

Document:-
A/CN.4/3371

Summary record of the 3371st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2017, vol. I

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well as the hierarchy of norms. He was in favour of drawing up an indicative list of *jus cogens* norms, or at least including examples in the annex to the draft conclusions. From a methodological and practical point of view, there were a number of reasons for the elaboration of such a list. First, as had already been noted, there were different approaches to the scope of *jus cogens*. If the Commission's work was to lead to the identification of genuine peremptory norms, and the exclusion of other legal techniques aimed at non-derogation or the hierarchy of certain rules, it could hardly be done without giving examples of *jus cogens* norms. Second, the generalized elements or criteria of *jus cogens* should, in turn, be tested against at least some examples of such norms. Third, though such a list must necessarily be non-exhaustive, it might nevertheless give some theoretical and practical indications of what the Commission would identify as peremptory norms of general international law.

59. In conclusion, he recommended that the Commission refer all the draft conclusions to the Drafting Committee.

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

[Agenda item 1]

60. The CHAIRPERSON drew attention to the proposed programme of work for the remainder of the session, which, as usual, was subject to change.

61. Mr. ŠTURMA, responding to a question by Mr. VALENCIA-OSPINA, said that the four proposed draft articles on succession of States in respect of State responsibility that might be referred to the Drafting Committee were contained in paragraphs 29, 81, 111 and 132 of his first report (A/CN.4/708).

62. After a procedural discussion in which Mr. HASSOUNA, Mr. MURPHY, Mr. PARK, Mr. REINISCH, Mr. TLADI and Sir Michael WOOD participated, the CHAIRPERSON said that the Commission would follow its usual practice when it came to the topic of succession of States in respect of State responsibility, as the Special Rapporteur's report was available electronically in all six languages and would serve as the basis for the debate in the plenary, followed by discussion in the Drafting Committee.

63. Mr. OUZZANI CHAHDI said that it was regrettable that the proposed programme of work was not available in French.

64. The CHAIRPERSON said that the Commission attached great importance to the issue of translation but, as the programme had been finalized just before the meeting, there had unfortunately not been time to translate it. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

The meeting rose at 12.55 p.m.

3371st MEETING

Thursday, 6 July 2017, at 10.05 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

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

1. The CHAIRPERSON welcomed Mr. de Serpa Soares, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited him to take the floor.
2. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, as part of the activities of the Office of Legal Affairs during the previous year, the Codification Division had provided substantive secretariat services to the Sixth Committee during the seventy-first session of the General Assembly. The Committee had considered a total of 27 agenda items, convened four different working groups and held numerous informal consultations on draft resolutions. Upon the recommendation of the Sixth Committee, the General Assembly had eventually adopted without a vote 26 resolutions and 4 decisions.
3. In resolution 71/140 of 13 December 2016, entitled "Report of the International Law Commission on the work of its sixty-eighth session", the General Assembly had noted the completion of the first reading of two of the Commission's projects: the draft conclusions on identification of customary international law²⁸⁶ and the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.²⁸⁷ It had also endorsed the Commission's recommendation that the first part of its seventieth session be held in New York and had taken note with appreciation of the Commission's plans to commemorate its seventieth anniversary in 2018 with events in New York and Geneva. In resolution 71/141 of 13 December 2016, entitled "Protection of persons in the event of disasters", the General Assembly had taken note of the draft articles on the protection of persons in the event of disasters,²⁸⁸ presented by the Commission, and had decided to include an item on that topic in the provisional agenda of its seventy-third session.
4. At the seventy-first session of the General Assembly, the Sixth Committee's agenda had included four items

²⁸⁶ See *Yearbook ... 2016*, vol. II (Part Two), pp. 60 *et seq.*, paras. 62–63.

²⁸⁷ See *ibid.*, pp. 84 *et seq.*, paras. 75–76.

²⁸⁸ See *ibid.*, pp. 25 *et seq.*, paras. 48–49.

* Resumed from the 3367th meeting.

relating to outcomes of the Commission's work in previous years, namely "Responsibility of States for internationally wrongful acts", "Diplomatic protection", "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm" and "The law of transboundary aquifers". The Committee had established working groups on the first two of those items. While the possibility of a convention on State responsibility had gathered some momentum, the Committee had made little concrete progress on any of those agenda items and had postponed the debate on all of them by three years, until 2019. At its forthcoming seventy-second session, the Sixth Committee would once more consider two items relating to outcomes of the Commission's work, namely the draft articles on the responsibility of international organizations,²⁸⁹ which the Commission had completed in 2011, and the draft articles on the expulsion of aliens,²⁹⁰ which it had completed in 2014.

5. In the past year, the Office of Legal Affairs had dealt with a variety of legal issues related to United Nations peacekeeping operations. In response to the grave danger posed to United Nations personnel and to civilians in the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), which was tragically illustrated by the fact that 114 peacekeepers had been killed and nearly 150 injured in over 70 terrorist attacks since its creation in 2013, the Security Council, in its resolution 2295 (2016) of 29 June 2016, had requested MINUSMA to move to a more proactive and robust posture to carry out its mandate. The Council had emphasized that the Mission "in pursuit of its priorities and active defence of its mandate" should "anticipate and deter threats and ... take robust and active steps to counter asymmetric attacks against civilians or United Nations personnel".²⁹¹ That new language did not mean that MINUSMA was mandated to engage in counter-terrorism, which continued to be the exclusive domain of the State authorities. Those adaptations in the Council mandate had, however, been reflected in revised rules of engagement for the Mission's military contingents, which had been prepared in consultation with his Office.

