

Provisional

For participants only

9 July 2019

Original: English

International Law Commission

Seventy-first session (first part)

Provisional summary record of the 3472nd meeting

Held at the Palais des Nations, Geneva, on Friday, 31 May 2019, at 10 a.m.

Contents

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

Peremptory norms of general international law (*jus cogens*) (*continued*)

Report of the Drafting Committee

Cooperation with other bodies

Visit by representatives of the Council of Europe

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

GE.19-08884 (E) 180619 090719



* 1 9 0 8 8 8 4 *

Please recycle



Present:

Chair: Mr. Šturma
Members: 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. Park
Mr. Petrič
Mr. Rajput
Mr. Ruda Santolaria
Mr. Saboia
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

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

Organization of the work of the session (agenda item 1) (*continued*)

The Chair said that he wished to draw attention to the revised programme of work proposed for the following week. Two additional meetings of the Working Group on the long-term programme of work had been added, on the afternoon of 4 June and the morning of 6 June. The open-ended Study Group on sea level rise would meet, after the Working Group on the long-term programme of work, on the morning of 6 June. However, if the Drafting Committee on the topic “Protection of the environment in relation to armed conflicts” required extra time to complete its work, an additional meeting might have to be held on the afternoon of 4 June and the other meetings would then have to be rescheduled. Lastly, he also proposed that on 7 June, after hearing the report of the Drafting Committee on the topic “Protection of the environment in relation to armed conflicts”, the Commission should meet in private to hear the Bureau’s report on its visit to the United Nations High Commissioner for Human Rights regarding former Commission member Mr. Kamto.

He took it that the Commission wished to adopt the revised programme of work as proposed.

It was so decided.

Peremptory norms of general international law (*jus cogens*) (agenda item 5) (*continued*)
([A/CN.4/727](#))

Report of the Drafting Committee ([A/CN.4/L.936](#))

The Chair invited the Chair of the Drafting Committee to present the report of the Drafting Committee on the topic “Peremptory norms of general international law (*jus cogens*)” ([A/CN.4/L.936](#)).

Mr. Grossman Guiloff (Chair of the Drafting Committee) said that the report contained the texts and titles of the entire set of draft conclusions adopted by the Drafting Committee on first reading.

He wished to pay tribute to the Special Rapporteur, Mr. Tladi, who once again had demonstrated a constructive and innovative approach, which had facilitated the work of the Drafting Committee. Thanks were also due to the other members of the Drafting Committee for their active participation and significant contributions. In particular, he wished to express his gratitude to Mr. Rajput, who had kindly agreed to chair a meeting of the Committee in his absence.

The Drafting Committee had held 13 meetings from 30 April to 23 May. It had first considered the Special Rapporteur’s proposals for draft conclusions 15 to 23 contained in his third report ([A/CN.4/714](#) and [A/CN.4/714/Corr.1](#)) and a new proposal based on draft conclusion 10 (3), which had been held in abeyance since the previous session. It had then examined the Special Rapporteur’s proposal for draft conclusion 24, as contained in his fourth report ([A/CN.4/727](#)), which had been referred to the Drafting Committee at the Commission’s 3465th meeting. After the provisional adoption of those new draft conclusions, the Committee had undertaken the *toilettage* of the entire set of draft conclusions.

At the Commission’s sixty-eighth session, the decision had been taken to follow the Special Rapporteur’s recommendation that the draft conclusions should remain in the Drafting Committee until a full set had been adopted ([A/CN.4/SR.3323](#)). As, however, the previous Chairs of the Drafting Committee had presented oral interim reports on the outcome of the Committee’s work on the topic at the sixty-eighth, sixty-ninth and seventieth sessions ([A/CN.4/SR.3342](#), [A/CN.4/SR.3382](#) and [A/CN.4/SR.3402](#)), he would focus on modifications made to draft conclusions previously adopted provisionally by the Committee and on the new provisions adopted for the first time at the current session.

Several draft conclusions had been moved within the text. When, as a result, their numbering changed, the original number was shown in square brackets. In response to a

proposal from the Special Rapporteur, the Committee had decided to divide the draft conclusions into four parts.

Part One, entitled “Introduction”, contained three introductory provisions. In draft conclusion 1, entitled “Scope”, the words “legal effects” had been replaced with “legal consequences”. The Committee had decided to refer to “consequences” to ensure consistency with the rest of the draft conclusions. With regard to draft conclusion 2 [3 (1)], on the definition of a peremptory norm of general international law (*jus cogens*), the Commission had decided to reverse the order of draft conclusions 2 and 3 in keeping with the approach adopted to other topics, where the provision on definitions followed that on scope. Draft conclusion 3 [3 (2)] was entitled “General nature of peremptory norms of general international law (*jus cogens*)”.

Part Two, entitled “Identification of peremptory norms of general international law (*jus cogens*)”, comprised six draft conclusions that had been provisionally adopted at previous sessions. They concerned criteria for the identification of a peremptory norm of general international law (*jus cogens*), bases for peremptory norms of general international law (*jus cogens*), acceptance and recognition, the international community of States as a whole, evidence of acceptance and recognition and subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). Apart from a minor editorial adjustment of the title of draft conclusion 4, no changes had been made to the wording of those draft conclusions. After discussing whether the phrase “very large majority” in draft conclusion 7 (2) should be altered to “overwhelming majority”, the Committee had decided to retain “very large majority” on the understanding that some members’ preference for “overwhelming majority” would be mentioned in the commentary. The Committee had also considered splitting that paragraph into two sentences, but had decided to leave it as it stood.

Part Three entitled “Legal consequences of peremptory norms of general international law (*jus cogens*)”, consisted of 12 draft conclusions. In response to a proposal from the Special Rapporteur, the Committee had considered dividing it into two separate parts, on the consequences of peremptory norms (*jus cogens*) for other rules of international law and on the consequences of peremptory norms (*jus cogens*) in respect of State responsibility. It had also been suggested that one part should address the sources of international law in relation to peremptory norms of general international law (*jus cogens*) and the other should concern State responsibility. In the end, the Committee had decided not to split that part.

The Committee had also discussed whether or not to include a provision on general principles of law conflicting with a peremptory norm of international law (*jus cogens*). At the seventieth session, the Special Rapporteur had expressed a willingness to consider including a provision that would complement the corresponding provisions on treaties, rules of customary international law, unilateral acts of States and resolutions, decisions or other acts of international organizations. The Drafting Committee recommended that the Commission should consider that issue during the second reading in order to take account of its forthcoming work on the topic “General principles of law”.

Draft conclusions 10, 11 and 12 had been provisionally adopted by the Committee at the seventieth session (A/CN.4/SR.3402). During the *toilettage*, the Committee had adjusted the titles to read “Treaties conflicting with a peremptory norm of general international law (*jus cogens*)”, “Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)” and “Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)”, respectively. Those changes had been made in order to align the titles with those of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties. Article 53 of the latter used the phrase “treaties conflicting” rather than “treaties in conflict” with a peremptory norm of general international law (*jus cogens*) and made no reference to the legal consequences of such a conflict in the title.

Apart from a minor editorial adjustment in paragraph 1, the title and text of draft conclusion 13 remained unchanged.

