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Held at the Palais des Nations, Geneva, on Thursday, 5 July 2018, at 3 p.m.

Contents

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	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
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Commemoration of the seventieth anniversary of the Commission (agenda item 11) (*continued*)

Panel 2: The working methods of the Commission

The Chair invited Mr. Gajić to introduce and moderate the panel discussion on the working methods of the Commission.

Mr. Gajić (Ministry of Foreign Affairs, Serbia), moderator, said that the International Court of Justice and the International Law Commission, the former being the principal judicial organ of the United Nations and the latter its principal institution for codification and progressive development, were indispensable institutions in the field of international public law. But it was the Commission whose reputation and authority appeared indisputable. Indeed, the impact of its work could be observed in academia, foreign policy and international justice. Although the Commission's members had shown themselves capable of dealing with the most important and sensitive issues of international law, its reputation and authority were due in large part to its working methods.

In that context, he invited the three panellists for panel discussion 2 to address the theme of the Commission's working methods.

Ms. Azaria (University College London), panellist, said that, in the twenty-first century, the Commission had increasingly moved away from a paradigm of "codification by convention" towards the preparation of instruments that were intended to remain non-binding. Various factors might encourage States and national and international courts and tribunals to rely on such non-binding outputs. They included the Commission's geographically representative membership, the fact that it was institutionally required to interact with Governments and the high quality of its work, which was inextricably linked with its working methods. However, numerous challenges had emerged since the Commission's establishment, including an increase in the number of States, the enlargement of the Commission's membership, the conclusion of a larger number of multilateral treaties, a proliferation of international courts and tribunals and the growing retreat of some States from international law, especially from multilateralism. Those challenges had increased the need for further reflection on the Commission's working methods.

Although a distinction was made in the Statute of the International Law Commission between progressive development and codification, the Commission had in practice tended not to make a distinction between those two functions in its working methods. Neither had the Commission tailored its procedures to the expected outcome of its work on a given topic or the nature of the rules with which that topic primarily dealt. The Commission had instead made such distinctions on a purely *ad hoc* basis. The Commission had a practice of not classifying its output for a given topic as progressive development or codification. It sometimes indicated in the introduction to its commentaries that there were instances of both in a topic. Occasionally, it clarified in the commentary to a specific provision that it represented *lex lata* or *lex ferenda*. States sometimes expressed concern that international courts and tribunals attached excessive authority to the Commission's pronouncements by assuming that they all reflected existing law. Such criticisms might become more trenchant in an era in which codification through non-binding instruments was becoming the dominant paradigm. The Commission might thus be encouraged to demonstrate a consistent and transparent adherence to methodology in relation to its pronouncements.

In its commentary to draft conclusion 14 of the draft conclusions on identification of customary international law, the Commission stated that assessing the authority of a given work of an international expert body was essential as part of the process of identifying subsidiary means for the determination of rules of law. According to the Commission, the value of each output had to be carefully assessed in the light of the mandate and expertise of the body concerned, the "care and objectivity" with which it worked on a particular issue, the support that a particular output enjoyed within the body and the reception of the output by States. The Commission's use of the expression "care and objectivity" corresponded to Thomas Franck's use of the word "adherence". Franck argued that rules that were

legitimate were more likely to be complied with, and one of the factors that made rules legitimate was their adherence to secondary rules. The Commission's consistent "adherence" to a methodology for identifying and interpreting rules of international law operated as a restraint over its discretion by anchoring its work in State practice and international jurisprudence.

The Commission's recent work on the identification and interpretation of international law, including in the context of the identification of customary international law and peremptory norms of general international law (*jus cogens*), could serve as an invaluable guide for the Commission itself. Indeed, the secondary rules that the Commission had developed for those topics should be used to guide its own work. Progressive development also required "care and objectivity", and the Commission ought to follow a consistent method in that regard. The Commission's commentaries, in which it explained a draft text with appropriate references to practice, judicial decisions and doctrine, provided evidence of the "care and objectivity" of its reasoning. In addition, the commentaries had a major legal significance, as international courts and tribunals often relied on them.

As at 30 April 2018, the International Court of Justice had expressly relied on the Commission's work in a total of 23 cases. In those 23 cases, the Court had relied on the Commission's work in relation to a total of 35 separate legal questions. It had relied on the Commission's commentaries in 14 of those 23 cases. The Commission's commentaries provided the context in which its draft provisions were to be interpreted, and that context was important in practice. In two cases brought in response to separate applications filed by the Marshall Islands against India and the United Kingdom of Great Britain and Northern Ireland, which had been heard as cases entitled *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, India and the United Kingdom had objected to the Court's jurisdiction by arguing that article 43 of the articles on responsibility of States for internationally wrongful acts required the injured State to give notice of its claim to the State allegedly responsible. The Court had rejected that argument on the basis of an interpretation of article 43 informed by the Commission's commentary to article 44.