6. Some of the shortcomings of the United Nations Mission in South Sudan had highlighted serious challenges in implementing mandates to protect civilians in the midst of armed conflict and had called into question the effectiveness of the United Nations command and control structure *vis-à-vis* States contributing personnel to serve in United Nations operations.

7. Concerning the United Nations Mission for the Referendum in Western Sahara (MINURSO), the United Nations was still dealing with the effects of the decision by the Government of Morocco in March 2016 to expel a

significant proportion of the Mission's civilian component, including its legal adviser. Such action was contrary to the principles of the Charter of the United Nations, as well as to the provisions of the status-of-mission agreement between the United Nations and Morocco. Increased tensions in the buffer strip in south Western Sahara had necessitated a greater level of support from his Office to the Department of Peacekeeping Operations and the Mission, particularly in connection with understanding the ceasefire arrangements between the parties and the role of MINURSO in monitoring and verifying them.

8. On the subject of the institutional law of the United Nations, a relationship agreement had been concluded with the International Organization for Migration (IOM), under whose terms the United Nations recognized IOM as an organization with "a global leading role in the field of migration", while recognizing that the member States of IOM, as per IOM Council resolution No. 1309, regarded it as "the global lead agency on migration".²⁹² According to the agreement, those two understandings were without prejudice to the mandates and activities of the United Nations, its offices, funds and programmes in the field of migration. IOM had undertaken to conduct its activities in accordance with the purposes and principles of the Charter of the United Nations and with due regard to the policies of the United Nations furthering those purposes and principles and to other relevant instruments in the international migration, refugee and human rights fields. The agreement allowed IOM to participate as a full member in various United Nations coordination mechanisms, as well as in United Nations country teams present in more than 131 countries.

9. Turning to privileges and immunities, he said that he wished first to address the Haiti cholera matter. On 17 January 2017, the decision of an appeals court in the United States on the issue of the immunity of the United Nations with respect to claims, which confirmed that the United Nations enjoyed absolute immunity from suit, absent an express waiver, had become final. Although in another case under way in a United States district court, plaintiffs were arguing that the United Nations had waived its immunity based on reports of the Secretary-General and a General Assembly resolution regarding the liability of the United Nations for third-party claims issued in the 1990s, it was the position of the United Nations that the statements in those documents, which dated back to more than 10 years before the cholera outbreak, could not constitute an express waiver in relation to any particular case. The district court had already expressed its doubt about the viability of the plaintiffs' claims, and his Office expected that this court, too, would uphold the immunity of the United Nations.

10. The United Nations also continued to face a number of other challenges to its status, privileges and immunities. In South America, for example, such challenges related to matters concerning taxation and social security, the validity of existing bilateral agreements concluded by the United Nations with the State and the status of the relationship between the United Nations and the personnel

²⁸⁹ The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

²⁹⁰ The draft articles on the expulsion of aliens adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 22 *et seq.*, paras. 44–45.

²⁹¹ Security Council resolution 2295 (2016), para. 19 (*d*).

²⁹² See the Agreement concerning the Relationship between the United Nations and the International Organization for Migration, General Assembly resolution 70/296 of 25 July 2016, annex, art. 2, para. 1.

it engaged. On that last point, a series of labour claims had been filed against United Nations funds and programmes before Mexican courts by former locally recruited personnel. In two cases, the Mexican courts had followed the jurisprudence established by the Supreme Court and had concluded that international organizations in Mexico did not enjoy immunity from legal process in relation to labour claims brought by locally recruited persons. The Government acknowledged that this was legally incorrect and that the United Nations enjoyed immunity from every form of legal process, including in such matters. While the Government had taken several steps to assert immunity on behalf of the United Nations, it had not appeared before the courts at any stage of the proceedings.

11. Another case concerned the diplomatic immunity of a judge of the International Residual Mechanism for Criminal Tribunals. Judge Akay, a national of Turkey, had been accused of alleged crimes related to the attempted *coup d'état* of July 2016 and had been arrested in Turkey in September 2016. At the time of his arrest, Judge Akay had been serving as a member of the appeals bench in the *Augustin Ngirabatware* case, to which he had been assigned on 25 July 2016.

12. On behalf of the Secretary-General, the speaker had asserted the judge's immunity as accorded to diplomatic envoys, including immunity from personal arrest and detention and from legal process. He had noted that the Security Council had expressly decided in article 29, paragraph 1, of the Statute of the International Mechanism for Criminal Tribunals²⁹³ that the 1946 Convention on the Privileges and Immunities of the United Nations should apply to the judges of the Mechanism. He had then reiterated the long-standing position of the Organization that the diplomatic immunity conferred under the Convention must be respected by all Member States, including the State of nationality and State of residence of the person on whom such privileges and immunities were conferred. In that regard, he had recalled that privileges and immunities were conferred solely in the interests of the Organization and were based on the fundamental principle of an independent international civil service established under the Charter of the United Nations in which there was no inequality by reason of nationality.

13. The Government of Turkey had taken the position that Judge Akay enjoyed functional immunity only and that his arrest was not related to his official functions and had continued with his criminal prosecution. On 14 June 2017, Judge Akay had been convicted on a single charge of being a member of a terrorist organization and sentenced to seven years and six months' imprisonment. The judgment was subject to appeal and review proceedings at the national level. The judge had been provisionally released under judicial supervision, with restrictions on his travel, and he would be detained again if the conviction was confirmed by a higher court. While the judge's release was a welcome development from a humanitarian perspective, the Office of Legal Affairs was considering how to react to the conviction given its inconsistency with the judge's diplomatic immunity.

