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Held at the Palais des Nations, Geneva, on Thursday, 9 August 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter VI. Protection of the atmosphere (*continued*) (A/CN.4/L.919 and A/CN.4/L.919/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter VI of the draft report contained in document A/CN.4/L.919/Add.1.

Commentary to draft guideline 10 (Implementation)

Paragraph (9)

Mr. Park, recalling that paragraph (9) had been adopted at the Commission's 3449th meeting, said that he nevertheless wished to propose an amendment to the first sentence. Although footnote 174 cited mainly precedents involving arbitration or international dispute mechanisms, the last citation — a national law of Singapore — was the exception. Rather than give the impression that the Singaporean claim in question was legal and justified, he proposed replacing, in the first sentence, the phrase "to the extent permissible where there is a well-founded grounding in international law" with the phrase "to the extent permissible where there might be legal grounding in international law".

Mr. Saboia said that he supported the proposed amendment to the first sentence.

Sir Michael Wood said that he was not sure of the need for the paragraph, which dealt with extraterritorial application, an issue that the Commission had decided not to cover in the text. If it were to be retained, he agreed that Mr. Park's proposal was an improvement on the original drafting; he would prefer, however, to simplify it, so that the phrase in question would read "to the extent permissible under international law".

Mr. Murase (Special Rapporteur) said that he thought it was important to keep paragraph (9). He agreed with Sir Michael Wood's proposed amendment to the first sentence and noted that the Commission members had agreed, when adopting the sentence at the 3449th meeting, that the phrase "as originally proposed", at the end of the first sentence, should be deleted and that footnote 175 should be amended to read simply "See the Special Rapporteur's fifth report (A/CN.4/711), para. 31".

Mr. Nguyen said that he had reservations about footnote 176, in that it cited a paper published by the Special Rapporteur prior to the Commission's debate of the matter to which the footnote related. Such a discrepancy might confuse readers.

The Chair said that, in his view, the paper cited in footnote 176 merely illustrated the position adopted by the Commission.

Mr. Jalloh said that he supported Sir Michael Wood's proposed amendment to the first sentence. As for footnote 176, related to the position taken by the Commission on the matter of extraterritorial application of national law by a State, he agreed that it should not cite a source that preceded the Commission's consideration of the matter. He suggested that the footnote might begin with the words "See also", rather than simply "See", and make clear that it referred to an academic contribution that matched the Commission's position.

Mr. Vázquez-Bermúdez said that it was helpful to include a scholarly contribution; there was no need to qualify it as such because it was self-evident.

Mr. Petrič said that he did not have a problem with footnote 176, so long as it was made clear that the scholarly paper by Mr. Murase was just that and did not necessarily represent the collective position of the Commission as a whole. More generally, however, it was obvious that the commentaries to any outcome of the Commission were mainly the product of the Special Rapporteur's work, as supported collectively by the Commission. It would therefore be unacceptable to include a reference in which the Special Rapporteur — or any individual member of the Commission, for that matter — disagreed with the stance adopted by the Commission as a whole.

The Chair said that, although he wished to acknowledge the concerns expressed by Mr. Petrič, the current juncture was not the time to enter into a debate on such matters of general import. The Commission had already adopted commentaries that contained footnotes citing academic contributions by the Special Rapporteur that reflected the position of the Commission, as in footnote 176, and while it was not the Commission's general practice to do so, they were not problematic in his view. It would be a different matter altogether if the article cited in footnote 176 reflected a position that was inconsistent with the Commission's.

Mr. Murase (Special Rapporteur) said that, in order to accommodate the concerns raised, he proposed moving the content of footnote 176 to the end of footnote 174.

Mr. Nolte said that it had been the Commission's practice, in its consideration of other topics, to include relevant academic contributions of the Special Rapporteur.

Ms. Galvão Teles (Rapporteur) said that she supported the Special Rapporteur's proposal to move the content of footnote 176, as it appeared to be the placement, rather than the content itself, that posed a problem.

Mr. Ouazzani Chahdi said that, in his opinion, the problem lay in the formulation of the footnote, not in its placement. The usual formulation when referring to academic contributions was a phrase along the lines of "See for more details".

The Chair, noting that changing the formulation of the footnote would likely necessitate a more in-depth analysis of the article cited therein, suggested that the Commission should adopt the paragraph, with the following amendments: in the first sentence, the phrase "to the extent permissible where there is a well-founded grounding in international law" would be replaced with the phrase "to the extent permissible under international law"; the phrase "as originally proposed" would be deleted; footnote 175 would be amended to read "See the Special Rapporteur's fifth report (A/CN.4/711), para. 31"; and the content of footnote 176 would be moved to the end of footnote 174.

Paragraph (9), as amended and with amendments to footnotes 174, 175 and 176, was adopted.