The Commission's usual working method was to hold a discussion of the special rapporteur's report in the plenary in order to decide which proposals to refer to the Drafting Committee. Once the Drafting Committee had adopted the draft provisions, they were submitted to the plenary for adoption on first reading along with the commentaries. The same process was followed for their adoption on second reading, although the comments of Governments were also taken into account at that stage. The reports of special rapporteurs were the principal tool for the development of the Commission's work and, alongside comments in the plenary and discussions in the Drafting Committee, were a springboard for the preparation of commentaries. Special rapporteurs and the quality of their reports were critical to the progress of a topic.

Owing to its function, informality and composition, the Drafting Committee made an extraordinary contribution. Its negotiations were painstakingly detailed and touched on issues of technical drafting and legal substance, *inter alia*. However, the Drafting Committee's workload prevented it from producing commentaries. The usual practice was for the special rapporteur to prepare and revise the commentaries on a given set of draft provisions once the Drafting Committee had provisionally adopted them. The Commission adopted its commentaries in the plenary, usually towards the end of the session, but the fact that they were considered so late in the session introduced an element of time pressure. Commission members had ample time in which to consider commentaries in detail before they were adopted on second reading, but international courts and tribunals had also relied on draft articles and commentaries adopted on first reading. There might be some merit in decreasing the number of topics for which draft provisions were referred to the Drafting Committee, but she did not envisage the Commission making such a concession in the immediate future.

In recent years, the draft provisions for some topics had been kept in the Drafting Committee for some time. After a few years, once the Drafting Committee had adopted those provisions, the special rapporteur prepared the commentaries with the assistance of a

working group. The texts and commentaries were then all adopted in the plenary on first reading. The Commission seemed to be taking that approach for the topic of peremptory norms of general international law (*jus cogens*). It was worth considering the implications of such an approach with a focus on the commentaries.

First, working groups had previously assisted in the preparation of commentaries. Such working groups did not negotiate or prepare commentaries, but instead assisted the special rapporteur in the light of the enormous volume of material to be assessed, which gave a larger number of Commission members a degree of ownership over the commentaries and thereby enabled consensus and saved time in the plenary. It might be worth giving consideration to the possibility of replicating that practice in the future.

Secondly, it had been suggested that it might be more efficient to prepare the commentaries once the Drafting Committee had adopted all the draft provisions for a particular topic. However, it might be easier to secure agreement on a given draft provision if the commentaries to other draft provisions for the same topic were already available. In addition, if the commentaries were not considered until the end of the Commission's consideration of a topic, their preparation would be too far removed from the work of the Drafting Committee, and certain nuances might be lost, particularly if a new special rapporteur had been appointed.

Thirdly, the statements of the Chair of the Drafting Committee had been published since 2012. They included an annex containing the draft provisions that the Drafting Committee had adopted. The publication of such statements had encouraged the Sixth Committee to read and react to the draft provisions, which allowed the Drafting Committee and the special rapporteur to make further changes before the commentaries were adopted on first reading and therefore saved time. However, the manner in which the Commission made reference in its reports to texts that had been provisionally adopted by the Drafting Committee was currently inconsistent. It was also unclear whether States in the Sixth Committee were commenting on the Drafting Committee's output or the special rapporteur's report. If they commented on the latter, they could be commenting on proposals that had already been revised by the Drafting Committee; if they commented on the former without reference to the commentaries, they would not be seeing the Drafting Committee's draft provisions in context.

Lastly, if the Commission adopted the commentaries on first reading, States were presented with a large quantity of material and usually had little over a year in which to submit written comments, which would be challenging even for a State that had a large legal staff in its ministry of foreign affairs.

In that context, the Commission should reflect on the role, preparation and adoption of commentaries as a matter of priority, given their importance in judicial practice and for the Commission itself. It was important to facilitate a meaningful review of the commentaries in the plenary. To that end, Commission members needed sufficient time before the plenary in which to consider the commentaries and sufficient time in the plenary itself in which to discuss them specifically. One solution might be to decrease the time allocated to statements prior to the referral of proposals to the Drafting Committee.

With regard to decision-making, she noted that, in the early years of the Commission, decisions had often been taken by vote. For example, the 1966 draft articles on the law of treaties, which constituted one of the Commission's most widely celebrated achievements, had been adopted by vote. However, since the 1970s, it had relied largely on consensus and had only exceptionally resorted to voting. The most recent example was the 2017 vote on draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction.