The Committee had discussed draft conclusion 14 [15], entitled “Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)”, which concerned the consequences of a conflict between a rule of customary international law and a peremptory norm of general international law (*jus cogens*), on the basis of the provision proposed by the Special Rapporteur in his third report. The first sentence of paragraph 1 provided that a rule of customary international law did not come into existence if it conflicted with a peremptory norm of general international law (*jus cogens*), which was consonant with article 53 of the 1969 Vienna Convention, as also reflected in draft conclusion 10 (1). The initial wording proposed by the Special Rapporteur had been modified to follow more closely the language of the draft conclusions on identification of customary international law. Accordingly, the phrase “a customary international law rule” had been changed to “a rule of customary international law” and the phrase “does not arise” had been replaced with “does not come into existence”.

The second sentence of paragraph 1 set forth the exception to the general rule stipulated in the first part of the paragraph. Several members had expressed concern that paragraph 1 would prevent the development of a new rule of customary international law of a peremptory character that could modify an existing peremptory norm of general international law (*jus cogens*). The Special Rapporteur had been of the view that the emergence of a new rule of customary international law could occur only if it were also of a peremptory nature in line with article 53 of the 1969 Vienna Convention. He had therefore suggested that members’ concerns might be addressed by adding the phrase “unless the underlying rule itself attains the status of a peremptory norm of general international law (*jus cogens*)” to the first sentence of paragraph 1. The Committee had then discussed how that proposal could be more closely aligned with the wording of article 53 of the 1969 Vienna Convention by allowing for a modification of a peremptory norm of general international law (*jus cogens*) by a “subsequent norm of general international law having the same character” or by a rule that “is accepted and recognized as a peremptory norm of general international law (*jus cogens*)”. In order to avoid any impression that two conflicting peremptory norms of general international law (*jus cogens*) could coexist, it had also been suggested that the possibility that a peremptory norm of general international law (*jus cogens*) could be modified by a new rule of customary international law should be discussed only in the commentary. The Committee had settled on the “without prejudice” clause in the second sentence of paragraph 1 as a compromise between those different views.

Paragraph 2 stipulated that a rule of customary international law not of a peremptory nature ceased to exist if and to the extent that it conflicted with a new peremptory norm of general international law (*jus cogens*). That paragraph was consistent with article 64 of the 1969 Vienna Convention and with draft conclusion 10 (2). As in draft conclusion 14 (1), the phrase “a customary international law rule” had been changed to “a rule of customary international law”. The expression “not of a *jus cogens* character” had been replaced with “not of a peremptory character” on the understanding that the commentary would explain that “peremptory” meant “*jus cogens*”. In order to indicate that the entire rule of customary international law did not cease to exist as a result of a conflict with a peremptory norm of general international law (*jus cogens*), the Drafting Committee had added the phrase “to the extent that” as suggested by the Special Rapporteur.

Paragraph 3 provided that the persistent objector rule did not apply to peremptory norms of general international law (*jus cogens*). The first part of the paragraph proposed by the Special Rapporteur had been deleted and the phrase “is not applicable” had been replaced with “does not apply to peremptory norms of general international law (*jus cogens*)”. The Drafting Committee had agreed that the commentary could discuss why that rule did not apply in respect of peremptory norms of general international law (*jus cogens*) and address the situation where a State was a persistent objector to a rule of customary international law that became a peremptory norm of general international law (*jus cogens*). Notwithstanding the view that “persistent objection” to a rule of customary international law should not be characterized as a “rule”, but rather as a “doctrine”, the Committee had ultimately decided to retain the phrase “persistent objector rule”, because the Commission had used it in its work on the identification of customary international law. It had also been suggested that the persistent objector rule concerned the formation of a peremptory norm of

general international law (*jus cogens*) rather than its consequences and, for that reason, could be located in an earlier part of the draft conclusions. The Drafting Committee had, however, decided to retain its current location.

Draft conclusion 15 [16], entitled “Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)”, addressed the consequences of a conflict between an obligation created by a unilateral act and a peremptory norm of general international law (*jus cogens*). The Committee had based its deliberations on a proposal from the Special Rapporteur, but had then decided to add a second paragraph to align that draft conclusion with the structure of draft conclusions 10 and 14 concerning treaties and customary international law, respectively.

Paragraph 1 stated that a unilateral act manifesting the intention to be bound under international law that would be in conflict with a peremptory norm of general international law (*jus cogens*) did not create such an obligation. Having regard to guiding principle 8 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which the Commission had adopted in 2006, the Committee had discussed whether draft conclusion 15 should be confined to “unilateral declarations”, but had decided to retain the broader formulation “unilateral acts”, as initially proposed by the Special Rapporteur. The draft conclusion made it clear that it was not the unilateral act that would be in conflict with the peremptory norm of general international law (*jus cogens*) but the obligation which would have been created but for the conflict. To underline that not all unilateral acts created obligations, the Special Rapporteur had presented a revised proposal which limited the scope of the draft conclusion to unilateral acts “manifesting the will to undertake obligations under international law”. Other Committee members had proposed the replacement of that phrase with a more objective standard such as that of unilateral acts “capable of creating legal obligations” drawn from the title of the above-mentioned guiding principles, or by specifying that the unilateral act must be publicly made. The Committee had finally settled on the phrase “a unilateral act … manifesting the intention” derived from the Guiding Principles and in line with the relevant case law of the International Court of Justice. It had been agreed that the term “manifesting” implied “publicly made” and would ensure that the intention to be bound by an obligation under international law could be objectively ascertained.

Paragraph 2 concerned the situation where a unilateral act had already created an obligation which conflicted with a newly emerged peremptory norm of general international law (*jus cogens*). The text was based on a proposal made by the Special Rapporteur which largely followed the wording of draft conclusion 14 (2) and included the phrase “if and to the extent that”. It was understood that the obligation under international law which conflicted with a peremptory norm of general international law (*jus cogens*) had been created by a unilateral act with the effects set forth in draft conclusion 15 (1).

The phrase “of a State” had been included in draft conclusion 15 (1) and (2) on the understanding that the draft conclusion mainly concerned unilateral acts by States. During the discussion in the Committee, it had been pointed out the draft conclusion would be without prejudice to the conflict between obligations created by unilateral acts of non-State actors and a peremptory norm of general international law (*jus cogens*). It had been the Committee’s understanding that unilateral acts of international organizations would be covered by draft conclusion 16.

Draft conclusion 16 [17 (1)] was entitled “Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)”. The Committee had considered alternative wording for the title, including the insertion of the adjective “binding” before “resolutions”, but had decided that it was unnecessary to do so. That draft conclusion addressed the conflict between obligations created by resolutions, decisions or other acts of international organizations and a peremptory norm of general international law (*jus cogens*). It was based on paragraph 1 of the proposal presented by the Special Rapporteur in his third report. The content of paragraph 2 as proposed by the Special Rapporteur was covered by draft conclusion 20 on interpretation.

Draft conclusion 16 provided that a resolution, decision or other act of an international organization that would otherwise have a binding effect did not create obligations under international law if and to the extent that they conflicted with a peremptory norm of general international law (*jus cogens*). It had a dual function: on the one hand, it concerned a situation where a resolution, decision or other act of an international organization would otherwise create obligations for its member States; on the other, it covered the same scenario as draft conclusion 15 where an international organization intended to be bound by a unilateral act.

