHDI had not discussed the problem, but that several countries represented in CAHDI had sent letters to the President of the Security Council explaining why they felt in a position to invoke the right of collective self-defence against ISIL. The letters had been issued as documents of the Security Council and could be consulted.

CAHDI had not discussed the topic of *jus cogens*, but, after Mr. Singh's presentation, questions had been asked about how the Commission viewed the matter, to which Mr. Singh had replied by informing CAHDI about the status of the Commission's work on the topic. As to the possible existence of regional *jus cogens*, the issue had not yet been discussed within CAHDI, but it might be in the future given its importance.

In response to Mr. Kamto and Ms. Jacobsson's question on cultural property, from a strictly legal standpoint, he acknowledged that he had perhaps used the word "practice" somewhat loosely, although Belgian legislation, for instance, already prohibited the attachment of State-owned cultural property on display abroad. The authors of the declaration that he had mentioned, which originated from a proposal by Austria and the Czech Republic, acknowledged the existence of an *opinio juris* to the effect that State-owned cultural property could not be attached, the idea being that it was desirable for as many States as possible to endeavour, in practice, to counter the attempted attachment of such property on display abroad, without awaiting the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property. That being said, if there was a custom, CAHDI considered that it could only be universal, for it was hard to see why State-owned cultural property should be exempt from attachment only in the territories of member States of the Council of Europe and not in other regions of the world. In fact, a non-member State of the Council of Europe had already signed the declaration.

Regarding the non-applicability of statutory limitations to crimes against humanity and war crimes, CAHDI had not examined the issue in substance, but had addressed it in the context of a general review of the Council of Europe conventions undertaken pursuant to a decision of the Committee of Ministers of the Council. On that occasion, there had been a discussion about the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, and it had been as part of that discussion that some delegations had maintained that the Convention had been supplanted by the Rome Statute, while others had asserted that it had retained intrinsic value and could even be evidence of an international custom.

Concerning Ms. Escobar Hernández's question on the rise in the number of reservations and declarations aimed at subjecting the application of the provisions of a convention to domestic law, CAHDI did have data, but had not yet collated and analysed them. It would, however, be useful to do so, as interesting conclusions could be drawn. Indeed, discussions on objections to reservations increasingly focused on reservations of that kind. They could be of a general nature or directed at a particular article of a treaty, but did not concern specific areas and were not always formulated in the same way. CAHDI would endeavour to collate the data at its disposal in order to have a clearer picture of the issue.

As to the status of work on the settlement of disputes of a private character to which an international organization was a party, CAHDI had, on the basis of a document from the Netherlands analysing the matter, sent to its members a questionnaire prepared by that country and intended to attempt to identify trends from the responses received.

Ms. Requena (Committee of Legal Advisers on Public International Law (CAHDI)), replying to Mr. Kittichaisaree's question on whether the theft of virtual currencies was covered by the Budapest Convention on Cybercrime, said that the Convention prohibited the use of the Internet for the purpose of committing acts that were treated in law as criminal offences. Consequently, for the Convention to apply to the theft of virtual currencies, the latter had to be criminalized. As to Mr. Kittichaisaree's second question, concerning ISIL, CAHDI had not discussed the problem, as indicated by its Chair, because its mandate was limited to matters of international law affecting States and international organizations. Other Council of Europe bodies were, however, competent to deal with the conduct of non-State actors and, given the possible impact of the activities of ISIL on public international law, it was likely that the Council of Europe would soon be required to tackle the issue.

With regard to Sir Michael Wood's question on the declassification of Council of Europe documents, the Council, like any international organization, had its own rules in that respect. Confidential documents, for example those that contained States' replies to a CAHDI questionnaire, could be declassified after a period of 10 years. The next meeting of CAHDI might be a good opportunity for it to ask States whether they were opposed to the declassification of their replies to the questionnaires sent to them. The replies to the questionnaire on special missions, in particular, should be declassified shortly, as CAHDI was preparing a publication on the matter.

Regarding Mr. Gómez-Robledo's question, it was true that, in response to acts of terrorism targeting cultural property and World Heritage Sites, the Council of Europe had decided to draft a new convention criminalizing not only trafficking in, but also the destruction of, cultural property. Since it was an international agreement, negotiations would take some time, but the Committee on Offences relating to Cultural Property had already held an initial meeting. Further information could be provided to the Commission if it so wished.

As to Ms. Escobar Hernández's question on reservations and declarations aimed at subjecting the application of the provisions of a convention to domestic law, there had indeed been an increase in such reservations and declarations, which were mainly of a general nature and were directed, above all, at two conventions, namely the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) and the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), which, as the members of the Commission were aware, showed certain parallels with the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, respectively.

