

Provisional

For participants only

26 July 2019

Original: English

International Law Commission
Seventy-first session (first part)

Provisional summary record of the 3473rd meeting

Held at the Palais des Nations, Geneva, on Tuesday, 4 June 2019, at 3 p.m.

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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. Rajput

Mr. Reinisch

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 4.35 p.m.

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

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel), speaking via video link from United Nations Headquarters, said that it had been a great pleasure for the Office of Legal Affairs to work with the Commission at Headquarters the previous year during the first part of the Commission's seventieth anniversary session. The Office's Codification Division had arranged for the publication of a book on the commemorative events of the seventieth session, which was expected to be completed by the end of 2019.

In 2018 the Codification Division had provided substantive secretariat services to the Sixth Committee during the seventy-third session of the General Assembly. The Committee had held 35 plenary meetings, at which it had considered 27 agenda items. It had also convened three working groups and had held numerous informal consultations on draft resolutions. Upon the recommendation of the Sixth Committee, the General Assembly had adopted, without a vote, 24 resolutions and 7 decisions.

In resolution 73/265 of 22 December 2018, entitled "Report of the International Law Commission on the work of its seventieth session", the General Assembly had recommended that the Commission should continue its work on the topics in its current programme of work and had taken note of the Commission's decision to include the topic "General principles of law" in its programme of work and the topics "Universal criminal jurisdiction" and "Sea-level rise in relation to international law" in its long-term programme of work. It had also welcomed the completion of the Commission's work on the topics "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Identification of customary international law", as well as the Commission's adoption of draft conclusions and commentaries thereto on those topics. The texts of those conclusions were annexed to resolutions 73/202 and 73/203, respectively, whereby the Assembly had brought them to the attention of States and all other entities concerned and had encouraged their widest possible dissemination.

In resolution 73/209, entitled "Protection of persons in the event of disasters", a topic that the Commission had completed at its sixty-eighth session, the General Assembly had decided to revert to the item at its seventy-fifth session. It had also drawn the attention of States to the Commission's recommendation that a convention should be elaborated on the basis of the draft articles and had requested the Secretary-General to invite Governments that had not yet done so to submit comments thereon.

At its seventy-fourth session, the Assembly would once more consider a number of agenda items emanating from projects completed by the Commission, namely "Responsibility of States for internationally wrongful acts", "Diplomatic protection", "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm" and "The law of transboundary aquifers".

Over the last year, the Codification Division had continued to successfully implement the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, which remained a priority for Member States and the Organization. Activities under the Programme had included the organization and facilitation of the International Law Fellowship Programme in The Hague and three regional courses in international law in the regions of Africa, Asia-Pacific and Latin America and the Caribbean. The Programme was responsible for developing and maintaining the United Nations Audiovisual Library of International Law, a virtual training resource that was available free of charge throughout the world. Also noteworthy was the successful launch of the podcast initiative of the Library, which made all lectures available free of charge in audio-only format as well as video format, in order to facilitate access in places where high-speed Internet service was limited.

Over the last year, the Office of the Legal Counsel had addressed a wide range of issues of public international law. In the area of accountability, there had been important developments in recent years with regard to the judicial and non-judicial international accountability mechanisms that the Office supported. At the end of 2018, the International

Residual Mechanism for Criminal Tribunals had completed its first year as a stand-alone institution tasked with carrying on the legacies of the two *ad hoc* tribunals, the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. On 20 March 2019, the Mechanism had rendered its appeal judgment in one of the major cases that had come before the International Tribunal for the Former Yugoslavia, largely upholding the verdict handed down against Radovan Karadžić and bringing those long-running proceedings to an end. Mr. Karadžić, who was one of the highest-ranking officials to have been tried by the Tribunal and the Residual Mechanism, had been found guilty of genocide for the 1995 Srebrenica massacre, crimes against humanity and violations of the laws or customs of war, and had been sentenced to life imprisonment.

The Mechanism's remaining caseload included one other appeal, in the case of General Ratko Mladić, and a retrial in the case of two former senior security officials, Jovica Stanišić and Franko Simatović. The conclusion of all the substantive cases of both international tribunals was therefore within sight.