14. On the subject of accountability for international crimes, it was noteworthy that, after 24 years of operation, the International Tribunal for the Former Yugoslavia was expected to complete its work by the end of 2017. There were some legal issues to resolve in the remaining months, such as the question of whether a contempt case could be transferred to the International Residual Mechanism for Criminal Tribunals under the existing legal framework if the accused persons had not been arrested before the Tribunal had finished its substantive cases. The work of United Nations-assisted tribunals was progressing, despite the funding problems faced by, for example, the Extraordinary Chambers in the Courts of Cambodia and the Residual Special Court for Sierra Leone. The experience of those two bodies had clearly vindicated the Secretariat's long-held view that funding of judicial institutions should not be left to the vagaries of voluntary contributions.

15. In the past year, the efforts of the Office of Legal Affairs had increasingly been directed towards supporting regional and domestic accountability efforts in various parts of the globe. In that regard, the Office had been providing technical assistance to the Office of the Legal Counsel of the African Union Commission for the establishment of the Hybrid Court for South Sudan. The Court would be established by the African Union, and the role of the United Nations was limited to assisting, at the request of the African Union, to facilitate the process, drawing from lessons learned from other tribunals.

16. As part of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace between the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo (FARC-EP) of 24 November 2016, the parties had agreed on a system of transitional justice and accountability that combined elements of truth, justice, reparations and guarantees of non-repetition. Under the Special Jurisdiction for Peace, which would be composed exclusively of Colombian judges, alleged perpetrators of serious crimes of international concern would be subject to judicial processes and sanction, and there would be no amnesties for war crimes and crimes against humanity. The Government and FARC-EP had invited the Secretary-General and four entities to designate members of a committee for the selection of Colombian judges and other officials of the justice component of the Agreement. The Office of Legal Affairs had been advising the Secretary-General and the Department of Political Affairs on that matter. It had also contributed in a somewhat similar fashion to the establishment of the Special Criminal Court in the Central African Republic.

17. Accountability was not limited to courts and tribunals only. In situations where there was no willingness or capacity to prosecute, other efforts could be undertaken to facilitate future prosecutions. That was precisely what was being envisaged in relation to the atrocities committed in Syria. On 21 December 2016, the General Assembly had adopted resolution 71/248, establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab

²⁹³ See Security Council resolution 1966 (2010) of 22 December 2010, annex.

Republic since March 2011. The functions of the Mechanism included collecting, consolidating, preserving and analysing evidence of violations of international humanitarian law and human rights violations and abuses, as well as preparing files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that had or might in the future have jurisdiction over those crimes. His Office had been collaborating with the Executive Office of the Secretary-General and the Office of the United Nations High Commissioner for Human Rights and providing advice on various legal issues, including the terms of reference of the Mechanism.

18. The establishment of the Mechanism had not been without controversy. Some Member States were questioning the validity of the General Assembly resolution establishing the Mechanism, arguing that the Assembly had acted *ultra vires*. The position of his Office was that the General Assembly determined its own competence and that the Secretariat had no authority to review the legality of the actions of the other principal organs. At the time of adoption of the resolution, the General Assembly had considered the question of its competence and had decided to adopt the resolution.

19. In March 2017, the Human Rights Council had expanded the mandate of the Commission on Human Rights in South Sudan to include the collection and preservation of evidence and clarifying responsibility for alleged gross violations and abuses of human rights and related crimes.²⁹⁴ The information was to be made available to transitional justice mechanisms in South Sudan, including the Hybrid Court, with a view to ending impunity and providing accountability.

20. In December 2015, an independent panel charged with reviewing sexual exploitation and abuse by peacekeeping forces in the Central African Republic had recommended a review of United Nations confidentiality practices. It had been considered crucial to determine whether such policies established a proper balance between safeguarding confidential information about victims of alleged sexual exploitation and abuse and disclosing such information to national authorities for purposes of holding accountable those responsible for such acts.

21. As a result of the panel's recommendation, the General Legal Division of the Office of Legal Affairs had been tasked with collating United Nations confidentiality policies relevant to the concerns raised by the panel and assessing how the balance between confidentiality and accountability had been struck in each one of those policies. Having found a significant number of confidentiality policies that did not all adequately address accountability, the Division had then been requested to prepare a new uniform policy on handling allegations of sexual exploitation and abuse made against United Nations personnel that would apply across the Organization. The new uniform policy was currently under consideration by senior management.

22. The Division for Ocean Affairs and the Law of the Sea continued to serve as the secretariat of the United Nations Convention on the Law of the Sea and the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Its functions included those of depositary of documents connected with the limits of maritime zones, and it serviced meetings of the Commission on the Limits of the Continental Shelf and of States parties to the Convention. The Division also provided the General Assembly, its subsidiary bodies and intergovernmental processes with substantive assistance in connection with oceans and the law of the sea.

23. The aforementioned bodies and processes included: the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (the Informal Consultative Process), the Preparatory Committee established by General Assembly resolution 69/292 of 19 June 2015: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects; and the United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, which had been held at United Nations Headquarters in New York in June 2017.

24. The accession of Azerbaijan to the United Nations Convention on the Law of the Sea in 2016 had brought the number of States parties to 168. The twenty-sixth Meeting of States Parties, held in June 2016, had, *inter alia*, adopted the biennial budget of the International Tribunal of the Law of the Sea. The twenty-seventh Meeting in June 2017 had elected 7 new members of the Tribunal and 21 members of the Commission on the Limits of the Continental Shelf.

