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Summary record of the 3317th meeting

Topic:
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3317th MEETING

Friday, 8 July 2016, at 10.05 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

Later: Mr. Georg NOLTE (Vice-Chairperson)

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, 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.

Cooperation with other bodies (concluded)

[Agenda item 13]

STATEMENT BY THE PRESIDENT
OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Ronny Abraham, President of the International Court of Justice, and invited him to address the Commission.

2. Judge ABRAHAM (President of the International Court of Justice) said that he welcomed the opportunity to meet with the members of the Commission for a second time, in accordance with a long-established practice, and to present a report on the judicial and other activities of the Court over the past year.

3. In April 2016, in order to celebrate its seventieth anniversary, the Court had held a solemn ceremony and a seminar during which the members of the Court had met with representatives of universities, practitioners and Member States, as well as international judges, to consider the main challenges that the Court was likely to face over the coming years. The presentations and a summary of the debate would be published shortly in the *Journal of International Dispute Settlement*.

4. Over the previous year, three new cases had been brought before the court, and proceedings had resumed in another. The latter case concerned *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in which the Court, in a judgment on the merits in 2005, had found that each party was under an obligation to the other to make reparations for injury caused by unlawful acts. The judgment had not addressed the nature or amount of reparations due, leaving it to the parties to reach an agreement on the matter, failing which the Court would, at the request of either party, determine the reparations owed. After lengthy but fruitless negotiations that had lasted over 10 years, the Democratic Republic of the Congo had requested the Court to settle the matter. The Court had decided to resume the proceedings and had fixed a time limit for the filing by each party of written pleadings indicating the reparations it considered

to be owed to it by the other party. In deciding the case, the Court would no doubt refer to the jurisprudence of other international courts that had experience in the area, but would also need to develop its own jurisprudence.

5. The three new cases concerned proceedings brought by Chile against the Plurinational State of Bolivia with regard to a *Dispute over the Status and Use of the Waters of the Silala*; proceedings instituted by Equatorial Guinea against France with regard to a dispute concerning the immunity from criminal jurisdiction of its Second Vice-President and the legal status of a building in Paris (*Immunities and Criminal Proceedings*); and proceedings brought by the Islamic Republic of Iran against the United States of America (*Certain Iranian Asssets*) with regard to a dispute concerning alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights.³²⁴

6. The Court had rendered three judgments concerning issues of procedure, jurisdiction and admissibility. In the first of those judgments, which had been delivered in September 2015 and related to the case concerning *Obligation to Negotiate Access to the Pacific Ocean*, the Court had rejected the preliminary objection raised by Chile to the Court's jurisdiction. The case was currently being considered on the merits. The second judgment related to preliminary objections raised by Colombia in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, in which Nicaragua had alleged that Colombia had failed to comply with the Court's 2012 judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)* and had violated its maritime zones and sovereign rights in those zones. Following the 2012 judgment, Colombia had denounced the American Treaty on Pacific Settlement (Pact of Bogotá), which had formed the basis of the Court's jurisdiction in the case, and claimed that the denunciation had taken immediate effect, thus rendering the new application by Nicaragua inadmissible because of a lack of jurisdiction *ratione temporis* on the part of the Court. However, Nicaragua had asserted that, in accordance with the provisions of the Pact, the denunciation had taken effect only one year after its notification and that consequently its new application, which had been submitted within that one-year period, was admissible. The Court had agreed with the latter interpretation and had therefore rejected the preliminary objections raised by Colombia. In a further case between Nicaragua and Colombia, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, the Court had rejected the preliminary objections of Colombia to jurisdiction and admissibility. In its judgment, the Court had found that the above-mentioned 2012 judgment could not be considered as having definitively settled the question of the delimitation of the continental shelf between the two States as a matter of *res judicata* and that therefore the application of Nicaragua was admissible.

7. The Court had held hearings in March 2016 in three cases brought by the Marshall Islands against India, Pakistan and the United Kingdom of Great Britain and Northern

³²⁴ Treaty of Amity, Economic Relations, and Consular Rights, signed at Tehran on 15 August 1955, United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

Ireland, respectively, relating to *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. According to the Marshall Islands, those obligations arose not only from the Treaty on the Non-Proliferation of Nuclear Weapons, to which the United Kingdom was a party, but also from customary international law, and that they thus applied also to India and Pakistan. The respondents had raised preliminary objections to jurisdiction and admissibility, which were currently being considered by the Court.

8. On 31 May 2016, the Court had issued an order on the appointment of independent experts to assist it in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* and who would be tasked with determining the state of the coast in the border region between the two countries. The Court considered that there were certain factual matters relating to the state of the coast that might be relevant for the purpose of settling the dispute submitted to it. There were few precedents for such action; expert reports considered by the Court were generally submitted by the parties concerned and tended to support their respective arguments. Although all experts were deemed to be neutral, there might be a higher presumption of neutrality in the case of those appointed by the Court.