Other tribunals were also reaching crucial stages of their work. In 2018, important progress had been made in the work of the Extraordinary Chambers in the Courts of Cambodia with the issuance of the trial judgment in Case 002/02, in which the most senior former Khmer Rouge leaders indicted before the Chambers, Nuon Chea and Khieu Samphan, had been convicted of genocide, crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949. That was the first case in which the Chambers had heard evidence related to charges of genocide. Those charges had not been brought in relation to the Khmer population itself, but in relation to the Cham and Vietnamese minority populations.

In an important contribution to the development of international criminal law, the Trial Chamber had found that the practices of forced marriage and rape in the context of forced marriage constituted crimes against humanity or other inhumane acts. The proceedings, in which 185 individuals had testified, provided an invaluable historical record for the people of Cambodia, and the judgment clearly demonstrated that perpetrators of the most heinous crimes could be held accountable, even decades after those crimes had been committed.

At the Special Tribunal for Lebanon, closing arguments in the central case of *Ayyash et al.* had concluded in September 2018, and the trial judgment was expected in the second half of 2019. The case related to the 14 February 2005 attack in which 22 individuals, including former Lebanese Prime Minister Rafik Hariri, had been killed and 226 others had been injured.

A new trend had recently emerged in relation to international criminal accountability mechanisms: in contexts where effective judicial accountability in the immediate future was seen as unlikely, there was growing interest in gathering and securing evidence for use in the future by national, regional or international courts that might have jurisdiction. That represented a significant new approach that focused on supporting the prosecution efforts of other stakeholders.

Such mechanisms had already been established in the Syrian context and in the case of Iraq. The Office of Legal Affairs was currently working with the Office of the United Nations High Commissioner for Human Rights on the establishment of a third such mechanism concerning the situation in Myanmar. The establishment of those mechanisms reinforced the idea that the main responsibility for ending impunity lay with States. That approach, in turn, posed new challenges that needed to be addressed.

First, they pointed to the need to build domestic judicial capacity. At the same time, the international community continued to have an essential role to play in supporting national initiatives to ensure accountability for serious crimes under international law.

Second, given that the three accountability mechanisms had been established in situations in which other domestic and international entities had already collected information and, in some cases, had attributed responsibility, they revealed the importance of coordination and cooperation between different bodies, such as fact-finding missions, sanctions committees and criminal accountability mechanisms. That was particularly

relevant in light of the fact that, in many cases, the information collected concerned the same facts, the same perpetrators and, most importantly, the same victims and witnesses, who were revictimized each time they had to recount their ordeal.

Third, the plethora of entities gathering information about the same situations also raised questions concerning the sharing of information with third parties, as not all entities followed the same policies. For example, while international accountability mechanisms could not, according to applicable United Nations policies, share evidence for use in criminal proceedings in which capital punishment could be imposed or carried out, other bodies did not appear to follow such a strict approach in their cooperation with domestic authorities.

Last but not least, the sustainable resourcing of accountability bodies remained problematic. However, the mechanisms for Iraq and Myanmar were funded from the regular budget, and the mechanism for the Syrian Arab Republic, which was currently funded through voluntary contributions, was to be included in the Secretary-General's budget proposal for 2020.

On the subject of peacekeeping, there had been a gradual shift in the nature and role of certain peacekeeping operations, particularly those deployed in dangerous and high-risk environments, where there was a frequent need to respond to threats posed by such actors as terrorist elements and armed groups. In those contexts, peacekeepers sometimes needed to take action in self-defence or as part of their mandate to protect civilians who were at risk of physical violence. The peacekeeping operations in Mali, the Central African Republic and the Democratic Republic of the Congo were cases in point. Other missions had faced similar challenges over the years, and hard lessons had had to be learned.