The Commission's outputs were not binding *per se*. Their influence could be attributed to a certain "perceived authority" that was due in part to the Commission's consistent adherence to methodology and in part to the fact that its decisions reflected the common understanding of experts representing the majority of the world's legal systems. That common understanding was especially important when it came to identifying existing rules. In 1996, the Commission had recommended that, while it should make every effort to achieve consensus, a vote might have to be taken, perhaps after a "cooling-off" period. She

agreed with the Commission that, if a disagreement persisted after such a cooling-off period, a vote might be a better indication of the Commission's view than a "false consensus".

In conclusion, the Commission's working methods should be expanded and enhanced. The Commission's seventieth anniversary came at a challenging time for international law, and it was possible that the role of the Commission itself might be called into question. The quality of the Commission's outputs, which reflected the common understanding of experts, should make it possible for States and international courts and tribunals to continue to rely on its work. Furthermore, that quality would enable the Commission to fulfil a real and long-term vision: to convince States to continue to use international law as a means of regulating their international affairs.

Mr. Kamto (University of Yaoundé II), panellist, said that the matter of the Commission's working methods had long been an area of concern. In recent decades, the General Assembly had repeatedly emphasized that the Commission should reconsider the way in which it selected topics and the methods and procedures that it used to conduct its work. On the occasion of the Commission's seventieth anniversary, it was worth revisiting a number of unresolved questions in that regard.

Draft articles were the only product of the Commission's work envisaged in article 20 of its Statute, but new types of product, such as draft guidelines, draft conclusions and the reports of study groups, had since been introduced. The Commission would benefit from clarifying the distinction between those various products and adapting its working methods to whichever of them it sought to obtain from its work on a given topic. To that end, the product sought should be selected at an early stage in the process, ideally as part of the discussion of the topic in the Working Group on the Long-term Programme of Work and in any case no later than in the special rapporteur's preliminary or first report. The product that the Commission sought to obtain from its work on a given topic should be discussed in the plenary, such that the Sixth Committee was in a position to approve the Commission's choice of a given topic and the expected outcome of its work on that topic at the same time.

The distinctions between the various products of the Commission's work had given rise to divergent views among its members and in the Sixth Committee. While the reports of the Commission's study groups clearly belonged to a different kind of exercise, one that was closer to academic research than to the progressive development and codification of international law, the specificity of its draft guidelines and draft conclusions was more difficult to isolate.

From a theoretical perspective, the distinction between draft guidelines and draft conclusions was unclear. It was tempting to presume that, as they were not draft articles, draft guidelines and draft conclusions were both intended to offer guidance to States. However, if that was the case, why were two different terms used to describe them? Was there a difference in the respective levels of authority that draft guidelines and draft conclusions enjoyed?

From a methodological perspective, the same working methods were employed to produce draft guidelines and draft conclusions. Regardless of whether draft guidelines or draft conclusions were the expected product of the Commission's work on a particular topic, the special rapporteur for that topic was required to produce successive reports in accordance with the same requirements of quality and with the same regard to treaties, State practice and international jurisprudence. However, the Commission had yet to establish precise and objective criteria for determining whether draft guidelines or draft conclusions should be the product of its work on a given topic. That ambiguity created the impression that there existed a hierarchy of importance among topics. For that reason, the Commission should clarify the situation.

From a legal perspective, it was difficult to distinguish between draft guidelines and draft conclusions in terms of their respective levels of authority. Did draft guidelines constitute mere legal advice to be taken into account at the discretion of States? The Commission had discussed that question in the context of its work on the draft guidelines constituting the Guide to Practice on Reservations to Treaties, but it had not been resolved.

In theoretical terms, experience seemed to suggest that draft articles differed from draft guidelines and draft conclusions in that they were the consummate expression of the current state of international law on a given topic. They would include, on the one hand, a crystallization of the rules of customary international law through codification and, on the other, the rules that the Commission considered to be emerging. The Commission thus identified law, specifically customary international law, and, owing to the power that it had to enunciate rules, was also a quasi-legislator. Although it had not been made explicit that draft guidelines and draft conclusions were the products of a different exercise, member States and users of the Commission's work perceived them as such.