9. On 16 December 2015, the Court had delivered a judgment on the merits in two joined cases – *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* – that were of interest in terms of substantive law, specifically international environmental law. The cases raised several questions relating to a dispute concerning territorial sovereignty over a small area on the border between the two States and to international law on protection from transboundary harm. With respect to territorial sovereignty, the judgment had not produced anything new in terms of substantive international law: the Court had found that Costa Rica had sovereignty over the disputed territory, that Nicaragua had violated the territorial sovereignty of Costa Rica by carrying out activities and establishing a military presence in the disputed territory and that it had the obligation to compensate Costa Rica for damage caused. Regarding international environmental law, the cases had enabled the Court to clarify a number of issues concerning the obligations of States in conducting activities on their own territory that might have a harmful effect on the territory of a neighbouring State. In particular, the Court had drawn a distinction between procedural and substantial obligations, according to which a State might have observed the former but have failed to comply with the latter, or vice versa. Thus, the Court had concluded that Costa Rica had violated its procedural obligation to carry out an environmental impact assessment concerning the construction of a road along the San Juan river, part of the border between the two countries and of which the bed belonged to Nicaragua, but that it had not breached its substantive obligations concerning prevention of transboundary harm. In reaching its conclusions, the Court had considered that the construction of a road by Costa Rica carried a risk of significant transboundary harm and that therefore Costa Rica was under an obligation to evaluate the environmental impact of the project prior to the commencement of the works. However, the

Court had found that the work conducted by Costa Rica had not caused harm to either the river bed or other territory of Nicaragua; consequently, it had not violated its substantive obligations.

10. In the cases in question, each State had alleged a breach by the other of its international obligations: Nicaragua had claimed that Costa Rica had violated its obligations by building a road along the border, while Costa Rica had alleged that Nicaragua had done so by carrying out dredging work in the Colorado River. The obligations invoked by the two States did not derive from treaty law; in their submissions, the parties had referred marginally to some legal instruments, but the Court had not considered them relevant. The debates between the parties had primarily concerned non-treaty law. The Court had found that both the procedural obligation to carry out a prior environmental impact assessment and the substantive obligation to prevent significant transboundary harm arose from customary or general international law. Although the Court had already referred to such obligations in the case concerning *Pulp Mills on the River Uruguay*, it had in the present cases confirmed and clarified their content, thus extending its previous jurisprudence and confirming the existence of certain obligations in general international law.

11. With respect to terminology, it might be noted that, in its judgment of 16 December 2015, the Court had referred to obligations resulting from both customary international law and general international law, without drawing any clear distinction between the two. However, it should not be deduced from that language that the Court considered the terms to be synonymous. It might – or might not – be the case that the concepts overlapped to a certain extent, but nothing more than that should be deduced in that respect from the language of the judgment, and any over-interpretation, to which writers were often inclined, should be resisted.

12. In the section of the judgment dealing with the alleged breach of an obligation to notify and consult, the Court had clarified its findings in earlier judgments. Whenever international legal instruments imposed precise notification and consultation obligations on neighbouring States, those treaty provisions of course applied. In the cases in question, however, the Court had had to determine whether, in situations not covered by treaty provisions, a duty of prior notification and consultation existed under general international law. In its relatively cautious reply, the Court had established that the existence of any such obligation was dependent on whether the State planning the activities was under an international obligation to conduct an environmental impact assessment. Its reasoning, which rested on precedent, was that if any activities carried a potential risk of significant transboundary harm, the State contemplating them must carry out a prior environmental impact assessment. If the findings of that assessment confirmed the existence of the aforementioned risk, that State must consult the States where that harm was likely to occur on the requisite steps to forestall or limit it as far as possible. In some instances, which would have to be determined on a case-by-case basis, States might have to cooperate to prevent harm from occurring, since only one of them might have the

necessary information, competence or technical know-how to ascertain what preventive measures were needed. Hence the obligation of prior notification and consultation existed only when, after a case-by-case appraisal, it appeared that cooperation between States was necessary in order to define the appropriate measures to prevent or limit transboundary harm. In the cases in question, the Court had found that the obligation to notify and consult had not been breached.

13. Mr. KITTICHAISAREE, referring to the Court's findings in paragraphs 112 to 114 of its judgment of 17 March 2016 on the preliminary objections in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, asked how the Court intended to proceed in that case, where it would not know whether Nicaragua had any basis for claiming an entitlement to an area beyond 200 nautical miles from its coast and where Colombia was not a party to the United Nations Convention on the Law of the Sea and could not therefore avail itself of the procedure of the Commission on the Limits of the Continental Shelf to establish the outer limits of the Continental Shelf beyond 200 nautical miles.