Deployment to such environments entailed obvious risks to all United Nations personnel, uniformed and civilian alike. Those risks had been highlighted in a report commissioned by the Secretary-General on improving the security of United Nations peacekeepers, which contained recommendations on increasing the robustness of peacekeepers' response to attacks and threats. That had led to a reassessment of the posture and dynamics of United Nations peacekeepers' engagement on the ground, pursuant to their various mandates. The Security Council had requested certain peacekeeping operations to adopt a proactive and robust posture and had highlighted the need for an appropriate response to deter asymmetric and other threats. The Secretary-General had led various initiatives to raise awareness among Member States, including those that contributed uniformed personnel to peacekeeping operations and those that hosted such operations. For instance, the Secretary-General had called upon all Member States that had not yet done so to consider becoming parties to the 1994 Convention on the Safety of United Nations and Associated Personnel and to the Optional Protocol thereto.

Operating in such high-risk environments also led inevitably to a reconsideration of the relationship of the United Nations to non-United Nations forces that were present in the theatre of operations, including national and international forces that might be engaged in counter-terrorism or other offensive operations. United Nations peacekeeping operations must remain within the boundaries of their mandate, as determined by the Security Council. However, those mandates were evolving and had led some peacekeeping operations to provide support to non-United Nations forces and enter into coordination arrangements or conduct joint operations with them. For example, the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) had been mandated to provide logistical support to the Joint Force of the Group of Five for the Sahel that was operating in Mali.

All such support must, of course, remain subject to the United Nations human rights due diligence policy. A compliance framework was being designed and implemented for the provision of United Nations support to the Joint Force. Lessons would be learned from all such activities. The United Nations must ensure that all entities that received its support provided appropriate guarantees that they would comply with international human rights, humanitarian and refugee law. It must also seek to ensure that national authorities did not impose or apply the death penalty in respect of detainees handed over to them and that they

afforded guarantees that the treatment of such detainees was in conformity with international standards.

The challenges relating to the status, privileges and immunities of the Organization unfortunately had not abated. The United Nations continued to face challenges in the areas of taxation and social security, as well as increasing challenges to its immunity in relation to labour claims brought against it. In a growing number of countries, labour courts refused to recognize the immunity of the United Nations from lawsuits of that kind, even in cases involving staff members who had access to the Organization's internal justice mechanisms. That, in turn, was leading to the seizure of United Nations funds pursuant to judgments issued by those labour courts, despite the absolute immunity from execution that was enshrined in the 1946 Convention on the Privileges and Immunities of the United Nations.

In that connection, he wished to highlight a recent opinion of the Supreme Court of the United States of America that did not directly affect the immunity of the United Nations itself, but had a direct impact on the specialized agencies of the United Nations system. In February 2019, the Supreme Court had rendered a decision in a case brought against the International Finance Corporation (IFC) in relation to its financing of a power plant in India (*Jam v. International Finance Corp.*). The plaintiffs in the case, who were citizens of India, had alleged that the power plant had polluted the air, land and water in the area surrounding the plant. Since the United States was not a party to the Convention on the Privileges and Immunities of the Specialized Agencies, many international organizations in the United States, including IFC, derived their immunity from the domestic law of the United States, specifically the International Organizations Immunities Act. Under that Act, the immunity to be accorded to international organizations was the "same immunity from suit ... as is enjoyed by foreign governments".

The United States Supreme Court had interpreted that provision of the Act to mean that international organizations enjoyed the same immunity from suit that foreign Governments currently enjoyed under the Foreign Sovereign Immunities Act, namely restrictive immunity, which meant that the "commercial activity" exception that applied to foreign Governments also applied to international organizations. While IFC and some *amici curiae* had argued that that finding could potentially open the floodgates of litigation, the Supreme Court had not been persuaded by those arguments and had noted that: (a) the constituent instruments of international organizations could always provide for a different level of immunity; (b) it was not clear that the lending activity of all development banks qualified as commercial activity within the meaning of the Foreign Sovereign Immunities Act; and (c) there were other requirements that must be met under the Act, including the requirement that the commercial activity must have a sufficient nexus with the United States.

While it was possible that future lawsuits would not be able to go forward because of an inability to show that the activity in question had a sufficient nexus with the United States, the specialized agencies would nonetheless be required to expend significant resources to hire counsel and defend themselves against allegations that they had engaged in commercial activities, and they could be liable for damages in cases where they no longer enjoyed immunity. In the *Jam v. International Finance Corp.* proceedings, the United States Government had expressed the view that the position of the United Nations was different from that of other international organizations, since the immunity enjoyed by the United Nations in the United States was derived from a multilateral treaty to which the United States was a party. However, questions might eventually arise as to why the United Nations should be treated differently from other international organizations in the United States. In the changing climate that he had just described, the absolute immunity of the United Nations from both suit and execution of assets must be maintained and supported.