The initial discussion in the Committee had focused on whether the reference to the Security Council should be deleted from the text. Several members had held that Security Council decisions were implied in the phrase “binding decisions” which covered decisions of various kinds of international organizations. It had also been mentioned that such reference could have a chilling effect on Security Council action. Other members had been of the view that an explicit reference to the Security Council was warranted on account of the special role which it had played in the international order since the Second World War. Attention had also been drawn to the fact that the report of the Study Group on the fragmentation of international law (A/CN.4/L.682) had examined the possibility of conflict between peremptory norms of general international law (*jus cogens*) and Security Council decisions. As a compromise, it had been suggested that the draft conclusion should refer to “all principal organs of the United Nations”. The Committee had ultimately decided to delete the reference to the Security Council and to make it clear in the commentary that the reference to binding decisions included those of the Security Council.

The text proposed by the Special Rapporteur had also been recast to avoid repetition of the adjective “binding” and to track more closely the language of draft conclusion 15. During the *toilettage* the words “be binding” had been changed to read “have binding effect” in order to make it plain that it was not the resolution itself that was the focus of the draft conclusion, but rather the provisions in the resolution that conflicted with the peremptory norms of general international law (*jus cogens*).

While the initial proposal of the Special Rapporteur had referred only to “decisions” of international organizations, the Committee had decided to refer more broadly to “resolutions, decisions or other acts of international organizations”, albeit in the singular, in line with the definition of “rules of the organization” of article 2 (b) of the articles on the responsibility of international organizations, which the Commission had adopted in 2011. The word “otherwise” indicated that the conflict with the peremptory norm of general international law (*jus cogens*) deprived the resolution, decision or other act of the organization of its legal effect, as was confirmed by the remainder of the text, which echoed the wording of draft conclusion 15 in that it stated that the resolution, decision or other act of an international organization “does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*)”.

Draft conclusion 17 [18], entitled “Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)”, concerned the relationship between *erga omnes* obligations and peremptory norms of general international law (*jus cogens*), including invocation of international responsibility for a breach of a peremptory norm of general international law (*jus cogens*). While several members had emphasized that it was important to have a provision on the relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*, others had questioned the necessity of including such a provision in the draft text at all. Some had made the point that the relationship between *erga omnes* obligations and peremptory norms of general international law (*jus cogens*) was a separate question from responsibility for a breach of those norms. Taking account of the various views expressed within the Committee, the Special Rapporteur had put forward a revised proposal which formed the basis of paragraphs 1 and 2, where the relationship between the two concepts was separated from the invocation of responsibility for a breach.

Paragraph 1 provided that peremptory norms of general international law (*jus cogens*) gave rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States had a legal interest. The Committee generally agreed that all

peremptory norms of general international law (*jus cogens*) had an *erga omnes* character, but that not all *erga omnes* norms were also peremptory norms of general international law (*jus cogens*). The suggestion had been made that the verb “establish” should be replaced with “constitute”, which had also been used in the report of the Study Group on the fragmentation of international law. The Committee had opted for “give rise to”, which had been taken from the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts adopted by the Commission in 2001. The phrase “owed to the international community as a whole” had been inserted before “obligations *erga omnes*” in order to be consistent with article 48 (1) (b) of the aforementioned articles and the Latin expression had been retained for its explanatory value. The phrase “the breach of which concerns all States” had been replaced with the broader formulation “in which all States have a legal interest”. Another proposal had been for the paragraph to read “in the protection of which all States have a legal interest”, which would have been closer to the language of the International Court of Justice in the case concerning *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. The Committee had ultimately agreed that the commentary would explain that the notion of “legal interest” encompassed the protection of the legal norm as such, including rights and obligations. Although the words “owed to the international community as a whole” implied the phrase “in which all States have a legal interest”, the phrase had been kept as a bridge to draft conclusion 17 (2).

Paragraph 2, which dealt with the invocation of responsibility for a breach of *erga omnes* obligations arising from peremptory norms of general international law (*jus cogens*), stipulated that any State was entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*) in accordance with the rules on responsibility of States for internationally wrongful acts. During the discussion, it had been clarified that the purpose of the paragraph was to provide guidance in the specific case where a State other than the injured State invoked responsibility for a breach of a peremptory norm of general international law (*jus cogens*). The Committee had added the phrase “in accordance with the rules on the responsibility of States for internationally wrongful acts” in order to emphasize that in draft conclusion 17 there was no intention to deviate from the Commission’s previous work with regard to the distinction between the various categories of injured States other than the injured State.

Draft conclusion 18 provided that no circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts might be invoked with regard to any act of a State which was not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*). While the Drafting Committee had generally followed the proposal of the Special Rapporteur, the text had been modified to insert the phrase “under the rules on the responsibility of States for internationally wrongful acts”. In line with article 26 of the articles on responsibility of States for internationally wrongful acts of 2001, the phrase was intended to make clear that the scope of the draft conclusion was limited to the circumstances precluding wrongfulness referred to in Part One, chapter V, of those articles. To further align the language with article 26 of those articles, the words “an act” had been replaced with the words “any act”. Drawing inspiration from article 27 of the articles, the Committee had replaced the word “advanced” with “invoked”.

In response to a proposal by the Special Rapporteur, the Drafting Committee had deleted paragraph 2 of the draft conclusion contained in the third report of the Special Rapporteur, which had dealt with the question of the emergence of a peremptory norm subsequent to the commission of the wrongful act. The matter would instead be addressed in the commentary to the draft conclusion 18.

The Committee had modified the title of the draft conclusion by omitting the reference to “effects”, so that the title now read: “Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness”.

Draft conclusion 19 concerned the particular consequences arising out of a serious breach of a peremptory norm of general international law (*jus cogens*) and was based on the Special Rapporteur’s proposals for draft conclusions 20 and 21 contained in his third report. The Drafting Committee had decided to merge the content of both of those draft

conclusions into a single provision, which corresponded in terms of substance and formulation to articles 40 and 41 of the 2001 articles on State responsibility.

In his third report, the Special Rapporteur had omitted the word “serious” before the word “breach” in draft conclusion 21, which concerned the duty not to render assistance in the maintenance of, or recognize, situations created by breaches of peremptory norms of general international law (*jus cogens*). At the request of the Special Rapporteur, the Drafting Committee had begun by debating whether that word should be retained in the provision. Those members seeking its deletion had argued that it would be sending a wrong message to suggest that States were free to recognize situations created by breaches of peremptory norms of general international law or to render assistance in the maintenance of such situations. However, since the majority of members had favoured retaining the word “serious” for the sake of consistency with the articles on State responsibility, the Committee had agreed to retain it on the understanding that the contrary view would be highlighted in the commentaries.

Paragraph 1 provided that States must cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*). While the provision indicated that the obligation to cooperate was on States – as indicated in article 41 of the articles on State responsibility – the commentary would make it clear that the obligation to cooperate also applied to international organizations, as envisaged in the corresponding provision of the 2011 articles on the responsibility of international organizations. The phrase “obligation arising under” had been added in order to align the text with that of article 40 (1) of the 2001 articles on State responsibility. The Drafting Committee had decided to leave to the commentary the content of paragraph 3 of draft conclusion 20, as initially proposed by the Special Rapporteur, which dealt with institutionalized cooperation mechanisms and *ad hoc* cooperative arrangements.