14. Mr. MURPHY asked whether, in the future, the Court was likely to have more frequent recourse to the services of experts retained by the Court itself because, in the past, it had proved difficult to decide issues by using only experts designated by the parties. Did the Court deem it necessary to obtain the parties' consent to the use of independent experts, or was it willing to call on them even in the face of opposition from the parties? He wondered whether the likelihood of using independent experts was influenced by whether the case had been brought to the Court by a unilateral application or on the basis of a special agreement.

15. Judge ABRAHAM (President of the International Court of Justice) said that the Court's judgment of 17 March 2016 in the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* had dealt with jurisdiction and admissibility, not the merits of the case. The main question which the Court had had to decide was whether the *res judicata* authority of its 2012 judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)* barred the application by Nicaragua in the case under discussion. The Court had decided that it did not, since in 2012 it had not ruled on delimitation, and that the application by Nicaragua was admissible, notwithstanding the fact that the Commission on the Limits of the Continental Shelf had not produced any recommendations with respect to the claim by Nicaragua to an extended continental shelf. In its 2012 judgment, the Court had ruled that the fact that Colombia was not a party to United Nations Convention on the Law of the Sea did not relieve Nicaragua of its obligations under that Convention, in particular of its obligation to ask the aforementioned Commission for recommendations. The Court had confirmed that finding in its 2016 judgment. The Court would decide how to determine the respective rights of the parties to a continental shelf in the absence of any recommendations

from the Commission on the Limits of the Continental Shelf when it examined the merits of the case. Whether both parties, or only one of them, would participate in the proceedings would depend on Colombia because, after the delivery of the Court's judgment in March 2016, the Colombian authorities had issued public statements to the effect that they did not consider that the Court had jurisdiction over the matter and that they did not intend to recognize any of its subsequent decisions in it. While it sometimes happened that States officially expressed their displeasure over the Court ruling that it had jurisdiction to hear a case, notwithstanding the respondent's opinion to the contrary, that did not necessarily signify that the latter would not take part in the subsequent phases of proceedings. The Court had set time limits for the submission of the memorial and counter-memorial and it had received no information indicating that Colombia did not intend to file its counter-memorial, despite the aforementioned statements. The Court could only regard those statements as unfortunate, since no matter how disgruntled a State or counsel for a State might feel after the delivery of a judgment which did not accept the State's pleas, all the States parties to the Statute of the International Court of Justice must comply with its judgments.

16. The appointment of a panel of experts by the Court was not a new departure; in fact, its rules made provision for it. The Court examined the need to appoint experts on a case-by-case basis and, although that step was likely to remain an exception, it could not be ruled out in future cases. It was, however, impossible to predict whether that practice would become more or less common than in the past. It was the Court's prerogative to appoint independent experts if it decided that it was in the interests of the sound administering of justice to do so. While the Court must inform the parties of its intentions in that regard and ascertain their views, their consent was not necessary and it was not bound by any objections they might raise. The likelihood that the Court would consider it necessary to retain independent experts was perhaps slightly greater when a case was brought by a unilateral application.

17. Mr. FORTEAU noted that, even though the Court had clarified the applicable law on compensation in the case concerning *Ahmadou Sadio Diallo*, it would, in the President's opinion, be incumbent upon it to develop its case law on the subject in the resumed proceedings in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. He asked whether it might be useful if the Commission were to undertake a study of that matter in the near future, as proposed in the working paper prepared by the Secretariat on possible topics for consideration in the Commission's long-term programme of work (A/CN.4/679/Add.1).

18. Sir Michael WOOD said that he would give careful consideration to the President's very interesting comments on the terms "customary international law" and "general international law". He had also taken note of the President's injunction not to read things into the Court's judgments which were not said in them. However, it was not only writers, but also practitioners appearing before the Court in subsequent cases, who had to try to understand the reasoning behind an earlier judgment. He wondered what was to be learned about that particular issue

from the separate opinions of Judge Donoghue and Judge *ad hoc* Dugard of December 2015 in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. Did the President wish to say anything about the practice and policy of the Court with respect to separate and dissenting opinions?

19. Judge ABRAHAM (President of the International Court of Justice) said that, while the Court had already dealt with requests for compensation in a number of earlier cases, including *Ahmadou Sadio Diallo*, the key issue facing it in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* was the nature and amount of the reparation due, in part for bodily harm and widespread loss of life as a result of crimes committed on a large scale. A study by the International Law Commission of compensation under international law would certainly be very useful since, despite the fact that the Court remained free to establish its own position and was not bound by the latter's recommendations or texts, it always examined the Commission's work with the greatest of interest and it never decided a point of law without giving due consideration to the Commission's opinion on the matter.