One possible distinction was that draft articles were an expression of *lex lata*, whereas draft guidelines and draft conclusions were related to *lex ferenda*. Although that distinction was not well founded, as draft articles also contained *lex ferenda* as part of the progressive development of international law, the term "draft articles" implied a kind of quasi-treaty whose provisions might be binding on States. The fact that international and even national courts referred to the draft articles of the Commission tended to give States the impression that they had a special or *ad hoc* legal status. In the Sixth Committee, States had on occasion expressed serious reservations regarding the Commission's draft articles, but they tended to be more comfortable with its draft guidelines and draft conclusions. That fact doubtless explained the recent trend in the Commission in favour of the production of draft guidelines and draft conclusions. When States wanted to prevent the formulation of international rules on a topic, they demanded that, if the topic was to be considered at all, the outcome of the Commission's work on it should take the form of guidelines, guiding principles or general principles.

The diversity of terms used to describe the products of the Commission's work could be confusing. Judges might not know how to determine the scope of provisions that were intended merely to clarify a particular legal question. Although it might be thought that draft guidelines were more prescriptive than draft conclusions, the use of the term "guidelines" nevertheless implied that their purpose was merely to guide the legal practice of States.

One possible interpretation was that the reports of the Commission's study groups, draft conclusions and even draft guidelines constituted teachings of the most highly qualified publicists within the meaning of article 38 (1) (d) of the Statute of the International Court of Justice. However, the Commission's draft articles could not be placed into that category; they were more than teachings, as, although they were *lex ferenda* from the formal point of view, at the substantive level, they comprised *lex lata* rules as declaratory of customary law. Moreover, regardless of whether the rules contained in the Commission's draft articles were *lex lata* or *lex ferenda*, they enjoyed a high level of authority that was in no way comparable to the teachings of publicists because the Commission's power to enunciate or formulate the law of the community of States was exercised through the General Assembly, of which it was a subsidiary body. It was doubtless for those reasons that various international courts and tribunals, particularly the International Court of Justice, relied on the Commission's work to support their decisions. However, it was not clear that the Court would be able to rely on the Commission's draft guidelines and draft conclusions with the same confidence with which it relied on its draft articles.

He wished to end his statement by noting the important role of the Commission's special rapporteurs and the valuable support that they received from the Codification Division of the Office of Legal Affairs of the Secretariat. The support of the Codification Division was critical to the timely preparation of commentaries. Lastly, he would encourage Commission members from developing countries to play a more prominent role in the Drafting Committee, as it was in the Drafting Committee that the Commission's draft provisions acquired their final form.

Mr. Murase (International Law Commission), panellist, said that he was concerned about the use of the term "conclusions" to describe the final products of the Commission's work. While that term was generally accepted by the Commission and the Sixth Committee, outside of that context it was used to refer to an internal understanding of a group that had conducted a study; the Commission, however, was a normative organ which produced

documents with certain "external effects of normativity". Its final products should be draft articles, as provided for in article 20 of its Statute, with draft guidelines or model rules being possible alternatives. The term "conclusions" should be used only to describe the products of the work of study groups.

Some study groups, such as those on the fragmentation of international law and the most-favoured nation clause, had produced excellent outcomes, but their reports were not translated into other United Nations languages and were given only limited circulation. Furthermore, attendance at study group meetings was not mandatory, no commentaries on their outcomes were developed and their discussions were given limited coverage in the annual reports of the Commission. He would therefore be in favour of special rapporteurs being appointed for any new topics proposed.

In respect of decision-making procedures, he considered that, provided it was preceded by sufficient discussion, voting — which was provided for in the rules of procedures of the General Assembly — was not a bad thing and would not damage the Commission's collegiate solidarity. The result of the previous year's vote on draft article 7 on the immunity of State officials from foreign criminal jurisdiction should be respected and the issue should not be returned to during the first reading. He hoped that the Sixth Committee would respect the result of the Commission's work, whether achieved by consensus or by vote. Unfortunately, there was no consensus on the meaning of "consensus"; it did not mean giving veto power to a small number of members, but it was sometimes used to block the views of the majority. Individual responsibility was avoided in decisions by consensus, whereas voting required each member to decide where they stood on a given subject, which was good for an expert body such as the Commission.

The use of informal working groups for drafting commentaries was also an issue that required some discussion. It was often difficult after a few years to recall why a drafting committee had decided on specific language; commentaries should therefore be discussed each year and adopted along with the draft conclusions before the end of each session. Postponing their adoption deprived the Sixth Committee of the opportunity to comment for many years. Furthermore, there was no record of the work of informal working groups, which raised the question of transparency and could make it difficult to trace the *travaux préparatoires*.