25. In the quinquennium which had ended in June 2017, the above-mentioned Commission had examined 21 submissions concerning the outer limits of the continental shelf beyond 200 nautical miles, a 62 per cent increase over the previous quinquennium. Although the backlog of submissions had grown smaller, 41 were still pending. The Commission had issued five new recommendations over the previous 12 months and had received another submission, which had brought their total number to 82, including five revised submissions.

26. The year 2016 had seen the launching of the second cycle of the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects. While the first cycle had concentrated on establishing a baseline, the second cycle would evaluate trends and identify gaps. The second cycle was expected to yield a second global integrated marine assessment and to back other intergovernmental processes related to the oceans.

²⁹⁴ See Human Rights Council resolution 34/25 of 24 March 2017, para. 16 (b).

27. The CHAIRPERSON thanked the United Nations Legal Counsel for his statement, as well as for the support the Commission received from the Codification Division, and invited members to ask him questions.

28. Sir Michael WOOD expressed his thanks for the excellent assistance which the Commission received from the Codification Division. He asked whether the United Nations Legal Counsel received sufficient support from Member States with regard to the privileges and immunities of the United Nations, especially from States where cases involving the Organization's privileges and immunities had been brought before courts. He asked whether more thought had been given to the General Assembly seeking an advisory opinion in relation to the Convention on the Privileges and Immunities of the United Nations.

29. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, when in his former duties as legal adviser to the Ministry of Foreign Affairs of his own country he had been confronted with tricky cases involving States' privileges and immunities, he had usually found that national judges were prepared to explore possible solutions with him. He therefore had difficulty in accepting the argument that legal advisers to ministries of foreign affairs could do little to uphold the immunities and privileges of the United Nations in national courts because of the independence of the judiciary. The challenges to its immunities and privileges which the Organization faced in Latin America were not confined to that region. However, one particular problem was that, under the Mexican legal system, the precedent established by five concordant decisions from the Supreme Court became binding on the lower courts. The Supreme Court's position that immunity did not take precedence over labour rights conferred by the national Constitution was very hard to accept, and he might have no alternative but to refer the issue to the General Assembly and to ask for its guidance on the matter. Seeking an advisory opinion on privileges and immunities was a possibility, but he was still trying to explore other options with the national authorities. It was up to the ministries of foreign affairs in Member States to take a proactive role in protecting the privileges and immunities of the United Nations, but unfortunately they sometimes failed to do so.

30. Mr. HASSOUNA asked whether the new Secretary-General had a vision or a road map for dealing with emerging challenges such as the spread of terrorism, environmental degradation, nuclear proliferation, displacement of persons, non-compliance with international law and violations of international humanitarian law and international human rights law, and for improving the United Nations system.

31. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Secretary-General had called a town hall meeting to be held shortly to present his ideas on the reform of the United Nations over the following five years. The Office of the Legal Counsel fully supported the reform programme which, he hoped, would bring some visible benefits in the near future.

32. Mr. MURASE said that he wished to highlight the value of the Codification Division's activities in the area of teaching and disseminating international law. The Audio-visual Library of International Law²⁹⁵ was most useful and he hoped that the excellent external training courses would continue for many years to come. He asked for assurances that the members of the Commission and the interns and assistants who provided them with vital support would not be affected by a travel ban when the Commission held the first part of its seventieth session in New York.

33. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, since the United Nations Regional Courses in International Law for Africa, Latin America and the Caribbean, and Asia-Pacific would henceforth be funded from the regular budget, their future was secure. They also benefited from the support of the Economic Commissions for those regions. His attendance of two Regional Courses had made him aware of the added value which derived from what was essentially a small and inexpensive programme. He trusted that his Office's excellent relations with the United States Mission to the United Nations in New York would ensure that a reasonable solution could be found to any travel difficulties that might arise in connection with the holding of the first part of the Commission's seventieth session at the United Nations Headquarters.

34. Mr. HMOUD asked whether the United Nations Legal Counsel's advice and opinion on matters relating to international peace and security was taken into consideration by the Security Council. He also wished to know whether the numerous bilateral agreements on privileges and immunities which had been concluded between the United Nations and individual States were consonant with the Convention on the Privileges and Immunities of the United Nations. Lastly, he requested information about the general policy followed by the Office of the Legal Counsel with regard to immunities and privileges.

35. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the Legal Counsel had no formal role in the Security Council. The members, especially the permanent members thereof, would probably not wish to give the Legal Counsel any formal role in its work. There was, however, a very healthy tradition of informal cooperation, as some members of the Security Council were genuinely interested in ascertaining the view of the Office of Legal Affairs on a given issue, in particular because it had one of the best archives in the Secretariat and could provide insight on situations which had already occurred in the past. In the previous nearly four years, he had only twice been invited to brief formally the Security Council. On those occasions the issue had been accountability in South Sudan. In any case, all members of the Security Council had their own legal advisers.

36. His Office adopted a pragmatic approach to immunities. The Convention on the Privileges and Immunities of the United Nations provided a template, but it allowed a margin of flexibility when bilateral agreements were negotiated, in order to accommodate the specific concerns or requests of host States.

²⁹⁵ Available from: <https://legal.un.org/avl/>.

