

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2012

Volume I

*Summary records
of the meetings
of the sixty-fourth session
7 May–1 June and
2 July–3 August 2012*

UNITED NATIONS



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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 2011*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the sixty-fourth session of the Commission (A/CN.4/SR.3128–A/CN.4/SR.3158), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2012

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MEMBERS OF THE COMMISSION

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First Vice-Chairperson: Mr. Bernd H. NIEHAUS

Second Vice-Chairperson: Mr. Hussein A. HASSOUNA

Chairperson of the Drafting Committee: Mr. Mahmoud D. HMOUD

Rapporteur: Mr. Pavel ŠTURMA

Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission.

* By letter of 22 July 2012 addressed to the Chairperson of the Commission, Mr. Vasciannie resigned with immediate effect (see 3149th meeting below, para. 42).

AGENDA

The Commission adopted the following agenda at its 3128th meeting, held on 7 May 2012:

1. Organization of the work of the session.
2. Expulsion of aliens.
3. The obligation to extradite or prosecute (*aut dedere aut judicare*).
4. Protection of persons in the event of disasters.
5. Immunity of State officials from foreign criminal jurisdiction.
6. Provisional application of treaties.
7. Formation and evidence of customary international law.
8. Treaties over time.
9. The most-favoured-nation clause.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Date and place of the sixty-fifth session.
12. Cooperation with other bodies.
13. Other business.

ABBREVIATIONS

AALCO	Asian–African Legal Consultative Organization
ASEAN	Association of Southeast Asian Nations
AUCIL	African Union Commission on International Law
CAHDI	Committee of Legal Advisers on Public International Law (Council of Europe)
ECHR	European Court of Human Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IFRC	International Federation of Red Cross and Red Crescent Societies
ILO	International Labour Organization
IMO	International Maritime Organization
ITLOS	International Tribunal for the Law of the Sea
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
WTO	World Trade Organization

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<i>I.C.J. Reports</i>	International Court of Justice, <i>Reports of Judgments, Advisory Opinions and Orders</i> . All judgments, advisory opinions and orders of the Court are available from the Court’s website (www.icj-cij.org).
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
<i>ITLOS Reports</i>	International Tribunal for the Law of the Sea, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	Permanent Court of International Justice, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)

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In the present volume, “International Tribunal for the Former Yugoslavia” refers to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and “International Tribunal for Rwanda” refers to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is <http://legal.un.org/ilc/>.

CASES CITED IN THE PRESENT VOLUME

Case	Nature and source of the decision
<i>Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo</i>	<i>Advisory Opinion</i> , <i>I.C.J. Reports 2010</i> , p. 403.
<i>Ahmadou Sadio Diallo</i>	<i>(Republic of Guinea v. Democratic Republic of the Congo)</i> , <i>Compensation, Judgment</i> , <i>I.C.J. Reports 2012</i> , p. 324.
	<i>Merits, Judgment</i> , <i>I.C.J. Reports 2010</i> , p. 639.
<i>Ahmed Mahamdia v. People's Democratic Republic of Algeria</i>	Court of Justice of the European Union (Grand Chamber), Case No. C-154/11, judgment dated 19 July 2012, <i>Reports of Cases 2012</i> , p. 491 (published in the electronic Reports of Cases (Court Reports - general), ECLI:EU:C:2012:491).
<i>Al-Adsani v. the United Kingdom</i> [GC]	No. 35763/97, ECHR 2001-XI.
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i>	<i>(Bosnia and Herzegovina v. Serbia and Montenegro)</i> , <i>Judgment</i> , <i>I.C.J. Reports 2007</i> , p. 43.
<i>Application of the Interim Accord of 13 September 1995</i>	<i>(the former Yugoslav Republic of Macedonia v. Greece)</i> , <i>Judgment of 5 December 2011</i> , <i>I.C.J. Reports 2011</i> , p. 644.
<i>Armed Activities on the Territory of the Congo (New Application: 2002)</i>	<i>(Democratic Republic of the Congo v. Rwanda)</i> , <i>Jurisdiction and Admissibility, Judgment</i> , <i>I.C.J. Reports 2006</i> , p. 6.
<i>Arrest Warrant of 11 April 2000</i>	<i>(Democratic Republic of the Congo v. Belgium)</i> , <i>Judgment</i> , <i>I.C.J. Reports 2002</i> , p. 3.
<i>Ayyash and others</i>	<i>The Prosecutor v. Salim Jamil Ayyash and others</i> , case STL-11-01/I/PTJ, indictment of 10 June 2011 (www.stl-tsl.org/en/the-cases/stl-11-01).
	Appeals Chamber, Interlocutory Decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, Case No. STL-11-01/I.
<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)</i>	Second Phase, <i>Judgment</i> , <i>I.C.J. Reports 1970</i> , p. 3.
<i>Certain Questions of Mutual Assistance in Criminal Matters</i>	<i>(Djibouti v. France)</i> , <i>Judgment</i> , <i>I.C.J. Reports 2008</i> , p. 177.
<i>Corfu Channel</i>	<i>Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949</i> , p. 4.
<i>Cudak v. Lithuania</i> [GC]	No. 15869/02, ECHR 2010.
<i>Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)</i>	Case No. 16, <i>Judgment of 14 March 2012</i> , <i>ITLOS Reports 2012</i> , p. 4.
<i>Dispute regarding Navigational and Related Rights</i>	<i>(Costa Rica v. Nicaragua)</i> , <i>Judgment</i> , <i>I.C.J. Reports 2009</i> , p. 213.
<i>EC Measures concerning Meat and Meat Products (Hormones)</i>	WTO, report of the Appellate Body (WT/DS26/AB/R, WT/DS48/AB/R), 13 February 1998.
<i>Factory at Chorzów</i>	<i>Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits)</i> , <i>Judgment No. 13, 13 September 1928, P.C.I.J., Series A, No. 17.</i>
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<i>Fisheries Jurisdiction</i>	<i>(Spain v. Canada)</i> , <i>Jurisdiction of the Court, Judgment</i> , <i>I.C.J. Reports 1998</i> , p. 432.
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“Ill-gotten gains”	“ <i>Biens mal acquis</i> ”, Court of Cassation, Criminal Chamber, 9 November 2010, Case No. 09-88272 (judgment not published in the <i>Bulletin</i> ; available from www.legifrance.gouv.fr).
	Court of Appeal, Paris, 29 October 2009 (cancelled).
<i>Jones and Mitchell v. Saudi Arabia</i>	<i>Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)</i> , <i>Mitchell and others v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)</i> , <i>Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)</i> , House of Lords, 14 June 2006, [2006] UKHL 26, reproduced in ILR, vol. 129 (2007), p. 713.

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- Maritime Delimitation in the Black Sea*
- (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 61.
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- North Sea Continental Shelf*
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- Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, United Kingdom, House of Lords, 24 March 1999, [1999] UKHL 17, ILR, vol. 119 (2002), p. 135.
- Prosecutor v. Anto Furundžija*
- Case No. IT-95-17/1-T, Trial Chamber, Judgment of 10 December 1998.
- The Prosecutor v. Charles Ghankay Taylor*
- Case No. SCSL-03-01, Judgment of 26 April 2012. The judgments of the Trial Chamber and the Appeals Chamber in this case are available from the website of the Special Court for Sierra Leone: www.rscsl.org/Taylor.html.
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- Case No. ICTR-01-75-AR11bis, decision of 28 June 2011, confirmed by the Appeals Chamber on 16 December 2011 (available from www.ictrcaselaw.org/docs/20111216-dco-0175-01-en.PDF).
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- Case No. ICC-02/05-01/09, Corrigendum to the decision [of 12 December 2011] pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011 (www.icc-cpi.int).
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- Case No. IT-09-92, International Tribunal for the Former Yugoslavia: the decisions and judgments concerning this case are available from www.icty.org/case/mladic/4.
- The Prosecutor v. Thomas Lubanga Dyilo*
- Case No. ICC-01/04-01/06, International Criminal Court, Trial Chamber I, 14 March 2012 (www.icc-cpi.int/CourtRecords/CR2012_03942.PDF).
- Pulp Mills on the River Uruguay*
- (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14.
- Questions relating to the Obligation to Prosecute or Extradite*
- (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422.
- Reservations to the Convention on Genocide*
- Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139.
- Respublica v. De Longchamps*
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- Soering*
- 1 U.S. 111 (1784), United States Supreme Court, October Sessions, 1784.
- S.S. “Wimbledon”*
- Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.
- Territorial and Maritime Dispute (Nicaragua v. Colombia)*
- Judgments, 1923, P.C.I.J., Series A, No. 1.*
- Applications for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 348 (Costa Rica) and p. 420 (Honduras).

MULTILATERAL INSTRUMENTS CITED IN THE PRESENT VOLUME

Source

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Pacific settlement of international disputes

African Union Non-Aggression and Common Defence Pact (Abuja, 31 January 2005) Available from the website of the African Union (www.au.int/en/treaties).

Privileges and immunities, diplomatic and consular relations, etc.

Convention on the privileges and immunities of the United Nations (New York, 13 February 1946) United Nations, *Treaty Series*, vol. 1, No. 4, p. 15, and vol. 90, p. 327.

Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) *Ibid.*, vol. 500, No. 7310, p. 95.

Vienna Convention on Consular Relations (Vienna, 24 April 1963) *Ibid.*, vol. 596, No. 8638, p. 261.

Convention on special missions (New York, 8 December 1969) *Ibid.*, vol. 1400, No. 23431, p. 231.

United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004) *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49 (A/59/49)*, vol. I, Resolution 59/38.

Human rights

Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948) United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950) *Ibid.*, vol. 213, No. 2889, p. 221.

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (Strasbourg, 16 September 1963) *Ibid.*, vol. 1496, No. 2889, p. 263.

International Covenant on Civil and Political Rights (New York, 16 December 1966) *Ibid.*, vol. 999, No. 14668, p. 171.

International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) *Ibid.*, vol. 993, No. 14531, p. 3.

American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969) *Ibid.*, vol. 1144, No. 17955, p. 123.

Convention for the protection of individuals with regard to automatic processing of personal data (Strasbourg, 28 January 1981) *Ibid.*, vol. 1496, No. 25702, p. 65.

Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984) *Ibid.*, vol. 1465, No. 24841, p. 85.

Convention on the rights of the child (New York, 20 November 1989) *Ibid.*, vol. 1577, No. 27531, p. 3.

Optional Protocol to the Convention on the Rights of the Child on a communications procedure (New York, 19 December 2011) General Assembly resolution 66/138.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990) United Nations, *Treaty Series*, vol. 2220, No. 39481, p. 3.

Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (Guatemala City, 8 June 1999) OAS, AG/RES. 1608 (available from www.oas.org/juridico/english/treaties/a-65.html).

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- Convention relating to the Status of Refugees (Geneva, 28 July 1951) United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137.
- Protocol relating to the Status of Refugees (New York, 31 January 1967) *Ibid.*, vol. 606, No. 8791, p. 267.
- Convention relating to the Status of Stateless Persons (New York, 28 September 1954) *Ibid.*, vol. 360, No. 5158, p. 117.
- OAU Convention governing the specific aspects of refugee problems in Africa (Addis Ababa, 10 September 1969) *Ibid.*, vol. 1001, No. 14691, p. 45.

International trade and development

- Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 17 March 1994) OAS, *Treaty Series*, No. 78.
- Marrakesh Agreement establishing the World Trade Organization (Marrakesh, 15 April 1994) United Nations, *Treaty Series*, vols. 1867–1869, No. 31874, p. 3.
- General Agreement on Trade in Services (Annex to the Marrakesh Agreement establishing the World Trade Organization) *Ibid.*, vol. 1869, annex 1B, p. 183.

Civil aviation

- Convention on International Civil Aviation (Chicago, 7 December 1944) United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

Penal matters

- European Convention on Extradition (Paris, 13 December 1957) United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273.
- Third Additional Protocol to the European Convention on Extradition (Strasbourg, 10 November 2010) Council of Europe, *Treaty Series*, No. 209.
- Fourth Additional Protocol to the European Convention on Extradition (Vienna, 20 September 2012) *Ibid.*, No. 212.
- International Convention against the taking of hostages (New York, 17 December 1979) United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205.
- Inter-American Convention on extradition (Caracas, 25 February 1981) *Ibid.*, vol. 1752, No. 30597, p. 177.
- Convention on the transfer of sentenced persons (Strasbourg, 21 March 1983) *Ibid.*, vol. 1496, No. 25703, p. 91.
- Inter-American Convention against Corruption (Caracas, 29 March 1996) Doc. E/1996/99, annex.
- Rome Statute of the International Criminal Court (Rome, 17 July 1998) United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

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- Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance (Washington, 2 February 1971) United Nations, *Treaty Series*, vol. 1438, No. 24381, p. 191.
- International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999) *Ibid.*, vol. 2178, No. 38349, p. 197.

Law of the sea

- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.
- Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994) *Ibid.*, vol. 1836, No. 31364, p. 3.
- 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 (New York, 4 August 1995) *Ibid.*, vol. 2167, No. 37924, p. 3.

Law of treaties

- Vienna Convention on the law of treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) A/CONF.129/15 in *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, Vienna, 18 February–21 March 1986, vol. II (United Nations publication, Sales No. E.94.V.5), p. 93.

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- Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere, 18 June 1998) United Nations, *Treaty Series*, vol. 2296, No. 40906, p. 5.

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- Convention establishing an International Relief Union (Geneva, 12 July 1927) League of Nations, *Treaty Series*, vol. 135, No. 3115, p. 247.
- Inter-American Convention to Facilitate Disaster Assistance (Santiago, 7 June 1991) OAS, *Treaty Series*, No. 74, OEA/Ser.A/49 (SEPF) (available from www.oas.org/juridico/english/treaties/a-54.html).
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- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (Kampala, 23 October 2009) Available from the website of the African Union (www.au.int/en/treaties).

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- Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (Geneva, 12 August 1949) *Ibid.*, No. 973, p. 287.
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977) *Ibid.*, vol. 1125, No. 17512, p. 3.
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- Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol (The Hague, 14 May 1954) *Ibid.*, vol. 249, No. 3511, p. 215.
- Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999) *Ibid.*, vol. 2253, No. 3511, p. 172.

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- Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997) *Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)*, vol. III, resolution 51/229, annex.

General international law

- Statute of the Permanent Court of International Justice (Geneva, 16 December 1920) League of Nations, *Treaty Series*, vol. 6, No. 170, p. 379.

Source

- Charter of the Organization of American States (Bogota, 30 April 1948)
- European Convention on Establishment (Paris, 13 December 1955)
- Constitutive Act of the African Union (Lomé, 11 July, 2000)
- Inter-American Democratic Charter (Lima, 11 September 2001)
- African Charter on Democracy, Elections and Governance (Addis Ababa, 30 January 2007)
- United Nations, *Treaty Series*, vol. 119, No. 1609, p. 3.
- Ibid.*, vol. 529, No. 7660, p. 141.
- Ibid.*, vol. 2158, No. 37733, p. 3.
- OAS, *Official Documents*, OEA/Ser.G/CP-1 (www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm). See also ILM, vol. 40, No. 5 (September 2001), p. 1289.
- Available from the websites of the African Union (<http://au.int/en/treaties>) or the African Commission on Human and Peoples' Rights (www.achpr.org/instruments/charter-democracy).

CHECKLIST OF DOCUMENTS OF THE SIXTY-FOURTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/649	Provisional agenda for the sixty-fourth session	Mimeographed. The agenda as adopted is reproduced on p. vii above.
A/CN.4/650 and Add.1	Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session	Mimeographed.
A/CN.4/651	Eighth report on the expulsion of aliens, by Mr. Maurice Kamto, Special Rapporteur	Reproduced in <i>Yearbook ... 2012</i> , vol. II (Part One).
A/CN.4/652	Fifth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur	<i>Idem.</i>
A/CN.4/653	Formation and evidence of customary international law, note by Sir Michael Wood, Special Rapporteur	<i>Idem.</i>
A/CN.4/654	Preliminary report on the immunity of State officials from foreign criminal jurisdiction, prepared by Ms. Concepción Escobar Hernández, Special Rapporteur	<i>Idem.</i>
A/CN.4/655 and Add.1–2	Filling of casual vacancies in the International Law Commission, note by the Secretariat	A/CN.4/655 reproduced in <i>Yearbook ... 2012</i> , vol. II (Part One). A/CN.4/655/Add.1 and 2 mimeographed.
A/CN.4/L.797	Expulsion of aliens: Texts of draft articles 1–32 provisionally adopted on first reading by the Drafting Committee at the sixty-fourth session of the International Law Commission	Mimeographed.
A/CN.4/L.798	Report of the Planning Group	<i>Idem.</i>
A/CN.4/L.799 [and Corr.1]	Draft report of the International Law Commission on the work of its sixty-fourth session, chapter I (Organization of the session)	<i>Idem.</i> See the adopted text in <i>Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10 (A/67/10)</i> . The final text appears in <i>Yearbook ... 2012</i> , vol. II (Part Two).
A/CN.4/L.800	<i>Idem</i> , chapter II (Summary of the work of the Commission at its sixty-fourth session)	<i>Idem.</i>
A/CN.4/L.801	<i>Idem</i> , chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem.</i>
A/CN.4/L.802 and Add.1	<i>Idem</i> , chapter IV (Expulsion of aliens)	<i>Idem.</i>
A/CN.4/L.803	<i>Idem</i> , chapter V (Protection of persons in the event of disasters)	<i>Idem.</i>
A/CN.4/L.804 and Add.1	<i>Idem</i> , chapter VI (Immunity of State officials from foreign criminal jurisdiction)	<i>Idem.</i>
A/CN.4/L.805	<i>Idem</i> , chapter VII (Provisional application of treaties)	<i>Idem.</i>
A/CN.4/L.806	<i>Idem</i> , chapter VIII (Formation and evidence of customary international law)	<i>Idem.</i>
A/CN.4/L.807	<i>Idem</i> , chapter IX (The obligation to extradite or prosecute (<i>aut dedere aut judicare</i>))	<i>Idem.</i>
A/CN.4/L.808	<i>Idem</i> , chapter X (Treaties over time)	<i>Idem.</i>
A/CN.4/L.809	<i>Idem</i> , chapter XI (The most-favoured-nation clause)	<i>Idem.</i>
A/CN.4/L.810	<i>Idem</i> , chapter XII (Other decisions and conclusions of the Commission)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.811	<i>Idem</i> , chapter XII (Other decisions and conclusions of the Commission) (<i>continued</i>)	<i>Idem</i> .
A/CN.4/L.812	Protection of persons in the event of disasters: Texts and titles of draft articles 5 <i>bis</i> , 12, 13, 14 and 15, provisionally adopted by the Drafting Committee from 5 to 11 July 2012	Mimeographed.
A/CN.4/SR.3128–A/CN.4/SR.3158	Provisional summary records of the 3128th to 3158th meetings	<i>Idem</i> . The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-FOURTH SESSION

Held at Geneva from 7 May to 1 June 2012

3128th MEETING

Monday, 7 May 2012, at 3.05 p.m.

Outgoing Chairperson: Mr. Maurice KAMTO

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Adoke, Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-fourth session of the International Law Commission, the first session of the new quinquennium.

Tribute to the memory of Mr. Carlos Calero Rodrigues, former member of the Commission

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note owing to the recent death of Mr. Carlos Calero Rodrigues, who had been a member of the Commission from 1982 to 1996. During that period, he had contributed greatly to the Commission's work, particularly in the areas of human rights, the law of the sea and international humanitarian law.

At the invitation of the Outgoing Chairperson, the members of the Commission observed a minute of silence.

Statement by the Outgoing Chairperson

3. The OUTGOING CHAIRPERSON provided a brief overview of the discussion in the Sixth Committee of the General Assembly during its consideration of the Commission's report on the work of its sixty-third session. A topical summary of that discussion was contained in documents A/CN.4/650 and A/CN.4/650/Add.1.

Strengthening the lines of communication with the Commission remained a key concern of delegations in the Sixth Committee, who had continued their practice, in line with paragraph 12 of General Assembly resolution 59/313 of 12 September 2005, of holding an interactive debate to supplement their formal discussions with the members of the Commission and the Special Rapporteurs who were present in New York. The debate, which had been pursued at meetings with legal advisers, had focused on the topics "Expulsion of aliens" and "Protection of persons in the event of disasters" and on the new topics that were being added to the Commission's long-term programme of work.¹

4. Based on the Sixth Committee's consideration of the Commission's report, the General Assembly had adopted resolution 66/98 of 9 December 2011, paragraph 4 of which commended the Commission for the completion of its work on the responsibility of international organizations, effects of armed conflicts on treaties and reservations to treaties. In paragraph 7 of that resolution, the General Assembly had taken note of the inclusion of five new topics in the Commission's long-term programme of work, and in paragraph 8 it had invited the Commission to continue to give priority to the topics "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)" and to work towards their conclusion. The General Assembly had also adopted, on 9 December 2011, resolutions 66/99 and 66/100, in which it had taken note of the draft articles on the effects of armed conflict on treaties² and on the responsibility of international organizations,³ respectively, and had decided to examine at its sixty-ninth session the form that might be given to those texts.

Election of officers

Mr. Caflich was elected Chairperson by acclamation.

Mr. Caflich took the Chair.

5. The CHAIRPERSON expressed his sincere gratitude to the members of the Commission for the honour they

¹ *Yearbook ... 2011*, vol. II (Part Two), paras. 365–367 and annexes I to V.

² *Ibid.*, paras. 100–101.

³ *Ibid.*, paras. 87–88.

had conferred on him and paid a tribute to Mr. Kamto, Chairperson of the sixty-third session, and to the other officers of that session for their outstanding work. As it was the start of the new quinquennium, he wished to welcome back the members of the Commission who had been re-elected and expressed confidence that the new members would quickly adapt to the Commission's pace and methods of work.

Mr. Niehaus was elected first Vice-Chairperson by acclamation.

Mr. Hassouna was elected second Vice-Chairperson by acclamation.

Mr. Hmoud was elected Chairperson of the Drafting Committee by acclamation.

Mr. Šturma was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/649)

The agenda was adopted.

The meeting was suspended at 3.40 p.m. and resumed at 4.35 p.m.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON drew attention to the programme of work for the first week of the Commission's session. The Commission would begin by hearing the introduction of the eighth report on the expulsion of aliens by the Special Rapporteur on that topic (A/CN.4/651). The Drafting Committee would be working on the topic throughout the week, during which the Study Group on treaties over time would also be meeting. Lastly, the Bureau proposed that the next plenary meeting should be dedicated to the memory of Mr. Carlos Calero Rodrigues.

The programme of work for the first week of the session was adopted.

7. Mr. CANDIOTI pointed out that with the start of the new quinquennium, one third of the Commission's members were new to its work. The General Assembly had given the Commission a clear mandate to make progress on two topics: "The obligation to extradite or prosecute (*aut dedere aut judicare*)" and "Immunity of State officials from foreign criminal jurisdiction". In addition, new topics would have to be chosen now that work on three major topics had just been completed. For all those reasons, it might be beneficial to hold an open exchange of views on how best to organize the Commission's work for the current session and beyond, throughout the new quinquennium.

8. The CHAIRPERSON said that the Commission, owing to its new composition, needed to appoint new special rapporteurs for two topics: "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)". He invited members to hold consultations

to that end. He also suggested that members give some consideration to the overall approach to be taken to its work: he would be holding informal consultations on that subject. He would be consulting informally, with members of the Enlarged Bureau, on the new items to be included in the programme of work.

9. Mr. HASSOUNA said he hoped that the Commission would continue to improve its methods of work during the current session, in line with decisions taken at the previous session. He looked forward to a productive start to the new quinquennium.

The meeting rose at 4.50 p.m.

3129th MEETING

Tuesday, 8 May 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Adoke, Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Carlos Calero Rodrigues, former member of the Commission (*concluded*)

1. The CHAIRPERSON said that, as had been announced at the previous meeting, the current meeting was dedicated to the memory of Mr. Carlos Calero Rodrigues, who had been a member of the Commission from 1982 to 1996. With his vast experience of diplomacy and the drafting of international legal instruments, he had made a significant contribution to the work of the Commission and, more generally, to the development of international law in such areas as the law of the sea, human rights, international humanitarian law and State immunity.

2. Mr. SABOIA commended the Commission for paying tribute to the memory of Mr. Carlos Calero Rodrigues, with whom he had worked at the Commission on Human Rights during the 1980s but also during the time when the latter had been Secretary General of the Brazilian Ministry of Foreign Affairs, during the 1990s. In addition to his contribution to the development of international law in the areas mentioned by the Chairperson, Mr. Calero Rodrigues had been a member of the Commission on Human Rights at a difficult time for Brazil and had participated in the drafting of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Even though his country had experienced problems in the area of human rights, he had believed that it was possible to take a positive approach and

move things forward. That spirit had also guided him in his work in the International Law Commission: he had been convinced that it was possible to bring opposing positions closer together and that it was necessary to find solutions in order to obtain satisfactory results, while seeking a compromise that genuinely contributed to the development of international law or to the strengthening of human rights. While he took the topics considered by the Commission very seriously, he never lost his sense of humour—he could in fact display biting sarcasm. The work of the Commission was what mattered most to him, and he made it a point of honour to work on his own, without any assistant or adviser. Having himself learned a great deal from Mr. Calero Rodrigues, he had been greatly distressed to learn of his death, and he was grateful to the Commission for having chosen to remember him.