The Commission had largely exhausted the traditional topics for its work and had begun to consider "special regimes" of international law, such as human rights law, environmental law and economic law, areas which had developed rapidly without any coordination with other regimes or with general international law. Although Commission members were not experts on those special regimes, the Commission could nevertheless play an important role in addressing the related topics from the viewpoint of general international law and so avoid its fragmentation. Under article 16 (e) of its Statute, it was authorized to "consult with scientific institutions and individual experts" for the purpose of the progressive development of international law and so should seek to have more contact with outside experts to facilitate its work, as it had done when looking at the topic of transboundary aquifers.

Mr. Gajić (Ministry of Foreign Affairs, Serbia), moderator, invited the participants to pose questions to the panellists.

Mr. Rajput (International Law Commission) said he would be interested to hear Mr. Kamto's views on the distinction between *lex lata* and *lex ferenda*. The general perception outside the Commission seemed to be that its entire product was both; however, each provision was different and should be analysed to assess which term applied. While the Commission and the Sixth Committee seemed to agree on that point, the Commission might endeavour to keep academia better informed on the matter.

Mr. Loko (Director of Legal Affairs (retired), Ministry of Foreign Affairs, Benin) said that he would like to hear Mr. Kamto's opinion on whether, given that some institutions were making increasing use of the Commission's commentaries, the idea that a product of the Commission's work was considered to have more authority than the legal opinion of an eminent lawyer meant that a commentary in fact set the doctrinal approach of an eminent lawyer either against or on an equal footing with that of the Commission.

Mr. Hmoud (International Law Commission) said that he would like to know what Ms. Azaria's opinion was on the extent to which the Commission's views were considered authoritative by national courts and the weight accorded to its documents.

Mr. Tomuschat (former member of the International Law Commission) said that experience had shown that special rapporteurs benefited from any support they received from networks and groups that they could consult. It was heartening to see that the International Law Commission had learned from the mistakes of the past, so that special rapporteurs were now able to take the right direction from the outset of their work.

Ms. Gueldich (University of Carthage, Tunis) said that she would like to hear Mr. Murase's opinion on how the Commission could expand its cooperation with, for instance, other international and regional bodies, to take account of economic, sociological and technical data in its work on codification of international law.

Mr. Alabrune (Ministry of Foreign Affairs, France), referring to the Commission's capacity to draw on all sources of legal doctrine and jurisprudence, said that he would welcome a discussion on how special rapporteurs could be helped to make best use of available sources.

Mr. Zhang (participant, International Law Seminar) said that he would like to know to what extent the opinions of Governments, who were the Commission's clients, were taken into account in its decision-making procedure, in light of the statement that its reports had not been directly implemented by Governments. It had also been suggested that the Commission had not adequately addressed new topics. Might that be related to some aspect of its decision-making procedure, such as the consensus rule or procedural delays, and could it be an argument for reform of the procedure?

Ms. Azaria (University College London), panellist, said, in response to Mr. Hmoud's question, that she had found from her comprehensive study that the International Court of Justice, when making pronouncements based exclusively on the Commission's commentaries, gave them the same weight as it did to draft articles. She had not carried out any detailed study of the use of the commentaries by national courts, but the question to consider was whether national judges were aware that the commentaries set the context for their interpretation of the draft provisions adopted by the Commission.

Responding to Mr. Murase's statement, she said she had not intended to suggest that voting was a poor method of decision-making, but rather that there was a need for balance and the formation of consensus as far as possible, without allowing a gridlock to occur. It was important that the method used should accord authority to the output and that all groups, including minorities, should feel that they had benefited from it.

Mr. Kamto (University of Yaoundé II), panellist, replying to Mr. Rajput, said that all the Commission's work on draft articles was *lex ferenda* because it had not been formally adopted by States in the form of conventions. However, some provisions were declaratory and could be considered as codification of customary law, which was binding even if it was not set out in a convention. National courts could thus make use of the Commission's work even where no instrument had been formally adopted. As far as the authority of commentaries was concerned, it was not important that individual members of the Commission had developed them; the important thing was that they had been adopted by the Commission as a whole. As far as he knew, no other body involved in codification was as strict in its methods of work as the Commission. As to how different traditions were taken into account in its work, it should be remembered that the members were elected taking the legal traditions from which they came and the languages they spoke into account. The Commission worked in the service of Member States' Governments and could not engage in politics; it was up to the Governments to decide what to do with the products of its work.

Mr. Murase (International Law Commission), panellist, said that it was important for special rapporteurs to be able to draw on a network of jurists around them and at the international level when working on their reports. The support received from international organizations was also extremely useful. In his work as Special Rapporteur for the topic

"Protection of the atmosphere", he had been able, with their support, to organize dialogue sessions for scientists working in that field and members of the Commission.