Jus cogens (agenda item 10) (continued) (A/CN.4/693)

The Chairman invited the Commission to resume its consideration of the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693).

Mr. Murphy, noting that, in chapter III of his report, the Special Rapporteur advocated a "fluid and flexible" approach and appeared to contemplate asking the Commission to adopt draft conclusions before it was confident that they were correct, said that he did not favour such an approach, and that the Special Rapporteur should thoroughly analyse any issue on which he was asking the Commission to adopt a draft conclusion and should not expect the Commission to return continually to previously adopted draft conclusions. For example, it did not make sense to ask the Commission to declare, in draft conclusion 3, that *jus cogens* norms were "universally applicable", while stating in paragraph 68 of the report under consideration that such a conclusion was necessarily provisional and would be "the subject of more detailed study in future reports": that was putting the cart before the horse.

In paragraph 17 of his report, the Special Rapporteur asked whether the Commission should draw up an illustrative list of *jus cogens* norms. Like the Special Rapporteur and other members of the Commission, he was against the idea. At the same time, the Special Rapporteur stated, in the same paragraph, that, in the course of its work on the topic, it was inevitable that the Commission would provide examples of *jus cogens* norms “to substantiate its conclusions”. That might be the case, but the current approach to the work on the identification of customary international law, under which references to jurisprudence in the commentaries illustrated the methodology without going into the substance of the decisions cited, demonstrated that it was entirely possible to complete the work on a topic by drawing examples of existing practice from a source of law without necessarily endorsing any particular substantive rules established in that source.

While he found the historical background in chapter IV of the report interesting, he doubted the relevance of part A and would therefore prefer that it did not appear in the commentary. For example, the fact that, under Roman law, private pacts could not derogate from public law, or that, in most countries, statutory law could not derogate from constitutional law, or that administrative law could not derogate from statutory law, did not tell the Commission much about the position of *jus cogens* in contemporary international law. Hierarchies did, of course, exist in legal systems, but that did not provide much guidance as to the current role of *jus cogens* in international law.

Regarding chapter V, in particular part C, on the core elements of *jus cogens*, he agreed with other members that the three concepts put forward — universality, hierarchical superiority and the fundamental values of the international community — were not supported by a thorough review of State practice, jurisprudence or doctrine. Indeed, he did not recall the International Court of Justice ever referring to “fundamental values” in the context of *jus cogens*, even though a judge might have done so on occasion in a dissenting opinion. The concepts seemed to be unsubstantiated extrapolations of article 53 of the Vienna Convention.

He agreed with the view expressed by the Special Rapporteur in paragraph 73 of his report that the outcome of the work should take the form of “draft conclusions”, but was not convinced of the need to adopt draft conclusions at the current session; the Special Rapporteur might wish, in the light of the debate, to consider revisiting some or all of his proposals in order to conduct a more detailed analysis, as had been done recently in the work on other topics.

Turning to the proposed draft conclusions in chapter VII of the report, he said that he supposed that starting with a provision on the scope of the project was inevitable. Noting that proposed draft conclusion 1 bore some resemblance to draft conclusion 1 from the topic “Identification of customary international law”, but that it contained the word “identified” rather than “determined”, he invited the Commission to ponder which word was more appropriate. He endorsed the Special Rapporteur’s proposal to replace the word “rules” with “norms”, which was used in article 53 of the Vienna Convention, though he generally preferred the former.

Like other members of the Commission, he found draft conclusion 2 more problematic. Paragraph 1, which dealt with the ways in which rules of international law could normally be modified, derogated from or abrogated, appeared to serve as a means of setting up paragraph 2 to demonstrate why *jus cogens* was different. However, its wording was very simplistic and did not at all reflect the complexity of the ways in question. He did not think it wise for the Commission to attempt to provide a reductive description of the complex ways in which rules of international law could normally be modified, nor did he think that doing so fell within the scope of the topic.

For example, a few States might decide to develop and apply among themselves, by means of a treaty, a rule that was different to a customary international law rule applicable to all. Should it be considered that the customary international law rule in question had been modified, derogated from or abrogated? The answer was both yes and no: yes in relation to States parties to the treaty, but no in relation to non-States parties. The simplistic wording of draft conclusion 2 (1) did not capture that nuance and was therefore misleading.