3. Sir Michael WOOD said that the Chairperson and Mr. Saboia had already said all that he had wished to say about Mr. Carlos Calero Rodrigues, which showed that the latter was the same to all who knew him. He had been one of the great international lawyers of his time and an accomplished master of diplomacy, a field that drew upon all the qualities and experience that the work of the Commission called for. In the Sixth Committee his contributions to the debates, particularly those relating to the report of the Commission, were listened to with the utmost attention, not only because he was always the first speaker to take the floor, but also because what he said was extremely pertinent and set the tone for the discussions that followed. He, too, had learned a great deal from Mr. Calero Rodrigues, who, in addition to possessing extensive skills, was a model of courtesy and diplomacy in the best sense of those terms: he displayed a keen interest in everyone, and while he could be sarcastic, he was never cruel. Above all, he would be remembered for his contribution to the progressive development and codification of international law, in particular his skilful chairing of the Sixth Committee during the consultations on jurisdictional immunities of States. The reports that he had drafted in the early 1990s had contributed greatly to the adoption in 2004 of the United Nations Convention on Jurisdictional Immunities of States and Their Property: when the Commission had taken up that topic, it had based itself on the issues on which Mr. Calero Rodrigues had worked and for which he had found solutions that had proved valid. That Convention was one of the Commission's greatest achievements, and he himself, who had also been very saddened by Carlos Calero Rodrigues's death, was pleased to give him much of the credit for it.

4. Mr. COMISSÁRIO AFONSO said that he had known Mr. Carlos Calero Rodrigues personally, having worked with him on many occasions, and that their relationship had left a deep and lasting impression on him. An outstanding personality, Mr. Calero Rodrigues had always acted in a respectful and friendly manner. He had been an excellent jurist who had served his country, the Commission, the United Nations and the entire international community with honour and distinction. He had had the privilege of meeting Mr. Calero Rodrigues several times during sessions of the Commission on Human Rights, to which the latter had been entirely devoted. He had also encountered him during meetings of Portuguese-speaking countries that had been organized in order to establish,

through a harmonization of positions, the Portuguese text of the United Nations Convention on the Law of the Sea, which was to be submitted to the Governments and parliaments concerned for approval. He had also met him in New York in the Sixth Committee, which he himself had chaired in 1991. Together with other representatives, including Sir Michael Wood, Mr. Calero Rodrigues had worked tirelessly to ensure that the work of the Sixth Committee led to a positive outcome. And indeed, that was one of the rare occasions on which a resolution on terrorism had been adopted by consensus, something that had not occurred in previous years or in subsequent ones. Mr. Calero Rodrigues had been a powerful but wise voice in the Sixth Committee, and he had developed his legal arguments in a convincing and forceful manner. He himself had consulted Mr. Calero Rodrigues time and again, given the latter's extensive experience as a negotiator, until they could find a solution to the thorny problems that faced them. Carlos Calero Rodrigues had been a major legal scholar who happily embraced great causes that embodied universal human values. He was staunchly opposed to human rights violations, in particular the death penalty, and had taken part in the drafting of numerous human rights instruments. He had also chaired the Third Committee of the United Nations Conference on the Human Environment, held in Stockholm in 1972, the fortieth anniversary of which had recently been observed in that city. He therefore wished to commend the Commission for its initiative to pay homage to the memory of an eminent jurist who had devoted his entire life to the ideals of peace, justice and human rights as well as to the progressive development and codification of international law.

5. Mr. GEVORGIAN said that he, too, had known Mr. Carlos Calero Rodrigues personally and that he had always had the impression, notwithstanding the difference in their ages and status, that Mr. Calero Rodrigues had been well disposed towards him. He agreed that Mr. Calero Rodrigues had been a veritable institution within the Sixth Committee whenever the Commission's report was considered, for his statements were as precise and detailed as they were unrestrained. Accordingly, he endorsed everything that had been said by previous speakers and wished to express his profound respect for Mr. Calero Rodrigues and to convey his deepest condolences to his family and to his fellow citizens.

6. Mr. VALENCIA-OSPINA said that he wished to associate himself with the tribute to the memory of Mr. Carlos Calero Rodrigues because he was the only member of the Commission to have had the honour of working with him in that body, where both had been members in 1982 and 1983, and he could therefore testify to the contribution that that eminent jurist had made to the Commission's work. Apart from Mr. Calero Rodrigues's contribution to the progressive development and codification of international law, he wished to stress another aspect, already mentioned by Mr. Saboia, namely the fundamental role played by Mr. Calero Rodrigues in the harmonization of divergent views expressed within the Commission: in fact, he had always endeavoured to find solutions that made it possible to rally divergent points of view in a constructive manner so as to move the process of codification forward. The very active role he had played

in the Commission and in the Sixth Committee had also made it possible to forge a link between those two bodies, which had been a key factor in the General Assembly's acceptance of a number of projects formulated by the Commission. Mr. Calero Rodrigues was in a sense part of a family tradition, since he was the brother-in-law of José Sette Câmara, who had preceded him in the Commission before serving on the International Court of Justice. Lastly, as everyone had noted, he had had a great sense of humour, but also—and that was perhaps less well known—a genuine passion for classical music.

7. The CHAIRPERSON said that he had also been very fond of Mr. Carlos Calero Rodrigues, an outstanding individual with whom he had had the privilege of working in the context of the United Nations Conference on the Law of the Sea and, later, in the Sixth Committee, on the question of jurisdictional immunities of States, and that he had been greatly affected and saddened by his death.

Expulsion of aliens (A/CN.4/650 and Add.1, sect. B,⁴ A/CN.4/651,⁵ A/CN.4/L.797)⁶

[Agenda item 2]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

8. The CHAIRPERSON invited the Special Rapporteur to introduce his eighth report on the expulsion of aliens (A/CN.4/651).

9. Mr. KAMTO (Special Rapporteur) said that when he had introduced his seventh report on expulsion of aliens⁷ at the sixty-third session, he had said that it would be the last report before the set of draft articles on the topic was submitted to the Drafting Committee and, he had hoped, adopted by the Commission. The debates in the Sixth Committee of the General Assembly at its sixty-sixth session had revealed a need for him to draft an eighth report to address the concerns expressed by certain States (see paras. 5–31 of the eighth report) and the European Union (*ibid.*, paras. 32–48).

10. He would not burden his colleagues by setting out in detail the concerns expressed and the responses he had made in an effort to address them, convinced that members had been able to take in the eighth report, which was fairly brief. Most of those observations had to do, in his view, with the discrepancies between the progress made by the Commission in considering the topic of expulsion of aliens and the information on that progress that had been submitted to the Sixth Committee in the context of its consideration of the Commission's annual report on its work.

11. In his eighth report, then, he had tried to dispel the misunderstandings created by that discrepancy while taking into account, where necessary, certain suggestions or proposing certain adjustments to the wording of certain draft articles. The draft articles had in fact been sent to

the Drafting Committee by the plenary Commission, and so it was in that context that those suggestions, largely of a drafting nature, would be considered. In essence, the report was mainly intended to show that the Special Rapporteur and the Commission were quite mindful of the observations of States, and groups of States like the European Union, and sought to make an adequate response to them. The Commission might therefore limit itself to taking note of them, but members were entitled to make observations, and he was open to all comments and suggestions.

12. He wished to conclude by raising a question that had come up during the debates in both the Commission and the Sixth Committee, namely the final form that the Commission's work on the topic would take. As he had already noted, few topics lent themselves to codification as well as the present one did. The arguments in support of that contention had been set out at length in the Commission at its sixty-third session⁸ and in the Sixth Committee in November 2011;⁹ he wished simply to reaffirm his conviction that once the drafting of the draft articles was completed, the coherence and solidity of the Commission's work would become more apparent, and the hesitation to which the codification exercise had given rise would be dispelled. He strongly hoped that when the time came, the Commission would decide to send the results of its work on the topic of expulsion of aliens to the General Assembly in the form of draft articles and entrust the Assembly with deciding what form it ultimately wished them to take.

13. Mr. MURPHY commended the Special Rapporteur for his eighth report on the expulsion of aliens, in which he considered and addressed many of the comments made by States and the observer for the European Union in the Sixth Committee. Those observations seemed to suggest mixed support for the draft articles, although there was certainly general agreement that a State's right to expel aliens must be exercised in accordance with international law, including rules on the protection of human rights. He wished to draw the Commission's attention to four main areas of concern that the Drafting Committee needed to consider.

14. First, several States had stressed that there already existed numerous global, regional and national regimes that addressed the expulsion of aliens in different contexts. According to those States, such regimes operated reasonably well and, given that they were complex, it was pointless to codify them further by means of a set of relatively simple rules. The Nordic countries, for example, had expressed "their scepticism concerning the usefulness of the Commission's efforts to identify general rules of international law with respect to the topic of expulsion of aliens".¹⁰ They had felt that "a significant body of detailed regional rules was already in place"¹¹ and that trying to codify those rules was not time well spent. Similarly, Germany had maintained that

⁴ Available from the Commission's website.

⁵ Reproduced in *Yearbook ... 2012*, vol. II (Part One).

⁶ Available from the Commission's website.

⁷ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/642.

⁸ *Ibid.*, vol. II (Part Two), para. 258.

⁹ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 25th meeting (A/C.6/66/SR.25), paras. 46–54.

¹⁰ *Ibid.*, 21st meeting (A/C.6/66/SR.21), para. 59.

¹¹ *Ibid.*

many national rules and regulations governed the question of expulsion, which was also addressed by human rights instruments and guarantees for protecting individuals. There was no need for further codification.¹²

Likewise, the United Kingdom had reiterated that it was “of the view that [the topic] was not suitable for codification or consolidation at the present time”.¹³ Greece, meanwhile, had stated that “many of the issues relating to the topic had not been settled in international law and did not lend themselves to codification or progressive development”.¹⁴ The Government of Japan had asked the Commission to “respond to the criticism that the topic was not ripe for codification”.¹⁵

15. Most of those States had pointed out that several widely adopted and detailed international treaties already addressed various aspects of the issue of expulsion: the Convention relating to the Status of Refugees, with 145 States parties; the Protocol relating to the Status of Refugees, with 146 States parties; the International Covenant on Civil and Political Rights, with 167 States parties; the Convention against torture and other cruel, inhuman or degrading treatment or punishment, with 150 States parties; and the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, with 194 States parties. Likewise, regional conventions and instruments adopted in Europe and elsewhere also dealt with expulsion, albeit in different ways according to different systems. Thus, when States like Germany, the Netherlands, the Islamic Republic of Iran and Canada had urged that “draft guidelines or principles could be drawn up, enunciating best practices such as those already contained in the current draft articles”,¹⁶ he understood them to mean that the Commission should not try to codify a single set of rules on the subject if the effect would be to blur the distinctions among the various treaty regimes. Rather, it should use its work to provide guidance to States that wished to develop national legislation and to encourage them, as appropriate, to enter into new or existing treaty regimes.

16. Second, several States also appeared to be concerned at the fact that the draft articles sought not to codify existing law but to impose new obligations on States that would modify or go beyond what they had accepted in their practice. The Czech Republic, for example, had stated that “some provisions ... exceeded the framework of codified rules of international law, and their wider acceptance could be problematic”,¹⁷ the Netherlands had asserted that the topic “represented progressive development of the law rather than State practice”¹⁸ and had protested that “[t]he Commission should not be involved in designing new human rights instruments”, while Hungary had maintained that

[t]he elaboration of a convention on the basis of the draft articles ... remained a controversial question, and concerns persisted over the need to balance the mere repetition of State practice with the introduction of a new regime with high human rights standards.¹⁹

¹² *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 26.

¹³ *Ibid.*, para. 46.

¹⁴ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 16.

¹⁵ *Ibid.*, 25th meeting (A/C.6/66/SR.25), para. 23.

¹⁶ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 26 (Germany).

¹⁷ *Ibid.*, para. 18.

¹⁸ *Ibid.*, para. 47.

¹⁹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 54.

17. Part of the problem was simply the use of wording in the draft articles that differed from that used in the major treaty regimes. That was why France,²⁰ for example, had objected to the language of draft article E1 (State of destination of expelled aliens),²¹ which he believed was to become article 17 under the Special Rapporteur’s proposed new numbering. Paragraph 2 of that draft article said that a State could not expel an alien to his or her State of nationality if the alien was “at risk of torture or inhuman and degrading treatment in that State”. France had correctly noted that that was not the standard used in the Convention against torture and other cruel, inhuman or degrading treatment or punishment, article 3 of which stipulated that no person could be expelled to a State “where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

18. Yet perhaps a bigger problem was that some States viewed the draft articles as inappropriately blending different concepts that existed in specific national, regional and international regimes, even though those concepts had been agreed only in the context of those particular regimes. Given that the draft articles were based on the premise that a State had the basic right to expel aliens from its territory (draft article 3), the imposition of restrictions on that right must be clearly established in State practice. State practice, which was associated with specific treaty regimes, demonstrated that some restrictions were accepted in some contexts, but it was problematic to then extrapolate from those regimes a broad right that would be applicable in all contexts, at least in the absence of widespread practice that supported the broader norm. Thus the United States of America was concerned that several provisions of the draft articles contained a *non-refoulement*²² obligation for which no comparable obligation existed in any of the widely ratified international human rights conventions.

19. Returning to paragraph 2 of draft article E1, he noted that the *non-refoulement* provision spoke of “inhuman and degrading treatment”. Yet article 7 of the 1966 International Covenant on Civil and Political Rights, which prohibited torture and cruel, inhuman or degrading treatment or punishment, did not prohibit *refoulement* to countries where the individual might be at risk of such treatment. Likewise, the *non-refoulement* obligation set out in article 3 of the later Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted in 1984, which had been viewed as an important development in international law, applied only in cases where there was a risk of torture but not of “inhuman or degrading treatment or punishment”, a situation that was contemplated in article 16 of the Convention. When the major treaties that had been widely ratified by States had been drafted, the issue of whether to extend the *non-refoulement* obligation to situations in which there was a risk of “inhuman or degrading treatment” had been rejected. That choice was obviously not meant to condone such treatment but constituted recognition that such conduct was different from torture.

²⁰ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 37.

²¹ *Yearbook ... 2011*, vol. II (Part Two), para. 218, footnote 564.

²² *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 21st meeting (A/C.6/66/SR.21), para. 66.

While there might be jurisprudence within the European human rights system that extended the *non-refoulement* provision to such treatment, the European system could not automatically be applied to the rest of the world, as the observer for the European Union himself had recognized in autumn 2011.²³

20. Third, some States had feared that the draft articles might undermine existing protections. France,²⁴ as well as Hungary²⁵ and Portugal,²⁶ had expressed concern that draft article E1, paragraph 2, identified a *non-refoulement* provision only when an individual was being expelled to his or her country of nationality, whereas the *non-refoulement* provision in the Convention against torture and other cruel, inhuman or degrading treatment or punishment applied to expulsions to any country, not just the country of the expellee's nationality. Similar deviations from other regimes, such as the Convention relating to the Status of Refugees, had prompted the Netherlands to caution that the Commission's work "could cause uncertainty as to which international legal regime applied in a specific situation".²⁷

21. Fourth, some States had expressed misgivings about the scope of the topic, with some of them expressing concerns about the inclusion of the question of extradition. Spain had maintained that "extradition and expulsion were two different categories that must be kept separate in order to prevent expulsion procedures from being exploited for the purpose of extradition".²⁸ Similarly, Chile had noted that it had "particular concerns stemming from the connection between the two related but different institutions of expulsion and extradition, each of which had its own regulations".²⁹ India had been of the view that

[a]lthough both expulsion and extradition led to a person leaving the territory of one State for another, the legal basis for and the laws governing the process and the procedure involved were altogether different, and one could not be used as an alternate for the other.³⁰

Canada had also advocated deleting revised draft article 8 (Expulsion in connection with extradition), asserting that the draft articles should not

attempt to address the issue of extradition, which was both legally and conceptually different from the issue of expulsion of aliens. In many countries, both aliens and citizens could be extradited, but only aliens could be expelled. The main purpose of extradition was to ensure that criminals were not able to escape prosecution simply by fleeing from one State to another. Such considerations would not be relevant in many instances of the expulsion of aliens.³¹

22. In conclusion, he urged the Drafting Committee to take four broad points into account. First, the Commission needed to consider whether the next step should be the adoption of a full set of draft articles on first reading or should instead be a reworking of the current articles into

a series of guidelines or best practices. Second, if draft articles were to be adopted, a guiding principle of the Commission's work should be to rework them so that they truly reflected the current obligations that States had accepted, either through treaties to which they had become parties or through their well-established practice. The draft articles would not be well received if they attempted to create new obligations by blurring distinctions between agreements that were legally binding and those that were not or by extrapolating from legally binding agreements obligations that they did not actually contain. Third, the Commission must be very careful not to undermine existing protections accorded to expellees. And fourth, the draft articles should avoid attempting to regulate areas that were properly regarded as falling outside the scope of the topic.

23. Only by recognizing and addressing those areas of concern would the Commission's work be seen by States as correctly reflecting the obligations they had undertaken. In that connection, he believed that the Czech Republic had been particularly perceptive when it had noted in autumn 2011 that "it was important to ensure not only a high level of protection for the affected persons, but also the wide acceptance by the international community of rules in the matter".³²

24. Mr. AL-MARRI said that the Special Rapporteur's comments regarding the debate on his two previous reports in the Sixth Committee in 2011 indicated that he was willing to look into any positive suggestions in the context of the work of the Drafting Committee. His zeal in protecting the rights of aliens subject to expulsion was praiseworthy, as were the efforts he had made ever since the topic had been included on the Commission's agenda to draw members' attention to very useful information and the concerns they had or ought to have relating to the preservation of the rights of aliens.

25. The present times were troubled; all over the world, aliens who were legitimate residents of countries were increasingly falling under the scrutiny of Governments that wished to return them to their countries of nationality. That was particularly true in Europe, which was traditionally host to aliens from Africa and other regions of the world. Globalization and aspirations for a better life prompted increased migration, which was also caused by natural and man-made disasters as well as by economic and political crises affecting large parts of the world.

26. At the same time, recent trends in the areas of counter-terrorism, organized crime and drug trafficking as well as the growing sense of insecurity engendered by an increase in crime rate were causing the developed countries to reduce the number of aliens in their territory. In Europe and the United States of America, the downturn in national economies and growing debt burdens were adversely affecting the lives of aliens, making it ever more urgent to contain the flow of immigrants and reduce the number of aliens. Expulsion was one of the main instruments invoked by States, which had almost limitless discretion to control the entry of foreigners into their territory and to force aliens to leave.

²³ *Ibid.*, paras. 45–51.

²⁴ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 37.

²⁵ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 57.

²⁶ *Ibid.*, para. 63.

²⁷ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 47.

²⁸ *Ibid.*, para. 49.

²⁹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 7.

³⁰ *Ibid.*, 25th meeting (A/C.6/66/SR.25), para. 14.

³¹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 76.

³² *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 18.

27. The reports and draft articles submitted by the Special Rapporteur deserved careful attention and, to the extent that they sought to ensure that any order of expulsion should be in accordance with the law and international standards and should guarantee due process while preserving the rights of aliens and discouraging disguised forms of expulsion, they should be supported. Now that the Commission was in a position to complete its second reading of two topics and its first reading of another, it was time to give priority to the draft articles that had been submitted and sent to the Drafting Committee. In approaching the draft articles, the Commission must bear in mind the important observations and comments made by States to the effect that the scope of the topic should be precisely defined and narrowed down to ensure that the Commission focused on issues that needed priority attention. Other issues, such as extradition or human rights in general, should be addressed to the extent that they were important and the necessary “without prejudice” clauses could be articulated.

28. He agreed that questions such as denial of admission, extradition, other transfers for law enforcement purposes and expulsions in situations of armed conflict should be excluded from the scope of the draft articles, as should issues related to deportation. Another important consideration was that nationals with multiple nationalities, whether they had been naturalized or had acquired nationality by birth, should not be expelled.

29. As for the human rights of aliens, all prerogatives of States should be in accordance with the principles of the rule of law, due process and equality before the law. The principles, rights and obligations enunciated by the International Court of Justice in its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, to which the Commission’s attention had been drawn, should provide necessary guidance in the articulation of those rights.

30. Mr. WISNUMURTI said that, in general, he endorsed most of the comments made by the Special Rapporteur in his excellent eighth report on the views expressed by States, particularly during the debate in the Sixth Committee of the General Assembly. He nevertheless wished to make an observation with regard to paragraph 10 of the report, which dealt with draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State). The Special Rapporteur considered that neither bilateral cooperation agreements that the expelling State had concluded with the transit State nor domestic law could contradict the rules of international human rights law, from which aliens subject to expulsion must also benefit. While he agreed with that position, he found it difficult to endorse the Special Rapporteur’s proposal to expand the scope of the transit State’s obligations to include all the rules of international human rights law to which it was subject, above and beyond those contained in the instruments to which it was a party. Such a proposal departed from the fundamental principles of international law. In fact, States must not be bound by obligations established in treaties or agreements to which they were not parties.

31. The Special Rapporteur had considered various comments made by States regarding certain aspects of draft article H1 (Right of return to the expelling State). In general, he endorsed the Special Rapporteur’s response to those comments, and he recalled that in the statement he had made on the subject at the previous session he had supported the draft article, considering that it struck an adequate balance between the rights of an alien subject to an illegal expulsion to return to the expelling State and the sovereign right of that State to refuse to allow the alien to return to its territory if his or her return constituted a threat to public order or public security. That said, the Special Rapporteur proposed, in paragraph 18 of his report, that the term “readmission of an alien in cases of illegal expulsion” should be used rather than “right of return” in order to avoid any disagreement as to whether that was in all cases a right of the illegally expelled alien or whether the expelling State retained its power to grant or deny admission to its territory to an alien. That proposal ought to be considered by the Commission.

32. The Special Rapporteur’s response to States’ comments on revised draft article 8 (Expulsion in connection with extradition),³³ contained in paragraph 23 of his eighth report, pointed up the complexity of the situation. While in general, the text of revised draft article 8 did not pose any problem, he believed that, given the controversy that it had generated, it ought to be considered further with a view to harmonizing the institution of expulsion with that of extradition.

33. As to the final form that the draft articles should take, he disagreed with the view expressed in paragraph 55 of the report, which certain States had put forward and which had been supported by Mr. Murphy, that the topic of expulsion of aliens was not suitable for codification. While it was true that at the current phase of work a decision as to the form the final outcome should take would be premature, there was no denying that the Special Rapporteur’s excellent reports, drawing on an extensive range of legal sources, had made it possible to prepare important draft articles that would provide a solid basis for codification. In that connection, it was essential, as several members of the Commission had noted, that the Special Rapporteur should begin to systematically organize the draft articles so that the Commission could have a more global view of them. From that perspective the new draft plan of work presented by the Special Rapporteur was to be welcomed.

34. Mr. KITTICHAISAREE said that he had attended the discussion on the topic of expulsion of aliens held in the Sixth Committee during the sixty-sixth session of the General Assembly and that, on the basis of their comments, States could be divided into three groups. The first group was made up of the Nordic countries, which adhered to rigorous human rights protection standards that were applicable to aliens, including refugees. The second group consisted of States that preferred to exercise their sovereign right to expel aliens to the maximum extent permissible under international law. The third group was made up of States that were searching for best practices in order to guide their policy in that area.

³³ *Yearbook ... 2011*, vol. II (Part Two), para. 224, footnote 572.

In that connection, note should be taken of the Special Rapporteur's observation in paragraph 56 of his eighth report that "no other topic on the Commission's agenda for the past three quinquenniums ha[d] had a richer and more solid foundation for codification than that of the expulsion of aliens".

35. With regard to the objections to codification raised in the Sixth Committee, which had been summarized by Mr. Murphy and which must be addressed by the Commission, he wished to make the following comments. First, although it was true that rules governing the expulsion of aliens already existed, worked very well and did not require codification, there was no reason why the Commission could not incorporate them into the draft articles or guidelines it was preparing. The latter essentially amounted to best practices that the international community ought to follow. Second, some delegations had expressed concern that the outcome of the Commission's work might impose new obligations or modify existing ones by departing from established practice. The Commission could address that concern at the drafting stage by seeing to it that it did not create new obligations. The third concern expressed was that the outcome of the work might undermine existing protections. Once again, that pitfall could be avoided by following best practices and adhering to international rules that were already operating satisfactorily. Lastly, several delegations had expressed concern that the institution of extradition might be adversely affected. He himself shared that opinion and consequently believed that the Commission should delete all references to extradition from the provisions it was drafting.