Commentary to draft guideline 11 (Compliance)

Paragraph (1)

Sir Michael Wood proposed replacing, in the fourth sentence, the words "is intended to reinforce" with "reflects". He further proposed deleting the following sentence, which, being somewhat convoluted, was superfluous, in that it merely restated the content of draft guideline 11, paragraph 1. In the sixth sentence, he suggested replacing the word "regarding" with "relating to" and the word "form" with "language". Lastly, he suggested replacing, in the seventh sentence, the phrase "later crystallize into customary international law" with "lead to the crystallization of rules of customary international law".

Mr. Nolte said that compliance, the subject of draft guideline 11, related not only to treaties and therefore to the principle *pacta sunt servanda*, but also to customary international law obligations, as spelled out in the guideline itself. He therefore proposed adding, at the end of the third sentence, the words "or other rules of international law". If that proposal were acceptable to the Commission, then the idea of reinforcing the principle of *pacta sunt servanda* would be limited. He suggested therefore that the words "in particular" might be inserted before the phrase "the principle of *pacta sunt servanda*"; alternatively, he could agree to the proposal put by Sir Michael Wood in respect of the same sentence. In addition, he suggested changing, in the seventh sentence, the word "reality" to "fact".

Mr. Park said that the seventh sentence was a very controversial one. He had consulted the chairs of relevant bodies as to the meaning of the phrase "obligations under international law", to no avail. In his recollection, it had not been decided to adopt the phrase "the broad nature", which in the current context seemed to refer not only to treaty obligations but also to *erga omnes* effects. He understood the phrase "obligations under international law" to encompass only treaty law obligations and customary international

law obligations, and not *erga omnes* effects. He would therefore prefer to delete the entire seventh sentence.

Ms. Oral said that the word "provisions" in the third sentence was too general in the context of a mechanism for compliance; she proposed replacing it with the word "obligations". Furthermore, while noting that the Special Rapporteur had already expressed his support for the amendment proposed by Mr. Nolte, it was her understanding that draft guideline 11, specifically paragraph 1, was focused on compliance with obligations under a treaty and the triggering of compliance mechanisms; it was not clear to her that that could be broadened so as to cover other rules of international law.

Mr. Rajput said that paragraph (1) was necessarily linked to treaties. It would be improper to attempt to expand its scope or to make mention of customary international law or any other obligations.

Mr. Murase (Special Rapporteur) said that his position as put forward in his fifth report on the topic had been to confine obligations to those under relevant treaties; however, in the Drafting Committee, the scope been expanded to encompass customary international law and other rules of international law. He had therefore chosen to reflect the understanding reached by the Drafting Committee.

Mr. Nolte said that, in making his proposed amendment to the third sentence of paragraph (1) of the commentary, he had not intended to expand the scope of paragraph 1 of draft guideline 11. He had merely wished to better reflect the latter, which referred to States' "obligations under international law … including through compliance with the rules and procedures in the relevant agreements …" and which therefore made it clear that such obligations encompassed other rules of international law.

Mr. Vázquez-Bermúdez said that he supported the statement made by Mr. Nolte.

Mr. Rajput said that, if the Commission accepted the arguments put forward by Mr. Nolte and supported by Mr. Vázquez-Bermúdez, it would be contradicting the Drafting Committee, whose report on the topic made specific reference to the principle of *pacta sunt servanda*.

The Chair said that, while the conclusions of the Drafting Committee should obviously be taken into account, the Commission's task at hand was to decide whether the commentary to the draft guideline currently under consideration was acceptable in form and content, including *vis-à-vis* the draft guideline; that was the purpose of the second reading.

Mr. Jalloh (Chair of the Drafting Committee) said that the deliberations of the Drafting Committee were necessarily a very technical, substantive process that involved compromises. In a way, then, it should not be surprising that some members who ultimately had joined the consensus in the Committee after failing to have their individual views reflected in the outcome sought to express their individual opinions in a later plenary meeting on the same subject. The statement by the Chair of the Drafting Committee on any given topic, although it might capture accurately the deliberations within the Committee, were not necessarily the last word on any matter; members should not be prohibited from expressing their opinions in a plenary meeting.

Referring to comments made by colleagues to the effect that the phrase "obligations under international law" was not explained, he said that an explanation was given in the report of the Drafting Committee, according to which the current phrase had been chosen as a position that was preferable to the one originally proposed by the Special Rapporteur, of "international law norms"; likewise, the inclusion of a reference to "*pacta sunt servanda*" had been insisted upon by members of the Drafting Committee. In view of the pressing nature of the work before the Commission, it was important not to go to the other extreme and ignore the report of the Drafting Committee, either. In the present case, nevertheless, if the Special Rapporteur agreed with the proposals made, he suggested that they should be acceptable to the Commission as a whole.