Draft conclusion 3 contained an extensively revised version of the second sentence of article 53 of the Vienna Convention. The first paragraph included only some of the elements of that article, and the second paragraph introduced new elements, which were not thoroughly analysed in the report. Following the example of draft conclusion 1 from the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, in which the Commission reproduced the key elements of article 31 of the Vienna Convention, he proposed that the wording of the second sentence of article 53 of the Vienna Convention should be replicated in draft conclusion 2 so as to provide the reader with a well-known definition of *jus cogens* before exploring new lines of reasoning.

While he supported the referral of draft conclusion 1 to the Drafting Committee, he had serious doubts about the validity of draft conclusion 2, which it would be preferable to set aside for the time being. It would also be premature to send draft conclusion 3 to the Drafting Committee, unless it was done with the objective of restoring the definition of *jus cogens* as set out in the Vienna Convention.

Mr. Park said that he welcomed the considerable analytical work carried out by the Special Rapporteur in preparing his first report, which, through the multiplicity of documents and sources cited, demonstrated the breadth and complexity of the topic. *Jus cogens* implied the existence and development of a concept accepted by the organized international community as a whole. It was certainly one of the most important topics in contemporary international law, but also among the most complex, and the first challenge lay in determining how to approach it and what method to employ. Although nobody denied the existence of *jus cogens*, its nature and legal and political implications were still debated. One of the priorities in studying the topic should thus be to discuss what approach and method to adopt. He would comment on the following six points: terminology, an illustrative list of norms that had achieved the status of *jus cogens*, the theoretical basis for *jus cogens*, the core elements of *jus cogens*, the three draft conclusions proposed by the Special Rapporteur and future work.

With regard to terminology, it would be a good idea to confirm at the outset that the terms “*jus cogens*” and “peremptory norms” were used interchangeably in the report. Clarification should also be provided as to the meaning of the terms “fundamental”, “absolute”, “non-derogation” and “non-rejectable”, which were not clearly related to the nature of *jus cogens*. The adjective “fundamental”, for example, seemed to be used with different meanings depending on whether it was qualifying norms, rules and laws (as in paragraphs 18, 21, 32 and 34 of the report), or values (as in paragraphs 56 and 63, and in draft conclusion 3 (2)), without any clear explanation being given in that respect. It would be useful to know what was meant by “fundamental” in terms of the nature of *jus cogens*, and what relationship there was between the fundamental norms of international law and the fundamental values of the international community. In the light of those considerations, it might be helpful to insert a “Use of terms” section at the beginning of the project.

The Special Rapporteur had sought the opinions of the Commission and member States on the possibility of developing an illustrative list of norms that had the status of *jus cogens*. Views on the matter differed, including within the Commission. It was true that the idea that *jus cogens* norms could be catalogued in a detailed and exhaustive way was controversial. In his opinion, however, a list of examples of such norms would be of use to States, in that it would help them to identify *jus cogens* norms and to gain a better understanding of the criteria related to the emergence of new peremptory norms. The Special Rapporteur might have to restructure the draft conclusions in order to incorporate those elements.

In its 2006 report (A/CN.4/L.682), the Study Group on Fragmentation of international law cited several examples of *jus cogens* norms that would assist the Commission’s work, including the prohibition of the aggressive use of force, the right to self-defence, the prohibition of genocide, the prohibition of torture, the prohibition of crimes against humanity, the prohibition of slavery and the slave trade and the prohibition of hostilities directed at the civilian population (“basic rules of international humanitarian law”). Bearing in mind its previous work, the Commission was fully justified in delving into the content of *jus cogens* and in compiling an illustrative list that would be used for the codification and progressive development of international law. An analytical study of

relevant instruments and jurisprudence could help to prepare it for that next step. In that regard, it might be useful to consult Thomas Weatherall's doctoral thesis, entitled "Jus cogens: *International Law and Social Contract*" (2015), which contained a non-exhaustive list of *jus cogens* norms and a summary of domestic court decisions on the matter.

As reflected in paragraphs 18 to 50 of the report, there was a divergence of views concerning the theoretical basis for *jus cogens*. Indeed, the idea that *jus cogens* was non-derogable could be associated with natural law theories. By contrast, positivists, for whom will played a key role, considered that the law was a set of man- or State-made rules whose existence could be recognized and content determined without having to rely on a reason stemming from natural law or on any other non-legal institution. The theoretical basis for *jus cogens* could lie in each of those theories, but it was better to allow each legal expert to find his or her own explanation because, as was rightly noted in paragraph 59 of the report, no single theory had yet adequately explained the uniqueness of *jus cogens* in international law, and the binding and peremptory force of *jus cogens* was best understood as an interaction between natural law and positivism. There was a need to be pragmatic and to focus on the analysis of State practice, the work of the Commission and jurisprudence.