The Office of the Legal Counsel had repeatedly been called upon to provide legal advice in relation to the situation in the Bolivarian Republic of Venezuela. The Secretary-General had sought to keep open the possibility of playing a role in defusing the crisis in that country, if the parties so wished, in particular by lending them his good offices in the context of any political negotiations. The economic and social situation in the country presented an additional challenge in that regard. There were humanitarian problems, with drastic shortages of food, medicines and other essential supplies. The Government denied

that the situation had taken on the dimensions of a humanitarian crisis, while the opposition was calling for humanitarian aid and had made attempts to secure the entry of such aid across the country's borders.

Regardless of the political and moral rights and wrongs of the situation, the law was clear, even if the circumstances in the country were deemed to constitute a disaster or other similar emergency. As had been noted in the context of the Commission's work on its draft articles on the protection of persons in the event of disasters, the law might be evolving towards greater recognition of a duty on the part of a State affected by a disaster to seek external assistance if its national response capacity was overwhelmed, and, by extension, to accept offers of assistance of the kind and in the amounts that it needed.

However, even if the affected State was assumed to have a concrete legal obligation to consent to the entry of humanitarian assistance onto its soil, a decision by that State to withhold such consent would not mean that external actors could lawfully deliver assistance to its territory. To think otherwise would be to commit the fallacy that the International Court of Justice had highlighted nearly seventy years previously in its advisory opinion in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: if a State failed to meet a legal obligation, the fact that the failure was a violation of its obligations under international law did not mean that other States could treat it as though it had done what it ought rightfully to have done. Thus, the Government of the Bolivarian Republic of Venezuela had retained, at all times, the legal ability to prevent the lawful entry of aid and assistance onto its territory.

Another issue that had been a subject of recent discussion among delegations concerned the representation of the Bolivarian Republic of Venezuela in United Nations bodies and at United Nations conferences. Situations in which more than one authority claimed to be entitled to represent a Member State in the United Nations had been addressed early in the Organization's history by General Assembly resolution 396 (V) of 14 December 1950, in which the Assembly had recommended that it should have the responsibility of considering such questions and adopting the relevant decisions. Those situations most often arose when the Secretariat received two sets of credentials appointing different delegations to participate on behalf of the same Member State, as had occurred in the cases of Afghanistan, Cambodia and, more recently, Guinea-Bissau. Such matters were dealt with by the nine-member Credentials Committee of the General Assembly. The Committee reported to the Assembly on its findings and recommendations, on the basis of which the Assembly took a decision.

At the second High-level Conference on South-South Cooperation, held in Argentina in March 2019, the only credentials submitted on behalf of the Bolivarian Republic of Venezuela had been those signed by Mr. Jorge Arreaza, the Venezuelan Minister for Foreign Affairs. Consequently, some members of the Credentials Committee had disassociated themselves from the Committee's decision solely with respect to the acceptance of the credentials of that country's representatives. One member had stated that it recognized "Interim President Juan Guaidó" as the only legitimate president of the country. Various statements had been made at the Conference with regard to the Committee's report, some expressing support for Mr. Guaidó and calling for free and fair elections in the Bolivarian Republic of Venezuela, and others raising concerns about the report and recalling the principles of national sovereignty and non-interference.

On 20 December 2018, the General Assembly had adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation, thus bringing to a close three years of intense work within the United Nations Commission on International Trade Law (UNCITRAL). As the Convention had been opened for signature at a ceremony held in Singapore, the Assembly had recommended that the Convention should be known as the "Singapore Convention on Mediation".

The Convention complemented a remarkable series of UNCITRAL instruments on the settlement of international commercial disputes, particularly through arbitration, but also through mediation, which was a flexible, expeditious and inexpensive method of dispute settlement that protected the long-term relationship between the parties. It had been

used for many years in bilateral and multilateral diplomacy and was the subject of numerous public international law studies.