36. As to what form the final outcome of the Commission's work on the topic of expulsion of aliens should take, that was a matter to be decided by the Sixth Committee.

37. Mr. TLADI, after noting that he considered the title of the topic to be a terrible one, for he liked neither the word "expulsion" nor the word "aliens", said that, unlike Mr. Murphy, he did not believe that the starting point of work on the topic should be the sovereign right of States to decide who was authorized to reside in their territory and in what circumstances, but rather the balance that should be struck between that right and the need to protect human rights and the individual. Many delegations had pointed to the need to protect aliens while also ensuring that the final product of the Commission's work on the topic was acceptable to States. The same also applied to the topics of immunity of State officials from foreign criminal jurisdiction, protection of persons in the event of disasters and, to a lesser extent, the obligation to extradite or prosecute. Needless to say, that balance could shift depending on the context and state of development of the various areas of law, but the Commission must bear it in mind when discussing the proposed draft articles.

38. Although concerns had been expressed by States and reiterated by Mr. Murphy at the fact that the *non-refoulement* principle underpinned various provisions of the draft articles, that principle was well established in international human rights law. In his previous reports, including in footnote 8 of the revised and restructured draft articles submitted as a supplement to his fifth report

in 2009,³⁴ the Special Rapporteur had referred to various international instruments that incorporated the principle, which was also found in the case law produced by the domestic courts of States. Excluding it from the final product of the work on the topic—whether a set of draft articles or some other form—would upset the balance he had spoken of earlier.

39. The treatment given to the State of destination of expelled aliens in the Special Rapporteur's sixth report³⁵ and particularly in the second addendum thereto was comprehensive and helpful. Consideration of the subject in the report and in the debate had revolved around the sovereign right of expelling and receiving States to set conditions of entry into and exit from their respective territories. That was, of course, a very important consideration, but the choice made by the individual must also be taken into account—again, for the sake of balance. Although draft article E1 did provide to a certain extent for the transfer of expelled individuals to their State of choice "where appropriate", in his view, the State of destination should be the one chosen by the expelled person, provided that the State in question consented to receive that person. Draft article E1 should be reformulated in order to avoid conveying the impression that the expelled person's choice carried little weight.

40. Similarly, the issue of the right of return to the expelling State also related to the balance to be struck between States' sovereign right and the human rights of expelled persons. The main issue was to determine whether, in the event that a decision to expel was annulled, there nevertheless remained grounds for the removal of the individual in question. It was generally agreed that while every State had the right to expel aliens, that right was governed by international law. Consequently, it should also be generally agreed that, where a decision to expel was annulled, the effects of the expulsion should also be annulled. Hence, if an expulsion led to the revocation of a residence or stay permit, for example, the expelled person should be granted the opportunity to reclaim the status originally afforded by that document. To do otherwise would amount to authorizing *de facto* expulsion in circumstances in which international law did not permit it. That approach, which took into account the status of the expelled person prior to expulsion, had the further advantage of drawing a distinction between aliens lawfully present and those unlawfully present in the territory of a State. He was not convinced by the distinction drawn by the Special Rapporteur in his eighth report between the effects of the annulment of an expulsion order flowing from the violation of a substantive rule of international law, on the one hand, and those from a procedural norm, on the other. After all, the purpose of procedural guarantees was to facilitate substantive protection. If a court or other competent authority annulled an expulsion order on the grounds that, for example, the *audi alteram partem* rule had been violated, it would be dangerous to suggest that the consequences of such a violation were less serious than if the expulsion had been annulled on the

³⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617 (footnote referring to draft article 14).

³⁵ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1-2.

ground that the individual did not pose a threat to public security. After all, the purpose of the *audi alteram partem* rule was to ensure the legitimacy of substantive findings.

41. As to the final form its work on the topic should take, the Commission could decide that more easily once it had before it a complete set of draft articles. Nonetheless, form influenced content and vice versa; thus at the current stage the Commission should already have a clear idea of the form its final product should take. To that end, it had to assess whether there was a sufficiently large body of positive law to justify the elaboration of a set of draft articles. In that connection, the Commission should bear in mind the Special Rapporteur's observation that no other topic on the Commission's agenda for the past three quinquenniums—aside from diplomatic immunity and State responsibility—had had a richer or more solid foundation for codification than the current topic. More importantly, rather than seeking to codify what States were already doing, the Commission might wish to engage more in progressive development by laying down principles that could or should guide States' practice in the area of the expulsion of aliens. If, as Mr. Murphy had suggested, it was necessary to choose between draft articles that provided weak protection for aliens, on the one hand, and principles or guidelines that offered them stronger protection, on the other, he would not hesitate to choose the latter.

42. Sir Michael WOOD, after commending Mr. Kamto for his admirable chairpersonship of the sixty-third session of the Commission, said that he agreed with Mr. Tladi's comment concerning the title of the topic.

43. The topic was a very controversial one, and the sensitivity of the domestic issues involved for many States made it a particularly challenging area of study for the Commission.

44. The Special Rapporteur's eighth report focused on the debate held on the topic in the General Assembly, and it was very important for the Commission to take full account of the comments made by delegations. He wished to thank the Secretariat for the topical summary (A/CN.4/650 and Add.1) it had prepared of the discussions held in the Sixth Committee on the Commission's report; the summary contained a long section on the expulsion of aliens, which also deserved the Commission's careful attention. The procedure that had been adopted by the Special Rapporteur on reservations to treaties provided an excellent model: in his reports, Mr. Pellet had examined in detail every comment made by every State, both in the Sixth Committee and in writing, with explanations as to why he could or could not accept each one. The Commission might wish to follow a similar procedure at the current stage of its consideration of the topic of expulsion of aliens.

45. The Special Rapporteur had indicated in his eighth report that some members of the Sixth Committee might have misunderstood the current state of work on the topic. If that was the case, and it might very well be, three comments were in order. First, it was perhaps the Commission's own fault. When drafting its report, the Commission should clearly explain the current state of its work, indicating, for example, whether there were draft articles under

preparation in the Drafting Committee that had not yet been included in the report, the purpose being to avoid a situation in which delegations to the Sixth Committee prepared comments on outdated drafts. Second, some members of the Commission, including those who had been members during the previous quinquennium, might not themselves know with absolute certainty where things stood on the topic. He himself looked forward to receiving a complete set of draft articles, since it was only then that possible inconsistencies to which attention had been drawn previously would become obvious. Third, and last, the Commission should not imply that the comments made in the Sixth Committee had been based on misunderstanding, as the Commission should not be seen as downplaying the importance of those comments.

46. With regard to what form the final outcome of the work on the topic should take, he drew attention to paragraph 27 of the topical summary prepared by the Secretariat (A/CN.4/650 and Add.1), which revealed clearly that the Sixth Committee itself was divided on that very important matter. He agreed with Mr. Tladi that substance determined form and vice versa. Lastly, he indicated that he would comment on the substance of the draft articles in the Drafting Committee and in plenary meeting, once the Drafting Committee had completed its work.

47. Mr. PETRIČ thanked the Special Rapporteur for his eighth report, which revealed that States attached great importance to the topic and rightly considered it a very sensitive one. It was significant that States had responded with keen interest to issues such as the expellee's State of destination, protection of the expelled person's property, the right to return in the event of unlawful expulsion, the relationship between extradition and expulsion, and the suspensive effect of an appeal against an expulsion decision, which had also been vigorously debated in the Commission and in the Drafting Committee.

48. When preparing the draft articles, the Special Rapporteur had endeavoured to strike the balance referred to by Mr. Tladi between the sovereign right of States to expel aliens and the protection of the rights of such persons. In that regard, he recalled that, although it had not prevailed in the Commission, his position from the outset had been that a clear distinction should be drawn between aliens lawfully present and those unlawfully present in the territory of a State. It should not be possible to expel the former, save in exceptional circumstances, such as when State security or law and order were threatened. Aliens illegally present in the territory, on the other hand, were in a totally different situation. It was probably because the Commission put both in the same basket that so many draft articles posed problems, and if there had been misunderstanding in the Sixth Committee, it was because that distinction had not been maintained.

49. As to what form the final outcome of the Commission's work on the topic should take, he was of the view that since the Commission had been elaborating draft articles and not general principles all along, it was preparing draft articles with a view to a future convention. Drawing attention to paragraph 57 of the eighth report, in which the Special Rapporteur stated that "it is doubtless premature to decide on the final form of the Commission's

work on the topic of the expulsion of aliens”, he said that he fully shared the view expressed earlier by Mr. Tladi. If the Commission was in fact contemplating the preparation of draft articles for a future convention, it should take greater account of State practice, which was abundant but very diverse, and by which the Commission was to some extent bound. If, on the other hand, what it was doing was drafting general principles that would aim to promote the development of an *opinio juris* in favour of individuals and the protection of human rights, then the Commission had more leeway and could go a little bit further.

50. Should that idea emerge in the Sixth Committee, causing the Commission to reconsider the final form of its work, it would be wise not to exclude a debate on the matter. It might actually be better to debate it now, rather than after the Commission had finished its work. On the other hand, and in view of the excellent work done by the Special Rapporteur, he was also ready to continue to develop the topic following the approach taken by the Commission to date, and to do so until the final outcome was submitted to the General Assembly, which would decide on the definitive form it wished to give it. To sum up, if the majority of Commission members favoured a particular option, he would go along with them. On the other hand, if there was no clear majority, he would prefer for the Commission to continue its work using the approach it had followed up to that point.

51. Mr. SABOIA thanked the Special Rapporteur for his eighth report and said that he agreed entirely with Mr. Tladi on the need to strike a balance between the rights of States and the rights of individuals subject to expulsion. He also agreed with many of the remarks made by Mr. Petrič regarding the final outcome of the Commission’s work on the topic, considering it inappropriate to change the form of that outcome when the Commission was on the verge of completing its consideration of the draft articles on first reading.

52. Contrary to the contention that the topic was not ripe for codification because of the various regimes and conventions that existed in that area, it was precisely because the rules applicable to the expulsion of aliens were scattered that it was necessary to codify them. He pointed out in that connection that the refugee regime, which had been mentioned previously, was a very specific regime and did not apply to all aliens but only to refugees. It was therefore necessary to select from the provisions contained in conventions that were of general applicability, leaving it to the Drafting Committee to harmonize the wording.

53. In his seventh report, the Special Rapporteur had referred to the 2010 judgment handed down by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo*. In that judgment, the Court had highlighted a number of obligations under international law that should be taken into account by States’ domestic courts when dealing with matters relating to the expulsion of aliens.

54. Lastly, with regard to the issue of extradition, he agreed that it was indeed a separate situation and should not be a focus of discussion, with one possible exception: when expulsion was actually a disguised form of extradition.

55. Mr. HMOUD said that work on the topic of expulsion of aliens should be continued within the Drafting Committee, given that the Commission was already at an advanced stage in its first reading of the text. He also wished to comment on statements made by earlier speakers concerning the report in general and the progress of the Commission’s work on the topic.

56. The Special Rapporteur’s eighth report incorporated some of the comments made by Commission members at previous sessions, largely having to do with duplications between the text of the draft articles and the applicable laws. That was the issue that most concerned him and on which he had made a number of comments at previous sessions. In that connection, he wished to endorse some of the arguments put forward by Mr. Murphy. However, he himself did not think that the Commission should abandon a topic that was among the most important it had ever undertaken and that could have a considerable influence on international relations. Moreover, there were numerous legal sources on which the Commission could draw in formulating the draft articles, including State practice and the laws applicable under it. Given variations in State practice, it was necessary to establish normative criteria. Those differences, which were sometimes significant, could also be traced to the political orientations or the internal policies of expelling States. The Commission’s work on the draft articles would have an impact on those political orientations at both the domestic and international levels.

57. The Commission had started from the premise that the issue of the expulsion of aliens was a matter that related to the sovereignty of States, which had the right and the duty to protect their territory and borders. That right was not absolute, however, but was subject to certain restrictions. Accordingly, the rights of the expelled person or the person facing expulsion must be respected, just as the rights of States other than the expelling State should also be respected. The draft articles must thus offer some “added value” with regard to existing legal norms and should not weaken the regimes in force.

58. He did not believe that the final form should be decided at the current stage of the Commission’s work, and he agreed with the Special Rapporteur on that point. Moreover, the Commission could always come back to that question on second reading or leave it to the General Assembly to decide.

59. Mr. ŠTURMA said that it might be premature to determine what the final form of the Commission’s work on the current topic should be and that further discussion would no doubt be necessary. He agreed that the wording of the draft articles should not differ from that of most treaties unless there was a valid reason for it. In any event, it would be up to the Drafting Committee to decide on the matter. Lastly, concerning the issue of extradition, he drew attention to paragraph 25 of the Special Rapporteur’s eighth report, where reference was made to a “without prejudice” clause, which he himself considered to be perfectly acceptable.

60. Mr. KAMTO (Special Rapporteur) thanked the members who had expressed their views on his eighth

report. Some of their statements largely reflected views that had already elicited a sometimes intense debate within the Commission and to which the Commission had attempted to respond, both in plenary meetings and in the Drafting Committee. Obviously, not all problems had been resolved, and consideration of the set of draft articles would thus continue with the Drafting Committee, taking into account new contributions made at the current session.

61. With regard to a number of points, responses had, for the most part, been provided or suggested in the eighth report. That had been the case, for example, with the issue of expulsion as it related to extradition. In the light of the discussions held in the Sixth Committee, the Special Rapporteur had thought it advisable to address the concern raised by States by proposing a “without prejudice” clause in paragraph 25 of his report, although it had not been his preferred choice. That solution, if adopted by the Drafting Committee, could provide an acceptable response and allay States’ fears in that regard. The Special Rapporteur had also taken into account the question of the right to return and had followed the proposals made by States on that point.

62. The question of the multiplicity of regimes brought him back to an issue that never ceased to amaze him: the endless debate on the question of whether the topic lent itself to codification. In fact, expulsion of aliens was the topic that had supplied the most abundant practice since the nineteenth century (with the possible exception of State responsibility for internationally wrongful acts and, to a certain extent, diplomatic immunity). If that subject did not lend itself to codification, then he wondered what the Commission was doing and why it codified certain topics that lacked a basis in customary law and that were based on very limited practice. The Commission had recognized that the topic might give rise to draft articles and those articles had been submitted to the General Assembly, which had taken note of them.

63. The Commission could, of course, limit itself to what was known as codification “on the basis of established law”—in other words, consisting solely of a compilation of provisions that already existed in various conventions. That was not the task assigned to the Commission, whose mission, according to its statute, was the progressive development of international law and its codification. In fact, it seemed to him that, to date, the Commission had done very little progressive development on the topic of expulsion of aliens, which was generally based on State practice and international case law.

64. Without wishing to pre-empt the Commission’s eventual decision, he urged the Commission once again, as he had done from the outset, to submit the outcome of its work to the General Assembly in the form of draft articles. Whatever follow-up the General Assembly might wish to give to those draft articles—whether the elaboration of a draft convention or the convening of a diplomatic conference—fell outside the scope of the Commission’s competence.

65. Mr. HMOUD (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of

expulsion of aliens would be composed of Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Kittichaisaree, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti and Sir Michael Wood, together with Mr. Kamto (Special Rapporteur) and Mr. Šturma (*ex officio*).

The meeting rose at 1 p.m.

3130th MEETING

Friday, 11 May 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON said that he had not yet completed his informal consultations regarding the manner in which topics on the Commission’s agenda or new subjects should be approached. He hoped that he would be able to provide more information at the plenary meeting on Wednesday, 16 May.

2. Ms. JACOBSSON thanked the Chairperson for consulting his colleagues with regard to the work of the current session and suggested that, as the Planning Group was supposed to advise the Commission about the organization of its work, it might be wise to hold a meeting of the Group in May, in keeping with previous practice. A meeting early in the session would also be beneficial for the new members of the Commission.

3. The CHAIRPERSON said that the Bureau had already considered that matter and was in favour of holding a meeting of the Planning Group as soon as he had completed his informal consultations.

4. Mr. CANDIOTI said that he supported the idea of holding a meeting of the Planning Group as soon as was appropriate. The Group should consider the Commission’s functioning and work for the entire quinquennium and should be prepared to answer any questions that new members might have in that connection.

* Resumed from the 3128th meeting.

5. Sir Michael WOOD, endorsing the statements of Ms. Jacobsson and Mr. Candiotti, said that it would be wise to hold a meeting of the Planning Group the following week. It was important that all members should be aware of the procedure that special rapporteurs had to follow and it was also vital to plan the work for the quinquennium, as the Commission had made clear in paragraph 378 of its report to the General Assembly on the work of the Commission's sixty-third session (A/66/10).³⁶ Members might wish to refresh their memories as to what had been agreed in that respect in 2011.

6. Mr. GÓMEZ ROBLEDO said he believed that, as a new member of the Commission, he would benefit greatly from a meeting of the Planning Group at the earliest opportunity.

7. The CHAIRPERSON suggested that the Planning Group should meet on Friday, 18 May.

It was so decided.

The meeting rose at 10.15 a.m.

3131st MEETING

Friday, 18 May 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

The CHAIRPERSON announced that the Bureau had adopted the programme of work for the following week, copies of which had just been distributed to members.

The meeting rose at 10.05 a.m.

3132nd MEETING

Tuesday, 22 May 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau,

Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

1. The CHAIRPERSON welcomed Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, and invited her to brief the Commission on the latest legal developments in the United Nations. He also welcomed Mr. Hans Corell, former Legal Counsel, who had come to observe the proceedings.

2. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs and United Nations Legal Counsel), after congratulating the new members of the Commission on their election, said that there had been a number of significant developments in the Sixth Committee during the sixty-sixth session of the General Assembly. In its resolution 66/98 of 9 December 2011, entitled "Report of the International Law Commission on the work of its sixty-third session", the Assembly had provided policy guidance for the Commission's work. The Sixth Committee continued to look to the Commission for its valuable contribution towards the progressive development and codification of international law.

3. At its sixty-third session, the Commission had completed its work on the draft articles on the responsibility of international organizations³⁷ and on the effects of armed conflicts on treaties³⁸ and commentaries thereto; the General Assembly had therefore taken note of both sets of articles, annexed them to resolutions³⁹ and commended them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. It had also decided to revert to those items at its sixty-ninth session with a view to examining, *inter alia*, the question of the form that might be given to the articles.

4. Regarding the Commission's work on the topic "Reservations to treaties", which had included the adoption of draft guidelines and commentaries thereto in the Guide to Practice on Reservations to Treaties,⁴⁰ she recalled that the Assembly had decided that, in order to have a fuller debate, consideration of the topic should be resumed at its sixty-seventh session,⁴¹ once all the relevant documentation had become available.

5. As for the other topics currently on the Commission's programme of work, the Assembly had recommended in

³⁷ *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88.

³⁸ *Ibid.*, paras. 100–101.

³⁹ General Assembly resolutions 66/100 and 66/99 of 9 December 2011, respectively.

⁴⁰ *Yearbook ... 2011*, vol. II (Part Three) and vol. II (Part Two), para. 75.

⁴¹ General Assembly resolution 66/98, para. 5.

³⁶ *Yearbook ... 2011*, vol. II (Part Two), pp. 176–177.

resolution 66/98 that the Commission should continue its work on them, taking into account the observations of Governments. The topical summary of the debate in the Sixth Committee on the Commission's report (A/CN.4/650 and Add.1) contained a detailed account of the views expressed.

6. The Sixth Committee had also considered two items deliberated previously in the Commission, namely "Nationality of natural persons in relation to the succession of States",⁴² on which the Commission had completed its work in 1999, and "The law of transboundary aquifers",⁴³ completed in 2008.

7. Concerning the first item, she recalled that at its fifty-first session the Commission had adopted draft articles on nationality of natural persons in relation to the succession of States and commentaries thereto and had recommended to the General Assembly that it should adopt them in the form of a declaration.⁴⁴ The draft articles had been annexed to General Assembly resolution 55/153 of 12 December 2000, and the Assembly had reverted to the item at two subsequent sessions to consider the final form the articles should take. In its resolution 66/92 of 9 December 2011, the Assembly had emphasized the value of the articles in providing guidance to the States dealing with issues of nationality of natural persons in relation to the succession of States, in particular concerning the avoidance of statelessness, and had decided that, upon the request of any State, it would revert to the question at an appropriate time, in the light of the development of State practice in those matters.

8. Concerning the second item, she recalled that at its sixtieth session the Commission had adopted draft articles on the law of transboundary aquifers and commentaries thereto and had proposed a two-step approach⁴⁵ that would consist of the General Assembly's annexing the draft articles to a resolution, which it had done in its resolution 63/124 and, subsequently, the possible elaboration of a convention. The Sixth Committee had focused chiefly on the final form that might be given to the draft articles, and in its resolution 66/104 of 9 December 2011 it had encouraged States to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles, and had also encouraged the International Hydrological Programme of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to offer further scientific and technical assistance to the States concerned. The Sixth Committee was expected to consider the item again at its sixty-seventh session.

9. She wished to inform the Commission briefly of recent developments in the field of the administration of

justice at the United Nations. The Sixth Committee had recently considered some amendments to the statutes of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. In its resolution 66/107 of 9 December 2011, the General Assembly had approved the amendments to the rules of procedure of the United Nations Appeals Tribunal, as set out in the annex to that resolution; however, it had decided not to approve the amendment to article 19 (Case management) of the rules of procedure of the United Nations Dispute Tribunal, contained in annex I of the Secretary-General's report on this topic.⁴⁶

10. The Sixth Committee had also considered the code of conduct for the judges of the Dispute Tribunal and the Appeals Tribunal, prepared by the Internal Justice Council. On the recommendation of the Sixth Committee, the General Assembly had, by its resolution 66/106 of 9 December 2011, approved the code of conduct, which was set out in the annex to the resolution.

11. The General Assembly had decided to continue its review of effective remedies for resolution of disputes by non-staff personnel, such as individual contractors and consultants. It had requested the Secretary-General to report to it at its sixty-seventh session on a proposed mechanism for expedited arbitration procedures for non-staff personnel, as well as on a mechanism to address possible misconduct of judges (resolution 66/237 of 24 December 2011, para. 38).

12. The Assembly had also assessed the operation of the new administration of justice system and had indicated its interest in continuing to monitor developments in the jurisprudence of the Dispute Tribunal and the Appeals Tribunal and to examine specific issues such as compensation for moral damages. The tribunals were entering their third year of operation.

13. To date, the Dispute Tribunal had issued more than 560 judgments, and the Appeals Tribunal more than 180 judgments.⁴⁷ The judgments of the Appeals Tribunal had addressed fundamental issues such as the role of judicial review and the standard of proof required in establishing disciplinary measures. For example, the Appeals Tribunal had ruled that since disciplinary cases were not criminal, the United Nations should not follow the jurisprudence of the International Labour Organization (ILO) Administrative Tribunal, which required that disciplinary charges must be proved beyond reasonable doubt. Instead, the Appeals Tribunal had held that when termination was a possible outcome, misconduct must be established by clear and convincing evidence. The Appeals Tribunal was also continuing to clarify other important principles, including those governing the award of compensation.

14. Those developments would have a significant impact on the evolution of United Nations administrative and management policies and on the advisory functions of the Office of Legal Affairs, with the Office's General Legal Division playing a critical role in that regard.

⁴² General Assembly resolution 55/153 of 12 December 2000, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48.

⁴³ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), pp. 19 *et seq.*, paras. 53–54.

⁴⁴ *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 44.

⁴⁵ *Yearbook ... 2008*, vol. II (Part Two), p. 19, para. 49.

⁴⁶ A/66/86.

⁴⁷ The judgments can be consulted on the following web page: www.un.org/en/oaj/unjs/jurisprudence.shtml.

15. Turning to other activities carried out by the Office of Legal Affairs over the past year, she said that the Office of the Legal Counsel had been very busy with the international tribunals. Her Office had a long history of involvement in the establishment and operation of international criminal tribunals, and she was pleased to note that, having made so much progress in fulfilling their mandates since their establishment in the 1990s, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda were now concluding their work and preparing to close.

16. Pursuant to Security Council resolution 1966 (2010) of 22 December 2010, substantial progress had been made towards the start-up of the Mechanism for International Criminal Tribunals. The General Assembly had elected the 25 judges of the Mechanism, and the President, Prosecutor and Registrar had been appointed. It was expected that the Mechanism's Rules of Procedure and Evidence, an information access and security policy for the archives and records and headquarters agreements with the Governments of the Netherlands and the United Republic of Tanzania, the Mechanism's host countries, would be finalized soon. The Office of the Legal Counsel had been at the centre of that pioneering work.