37. Mr. GROSSMAN GUILOFF said that he, too, appreciated the outreach of the Office of Legal Affairs to academia and its assistance with the provision of teaching material in law schools. He greatly valued the Office's role in promoting accountability and other measures to counter impunity for genocide and crimes against humanity. The Office's work had helped to generate State practice and *opinio juris* that outlawed amnesty for such crimes. He therefore wished to know what further steps were being contemplated by the Office to promote accountability.

38. Mr. JALLOH asked what further cooperation was envisaged between the Office of the Legal Counsel and the African Union to clear the way for setting up the Hybrid Court for South Sudan and whether the Office might request Security Council action under Chapter VII of the Charter of the United Nations in that connection. He also requested details of the Office's practice with regard to amnesties for international crimes.

39. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that efforts by the Office of Legal Affairs to reach out as much as possible to the outside world in order to disseminate international law had resulted in the Audio-visual Library having 1.5 million views. Turning to the question on how to promote accountability, he said that he was endeavouring to support the action of national and regional authorities in that respect. His Office had been working with the African Union to prepare the legal texts needed for the establishment of the Hybrid Court for South Sudan. However, the moment of political truth had arrived because the Government of South Sudan was reluctant to engage in the process. The Security Council had clearly indicated that the African Union should lead the process and, for that reason, it was for the African Union to provide the fundamental political momentum to ensure that the 2015 Agreement on the resolution of the conflict in the Republic of South Sudan²⁹⁶ was implemented. His Office had provided substantial support for the Special Criminal Court in the Central African Republic and it was still advocating the universal ratification of the Rome Statute of the International Criminal Court, although at the same time it believed that the reinforcement of regional and national capacity to deal with international crimes for which there could be no amnesty was a crucial part of the way forward.

40. Mr. RAJPUT said that, although the Commission on the Limits of the Continental Shelf had a vital function to perform in dealing with what appeared to be a never-ending succession of submissions, it did not have its own budget. He therefore wondered how States and the United Nations viewed the Commission's prospects.

41. Mr. REINISCH, putting a follow-up question to that posed by Sir Michael Wood, said that requesting an advisory opinion might offer a way of circumventing difficulties in settling a dispute between the United Nations and a State concerning privileges and immunities. He wondered if any consideration had been given to reviving

the proposal to empower the Secretary-General to request such opinions more broadly with regard to issues concerning the rights and obligations of the United Nations. He noted that, in the past, that proposal had often met with resistance due to a fear that an overly proactive Secretary-General could request an advisory opinion on any issue of international law. However, that procedure might offer a means of strengthening the role of the Organization.

42. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that the number of submissions to the Commission on the Limits of the Continental Shelf was expected to rise further as States became increasingly aware of the huge economic and geostrategic interest of the continental platform. Serious consideration would therefore soon need to be given by Member States in the General Assembly to whether the current institutional arrangements were adequate to meet the expected increase in the Commission's workload, particularly bearing in mind that the Commission met for a limited period only each year and under conditions that were less than optimal.

43. As to the possibility of the Secretary-General being provided with new powers to request advisory opinions, he did not recall any particular recent discussion in New York in that connection and considered it unlikely that any such development would occur in the foreseeable future. In his view, advisory opinions should in general be used sparingly as a means of clarifying international law. In a certain sense, some of the responsibility in that regard might be considered to fall on him and his Office. Although he himself did not provide formal legal opinions very often, consideration should perhaps be given to issuing such opinions on specific points of concern more frequently, since, although non-binding, a formal legal opinion by the United Nations Legal Counsel would hopefully carry some weight.

44. Mr. RUDA SANTOLARIA said that he would be interested to hear the United Nations Legal Counsel's thoughts on the role of clear legal responses in terms of meeting the very serious threats to international peace and security posed by, in particular, terrorism and violent extremism.

45. Ms. ORAL said that, in the light of recent developments, including the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and the June 2017 United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development, she would like to know whether the United Nations Legal Counsel foresaw that oceans issues would continue to gain increasing importance and, if so, whether the Division for Ocean Affairs and the Law of the Sea, in particular, would have available to it the resources to respond to future challenges.

46. Mr. de SERPA SOARES (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that terrorism, together with climate change and

²⁹⁶ Agreement on the resolution of the conflict in the Republic of South Sudan, signed at Addis Ababa on 17 August 2015, S/2015/654, annex.

migration, was indeed one of the most important challenges on the multilateral agenda. Some of the most interesting legal work relating to the fight against terrorism currently taking place in the Office of Legal Affairs concerned discussions regarding the nature of peacekeeping mandates, in particular their robustness and how far such mandates could go in support of antiterrorism activities. In particular, he had in mind the discussions concerning MINUSMA and support for the French forces of Operation Barkhane fighting terrorism in the north of Mali. As those discussions were ongoing, it was not yet clear what the final outcome would be.

47. Regarding oceans issues, he, as focal point of UN-Oceans, and his Office had been very involved in the June 2017 Operation Barkhane and the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. In his view, oceans-related matters and Sustainable Development Goal 14, in particular, would have more prominence in coming years, since, among other things, discussions in those regards were a way of keeping the closely related issue of climate change high on the multilateral agenda. In terms of resources, the Division for Ocean Affairs and the Law of the Sea was adequately funded at the current time; however, if new mandates were attributed to the Office of Legal Affairs, he would address the question of resources with Member States in an open manner.

48. The CHAIRPERSON thanked the United Nations Legal Counsel for his statement and interesting and detailed replies to members' questions.

Cooperation with other bodies

[Agenda item 11]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

49. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Kaukoranta, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Requena, Head of the Public International Law Division and Treaty Office of the Council of Europe Directorate of Legal Advice and Public International Law and Secretary to CAHDI, and invited them to address the Commission.