Nevertheless, despite the practical advantages of mediation, its use was still at the expansion stage in the business world, particularly in Western countries, whose legal culture favoured adversarial procedures. That contrasted with the situation in regions such as Asia and the Middle East, where mediation was more deeply rooted. A clear trend towards the more widespread use of mediation, particularly judicial mediation, was nonetheless emerging.

The Singapore Convention on Mediation took into account the varying levels of experience with mediation in different countries. By providing consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, the Convention facilitated the prompt and effective resolution of commercial disputes and thus contributed to the optimization of resources in international trade.

Once adopted and in force, the Convention would provide the legal framework for the enforcement of international settlement agreements, in the same way as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 1958 New York Convention.

In addition to drafting the Convention, UNCITRAL had amended its Model Law on International Commercial Conciliation and had renamed it the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

At its fifty-first session, UNCITRAL had also adopted the Legislative Guide on Key Principles of a Business Registry as part of its work on microenterprises and small and medium-sized enterprises, which were an essential part of the economic fabric worldwide and employed more than 60 per cent of the world's working population. The Guide supported States that were undertaking legislative reforms to remove legal barriers faced by such enterprises and, in particular, to facilitate their establishment. As part of the UNCITRAL programme of work on microenterprises and small and medium-sized enterprises, the Guide contributed to the implementation of Sustainable Development Goal 8, which was to "promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all".

In the same spirit of facilitating the development and operation of enterprises and rescuing those that were financially troubled, UNCITRAL had adopted the Model Law on Recognition and Enforcement of Insolvency-Related Judgments, along with a guide to enactment.

Other ongoing work of UNCITRAL also related to topical issues, such as the reform of the investor-State dispute settlement system, expedited arbitration, legal aspects of digital identity management and trust services in electronic commerce, and enterprise group insolvency. UNCITRAL had decided that, once its Working Group VI had finalized the draft practice guide to the UNCITRAL Model Law on Secured Transactions, it would consider legal issues related to the judicial sale of ships in the context of international trade.

The Division for Ocean Affairs and the Law of the Sea discharged the functions vested in the Secretary-General by the United Nations Convention on the Law of the Sea and related agreements. It also performed numerous functions mandated by the General Assembly in its ocean-related resolutions, in particular its annual resolutions on oceans and the law of the sea and on sustainable fisheries.

The year 2019 marked the twenty-fifth anniversary of the entry into force of the Convention. At United Nations Headquarters, the occasion would be commemorated on 17 June, during the twenty-ninth Meeting of States Parties to the Convention, and at a side event hosted by the Government of Singapore.

The Convention remained one of the most widely ratified and influential multilateral treaties, even though there had been no new ratifications or accessions over the previous year. There were currently 168 States parties, including the European Union. However, a substantial part of the Convention's regime was applicable also to States that were not

parties, insofar as its provisions reflected customary international law. In its most recent resolution on oceans and the law of the sea, the General Assembly had once again recognized the universal and unified character of the Convention. It had also reaffirmed that the Convention set out the legal framework within which all activities in the oceans and seas must be carried out, that it was of strategic importance as the basis for national, regional and global action and cooperation in the marine sector and that its integrity needed to be maintained.

Under the Convention, the Secretary-General had a number of functions, which were discharged by the Division. Among them, he wished to highlight the depositary function. The deposit of information concerning the baselines and outer limits of maritime zones, as well as charts and lists of geographical coordinates, was of increasing importance and might be of direct relevance to the Commission's work when it embarked on the topic "Sea-level rise in relation to international law". His colleagues in the Division stood ready to share their know-how and experience with the Commission and to provide information on the technical aspects of the Convention.

Apart from servicing the Meetings of States Parties, the Division continued to offer extensive support to the Commission on the Limits of the Continental Shelf, which was the only body established under the Convention that had not been provided with a dedicated secretariat.