Mr. Nolte said that he would withdraw his proposal if it proved inconsistent with the report of the Drafting Committee on the topic; however, there would still be an obvious problem in the formulation of the draft guideline.

Mr. Park said that he too would withdraw his proposal if it proved inconsistent with the report of the Drafting Committee on the topic.

The Chair said he took it that the Commission wished to adopt the paragraph, with the following amendments: in the third sentence, the word "provisions" would be replaced with "obligations" and the phrase "or other rules of international law" would be inserted at the end of the sentence; in the fourth sentence, the phrase "is intended to reinforce" would be replaced with "reflects, in particular,"; the fifth sentence would be deleted; in the sixth sentence, the words "regarding" would be replaced with "relating to" and the word "form" with "language"; and, in the seventh sentence, the word "reality" would be changed to "fact" and the phrase "later crystallize into" to "lead to the crystallization" of rules of customary international law.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Ouazzani Chahdi, referring to the French version, said that the word "*chapeau*" should be replaced with "*intitulé*" or "*libellé*". The other language versions should be amended accordingly.

Paragraph (3) was adopted on that understanding.

Paragraph (4)

Mr. Nolte said that he had three language proposals. In the second sentence, the words "since those States are willing" should be replaced with "since some States may be willing". In the last sentence, the indefinite article "a" should be inserted before the words "general lack of capacity" and the definite article "the" inserted before "receipt of external support".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Nolte said that, in the first sentence, the words "provides for enforcement procedures" should be replaced with "speaks of enforcement procedures", as draft guideline 11 itself did not provide for such procedures.

Mr. Nguyen proposed that, in the last sentence, the words "to which they are parties", which appeared in draft guideline 11 (1), should be inserted after "relevant agreements".

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 11 as a whole, as amended, was adopted.

Commentary to draft guideline 12 (Dispute settlement)

Paragraph (1)

Sir Michael Wood said that, in the last sentence, the word "basis" should be used instead of "primer".

Mr. Nolte proposed that, in the third sentence, the words "omits the often quoted reference" should be replaced with "does not refer".

Mr. Jalloh said that, to simplify the penultimate sentence, it should be redrafted to read: "Paragraph 1 is not intended to interfere with or displace existing dispute settlement provisions in treaty regimes, which will continue to operate in their own terms."

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Nolte said that, in the second sentence, the word "been" should be inserted after "technical issues have", while in the third sentence, the word "been" should be deleted. In the last sentence, the word "would" and the comma that preceded it should both be removed.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Nolte proposed that, in the first sentence, the word "certainly" should be deleted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Park said that the paragraph should be deleted.

Mr. Nolte said that, in the first sentence, the word "process" should be replaced with "processes".

Mr. Petrič said that he also was in favour of deleting the paragraph, which was of little relevance to draft guideline 12. Paragraph 1 of the draft guideline was amply addressed in paragraph (1) of the commentary, while paragraph 2 was dealt with in paragraphs (2) and (3) of the commentary. It was clear that no judicial or arbitral decision could be incompatible with the principles of *jura novit curia* or *non ultra petita*. A court was bound to decide on the matter brought before it. Consequently, if the paragraph were retained, the words "may become", in the first sentence, should be replaced with "are". Furthermore, in the last sentence, the words "as originally proposed by the Special Rapporteur", which were misleading and unnecessary, should be deleted, together with footnote 191. He had, from the outset, supported the consideration of what was a very important topic and the Special Rapporteur's persistent work thereon. However, the Commission had a responsibility to handle the topic in a rational way. He would therefore appeal to the Special Rapporteur to be flexible with regard to proposed amendments and deletions.

Sir Michael Wood, supported by **Mr. Šturma**, said that he, too, would be happy to see the paragraph deleted. However, if it were retained, he agreed with Mr. Petrič that the words "as originally proposed by the Special Rapporteur" and footnote 191 should be deleted. The final sentence of that footnote should, however, be moved to the end of footnote 190.

Mr. Huang said that he was strongly in favour of deleting the paragraph. He was uncomfortable with the Special Rapporteur's repeated attempts, in the commentaries to draft guidelines 10 to 12, to include, by any means possible, controversial language that had been debated and ultimately rejected by the Drafting Committee. The decisions of the Drafting Committee were final and should be respected by the Special Rapporteur.

Mr. Cissé said that he too was in favour of deleting the paragraph, since it contributed little to an understanding of the text.

Mr. Vázquez-Bermúdez said that the paragraph contained relevant information. Having said that, he agreed with Sir Michael Wood's proposal to delete footnote 191, with the exception of the last sentence.