17. One of the significant developments at the International Tribunal for Rwanda in 2011 had been the decision to refer a case to Rwanda for trial.⁴⁸ The referral of cases to national jurisdictions was a key element of the Tribunal's completion strategy and was consistent with the notion that States were primarily responsible for the prosecution of serious international crimes. In practical terms, the decision might encourage the referral of the cases of the six low-level fugitives to Rwanda.

18. With the arrest of Ratko Mladić and Goran Hadžić in 2011, the International Tribunal for the Former Yugoslavia no longer had any fugitives; all 161 indicted persons had been brought to justice. While the trials of Ratko Mladić⁴⁹ and Radovan Karadžić⁵⁰ would be conducted by the International Tribunal for the Former Yugoslavia, appeals in those cases, if any, would be dealt with by the Mechanism, in accordance with Security Council resolution 1966 (2010).

19. In April 2012, the Special Court for Sierra Leone had convicted Charles Taylor, the former Liberian President, of planning, aiding and abetting war crimes and crimes against humanity.⁵¹ It had been a historic moment for international criminal justice, as the first conviction of a former Head of State by an international criminal tribunal since the Nuremberg Tribunal. However, Charles Taylor was not the first Head of State to commit international crimes

while in office, and he would not be the last one to be held accountable for his crimes in a court of law. That judgment sent a strong and unequivocal message that no one was above the law. It was a victory in the fight against impunity and a true testament to the fact that an era of accountability had arrived. It was expected that an appeal, if any, would be completed by the end of the year, at which point the Special Court would make way for the Residual Special Court for Sierra Leone, established by agreement between the United Nations and the Government of Sierra Leone.⁵²

20. Unlike the other tribunals, the Extraordinary Chambers in the Courts of Cambodia had not quite reached the completion stage. In its first appeal judgment, delivered in February 2012, the Supreme Court Chamber had confirmed the conviction of Kaing Guek Eav, alias Duch, for crimes against humanity and had extended his sentence from 35 years to life imprisonment. With the completion of the *Kaing Guek Eav alias Duch* case, the focus had shifted to the second trial, which had started in November 2011 and involved the four surviving senior leaders of the Khmer Rouge regime.⁵³ In view of the advanced age of the accused, the judges had taken a novel approach, splitting the trial into several phases that would be heard successively. Many commentators considered it to be the most significant international criminal trial under way in the world. Two other cases that continued to generate much controversy were at the investigation phase. Two international co-investigating judges had resigned in quick succession, and there was serious concern that such developments could eventually lead to a lack of accountability for the suspects concerned. However, the United Nations remained committed to ensuring that impunity for the crimes committed during the period of Democratic Kampuchea would not be tolerated.

21. In June 2011, the Special Tribunal for Lebanon had confirmed the indictment of four individuals allegedly involved in the attack that had killed former Lebanese Prime Minister Rafiq Hariri and 22 others, and had issued warrants for their arrest.⁵⁴ As efforts to locate and arrest the four accused had been unsuccessful to date, the Special Tribunal would try them *in absentia* later in the year. The Prosecutor was also examining four other related attacks to determine whether sufficient evidence existed to file an indictment. The initial three-year mandate of the Special Tribunal had expired in February 2012. Pursuant to the terms of the annex to Security Council resolution 1757 (2007) of 30 May 2007 (art. 21), the Secretary-General, after consulting with the Government of Lebanon and the Security Council, had extended the mandate of the Special Tribunal for an additional three years.

⁴⁸ *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-01-75-AR11bis, decision of 28 June 2011, confirmed by the Appeals Chamber on 16 December 2011 (available from www.ictrcaselaw.org/docs/20111216-dco-0175-01-en.PDF).

⁴⁹ *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92, the decisions and judgments concerning this case are available from www.icty.org/case/mladic/4.

⁵⁰ *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18, the decisions and judgments concerning this case are available from www.icty.org/case/karadzic/4.

⁵¹ *The Prosecutor v. Charles Ghanay Taylor*, Case No. SCSL-03-01, judgment of 26 April 2012.

⁵² Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Residual Special Court for Sierra Leone (New York, 29 July, and Freetown, 11 August 2010), United Nations, *Treaty Series*, vol. 2871, No. 50125, p. 333. Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

⁵³ Nuon Chea and Khieu Samphan (together with Ieng Sary and Ieng Thirith) were indicted on charges related to crimes against humanity, genocide and grave breaches of the 1949 Geneva Conventions in Case No. 002 before the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (www.eccc.gov.kh/en/case/topic/2).

⁵⁴ *The Prosecutor v. Salim Jamil Ayyash and others*, Case No. STL-11-01/T/TC (www.stl-tsl.org/en/the-cases/stl-11-01).

22. The Rome Statute of the International Criminal Court currently formed the centrepiece of the United Nations international criminal justice system. The tenth anniversary of the Statute's entry into force was a symbolic milestone that would be celebrated throughout the year. The event would provide an opportunity to review achievements in the field of international criminal justice over the past 10 years and, it was hoped, to serve as a reminder of the urgency for all States committed to justice to ensure continued support for the Court.

23. The International Criminal Court had issued its first judgment on 14 March 2012, convicting Thomas Lubanga Dyilo of the war crimes of conscripting children under the age of 15 years into armed groups, enlisting children into armed groups and using children to participate actively in an armed conflict that had taken place in the eastern region of the Democratic Republic of the Congo. The sentencing hearing was scheduled to begin in mid-June. While there had been some criticism of the fact that it had taken the Court over five years to complete its first trial, critics must bear in mind the issues that any new jurisdiction faced, where legal paths were unexplored and there were no precedents that might afford guidance. It was to be expected that with time the Court would accelerate the pace of its work while guaranteeing due process of law to those brought before it.

24. The International Criminal Court was currently exercising jurisdiction in respect of seven situations: the Democratic Republic of the Congo, the Central African Republic, Northern Uganda, Darfur, Libya, Kenya and Côte d'Ivoire. The Court was at the heart of the international community's efforts to ensure accountability, end impunity and strengthen the rule of law, and if the international community was serious about achieving those goals, it must support the work of the Court.

25. In response to requests from Member States and regional international organizations, the Organization was increasingly being called upon to provide financial and logistical support to non-United Nations security forces. Yet the provision of such support came with a risk that the United Nations might be implicated in violations of international law by those forces. Events in the Democratic Republic of the Congo in 2009 had proved that to be true. To manage that risk, the Secretary-General had announced in July 2011 the establishment of a human rights due diligence policy, applicable whenever any part of the Organization was contemplating or involved in the provision of support to non-United Nations security forces.⁵⁵ The Office of the Legal Counsel had played a central role in developing that policy. Under the policy, whenever a United Nations entity contemplated providing support to non-United Nations security forces, it first had to conduct an assessment of the risks involved, in particular the risk that the recipient forces might commit grave violations of international humanitarian law, human rights law or refugee law. Where

there were substantial grounds for believing that such a risk was real and it was not possible to take measures to eliminate or reduce it to acceptable levels, the United Nations entity concerned must refrain from supporting the non-United Nations security forces in question. If a United Nations entity did provide support to non-United Nations security forces, it was required by the policy to put in place measures to closely monitor the conduct of those forces. If it subsequently received information that gave it reasonable grounds to suspect that those forces were committing grave violations of international humanitarian, human rights or refugee law, it must immediately intercede with the respective command elements with a view to bringing those violations to an end. If those intercessions did not succeed and the violations continued, then the United Nations entity must suspend or withdraw its support from the forces concerned.

26. The policy had its roots in three different bodies of law. The first was Article 1, paragraph 3, of the Charter, which mandated the Organization to promote and encourage respect for human rights and fundamental freedoms. The second was the law of international responsibility, which required that an international organization should not aid or assist a State or another international organization in violating its international legal obligations. The third came into play when the non-United Nations security forces were party to an armed conflict and the United Nations became a party to that conflict precisely because the Organization was providing support to those forces. In such a situation, international humanitarian law, as reflected in common article 1 of the Geneva Conventions of 12 August 1949, required that the Organization should take such action as was in its power to ensure that the non-United Nations security forces conducted their operations in a manner consistent with their obligations under international humanitarian law.

27. Another area of concern of her Office was the question of amnesty. For over a decade, the Secretary-General had advised his envoys and special representatives negotiating peace agreements that such agreements should not contain amnesties for genocide, crimes against humanity or war crimes or for gross violations of human rights, such as summary executions, extrajudicial killings, torture, enforced disappearances, enslavement, rape and crimes of sexual violence of a comparably serious nature. The Office of the Legal Counsel had played a central role in helping to formulate and establish that policy; moreover, with the Secretariat's increasingly "joined-up" approach to mediation and mediation support, the Office was currently playing a similar role in ensuring its proper implementation.

28. On the matter of human rights vetting in the context of peacekeeping, she noted that while cases of serious misconduct, including sexual exploitation and abuse, by United Nations personnel in peacekeeping operations were rare, the cases that did arise had enormous potential to undermine the reputation and work of the Organization. When carrying out complex mandates in challenging circumstances, the Organization relied on its credibility and legitimacy in the eyes of the local population. Thus, when United Nations personnel broke local laws, they tarnished the image of the Organization and undermined

⁵⁵ See the report of the Secretary-General on the work of the Organization (A/67/1), para. 58. The text of the human rights due diligence policy on United Nations support to non-United Nations security forces is set out in the annex to the identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council (A/67/775-S/2013/110).

its efforts to carry out its mandates. The negative effect was compounded when, as was often the case, there was no real accountability for crimes committed or when accountability measures were taken remotely in the jurisdiction of a troop-contributing country, which might be far from the place where the crime had been committed and from the victims.

29. Accordingly, the Organization was trying to put in place measures to prevent the occurrence of serious misconduct, an undertaking that posed a multidimensional challenge. Such measures included ensuring that all persons who served in United Nations peacekeeping operations met the highest standards of integrity as required under the Charter. To that end, the Policy and Best Practices Service of the Department of Peacekeeping Operations was leading an interdepartmental working group to devise a policy requiring troop or police contributors to screen the personnel they provided to United Nations operations. Once that policy was implemented across the Organization, it would allow the United Nations to reserve the right to deny deployment or to repatriate peacekeepers prematurely at the expense of the relevant national authority if there were grounds to believe that a peacekeeper had committed a criminal or serious disciplinary offence or had committed an act that amounted to a violation of international human rights law or international humanitarian law.

30. In upholding the rule of law, United Nations peacekeepers must lead by example. The Secretary-General had made it clear that he would not hesitate to impose disciplinary measures or, if appropriate, to refer cases for prosecution, due process considerations being taken into account and without prejudice to the applicable privileges and immunities set forth in the 1946 Convention on the privileges and immunities of the United Nations. In addressing those issues, the Organization worked closely with the Member States concerned, which were usually the State hosting the peacekeeping operation or the State of nationality of the peacekeeper in question.

31. Operational difficulties in the implementation of the applicable rules and mechanisms had been encountered in instances where the host State's judicial institutions were weak and lacked the capacity to provide the accused with a fair trial. Practice demonstrated that cooperation among all concerned was vital to the success of existing mechanisms—in other words, cooperation between the host State, the State of nationality of the peacekeeper and the United Nations.

32. The United Nations took seriously its obligation to cooperate with the relevant authorities of the host State in order to facilitate the proper administration of justice, in accordance with the 1946 Convention, since that was a key element of the rule of law. The issue arose, for example, when host country nationals tried to avoid arrest by local law enforcement authorities by taking refuge in United Nations premises. While the Organization must cooperate with the relevant national authorities when that happened, its cooperation must be conditional on the receipt of guarantees from the host State that the individuals concerned would be afforded due process in any legal proceeding and, more generally, that they would not be subjected to torture or other serious violations of human rights.

33. The responsibility to protect was an interesting and relatively new political and legal concept that had been the subject of much discussion at the United Nations in recent years. At the high-level plenary meeting of the General Assembly held in 2005, more than 150 Heads of State and of Government had unanimously embraced the concept of “responsibility to protect” when they had declared that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”⁵⁶ and that “the international community, through the United Nations, also has the responsibility ... to help protect populations”⁵⁷ from those crimes.

34. The Secretary-General had identified three pillars of action for putting the responsibility to protect into operation.⁵⁸ Pillar one was the enduring responsibility of States to protect their populations. Pillar two was the role of the international community to assist States in protecting their populations before crises and conflicts escalated to a level where crimes were committed against the responsibility to protect. Pillar three entailed a commitment from States that they would be prepared to take collective action in a timely and decisive manner, through the Security Council, in accordance with the Charter of the United Nations, if national authorities were manifestly failing to protect their populations. That commitment extended also to action under Chapters VI and VIII, as well as under Chapter VII, of the Charter and included cooperation with any relevant regional organizations, as appropriate. Of course, the concept was necessarily limited by the legal framework provided under the Charter: any decision of the Security Council to take action required the concurring votes of all permanent members. That requirement underscored the fact that the responsibility to protect did not create any additional exceptions to the prohibition on the use of force laid down by the Charter. Those exceptions were well known: acts taken in self-defence and acts authorized by the Security Council.

35. Most States had agreed that the United Nations should focus at the outset on prevention. In order to give practical meaning to that concept, then, it was necessary to work out how the Organization could best assist States in protecting their population before crises occurred, especially in situations where the Security Council would be unlikely to authorize enforcement action under Chapter VII. That challenge had yet to be met and would, of course, differ from one case to another because each situation was unique.

36. The responsibility to protect reflected a worldwide conviction that it was immoral and unacceptable for States to allow gross violations of their populations' human rights and that the international community had a responsibility to prevent such crimes. The concept of responsibility to protect had grown out of a number of important developments, the first being a recognition of the changing nature of conflict since the drafting of the Charter in

⁵⁶ General Assembly resolution 60/1 of 16 September 2005, “2005 World Summit Outcome”, para. 138.

⁵⁷ *Ibid.*, para. 139.

⁵⁸ Implementing the responsibility to protect: report of the Secretary-General (A/63/677), paras. 11–66.

1945: most current conflicts occurred within States rather than between them. It signified a broad acceptance of fundamental human rights principles, reinforced the normative context for dealing with the crimes of genocide, war crimes and crimes against humanity, and affirmed States' obligations under international law to prevent, prosecute and punish those crimes.

37. The recognition that State sovereignty—the cornerstone of international relations—entailed responsibility lay at the heart of the responsibility to protect. While States had to protect their populations from the crimes targeted by the responsibility to protect, the international community likewise had a positive obligation to help States meet their responsibilities and to take action if they failed to do so. The notion that sovereignty implied responsibility underscored the fact that sovereignty constituted the basis for a certain status and authority under international law, as well as for enduring obligations towards one's people.

38. It was important to note that, rather than detracting from the principle of State sovereignty, the notion of responsibility to protect reinforced it and highlighted the role of the State as a protector of its nationals. As the Secretary-General had stated, the responsibility to protect was “an ally of sovereignty, not an adversary”.⁵⁹ Since one of the defining attributes of both statehood and sovereignty was the protection of populations, the prevention of atrocities began at the national level. Because of its emphasis on prevention, the responsibility to protect strengthened the collective security mechanism established by the Charter and the principle that enforcement measures might be taken only in accordance with the legal framework prescribed by the Charter.

39. Some people might therefore wonder what was new. The “added value” of the responsibility to protect was that it encapsulated the moral and legal imperatives of the international community in relation to the four crimes at which it was aimed. It was potentially a powerful vehicle for an important political process, whereby political pressure might accompany technical and material assistance in an effort to help States exercise their responsibilities. It placed pressure not only on national Governments, but also on actors in the international community. It reflected a marked shift in perspective. While some would argue that the responsibility to protect had no normative effect, others held that it was an enabling new norm and that, while not an obligatory norm that imposed binding new duties, it did confer additional responsibility, which included taking action.

40. When the responsibility to protect had been invoked in respect of Libya, the Security Council had, in the preamble to its resolution 1970 (2011) of 26 February 2011, recalled Libya's “responsibility to protect its population”. The international community, acting through the United Nations and other multilateral and bilateral bodies, had taken a series of measures under pillars two and three to help protect the civilian population from what were described by the Security Council as “widespread and systematic attacks ... [which] may amount to crimes against humanity” (*ibid.*), thus placing the attacks within the framework of crimes

against the responsibility to protect. The steps taken had ranged from diplomatic approaches, the imposition of sanctions and referral of the situation to the International Criminal Court to the authorization by the Security Council, under its resolution 1973 (2011) of 17 March 2011, of “all necessary measures to protect civilians and civilian populated areas under attack” (para. 4). The international community's action in Libya had been swift, multifaceted and targeted, and the most explicit and robust application of the responsibility to protect so far.

41. It was arguably premature to pass judgment on the success of actions taken by the international community in Libya in the context of the responsibility to protect. The intervention by the North Atlantic Treaty Organization had been criticized for going beyond the limits of the Security Council's authorization and had fed concerns that the responsibility to protect had been and might be used again for “political considerations”—that is, to accomplish “regime change” or to legitimize interference in the internal affairs of States. Others, meanwhile, had contended that the limits set by the Security Council had not been exceeded, that the protection of civilians in Libya had required the drastic action taken and that many thousands of lives had been saved by the intervention.

42. With thousands dead and many more injured, the grave situation in Syria had risen to the top of the international agenda and had become a true test of the responsibility to protect. States and the international community, acting through the League of Arab States and the machinery of the United Nations, had sought to provide assistance and apply pressure through efforts under pillars two and three. The Secretary-General had repeatedly called upon the Syrian authorities to stop the violence, and he continued to remind Syria of its responsibilities. The League of Arab States and the United Nations Human Rights Council and General Assembly had been very engaged and vocal with regard to the situation in Syria.

43. The Security Council had adopted two resolutions on Syria. In its resolution 2042 (2012) of 14 April 2012, it had called for the urgent, comprehensive and immediate implementation of all elements of the Joint Special Envoy's six-point proposal (which appeared in the annex). In resolution 2043 (2012) of 21 April 2012, the Council had decided to establish a United Nations Supervision Mission in Syria for an initial period of 90 days (para. 5). Since the Mission had to reach its authorized maximum strength without further delay, deployment was continuing apace.

44. Although it was too late to prevent bloodshed in Syria, the challenge for the international community was to find ways of preventing a further escalation in the conflict. The responsibility to protect served not only to underscore the responsibilities of States *vis-à-vis* their populations, but also to bring pressure to bear on the international community and to mobilize it into helping States to meet those obligations, possibly by taking collective action when States failed to do so. The Syrian authorities had thus far largely disregarded their responsibilities, but the international community had not: it was mobilized and while much more remained to be done, it was relying strongly on the doctrine of the responsibility to protect.

⁵⁹ *Ibid.*, para. 10 (a).

45. Turning to the activities of the Division for Ocean Affairs and the Law of the Sea, which performed multiple functions under the United Nations Convention on the Law of the Sea, she said that the Division supported the uniform and consistent application not only of the Convention and its two implementing agreements, but also of other relevant agreements and instruments. The Division successfully assisted the General Assembly in its annual review of issues connected with ocean affairs and the law of the sea, issues that had acquired special significance in view of the forthcoming United Nations Conference on Sustainable Development to be held in Rio de Janeiro in June 2012.

46. As universal participation in the Convention was important if there was to be a single, coherent, legal regime of the oceans, it remained a priority for the General Assembly. Accordingly, in its resolution 66/231 of 24 December 2011, on oceans and the law of the sea, the Assembly had reiterated its call to all States to become parties to the Convention and its implementing agreements. The Secretary-General had likewise encouraged the 34 Member States that had not yet become parties to the Convention to accede to it. Cambodia had announced its intention to ratify the Convention in the near future. To commemorate the thirtieth anniversary of the opening for signature of the Convention, the General Assembly had decided to devote a two-day debate to the Convention in December 2012, and the Secretary-General had been requested to organize activities to mark the occasion.

47. In September 2011, the first workshop in support of the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects, had been held in Chile, with a second workshop held in China in February 2012. The outcome of the workshops had been presented by the host countries at the third meeting of the Ad Hoc Working Group of the Whole on the Regular Process, in April 2012.

48. In the context of fisheries, the General Assembly had reviewed its resolutions 61/105 of 8 December 2006 and 64/72 of 4 December 2009 relating to bottom fishing, a practice that could negatively affect vulnerable marine ecosystems and the long-term sustainability of deep-sea fish stocks. A two-day workshop had been held in New York in September 2011 to discuss the implementation of those resolutions, and those discussions had then been taken into account by the Assembly when it had decided on additional urgent actions to regulate bottom fisheries in areas beyond national jurisdiction. Those actions were listed in resolution 66/68 of 6 December 2011, on sustainable fisheries (chap. X).

49. Despite a decrease in the rate of hijackings, piracy off the coast of Somalia continued to threaten the lives of seafarers, the safety and security of international navigation and the stability of the region. It was also worrisome to note that there had been an increase in incidents of piracy in the Gulf of Guinea in recent months. The Office of Legal Affairs had been working in a number of forums to help States address the legal aspects of the repression of piracy under international law. Its work in 2011 had focused on two principal areas, namely regional mechanisms for the prosecution of suspected pirates, including specialized anti-piracy courts and national legislation on piracy.

50. With regard to regional mechanisms, the Office of Legal Affairs, pursuant to a request made by the Security Council in its resolution 1976 (2011) of 11 April 2011, had prepared a report issued by the Secretary-General on the modalities for the establishment of specialized Somali courts to try suspected pirates,⁶⁰ both in Somalia and in the region, including an extraterritorial Somali specialized anti-piracy court sitting in another State in the region. The Bureau assessed the legal and practical considerations surrounding the establishment of such courts, including the possible participation of international personnel, as well as the projected costs.

51. In its resolution 1515 (2011) of 24 October 2011, the Security Council had decided to continue its consideration, as a matter of urgency, of the establishment of specialized anti-piracy courts in Somalia and other States in the region. On the basis of that resolution, her Office had prepared a further report for the Secretary-General⁶¹ setting out detailed proposals for the establishment of such courts. The report assessed (a) the kind of international assistance, including the provision of international personnel, that would be required to make specialized anti-piracy courts operational; (b) the procedural arrangements for the transfer of apprehended pirates and related evidence; and (c) the projected case capacity of such courts and the projected timeline for and costs of such courts.

52. In its resolution 1515 (2011), the Security Council had called on all States to criminalize piracy under their national legislation. It had also called upon international partners to assist States in elaborating counter-piracy laws. The Council had requested the Secretary-General to compile and circulate information received from Member States on the measures they had taken to criminalize piracy under their domestic law, and to prosecute and support the prosecution of individuals suspected of piracy off the coast of Somalia, as well as to imprison convicted pirates. To date, information had been received from 42 Member States.

53. The related question of the use of privately contracted armed security personnel on-board ships as a protective measure against piracy was a matter that raised a number of complex legal issues. The latter were being examined by the Contact Group on Piracy off the Coast of Somalia and by the International Maritime Organization (IMO).

54. Turning to the activities of the International Trade Law Division, she said that 2011 had been another productive year for the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Model Law on Public Procurement had been revised⁶² to reflect both experience gained in its use and practice developed since the adoption of the original text in 1994.⁶³ The main

⁶⁰ S/2011/360.

⁶¹ S/2012/50.

⁶² UNCITRAL Model Law on Public Procurement, 1 July 2011. Available from www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf.

⁶³ UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (New York, United Nations, 1995). Available from www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf.

objective of the Model Law was to enhance efficiency and effectiveness in the procurement process. The Commission had also issued a publication entitled *UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective*,⁶⁴ which was intended to foster the uniform interpretation of the Model Law by providing information and guidance to judges on issues related to cross-border insolvency. Through its working groups, UNCITRAL was also engaged in work on a number of other topics, including transparency in treaty-based investor-State arbitration, online dispute resolution, electronic transferable records, selected concepts relating to cross-border insolvency and registration of security rights in movable assets.

55. At its forty-fifth session, to be held in New York from 25 June to 6 July 2012, UNCITRAL was expected to consider and finalize the Revised Guide to Enactment to accompany the UNCITRAL Model Law on Public Procurement.⁶⁵ The Commission would also consider possible future work in the areas of public procurement and microfinance, as well as its role in promoting the rule of law at the national and international levels.

56. A notable development in that regard had been the establishment of the UNCITRAL Regional Centre for Asia and the Pacific, a novel yet important step that would enable UNCITRAL to provide technical assistance to developing countries. The Regional Centre had officially opened on 10 January 2012, and its key objective was to enhance international trade and development in the Asia-Pacific region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL.

57. Turning to the activities of the Treaty Section, she recalled that broad participation in the multilateral treaties deposited with the Secretary-General—the most recent of which was the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the General Assembly in its resolution 66/138 of 19 December 2011—was promoted through annual and special treaty events. The 2012 treaty event, the focus of which would be the rule of law, would coincide with the one-day plenary meeting on the rule of law at the national and international levels to be held during the high-level segment of the sixty-seventh session of the General Assembly.