20. Sir Michael Wood's question about the interpretation of the Court's decisions and the way in which those decisions could be construed by writers and practitioners was naturally of major concern to States, their agents and their counsel. A decision was what was written down on paper and what could be inferred logically and necessarily therefrom. The inferences that could be logically drawn from the text of a judgment bound the Court, even though the judges might not have realized the implications of a given sentence, since what was implicit was inherent in what was explicit. Logical reasoning was what was called for, not an attempt to guess the potential intentions behind the Court's position; any such attempt was no more than worthless speculation or supposition. In fact what he had just said did not bind the Court, because it was not embodied in one of its decisions; it was simply his own opinion.

21. Separate or dissenting opinions clarified not the position of the Court but that of the judges concerned. They sometimes shed light, *a contrario*, on the Court's position because, if a judge took issue with a decision, that could mean that the Court had espoused the opposite viewpoint. A separate opinion criticizing a judgment might also make it possible to draw a conclusion about what the Court had actually wanted to say in its decision, when the judge had thought it his or her duty to set forth an argument which he or she knew was shared by the majority of judges, but which had not been explicitly expressed in the decision. For those reasons, an *a contrario* interpretation of a judgment based on the critique contained in a separate opinion was a delicate matter, and the greatest caution must therefore be exercised when using those opinions. While they were enlightening as to the thinking of the judge in question in a particular case, they did not necessarily indicate what position he or she would take in a subsequent case, as a judge could change his or her mind. Even though they might take issue with a precedent when it was adopted, judges might consider themselves bound by it and in a subsequent case would cleave to the majority opinion of the Court for the sake of judicial consistency.

22. Mr. PARK enquired about the current state of the trust fund to assist States in the settlement of disputes through the International Court of Justice.

23. Mr. VALENCIA-OSPINA requested that the replies given by the President of the Court to the questions put by members be reflected fully in the record of the Commission's meeting.

24. Judge ABRAHAM (President of the International Court of Justice) said, with regard to the Trust fund to assist States in the settlement of disputes through the International Court of Justice, that he had nothing specific to add to the information available in existing United Nations documents. The Court remained seized of the need to ensure that the fund operated effectively in practice and was sufficiently well financed to allow all States to enjoy access to international justice; the Court itself, however, could do little in that regard.

25. Mr. KAMTO said that the visits to the Commission by the President of the International Court of Justice provided a valuable link between the work of the two bodies. The President's comments had helped to clarify certain matters for the Commission. The Commission must, of course, strive to reflect the Court's rulings closely, but it should be careful not to give the impression that it accorded the same importance to individual or dissenting opinions as to the views of the Court. The President's remarks in that regard were particularly pertinent.

26. He welcomed the Court's May 2016 decision in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* to obtain an expert opinion, which would help to allay some concerns over the methods lately employed by the Court in reaching its decisions. Referring to its ruling of 16 December 2015 in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, he asked whether, in a dispute relating to territorial sovereignty, the Court proceeded differently than it would in a case in which the focus was on State responsibility.

27. Mr. HMOUD said that he would be interested to know how the Court approached jurisprudence from other international courts and tribunals, when their pronouncements on international law matters were inconsistent with the Court's interpretations. He asked what view the President took of claims by some States that the Court's interpretations of the rules of international law in its advisory opinions were not binding and whether, in formulating its judgments, the Court took account of the potential difficulty of implementing them, taking into account that there were instances where parties to the contentious disputes were not implementing the Court's judgments.

28. Judge ABRAHAM (President of the International Court of Justice), in response to Mr. Kamto, said that the question of State responsibility could arise in any case relating to internationally wrongful acts, including violations of territorial sovereignty. There was therefore nothing unusual in the fact that a case concerning territorial sovereignty might give rise to consideration of issues of State responsibility, as it had in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. In that case, Costa Rica had asked the Court

to declare that Costa Rica had sovereignty over disputed territory claimed by both it and Nicaragua, that Nicaragua had consequently violated its sovereignty by engaging in certain activities on that territory and that Nicaragua was therefore under an obligation to make reparation for the damage caused by its unlawful activities. Accordingly, the Court had had to decide which State had sovereignty over the territory in question and then rule on the issue of international responsibility.