Paragraph 2 provided that no State was to recognize as lawful a situation created by a serious breach by a State of an obligation arising from a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation. While in his initial proposal for draft conclusion 21, the Special Rapporteur had proposed two separate paragraphs to convey those provisions, the Drafting Committee had decided to reproduce, with the necessary modifications, article 41 (2) of the 2001 articles on State responsibility. It had also been agreed that the commentary would clarify that non-recognition, as stipulated in paragraph 2, should not result in depriving the affected population of any advantages derived from international cooperation, as indicated by the International Court of Justice in its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

Paragraph 3 contained the definition of what constituted a serious breach of a peremptory norm of general international law (*jus cogens*). It tracked in large part the wording of article 40 (2) of the articles on State responsibility, namely, that such a breach of an obligation arising under a peremptory norm was serious if it “involves a gross or systematic failure by the responsible State to fulfil that obligation”. The view of the Drafting Committee had been that, even when a breach of a peremptory norm of general international law did meet the threshold of “seriousness” under paragraph 3, the other legal consequences that followed from the rules of State responsibility continued to apply.

The Drafting Committee had further decided to add a paragraph 4, which provided that the draft conclusion was without prejudice to the other consequences that a serious breach by a State of an obligation arising from a peremptory norm of general international law (*jus cogens*) might entail under international law. The text of paragraph 4 replicated, with the necessary modifications, the “without prejudice” clause contained in article 41 (3) of the articles on State responsibility. The title of draft conclusion 19 was based on the title of article 41 of the articles on State responsibility.

Draft conclusion 20 concerned the interpretation and application of other rules of international law in a manner consistent with peremptory norms of general international law (*jus cogens*). Following the views expressed during the Commission’s debate at its

seventieth session, the Special Rapporteur had proposed a separate draft conclusion on interpretation, based on his proposals for draft conclusion 10 (3), on the interpretation of treaties, and draft conclusion 17 (2), on the interpretation of resolutions of international organizations.

During the discussion in the Drafting Committee as to whether it was necessary to include a provision on interpretation in the draft conclusions at all, it had been recalled that the requirement of interpretation leading to the harmonization of different rules of international law was envisaged in article 31 (3) (c) of the 1969 Vienna Convention on the Law of Treaties. The Committee had taken into account the guidance in the commentary to article 26 of the articles on State responsibility that “peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts”. At the same time, it had been considered that draft conclusion 20 should not be understood as imposing a requirement for the interpreter to systematically undertake an examination of whether any rule of international law under consideration was consistent with peremptory norms of general international law (*jus cogens*).

The phrase “where it appears that there may be a conflict” indicated that the draft conclusion covered cases of an apparent conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law. In the event of an actual conflict, the consequences set out in draft conclusions 10, 11, 12, 14, 15 or 16 would be triggered, depending on the nature of the other rule of international law concerned. The commentary would explain the meaning of the word “appears” in that context.

The phrase “as far as possible” suggested that there might be situations in which it was indeed not possible to reconcile the rule of international law with a peremptory norm of general international law (*jus cogens*) by means of a consistent interpretation. The phrase “the latter” implied that it was the other rule of international law that must be consistent with the peremptory norm of general international law (*jus cogens*), which, as indicated in draft conclusion 3, was hierarchically superior.

The phrase “interpreted and applied” in the draft conclusion anticipated the possibility that a rule of international law might be consistent with a peremptory norm of general international law (*jus cogens*) on its face, but that a conflict might arise in the application of that rule. Several Drafting Committee members had been of the view that interpretation and application were different concepts and that the draft conclusion should be limited to interpretation. It had also been pointed out that the situation in which the application of a rule of international law might lead to a possible conflict with a peremptory norm of general international law (*jus cogens*) had been addressed in previous draft conclusions. The Committee had agreed to include the words “and applied” on the understanding that the commentary would clarify that the interpretation and application of a rule were interrelated but separate concepts. The commentary would also explain the relationship between draft conclusion 20 and other relevant draft conclusions, in particular draft conclusion 21.

Draft conclusion 21, which proposed several procedural requirements for the invocation of a peremptory norm of general international law (*jus cogens*) as a ground for the invalidation or termination of a rule of international law, had been provisionally adopted at the Commission’s seventieth session as draft conclusion 14. He drew the Commission’s attention to the statement delivered by Mr. Jalloh at that session explaining the provision (A/CN.4/SR.3436).

At the current session, the Drafting Committee had decided to relocate the provision to the end of Part Three, as draft conclusion 21, since it covered not only treaties but also the situation of a conflict between a peremptory norm of general international law (*jus cogens*) and other rules and obligations under international law, as envisaged in draft conclusions 14, 15 and 16. A minor technical amendment had been made in paragraph 5, where the word “and” had been replaced with “or” so as to clearly indicate that the options envisaged in that paragraph were alternatives. It had also been agreed that the expression “relevant rules” in paragraph 5 was understood also to cover obligations.

Part Four of the draft conclusions, entitled “General provisions”, contained two “without prejudice” clauses, both of which had been adopted by the Drafting Committee at the current session.

Draft conclusion 22 stipulated that the draft conclusions were without prejudice to particular consequences that specific peremptory norms of general international law (*jus cogens*) might otherwise entail under international law. It reflected the compromise proposed by the Special Rapporteur during the summing up of the debate on his third report, according to which draft conclusions 22 and 23, as proposed in his third report, would be referred to the Drafting Committee on the understanding that they would be replaced by a single “without prejudice” clause.

In considering the Special Rapporteur’s new proposal for draft conclusion 22, the Drafting Committee had decided to insert the word “specific” before “peremptory norms” because the word “particular” had been used in the title of draft conclusion 19 and in the conclusions on the identification of customary international law to contrast “particular” with the word “general” in the phrase “general customary international law”. The term “otherwise” had been inserted to make it clear that the provision covered consequences of peremptory norms of general international law (*jus cogens*) other than those provided for in the present draft conclusions. The phrase “entail under international law” had been inserted in order to track the wording of article 41 (3) of the articles on States responsibility, which was also reflected in draft conclusion 19 (4). The verb “may” had been chosen so as to avoid prejudging the occurrence and nature of such specific consequences.

The commentary would explain that, given their general nature, the draft conclusions were not intended to address the consequences of specific norms of general international law (*jus cogens*). It would also note that there were differing views on the consequences of peremptory norms of general international law (*jus cogens*) with regard to immunities.

The title of draft conclusion 22 was “Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail”. Although the Drafting Committee had considered shorter titles such as “Without prejudice clause”, “Other consequences of specific peremptory norms” and “Other possible consequences of specific peremptory norms”, the longer title had been chosen as the one that most appropriately reflected the content of the draft conclusion.

Draft conclusion 23 was based on the Special Rapporteur’s proposal to include a non-exhaustive list of peremptory norms of general international law (*jus cogens*) in the draft conclusions. The plenary Commission had referred the proposal to the Drafting Committee at the current session on the premise that the draft conclusion would be limited to those norms that the Commission had referred to in its previous work and that the list of norms would be reflected in an annex. That approach had been modelled on article 7 of the articles on the effects of armed conflicts on treaties and the corresponding annex.

Draft conclusion 23 indicated that the list included in the annex to the draft conclusions was “without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*)”. In his revised proposal, the Special Rapporteur had included the phrase “future emergence” to address concerns expressed during the plenary debate and in the Drafting Committee that the inclusion of a list of peremptory norms of general international law (*jus cogens*) in the draft conclusions could prejudice the development of new norms with that status. The Committee had replaced the word “future” with the word “subsequent” to emphasize that new peremptory norms of general international law (*jus cogens*) might emerge subsequent to the formulation of the non-exhaustive list in the annex. It had been reiterated in the Committee that the identification of such additional norms was beyond the scope of the Commission’s work on the topic and would require separate consideration.