Panel 3: The function of the Commission: How much identifying existing law, how much proposing new law?

Ms. Aziz (Attorney-General's Chambers, Singapore), moderator, said that the Charter of the United Nations and the Statute of the International Law Commission mentioned both "the progressive development of international law" and "its codification", for which several procedural steps had originally been specified. However, the two concepts had been defined in article 15 of the Statute only "for convenience" and, by 1996, the Commission had considered that it was difficult, if not impossible, to draw a distinction between them in practice. Nevertheless, that distinction continued to preoccupy international lawyers.

Mr. Chen (Peking University), panellist, said that the idea of codification, which was quite recent, had grown out of the codification activities of the League of Nations and had been institutionalized with the establishment of the Commission in 1947, which had formally introduced the distinction between "progressive development" and "codification". One view of codification had been as the registration of unwritten rules of law, "a scientific and not a political task" that should be entrusted to a group of legal experts. Given that codification was seen as the restatement of existing law, presenting it in the form of a draft treaty was a very narrow interpretation. Another view saw codification more broadly as international legislation, with international conventions as its most prominent form. The distinction imposed many limitations on the work of the Commission, with codification based on State practice and especially on progressive development, its outcome being a normative product.

Many changes had occurred in recent years, firstly with the increasing emphasis on progressive development, when the Commission openly recognized the absence of any norms or rules of customary international law, as, for instance, in its work on the exclusion of aliens or on the articles on the responsibility of international organizations. In the case of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the commentary recognized that the principles were intended to contribute to the process of development of international law in the field; that demonstrated that the Commission now felt more at ease with progressive development than with codification.

The second development had been the increasing formalization of principles and abstract rules, with some of the Commission's projects presenting a very general description of a subject rather than setting out specific rights and obligations. There had also been a change in the understanding of the underlying philosophy of codification. Originally, it had emerged in response to the problem of achieving international peace, based on the idea that disputes should be adjudicated by international adjudicatory bodies. In a rule-based notion of international law, rules were considered to be objective and their meanings ascertainable. All international relations were subject to the rule of law. However, codification was also a State-centred approach, with a strong commitment to legal formalism. At the same time, there had been a rise in "soft law", which was sometimes difficult to distinguish from hard law. Given that the latter was developed for the purpose of adjudication, it was clear that there had been a movement beyond the traditional understanding of international law.

The third aspect was the changing form of the Commission's products. It was widely considered that codification, culminating in an international convention, had become the exception rather than the rule in its work. Increasingly, the products of its work had become more flexible and included model rules, draft statutes, guiding or draft principles and conclusions. That raised the question of their authority and legitimacy and of whether they were desirable or appropriate. It also begged the question of whether the adoption or endorsement of such documents by the General Assembly gave them normative force. Most of the Commission's work now concerned secondary rules; furthermore, in formulating conceptual and normative frameworks, it had identified paradigmatic and epistemic constraints, which could also be interpreted as an exercise in international legislation. As

had been noted by Judge Keith, of the International Court of Justice, the work of the Commission had played a structural role in the international legal process and strongly influenced the intellectual framework in which international legal problems were addressed, solved and answered.

The Commission's legitimacy had thus grown considerably over recent years, based on the consent of States during the drafting of documents and on the expertise of the Commission members in matters of public international law. It was further strengthened by the references made to its work by other international bodies, including the International Court of Justice. It might thus be asked whether the Commission could be an autonomous lawmaker. It had contributed substantively to the development of hard law in the form of conventions and the restatement of customary international law. It had made a significant contribution to the growing body of documents known as soft law. And the epistemic and paradigmatic effect of the Commission's work had given it legitimacy and acceptance among States. Clearly, therefore, there was much room for autonomous action by the Commission, although it could not be fully autonomous in performing its fundamental role in the codification and development of international law.

Ms. Ziemele (Riga Graduate School of Law), panellist, said that, while the changing landscape of international law made it difficult to draw a distinction between progressive development and codification, there were clearly areas of law where doing so was important. In adapting to that changing landscape, the Commission could turn to several mechanisms, particularly informal ones, to help to preserve its legitimacy and authority.

The international legal system was composed of a growing plurality of actors and so-called "constitutional sites" active at the international, regional and national levels. The Commission's engagement with national courts, including constitutional courts, was vital and had increased dramatically over the previous 20 years. Steps had to be taken to achieve harmony among competing legal sites. Indeed, the only way forward was through mutual respect and recognition, and better engagement between the Commission and those sites. To that end, the Commission needed to have the capacity to survey normative claims made by a variety of actors, not least regional, supranational and constitutional courts. With that came a need for an effective methodology to distinguish between proper normative claims and mere developments of practice. Efforts by the Commission to engage with other actors would serve to democratize and lend greater transparency to its work, and enhance the legitimacy of its work on codification.