29. In the specific case of disputes concerning maritime delimitation in which the Court established a maritime boundary between States, it did not necessarily follow that any activity carried out in the disputed area before the boundary was drawn constituted an internationally wrongful act. In its 2012 judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court had taken the position that, until it fixed the maritime boundary between the two States, that boundary did not exist and therefore neither State could be said to have been engaged in activities violating the territorial sovereignty of the other. Once the boundary had been fixed, however, any subsequent acts by one State in the other's territorial zone could give rise to international responsibility. Nicaragua had returned to the Court with just such a claim against Colombia; the Court had ruled that it was competent to hear the case and would proceed to consider the merits thereof. If it found that Colombia had violated the sovereign rights of Nicaragua, it would necessarily hold Colombia responsible for internationally wrongful acts. The issue of State responsibility was not separate from other substantive aspects of a case. Although certain reservations had previously been expressed about the dual nature of certain cases involving territorial disputes, he took the view – shared by the Court – that nothing prevented the Court from fixing territorial limits and establishing international responsibility as part of the same proceedings.

30. Turning to Mr. Hmoud's questions, he said that the Court took account of the jurisprudence of other international courts and tribunals and endeavoured to ensure coherence in international law by aligning its rulings with those of other bodies. It had often had cause to quote from the judgments of such bodies. That said, the Court and those other bodies were not bound by one another's rulings and could and did take differing positions on the same issue, intentionally or otherwise. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court had, in 2007, re-examined its 1996 judgment in the light of a ruling by the International Tribunal for the Former Yugoslavia but had not been convinced by that Tribunal's position and had maintained its previous view.

31. With regard to the binding nature of the Court's rulings, he recalled that, while advisory opinions were not binding, judgments were binding, but only between the parties to a case and with respect to that particular case. There was no legal obligation on other States or the parties to a case to consider themselves bound by, or bound to apply, the Court's general pronouncements or reasoning, although they should be given the greatest attention as expressions of the Court's views and the state of international law. For instance, while the judgment given in

Jurisdictional Immunities of the State that States were immune from the civil jurisdiction of other States, at least with respect to actions taken in exercise of public authority, was relevant to all States and to similar situations, only Germany and Italy were formally bound by it and that only with respect to the specific cases before the Italian courts that were the subject of the proceedings.

32. In the aforementioned case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, Nicaragua had accused Colombia of deliberately ignoring the Court's 2012 ruling that fixed the maritime boundary between the two States. If, in its consideration of the merits, the Court confirmed the alleged actions of Colombia, they would constitute a violation of the sovereign rights of Nicaragua and probably also a violation of the obligation of Colombia to abide by the judgment of the Court. In its preliminary objections, Colombia had raised the issue of whether the Court could itself rule that a State had failed to comply with a previous ruling, arguing that enforcing the Court's judgments was the role of the Security Council by virtue of the Charter of the United Nations. The Court had rejected that argument on the grounds that Nicaragua was not asking the Court to enforce a ruling directly but to establish whether Colombia had violated its sovereign rights in maritime zones, those rights deriving not from the Court's ruling but from the law of the sea. The question of the respective roles of the Court and the Security Council did not therefore form part of the case, although the subject might arise in future cases.

33. Mr. VÁZQUEZ-BERMÚDEZ asked what effect the different legal traditions from which the Court's judges were drawn had upon its workings.

34. Judge ABRAHAM (President of the International Court of Justice) replied that any differences in approach tended to concern procedural matters. Although differences of opinion on matters of substance were to be expected, they rarely reflected divergences in legal background. Moreover, the international law applied by the Court was a common language uniting diverse legal traditions.

35. The CHAIRPERSON expressed appreciation to the President of the International Court of Justice for his informative contribution to the Commission's work.

Mr. Nolte, First Vice-Chairperson, took the Chair.

***Jus cogens (continued) (A/CN.4/689,
Part II, sect. H, A/CN.4/693)***

[Agenda item 10]

FIRST REPORT OF THE SPECIAL RAPporteur (continued)

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

37. Mr. CANDIOTI said that he wished to thank the Special Rapporteur for his clear and well-structured first report, which would serve as a solid basis for the Commission's work on the topic. It was timely for the Commission to

undertake a study to systematize the elements of *jus cogens* norms and the consequences of *jus cogens*. In its previous codification work, the Commission had emphasized the relevance and importance of *jus cogens* within the international legal system, for example in the draft texts that had become common articles 53, 64 and 71 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (“1986 Vienna Convention”)³²⁵ and articles 26, 40 and 41 of the 2001 draft articles on the responsibility of States for internationally wrongful acts.³²⁶

38. As noted by the Special Rapporteur in his first report, Member States in the Sixth Committee had generally welcomed the Commission’s decision to address the topic of *jus cogens* and had been optimistic that the Commission’s work would lead to a better understanding of the nature, content and effects of *jus cogens* norms. The topic therefore represented a great challenge and responsibility for the Commission, which could make a significant contribution to the progressive development and codification of international law. He agreed with the Special Rapporteur that the topic should be approached in a flexible and pragmatic manner, with a focus on analysing State and judicial practice and, if necessary, relevant writings and other useful sources.