The phrase “a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status” in the draft conclusion emphasized that its scope was limited to references by the Commission and was not based on a substantive discussion of the content of the norms listed. Accordingly, the term “referred to” was a factual statement indicating that the Commission had made reference to the norms

contained in the annex in its previous work. The commentary to the annex would indicate the relevant references in the Commission's previous work. Although the Special Rapporteur's revised proposal for draft conclusion 23 had referred to norms "having attained" the status of peremptory norms of general international law (*jus cogens*), that wording had been deleted. The formulation "is to be found in the annex to the present draft conclusions" reflected the wording of article 7 of the articles on the effects of armed conflicts on treaties.

The title of draft conclusion 23 was "Non-exhaustive list". It allowed for the possibility that there could be peremptory norms of general international law (*jus cogens*) that had not been referred to by the Commission in its prior work and also confirmed that the list did not necessarily include all such norms that had been referred to by the Commission in the past.

The list contained in the annex reflected the norms that the Special Rapporteur had set out in draft conclusion 24 in his fourth report as the norms to which the Commission had previously referred. The Special Rapporteur had presented a revised proposal that included amendments reflecting comments and suggestions made during the plenary debate. However, in some cases, the Drafting Committee had preferred the Special Rapporteur's initial formulation. The Committee had accepted the suggestion to change the order of the norms, so as to place the phrase "basic principles of humanitarian law" close to the prohibition of genocide and the prohibition of crimes against humanity. At the same time, it had been understood in the Drafting Committee that the list did not reflect a hierarchy of peremptory norms of general international law (*jus cogens*).

In line with the understanding that the list should reflect those norms previously referred to by the Commission, the discussion in the Drafting Committee had focused on the formulation of the norms. The Committee had accepted the wording proposed by the Special Rapporteur, in his revised proposal, of all except three norms, in place of which the Commission had resorted to various formulations contained in its previous work.

The first of those was the prohibition of aggression, to which the Special Rapporteur had, in his fourth report, proposed adding the phrase "or aggressive force". The revised proposal contained only the words "prohibition of aggression". Some members had noted that the prohibition of aggression could be reformulated more broadly as "the law of the Charter concerning the law of the use of force". The Drafting Committee had kept the formulation "prohibition of aggression", based on the Commission's most recent relevant reference to that concept in the articles on State responsibility.

Although the Special Rapporteur had proposed to reformulate the phrase "basic rules of international humanitarian law" as "the prohibition of war crimes", based on comments made during the plenary debate, the Drafting Committee had reverted to the Special Rapporteur's initial proposal, which corresponded to previous references by the Commission. Likewise, following on from the debate in plenary, the Special Rapporteur in his revised proposal had included only "the prohibition of apartheid", omitting the words "racial discrimination". However, the Drafting Committee had decided to retain the phrase "the prohibition of racial discrimination and apartheid", as proposed by the Special Rapporteur in his third report, albeit in reverse order. Once again, that had been done in order to align the formulation with one that had previously been used by the Commission.

During the discussion of the norms listed in the annex, several members had reiterated their respective views, as expressed during the plenary debate, that the list should include other norms. It had been suggested, for example, that the fundamental principles contained in the Charter of the United Nations should be included at the beginning of the norms enumerated in the annex. Some members had proposed to include such principles as the sovereign equality of States, non-intervention, the peaceful settlement of international disputes and *pacta sunt servanda*. Reference had also been made to the prohibition of piracy and to the Commission's previous work on article 19 of the draft articles on State responsibility on first reading, in 1996, which had included the formulation "serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas".

In accordance with the compromise approach reached at the conclusion of the plenary debate, which was reflected in draft conclusion 23, the Drafting Committee had decided to limit the list to those norms that the Commission had most clearly designated as peremptory norms of general international law (*jus cogens*) in the past. In that context, it should be recalled that draft conclusion 23 was “without prejudice” to other possible peremptory norms of general international law (*jus cogens*).

The Chair invited the Commission to adopt the text of the draft conclusions and draft annex provisionally adopted by the Drafting Committee on first reading, as contained in document A/CN.4/L.936.

Part One

Introduction

Draft conclusion 1

Mr. Murphy said that the Chair of the Drafting Committee, when discussing draft conclusion 22, had noted that there had been disagreement concerning the consequences of peremptory norms of general international law with regard to immunities but had failed to mention that differing views had also been expressed, at least during the plenary debate, concerning those consequences with regard to domestic jurisdiction. He took it that the Special Rapporteur would seek to reflect both points in the commentary.

Mr. Nolte said that the Chair of the Drafting Committee had stated, with respect to draft conclusion 15 on unilateral acts of States, that there had been an understanding that acts of international organizations would be covered by that draft conclusion. That was his own recollection. It was also his recollection that the question of the applicability of the rules reflected in the draft conclusions to international organizations was a larger question than just draft conclusion 15. The Chair of the Drafting Committee had mentioned that question in connection with draft conclusion 19 (1), but not, for example, with respect to draft conclusions 17 (2), 18 or 19 (2) and (4). It had been his understanding that the Special Rapporteur would address the question of the applicability of the draft conclusions to international organizations in the commentaries in a somewhat broader way than just with respect to draft conclusion 15. He had taken the floor in order to seek reassurance that that was indeed the case.

Draft conclusion 1 was adopted.

Draft conclusions 2 to 3

Draft conclusions 2 to 3 were adopted.

Part Two

Mr. Tladi (Special Rapporteur) said that, in the title of Part Two, the word “norm”, which was in the singular, should be changed to the plural “norms”, so that it would read: “Identification of peremptory norms of general international law (*jus cogens*)”.

The title of Part Two, as amended, was adopted.

Draft conclusions 4 to 9

Draft conclusions 4 to 9 were adopted.

Part Three

Draft conclusions 10 to 13

Draft conclusions 10 to 13 were adopted.

Draft conclusion 14

Mr. Park said that he wished to make a brief statement regarding the expression “persistent objector rule”, which was used in paragraph 3 of draft conclusion 14. It was his consistent position that the concept of “persistent objector” was not a rule but a doctrine. He had expressed that same position with regard to conclusion 15, entitled “Persistent objector”, of the draft conclusions on the identification of customary international law.

The Chair said that due note would be taken of Mr. Park’s position.

Draft conclusion 14 was adopted.

Draft conclusions 15 to 18

Draft conclusions 15 to 18 were adopted.

Draft conclusion 19

Mr. Tladi (Special Rapporteur) said that, for the sake of consistency with paragraph 1, and in line with the Commission’s articles on responsibility of States for internationally wrongful acts, the phrase “arising from a peremptory norm” in paragraphs 2 and 4 should be replaced with “arising under a peremptory norm”.

Draft conclusion 19, as amended, was adopted.

Draft conclusions 20 to 23

Draft conclusions 20 to 23 were adopted.

Draft annex

Mr. Tladi (Special Rapporteur) said that it had been pointed out to him that the Commission’s practice was to italicize the word “apartheid”. The draft annex should be amended accordingly.

Mr. Murphy said that, in the Commission’s draft articles on crimes against humanity, the word was not italicized. It should be left to the Special Rapporteur and the Secretariat to ensure that the draft annex was consistent with the Commission’s practice.