50. Ms. KAUKORANTA (Chairperson of the Committee of Legal Advisers on Public International Law) said that she welcomed the opportunity that was offered every year to CAHDI to present its work to the Commission. CAHDI, which was composed of the legal advisers of the ministries of foreign affairs of Council of Europe member States, as well as representatives of observer States and international organizations, held biannual meetings with a view to, among other things, discussing topical issues and promoting exchanges of national experiences and practices. In addition, CAHDI played an important role in fostering cooperation between the Council of Europe and the United Nations through, for example, meetings with the United Nations Legal Counsel and the President of the International Court of Justice.

51. An important initiative in which CAHDI had recently been involved related to the draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe. Those clauses had been prepared by the Treaty Office of the Council of Europe in order to update the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, as adopted by the Committee of Ministers of the Council of Europe in 1980, in order to take account of developments that had occurred during the previous four decades within the treaty-making process at the Council of Europe. Since 1980, treaties concluded under the auspices of the Council of Europe had become more varied not only with regard to the subject matters addressed, but also in relation to their ever wider reach beyond Europe. That global reach and transnational character of the recent Council of Europe conventions and protocols had led to an increased participation of non-member States, the European Union and international organizations. Currently, of the 221 treaties concluded within the Council of Europe, 152 were open to non-member States upon invitation by the Committee of Ministers. Since 2012, the Treaty Office had received 96 requests from non-member States to become party to Council of Europe conventions. Similarly, given a significant increase in the use of additional and amending protocols to complement or modernize existing conventions, it had become necessary to prepare specific clauses for those instruments as well. It had been felt, however, that specific model final clauses for instruments entitled "agreements" were no longer needed, as no such instruments had been drafted under the auspices of the Council of Europe since 1996. As had been the case in 1980, the draft prepared by the Treaty Office had been submitted to CAHDI, which, thanks to the invaluable experience of its members, had helped ensure that the revised version currently before the Committee of Ministers for adoption took into account the latest developments of treaty law.

52. In its capacity as the European Observatory of Reservations to International Treaties, CAHDI examined reservations and declarations subject to objection, thereby promoting and monitoring States' adherence to the rules of public international law in that field. CAHDI examined the reservations and declarations made both to Council of Europe conventions and to conventions deposited with the Secretary-General of the United Nations. In carrying out that examination, CAHDI made use of the reservations dialogue, which allowed States that had formulated a problematic reservation to have an opportunity to clarify its scope and effect and, if necessary, tone it down or withdraw it, while enabling other delegations to understand the rationale behind reservations before formally objecting to them. In that connection, CAHDI had recently noted a revival of a trend of States subordinating the application of the provisions of a convention to their domestic law; of course, such reservations were inadmissible or objectionable under international law due to reasons of legal uncertainty and also because they were contrary to the object and purpose of the treaties concerned. At its recent meetings, CAHDI had discussed the use of reservations and declarations to international treaties for highlighting the non-recognition of a State by another or because of a territorial dispute.

53. An example of the contribution of CAHDI to the development of international law was the interesting discussion currently taking place within the Committee on the question of the settlement of disputes of a private character to which an international organization was a party. The immunity of international organizations in many cases prevented individuals who had suffered harm from conduct of an international organization from bringing a successful claim before a domestic court. That immunity had been increasingly challenged on an alleged incompatibility of upholding immunity with the right of access to court. While the topic was of practical importance for the Council of Europe itself, it obviously went beyond the European regional framework and was a good example of the pioneer role of CAHDI, which acted as a testing ground for subjects which currently were more difficult to discuss at a more universal level because of the greater number of actors involved. CAHDI took full advantage of its ability to focus pragmatically on issues that could not at present be addressed in the same way within other international organizations.

54. Turning to the contribution of CAHDI to the work of the International Law Commission, she said that among the many items on the CAHDI agenda that related to the topics considered by the Commission was the Declaration on Jurisdictional Immunities of State Owned Cultural Property. The Declaration, which had been developed within the framework of CAHDI, was a non-legally binding document that expressed a common understanding of *opinio juris* concerning the fundamental rule that a certain kind of State property, namely cultural property on exhibition, enjoyed immunity from any measure of constraint, such as attachment, arrest or execution, in another State. By signing the Declaration, a State recognized the customary nature of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had not yet entered into force. In January 2017, as part of efforts to raise awareness of the Declaration beyond the boundaries of the Council of Europe, the Permanent Representatives of Austria and Czechia to the United Nations had transmitted to the Secretary-General of the United Nations a letter requesting that the Declaration be circulated among Member States for information purposes under the agenda item “The rule of law at the national and international levels” of the General Assembly.

55. In conclusion, she said that the International Law Commission and CAHDI shared a common goal of promoting the role of public international law in international relations. CAHDI would continue its work on, for instance, issues relating to treaty law, immunities, sanctions, case law relating to public international law, peaceful settlement of disputes and international criminal justice. While doing so, it would always welcome any input from or interaction with the Commission.