39. Peremptory law had evolved over time and would continue to do so, but its recognition in the international legal order undoubtedly lay in the decision to include, in the Charter of the United Nations, principles on the protection of values that States recognized as basic and essential in the interests of international peace and security and of respect for fundamental human rights. It should be recalled that the basic norms of international law that had emerged from the Charter of the United Nations had been developed and clarified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, which had been adopted by the General Assembly in its resolution 2625 (XXV) of 24 October 1970.

40. In principle, he supported the proposal to provide an illustrative list of norms that currently qualified as *jus cogens*. It was hard to see how it would be possible to reach conclusions on such norms *in abstracto*, without identifying them appropriately or considering carefully their content and material scope. As Mr. Park had pointed out at the previous meeting, the Commission had already clearly indicated in some of its recent work the main peremptory norms. In the commentaries to articles 26, 40 and 41 of the draft articles on the responsibility of States for internationally wrongful acts adopted in 2001, the Commission had given the following examples of *jus cogens* norms recognized by State practice, international conventions and judicial decisions: the prohibition of aggression, genocide, slavery and the slave trade, racial

discrimination and apartheid, crimes against humanity and torture; basic rules of international humanitarian law applicable in armed conflicts; and the obligation to allow and respect the exercise of the right to self-determination.

41. With regard to the title of the topic, the end users of the Commission’s work might find the Latin term “*jus cogens*” unfamiliar or unclear when used in isolation. The Commission recognized the importance of ensuring that actors in the international arena could understand its draft texts and other normative proposals, regardless of whether they were experts in international law or, in the case of *jus cogens*, Latin. For that reason, the overuse of Latin terms had until recently come to be frowned upon within the Commission; however, such terms were now being used again fairly frequently. He therefore proposed that the final title of the topic should refer to *jus cogens* norms, using the equivalent term in each of the official languages of the United Nations – “peremptory norms” in English, for example – followed by the Latin term “*jus cogens*” in parentheses. That had been the approach taken by the Commission with regard to the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”; the titles of common articles 53 and 64 of the 1969 and 1986 Vienna Conventions could also serve as precedents.

42. Concerning draft conclusion 1, he had no major objection to the substance, but agreed with previous speakers that it was not so much a conclusion as an introductory clause that described the purpose and scope of the draft conclusions that followed. As Mr. Park had noted, it would be preferable to use a single term to refer to *jus cogens* rules throughout the draft conclusions. His own preference would be to refer to them as “peremptory norms of general international law (*jus cogens*)”, in line with the terminology used in previous work of the Commission.

43. The first draft conclusion proper should contain a definition of peremptory norms for the purposes of the conclusions. Such definition should consist of an appropriate combination of the elements set forth in draft conclusion 3 and thus indicate that such norms served to protect the fundamental values of the international community; were universally applicable; were hierarchically superior to other norms of international law; were accepted and recognized as peremptory norms by the international community; and might be modified, derogated from or abrogated only by norms having the same character. Definitions of other terms could be included in the introduction subsequently, if it was considered appropriate.

44. Like other colleagues, he was of the view that draft conclusion 2 could be deleted, since paragraph 1 bore no direct relevance to the topic and paragraph 2 would be superfluous if the fact that peremptory norms could not be modified, derogated from or abrogated was set out in the definition or, alternatively, established and developed in a subsequent draft conclusion.

45. As to future work on the topic, he agreed with the points made by the Special Rapporteur in paragraphs 75 to 77 of his first report. Regarding the form of the Commission’s product, he also agreed that draft conclusions were the most appropriate outcome, as with the topics “Identification of customary international law” and “Subsequent

³²⁵ See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 247, 261 and 266 (draft articles 50, 61 and 67).

³²⁶ The draft articles on the responsibility of States for internationally wrongful acts and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

agreements and subsequent practice in relation to the interpretation of treaties”. The final document could comprise three parts. The first, introductory part could contain an outline of the topic and a detailed description of the key issues, following the approach adopted in relation to the topics “Fragmentation of international law” and, more recently, “The most-favoured-nation clause”. In the second part, the Special Rapporteur could provide a concrete, precise and well-structured set of conclusions, while the third part could be reserved for commentaries on each conclusion similar to those formulated by the Commission when it developed draft articles.

46. Mr. FORTEAU said that he wished to thank the Special Rapporteur for his first report, which provided the Commission with an excellent basis on which to address the topic of *jus cogens*. He would not dwell on the theoretical basis of *jus cogens* or on the opposition between the voluntarist and natural law schools, issues which, in his view, would have barely any impact on the Commission’s work. As per its traditional method, the Commission would seek to put down in writing what it saw as arising from contemporary practice and jurisprudence. In so doing, it did not have to come down in favour of one school of thought over another. Contrary to what was stated in the first report, he felt that the theoretical debate could be avoided and that the core elements of *jus cogens* could be deciphered not from that debate but from the Vienna Conventions and the resulting practice and jurisprudence.