Mr. Murase (Special Rapporteur) said that he was willing to replace the word "process" with "processes", to remove the words "as originally proposed by the Special Rapporteur" and to delete footnote 191, with the exception of the last sentence, which could be moved to the end of footnote 190. While he did not object to Mr. Petrič's proposal to replace the words "may become" with "are", the existing wording seemed more natural.

Sir Michael Wood proposed that, in the first sentence, the words "may be" should be used instead of "may become".

Paragraph (4), as amended, was adopted.

The commentary to draft guideline 12 as a whole, as amended, was adopted.

Mr. Park said that he wished to have it placed on record that, in his view, the Commission had created an unwelcome precedent by allowing the Special Rapporteur to incorporate, in the commentaries, paragraphs on concepts that had been excluded from the draft guidelines by the Drafting Committee and the plenary.

Sir Michael Wood said that, while he tended to agree with Mr. Park, there was an advantage to retaining the paragraphs on first reading, which was that States would have an opportunity to react to the decisions made by the Commission. On second reading, the Commission might well wish to delete the paragraphs.

The Chair said that the Commission had taken the position that, on first reading, even individual opinions that were not necessarily in accord with the majority view could, if appropriate, be reflected.

Mr. Tladi said that he agreed with Mr. Park. As a matter of principle, the Commission should not treat the commentaries as an alternative text.

The Chair said that the Commission might wish to consider the idea of delaying the adoption of draft texts until it had adopted the commentaries, or potential commentaries, thereto. He invited the Commission to resume its consideration of a number of paragraphs that had been left in abeyance.

Commentary to draft guideline 3 (Obligation to protect the atmosphere)

Paragraph (5)

The Chair said that there were two proposals concerning the paragraph, from Ms. Oral and Mr. Rajput. Ms. Oral proposed the deletion of the last three sentences, and that the fourth sentence should be redrafted to read:

> "It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. It also requires taking into account the context and evolving standards of both regulation and technology."

Mr. Rajput proposed that footnote 73 should read:

> *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), *I.C.J. Reports 2010*, p. 14, paras. 101 and 197; *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), *I.C.J. Reports 2015*, p. 665, paras. 104, 153, 168 and 228; *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Case No. 17, 1 February 2011, para. 131; International Law Commission, draft articles on prevention of transboundary harm from hazardous activities, paras. 7 to 18 at pp. 154-5; International Law Association Study Group on due diligence in international law, first report, 7 March 2014; International Law Association Study Group on due diligence in international law, second report, July 2016; J. Kulesza, *Due Diligence in International Law* (Leiden, Brill, 2016).

Ms. Oral said that her proposal for the fourth sentence was more aligned with existing case law than the text that it was intended to replace, and had been amended in consultation with Mr. Rajput.

Paragraph (5), as amended, was adopted.

The commentary to draft guideline 3 as a whole, as amended, was adopted.

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

The Chair said that Mr. Tladi had submitted a proposal in writing for three changes to the paragraph, principally to introduce the language used by the International Court of Justice in the *Pulp Mills* case and the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea in its advisory opinion on the *Responsibilities and Obligations of States Regarding the Activities in the Area*. First, he proposed that the penultimate sentence should be redrafted to read:

> "In 2010, the Court in the *Pulp Mills* case stated that the requirement for environmental impact assessments 'has gained so much acceptance among States that it may now be considered a requirement' under customary international law … where there is a risk that a proposed industrial action may have a significant adverse impact in a transboundary context [para. 205]."

Secondly, he proposed that the last sentence should be redrafted to read:

> "Moreover, the 2011 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea Advisory Opinion on the *Responsibilities and Obligations of States Regarding the Activities in the Area* expressed the view that the duty to conduct an environmental impact assessment arises not only under the Law of the Sea Convention and its related instruments, but is also a 'general obligation under customary international law' [para. 145]."

Thirdly, he proposed the insertion of a new sentence at the end of the paragraph, to read: "Similarly, the International Court of Justice in the *Gabčíkovo-Nagymaros* case alluded to the importance of environmental impact assessments."

Mr. Zagaynov said that the language proposed by Mr. Tladi was not entirely precise. The text quoted in his proposal for the penultimate sentence was taken from paragraph 204, not 205, of the International Court of Justice's judgment in *Pulp Mills*. Moreover, it would be better to quote more fully from the judgment in order to remain faithful to it. Regarding Mr. Tladi's proposal for the last sentence, in the advisory opinion cited, the International Tribunal for the Law of the Sea had spoken only of the United Nations Convention on the Law of the Sea. It had made no reference to the Convention's related instruments.

Sir Michael Wood said that he was in favour of deleting the words "and its related instruments" from Mr. Tladi's proposal for the last sentence.