The importance of differentiating between progressive development and codification was illustrated by two cases brought before the European Court of Human Rights. In *Al-Adsani v. the United Kingdom*, the Court had delivered a judgment in which it had made very little use of the Commission's existing work in the field of State immunity. However, in *Jones and Others v. the United Kingdom*, the Court had engaged extensively with the Commission, and large parts of its judgment had been devoted to examining the Commission's position on State immunity and the immunity of State officials from foreign criminal jurisdiction. A major reason why the Court had concluded that the United Kingdom had not breached the European Convention on Human Rights had been that, when the Commission had been given an opportunity to revise its draft articles on jurisdictional immunities of States and their property in order to incorporate an exception to sovereign immunity in cases of torture, it had chosen not to do so. The Court had argued that, while it was possible to identify trends and emerging practices, it could not be said with certainty that States had an obligation to provide for an exception. The Court had added that it could not exclude rapid developments in that regard, but that, ultimately, it was not its task to anticipate any such developments. It was clear, then, that other actors responsible for adjudicating on the rights of individuals were keen to know the Commission's positions on various topics and the reasoning behind them.

To conclude, it was crucial for the Commission to develop networks and enter into dialogues with scholars and regional and constitutional courts, among other actors. In the twenty-first century, informal dialogues and working meetings had become a fundamental means of making progress. The Commission should harness the possibilities offered by the digital era and engage fully with the plurality of actors in the international legal system in

order to, *inter alia*, achieve a better understanding of the distinction between codification and progressive development.

Mr. Murphy (International Law Commission), panellist, said that the Statute of the International Law Commission set out particular processes for engaging in either codification or progressive development of the law, but that the Commission itself had never followed those processes. Instead, the Commission had always viewed codification and progressive development of the law as being intertwined and had never categorized a topic as belonging to one or the other. Although the Commission had a general sense of what each approach entailed, precise definitions had proved elusive.

There were a number of reasons that might push the Commission towards codification for any given aspect of its work. First, there was a deep desire within the Commission for its work to be accepted by States, scholars and other actors. Whenever the Commission pursued progressive development, there was a greater chance of actors voicing their disagreement. Secondly, there was often a desire within the Commission to have influence in a particular field of international law even when the final product of its project was not a treaty. The Commission was going through a phase in which its topics resulted in fewer treaty instruments, with "draft articles" being developed for only three of the nine topics on its current programme of work. When the final product was not envisaged to be a treaty, there was an impulse to develop it as codification of the law, since it would not receive the blessing of States in the same way as would a treaty. Thirdly, many of the Commission's members believed that it was not a law-making body and should thus focus most of its attention on codification.

Yet there were also reasons that might push the Commission towards pursuing progressive development with respect to some or most of its work on a project. First, there was a desire to build a better world. To the extent that codification merely crystallized existing practice, precedent and doctrine, it might be felt that the Commission could do better by trying to improve on the status quo. Secondly, true codification was a complex and difficult task that involved uncovering, translating and understanding the practice and *opinio juris* of 193 States. Advances in technology had facilitated that task to a certain extent, but it had also opened the door to an extraordinary amount of information that required much time to analyse properly. If the Commission were to take the laudable step of strengthening its engagement with non-State actors, the task was harder still. As the Special Rapporteur for the topic "Crimes against humanity", he had participated in workshops around the world, yet his efforts felt like a drop in the ocean as compared to what might be done in that regard. Thirdly, even if the Commission did have a perfect understanding of all relevant treaties, State practice, jurisprudence and writings, the threshold for satisfying the requirements for codification was very high, as could be seen from the Commission's work on the topic "Identification of customary international law". It was easier, in that sense, to go down the path of progressive development.

A separate issue altogether was whether the Commission was transparent to others as to whether it was engaged in codification or in progressive development, which typically might take the form of indicating clearly in its commentary whether a particular provision was codification or not. The reasons pushing the Commission in favour of disclosure were at least threefold. First, it had sometimes helped members to reach agreement on whether an aspect of the Commission's work was codification or progressive development. Secondly, it was useful to other actors who might rely on the Commission's work, such as the European Court of Human Rights, for the Commission to be as clear as possible about what was or was not settled law. Thirdly, being candid helped to preserve the Commission's overall authority and legitimacy.