The Meetings of States Parties to the Convention were normally held on an annual basis, but could be resumed as required. In practice, that occurred when there was a need for by-elections. In January 2019, the twenty-eighth Meeting had been resumed for the purpose of filling two vacancies in the Commission on the Limits of the Continental Shelf. Mr. Yong Tang, of China, had been elected to fill the vacancy created by the resignation of his compatriot Mr. Lu Wenzheng. Unfortunately, the other vacancy, which was reserved for the Group of Eastern European States and had been unfilled for years, could not be filled owing to an ongoing lack of nominations. The issue would need to be addressed at the twenty-ninth Meeting of States Parties. On that occasion, States parties would also receive information reported by the three bodies established under the Convention and would consider budgetary matters relating to the International Tribunal for the Law of the Sea and issues of a general nature that had arisen with respect to the Convention under article 319 thereof.

The Commission on the Limits of the Continental Shelf continued to hold three sessions per year for a total of 21 weeks of meeting time, which placed significant demands on its secretariat. Over the previous year, it had actively considered 12 submissions from coastal States, some of which had been quite substantial and complex. The submissions had been made by the Russian Federation in respect of the Arctic Ocean; Brazil in respect of the Brazilian Southern Region; Norway in respect of Bouvetøya and Dronning Maud Land; France and South Africa, jointly, in respect of the area of the Crozet Archipelago and the Prince Edward Islands; Kenya; Nigeria; Seychelles in respect of the Northern Plateau Region; France in respect of Réunion and the Saint-Paul and Amsterdam islands; Côte d'Ivoire; Sri Lanka; Portugal; and Tonga. In addition, presentations had been made with respect to three additional submissions made by the Bahamas, Benin and Togo jointly, and Liberia. The additional submissions showed that the workload of that Commission continued to increase. At its forty-ninth session, it had approved two sets of recommendations, one in respect of the submission by Brazil concerning the Brazilian Southern Region and the other in respect of the submission by Norway concerning Bouvetøya.

The Division for Ocean Affairs and the Law of the Sea also acted as the secretariat of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Between 2016 and 2018, participation in the Agreement had continued to increase, with the number of States parties having risen from 82 to 90.

Building on the success of the thirteenth round of informal consultations of States parties to the Agreement, which had taken place in May 2018 and had addressed, under a

new format, the topic “Science-policy interface”, the fourteenth round, which had taken place in May 2019, had focused on the topic “Performance reviews of regional fisheries management organizations and arrangements”.

One other major ongoing development was the intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, which had been convened pursuant to General Assembly resolution 72/249. The purpose of the negotiations at the conference was to address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular marine genetic resources, including questions on the sharing of benefits; measures such as area-based management tools, including marine protected areas; environmental impact assessments; and capacity-building and the transfer of marine technology.

The first session of the conference had taken place from 4 to 17 September 2018. The participants had focused, in informal working groups, on the four topics identified in the package, and had held discussions on the process for the preparation of a preliminary draft of the instrument. The second session had taken place from 25 March to 5 April 2019. An “aid to negotiations” prepared by the President of the conference, which included treaty language and options, had facilitated focused discussions and text-based negotiations within the informal working groups on the four topics of the package agreed in 2011. The second session had ended on a high note, with many delegations expressing satisfaction at the progress achieved.

For the third session, the President of the conference had been requested to prepare a document structured in a form similar to that of a treaty and containing treaty language, to serve as a basis for negotiations. The third session would be held from 19 to 30 August 2019, and the fourth would be held in the first half of 2020.

To conclude, he wished the Commission a successful and fruitful session. The Office of Legal Affairs would continue to serve the Commission with the highest standards of diligence, professionalism and dedication.

The Chair said that he appreciated the Legal Counsel’s informative and enlightening statement and the interest that the Legal Counsel had shown in the Commission’s work.

Mr. Jalloh said that he would like to know whether the General Assembly was likely to take further action on the output submitted to it by the Commission in relation to a number of topics, including the topic of responsibility of States for internationally wrongful acts. Any reflections on the status of the Hybrid Court for South Sudan would also be appreciated.

Ms. Oral said she was particularly pleased that the Commission would now be actively considering the topic of sea-level rise in relation to international law. There were three parts to the topic: the law of the sea, human displacement and loss of statehood. As the Commission would begin its work by considering the first of those issues, she very much looked forward to cooperating with the knowledgeable staff of the Office of Legal Affairs, whose technical expertise in matters such as baselines and delimitation of maritime zones would be particularly helpful.