56. Ms. REQUENA (Head of the Public International Law Division and Treaty Office of the Council of Europe Directorate of Legal Advice and Public International Law and Secretary to the Committee of Legal Advisers on Public International Law) said that the main priorities of the current Czech chairpersonship of the Committee of Ministers related to the protection of human rights of persons belonging to vulnerable or disadvantaged groups

and to promoting gender equality. In that connection, particular emphasis was placed on the implementation of the recommendations of the European Commission against Racism and Intolerance and the implementation of the Framework Convention for the Protection of National Minorities and of the European Charter for Regional or Minority Languages. A further important objective of the Czech chairpersonship concerned the implementation of the recently adopted Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe for the period from 2017 to 2019.²⁹⁷

57. Turning to recent developments concerning treaty law within the Council of Europe, in particular declarations of derogation under article 15 of the European Convention on Human Rights, she said that the Governments of France, Turkey and Ukraine had extended the declarations of a state of emergency in their respective countries allowing them to derogate from certain obligations under the Convention. With regard to France, on 21 December 2016, the Secretary General of the Council of Europe had received a notification indicating that the state of emergency had been extended for a further period of six months until 15 July 2017. In relation to Turkey, the declaration of derogation under article 15 of the Convention had been transmitted to the Secretary General in July 2016 following the attempted *coup d'état* of 15 July 2016. Further declarations concerning the extension of the state of emergency had been transmitted to the Council of Europe in October 2016 and January 2017, and the declaration of derogation from certain rights had currently been prolonged until 18 July 2017. In the meantime, the first cases concerning measures taken under the state of emergency had reached the European Court of Human Rights. Applications in four cases had been declared inadmissible for failure to exhaust all domestic remedies, and so the Court had not examined the complaints on the merits. More than 11,000 applications were currently pending before the Court concerning cases arising from the failed coup attempt.

58. As a result of the close cooperation between the Council of Europe and the Turkish authorities, a national commission had been established to investigate alleged human rights violations related to, *inter alia*, dismissals, school closures and the confiscation of private property.

59. Other Council of Europe bodies had scrutinized the measures adopted by Turkey during the state of emergency. In its Opinion on Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016²⁹⁸ and its Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media,²⁹⁹ the European Commission for Democracy through Law (Venice Commission) had acknowledged the right of a democratically elected Government to defend itself, including by resorting to extraordinary measures. It had also emphasized, however, that

²⁹⁷ Document CM(2017)54-final, adopted at Nicosia on 19 May 2017.

²⁹⁸ Opinion No. 865/2016, adopted by the Venice Commission at its 109th Plenary Session (Venice, 9–10 December 2016) [CDL-AD (2016)037].

²⁹⁹ Opinion No. 872/2016, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10–11 March 2017) [CDL-AD (2017)007].

measures such as the mass liquidation of media outlets on the basis of emergency decree laws, without individualized decisions, and without the possibility of timely judicial review, were unacceptable under international human rights law.

60. On 9 June 2015, the Secretary General of the Council of Europe had been notified by the Government of Ukraine of its decision to have recourse to article 15 of the European Convention on Human Rights. Since then, the Government had, on three occasions, transmitted an updated list of localities in the Donetsk and Luhansk regions that were under the total or partial control of the Government and were covered by the derogation, which remained in place.

61. With respect to the supervision of the execution of judgments of the European Court of Human Rights, in the case of *Ilgar Mammadov v. Azerbaijan*, the applicant remained in detention despite the fact that the European Court of Human Rights had found that his deprivation of liberty violated not only article 5 but also article 18 of the European Convention on Human Rights. Following a secretariat mission in January 2017 under article 52 of the Convention, the Government of Azerbaijan had submitted an action plan to the Committee of Ministers that included the adoption of legislative measures to execute the Court's judgment in that case. However, as the Committee of Ministers had underlined in December 2016, the continuing arbitrary detention of Ilgar Mammadov constituted a flagrant breach of obligations under article 46, paragraph 1, of the Convention, and the Committee was considering referring to the Court the question of whether Azerbaijan had failed to fulfil its obligation to execute the Court's judgments.

62. Regarding recent developments concerning other Council of Europe conventions, the revised Council of Europe Convention on Cinematographic Co-production, which had been opened for signature on 30 January 2017 in Rotterdam, the Netherlands, would enter into force for those States that had already ratified it on 1 October 2017. The Council of Europe Convention on Offences relating to Cultural Property had been opened for signature on 19 May 2017 in Nicosia and had, on that occasion, been signed by six States, including Mexico, a non-member. The Convention was aimed at preventing and combating the illicit trafficking and destruction of cultural property, in the framework of the Council of Europe's action to fight terrorism and organized crime. The Convention, which was the only international treaty dealing specifically with the criminalization of the illicit trafficking of cultural property, established a number of criminal offences, including theft, unlawful excavation, importation and exportation, illegal acquisition and placing on the market. The Convention would enter into force once it had been ratified by five States, including at least three member States of the Council of Europe. The Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was the subject of ongoing negotiations, and the possibility of it entering into force by tacit acceptance was being explored.

63. Mr. VÁZQUEZ-BERMÚDEZ, noting that the Declaration on Jurisdictional Immunities of State Owned

Cultural Property was viewed as expressing a common understanding, within the framework of the Council of Europe, of relevant *opinio juris*, asked how CAHDI intended to go about achieving a more global understanding of such *opinio juris*, including within the United Nations system.

64. He said that he wished to know the extent to which the Council of Europe Convention on Offences relating to Cultural Property had helped to overcome the limitations of similar instruments, most notably the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It was typically difficult, for example, to demand the restitution of cultural property that had been exported illicitly. Domestic courts tended to afford protection to holders in good faith, and the burden of proof fell on the claimant, but it was hard to prove that a clandestine excavation had taken place. He would appreciate information on how those challenges had been addressed in the negotiations and final text of the Convention.