The draft annex was adopted on that understanding.

The Chair said that he took it that the Commission wished to adopt, on first reading, the texts and titles of the draft conclusions and draft annex on peremptory norms of general international law (*jus cogens*), as contained in document [A/CN.4/L.936](#).

It was so decided.

Cooperation with other bodies (agenda item 10)

Visit by representatives of the Council of Europe

The Chair welcomed the representatives of the Council of Europe, Mr. Válek, Chair of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Requena, Head of the Public International Law Division and Secretary to CAHDI, and invited them to address the Commission.

Mr. Válek (Council of Europe) said that it was an honour for him to address the Commission for the first time in his capacity as Chair of CAHDI. He had begun his term of office in January 2019, following elections that had taken place in September 2018.

CAHDI, which had been established 28 years previously, was composed of the legal advisers of the ministries of foreign affairs of the 47 Council of Europe member States and the representatives of 9 observer States and 10 participant international organizations, including the Asian-African Legal Consultative Organization. A total of 66 States and organizations were entitled to take part in CAHDI meetings. At the most recent meeting, in March 2019, there had been 92 participants. With the help of such high levels of

participation, CAHDI was building bridges among legal advisers on public international law beyond Europe and across continents.

Within a truly pan-European setting, namely the Council of Europe, CAHDI was a legal forum not only for coordination but also for discussion, reflection and advice. It was a laboratory of ideas, essential for the development of public international law. At its biannual meetings, participants were able to inform one another about topical issues and exchange national experiences and practices. CAHDI also played an important role in fostering cooperation and collaboration between the Council of Europe and the United Nations. With a view to strengthening that cooperation, it had held an exchange of views with Mr. Mathias, Assistant Secretary-General for Legal Affairs of the Office of Legal Affairs, at its meeting in Helsinki in September 2018.

CAHDI had close ties with the Commission, which was reflected on two levels. First, the Commission's work was regularly on the agenda of CAHDI meetings and was the subject of enlightening discussions among all participants. Secondly, there was an institutional relationship, which was strengthened, each year, by extending an invitation to a member of the Commission to exchange views on the Commission's work. CAHDI looked forward to receiving the Chair of the Commission, Mr. Šturma, at its fifty-eighth meeting in Strasbourg in September 2019.

CAHDI also engaged in dialogues with international courts. In March 2019, it had held an exchange of views with Ms. Hrdličková, President of the Special Tribunal for Lebanon, who had provided an overview of the Tribunal's work and activities, including information on its unique features within the international criminal justice system, such as trials in absentia and the fact that it applied law and procedural rules inspired by both the Lebanese and the international legal systems.

One of the major ways in which CAHDI contributed to the development of public international law was through its role as the European Observatory of Reservations to International Treaties. In that capacity, CAHDI monitored States' compliance with rules of public international law in the field of treaty law and examined reservations and declarations to Council of Europe conventions and to conventions deposited with the Secretary-General of the United Nations. The role, which CAHDI had been performing for more than 19 years, was of proven effectiveness. In examining reservations and declarations, CAHDI encouraged recourse to the reservations dialogue, a concept that fostered dialogue and conciliation, and whose birth could be traced back to CAHDI. It not only allowed States that had formulated a problematic reservation to clarify its scope and effect, and, if necessary, tone it down or withdraw it, but also gave other States an opportunity to understand the rationale behind the reservation before formally objecting to it. In that respect, the participation of observers from regions other than Europe was of great importance.

CAHDI continued to observe the revival of a trend whereby States subordinated treaty provisions to their domestic law. Reservations of that nature were inadmissible under international law as they created legal uncertainty and often went against the object and purpose of the treaties concerned. The Commission's Guide to Practice on Reservations to Treaties was of great assistance to CAHDI in its examination of reservations.

In September 2018, as part of its role of advising the Committee of Ministers on legal matters, CAHDI had adopted a legal opinion concerning challenges related to hybrid warfare, in which it had underlined that, in the absence of a universally agreed definition of "hybrid war", relevant national and international legal regimes applied to military and non-military means of "hybrid war". Consequently, actions should be assessed individually according to the relevant legal regime. If such actions amounted to an international or other armed conflict, international humanitarian law applied. CAHDI had also recalled that international human rights law was pertinent to both military and non-military actions carried out as part of a "hybrid war", including, in particular, the case law of the European Court of Human Rights regarding restrictions on certain human rights. Many political and legal issues were raised by activities that constituted hybrid warfare, but some of them were already addressed by existing legally binding international instruments and by several international entities within the Council of Europe and beyond. CAHDI had concluded that,

in the absence of a common understanding of what “hybrid war” entailed, it would be premature to develop new legal standards to prevent and combat the threat of “hybrid war”.

CAHDI had adopted two other legal opinions in September 2018, entitled “State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights” and “Humanitarian needs and rights of internally displaced persons in Europe”. All legal opinions adopted by CAHDI were published on its website and were fully accessible.

The discussions traditionally held by CAHDI on peaceful settlement of disputes had focused mainly on clauses of acceptance of the compulsory jurisdiction of the International Court of Justice. Nevertheless, in 2018, CAHDI had decided to expand the topic to cover other clauses establishing the jurisdiction of the Court, the case law of the International Tribunal for the Law of the Sea, inter-State arbitration cases and any other relevant cases of peaceful settlement of disputes between States. Currently, at every CAHDI meeting, members provided information on the latest developments in the field of peaceful settlement of disputes.

With regard to the most recent activities of CAHDI in relation to immunities, in 2014, at the request of the delegation of the Netherlands, it had begun to examine the settlement of disputes of a private character to which an international organization was a party. The Netherlands delegation had prepared a document to facilitate discussions on questions related to the settlement of third-party claims for bodily injury or death and for loss of property or damage allegedly caused by an international organization, and on the effective remedies available to claimants in such situations. In many cases, the immunity of international organizations prevented individuals who had been harmed by the actions of an international organization from bringing a successful claim before a domestic court. Such immunity had increasingly been challenged on account of its alleged incompatibility with the right to access to court. In the document, the Netherlands delegation had addressed five questions to CAHDI members. To date, 20 delegations had submitted replies, which remained confidential, as they were used only as a basis for the examination of the issue by CAHDI, and, in any event, discussions had not yet been finalized.

While the topic was of practical importance for the Council of Europe itself, it was of relevance beyond the European regional framework and could affect, in particular, the peacekeeping operations of the United Nations. Thus, the consideration of the topic by CAHDI was a good example of how CAHDI played a pioneering role by acting as a testing ground for subjects that were more difficult to discuss at a “global” level. Such discussions were facilitated by the fact that CAHDI experts also took part in global forums within the United Nations system, which made it possible to ensure legal coherence on certain issues and promote legal exchanges within various organizations.

At the joint initiative of Austria and the Czech Republic, the non-legally binding Declaration on Jurisdictional Immunities of State Owned Cultural Property had been developed within the CAHDI framework. The Declaration expressed a common understanding of *opinio juris* concerning the fundamental rule that certain kinds of State property enjoyed immunity from any measure of constraint, such as attachment, arrest or execution, in another State. By signing the Declaration, States recognized the customary nature of relevant provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which had not yet entered into force. CAHDI was therefore at the centre of the development of international law and, in the case of the Declaration, was the main actor in the formulation and reaffirmation of relevant customary law. To date, the Declaration had been signed by 20 ministers of foreign affairs of member and non-member States of the Council of Europe. Over the years, the Declaration had proved to be a practical tool that facilitated the loan of State-owned cultural property and did not prejudice States with regard to their position *vis-à-vis* the 2004 United Nations Convention.