Mr. Tladi said that his proposal for the penultimate sentence accurately reflected the International Court of Justice's judgment in *Pulp Mills*. As to his proposal for the last sentence, while it was true that, in paragraph 145 of the advisory opinion, the Tribunal had not spoken of the Convention's related instruments, it was clear, from reading the rest of the opinion, that it had viewed the duty to conduct an environmental impact assessment as arising not only from article 206 of the Convention but also from related instruments. He would be willing, however, to delete the words "and its related instruments".

Mr. Jalloh said that, for the sake of clarity in the penultimate sentence, the following text should be quoted from the Court's judgment in *Pulp Mills*: "has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context".

Mr. Tladi said that he was happy to quote more fully from the Court's judgment, but that doing so would necessitate a further redrafting of the penultimate sentence.

Paragraph (1) was adopted on that understanding.

Paragraph (4)

The Chair said that Mr. Tladi had submitted a proposal in writing to the effect that, in the last sentence, everything after the word "indicated" should be replaced with the following text: "that the threshold for triggering the duty to conduct an environmental impact assessment was 'significant adverse impact in a transboundary context'".

Mr. Zagaynov said that the Commission should give some thought to whether the threshold was the existence of a significant adverse impact, as suggested in Mr. Tladi's proposal, or the existence of a risk thereof, as the Court had stated in its judgment in *Pulp Mills*. While he did not have strong feelings on the matter, the Commission should be cautious not to interpret the Court's judgment in an inappropriate way.

Sir Michael Wood said that he agreed with Mr. Zagaynov. The Commission should quote more extensively from paragraph 204 of the Court's judgment in *Pulp Mills*, including the words "where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context".

Paragraph (4), as amended, was adopted on that understanding.

The commentary to draft guideline 4 as a whole, as amended, was adopted.

Commentary to draft guideline 10 (Implementation) (*continued*)

Paragraph (4) (continued)

The Chair invited the Commission to consider the new version of paragraph (4) proposed by Mr. Rajput and the Special Rapporteur, which had been circulated to members. It read:

> "The term '[n]ational implementation' denotes the measures that parties may take to make international agreements operative at the national level, pursuant to the national constitution and legal system of each State. National implementation may take many forms including in 'the form of legislative, administrative, judicial and other actions'. The word 'may' reflects the elective nature of the provision. The reference to 'administrative' actions is used, rather than 'executive' actions, as it is more encompassing. It covers possible implementation at lower levels of governmental administration. The term 'other actions' is a residual category covering all other forms of national implementation. The term 'national implementation' also applies to obligations of regional organizations such as the European Union."

Sir Michael Wood said that, for the sake of readability, the phrase "may take many forms including in 'the form of legislative, administrative, judicial and other actions'" in the second sentence could be replaced with "may take many forms, including 'legislative, administrative, judicial and other actions'". In the third sentence, the phrase "the elective nature of the provision" seemed rather obscure — was it intended to indicate that States had a choice of measures?

Mr. Nolte said that, the previous day, he had proposed replacing the word "elective" with "discretionary".

The Chair said he took it the Commission wished to adopt the proposed new paragraph, as further amended by Sir Michael Wood and Mr. Nolte.

Paragraph (4), as amended, was adopted.

The commentary to draft guideline 10 as a whole, as amended, was adopted.

The commentaries to the draft guidelines on protection of the atmosphere, as a whole, as amended, were adopted.

The Chair invited the Commission to resume its consideration of the portion of chapter VI contained in document A/CN.4/L.919.

Paragraphs 9 and 10

The Chair drew the members' attention to two proposed new paragraphs, 9 and 10, which had been distributed in all languages. It read:

> "9. At its … meeting, on … 2018, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Shinya Murase, which had enabled the Commission to bring to a successful conclusion its first reading of the draft guidelines on the protection of the atmosphere.
>
> 10. At its … meeting, on … 2018, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft guidelines on the protection of the atmosphere (see section C below), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019."

Paragraphs 9 and 10 were adopted.

Chapter VI of the draft report as a whole, as amended, was adopted.

Mr. Murase (Special Rapporteur) said that he wished to express his gratitude to the Commission members for their sincere commitment to the topic, to the Chair for his thoughtful guidance of the discussions in the plenary and to Mr. Jalloh and Mr. Rajput for their chairing of the Drafting Committee. He also wished to thank the Secretariat, as well as his assistants and interns.

The Chair said that Mr. Murase was to be commended on the extraordinary patience and determination he had shown as Special Rapporteur.

Chapter VIII. Peremptory norms of general international law (jus cogens) (A/CN.4/L.921)

The Chair invited the Commission to consider chapter VIII of its draft report, as contained in document A/CN.4/L.921.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

Mr. Nolte proposed the addition of a new sentence to read: "The Commission referred the draft conclusions proposed in the reports to the Drafting Committee, where they remain pending." That would reflect more accurately what had actually happened at the sixty-eighth and sixty-ninth sessions.