In paragraph 63 of his report, the Special Rapporteur identified three core elements that characterized *jus cogens* norms: their universal applicability, their superiority and their role in protecting fundamental values of the international community. Regarding the first element, the possible existence of regional *jus cogens* seemed, at first glance, to run counter to article 53 of the Vienna Convention on the Law of Treaties, which provided that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole". However, it would be wrong, at the initial stage of the work, to dismiss the possibility of regional *jus cogens*, which, both theoretically and practically, could not be excluded altogether, especially if one accepted that the emergence of *jus cogens* was closely related to treaties or to customary international law. The issue warranted further examination.

He agreed with the Special Rapporteur that the doctrine of the persistent objector was not applicable to *jus cogens* and believed that any such possibility should be categorically excluded. However, the Commission had accepted that doctrine in the context of customary international law, so it seemed pointless to declare that it was not applicable to *jus cogens* when it formed part of the rules of customary international law, although one might wonder how to determine with certainty whether or not an emerging rule of customary international law would achieve the status of *jus cogens* in the future.

The Special Rapporteur indicated in his report that public order appeared more suited to explain the quality of the norms, and that public order norms could be explained in terms of either positive or natural law theories. He agreed that the public order approach had some merit, but did not think that it was appropriate in the field of public international law. Historically, it was true that the dualism of *jus cogens* and *jus dispositivum* had been derived from the Roman private law system, and that the private law analogy had played a role in the past. However, that analogy was not always pertinent in international relations: the international legal order had not been formed from a single State's domestic legal system; rather, it was based on diverse cultural, religious, political and economic regimes. The discussion of public order was more relevant to private international law. The Commission might one day examine the so-called "international public order" or the "constitutionalization of the international order", but that discussion would focus on a different legal question.

Regarding fundamental values, he supported Mr. Nolte's comments. *Jus cogens* covered two different domains: the protection of human dignity and the protection of State sovereignty. The former focused on the protection of persons in times of war or on protection from grave human rights abuses in times of peace. The latter concerned the traditional Westphalian principles. The scope of the analysis of the *raison d'être* of *jus cogens* should therefore be expanded.

Turning to the draft conclusions, he said that he could accept draft conclusion 1, provided that the word "rules" was replaced with "norms", as proposed by the Special Rapporteur. Some members had argued that the Special Rapporteur wrongly limited the

scope of the topic to questions related to the law of treaties. In his opinion, it was clear from the report that the Special Rapporteur was aware that the role of *jus cogens* went beyond the law of treaties. His reasoning was well substantiated, particularly in paragraphs 44 to 49, in which he discussed not only the law of treaties but also State responsibility and the criminal sanctioning of perpetrators of violations, basing himself on the practice of States and international organizations, and on the case law of the International Court of Justice.

Moreover, it would perhaps be appropriate to broaden the scope of the topic to include non-State actors, whose role had undeniably grown in recent years. The Commission might need to decide whether non-State actors should also be subjected to peremptory norms of international law, insofar as they were capable of committing large-scale violations of international human rights law. Natural persons could be held responsible for crimes under the Rome Statute of the International Criminal Court. Murder, enslavement, extermination, torture and sexual slavery committed on a widespread and systematic basis by non-State actors could thus fall within the scope of the Rome Statute. In addition, the discussions that had taken place recently in academic circles on the criminal responsibility of legal persons (corporations) in relation to serious human rights violations raised the question of whether the Commission should extend the scope of the research on *jus cogens* to non-traditional fields of international law. For example, as evidenced by the work of Luke Eric Peterson and Kevin R. Gray on bilateral investment treaties, the application of *jus cogens* could be envisaged if there was complicity between investors and host States in the commission of massive human rights abuses.

Regarding draft conclusion 2, he considered that the overly general paragraph 1 was superfluous, particularly as the rule of *jus dispositivum* contained therein could be inferred from draft conclusion 3. If necessary, the rule could be explained in the commentary to the draft conclusion. Draft conclusion 2 (2) was very closely related to draft conclusion 3 (1), in that both concerned the definition or the legal nature of *jus cogens*. They should therefore be merged into a single draft conclusion entitled "Definition of *jus cogens*". It would also be a good idea, as noted by Sir Michael Wood, to follow the exact wording of article 53 of the 1969 Vienna Convention on the Law of Treaties. The discussion of draft conclusion 3 (2) should be left for a later stage of work on the topic because the meaning of the expressions "fundamental values", "hierarchically superior" and "universally applicable" required clarification, and because those concepts were related to the effects or consequences of *jus cogens*.