In between its biannual meetings, CAHDI fed discussions on several topics by, *inter alia*, collecting evidence from delegations on State practice concerning a topic under consideration. On several occasions, the data collected had served as the basis for a publication, which allowed CAHDI to make its research publicly available, including to

researchers and practitioners. The most recent CAHDI publication was entitled *Immunities of Special Missions*. CAHDI had discussed the topic in September 2013 and had agreed to prepare a questionnaire in order to obtain an overview of legislation and specific national practices in the field of special missions. It had received replies from 38 member and non-member States of the Council of Europe.

In that connection, he wished to thank Sir Michael Wood for preparing an excellent analytical report on the basis of the information submitted by those States, but also taking into account the 1969 Convention on Special Missions, key judicial decisions, national legislation on special mission immunity, government statements and other State practice and evidence of *opinio juris*. The report had been published earlier that year.

To conclude, he wished to highlight the fundamental importance that CAHDI attached to its collaboration with the Commission. The two bodies had the common goal of promoting the role of public international law in international relations. CAHDI would continue its work on issues of treaty law, immunities, case law related to public international law, peaceful settlement of disputes and international criminal justice. In so doing, it would always welcome the Commission's input.

Ms. Requena (Council of Europe) said that she wished to thank the Commission for allowing the Council of Europe to provide an annual update on its main activities in the field of public international law. The Council attached great importance to its exchanges of views with the Commission and to the close links that had been forged between the two bodies.

With the statute of the Council of Europe having been signed in London on 5 May 1949, it had been 70 years since the organization's inception and, coincidentally, 60 years since the establishment of the European Court of Human Rights. To celebrate the occasion, two key events had been organized under the slogan "Our Rights. Our Freedoms. Our Europe." The first had been the 129th session of the Committee of Ministers of the Council of Europe, which had been held in Helsinki on 16 and 17 May 2019 and had marked the end of the Finnish Presidency of the Committee. At the session, the Committee had adopted a declaration in which it had asserted that the Council was the leading human rights organization in Europe. It had also adopted a decision entitled "A shared responsibility for democratic security in Europe: Ensuring respect for rights and obligations, principles, standards and values", which addressed the relationships among member States of the Council and among the Council's various statutory organs, and a decision entitled "Securing the long-term effectiveness of the system of the European Convention on Human Rights". The second key event would take place in September and October 2019 in Strasbourg under the French Presidency of the Committee.

The term of office of the current Secretary General of the Council of Europe, Mr. Jagland, would expire on 1 October 2019. According to the statute of the Council, the election of the Secretary General was the shared responsibility of the Committee of Ministers and the Parliamentary Assembly. The Committee drew up a list of candidates to be transmitted to the Assembly, which proceeded to elect the Secretary General. Of the four candidates who had applied for the post, two had been retained by the Committee, namely Ms. Burić, the Minister for Foreign and European Affairs of Croatia, and Mr. Reynders, the Minister for Foreign Affairs of Belgium. The Assembly would elect the new Secretary General at its session to be held from 24 to 28 June 2019.

As she had alluded to previously, France had assumed the Presidency of the Committee of Ministers on 17 May 2019. The three main priorities of the French Presidency were to preserve and consolidate the European system of human rights protection, promote equality and living together, and meet the new challenges facing human rights and the rule of law, in particular digital technology issues and artificial intelligence.

On 17 June 2018, the Republic of Macedonia and the Hellenic Republic had signed the Final Agreement for the Settlement of the Differences as Described in the United Nations Security Council resolutions 817 (1993) and 845 (1993), the Termination of the Interim Accord of 1995, and the Establishment of a Strategic Partnership between the

Parties. The parties had agreed, *inter alia*, to the new official name “Republic of North Macedonia” and to the short name “North Macedonia”.

In the framework of the Council of Europe, the name used in all documents had been “the former Yugoslav Republic of Macedonia”. Following the entry into force of the Agreement, the Council’s Treaty Office had replaced that name with “North Macedonia” in its database and in all charts and headings referring to the country on its website, but not in the texts of registered reservations and declarations, which could not be modified retroactively. Furthermore, it should be noted that the practice whereby the State in question did not sign conventions of the Council, but instead deposited a letter of signature owing to the dispute related to the name “the former Yugoslav Republic of Macedonia”, would be brought to an end.

Turning to recent developments in the area of treaty law within the Council of Europe, she wished to draw attention to the withdrawal by Turkey of its derogation from the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The derogation had been in effect from the beginning, on 20 July 2016, to the end of the state of emergency in that country, on 19 July 2018. In that connection, she wished to update the Commission on one of the cases that had reached the European Court of Human Rights concerning measures taken under the state of emergency, namely the case of a Turkish Constitutional Court judge who had been detained following the attempted coup of 15 July 2016. The European Court of Human Rights had found a violation of article 5 of the Convention, on the right to liberty and security. It had also found that the measures taken against the applicant were not strictly required by the exigencies of the situation for the purposes of article 15 of the Convention, on derogation in time of emergency.

The derogation entered by Ukraine in 2015 was still in force: there were no developments to report on that front.

With regard to the monitoring of the execution of judgments of the European Court of Human Rights by the Committee of Ministers, she wished to draw attention to the latest development concerning the non-execution of the Court’s 2014 judgment in the case of Ilgar Mammadov, a political activist who had been detained in Azerbaijan. Mr. Mammadov had finally been released in August 2018, but his conviction had been maintained and he had been placed on probation. The Court had delivered its first judgment in infringement proceedings under article 46 of the Convention on 29 May 2019; in that judgment, it had found that Azerbaijan had failed to fulfil its obligation to comply with the Court’s 2014 judgment in Mr. Mammadov’s case. The Court had noted in particular that the Government had taken only limited steps to implement the judgment and therefore could not be said to have acted in good faith or in a manner that was in accordance with the conclusions and spirit of the judgment. In view of the fact that Azerbaijan had failed to fulfil its obligation under article 46 (1) of the Convention to abide by the final judgment of the Court, the case would be referred back to the Committee of Ministers for consideration of the measures to be taken, as provided for by Protocol No. 14 – the first time that had happened.

Protocol No. 16 to the European Convention on Human Rights, which had entered into force in August 2018, provided for the Court to issue advisory opinions. It had done so for the first time in April 2019, in response to a request from the French Court of Cassation concerning the affiliation of a child born abroad to a surrogate mother and the registration of that affiliation.

With regard to other Council of Europe conventions, the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data had been opened for signature in October 2018. The purpose of the Protocol was basically to align the Convention with new European Union legislation. CAHDI was currently preparing a second additional protocol to the Convention on Cybercrime of the Council of Europe. It was a well-known fact that cybercrime knew no boundaries and fell under multiple jurisdictions, while the powers of law enforcement were limited by territorial boundaries. The new protocol, which was designed to overcome those problems, should be finalized by the end of 2019 and adopted by the Committee of Ministers in 2020.

The Treaty Office of the Council of Europe was dealing with an increasing number of requests by non-member States to accede to the Council of Europe conventions. Indeed, 153 Council of Europe conventions, out of a total number of 223, were open to non-member States. In the past year alone, 19 non-member States from different regions of the world had expressed consent to be bound by a Council of Europe treaty.