58. The current scarcity of resources and difficult economic climate meant that the International Law Commission needed to reflect, as a matter of urgency, on how it could increase its efficiency, effectiveness and productivity. One key factor to be considered was the duration of the Commission's sessions, including whether the sessions should be split. The seriousness of the Organization's financial situation had compelled her to advise the Sixth Committee of the need for the Commission to manage prudently its way of doing

business. All United Nations entities would need to seek creative ways of meeting their objectives if they were to continue to operate within budgetary constraints.

59. The CHAIRPERSON thanked Ms. O'Brien, the Legal Counsel, for her statement and invited members to make comments and put questions.

60. Mr. NOLTE, referring to the responsibility to protect, asked whether his understanding was correct that while the concept did not imply any new legal duties, it did imply new political obligations.

61. Mr. HASSOUNA recalled that since 2008⁶⁶ the Commission had been invited each year by the General Assembly to comment on its role in promoting the rule of law, which was the essence of the Commission's work. He therefore wished to know whether the Commission would be invited to participate in the one-day plenary meeting on the rule of law at the national and international levels to be held during the high-level segment of the sixty-seventh session of the General Assembly. He also wished to know what the Legal Counsel expected the outcome of that meeting to be: Would it simply be another debate, such as the one held in the Sixth Committee or would the meeting lead to the adoption of new mechanisms that would give substance to the promotion of the rule of law in different regions of the world?

62. Mr. KAMTO asked what progress was being made in the prosecution in Côte d'Ivoire of the main perpetrators of the crimes committed during the period covered by the investigations of the International Criminal Court. The Court appeared to be turning into an African court *ratione personae*. He wondered what progress was being made in the investigations of situations in other continents that had previously been announced by the Office of the Prosecutor; a fundamental condition for the universality of the Court, which did not depend solely on the number of ratifications, was that there should be prosecutions in continents other than Africa.

63. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs and United Nations Legal Counsel) said that, with regard to the responsibility to protect, the distinction between a legal obligation and a political obligation was a subtle one. The concept of the responsibility to protect—especially pillar three, which encompassed Chapter VII of the Charter—did not give rise to another layer of international law or to a right of humanitarian intervention: the provisions of the Charter stipulating that the use of force required the authorization of the Security Council remained supreme. However, the concept did create a political and moral obligation. In her view, the concept implied a moral and political obligation to take action, but no legal duty to take action. She admitted, however, that the lines between the three types of obligations overlapped to some extent.

64. She was not sure what the outcome of the special General Assembly one-day plenary meeting would be.

⁶⁴ Available from www.uncitral.org/pdf/english/texts/insolven/Judicial-Perspective-2013-e.pdf.

⁶⁵ UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Public Procurement (New York, 2014). Available from www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf.

⁶⁶ General Assembly resolution 63/128 of 11 December 2008, entitled "The rule of law at the national and international levels", para. 7. See also resolutions 64/116 of 16 December 2009, para. 9, 65/32 of 6 December 2010, para. 10, and 66/102 of 9 December 2011, para. 12.

Participants at the meeting were expected to be of a very high level. From the point of view of the Office of Legal Affairs, the discussion should focus on international law and the rule of law at the international level. While it had been planned that the Chairperson of the Commission would be the sole representative of the Commission at the meeting, the Codification Division could look into the possibility of broader participation.

65. With regard to the status of International Criminal Court prosecutions in connection with events in Côte d'Ivoire, she recalled that Laurent Gbagbo was currently under arrest and his trial was under way. The Prosecutor continued to have the entire situation under review; he was pursuing his investigation and had the option of looking into broader crimes than those of the former Head of State alone. Her Office worked closely with the International Criminal Court but was not familiar with the internal workings of the Office of the Prosecutor.

66. It was her understanding that the Court had situations under review other than those arising in Africa, such as the situations in Afghanistan and Colombia. As for the implied focus on Africa, it should be borne in mind that the Rome Statute of the International Criminal Court would not exist without the commitment of the African States; they had been the largest regional group to support the establishment of the Court and a significant proportion of those States were parties to the Rome Statute. Importantly, many of the investigations into situations in Africa had been self-referrals by the African States in which the situations had occurred. Only two situations in Africa—the situations in Libya and Darfur—had been referred to the Court by the Security Council. The situation in Kenya had been the subject of an investigation by the Prosecutor *proprio motu*.

67. Mr. KITTICHAISAREE asked whether the third pillar of the concept of the responsibility to protect could be understood to authorize the exercise of universal jurisdiction over perpetrators of serious crimes under international law, especially leaders of States who failed to protect their own citizens. He also wished to know if it could be understood to authorize the extradition or prosecution of such leaders.

68. On the subject of piracy, he observed that there appeared to be a discrepancy between United Nations practice and the practice of IMO. The latter organization had been insisting that Somali pirates were not terrorists because they committed crimes for private, not political, ends. However, under various international conventions to combat terrorism, such as the International Convention against the taking of hostages, Somali pirates were considered to be offenders, and the International Convention for the Suppression of the Financing of Terrorism could thus be applied to curtail their activities.

69. With regard to the rule of law, he noted that there had been much criticism of the Special Tribunal for Lebanon for adopting a definition of terrorism that did not comply with the principle of legality.⁶⁷ Another tribunal—the

Extraordinary Chambers in the Courts of Cambodia—had been badly affected by the resignations of prosecutors and judges. The rule of law appeared to be in crisis, given that the very persons and institutions trying to uphold it were themselves experiencing difficulties.

70. Mr. TLADI asked to what extent the Office of Legal Affairs, when contributing to the reports on legal matters issued by the Secretary-General, felt the need to strike a balance between providing high-quality information, on the one hand, and furnishing information that was acceptable to Member States, on the other. For example, in the matter of piracy, the issue of regional prosecution mechanisms—including specialized anti-piracy courts—had been covered in the reports in some detail, while less coverage had been given to the question of natural resources, which some States considered to be important.

71. Mr. WAKO asked whether, when a State had failed to meet its primary responsibility to protect its citizens and the Security Council had consequently called for collective action in a resolution, the inevitable result of such a resolution was regime change. On the question of piracy, he noted that in his former capacity as Attorney General of Kenya he had conducted a record number of prosecutions against pirates and therefore appreciated the work carried out on that issue by the Office of Legal Affairs. Given the length of time it took for the States concerned to put in place mechanisms such as regional courts or national legislation, those States should be assisted in their efforts both financially and in terms of human resources. He appealed to the Legal Council to that end, since conducting prosecutions placed a heavy burden on States with scant resources, such as Kenya, Djibouti, Seychelles and the United Republic of Tanzania.

72. Ms. O'BRIEN (Under-Secretary-General for Legal Affairs and United Nations Legal Counsel), replying to Mr. Kittichaisaree, said that the international legal principles that applied to universal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) applied unchanged in the context of the responsibility to protect. The concept of responsibility to protect was neither intended to, nor did it, change any element of international law as such. In a sense, it created a moral and political obligation or duty on States to implement universal jurisdiction and the principle of *aut dedere aut judicare*.

73. She agreed that the United Nations and IMO differed in their approach to piracy; that was because the roles played by each organization were different. Nevertheless, the United Nations worked very closely with IMO, in particular through the United Nations Office on Drugs and Crime (UNODC), in order to understand and seek solutions to the common problems they faced. For instance, IMO had organized a conference in London the previous week to discuss, *inter alia*, a number of difficult legal questions such as the employment of privately contracted armed security personnel on ships. The Office of Legal Affairs considered that it was its obligation to promote relevant conventions and to ensure their implementation by encouraging States to fulfil their obligations under those instruments.

⁶⁷ Special Tribunal for Lebanon, Appeals Chamber, interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, 16 February 2011, Case

No. STL-11-01/I, paras. 145–148, for which “the Tribunal must apply the crime of terrorism as defined by Lebanese law” (para. 145).

74. The Extraordinary Chambers in the Courts of Cambodia, which was the most challenging of the hybrid courts or international tribunals, had faced a number of crises since its inception, including resignations, threats of resignations and, most recently, the possibility of a trial collapsing owing to the health concerns of one of the defendants. Investigations into certain cases had been fraught with political interference, and she had had on a number of occasions to intercede with the Cambodian Government in an attempt to stop such interference. Yet, despite those challenges and difficulties, the tribunal had been an important catalyst for the rule of law. Its importance for Cambodia was highlighted by the fact that over 30,000 people had made their way across the country to attend hearings and feel the proximity of justice. Given the very important role the tribunal had played in that respect, its current vulnerabilities and the prospect of further difficulties were matters of particular concern to her Office.

75. Replying to Mr. Tladi's question, she said that ensuring the quality of its product while meeting the expectations of Member States was one of the most difficult challenges her Office faced. The Office's response to a question related to the issue of piracy provided a good example in that regard. The Security Council had initially requested a report on the possibility of establishing an international tribunal to deal with piracy, since some States, in particular France and the Russian Federation, had expressed strong support for such a court. The Office had compiled its reports with objectivity, professionalism and integrity and had duly submitted them to the Security Council. On the basis of advice provided to it not only by her Office but also by national legal advisers, the Council had decided that it would not be desirable to set up such a tribunal. Her Office had subsequently worked very closely with the Security Council to consider various ways of improving the system of justice for dealing with piracy, such as building upon the regional and national court systems and helping them develop their capacity to counter piracy. The Security Council still had to take a decision in that regard.

76. A further illustration of the broader issue of ensuring quality of output and meeting Member States' expectations had been provided the previous week in the context of reform of the Security Council. A number of States known collectively as the Small Five group had tabled a draft resolution in the General Assembly on improving the working methods of the Security Council, which had included a provision dealing with the use of the veto. Following a request from the President of the General Assembly, the Office of Legal Affairs had prepared, within a very tight time frame, a legal advice based on a thorough analysis of all efforts to reform the working methods of the Security Council since the establishment of the United Nations. It had, in particular, considered General Assembly resolution 53/30 of 23 November 1998, which had been the catalyst for the motion by the Small Five group, with a view to determining whether it had the effect of creating a requirement for a two-thirds majority for any decision on the matter or whether, as the sponsors of the draft resolution maintained, a simple majority was required. Her Office had advised that, in the case of the draft resolution that had been submitted, it would be appropriate if the General Assembly should adopt it by a two-thirds majority. In her opinion, the advice provided by

the Office had been objective, professional and balanced; however, it had been described to the General Assembly by those who had been disappointed by the outcome as being utterly wrong and biased.

The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/650 and Add.1, sect. G)

[Agenda item 10]

77. The CHAIRPERSON recalled that, pursuant to his consultations on the approach to be taken to the work of the Commission, it had been decided to appoint a chairperson of the Working Group for the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" and a new special rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction".

78. The Bureau had proposed that Mr. Kittichaisaree should be appointed Chairperson of the Working Group for the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". If he heard no objection, he would take it that the Commission so agreed.

Mr. Kittichaisaree was appointed as Chairperson of the Working Group on the obligation to extradite or prosecute (aut dedere aut judicare).

79. The CHAIRPERSON said that the Bureau had proposed that Ms. Escobar Hernández should be appointed Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction". If he heard no objection, he would take it that the Commission so agreed.

Ms. Escobar Hernández was appointed Special Rapporteur for the topic "Immunity of State officials from foreign criminal jurisdiction".

80. The CHAIRPERSON said that, following consultations, a consensus had been reached on the inclusion of two new topics in the programme of work of the Commission, namely "Provisional application of treaties" and "Formation and evidence of customary international law".

81. The Bureau had proposed that the topic "Provisional application of treaties" should be included in the current programme of work and that Mr. Gómez Robledo should be appointed Special Rapporteur for the topic. If he heard no objection, he would take it that the Commission so agreed.

The Commission decided to include the topic "Provisional application of treaties" in the current programme of work and to appoint Mr. Gómez Robledo as Special Rapporteur for the topic.

82. The CHAIRPERSON said that the Bureau had proposed that the topic "Formation and evidence of customary international law" should be included in the current programme of work and that Sir Michael Wood should be appointed Special Rapporteur for the topic. If he heard no objection, he would take it that the Commission so agreed.

The Commission decided to include the topic "Formation and evidence of customary international law" in the current programme of work and to appoint Sir Michael Wood as Special Rapporteur for the topic.

83. Mr. NIEHAUS (Chairperson of the Planning Group) announced that the Planning Group would be composed of the following members: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood and Mr. Šturma (Rapporteur, *ex officio*).

The meeting rose at 12.20 p.m.

3133rd MEETING

Friday, 25 May 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. McRae, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

The CHAIRPERSON said that the Bureau had adopted the programme of work for the following week, which had just been distributed to members. If he heard no objection, he would take it that the Commission approved it. He also wished to draw the attention of members to the provisional programme of work for the second part of the session, stressing that it should be taken to be purely provisional in nature.

The meeting rose at 10.05 a.m.

3134th MEETING

Tuesday, 29 May 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud,

Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/650 and Add.1, sect. B, A/CN.4/651, A/CN.4/L.797)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. HMOUD (Chairperson of the Drafting Committee) introduced the titles and texts of draft articles 1 to 32, which constituted the entire set of draft articles on the expulsion of aliens, provisionally adopted on first reading by the Drafting Committee, as contained in document A/CN.4/L.797, which read as follows:

PART ONE

GENERAL PROVISIONS

Draft article 1. Scope

1. The present draft articles apply to the expulsion by a State of aliens who are lawfully or unlawfully present in its territory.
2. The present draft articles do not apply to aliens enjoying privileges and immunities under international law.

Draft article 2. Use of terms

For the purposes of the present draft articles:

(a) "expulsion" means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State;

(b) "alien" means an individual who does not have the nationality of the State in whose territory that individual is present.

Draft article 3. Right of expulsion

A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles and other applicable rules of international law, in particular those relating to human rights.

Draft article 4. Requirement for conformity with law

An alien may be expelled only in pursuance of a decision reached in accordance with law.

Draft article 5. Grounds for expulsion

1. Any expulsion decision shall state the ground on which it is based.
2. A State may only expel an alien on a ground that is provided for by law, including, in particular, national security and public order.
3. The ground for expulsion shall be assessed in good faith and reasonably, taking into account the gravity of the facts and in the light of all of the circumstances, including the conduct of the alien in question and, where relevant, the current nature of the threat to which the facts give rise.
4. A State shall not expel an alien on a ground that is contrary to international law.

* Resumed from the 3131st meeting.

PART TWO

CASES OF PROHIBITED EXPULSION

Draft article 6. Prohibition of the expulsion of refugees

1. A State shall not expel a refugee lawfully in its territory save on grounds of national security or public order.

2. Paragraph 1 shall also apply to any refugee unlawfully present in the territory of the State, who has applied for recognition of refugee status, while such application is pending.

3. A State shall not expel or return (*refouler*) a refugee in any manner whatsoever to a State or to the frontiers of territories where the person's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion, unless there are reasonable grounds for regarding the person as a danger to the security of the country in which he or she is, or if the person, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Draft article 7. Prohibition of the expulsion of stateless persons

A State shall not expel a stateless person lawfully in its territory save on grounds of national security or public order.

Draft article 8. Other rules specific to the expulsion of refugees and stateless persons

The rules applicable to the expulsion of aliens provided for in the present draft articles are without prejudice to other rules on the expulsion of refugees and stateless persons provided for by law.

Draft article 9. Deprivation of nationality for the sole purpose of expulsion

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.

Draft article 10. Prohibition of collective expulsion

1. For the purposes of the present draft articles, collective expulsion means expulsion of aliens as a group.

2. The collective expulsion of aliens, including migrant workers and members of their family, is prohibited.

3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group.

4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

Draft article 11. Prohibition of disguised expulsion

1. Any form of disguised expulsion of an alien is prohibited.

2. For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a State resulting indirectly from actions or omissions of the State, including situations where the State supports or tolerates acts committed by its nationals or other persons, with the intention of provoking the departure of aliens from its territory.

Draft article 12. Prohibition of expulsion for purposes of confiscation of assets

The expulsion of an alien for the purpose of confiscating his or her assets is prohibited.

Draft article 13. Prohibition of the resort to expulsion in order to circumvent an extradition procedure

A State shall not resort to expulsion in order to circumvent an ongoing extradition procedure.

PART THREE

PROTECTION OF THE RIGHTS OF ALIENS
SUBJECT TO EXPULSION

CHAPTER I

GENERAL PROVISIONS

Draft article 14. Obligation to respect the human dignity and human rights of aliens subject to expulsion

1. All aliens subject to expulsion shall be treated with humanity and with respect for the inherent dignity of the human person at all stages of the expulsion process.

2. They are entitled to respect for their human rights, including those set out in the present draft articles.

Draft article 15. Obligation not to discriminate

1. The State shall exercise its right to expel aliens without discrimination of any kind on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. Such non-discrimination shall also apply to the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles.

Draft article 16. Vulnerable persons

1. Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.

2. In particular, in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration.

CHAPTER II

PROTECTION REQUIRED IN THE EXPELLING STATE

Draft article 17. Obligation to protect the right to life of an alien subject to expulsion

The expelling State shall protect the right to life of an alien subject to expulsion.

Draft article 18. Prohibition of torture or cruel, inhuman or degrading treatment or punishment

The expelling State shall not subject an alien subject to expulsion to torture or to cruel, inhuman or degrading treatment or punishment.

Draft article 19. Detention conditions of an alien subject to expulsion

1. (a) The detention of an alien subject to expulsion shall not be punitive in nature.

(b) An alien subject to expulsion shall, save in exceptional circumstances, be detained separately from persons sentenced to penalties involving deprivation of liberty.

2. (a) The duration of the detention shall not be unrestricted. It shall be limited to such period of time as is reasonably necessary for the expulsion to be carried out. All detention of excessive duration is prohibited.

(b) The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.

3. (a) The detention of an alien subject to expulsion shall be reviewed at regular intervals on the basis of specific criteria established by law.

(b) Subject to paragraph 2 (a), detention shall end when the expulsion cannot be carried out, except where the reasons are attributable to the alien concerned.

Draft article 20. Obligation to respect the right to family life

1. The expelling State shall respect the right to family life of an alien subject to expulsion.

2. The expelling State shall not interfere with the exercise of the right to family life, except where provided by law and on the basis of a fair balance between the interests of the State and those of the alien in question.

CHAPTER III

PROTECTION IN RELATION TO
THE STATE OF DESTINATION*Draft article 21. Departure to the State of destination*

1. The expelling State shall take appropriate measures to facilitate the voluntary departure of an alien subject to expulsion.

2. In cases of forcible implementation of an expulsion decision, the expelling State shall take the necessary measures to ensure, as far as possible, the safe transportation to the State of destination of the alien subject to expulsion, in accordance with the rules of international law.

3. The expelling State shall give the alien subject to expulsion a reasonable period of time to prepare for his or her departure, having regard to all circumstances.

Draft article 22. State of destination of aliens subject to expulsion

1. An alien subject to expulsion shall be expelled to his or her State of nationality or any other State that has the obligation to receive the alien under international law, or to any State willing to accept him or her at the request of the expelling State or, where appropriate, of the alien in question.

2. Where the State of nationality or any other State that has the obligation to receive the alien under international law has not been identified and no other State is willing to accept the alien, that alien may be expelled to any State where he or she has a right of entry or stay or, where applicable, to the State from where he or she has entered the expelling State.

Draft article 23. Obligation not to expel an alien to a State where his or her life or freedom would be threatened

1. No alien shall be expelled to a State where his or her life or freedom would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.

2. A State that does not apply the death penalty shall not expel an alien to a State where the life of that alien would be threatened with the death penalty, unless it has previously obtained an assurance that the death penalty will not be imposed or, if already imposed, will not be carried out.

Draft article 24. Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment

A State shall not expel an alien to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

CHAPTER IV

PROTECTION IN THE TRANSIT STATE

Draft article 25. Protection in the transit State of the human rights of an alien subject to expulsion

The transit State shall protect the human rights of an alien subject to expulsion, in conformity with its obligations under international law.

PART FOUR

SPECIFIC PROCEDURAL RULES

Draft article 26. Procedural rights of aliens subject to expulsion

1. An alien subject to expulsion enjoys the following procedural rights:

(a) the right to receive notice of the expulsion decision;

(b) the right to challenge the expulsion decision;

(c) the right to be heard by a competent authority;

(d) the right of access to effective remedies to challenge the expulsion decision;

(e) the right to be represented before the competent authority; and

(f) the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority.

2. The rights listed in paragraph 1 are without prejudice to other procedural rights or guarantees provided by law.

3. An alien subject to expulsion has the right to seek consular assistance. The expelling State shall not impede the exercise of this right or the provision of consular assistance.

4. The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for less than six months.

Draft article 27. Suspensive effect of an appeal against an expulsion decision

An appeal lodged by an alien subject to expulsion who is lawfully present in the territory of the expelling State shall have a suspensive effect on the expulsion decision.

Draft article 28. Procedures for individual recourse

An alien subject to expulsion shall have access to any available procedure involving individual recourse to a competent international body.

PART FIVE

LEGAL CONSEQUENCES OF EXPULSION

Draft article 29. Readmission to the expelling State

1. An alien lawfully present in the territory of a State, who is expelled by that State, shall have the right to be readmitted to the expelling State if it is established by a competent authority that the expulsion was unlawful, save where his or her return constitutes a threat to national security or public order, or where the alien otherwise no longer fulfils the conditions for admission under the law of the expelling State.

2. In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted.

Draft article 30. Protection of the property of an alien subject to expulsion

The expelling State shall take appropriate measures to protect the property of an alien subject to expulsion, and shall, in accordance with the law, allow the alien to dispose freely of his or her property, even from abroad.

Draft article 31. Responsibility of States in cases of unlawful expulsion

The expulsion of an alien in violation of international obligations under the present draft articles or any other rule of international law engages the international responsibility of the expelling State.

Draft article 32. Diplomatic protection

The State of nationality of an alien subject to expulsion may exercise diplomatic protection in respect of the alien in question.

2. The report covered the entire work of the Drafting Committee on the topic of expulsion of aliens, which it had begun in 2007. The Commission had decided to refer the various draft articles to the Drafting Committee at successive sessions, and the Drafting Committee had decided that those draft articles that had been provisionally elaborated would remain in the Committee until it completed its work on the topic.

3. After providing a brief overview of the origin and development of the draft articles, he noted that the Drafting Committee had held 12 meetings at the current session, during which it had reviewed the entire set of draft articles and had decided to recommend to the plenary Commission that they should be adopted on first reading.

4. He paid a tribute to the Special Rapporteur, whose mastery of the subject, guidance and cooperation had greatly facilitated the Drafting Committee's task, and thanked the members of the Committee for their active participation and significant contributions and the secretariat for its valuable assistance.

5. The draft articles were structured into five parts, and he wished to begin his introduction by covering Part One (General provisions) and Part Two (Cases of prohibited expulsion).

6. Draft article 1 was entitled "Scope", as had originally been proposed. In paragraph 1, the phrase "lawfully or unlawfully present" had been introduced in order to signal that the draft articles dealt with a broad range of aliens who might be in the territory of the expelling State, irrespective of the legality of their presence. It reflected the view prevailing in the Commission since the inception of its work on the topic that both categories of aliens should be covered by the draft articles. That being said, not all provisions of the draft articles applied equally to aliens lawfully and those unlawfully present, or treated the two categories equally. Moreover, the inclusion within the scope of the draft articles of aliens unlawfully present was to be understood in conjunction with the exclusion from the scope, enunciated in draft article 2, subparagraph (a), of issues concerning non-admission. That point would be clarified in the commentary.

7. The notion of "expulsion", which determined the scope *ratione materiae* of the draft articles, was defined in draft article 2, subparagraph (a). As to the scope *ratione personae*, the Drafting Committee had discussed at length whether to define the term positively, by listing the various categories of aliens included, as the Special Rapporteur had proposed, or negatively, by mentioning those not included. While some members had expressed a preference for the first option, others were of the view that providing a list of categories of aliens included in the scope *ratione personae* would run the risk, *inter alia*, of omitting other categories that should also be included. The Drafting Committee had ultimately opted for an exclusionary clause.

8. Paragraph 2 of draft article 1 thus excluded from the scope of the draft articles aliens enjoying privileges and immunities under international law. The commentary would clarify that such aliens were those whose departure

from the territory of a State was governed by special rules of international law; they included diplomats, consular or other officials of a foreign State, agents of an international organization, as well as military personnel posted abroad pursuant to a status-of-forces agreement. Even though the scope *ratione personae* of the draft articles was defined negatively in the exclusionary clause contained in paragraph 2, the commentary would enumerate, for purposes of illustration, specific categories of aliens that fell within the scope of the draft articles, in addition to aliens in general. Such categories included refugees, stateless persons and migrant workers and members of their family.