Mr. Tladi (Special Rapporteur) said that he was not convinced that such an addition was necessary, as it was explained elsewhere in the chapter that the draft conclusions were intended to remain in the Drafting Committee. The paragraphs in the introduction referred to what had happened in the plenary; as the draft conclusions had not been pending in the plenary, the additional sentence would not be an accurate reflection of the situation.

Mr. Nolte said that his proposal was simply to indicate that the draft conclusions had been pending in the Drafting Committee, not the plenary.

Mr Jalloh, speaking as a member of the Commission, proposed that the paragraph should be left in abeyance pending confirmation by the Secretariat as to whether the Commission had in the past included statements in its reports to the effect that draft texts remained pending in the Drafting Committee.

Mr. Nolte said that he supported the proposal but it was important when looking at precedents to consider not just whether the Commission had indicated that texts remained pending but also whether it had mentioned texts being referred to the Drafting Committee.

The Chair said that he took it the Commission wished to hold paragraph 2 in abeyance on that understanding.

It was so decided.

Paragraph 3

Paragraph 3 was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

The Chair said that, at the request of Mr. Murphy and the Special Rapporteur, the Secretariat had drafted an amendment to paragraph 6. The proposal was to delete the full stop at the end of the sentence and to add the words "on the understanding that draft conclusions 22 and 23 would be dealt with by means of a 'without prejudice' clause."

Mr. Jalloh asked whether the proposed language reflected what the Chair had said in his statement in the plenary.

Mr. Llewelyn (Secretary to the Commission) said that, as far as he recalled, the Chair's statement at that time had referred to the summing up by the Special Rapporteur, in which that language had been used.

Paragraph 6, as amended, was adopted.

Paragraph 7

Mr. Nolte said that he had attempted to follow the link in footnote 7 to the Commission's website but had been unable to locate the reports of the Chair of the Drafting Committee. Perhaps a more precise link should be indicated in that footnote and others throughout the report.

Paragraph 7 was adopted on that understanding.

Paragraph 8

Mr. Tladi said that, at the very end of the last sentence, the words "customary international law was a source" should be replaced with "customary international law was the most common basis for *jus cogens* norms".

Mr. Nolte said that the third sentence — "while many States had agreed that there should be a 'very large majority' of States accepting and recognizing the peremptory character of a norm, some preferred a more stringent qualifier that would not be seen just from the perspective of numbers but also from the representative character of the group of States" — expressed an opposition whose existence he did not recall, although there had been a debate about whether the expression used should be a "very large majority" and about the question of representativeness. He was therefore unsure whether the summary accurately reflected what had actually happened.

Mr. Tladi (Special Rapporteur) said that his introductory statement had read:

> "Many States expressed agreement with the Drafting Committee's requirement that there should be a 'very large majority' of States accepting and recognizing the peremptory character of a norm. A few States did suggest, however, that even this qualifier could be made even more stringent. Importantly, Poland observed that the question of majority — large, very large, overwhelmingly large, etc. — should not be seen from just the perspective of numbers but also the representative character of the group of States."

In his view, that statement had been correctly and succinctly summarized. He was not wedded to the language used in paragraph 8, but it should be borne in mind that, even if the Special Rapporteur had misrepresented the situation in his introduction, that should be reflected in the summary. He would therefore not be in favour of substantively changing the paragraph.

Mr. Nolte said that it seemed that the position expressed by Poland alone had inadvertently been reflected as the position of "some States". Perhaps a more nuanced formulation could be found.

Mr. Tladi (Special Rapporteur) said that the summary provided in paragraph 8 was not incorrect. He had happened to highlight in his introduction just the statement by Poland because it was a particularly strong example, but other States, including the Russian Federation, had made the same point. However, to resolve Mr. Nolte's concern, perhaps the sentence could be reformulated to read: "Many States agreed that there should be a 'very large majority' of States accepting and recognizing the peremptory character of a norm. Some States preferred a more stringent qualifier that would not be seen just from the perspective of numbers but also from the representative character of the group of States."

Paragraph 8, as amended by the Special Rapporteur, was adopted.

Paragraph 9

Mr. Tladi (Special Rapporteur) said that Mr. Murphy had proposed that the second sentence should be amended and split in two so as to read: "He noted that draft conclusions 10, 11 and 12 were based on provisions of the Vienna Convention on the Law of Treaties of 1969 ("1969 Vienna Convention"), with the exception of paragraph 3 of draft conclusion 10, which provides for a treaty to be interpreted in a manner consistent with peremptory norms. The Special Rapporteur considered this to be a necessary consequence of article 31, paragraph 3 (c)".

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

Mr. Nolte proposed that, in the first sentence, the phrase "disputes involving conflict" should be changed to "disputes involving a conflict".