To conclude, she wished to underline the importance of the increasing cooperation between the Council of Europe and the United Nations in a wide range of fields, as recognized by the United Nations General Assembly in its resolution 73/15 of 26 November 2018, in which it acknowledged “the contribution of the Council of Europe to the development of international law”, noted “the openness of the Council of Europe to the participation of States of other regions in its legal instruments” and welcomed “the contribution of the Council of Europe to the Sixth Committee of the General Assembly and the International Law Commission”. She was thus very grateful to have the opportunity to take part in the sessions of the Commission and welcomed the participation of the Chair of the Commission in various CAHDI meetings.

Mr. Vázquez-Bermúdez said that he wished to comment on the work done by the many legal advisers from the ministries of foreign affairs of member States of the Council of Europe who defended their State in disputes before international courts. Their workload must have greatly increased as a result of the thousands of applications lodged with the European Court of Human Rights; indeed, the Court was in many ways a victim of its own success. He wondered how CAHDI was dealing with the problems posed by the increased workload. Had it expanded its legal offices? Was it training more legal experts?

Mr. Saboia said that, in recent times, democratic institutions and human rights had increasingly been under attack from populist Governments, even in countries that had previously been known for their leadership in the promotion and defence of human rights and democracy. The policies being introduced by such Governments were a real cause for concern, not only in Europe but also in other parts of the world. Respect for human rights in such areas as discrimination and the treatment of migrants and refugees, as well as the independence of democratic institutions, were at risk. He would like to know how those issues were perceived within the Council of Europe and what was being done to address them.

Mr. Petrić referring to the situation in the Balkans, said that CAHDI and the Commission shared a common interest in the rule of law, of which *pacta sunt servanda* and the execution of rulings on compliance with treaties were fundamental principles. In that connection, he said that two countries that were now both members of the European Union had signed an agreement to resolve the border problem between them, a *sine qua non* of membership of the European Union. An arbitration ruling had resolved the border problem and opened the way for the second party to join the European Union. However, one of the parties had taken the position that the arbitration ruling was irrelevant. Such a rejection of arbitration was contrary to the rule of law. He would like to know if that situation was under consideration by CAHDI, or whether the latter was remaining neutral in the dispute.

Sir Michael Wood said that Mr. Válek had mentioned that the work of CAHDI on private law disputes involving international organizations was “confidential”. Such disputes were related to a topic of long-term interest to the Commission. It would be interesting if Mr. Válek could say more on the subject, and especially on the question of confidentiality. Noting that CAHDI meetings appeared to be well attended by a rather *ad hoc* group of non-member States, he would be interested to know if it was easy for a State to become an observer in that regard.

Ms. Lehto, noting that CAHDI had recently drafted opinions based on the recommendations of the Parliamentary Assembly of the Council of Europe, on the legal and human rights aspects of hybrid war, states of emergency and internal displacement, said that those were complicated issues of international law. Since CAHDI met only twice a year for a short time, such opinions were necessarily subject to some form of written procedure. She would like to know how well that procedure worked in Mr. Válek’s view. Was it effective and did it take into account input from member States?

Mr. Ruda Santolaria, after offering his congratulations to the Council of Europe on its seventieth anniversary, said that the Council was a leading light in the field of human rights and an example to institutions in other regions, including in Latin America. There was great interest in that region in having more States from Latin America participate as observers in the work of CAHDI. Latin American legal advisers already met regularly during International Law Week in New York, so the experience of CAHDI with observers was of particular interest. He would also be interested to hear more about the new draft protocol to the Convention on Cybercrime mentioned by Ms. Requena.

Mr. Válek (Council of Europe) said that Mr. Vázquez-Bermúdez was right to say that the European Court of Human Rights was a victim of its own success. The problem of dealing with the massive increase in the number of applications received was not specifically dealt with by CAHDI, but by other committees of the Council of Europe that dealt with systemic and management issues. CAHDI focused primarily on the Court's jurisprudence, mainly in the areas of State responsibility and international humanitarian law.

As a legal adviser to the Government of the Czech Republic when it had become a member of the Council of Europe, he had witnessed at first hand the problems caused by having to process a huge number of individual applications. Most of those applications were based on article 6 of the European Convention, on the right to a fair trial. Knowing that, his Government had managed to reduce the number of applications by enacting special legislation that enabled it to settle cases before they went to Strasbourg. In passing, he wished to mention that not all agents before the Court in Strasbourg reported to their ministry of justice; some reported to their ministry of foreign affairs or some independent body.

He agreed with Mr. Saboia that the rule of law was fundamental. The body within the Council of Europe that had special responsibility in that area was the Venice Commission.

With regard to the so-called Balkan problem, regarding the border between Slovenia and Croatia, CAHDI had discussed the matter but could not resolve it. The Committee operated on the basis of consensus, a little like the Sixth Committee of the General Assembly, and so was limited in the action it could take. His personal view was that the arbitration ruling had been handed down and must be implemented, but enforcing the ruling was a political problem, not a legal one.

On the question of the confidentiality surrounding private law disputes involving international organizations, it was possible that something would change with the appointment of a new legal adviser to the Netherlands, which was the driving force behind the initiative. In the meantime, CAHDI was collecting more replies from States. There was also a debate on the confidentiality of those replies: personally, he would have no problem publishing the reply from his Government, but he realized that it was a sensitive matter for some member States that had cases pending before the courts. Confidentiality was certainly an issue that CAHDI would have to talk about in the future.

Regarding the process for producing advisory opinions, the secretariat's draft faced close scrutiny by 47 smart legal advisers, and so, unsurprisingly, it was very difficult to reach agreement on the final text in a meeting that lasted just a couple of days. It had been particularly difficult at the meeting in Helsinki in September 2018, where three opinions were to be adopted. Basically, CAHDI tried to achieve consensus by holding meetings in small groups before the matter went to plenary and then relying on the goodwill of CAHDI members to reach consensus.

Ms. Requena (Council of Europe) said that CAHDI was taking steps, particularly under Protocol No. 14, to cope with the large number of applications lodged with the European Court of Human Rights. Three-judge panels were sorting the applications, which were subject to a classification process that grouped repetitive ones together. As a result, the number of applications had been cut by 10 per cent in the year leading up to the Helsinki meeting.

Replying to Mr. Ruda Santolaria, she said that the idea behind the second additional protocol to the Convention on Cybercrime was to make mutual legal assistance more

effective and to encourage direct cooperation with the providers, rather than rely solely on States' legal systems. The protocol should be ready by the end of the year for adoption by the Committee of Ministers in 2020.

Regarding the challenge to democratic institutions posed by the rise of populist Governments, she wished to stress that the Council of Europe was by definition an organization committed to the rule of law. It had many bodies dealing with that challenge, including the Venice Commission and the bodies that monitored Council of Europe conventions, whose decisions were binding.

Lastly, in reply to Sir Michael Wood's question, the process for becoming an observer at CAHDI was relatively straightforward. It was sufficient to request observer status by writing to the Secretary General of the Council of Europe, with a copy to the Chair of the Committee; CAHDI would check that the terms and conditions of observer status were met and, if they were, the request would be submitted to the Committee of Ministers for a final decision.

The Chair thanked the representatives of CAHDI for their very informative and interesting presentations and replies to the questions raised by Commission members.

The meeting rose at 1.05 p.m.