9. Draft article 2 provided definitions of the terms "expulsion" and "alien", which appeared throughout the text. In accordance with the Commission's drafting practice, the Drafting Committee had entitled the draft article "Use of terms" rather than "Definitions", as originally proposed by the Special Rapporteur.⁶⁸

10. Turning to subparagraph (a), which defined the term "expulsion", he noted that after an extensive debate, the Drafting Committee had endorsed the Special Rapporteur's suggestion to adopt a formulation that reflected the distinction between, on the one hand, a formal act of a State compelling an alien to leave its territory and, on the other, conduct attributable to that State that could lead to the same result. It was felt that both should be included in the definition of "expulsion" for the purposes of the draft articles. The Drafting Committee had decided to use the term "formal act" as an English equivalent for the French term "*acte juridique*", rather than the term "legal act", which might lead to confusion if it was understood as referring to the lawful character of the expulsion. Allowing such an ambiguity to persist would have been unfortunate, since draft article 2 was concerned only with the definition of the term "expulsion" and was without prejudice to the question of the lawfulness of a particular expulsion.

11. The explicit statements that the formal act or conduct that might amount to expulsion must be attributable to a State and that such conduct could consist of "an action or omission" were in line with the wording used in the Commission's articles on responsibility of States for internationally wrongful acts⁶⁹ and on the responsibility of international organizations⁷⁰ adopted by the Commission in 2001 and 2011, respectively. The element of coercion as an essential feature of conduct in the context of expulsion, which had been referred to in a separate subparagraph proposed by the Special Rapporteur, would be addressed in the commentary. The commentary would also provide some explanation of possible cases of expulsion "by conduct" and would refer in that connection to the State's "intention" in provoking the alien's departure from its territory. The commentary would also address cases of omission by the State, which might take the form of tolerance of conduct by individuals or private entities directed against an alien.

⁶⁸ *Yearbook ... 2007*, vol. II (Part Two), p. 69, para. 258, footnote 327.

⁶⁹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two) and Corr.1, pp. 26 *et seq.*, paras. 76–77.

⁷⁰ General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles and commentaries thereto appear in *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88.

In so doing, it would make reference to the prohibition of disguised expulsion as set out in draft article 11. It should be noted that the Drafting Committee had preferred the passive formulation contained in the first sentence of subparagraph (a) of draft article 2 (“by which an alien is compelled to leave the territory”) to the active formulation contained in the text proposed by the Special Rapporteur, since the former allowed the draft article to cover the case of an expulsion resulting from an omission by the authorities of a State, such as failure to protect an alien against hostile acts by non-State actors.

12. The express exclusion in the second clause of subparagraph (a) of three issues from the draft articles—the extradition of an alien to another State, the surrender of an alien to an international criminal court or tribunal and the non-admission of an alien other than a refugee to a State—appeared to have gained wide support both in the Commission and among States. With regard to the issue of non-admission, the commentary to subparagraph (a) would provide some explanation regarding situations to which the exclusionary clause applied. In particular, it would make it clear that non-admission, which normally took place upon an alien’s arrival at the border, was to be distinguished from the removal of an alien who was already present, albeit unlawfully, in the territory of the State, the latter case falling within the scope of the draft articles.

13. The definition of the term “alien” contained in subparagraph (b) corresponded to what had been proposed by the Special Rapporteur, except for the replacement of the term “person” with “individual” in order to make it clear that only natural persons were covered by the draft articles. The Drafting Committee had decided to delete the proviso contained in the Special Rapporteur’s proposed text, in which the definition of “alien” had been qualified by the words “except where the legislation of that State provides otherwise”,⁷¹ as several members had considered it to be unclear. While there was no doubt that a State could grant special protection against expulsion to certain categories of aliens, who could thus be regarded as nationals for the purposes of expulsion, it was decided that the matter was one that should be regulated by domestic law (or special treaty regimes) and that a reference to it in the commentary might suffice. Moreover, it was felt that excluding those categories of individuals from the definition of “aliens” in subparagraph (b) might have the undesirable effect of depriving them of the protection embodied in the draft articles.

14. After a long discussion, the Drafting Committee had decided to delete the definition of the term “territory” contained in subparagraph (d) of the Special Rapporteur’s original text. It was considered that the proposed definition of “territory” as “the domain in which the State exercises all the powers deriving from its sovereignty” might create more problems than it solved, especially in situations in which a State exercised sovereign powers in the territory of another State, such as territories under foreign administration, occupied territories and military bases.

15. The Drafting Committee had also decided to delete the definition of the term “frontier” as it appeared in

subparagraph (e) of the text originally proposed in 2007. It did not see the need to define a term that appeared only in draft article 6, paragraph 3, which, in turn, reproduced the content of article 33, paragraph 1, of the 1951 Convention relating to the Status of Refugees. The Committee was also of the view that the proposed definition of “frontier” as a “zone” would give rise to difficulties. For example, the reference in the original definition to the non-enjoyment of “resident status” within the frontier zone was inappropriate because even aliens lawfully present in the territory of a State might not enjoy such status. Furthermore, defining the frontier as a “zone” could produce the unintended effect of encouraging States to maintain aliens within their jurisdiction while denying them the benefit of their rights.

16. Draft article 3 was entitled “Right of expulsion”. The text provisionally adopted by the Drafting Committee was based largely on a revised version submitted to the Committee by the Special Rapporteur in which paragraphs 1 and 2 of his original text had been merged. Unlike the version of the draft article that had been referred to the Drafting Committee, the current formulation avoided any reference to the “fundamental principles of international law”,⁷² which had been regarded by several members of the Commission as too restrictive, and referred instead to “the present draft articles and other applicable rules of international law”. The draft article specifically mentioned human rights because of their particular relevance in the context of expulsion; however, the Drafting Committee had not deemed it necessary for the draft article to include a reference to good faith.

17. Except for certain minor changes, draft article 4 (Requirement for conformity with law) corresponded to the text originally proposed by the Special Rapporteur in his sixth report,⁷³ which had received broad support in the Commission during the debate at its sixty-second session.⁷⁴

18. The rule that expulsion could be ordered only in pursuance of a decision reached in accordance with law was set out in article 13 of the International Covenant on Civil and Political Rights, which related to the expulsion of aliens lawfully present in the territory of the expelling State. Nonetheless, the Drafting Committee had decided to delete the term “lawfully” from the Special Rapporteur’s text because most Committee members considered that the requirement for conformity with law corresponded to a well-established rule of international law that applied to any expulsion measure, irrespective of the lawfulness of the alien’s presence in the territory of the expelling State. The commentary would emphasize that point, while also recognizing that different rules and procedures might be provided for in domestic laws governing the expulsion of aliens unlawfully present in the State. The commentary would also clarify that the requirement for conformity with law, set out in draft article 4, referred to both formal and substantive

⁷² *Ibid.*, p. 63, para. 196, footnote 321.

⁷³ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2 (draft article B.1).

⁷⁴ *Ibid.*, vol. II (Part Two), para. 144, footnote 1293, and paras. 164–167.

⁷¹ *Yearbook ... 2007*, vol. II (Part Two), p. 69, para. 258, footnote 327.

conditions for expulsion; it therefore had a wider scope than the similar requirement enunciated in draft article 5, paragraph 2, with regard to grounds for expulsion.

19. Draft article 5 was entitled “Grounds for expulsion”, as originally proposed.⁷⁵ Paragraph 1 enunciated the essential requirement, which had been underscored by various members of the Commission, that an expulsion decision must state the ground on which it was based. The English text of the paragraph had been reworded with a view to aligning it with the French text, which remained unchanged.

20. Although in the Drafting Committee’s discussion on the formulation of paragraph 2 it had been recognized that national security and public order were common grounds for expulsion, the general view was that there were also other valid grounds. At the same time, it was generally recognized that a State could expel an alien only on a ground that was provided for in its law, hence the decision to redraft paragraph 2 accordingly. A specific reference to national security and public order had nevertheless been retained in the text, given their particular relevance to the expulsion of aliens. The commentary would clarify that the term “law” in paragraph 2 was to be understood as referring to the domestic law of the expelling State. It would also clarify the notions of “national security” and “public order” as grounds for the expulsion of an alien, while mentioning other grounds—including the violation of immigration law—provided for in domestic laws.

21. Paragraph 3 corresponded, with minor modifications, to the text initially proposed by the Special Rapporteur and set out general criteria for the assessment by the expelling State of the ground for expulsion. In order to reflect the fact that the reference to “the current nature of the threat to which the facts give rise” was relevant only with regard to grounds such as national security and public order, the Drafting Committee had decided to move that element to the end of the paragraph and to qualify it by the words “where relevant”. In addition, a few minor linguistic changes had been made to the English text in order to align it with the French original.

22. The text of paragraph 4 was identical to that originally proposed by the Special Rapporteur and simply indicated that a State must not expel an alien on a ground that was contrary to international law.

23. Turning to Part Two of the draft articles (Cases of prohibited expulsion), containing draft articles 6 to 13, he said that the Drafting Committee had considered it more appropriate to address the definition of the terms “refugee” and “stateless person” in the commentary than in the text of the draft articles. As far as refugees were concerned, the commentary would underline the need to take into account not only the Convention relating to the Status of Refugees but also subsequent developments, including the adoption of regional instruments such as the Organization of African Unity (OAU) Convention governing the specific aspects of refugee problems in Africa, adopted in 1969. In that regard, it would indicate that the draft articles were without prejudice to such forms of *lex specialis* as the broader

definition of “refugee” contained in article 1 of the above-mentioned regional Convention.

24. Draft article 6 was now entitled “Prohibition of the expulsion of refugees”. The Drafting Committee had based its work on a text which the Special Rapporteur had revised pursuant to a request made by the Drafting Committee at the Commission’s sixtieth session that the text should follow more closely the content and structure of the relevant provisions of the 1951 Convention relating to the Status of Refugees. It should be recalled that the wording initially proposed by the Special Rapporteur had been criticized by several members of the Commission for seeking to combine articles 32 and 33 of the 1951 Convention without addressing the principle of *non-refoulement*.⁷⁶

25. Paragraph 1 of draft article 6 faithfully reproduced the text of article 32, paragraph 1, of the 1951 Convention relating to the Status of Refugees, except that it replaced the words “the Contracting States” with “a State”. Paragraph 1 applied only to refugees lawfully present in the territory of the expelling State and limited the grounds for the expulsion of such refugees to those of national security or public order. In order to align the text of the paragraph with the 1951 Convention, the words “may not” in the Special Rapporteur’s text had been replaced with “shall not”. Furthermore, in keeping with a preference expressed by several Commission members, the reference to “terrorism” as a separate ground for the expulsion of a refugee had been deleted. Another reference to an additional ground for the expulsion of a refugee (“if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State”) had also been deleted, owing to the fact that no such ground was mentioned in article 32, paragraph 1, of the 1951 Convention. It was proposed that the commentary should indicate that the phrase “refugee lawfully in its territory” meant a refugee who had been granted refugee status in the State concerned.

26. The Drafting Committee had engaged in a lengthy discussion on paragraph 2 of draft article 6, which had no equivalent in the 1951 Convention but had been proposed by the Special Rapporteur on the basis of judicial pronouncements and doctrinal opinion. Paragraph 2 purported to extend the applicability of paragraph 1 to any refugee who, albeit unlawfully present in the territory of a receiving State, had applied for recognition of refugee status while such application was pending. The Committee had discussed whether it was necessary to make provision for an exception to that form of protection, as the Special Rapporteur had initially proposed, in cases in which the manifest intent of an application for refugee status was to thwart a probable expulsion order. After an intense debate, the Drafting Committee had concluded that a provision to that effect was not necessary, since draft article 6 applied only to individuals who met the requirements for the definition of “refugee” under the 1951 Convention or other relevant instruments. Most members considered that if a person

⁷⁵ *Ibid.*, para. 140, footnote 1288 (draft article 9).

⁷⁶ *Yearbook ... 2007*, vol. II (Part Two), para. 198, footnote 323 (draft article 5), and para. 235.

was a genuine refugee, the motives of the application for refugee status should not matter any more than the fact that an application for refugee status purported to avoid an expulsion order. The commentary would clarify that point, while also emphasizing that a person was to be regarded as a refugee if he or she met the requirements set forth in the relevant legal instruments, irrespective of whether that person had been granted refugee status. In contrast, the commentary would indicate that a person who did not meet the requirements of the definition of “refugee” might be expelled for grounds other than those mentioned in paragraph 1, and that draft article 6 was without prejudice to the right of a State to expel an individual whose application for refugee status was manifestly abusive. It had also been suggested that the commentary should indicate that paragraph 2 could be regarded as an exception to the principle according to which the unlawful presence of an alien in the territory of a State could by itself justify the expulsion of that alien.

27. Paragraph 3, which dealt with the issue of *non-refoulement*, was a combination of paragraphs 1 and 2 of article 33 of the 1951 Convention. Its wording reproduced that of the 1951 Convention, save for the addition of the words “to a State” in the second line in order to cover all cases of expulsion and not only the situation of *refoulement* in the strict sense of the term. The commentary would indicate that paragraph 3 applied both to refugees lawfully present and to those unlawfully present in the territory of a State.

28. The Drafting Committee had discussed whether draft article 6 should also cover other legal aspects of the expulsion of refugees, including by reproducing *in extenso* the content of article 32 of the 1951 Convention. After careful consideration, the Committee had concluded that it was preferable to address such aspects through the “without prejudice” clause contained in draft article 8 (Other rules specific to the expulsion of refugees and stateless persons).

29. Draft article 7 (Prohibition of the expulsion of stateless persons) consisted of a single paragraph. A number of changes had been introduced by the Drafting Committee in order to align the original text with the wording of article 31, paragraph 1, of the 1954 Convention relating to the Status of Stateless Persons. Thus, the verb “may” at the beginning of the paragraph had been replaced by the verb “shall”, and, at the suggestion of several members of the Commission, the term “lawfully”, which had appeared in brackets in the Special Rapporteur’s text,⁷⁷ had been retained as it appeared in the 1954 Convention. Furthermore, as in draft article 6, the reference to “terrorism” as a possible ground for the expulsion of a stateless person had been deleted. Moreover, as it had done in respect of refugees in draft article 6, the Drafting Committee had decided to delete the reference to an additional ground for the expulsion of a stateless person, included in the Special Rapporteur’s original text but not mentioned in article 31, paragraph 1, of the 1954 Convention, namely “if the person, having been convicted by a final judgment of a particularly serious crime or offence, constitutes a danger to the community of that State”.

30. The Drafting Committee had discussed whether a provision on *non-refoulement* similar to that retained in draft article 6, paragraph 3, should be included in draft article 7. The Committee had finally decided to omit such a provision, with the understanding that stateless persons enjoyed the protection recognized in draft articles 23 and 24, which applied to aliens in general. Furthermore, as in draft article 6, the Drafting Committee had decided that other matters relating to the expulsion of stateless persons would be covered by the “without prejudice” clause contained in draft article 8.

31. Draft article 8 (Other rules specific to the expulsion of refugees and stateless persons), which was new, contained a “without prejudice” clause ensuring the application of other rules on the expulsion of refugees and stateless persons that were provided for by law but not mentioned in draft articles 6 and 7. The term “law” in the draft article was intended to refer to the rules contained in the relevant international instruments dealing with refugees and stateless persons, as well as any internal rules of the expelling State, to the extent that they were not incompatible with that State’s obligations under international law.

32. The “without prejudice” clause concerned in particular the rules relating to the procedural requirements for the expulsion of a refugee or of a stateless person, which were stated, respectively, in article 32, paragraph 2, of the 1951 Convention relating to the Status of Refugees and in article 31, paragraph 2, of the 1954 Convention relating to the Status of Stateless Persons. It also concerned the provisions of article 32, paragraph 3, of the 1951 Convention and article 31, paragraph 3, of the 1954 Convention, under which the expelling State was required to allow a refugee or a stateless person subject to expulsion a reasonable period within which to seek legal admission into another country and reserved the right to apply during that period such internal measures as the expelling State might deem necessary.

33. With regard to the issue of the expulsion of nationals, he recalled that the Special Rapporteur, in his third report,⁷⁸ had proposed a draft article 4 entitled “Non-expulsion by a State of its own nationals”, which the Commission had referred to the Drafting Committee.⁷⁹ That draft article had given rise to an intense debate in the Drafting Committee: while some members would have favoured the inclusion in the draft articles of a provision on the prohibition of the expulsion by a State of its own nationals, other members had questioned the need and even the appropriateness of such a provision, which would deal with a category of individuals who ought not to fall within the scope of the present topic. Moreover, divergent views had been expressed regarding the content of the proposed draft article. Some members had been of the opinion that no exceptions could be recognized to the principle prohibiting the expulsion of nationals and had therefore been opposed to the text initially proposed by the Special Rapporteur, which contemplated possible exceptions. Others, meanwhile, had expressed the view that no absolute prohibition of the expulsion of nationals existed under current international law. After careful

⁷⁷ *Ibid.*, para. 198, footnote 324 (draft article 6).

⁷⁸ *Ibid.*, vol. II (Part One), document A/CN.4/581.

⁷⁹ *Ibid.*, vol. II (Part Two), para. 188. See also para. 197, footnote 322.

consideration, the Drafting Committee had come to the conclusion that, since nationals fell outside the scope of the topic as determined by draft article 1, it would not be appropriate to include a provision on the expulsion of nationals in the draft articles.

34. Turning to draft article 9 (Deprivation of nationality for the sole purpose of expulsion), he said that the Drafting Committee had nevertheless discussed the advisability of including in the draft articles a provision dealing with cases of deprivation of nationality in connection with expulsion. The Committee had been mindful of the Commission's approval of the conclusions of the Working Group on the topic established at the sixtieth session to consider the issues raised by the expulsion of persons having dual or multiple nationality and by denationalization in relation to expulsion.⁸⁰ One of those conclusions, which the Drafting Committee had been requested to take into consideration in its work, was that the commentary to the draft articles should include wording to make it clear that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals.⁸¹ However, the Drafting Committee had considered that since no prohibition of the expulsion of nationals was provided for in the draft articles, it would not be appropriate to address therein the question of the circumvention of such a prohibition. A more radical view had also been expressed in the Committee that no provision should be included that would touch upon the sensitive area of nationality, in which States enjoyed a wide margin of discretion.

35. All things considered, the majority of the members of the Drafting Committee had deemed it useful to address the specific case in which a State deprived a national of his or her nationality, thereby making that national an alien, for the sole purpose of expelling him or her. In that regard, it had been found that such deprivation of nationality, insofar as it had no other justification than the State's wish to expel the individual, would be abusive and possibly also arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.⁸² The commentary would emphasize that draft article 9 was not intended to interfere with the normal operation of nationality laws or to affect a State's right to denationalize an individual on a ground provided for in its legislation.

36. Draft article 10 retained the originally proposed title "Prohibition of collective expulsion". A discussion had taken place in the Drafting Committee on whether a definition of collective expulsion was necessary or appropriate in the draft articles, and the Committee had eventually decided to include such a definition in paragraph 1 of draft article 10. However, contrary to the original proposal by the Special Rapporteur, the definition retained by the Drafting Committee addressed only the collective element and did not replicate the general elements of the definition of expulsion set out in draft article 2, subparagraph (a). Thus, collective expulsion was defined in paragraph 1 as the "expulsion of aliens as a group".

37. Paragraph 2, which provided for the prohibition of collective expulsion, corresponded to the first sentence of paragraph 1 of the text originally proposed by the Special Rapporteur.⁸³ The prohibition was to be read in conjunction with paragraph 3 of the draft article.

38. Paragraph 3 of draft article 10 was based on the wording of the second sentence of paragraph 1 of the text initially proposed by the Special Rapporteur. It indicated that a State might expel concomitantly the members of a group of aliens, provided that the expulsion took place after and on the basis of a reasonable and objective examination of the particular case of each individual member of the group. The commentary would indicate that the criterion of "reasonable and objective examination" had been drawn from the case law of the European Court of Human Rights.

39. Paragraph 4 contained a "without prejudice" clause referring to situations of armed conflict. He recalled that the original draft article on collective expulsion that had been proposed by the Special Rapporteur and referred to the Drafting Committee had contained a paragraph that allowed the collective expulsion of aliens, under certain conditions, in times of armed conflict. Subsequently, in order to address concerns expressed by several members of the Commission, the Special Rapporteur had submitted to the Drafting Committee a revised version of that paragraph, which provided for further limitations of the right of a State to expel aliens collectively in the event of an armed conflict. During the debate in the Drafting Committee, some members had expressed the view that a possible exception, in times of armed conflict, to the prohibition of collective expulsion would apply only in respect of aliens who were nationals of a State engaged in an armed conflict with the State in which they were present, and not to all aliens in the territory of a State engaged in an armed conflict. The view had also been expressed that such aliens might be subject to measures of collective expulsion only if they were engaged as a group in activities that endangered the security of the State. According to a different view, current international law would not impose such limitations on the right of a State to expel aliens who were nationals of another State with which it was engaged in an armed conflict. Furthermore, the point had been made that the issue of expulsion in times of armed conflict was a complex one and that the Commission should not take the risk of elaborating a draft article that would not be entirely compatible with international humanitarian law. In the light of those difficulties, the Committee eventually opted for a "without prejudice" clause, formulated broadly so as to cover any rules of international law that might be applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State.

40. Draft article 11 retained the originally proposed title "Prohibition of disguised expulsion". During the plenary debate at the Commission's sixty-second session, some members had suggested alternative wording such as "constructive" or "*de facto*" expulsion in order to

⁸⁰ *Yearbook ... 2008*, vol. II (Part Two), para. 170.

⁸¹ *Ibid.*, para. 171.

⁸² General Assembly resolution 217 A (III) of 10 December 1948.

⁸³ *Yearbook ... 2007*, vol. II (Part Two), para. 199, footnote 325 (draft article 7).

characterize the situations referred to in draft article 11.⁸⁴ However, the Drafting Committee had decided to retain the term “disguised expulsion” proposed by the Special Rapporteur. The terminology had been deemed appropriate, since it adequately reflected the main purpose of the draft article, which was to indicate that a State should not utilize disguised means or techniques in order to provoke the same result as that of an expulsion decision, namely the forcible departure of an alien from its territory. Furthermore, the point had been made in the Drafting Committee that the term “constructive expulsion” might have an undesired positive connotation, and it would be difficult to find a satisfactory equivalent to that term in French.

41. Paragraph 1 of draft article 11, which provided for the prohibition of any form of disguised expulsion, corresponded to the text originally proposed by the Special Rapporteur in his sixth report.⁸⁵ Paragraph 2 was also based on the text that had been proposed by the Special Rapporteur. However, the Drafting Committee had introduced some changes to that text with a view to clarifying the definition of “disguised expulsion”. It had been felt in particular that the notion of “disguised expulsion” must be circumscribed more precisely in order to avoid possible overlaps with the general definition of “expulsion” in draft article 2, subparagraph (a). After careful consideration, the Drafting Committee had agreed on the inclusion of the word “indirectly” in the second line of paragraph 2, so as to capture the specificity of “disguised expulsion”. That specificity lay in the fact that the expelling State, while not having adopted an expulsion decision, produced by its actions or omissions the same result, namely the forcible departure of an alien from its territory. In order to make it clearer that the provision referred only to situations in which the forcible departure was the intended result of actions or omissions of the State concerned, the Drafting Committee had decided to replace, at the end of paragraph 2, the words “with a view to provoking the departure” by the more explicit formulation “with the intention of provoking the departure”.

42. Some concerns had been expressed in the Drafting Committee about the reference in paragraph 2 to situations in which the State supported or tolerated acts committed by private persons. Some Committee members had considered that it would be problematic to regard such support or tolerance as possibly amounting to a disguised expulsion prohibited by international law. However, the majority of members had been of the view that a mention of such situations could be retained, provided it was made clear, through the insertion of the word “including”, that reference was made only to support or tolerance that could be regarded as “actions or omissions of the State ... with the intention of provoking the departure of aliens from its territory”. In other words, the element relating to the specific intent of the expelling State, enunciated at the end of the paragraph, referred also to the case of support or tolerance of acts committed by private persons. It had been suggested that the commentary should indicate that a high threshold should be applied in order to regard situations

of “tolerance” by the State as disguised expulsion. That being said, the Drafting Committee had been of the view that the scenario relating to “support” or “tolerance” could also encompass situations in which the acts supported or tolerated by the expelling State were committed by aliens acting in its territory. Therefore, contrary to the text originally proposed by the Special Rapporteur, in which only acts of the citizens of the expelling State had been mentioned, the draft article provisionally adopted by the Drafting Committee referred, in more general terms, to “acts committed by its nationals or other persons”. The commentary would indicate that the term “persons” was intended to cover both natural and legal persons.

43. Draft article 12 (Prohibition of expulsion for purposes of confiscation of assets) corresponded to paragraph 1 of the originally proposed draft article on protecting the property of aliens facing expulsion. The Drafting Committee had not changed the wording of that provision. However, following a suggestion made by some Commission members at the previous session, the Drafting Committee had decided to address the issue of confiscatory expulsions in a separate draft article and to place it in Part Two, given that it dealt with a specific case of prohibited expulsion.