Sir Michael Wood said that, in his view, the original formulation was preferable, as it was more general.

Mr. Tladi (Special Rapporteur) said that either option would be correct but he saw no need to change the original wording.

Paragraph 11 was adopted.

Paragraph 12

Mr. Nolte said that perhaps the formulation "as regarded" should be replaced with "regarding" in that paragraph and elsewhere in the chapter.

It was so decided.

Mr. Tladi (Special Rapporteur) said that in the third sentence, the formulation "was based on article 64" should be replaced with "was inspired by". Regarding the second sentence, Mr. Murphy had made a proposal, which he supported, to reformulate the phrase "invalidate or prevent customary international law rules from coming into being" to read "invalidate customary international law rules or prevent them from coming into being".

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

Mr. Nolte proposed that, in the second sentence, the term "Security Council resolutions" should be followed by "in particular" in order to distinguish such resolutions from resolutions of international organizations in general, mentioned earlier in the sentence.

Mr. Tladi (Special Rapporteur) said that in his view, the current formulation accurately captured the introductory statement that he had made.

Paragraph 14 was adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

Mr. Tladi (Special Rapporteur) said that, in the first sentence, the word "concerning" should be replaced with "concerned".

Paragraph 17, as amended, was adopted.

Paragraph 18

Sir Michael Wood said that the advisory opinion of the International Court of Justice referred to in the second sentence as the *Legal Consequences for States* opinion should be referred to as the *Namibia* opinion throughout the document in order to distinguish it from other advisory opinions or proceedings with a similar name.

Mr. Tladi (Special Rapporteur) said that he wished to share two proposals put forward by Mr. Murphy, namely, in the fourth sentence, to replace the first occurrence of the word "or" with "nor", and, in the fifth sentence, to delete the words "a duty".

Paragraph 18, as amended, was adopted.

Paragraph 19

Mr. Tladi (Special Rapporteur) proposed that, in the second sentence, the words "given the prevailing uncertainty in State practice" should be replaced with "as the practice in this area was less settled".

Mr. Nolte, referring to the first sentence, asked whether the Special Rapporteur had used in his statement the words "based on" rather than "inspired by".

Mr. Tladi (Special Rapporteur) said that he had indeed used the words "based on".

Paragraph 19 was adopted with the amendment proposed by Mr. Tladi.

Paragraph 20

Mr. Nolte, referring to the second sentence, asked whether the Special Rapporteur had used in his statement the word "establishing" rather than "providing".

Mr. Tladi (Special Rapporteur) said that he had in fact used the word "providing". The sentence should therefore be amended to reflect his statement.

Paragraph 20, as amended, was adopted.

2. Summary of debate

(a) General comments

Paragraph 21

Mr. Nolte said that, in the third sentence, the words "it was noted" should be replaced with "some members noted", to make clear that the phrase "members generally welcomed", which appeared at the beginning of the first sentence, did not also apply to the third sentence.

Paragraph 21, as amended, was adopted.

Paragraph 22

Mr. Nolte said that the first sentence seemed to presuppose the truth of an assumption that might or might not be correct. For the sake of clarity, the words "intention to pursue a" should be inserted before "practical approach".

Mr. Tladi (Special Rapporteur) said that several members had in fact assumed, correctly or otherwise, that his approach was a practical one; the sentence was therefore an accurate reflection of the statement.

Mr. Nolte said that his concern was that there was an assumption in the sentence that it had been generally accepted that the approach was a practical one.

Mr. Jalloh said that he had been among the members who had supported what he considered to be the Special Rapporteur's practical approach. He was of the view that the current formulation was entirely appropriate.

Mr. Tladi (Special Rapporteur) said that the document under consideration should reflect what had occurred during the debate, irrespective of the accuracy of what had been said. He therefore strongly objected to Mr. Nolte's proposal, which appeared to be an attempt to change history.

Mr. Saboia said that the sentence should be retained as it stood.

Mr. Cissé said that he too was in favour of retaining the current sentence.

Sir Michael Wood said that the first sentence should not be amended. In the fourth sentence, the words "it was noted" should be replaced with "it was suggested".

Mr. Nolte said that he was certainly not attempting to change history but merely to enhance the accuracy of the paragraph. He would, however, not insist on his proposal.

Paragraph 22, as amended by Sir Michael Wood, was adopted.

Paragraph 23

Sir Michael Wood said that, in the first sentence, the word "generally" should be deleted. In the fourth sentence, it was unclear what was meant by the word "source" in the phrase "the invalidity of a particular source of international law". He wondered whether "source" should be replaced with the word "rule".

Mr. Tladi (Special Rapporteur) said that the word "rule" would be preferable, since the sentence referred to the procedures for determining whether a particular rule of international law was a treaty rule, a customary international law rule or a rule that derived from a binding decision.