47. His reluctance to wade into theoretical debates stemmed also from his belief that experts in international law were not the best qualified to take positions on highly abstract theoretical issues and that any attempt to do so could give rise to misinterpretations. He tended to think that modern experts in international law generally gave erroneous descriptions of the historical development of natural law in legal thought, given that they were not specialists in Roman or medieval law. For instance, the Special Rapporteur repeatedly stated in his first report that natural law was immutable, in other words, that it existed independently of time and space. Legal historians, particularly specialists in ancient and medieval law such as Michel Villey, had shown, however, that natural law evolved and that, unlike divine nature, human nature was not fixed or immutable. In his *Summa Theologica*, Thomas Aquinas, following in the footsteps of Aristotle, had recalled that a distinction should be drawn between general justice, of a divine and moral nature, and particular justice, in other words, natural law, which mirrored social life and any developments in it. To say that natural law was immutable was thus a historical misinterpretation, one that proponents of positivism in the twentieth century had sought to keep alive in order to discredit natural law.

48. By concentrating the debate on technical and legal issues, the Commission would simplify its task. *Jus cogens* and natural law were of the same nature, in that they were legal vehicles that conveyed the fundamental values of a society at a given moment in time. Consequently, he saw no conflict between the natural law and positivist schools when it came to *jus cogens*. In domestic law, “public policy” was not generally the product of will. Its substantive content tended to be determined by a judge on the basis of what he or she considered to be the

fundamental values of society at that particular moment. *Jus cogens* was thus fulfilling the classical role of natural law by means of a different legal technique.

49. In public international law, there were currently legal vehicles other than *jus cogens* that conveyed fundamental international values. In that regard, it would have been useful for the Special Rapporteur to address transnational public policy, which was increasingly invoked before and applied by international arbitration tribunals in cases involving foreign investment, particularly since the Arbitral Tribunal of the International Centre for Settlement of Investment Disputes, under the presidency of Judge Guillaume, had issued an arbitral award in the case of *World Duty Free Company Limited v. The Republic of Kenya*. Transnational public policy was closely linked to *jus cogens* and deserved further study.

50. There was no doubt that the scope of the topic was not limited to treaty law. The Commission’s task was to determine the role and effects of *jus cogens* with regard to all branches of international law. With that in mind, in chapter III of his first report, the Special Rapporteur should have examined the Commission’s work on the law of responsibility, which had enriched the debate on *jus cogens*, particularly at the time of the adoption of article 19³²⁷ of the draft articles on State crimes in 1976 and of articles 40 and 41 of the draft articles on the responsibility of States for internationally wrongful acts between 1998 and 2001.

51. He was in favour of establishing an illustrative list of norms that currently qualified as *jus cogens*. The question of the form that such a list would take was of secondary importance and could be decided at a later stage. He was in favour for four reasons. First, the inclusion of a list was part of the syllabus adopted when the topic had been added to the long-term programme of work and, later, to the Commission’s agenda. Second, it could not be argued that *jus cogens* was a purely methodological topic in the same way as the identification of customary international law was. *Jus cogens* had been included in the agenda with three main ambitions, namely to clarify the criteria for identifying *jus cogens*, to propose an indicative list of *jus cogens* norms and to determine the legal consequences of those norms. Again, he saw no strong reason to deviate from the syllabus. Third, while it would be impossible to draw up a list of rules of customary law, it would be easy to compile a list of *jus cogens* norms, which were, by their very nature, more limited in number. Fourth, he could not fully understand why concerns were being expressed over the proposal for a list. In 1966 and 2001, the Commission’s decision to draw up similar lists had hardly been contested. It would be at the very least surprising for the Commission to refrain from repeating the exercise after having opted to include the topic of *jus cogens* in its agenda.

52. In compiling an illustrative list, the Commission would, as usual, have to be prudent and to include only those norms that had been indisputably recognized as peremptory. If there was any doubt, the Commission would have to refer to practice and jurisprudence in explaining why it was not in a position to state definitively that a

³²⁷ *Yearbook ... 1976*, vol. II (Part Two), p. 95.

particular norm qualified as *jus cogens*. As the Special Rapporteur said in paragraph 11 of his first report, the Commission's aim should be to report on the current state of international law relating to *jus cogens*.