65. Ms. KAUKORANTA (Chairperson of the Committee of Legal Advisers on Public International Law) said that the initiators of the Declaration on Jurisdictional Immunities of State Owned Cultural Property had already taken steps to have the Declaration circulated among United Nations Member States for information purposes. The Council of Europe would work to raise the global profile of the Declaration and ensure the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had not yet received the required number of ratifications.

66. Ms. REQUENA (Head of the Public International Law Division and Treaty Office of the Council of Europe Directorate of Legal Advice and Public International Law and Secretary to the Committee of Legal Advisers on Public International Law) said that the Declaration had been signed by a non-member State of the Council of Europe, namely Belarus.

67. The Council of Europe Convention on Offences relating to Cultural Property had been developed in response to the use, in some countries, of the mass destruction of cultural property as a weapon of war. The Convention covered theft and sought to overcome some of the limitations of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, though she could not claim that it represented a panacea in that regard. The fact that the burden of proof in restitution cases fell on the claimant would continue to pose a significant obstacle. She would be happy to provide the Commission with a detailed report on the difficulties encountered during the negotiation of the Convention.

68. Mr. ŠTURMA asked whether CAHDI, as the European Observatory of Reservations to International Treaties, had envisaged the possibility of examining the quality of derogations under article 15 of the European Convention on Human Rights.

69. Mr. PARK, noting that the European Convention on Human Rights was not open to non-member States of the

Council of Europe, asked what criteria were used when deciding which Council of Europe conventions should be open to non-members.

70. Ms. LEHTO said that she would be grateful for information about the extent to which CAHDI referred to the Commission's 2011 Guide to Practice on Reservations to Treaties³⁰⁰ and about the ratification status of the Convention on Cybercrime.

71. Mr. HASSOUNA, noting that the issue of sanctions had been placed on the agenda of CAHDI, said that he wished to know what aspects of the issue would be discussed. He would also appreciate details of whether and, if so, how CAHDI planned to strengthen its relationship with other regional bodies concerned with international law, such as the Inter-American Juridical Committee and the African Union Commission on International Law.

72. Ms. KAUKORANTA (Chairperson of the Committee of Legal Advisers on Public International Law) said that the Commission's Guide to Practice on Reservations to Treaties had provided a valuable contribution to the work of CAHDI, and that she personally had used the Guide when faced with questions of interpretation. The reservations dialogue offered an opportunity for member States of the Council of Europe to discuss outstanding reservations during meetings of CAHDI. If a reservation was formulated by a non-member State, an attempt was made to obtain information from that State prior to the subsequent meeting of CAHDI, provided that was possible within the time limit for objections. It was for the European Court of Human Rights to examine the quality of derogations under article 15 of the European Convention on Human Rights, and she did not foresee any institutional deliberations on the matter within CAHDI. The issue of sanctions had been on the agenda of CAHDI for a long time and would continue to be discussed, particularly in the light of the case law of the European Court of Human Rights and the European Court of Justice.

73. Ms. REQUENA (Head of the Public International Law Division and Treaty Office of the Council of Europe Directorate of Legal Advice and Public International Law and Secretary to the Committee of Legal Advisers on Public International Law) said that, in terms of opening Council of Europe conventions to non-member States, the European Convention on Human Rights was a very specific case. The general policy with regard to all other conventions, especially over the previous two decades, had been to encourage the accession of non-member States. Although she did not have comprehensive information on the ratification status of the Convention on Cybercrime to hand, she wished to inform the Commission that Chile, Senegal and Tonga were the States that had most recently acceded to the Convention, with Senegal having also acceded to the Additional Protocol thereto. The previous day, the Committee of Ministers had agreed to explore the possibility of Nigeria acceding to the Convention. In order for CAHDI to establish

formal relations with other regional bodies concerned with international law, a formal request for observer status had to be submitted to the Council of Europe.

The meeting rose at 1.05 p.m.

3372nd MEETING

Tuesday, 11 July 2017, at 10.05 a.m.

Chairperson: Mr. Eduardo VALENCIA-OSPINA
(Vice-Chairperson)

Present: Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Jus cogens (continued) (A/CN.4/703, Part II, sect. C, A/CN.4/706)*

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPporteur (continued)*

1. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on *jus cogens* (A/CN.4/706).

2. Mr. KOLODKIN said that article 53 of the 1969 Vienna Convention was undoubtedly the starting point for examining the whole legal regime of *jus cogens*. That regime included the notion of peremptory norms, their effects within the scope of the law of treaties, the law of responsibility in the context of jurisdiction, and so on. If one was to speak of the definition or notion of the peremptory norm, article 53 merely served as a framework, and not a starting point, for considering the question of how to define peremptory norms. Draft conclusion 1³⁰¹ restricted the scope of the topic to peremptory norms of general international law, and, as had been stated in the interim report of the Drafting Committee the previous year, that was without prejudice to the possibility of the existence of regional *jus cogens*. Mr. Nolte had referred to the possible existence not only of regional *jus cogens* but also of "particular" peremptory norms. It was to be hoped that the Special Rapporteur would pursue that issue. The fact that the Commission was dealing only with peremptory norms of general international law without prejudice to the possible existence of regional or particular norms of *jus cogens* should be made clear in the draft conclusions. In that regard, he supported the Special Rapporteur's suggestion to change the name of the topic.

³⁰⁰ The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq.* See also General Assembly resolution 68/111 of 16 December 2013, annex.

* Resumed from the 3370th meeting.

³⁰¹ For draft conclusion 1 proposed by the Special Rapporteur in his first report, see *Yearbook ... 2016*, vol. II (Part One), document A/CN.4/693, para. 74.