As to future work, since the *lex lata* of *jus cogens* was not always clear, he was in favour of devoting the next report to the rules on the identification of norms of *jus cogens* and generally agreed with the approach proposed by the Special Rapporteur. He would, however, like to reiterate two remarks that it might be helpful to bear in mind in future work. First, the Commission had recently adopted, on first reading, draft conclusions on the identification of customary international law that did not address the issue of *jus cogens*. However, since customary international law could be an element of *jus cogens*, the relationship between the identification of customary international law and *jus cogens* should be clarified. In particular, there should be a discussion of whether the rules set out in the draft conclusions on customary international law that had been adopted could be applied *mutatis mutandis* to *jus cogens*. While it had been mentioned that the doctrine of the persistent objector was not applicable to *jus cogens* despite being accepted in the field of customary international law, the issue deserved further consideration in the light of the general rules of customary international law.

Secondly, the work on the consequences of *jus cogens* would be closely related to the definition of the scope of the topic. In order to be comprehensive, the study of *jus cogens* should not be confined to the discipline of the Vienna Convention on the Law of Treaties, even though the concept of *jus cogens* had been conceived in that context; rather, it should cover other areas of relevance to the topic, such as State responsibility, State immunity, questions pertaining to international organizations and to the criminal responsibility of legal persons in international law, and so on. In other words, the study of *jus cogens*, especially its legal consequences, would be much broader and more complex than the Commission had thought unless it had a clear road map to guide its work.

Mr. Saboia said that he wished to congratulate the Special Rapporteur on his excellent first report, whose content, which was clearly structured and based on careful research, gave the Commission a solid foundation for its work on the complex topic of *jus cogens*. The syllabus on the basis of which the topic had been included on the Commission's agenda had been structured around four issues: (a) the nature of *jus cogens*; (b) requirements for the identification of *jus cogens*; (c) an illustrative list of norms; and (d) the consequences or effects of *jus cogens*. Given the breadth of those issues, he agreed with Mr. Murase and Mr. Hassouna that the topic would have merited a more ambitious title.

According to the Special Rapporteur, the purpose of the report under consideration was twofold: (i) to propose an approach to the topic in order to obtain the Commission's views; and (ii) to give a general overview of conceptual issues relating to *jus cogens*, with the limited, initial aim of identifying the core nature of *jus cogens*.

Concerning the methodology to be adopted, he agreed with the Special Rapporteur that the Commission should base its work on the variety of materials and sources at its disposal. He was in favour of the fluid and flexible approach advocated by the Special Rapporteur with regard to the order in which issues were considered, though he shared the doubts expressed by Sir Michael Wood over the application of that approach to the draft conclusions.

He was favourable to the idea of an illustrative list of norms that had the status of *jus cogens* and, like Mr. Caflisch, considered that the Commission's work on the topic under discussion would lose much of its value and interest unless the Commission at least attempted to draw up a list. The topic dealt not only with the process by which norms acquired the status of *jus cogens* and the methodology for identifying such norms but also with the nature of *jus cogens*, and an illustrative list could reveal a great deal in that regard. In its previous work, the Commission had already compiled illustrative lists of *jus cogens* norms, including in the commentaries to the draft articles on State responsibility and in the conclusions of the Study Group on Fragmentation of international law.

The historical evolution of the concept of *jus cogens* set out in chapter IV clearly demonstrated how the notion of non-derogable norms had survived during the early decades of the twentieth century despite the dominance of legal positivism, which was State-focused and disregarded moral and humanistic values. The Vienna Convention on the Law of Treaties had merely crystallized an idea that had already become generally accepted, namely that there could be treaties whose object was inadmissible under peremptory norms of general international law recognized by the international community and accepted as such by States.

The establishment of the United Nations and the work of the International Court of Justice, the International Military Tribunal at Nuremberg and, later, other international courts and numerous international organizations had given shape to the concept of a world public order based on values and had strengthened the international community's commitment to, and work on, human rights.

Chapter V contained an analysis of the legal nature of *jus cogens* that, leaving aside theoretical debates, firmly established, on the basis of the jurisprudence of the International Court of Justice, of other national and international courts, as well as State practice, that *jus cogens* was part of *lex lata*.

He had no objection to the draft conclusions, although he shared some of the reservations expressed about the usefulness of draft conclusion 2 in its current form. Draft conclusion 3 (1) should be rephrased to provide a definition of *jus cogens* and inserted after the provision on the scope of the project. Paragraph 2 should be retained, as it incorporated into the definition of the Vienna Convention on the Law of Treaties the important elements of the fundamental values of the international community, the hierarchical superiority of *jus cogens* norms and their universal acceptance.

The meeting rose at 1.05 p.m.