53. It was easier for the Commission to draw up a list than it had been in the past. Over the previous 15 years, international courts had made *jus cogens* more commonplace by referring to it with greater frequency, while at the same time narrowing its scope by refusing to recognize certain norms as *jus cogens* or by refusing to give them the legal effects sought by complainants. Recent examples included the judgment of the European Court of Human Rights in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* and that of the International Court of Justice in *Jurisdictional Immunities of the State*. Under the circumstances, the Commission could usefully draw up an indicative list in a more favourable context than in the past.

54. Before proceeding any further with its work on the topic, the Commission needed to clarify the differences between *jus cogens* and similar legal mechanisms. The Special Rapporteur referred to Article 103 of the Charter of the United Nations only in passing, in paragraph 28 of his first report, without explaining how that provision was similar to, but different from, *jus cogens*. He had likewise been very surprised that the Special Rapporteur made no mention of article 41 of the 1969 Vienna Convention, which limited the cases where States parties to a multilateral treaty could derogate therefrom by means of a bilateral or plurilateral treaty. In some respects, the article followed the same logic as *jus cogens*, and the Special Rapporteur should determine how it differed from article 53 of the 1969 Vienna Convention, in particular by examining the *travaux préparatoires* to the Convention. Such an examination was necessary in order to determine the parameters of *jus cogens* as a mechanism that was distinct from the one established in article 41 of the 1969 Vienna Convention, which, in his view, had not been taken fully into account in draft conclusion 2, paragraph 1.

55. He did not think that the possible existence of regional *jus cogens* could be dismissed out of hand. In-depth research was required before the Commission could take a position on the matter. It was true that article 53 of the 1969 Vienna Convention dealt only with universal *jus cogens*, but that did not preclude the emergence of other forms of peremptory norms. During the United Nations Conference on the Law of Treaties, some delegations had expressed support for the idea of regional *jus cogens*, and, since then, the Inter-American Court of Human Rights and the European Court of Human Rights had developed jurisprudence that echoed the idea. It was therefore an issue that should be taken up in the future.

56. Similarly, he did not see why, as a matter of principle, the persistent objector theory could not be applied to *jus cogens*. In paragraph 67 of his first report, the Special Rapporteur asserted that it was difficult to see how a rule from which no derogation was permitted could apply to only some States, but he was confusing cause and effect. A *jus cogens* norm produced effects only for those States to which it applied. If the persistent objector theory was accepted – which was a question that the Special Rapporteur

should study in detail – then *jus cogens* would have no effect for the States concerned. In order to decide whether the persistent objector theory applied to *jus cogens*, there was a need, first of all, to determine how *jus cogens* was formed and, in particular, whether it was based on the consent of all States or rather on a form of majority opinion. He took note of the Special Rapporteur's decision to examine the issue in a subsequent report.

57. He was of the view that the Commission should adhere to its traditional method and reject the approach to the topic proposed by the Special Rapporteur, which would involve reassessing draft conclusions that had already been adopted, as work on the topic progressed. Such an approach would greatly complicate the Commission's task and might make it harder for the Commission to reach a consensus on each of the draft texts.

58. He supported the adoption of an initial draft conclusion on the scope of the conclusions as a whole. In that regard, the Commission still had to agree on the purpose of its work on *jus cogens*. In draft conclusion 1, an explicit reference should be made to the identification of not only the criteria of *jus cogens* but also of the content of *jus cogens*. The Commission should, however, come to a decision on whether or not to include an illustrative list of *jus cogens* norms before looking to adopt draft conclusion 1.

59. Draft conclusion 2 fell outside the scope of the topic, introduced uncertainties and created legal difficulties. The notion of *jus dispositivum*, in particular, was rather obscure. Like Mr. Nolte, he found the suggestion that customary law was a form of agreement highly questionable. Moreover, derogation from a treaty could also take place through the decision of an international organization, which was not an agreement. As a result, draft conclusion 2 did not accurately reflect the current state of international law.

60. In draft conclusion 3, paragraph 1, the Commission should simply repeat, word for word, the text of article 53 of the 1969 Vienna Convention, without in any way modifying it. He was not in favour of adopting draft conclusion 3, paragraph 2, which did not appear to be grounded in practice or jurisprudence and contained legally ambiguous terms. The concepts of “fundamental values” and “hierarchy”, in particular, did not appear in the Convention, and including them in the draft conclusions would amount to a legal innovation, which, moreover, was not necessary. Once the Special Rapporteur had provided clarifications in that regard, the Commission would need to determine what other legal effects, if any, flowed from *jus cogens*.

61. In summary, he was in favour of referring draft conclusion 1 to the Drafting Committee, as long as the Commission had reached a clear decision with regard to the purpose of its work on *jus cogens*. He also agreed to the referral of draft conclusion 3, paragraph 1, to the Drafting Committee, provided that it was reworded in line with article 53 of the 1969 Vienna Convention.

The meeting rose at 12.55 p.m.