Mr. Rajput said that he wished to place on record his deep appreciation of the work of the Secretariat, which greatly facilitated the work of the Commission. He would be interested in hearing the Legal Counsel’s views on the problems facing the Commission on the Limits of the Continental Shelf, which had a long and growing list of submissions pending before it, did not have its own budget and did not have a full complement of members, as some States were unwilling to nominate candidates for the vacancies that arose. He wondered whether those problems were affecting its proper functioning and whether there were moves to wind it down.

Sir Michael Wood asked whether the Legal Counsel was still pondering the question of whether the General Assembly should ask the International Court of Justice for an advisory opinion on the very serious issue of immunities of international organizations.

Mr. Murphy, noting that the Legal Counsel had mentioned the decision of the Supreme Court of the United States in *Jam v. International Finance Corp.*, said that the decision would have implications for the way in which the immunities of international organizations, including the United Nations, were addressed in general. A related issue was the question of dispute settlement. Some believed that well-defined parameters for dispute settlement might lead to a reduction in the number of lawsuits filed against international organizations in national courts. The Commission was still considering whether to move forward with the topic on the settlement of international disputes to which international organizations were parties. He wondered whether the Legal Counsel's views on the value of carrying out a study of the topic had changed over the last year.

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that, unfortunately, he had little new information to report in reply to Mr. Jalloh's questions. He had no clear indication of the General Assembly's position on the various projects of the Commission and had little to add to what he had said at the Commission's seventieth session about the stalled process of establishing the Hybrid Court for South Sudan. All the technical work in that respect had been completed and all the necessary legal instruments had been prepared, but, in his view, further progress was now a matter of political will. Naturally, his Office stood ready to provide any assistance it could to the Government of South Sudan and the African Union in their efforts to establish the Court. However, the Security Council had made it quite clear that the process should be "owned" by the African participants.

In response to Ms. Oral's comments on the topic of sea-level rise in relation to international law, he would like to add that, in some of the countries visited by the Secretary-General on a recent trip to the South Pacific, sea-level rise was an existential threat. The topic dovetailed with the Secretary-General's priorities, one of which was climate change and its consequences. He was therefore very pleased that the Commission would be conducting a study on the topic, and his Office would be glad to put its considerable expertise on the law of the sea at the disposal of the Commission.

In reply to Mr. Rajput's very pertinent question, he said that the Commission on the Limits of the Continental Shelf did not appear to be "winding down" in any way. There was too much interest on the part of States in its work on issues related to the continental shelf, which was why the number of submissions it received was continuing to increase. The fact that it had been left with a vacancy because of the decision by the Group of Eastern European States not to nominate a candidate was unfortunate, but that situation could only be rectified by the States parties to the Convention.

With regard to the question raised by Sir Michael Wood, all he could do was to try to impress on Member States the desirability of requesting an advisory opinion on the immunities of international organizations. There was still a possibility that the General Assembly would make such a request. His Office was closely monitoring the situation with regard to those immunities in a number of countries on various continents, and worked closely with individual States when problems arose. For example, his Office had successfully intervened in the well-publicized case of the arrest in Tunisia of a member of the Security Council's Panel of Experts tasked with monitoring sanctions imposed on Libya. In other cases, however, Member States were taking a very dogmatic approach to the issue; he was sometimes confronted with unexpected arguments, such as the demand that the immunities regime should be subject to national constitutions and labour laws. He was currently dealing with one particularly sensitive situation in a Member State in which the settled jurisprudence of the Supreme Court was clearly opposed to the notion of absolute immunity for international organizations. In cases such as that one, an advisory opinion from the International Court of Justice could be very helpful.

Turning to Mr. Murphy's question, he said that his Office had been following the *Jam v. International Finance Corp.* case very closely over the last year. The United Nations had chosen not to submit an *amicus curiae* brief in the case, in line with its usual practice. The Office had, however, continued to cooperate on questions of immunity with colleagues from the World Bank Group and other specialized agencies of the United Nations system. His Office was still dealing with a petition to the United States Supreme Court in relation to the cholera outbreak in Haiti; he did not think that the Court would accept the petition, but

the case had not yet been formally closed. One problem was that many Member States and many of those involved in such cases had very little understanding of how the current system of immunities operated. In the light of all those circumstances, he would very much welcome a study on the subject by the Commission, and his Office would be happy to share its experience and expertise for that purpose.