Paragraph 23, as amended, was adopted.

Paragraphs 24 and 25

Paragraphs 24 and 25 were adopted.

(b) Specific comments on the draft conclusions

(i) Draft conclusion 10

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

Sir Michael Wood said that, in the first sentence, the word "while" should be deleted, and the word "norms" should be inserted after "*jus cogens*".

Paragraph 28, as amended, was adopted.

(ii) Draft conclusion 11

Paragraph 29

Sir Michael Wood said that, in the first sentence, the words "no part of" should be inserted before "a treaty", and the word "not" should be deleted.

Mr. Nolte said that, in the first sentence, the word "its" should be inserted before "conclusion".

Paragraph 29, as amended, was adopted.

(iii) Draft conclusion 12

Paragraph 30

Sir Michael Wood said that, in the first sentence, the first passage in quotation marks should be amended to read "any act in reliance of the provisions of the treaty".

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

(iv) Draft conclusion 13

Paragraph 32

Paragraph 32 was adopted.

(v) Draft conclusion 14

Paragraph 33

Mr. Nolte said that, since he had made several comments on draft conclusion 14, he wished to address a number of small points with a view to improving the paragraph. In the first sentence, he proposed the deletion of the word "recommended" from the phrase "the proposed recommended dispute settlement procedure". He had not proposed to delete the word "recommended" in the previous paragraph, which contained a reference to "recommended judicial settlement procedure". There were two dimensions involved: the proposed judicial dispute settlement procedure, where the question of the jurisdiction of the International Court of Justice arose and the larger question of dispute settlement by other means where the possibility of customary elements might need to be taken into account. In the second sentence, both instances of the word "invalidation" should be replaced with "invalidity", the latter being a more general term. In the fourth sentence, the words "it was questioned" should be replaced with "some members questioned". In the last sentence, the word "could" should be replaced with "would" and the final phrase should be expanded to read "or whether it would be merely declaratory".

Mr. Zagaynov said that he could not agree with Mr. Nolte's first proposal. As he had explained previously, he had some reservations with respect to the issue of the dispute settlement procedure in question being a rule of customary international law. However, as the Special Rapporteur had proposed it as recommended practice, the current language should be retained so as to reflect the debates.

Mr. Tladi (Special Rapporteur) said that he supported Mr. Zagaynov's position. While Mr. Nolte was correct that there was a larger question surrounding dispute settlement, the text under consideration should reflect the proposal that had been made, which had been termed the "recommended procedure".

Mr. Nolte said that an alternative solution would be to place the words "recommended dispute settlement procedure" in quotation marks.

The Chair said that he took it that Mr. Nolte's alternative solution was acceptable to the members.

Paragraph 33, as amended, was adopted.

Paragraph 34

Mr. Nolte said that, in his view, the paragraph did not sufficiently reflect the debate that had taken place, since it did not refer to a point he and several other members had raised with respect to the reference in the *Gabčíkovo-Nagymaros Project* case to the customary quality of articles 65 to 67 of the Vienna Convention. He wished to propose that, after the third sentence, a new sentence should be inserted to read: "In this connection it was pointed out that the International Court of Justice had noted that articles 65 to 67 of the Vienna Convention 'if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on the obligation to act in good faith'." A footnote should then be added with a reference to the source of the quote. Lastly, referring to the current fourth sentence, he wondered who had made the suggestion that State consent to the jurisdiction of the International Court was not necessary when it came to a dispute regarding *jus cogens* and whether its inclusion was warranted.

Mr. Tladi (Special Rapporteur) said that Mr. Nolte's proposal to insert an additional sentence and footnote was acceptable. With regard to the fourth sentence, the view had been expressed by Mr. Cissé and included in his own summing up of the debate; it could therefore be reflected in the paragraph.

Paragraph 34, as amended, was adopted.

Paragraph 35

Mr. Nolte said that, in the second sentence, the word "practice" should be replaced with "procedure".

Paragraph 35, as amended, was adopted.

(vi) Draft conclusion 15

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Paragraph 38

Mr. Nolte proposed that the last sentence of paragraph 38 should be deleted since, as far as he was aware, the point made therein had not been mentioned during the debate.

Paragraph 38, as amended, was adopted.

Paragraph 39

Paragraph 39 was adopted.

(vii) Draft conclusion 16

Paragraph 40

Paragraph 40 was adopted.

(viii) Draft conclusion 17

Paragraph 41

Mr. Jalloh said that he wished to make a number of proposals to strengthen and clarify paragraph 41.

The Chair requested Mr. Jalloh to provide his proposals in written form so that the Secretariat could circulate them to the members for consideration at the Commission's next meeting.

The meeting rose at 1 p.m.