Yet there were several reasons pushing the Commission away from disclosure as to the nature of its work. First, it was sometimes difficult for members to arrive at consensus about the nature of a particular provision, such that non-disclosure was the Commission's default approach. Secondly, the Commission's mandate allowed it to engage in both codification and progressive development, so it could be argued that both should be generally assumed to be happening and that disclosure in specific instances was therefore unnecessary. Thirdly, some members held the view that the nature of the Commission's work on a given provision was implicit in the commentary that related to that provision. If

the commentary cited copious treaties, State practice and jurisprudence, then codification might be assumed; if not, then implicitly it was progressive development. Fourthly, there was sometimes a concern that, by openly labelling a product as progressive development, the Commission would make it harder for the law to become settled over time. Fifthly, and lastly, some members were of the opinion that the Commission's relationship with the Sixth Committee, where Governments reacted to its work, and the Commission's very composition, with members elected by the General Assembly, lent considerable weight to its legitimacy and thereby lessened the need for, or expectation of, full disclosure.

Mr. Grossman Guiloff (International Law Commission) said that one of the most compelling reasons why the Commission was sometimes hesitant to classify an aspect of its work as codification or progressive development was that there was disagreement among members as to the normative content of customary law. Qualifying a product as progressive development was an effective way of indicating that it was not binding. For that reason, the struggle against colonialism had historically been presented not as progressive development but as the realization of legal principles through the invocation of law.

Mr. Hmoud (International Law Commission) said that Commission members held differing views over what constituted established practice, which made the identification of customary international law a challenging task. The commentaries drafted by the Commission provided a helpful insight into its reasoning.

Ms. Jacobsson (former member of the International Law Commission) said that, during her time on the Commission, she had been surprised at the extent to which its members, particularly the special rapporteurs, analysed and were knowledgeable about regional court cases. She would be interested to know what Ms. Ziemele meant when she said that the Commission should strengthen its engagement with other actors, since the manner in which that was achieved could have implications for the Commission's mandate and the independence of courts.

Mr. Momtaz (former member of the International Law Commission) said that distinguishing between codification and progressive development was a recurring issue. There had been times, in the past, when the Commission had expressed doubts over the meaning and scope of a provision in a draft article. For example, in the commentary to article 41 of the draft articles on responsibility of states for internationally wrongful acts, the Commission had said that paragraph 1, on the duty to cooperate, "may reflect the progressive development of international law". He wondered whether, when the Commission failed to reach consensus on what constituted progressive development, it preferred to maintain an element of doubt.

Ms. Gueldich (University of Carthage, Tunis) said that codification and progressive development were both necessary, as law was constantly evolving and, for as long as there was a human race, there would be new domains in which to legislate. Efforts to consolidate existing law were fraught with difficulty and open to criticism. It was widely agreed that international law was in crisis. When international law was manipulated and politicized by powerful States, it came to be tarnished and degraded, and, rather than the force of law, it was the law of force that prevailed. Consequently, it would be a good idea for the Commission to emphasize or focus on ways to boost the credibility and effectiveness of international law, which was currently the subject of fierce criticism.

Mr. Chen (Peking University), panellist, said that, when the Commission had been established in 1947, a balance had been struck between ensuring the independence of the experts who served as members and seeking the support of States. The combination of independence and State support had helped the Commission to overcome concerns about its legitimacy and remain relevant.

In some relatively new fields of international law, States were particularly keen to know about the status of certain rules, which put pressure on the Commission to take a firm position. Disagreement among States was common and, while the opinions of special rapporteurs were often reflected in their reports, draft articles or other products tended to be generic in nature. Looking to the future, the Commission could take a number of approaches, but it would also have to deal with some limitations.

Ms. Ziemele (Riga Graduate School of Law), panellist, said that there was and always would be disagreement among Commission members as to the nature of law, which was to be expected, given that law was not static. From her own experience working in two courts, it was sometimes not evident where the Commission's disagreements lay. It had to be remembered that not all actors were international lawyers. As a result, for the good of international law, there had to be better communication between legal sites and the Commission, including in the form of dialogues, which had already proved very helpful in giving the Commission a sense of the status of the legal discourse on important issues in different regions.

Mr. Murphy (International Law Commission), panellist, said that it was sometimes easier for the Commission to reach agreement over a particular formulation when the language used did not imply that a rule was settled law. In that sense, favouring language that conveyed a doubt was a valid approach, and one that did not prevent law from becoming settled over time. The international legal system, its rules and institutions were facing unprecedented challenges. In the circumstances, bodies like the Commission had to be careful not to provide opportunities for critics to attack them, for example by avoiding bold claims that they might otherwise wish to make.

The meeting rose at 6.05 p.m.