Mr. Tladi, referring to the problems faced by the Credentials Committee when it was presented with competing credentials from a Member State, said that such problems had recently arisen with respect to Côte d'Ivoire and Madagascar, in addition to the countries mentioned by the Legal Counsel. He had the impression that the General Assembly's approach to such matters was rather *ad hoc*, and that it had no guiding principles to follow when it had to choose between competing sets of credentials. Although the solution lay in the hands of Member States, not the Office of Legal Affairs, he wondered whether the Office could encourage and perhaps assist Member States to devise some objective criteria that would ensure a less chaotic approach to the determination of which credentials should be accepted. In view of the Legal Counsel's reply to Mr. Murphy's question, he noted that, in 2018, the Legal Counsel had expressed ambivalence about whether the Commission should study private claims if it decided to take up the topic of immunities of international organizations. Now that the Legal Counsel agreed that the Commission should carry out such a study, how would he react if it did so and arrived at an unexpected conclusion?

Mr. Hmoud said that he wished to ask the Legal Counsel to elaborate on the suggestion that there might be an emerging rule of international law to the effect that a State affected by a disaster had a duty to accept offers of assistance. On the important question of international criminal accountability mechanisms, he noted the Legal Counsel's comments that, in cases where justice could not be achieved immediately, attention had turned to the collection of evidence for future prosecutions. What was the Office of Legal Affairs doing to support developments of that sort?

Mr. de Serpa Soares (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that he agreed with Mr. Tladi that the General Assembly's approach to the verification of credentials was rather *ad hoc*. His Office stood ready to help Member States as needed, but there was little it could do to resolve what was a purely political question. The kind of problem experienced by the Bolivarian Republic of Venezuela in relation to the credentials signed by its Minister for Foreign Affairs was not unique to that country. Unfortunately, he saw little chance that objective criteria would be introduced to resolve such problems.

He would welcome a study by the Commission on the topic of immunities of international organizations, regardless of the outcome. One of the main problems he had encountered in the case concerning the cholera outbreak in Haiti was the fact that so few people understood the legal regime within which the Office of Legal Affairs had to operate. Dialogue between United Nations lawyers and their human rights colleagues had been extremely difficult. In that respect, he very much regretted the position taken by the Special Rapporteur on extreme poverty and human rights, Philip Alston, in his report on the responsibility of the United Nations in relation to cholera in Haiti ([A/71/367](#)), which could be seen as a personal attack on the Legal Counsel and the Office. The Special Rapporteur had never contacted him or the Office to give them an opportunity to express their views on the matter. He was not sure that, if the immunity regime were to be renegotiated, Member States would insist on full immunity for international organizations. Nonetheless, as Legal Counsel he needed clarity and legal certainty. If private claims against the United Nations were to be allowed, there would be associated costs; he would not object to that, provided that Member States were willing to pay those costs. Accordingly, if the Commission decided to conduct a study, the Office of Legal Affairs stood ready to cooperate fully with it.

As for Mr. Hmoud's question on the protection of persons in the event of disasters, he had nothing new to add to what he had already said, except that he was glad to have brought the matter to the Commission's attention. He could perhaps flesh out his ideas on the subject at future meetings with the Commission.

Regarding the accountability mechanisms that had been or were being created in relation to the Syrian Arab Republic, Iraq and Myanmar, the initial role of the Office of Legal Affairs, once Member States had decided to establish such a mechanism, was to prepare the terms of reference, usually in cooperation with colleagues from the Office of the United Nations High Commissioner for Human Rights. Once the mechanism had been established, it was completely independent. At that stage, the Office played a supporting role only, providing administrative and practical support in matters such as the preparation of protocols of cooperation with third parties.

The Chair said that he was grateful to the Legal Counsel for providing valuable information and answers. He hoped that the Legal Counsel would be able to address the Commission in person at its next session.

The meeting rose at 6 p.m.