44. Draft article 13 had been retitled “Prohibition of the resort to expulsion in order to circumvent an extradition procedure”. Commission members would recall that, in his sixth report, submitted to the Commission at its sixty-second session in 2010, the Special Rapporteur had proposed a draft article entitled “Prohibition of extradition disguised as expulsion”.⁸⁶ In an attempt to address the concerns raised by some members, who regarded the proposed draft article as being too broad, the Special Rapporteur had submitted to the Commission at the same session a revised draft article entitled “Expulsion in connection with extradition”, which the Commission had referred to the Drafting Committee at the sixty-third session. The revised draft article had read as follows:

Expulsion of a person to a requesting State or to a State with a particular interest in the extradition of that person to the requesting State may be carried out only where the conditions for expulsion are met in accordance with international law [or with the provisions of the present draft article].⁸⁷

A discussion had taken place in the Drafting Committee on the usefulness of such a proposition. Several members had considered that the proposed draft article failed to address the main issue at stake, namely the use of expulsion as a means to circumvent the conditions for extradition. It had therefore been proposed that the draft article should be recast so as to focus on the issue of circumvention. That proposal had been received favourably in the Committee.

45. The precise wording and content of draft article 13 had given rise to an intense debate in the Drafting Committee. Some members had been of the view that the enunciation of the prohibition of expulsion in order to circumvent extradition should have been complemented by an additional paragraph stating that no expulsion of a person whose extradition had been requested might

⁸⁴ *Yearbook ... 2010*, vol. II (Part Two), paras. 150–154. See also para. 137, footnote 1285 (draft article A).

⁸⁵ *Ibid.*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

⁸⁶ *Ibid.*, vol. II (Part Two), para. 138, footnote 1286 (draft article 8).

⁸⁷ *Ibid.*, para. 176, footnote 1299.

take place, either to the requesting State or to a third State with an interest in the extradition of the person to the requesting State, as long as the extradition process had not been completed, except for reasons of national security or public order. Other members had felt that such a formulation was too absolute. In particular, the point had been made that national security and public order were not the only grounds that allowed a State to expel a person in respect of whom a request for extradition had been made; other reasons, such as breach of immigration law, had been mentioned in that context. The view had been expressed that it would be difficult to formulate a provision that went beyond the general proposition that circumvention was more likely to occur in situations where an extradition process was ongoing. Also, following a proposal made in the Sixth Committee during the debate on the Commission's report on the work of its sixty-third session (A/CN.4/650 and Add.1, para. 19), the possibility of addressing the issue through a "without prejudice" clause had been raised in the Drafting Committee.

46. Bearing those difficulties in mind, the Drafting Committee had eventually decided to retain a general formulation indicating that a State should not resort to expulsion in order to circumvent an ongoing extradition procedure. The commentary would provide illustrations relating to that prohibition and emphasize that it applied only while an extradition procedure was ongoing. Reference would also be made in the commentary to relevant case law, as appropriate.

47. Part Three, which included draft articles 14 to 25, was entitled "Protection of the rights of aliens subject to expulsion". The draft articles had been provisionally adopted by the Drafting Committee at the Commission's sixty-second session and had been referred to the Drafting Committee⁸⁸ after having been revised by the Special Rapporteur in the light of debates in plenary.⁸⁹

48. Before introducing the individual draft articles, he wished to draw attention to a terminological point. Some discussion had taken place in the Drafting Committee concerning the phrase, relating to a person or alien, "who has been or is being expelled", which had appeared in several draft articles proposed by the Special Rapporteur. Some members of the Committee had considered that formulation to be ambiguous. The observation had been made that it was unclear at which point an alien would have to be regarded as having been expelled: Was it when he received notice of an expulsion decision or when the expulsion decision was implemented through the forcible departure of the alien from the territory of the expelling State? After careful consideration, the Drafting Committee had opted to use the phrase "subject to expulsion" with reference to aliens, which was regarded as encompassing both expulsion as a formal act, namely the adoption of the expulsion decision as such, and expulsion as a process that included all steps that might be taken to adopt and enforce an expulsion decision.

49. Chapter I of Part Three (General provisions) consisted of draft articles 14 to 16. Draft article 14 (Obligation

to respect the human dignity and human rights of aliens subject to expulsion) was the result of the merging of revised draft articles 8 and 9 that had been proposed by the Special Rapporteur.⁹⁰

50. Paragraph 1 of draft article 14 stated that all aliens subject to expulsion should be treated with humanity and respect for the inherent dignity of the human person at all stages of the expulsion process. Some members of the Drafting Committee had felt that human dignity should not have been referred to in a draft article, since it was not a human right entailing specific obligations for States, but rather the source of inspiration for human rights in general. Other members, including the Special Rapporteur, had considered that it was important to state in a draft article the obligation to respect the human dignity of persons subject to expulsion. It had been observed that in the course of the expulsion process aliens were often subjected to humiliating treatment that, without necessarily amounting to cruel, inhuman or degrading treatment, was offensive to their dignity as human beings.

51. The Drafting Committee had eventually decided to address the issue of respect for human dignity in draft article 14. However, the general reference to the "dignity of a person" in the text proposed by the Special Rapporteur had been replaced by a more specific reference to "the inherent dignity of the human person", a phrase that had been taken from article 10 of the International Covenant on Civil and Political Rights, which addressed the situation of persons deprived of their liberty. The wording retained by the Drafting Committee was intended to make it clear that the dignity referred to in draft article 14 should be understood as an attribute inherent in every human person, as opposed to a subjective notion of dignity.

52. The text of paragraph 2 of draft article 14, which recalled that aliens subject to expulsion were entitled to respect for their human rights, largely corresponded to the text of revised draft article 8 proposed by the Special Rapporteur. The words "in particular" that preceded the reference to the rights mentioned in the draft articles had been replaced by the word "including", which had been viewed as more neutral, since it avoided conveying the erroneous impression that the rights set out in the draft articles should be regarded as more important than the other human rights that an alien subject to expulsion enjoyed.

53. The wording of draft article 15 (Obligation not to discriminate) was based largely on the text of revised draft article 10 proposed by the Special Rapporteur.⁹¹ Paragraph 1 stated the principle of non-discrimination in relation to expulsion. The Drafting Committee had slightly amended the beginning of the paragraph to read "[t]he State shall exercise its right to expel aliens without discrimination", in order to bring it closer to the wording of draft article 3. The content of the non-exhaustive list of prohibited discriminatory grounds had been the subject of discussion in the Committee. In the text that had been referred to it, the

⁸⁸ *Ibid.*, para. 114.

⁸⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617.

⁹⁰ *Ibid.*, and for the examination of these draft articles by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), paras. 117–118, footnotes 1272–1273.

⁹¹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and for the examination of this draft article by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), para. 119, footnote 1274.

Special Rapporteur had proposed a list based on article 2, paragraph 1, of the International Covenant on Civil and Political Rights. During the discussions, some Committee members had suggested the inclusion of certain additional grounds such as sexual orientation or membership of a minority. Other members had held that paragraph 1 of draft article 15 should have simply reproduced the non-exhaustive list of the Covenant, without mentioning any other specific grounds, particularly when such grounds were still controversial. The point had also been made that the addition of any ground to the list set out in the Covenant might be interpreted as an implicit exclusion of other grounds not mentioned. The compromise solution that had eventually been reached in the Drafting Committee had been to retain the list of grounds contained in the Covenant, as proposed by the Special Rapporteur, with the sole addition of the ground “ethnic origin”, which appeared to be particularly relevant in the context of expulsion, and to complement that list with a general reference to “any other ground impermissible under international law”. That solution had the advantage of capturing legal developments that would have gone beyond the Covenant while retaining the possibility of reference to special legal regimes that allowed for certain differentiations between aliens, such as European Union law.

54. Although some members of the Committee had proposed that the commentary should explicitly state that discrimination on the grounds of “sexual orientation” was prohibited and should contain a reference to the relevant case law on the matter, others had maintained that the issue was controversial and that such a prohibition was not universally recognized. The existence of possible exceptions to the prohibition of discrimination based on nationality, in particular in the context of associations of States, such as the European Union, whose citizens enjoyed freedom of movement, would be mentioned in the commentary.

55. The wording of paragraph 2 had been much debated. Some members had felt that the reference to “international human rights law”, originally proposed by the Special Rapporteur, was imprecise and too doctrinal. The Committee had therefore decided to refer more simply to “the enjoyment by aliens subject to expulsion of their human rights, including those set out in the present draft articles”.

56. The title of draft article 16 had been shortened to “Vulnerable persons”. The text of the article was based largely on the revised draft article submitted by the Special Rapporteur with a view to extending the special protection afforded to children in the original draft article to other categories of vulnerable persons. The Committee had wondered how to phrase the requirement that special protection must be afforded to vulnerable persons, as some members had maintained that the original wording—“shall be considered, treated and protected as such”⁹²—lacked clarity. It had ultimately agreed on the phrase “considered as such and treated and protected with due regard for their vulnerabilities”, which emphasized that such persons’

vulnerabilities must be duly recognized by the expelling State as a basis for affording them the requisite treatment and protection. The Committee had also discussed the advisability of retaining the phrase “irrespective of their immigration status”. While the point had been made that immigration status might have some relevance in certain cases, it had been held that such a phrase might convey the erroneous impression that draft article 16 was the only one of the articles dealing with protection of rights that applied to aliens unlawfully present in the territory of the expelling State. For that reason, the Drafting Committee had decided, after some hesitation, to delete the phrase.

57. The Drafting Committee had also discussed the scope of draft article 16. Some members had observed that there might be other categories of vulnerable persons, such as persons suffering from incurable diseases, who might need special protection in the context of expulsion. The Committee had therefore decided to supplement the list of vulnerable persons proposed by the Special Rapporteur with the phrase “and other vulnerable persons”. The commentary would elaborate on that point by providing examples of other categories of vulnerable persons who might enjoy the special protection afforded by draft article 16.

58. Paragraph 2 of the draft article, which dealt specifically with children, referred to the concept of “the best interests of the child”, which had been drawn from article 3, paragraph 1, of the Convention on the rights of the child. Some members of the Drafting Committee had expressed concern that the wording proposed by the Special Rapporteur was too restrictive, as the best interests of the child could not be the sole criterion to be applied in matters of expulsion. The Committee had finally opted for a formulation based more closely on the above-mentioned article of the Convention on the rights of the child, namely, “in all actions concerning children who are subject to expulsion, the best interests of the child shall be a primary consideration”.

59. Turning to chapter II of Part Three (Protection required in the expelling State), which consisted of draft articles 17 to 20, he explained that draft article 17 (Obligation to protect the right to life of an alien subject to expulsion) corresponded, with some minor editorial changes, to revised draft article 11, paragraph 1, proposed by the Special Rapporteur.⁹³ Draft article 18 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment) was largely based on paragraph 2 of the same revised draft article. The Drafting Committee had, however, slightly modified its text. For example, the reference to “torture or to inhuman or degrading treatment” had been replaced with a more complete reference to “torture or to cruel, inhuman or degrading treatment or punishment”. The Committee had also discussed the appropriateness of the words “in its territory or in a territory under its jurisdiction”, which had appeared in the Special Rapporteur’s proposed text. The suggestion put forward by some members that reference should be made to persons under the jurisdiction or control of the expelling State had met with opposition

⁹² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and for the examination of this draft article by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), para. 122, footnote 1277.

⁹³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and for the examination of this draft article by the Commission, see *Yearbook ... 2010*, vol. II (Part Two), para. 120, footnote 1275.

from others who had been of the view that the notion of jurisdiction was wide enough to cover the situations addressed in that draft article. In the absence of agreement on that point, the Committee had decided to omit any reference in the draft article to the notions of “territory”, “jurisdiction” or “control”, as the territorial aspect was already covered by the definition of “expulsion” in draft article 2, subparagraph (a). It had been felt that the question of acts committed outside the territory of the expelling State in relation to the expulsion of an alien would be better dealt with in the commentary.

60. The new title of draft article 19 was “Detention conditions of an alien subject to expulsion”. While the initial proposal for the draft article had been contained in the Special Rapporteur’s sixth report,⁹⁴ the text referred to the Drafting Committee had been a revised version that the Special Rapporteur had submitted to the Commission during the debate at the sixty-second session.⁹⁵

61. The Drafting Committee had arrived at the conclusion that the reference in the text proposed by the Special Rapporteur to the obligation to respect the human rights of aliens being detained pending expulsion could be omitted, from both the text and the title, in order to avoid duplication with the content of draft article 14.

62. The Committee had reversed the order of paragraphs 1 (a) and 1 (b) as they had appeared in the text proposed by the Special Rapporteur, as it had been deemed preferable to begin the article by setting out the general principle that the detention of an alien subject to expulsion must not be punitive in nature. What had become paragraph 1 (b) should be seen as a consequence of that general principle. During the debate in plenary, some members of the Commission had maintained that draft article B proposed by the Special Rapporteur was too rigid, especially with regard to the requirement that the detention of an alien pending expulsion must be carried out in a place other than a facility in which persons serving a prison sentence were detained. In an attempt to respond to these concerns, the Committee had agreed to reformulate paragraph 1 (b) in such a way as to avoid conveying the impression that the expelling State would be under an obligation to provide special facilities for the detention of aliens subject to expulsion. What really mattered in that connection was that an alien subject to expulsion should be detained separately from persons sentenced to penalties involving deprivation of liberty, irrespective of whether detention took place in a separate facility or in different sections of the same facility. Moreover, the Committee had decided to qualify the requirement set out in paragraph 1 (b) by inserting the proviso “save in exceptional circumstances”, which appeared in article 10, paragraph 2 (a), of the International Covenant on Civil and Political Rights and which established the right of accused persons to be segregated from persons convicted of a criminal offence and to be subject to separate treatment appropriate to their status as unconvicted persons. For the sake of clarity, the commentary would emphasize that

paragraph 1 (b) referred only to detention with a view to ensuring the implementation of an expulsion decision and that it was without prejudice to the case of aliens who had been sentenced or were being prosecuted for a criminal offence, including situations in which the expulsion of an alien might be ordered as an additional penalty or as an alternative to prison.

63. Paragraph 2 of draft article 19, concerning the duration of detention, also comprised two subparagraphs. The Drafting Committee had retained the text of paragraph 2 (a) proposed by the Special Rapporteur, merely replacing the words “may” and “must” by the word “shall” in the English version of the first two sentences of the subparagraph. The Drafting Committee had debated whether the words “reasonably necessary” should be retained in the second sentence; some members had argued that the prohibition of excessive duration in the third sentence was sufficient and that there was thus no need to introduce a subjective element of reasonableness. However, the majority of the members had been in favour of retaining the words “reasonably necessary”, as those words would provide a judicial authority with an adequate standard for determining how long detention could last.

64. Paragraph 2 (b) stated that the extension of the duration of the detention might be decided only by a court or a person authorized to exercise judicial power. Notwithstanding the doubts raised by some members of the Drafting Committee as to the applicability of such a requirement in the context of immigration law, the Committee had decided to retain the subparagraph in the form proposed by the Special Rapporteur on the grounds that the requirement set forth therein was intended to prevent possible abuses by the administrative authorities when determining how long an alien subject to expulsion could be detained.

65. The text of paragraph 3 (a), establishing the requirement that the detention of an alien subject to expulsion must be reviewed and specifying the modalities for doing so, had been slightly modified by the Drafting Committee in order to make it clear that the object of such a review was the continuing detention of the alien in question, and not the initial decision on his or her detention. In the Committee’s view, the original phrase “periodically at given intervals” was tautological, and it had therefore been replaced by the words “at regular intervals”. While the point had been made that paragraph 3 (a) was to be regarded as a recommendation *de lege ferenda*, it had also been suggested that its inclusion was justified in the light of the principles of contemporary human rights law and also of the non-punitive nature of the detention of an alien pending his or her expulsion.

66. In the context of paragraph 3 (b), some members had endorsed the idea that the detention of an alien subject to expulsion must not end when the expulsion decision could not be carried out for a reason that was attributable to the alien concerned. Others had contended that the detention of the alien must end as soon as it became apparent that his or her expulsion had become impossible for any reason. The formulation finally retained made the relationship between the rule and the exception more explicit and followed the text proposed by the Special Rapporteur,

⁹⁴ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2 (draft article B); or *ibid.*, vol. II (Part Two), para. 141, footnote 1289.

⁹⁵ *Ibid.*, vol. II (Part Two), para. 141, footnote 1290.

with the insertion, however, of the proviso “subject to paragraph 2 (a)” as a reminder that all excessively long detention was prohibited.

67. Draft article 20 (Obligation to respect the right to family life) was based largely on the revised draft article submitted by the Special Rapporteur. The reference to private life, which had appeared in the draft article originally proposed by the Special Rapporteur in his fifth report,⁹⁶ had been omitted in the text subsequently referred to the Drafting Committee.⁹⁷ The text of draft article 20, paragraph 1, setting forth the obligation of the expelling State to respect the right to family life of an alien subject to expulsion, echoed the text originally proposed by the Special Rapporteur, with some minor editorial changes.

68. Paragraph 2 clarified the conditions under which limitations could be placed on the right to family life of an alien subject to expulsion. The Drafting Committee had concluded that the verb “derogate”, which had appeared in the text proposed by the Special Rapporteur, was inappropriate in the context of a limitation clause because that term had a specific legal meaning, namely that of derogations from human rights obligations that could be allowed, on certain conditions, in a time of public emergency (as in article 4 of the International Covenant on Civil and Political Rights, for example). For that reason, the words “derogate from” had been replaced with the words “interfere in the exercise of”, terminology which was consistent with that used in the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

69. Paragraph 2 set out two cumulative requirements that had to be met in order to justify interference in the exercise of the right to family life by an alien subject to expulsion. It first specified that such interference could take place only in cases “provided by law”. In response to a suggestion made by some members of the Commission at the sixty-first session, the revised version of the draft article proposed by the Special Rapporteur had contained a reference to “international law” rather than simply “law”. However, the Drafting Committee had concluded that what the provision really meant was that interference by the expelling State in the exercise of an alien’s right to family life must have an appropriate basis in the domestic legislation of the expelling State. The Committee had therefore restored the reference to “law” as it had appeared in the Special Rapporteur’s fifth report. The second requirement was that interference in the exercise of the right to family life could be permitted only on the basis of a fair balance between the interests of the State and those of the alien in question. Thus the Committee had preferred the words “on the basis of a fair balance” to the initial formulation, which had spoken of the need to “strike” a fair balance between the interests of the State and those of the individual in question. The commentary would include a reference to the case law of the European Court of Human Rights, where the criterion

of a “fair balance” had been applied in order to assess the lawfulness of interference in the exercise of the right to family life in the light of article 8 of the European Convention on Human Rights.

70. Chapter III of Part Three (Protection in relation to the State of destination) consisted of draft articles 21 to 24.

71. Draft article 21 had been retitled “Departure to the State of destination”; the word “return” had been changed to “departure” because the State of destination might well be a State in which the alien had never been before.

72. Much of the substance of paragraph 1, as provisionally adopted by the Drafting Committee, mirrored the original wording proposed by the Special Rapporteur. During the debate at the sixty-third session, some members of the Commission had suggested that the paragraph should be recast to prevent it from being construed as encouragement to exercise undue pressure on aliens.⁹⁸ It had been argued in particular that the verb “encourage” lacked legal precision and could pave the way to abuse. In response to those concerns, the Drafting Committee had revised paragraph 1, the current version of which stated that the expelling State must take “appropriate measures” to “facilitate the voluntary departure” of an alien subject to expulsion.

73. The Drafting Committee had retained nearly all of the text of paragraph 2 originally proposed by the Special Rapporteur. It had, however, deleted the reference to the rules of international law relating to air travel, as had been proposed by certain members of the Commission and by a number of States during the debate in the Sixth Committee, and had replaced the term “orderly transportation” with “safe transportation” in the English text. Although it recognized the particular relevance of air transport in the implementation of an expulsion decision, as well as the existence of an extensive body of international law relating to air travel, the Drafting Committee had been of the opinion that a reference to that law in the commentary would suffice, especially as other means of transportation were also used in carrying out expulsions. The commentary to the draft article would likewise elucidate the scope and meaning of the phrase “safe transportation ... in accordance with the rules of international law” by explaining that it encompassed not only the need to ensure the safety of other passengers on an aeroplane but also the protection of the human rights of the alien being expelled, as well as the avoidance of the excessive use of force.

74. A few changes had been introduced to the text of paragraph 3 as proposed by the Special Rapporteur. In keeping with a suggestion made by several States, the phrase “appropriate notice” had been replaced with “reasonable period of time”. Furthermore, the Committee had thought that the exception originally contemplated in that context, namely a situation in which there was reason to believe that an alien might abscond, was too narrow and failed to reflect other possible factors that had to be taken into account when a State determined how much time an alien should be given to prepare for

⁹⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611 (draft article 13).

⁹⁷ *Yearbook ... 2010*, vol. II (Part Two), para. 121, footnote 1276 (draft article 12).

⁹⁸ *Yearbook ... 2011*, vol. II (Part Two), para. 235; draft article D1 is reproduced at *ibid.*, para. 216, footnote 563.

his or her departure. The Committee had thus opted for simple wording to indicate that the decision concerning the time period must be taken “having regard to all circumstances”. The commentary would make it clear that the risk of the alien’s absconding was a factor that the expelling State might well take into consideration in that context. Lastly, the Committee had considered that the introductory phrase “in all cases”, which had appeared in the original version of paragraph 3, was unnecessary and possibly misleading. It had therefore deleted that phrase, on the understanding that the commentary would explain that paragraph 3 covered both voluntary departure and forcible implementation of an expulsion decision, the two situations contemplated in paragraphs 1 and 2 of the draft article, respectively.

75. The Drafting Committee had introduced a number of changes to the original text of draft article 22 (State of destination of aliens subject to expulsion). Some of those changes were of a substantive nature and were intended to respond to concerns expressed by Commission members during the debate at the sixty-third session in 2011.⁹⁹ Some members had supported the priority given in the original text to the State of nationality as the “natural” State of destination of an alien subject to expulsion, while others had considered that there was no reason why the possibility of expelling an alien to a State other than his or her State of nationality should be limited to situations in which that State could not be identified. Furthermore, some members of the Commission had been of the opinion that the alien’s choice should play a greater role in determining the State of destination, notwithstanding the fact that only the State of nationality had an obligation to receive a person expelled from another State. The Committee had ultimately agreed on a compromise text comprising two paragraphs.

76. The current version of paragraph 1 referred to other potential States of destination in addition to the State of nationality, although the State of nationality was still listed first, as it indisputably had an obligation to receive the alien under international law. However, the Drafting Committee had inclined to the view that other options could be envisaged, including the alien’s preference wherever feasible. For that reason, paragraph 1 also mentioned, as possible States of destination, any State (other than the State of nationality) that had the obligation to receive the alien under international law and any State willing to accept the alien at the request of the expelling State or, where appropriate, of the alien concerned. That new formulation also incorporated the essence of the original paragraph 3 by retaining the principle that the expulsion of an alien to a State was subject to that State’s consent, except where the State was required to receive the alien under international law. The commentary would explain what was meant by the phrase “any other State that has the obligation to receive the alien under international law”. A reference would be made, in that context, to the position adopted by the Human Rights Committee in relation to article 12, paragraph 4, of the International Covenant on Civil and Political Rights, which stipulates that “no one shall be arbitrarily deprived of the right to

enter his own country”. In its general comment No. 27 on freedom of movement, the Human Rights Committee had stated that the term “his own country” was broader than the “country of nationality” and “embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien”.¹⁰⁰ According to the Human Rights Committee, that would be the case of individuals who had been stripped of their nationality in violation of international law, individuals whose country of nationality had been incorporated into or transferred to another national entity and whose nationality had then been denied to them, and, possibly, “other categories of long-term residents”.¹⁰¹

77. Paragraph 2 of draft article 22 addressed the situation in which neither the State of nationality nor any other State with an obligation to receive the alien under international law had been identified, and no other State was willing to receive that alien. In such a case, the alien might be expelled to any State where he or she had a right of entry or stay or, where applicable, “to the State from where he or she had entered the expelling State”. While that last phrase should be understood as referring primarily to the State of embarkation, it was broad enough to cover situations in which the alien had entered the expelling State by means other than air transport. The formulation and content of paragraph 2 had been the subject of intense debate in the Drafting Committee. According to one point of view, if no State of destination could be identified pursuant to paragraph 1, the expelling State should then allow the alien to remain in its territory, as no other State could be compelled to receive him or her. It had proved impossible to bridge the divergence of views among Drafting Committee members as to whether certain States, such as the State that had issued a travel document or a permit of entry or stay, or the State of embarkation, would have an obligation to receive the alien under international law. It had been argued that reasons of national security or public order could be cited by a State as legitimate grounds for refusing the return of an alien to whom a permit of entry or stay had been issued and who, in the meantime, had been expelled from another State. The members of the Drafting Committee had also held a variety of views regarding the position of the State of embarkation: while some had contended that the expulsion of an alien to the State of embarkation was common practice and should thus be mentioned as a possibility, others had argued that the State of embarkation had no legal obligation to receive the alien.

78. The reference in paragraph 2 as originally proposed by the Special Rapporteur to a situation where there was a risk of torture or cruel or other inhuman or degrading treatment in the State of nationality of the alien subject to expulsion had been omitted in the text provisionally adopted by the Drafting Committee, since the obligation not to expel an alien to a State where he or she would face such a risk applied to any State of destination and was already established in draft article 24.

⁹⁹ *Ibid.*, paras. 239–242; draft article E1 is reproduced at *ibid.*, para. 218, footnote 564.

¹⁰⁰ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, annex VI, general comment concerning article 12, para. 20.

¹⁰¹ *Ibid.*

79. Draft article 23 was now entitled “Obligation not to expel an alien to a State where his or her life or freedom would be threatened”. The Drafting Committee had opted for the new title to make it clear that the provision enunciated an obligation not to expel to certain States. In paragraph 1, the phrase “where his life or freedom would be threatened” was taken from article 33 of the Convention relating to the Status of Refugees, which established the prohibition against *refoulement*. It replaced the Special Rapporteur’s original wording, which had referred to a State “where his or her right to life or personal liberty is in danger of being violated”.¹⁰²

80. Paragraph 1 of draft article 23 set out the prohibition against expelling a person to a State where his or her life or freedom would be threatened on any of the grounds mentioned in draft article 15. Such grounds included those listed in article 2, paragraph 1, of the International Covenant on Civil and Political Rights, with the addition of the ground of “ethnic origin” and “any other ground impermissible under international law”. The Drafting Committee had been of the view that there was no reason why the list of discriminatory grounds in draft article 23 should be different from the list contained in draft article 15. The text referred to the Drafting Committee, which had mentioned only the discriminatory grounds listed in article 33 of the 1951 Convention relating to the Status of Refugees, had been regarded as too narrow, given the broader scope of draft article 23, which applied to aliens in general and to a variety of situations.

81. As for draft article 15, the Drafting Committee had discussed at length whether or not sexual orientation should also be listed among the prohibited grounds of discrimination. Since divergent views had been expressed, the Committee had adopted a compromise solution whereby sexual orientation would not be mentioned in the text of the draft article but addressed in the commentary thereto, which would reflect in a balanced manner the members’ different positions. The commentary to draft article 23 would also note that the list of discriminatory grounds it contained was identical to the list in draft article 15.

82. Paragraph 2 of draft article 23 addressed the situation in which the life of an alien subject to expulsion would be threatened with the death penalty in the State of destination. During the debate in plenary, some members of the Commission had suggested that the protection afforded in the original draft article should be strengthened. In particular, it had been observed that the wording proposed by the Special Rapporteur was too restrictive in that it stated an obligation not to expel only for those States that had abolished the death penalty. It had been noted that in various States where the death penalty had not yet been abolished the penalty was not applied. Furthermore, it had been proposed that such protection should be extended to cover situations where, although the alien subject to expulsion was not under a death sentence in the State of destination, there was a risk that he or she might be sentenced to death in that State. Those concerns had been reiterated by some members in the Drafting Committee, where it had also been suggested that the obligation set forth in paragraph 2

could be made applicable to States in general, as a matter of progressive development.

83. In an effort to address some of those concerns, the Drafting Committee had modified the wording of paragraph 2 in order to render the obligation it set forth applicable to “a State that did not apply the death penalty”. The second part of the sentence had also been reformulated to cover both cases in which the death penalty had already been imposed in the State of destination and cases in which there was a risk that it might be imposed.

84. In accordance with a proposal made in the Drafting Committee, the Commission should also consider the possibility of including in the draft articles the obligation not to expel a person to a State where he or she would be at risk of being imprisoned without the right to parole.

85. The text of draft article 23 that had been submitted to the Drafting Committee had contained a third paragraph stating that the protection afforded in paragraphs 1 and 2 was also applicable to the expulsion of stateless persons. During the plenary debate at the sixty-second session, some doubts had been expressed regarding the need for such an additional paragraph. After discussion, the Drafting Committee had concluded that such a third paragraph was unnecessary and that it would be sufficient to specify in the commentary that draft article 23 applied also to stateless persons, who were in any event covered by the definition of the term “alien” contained in draft article 2, subparagraph (b). It had also been felt that a specific reference to stateless persons in draft article 23 might give the erroneous impression that stateless persons were not covered by other draft articles.

86. Draft article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment) as provisionally adopted by the Drafting Committee consisted of a single paragraph. While the formulation retained was based largely on paragraph 1 of a revised text proposed by the Special Rapporteur,¹⁰³ the Drafting Committee had introduced a number of amendments. Some had been made in order to align the wording with that of article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Thus, the Drafting Committee had replaced the reference to torture and inhuman or degrading treatment in the text proposed by the Special Rapporteur by a more complete reference: “torture or ... cruel, inhuman or degrading treatment or punishment”. Also, the words “where there is a real risk that he or she would be subjected to” had been replaced by the phrase “where there are substantial grounds for believing that he or she would be in danger of being subjected to”. Furthermore, the words “to another country” had been replaced by the words “to a State” and, in order to ensure consistency with other draft articles stating a prohibition, the words “may not” had been replaced by “shall not” at the beginning of the article.

87. The original text of the draft article proposed by the Special Rapporteur in 2009,¹⁰⁴ together with the revised

¹⁰² *Yearbook ... 2010*, vol. II (Part Two), para. 124, footnote 1278 (draft article 14 revised).

¹⁰³ *Ibid.*, para. 126, footnote 1279 (draft article 15 revised).

¹⁰⁴ *Yearbook ... 2009*, vol. II (Part Two), para. 97, footnote 845 (draft article 11).

version, had contained a paragraph 2 dealing with situations in which the risk of torture or other cruel, inhuman or degrading treatment would emanate from persons or groups of persons acting in a private capacity. However, in plenary debates at previous sessions some Commission members had expressed concerns regarding the initial formulation of that paragraph.¹⁰⁵ Some of those concerns had been reiterated during the debate on the revised text in 2010. In particular, the view had been expressed that the formulation of paragraph 2 remained too broad¹⁰⁶ despite the addition by the Special Rapporteur of a caveat concerning the inability of the receiving State to obviate the risk of ill-treatment by providing appropriate protection.

88. Several members of the Drafting Committee had been of the view that it was not necessary for draft article 24 to address questions relating to the scope of the prohibition of torture and other forms of ill-treatment, matters that were often better left for interpretation by courts and tribunals. After careful consideration, then, the Drafting Committee had decided to delete paragraph 2, on the understanding that the commentary would discuss the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law, including factors that needed to be taken into consideration in assessing the risk of torture or other forms of ill-treatment in the State of destination (specifically addressed in article 3, paragraph 2, of the Convention against torture) and situations in which such a risk could emanate from persons or groups of persons acting in a private capacity. On that last point, reference would be made to relevant case law, including that of the European Court of Human Rights.

89. Chapter IV of Part Three (Protection in the transit State) comprised only one draft article, namely draft article 25 (Protection in the transit State of the human rights of an alien subject to expulsion). The text of that draft article as provisionally adopted by the Drafting Committee was a reformulation of the text originally proposed by the Special Rapporteur, which had sought to extend to the transit State the protection of the human rights of aliens subject to expulsion.¹⁰⁷ While several members of the Commission had supported the inclusion of a draft article on the human rights obligations of the transit State, some members had been of the view that the draft article should be reworded to avoid conveying the erroneous impression that the transit State would be required to comply with human rights rules that were binding only upon the expelling State. The same point had been raised in the Drafting Committee, and in order to address that concern the Committee had reformulated the draft article so that it referred specifically to the obligations of the transit State under international law. It would be made clear in the commentary that the phrase was intended to cover obligations arising either from a treaty to which the transit State was a party or from a rule of general international law.

90. Part Four (Specific procedural rules) comprised draft articles 26 to 28. Draft article 26 was entitled “Procedural rights of aliens subject to expulsion”. In his sixth

report,¹⁰⁸ the Special Rapporteur had originally proposed in draft articles A1 and C1 that a list of procedural rights applicable to the expulsion of aliens lawfully present in the territory of the expelling State should be drawn up, but that it should be left to the discretion of the expelling State whether to grant some or all of those procedural rights to aliens unlawfully present in its territory. At the sixty-second session, several members of the Commission had expressed the view that some procedural rights should also be recognized in respect of aliens unlawfully present in the territory of the expelling State.¹⁰⁹ The Special Rapporteur endeavoured to address those concerns by submitting at the same session a revised version of draft article A1¹¹⁰ providing for the applicability of certain procedural rights to aliens who, albeit unlawfully present, enjoyed a special status in the expelling State or had been residing in that State for a certain period of time, for example, six months. The Commission had then referred draft article C1, together with the revised draft article A1, to the Drafting Committee.

91. The Drafting Committee had considered thoroughly the question of the procedural rights of aliens subject to expulsion. A preliminary discussion had taken place on a question of terminology, namely whether the draft articles should refer to procedural rights or to procedural guarantees. Some members of the Drafting Committee had noted that in some legal systems a distinction was drawn between procedural rights *stricto sensu* and other procedural guarantees. Ultimately, the Committee had decided to retain the term “procedural rights” in a generic sense in draft article 26. Moreover, following an extensive discussion on the general approach to be followed with regard to the enunciation of procedural rights, the majority of Committee members had favoured the inclusion, in paragraph 1 of the draft article, of a single list of procedural rights that applied both to aliens lawfully present and to aliens unlawfully present in the territory of the expelling State, with the possible exception—aliens who had been unlawfully present for less than six months—specified in paragraph 4.

92. With regard to the various rights listed in paragraph 1, he said that the Drafting Committee had considered that the “right to be heard by a competent authority”, set forth in paragraph 1 (c), was essential for the exercise of the alien’s right to challenge the expulsion decision, as enunciated in paragraph 1 (b), and that that point should be emphasized in the commentary. There had been some discussion regarding the content and exact formulation of the right to be heard. The English text of the subparagraph originally referred to the Drafting Committee had used the phrase “right to a hearing”; however, the Drafting Committee had noted that that wording could be interpreted as implying a right to an oral hearing, a right not necessarily recognized by international law in the context of expulsion proceedings. It had therefore chosen the more neutral formulation “right to be heard”, thereby aligning the English text with the original French, which used the expression “*droit d’être*

¹⁰⁵ *Ibid.*, paras. 120–125.

¹⁰⁶ *Yearbook ... 2010*, vol. II (Part Two), para. 134.

¹⁰⁷ *Yearbook ... 2011*, vol. II (Part Two), para. 219, footnote 565.

¹⁰⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

¹⁰⁹ *Ibid.*, vol. II (Part Two), paras. 163–164; the draft articles A1 and C1 are reproduced at *ibid.*, paras. 143 and 145, footnotes 1292 and 1294.

¹¹⁰ *Ibid.*, para. 179, footnote 1300.

entendu". The commentary would indicate that under international law the "right to be heard" did not necessarily imply a right to an oral hearing, as State practice was not uniform in that regard.

93. Turning to paragraph 1 (*d*), on the right of access to effective remedies to challenge the expulsion decision, he said that the Drafting Committee had considered that the reference to the principle of non-discrimination contained in the text initially proposed by the Special Rapporteur could be omitted from the text of the draft article and alluded to, as appropriate, in the commentary.

94. Paragraph 1 (*e*) referred to the right to be represented before the competent authority. The Drafting Committee had opted for that general wording, instead of the term "the right to counsel", originally proposed by the Special Rapporteur, since it had held that in the context of expulsion proceedings the right to be represented did not entail, under international law, a right to be represented by a lawyer. Moreover, the wording chosen by the Committee was in line with that of article 13 of the International Covenant on Civil and Political Rights.

95. Several members of the Drafting Committee had been of the view that an alien's right to the free assistance of an interpreter (para. 1 (*f*)) if he or she could not understand or speak the language used by the competent authority was an essential element of the right to be heard (para. 1 (*c*)) and was also relevant in connection with the procedural rights set out in paragraphs 1 (*a*) and 1 (*b*). The wording chosen for paragraph 1 (*f*) corresponded to that used in connection with criminal proceedings in article 14, paragraph 3 (*f*), of the International Covenant on Civil and Political Rights. The Committee had been of the opinion that, in the case contemplated in paragraph 1 (*f*), the provision of interpretation should be free so as to ensure the effective exercise by the alien concerned of the other procedural rights to which he or she was entitled. In that context, the alien should indicate to the competent authorities the language or languages that he or she understood. According to the Drafting Committee, an alien's right to the free assistance of an interpreter should not be construed as entailing a right to receive the written translation of potentially voluminous documents. All those matters would be alluded to in the relevant commentary.

96. The Drafting Committee had considered carefully the Special Rapporteur's proposal to include a right to legal aid within the list of procedural rights. Some Committee members had pointed to the fact that only certain domestic laws provided for such a right and that the existence of that right would in fact depend on requirements established in the relevant legislation. The Drafting Committee had thus decided to delete the subparagraph on legal aid, on the understanding that a reference to the possible existence of such a right in the domestic legislation of the expelling State would be included in the commentary to paragraph 2 of the draft article.

97. Paragraph 2 of draft article 26 stated that the list of procedural rights contained in paragraph 1 was without prejudice to other procedural rights or guarantees provided by law. The commentary would indicate that, although the "without prejudice" clause referred mainly

to procedural rights recognized under the domestic law of the expelling State, it also covered any other procedural right that might be recognized under applicable rules of international law.

98. Paragraph 3 of the draft article addressed the question of consular assistance. In the draft article originally proposed by the Special Rapporteur, a "right to consular protection" had appeared in the list of procedural rights enjoyed by an alien subject to expulsion. However, the Drafting Committee had considered that it would be preferable to deal with that issue in a separate paragraph in order to spell out its legal implications, while recognizing the function of consular assistance as a guarantee for the respect of other rights.

99. The exact wording of paragraph 3 had been the subject of discussions in the Drafting Committee. Some members had expressed the view that the original reference to a "right to consular protection" was inappropriate because such a right was not recognized under international law. The point had been made that, although a right to consular protection or assistance was recognized under certain domestic legal systems, the State of nationality of an alien subject to expulsion remained free under international law to decide on the provision of any protection or assistance to that alien. At the same time, some members had noted that under article 36 of the 1963 Vienna Convention on Consular Relations, an alien subject to expulsion enjoyed certain rights in relation to communication with and access to consular officers of his or her State of nationality. With those considerations in mind, the Drafting Committee had decided to rephrase paragraph 3 so as to mention both the alien's right "to seek consular assistance" and the obligation of the expelling State not to impede the exercise of that right and, as appropriate, the provision of such assistance. The term "consular assistance" in paragraph 3 was to be understood as referring to any assistance that the State of nationality of the alien subject to expulsion might wish to provide to that alien in accordance with the rules of international law governing consular relations. The commentary would refer to the relevant provisions of the 1963 Vienna Convention on Consular Relations, notably article 5 on the definition of consular functions and article 36 on communication and contact with nationals of the sending State. Specific reference would also be made to the case of aliens being detained, covered in article 36, paragraphs 1 (*b*) and 1 (*c*), of the 1963 Vienna Convention on Consular Relations. The commentary would also indicate that the draft article did not contemplate any right to consular assistance that an alien subject to expulsion might invoke *vis-à-vis* his or her State of nationality under the internal law of that State.

100. Paragraph 4 of draft article 26 addressed the special case of aliens unlawfully present in the territory of the expelling State for less than six months. It was formulated as a "without prejudice" clause that made possible the application in such cases of any legislation of the expelling State concerning the expulsion of those aliens. Some members of the Drafting Committee had questioned the advisability of setting a time limit in that context, and the view had also been expressed that a minimum core of procedural rights should apply to all aliens without exception. It had further been suggested

that the alien's level of integration at various levels (social, economic, professional or family) could also be taken into account in considering the extent to which the expelling State was required to grant certain procedural rights during the expulsion process to aliens unlawfully present in its territory. However, the Drafting Committee had ultimately considered that a criterion referring to the level of integration would have been difficult to implement, and it had therefore opted for an objective time limit for the duration of the alien's presence in the territory of the expelling State. A period of six months had been deemed reasonable, not least since such a time limit was to be found in procedural rules governing the expulsion process contained in the legislation of some States.

101. Turning to draft article 27 (Suspensive effect of an appeal against an expulsion decision), he recalled that the Special Rapporteur had originally refrained from proposing a draft article on the subject, as he had felt that State practice had not sufficiently converged to warrant the formulation, if only as progressive development, of such a provision. During the plenary debate at the sixty-third session,¹¹¹ some members of the Commission had shared the Special Rapporteur's view that no general rule of international law required the expelling State to provide a right of appeal against an expulsion decision with suspensive effect. Other members, however, thought that the Commission should formulate, if only in the context of progressive development, a draft article that contemplated the suspensive effect of an appeal against an expulsion decision, unless compelling reasons of national security dictated otherwise. Some members had pointed out that an appeal against an expulsion decision that lacked suspensive effect would not be effective, since an alien who had to leave the country was likely to encounter economic obstacles to his or her return to the expelling State. According to another view, the Commission should recognize as part of *lex lata* the suspensive effect of an appeal in which the person concerned could reasonably invoke the risk of being subjected to torture or ill-treatment in the State of destination.

102. In response to some of those concerns, the Special Rapporteur had submitted to the Drafting Committee, as an exercise of progressive development, a new draft article dealing with the suspensive effect of an appeal against an expulsion decision. In that text, a distinction had been made between the situation of an alien lawfully present in the territory of the expelling State and that of an alien unlawfully present. According to that proposal, the suspensive effect would be recognized in respect of an appeal lodged by an alien lawfully present in the territory of the expelling State, and possibly also by an alien unlawfully present who met certain additional requirements, such as minimum length of stay or minimum degree of social integration in the territory of the expelling State.

103. After a prolonged discussion, the Committee had opted for a draft article that recognized the suspensive effect only in respect of an appeal lodged by an alien lawfully present in the territory of the expelling State. The commentary would indicate that, even in such cases, the suspensive effect was recognized in the draft articles as a

matter of progressive development, since State practice was neither consistent nor uniform in that respect. The commentary would also mention that some members of the Commission would have preferred that the draft article should provide the same guarantee for certain categories of aliens who, albeit unlawfully present in the territory of the expelling State, had been there for a certain period of time or met other conditions to be defined.

104. Draft article 28 (Procedures for individual recourse) was new. During the debate at the sixty-third session on the draft article on diplomatic protection proposed by the Special Rapporteur, several members had suggested that some reference should be made to the individual complaint mechanisms available to aliens subject to expulsion under treaties on the protection of human rights, either in a separate draft article or in a "without prejudice" clause to be inserted in the draft article proposed.¹¹² In response, the Special Rapporteur had submitted to the Drafting Committee the text of a "without prejudice" clause as a proposed additional paragraph to the draft article on diplomatic protection. During the discussions in the Drafting Committee, two options had emerged: a single draft article covering, in two separate paragraphs, diplomatic protection and individual recourse to a competent international body; and two separate draft articles, each dealing with one of those two questions. After careful consideration, the Drafting Committee had opted for the second option, deciding that there should be a specific draft article on the question of individual recourse to a competent international body and that it should be placed at the end of Part Four, dealing with procedural rules. Furthermore, the Drafting Committee had deemed it preferable to draft the article not as a "without prejudice" clause but as a reminder that an alien subject to expulsion should have access to any available procedure involving individual recourse to a competent international body.

105. The CHAIRPERSON said that the Commission would conclude its consideration of the report of the Drafting Committee at the next plenary meeting.

The meeting rose at 1 p.m.

3135th MEETING

Tuesday, 29 May 2012, at 3 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

¹¹¹ *Yearbook ... 2011*, vol. II (Part Two), paras. 255–257.

¹¹² *Ibid.*, paras. 251–252; draft article J1 is reproduced at *ibid.*, para. 223, footnote 570.

Expulsion of aliens (*concluded*) (A/CN.4/650 and Add.1, sect. B, A/CN.4/651, A/CN.4/L.797)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to resume his introduction of the report of the Drafting Committee on the topic “Expulsion of aliens” (A/CN.4/L.797).

2. Mr. HMOUD (Chairperson of the Drafting Committee) drew the Commission’s attention to Part Five of the draft articles, entitled “Legal consequences of expulsion”, which included draft articles 29 to 32.

3. Draft article 29 was currently entitled “Readmission to the expelling State”. It should be recalled that the draft article initially proposed by the Special Rapporteur, which had been entitled “Right of return to the expelling State”, had given rise to some concerns during the debate in the Commission in 2011.¹¹³ In particular, several members had expressed the view that the draft article was too broad, in that it recognized a right of return in the event of unlawful expulsion, irrespective of the lawfulness or unlawfulness of the alien’s presence in the territory of the expelling State or of the reason for which the expulsion was to be regarded as unlawful.

4. The Drafting Committee had debated the appropriateness of having the draft articles provide for a right to readmission in the event of unlawful expulsion. According to some members, the recognition of such a right would go too far and would be questionable even from the perspective of *lex ferenda*. According to others, the rules on the responsibility of States for internationally wrongful acts,¹¹⁴ which were referred to in the “without prejudice” clause contained in draft article 31, and in particular the rules governing reparation—including, where appropriate, *restitutio in integrum*—already offered an adequate solution; there was thus no need to address the question of readmission in the event of unlawful expulsion from the perspective of an individual right of the expelled alien. However, the Drafting Committee had eventually decided to devote a separate draft article to that question.

5. The Drafting Committee had worked on the basis of a revised text presented by the Special Rapporteur in response to concerns raised during the plenary debate with regard to the original draft article. The Special Rapporteur had proposed that the scope of the draft article should be narrowed so as to restrict the right of return in cases of unlawful expulsion to those aliens who had been lawfully present in the territory of the expelling State. Also, in view of the fact that some States had questioned the existence of any automatic right of return to the expelling State, the Special Rapporteur had proposed to the Drafting Committee that the term “readmission”

should be used instead of “return”. Those proposals had been well received by the Drafting Committee, which, on the other hand, had concluded that it would have been difficult to limit the recognition of a right to readmission to those cases where the expulsion decision had violated a substantive legal rule, as opposed to a procedural one, since the two were often interconnected and difficult to distinguish from one another.

6. Following a lengthy discussion, the Drafting Committee had retained a formulation that it considered to be sufficiently cautious, in that it covered only aliens lawfully present in the territory of the expelling State and recognized a right to readmission to the expelling State only if it was established by a competent authority that the expulsion had been unlawful, save where the return of the alien constituted a threat to national security or public order, or where the alien no longer fulfilled the conditions for admission under the law of the expelling State. That being said, the Committee had formulated the draft article as an exercise of progressive development rather than an attempt to codify existing rules.

7. The term “unlawful expulsion” contained in the draft article covered any expulsion in violation of a rule of international law. However, that term should also be understood in the light of the principle stated in article 13 of the International Covenant on Civil and Political Rights and reiterated in draft article 4, according to which an alien could be expelled only in pursuance of a decision reached in accordance with law—meaning, primarily, the domestic law of the expelling State. The commentary would address that point.

8. The recognition of a right of readmission under draft article 29 was limited to those situations in which the unlawful nature of the expulsion had been determined by a binding decision handed down either by the authorities of the expelling State or by a competent international body, such as a court or a tribunal. In that connection, the phrase “on the basis of the annulment of the expulsion decision”, which appeared in the text of the draft article as referred to the Drafting Committee, had been considered too restrictive. The Committee had concluded that it would not have been appropriate to subordinate the alien’s right to be readmitted to an annulment of an expulsion decision, which could normally be issued only by an authority of the expelling State. In addition, the formulation adopted by the Drafting Committee also covered situations in which unlawful expulsion did not result from the adoption of a formal decision (a scenario addressed in draft article 11 on the prohibition of disguised expulsion). The commentary would clarify those various aspects.

9. Draft article 29 should not be read as conferring on determinations made by international bodies effects other than those provided for in the constituent instruments of such bodies. It recognized, as a matter of progressive development, only an independent right of the alien to be readmitted as a result of a determination of the unlawfulness of his or her expulsion by a competent national or international authority.

10. As was clearly indicated in the draft article, the expelling State retained the right to deny readmission

¹¹³ *Yearbook ... 2011*, vol. II (Part Two), paras. 247–249; draft article H1 is reproduced at *ibid.*, para. 222, footnote 568.

¹¹⁴ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

in cases where the return of the alien would constitute a threat to national security or public order or where the alien no longer fulfilled the conditions for admission under the law of the expelling State. The Drafting Committee had considered the recognition of those exceptions as necessary in order to preserve a balance between the rights of the alien unlawfully expelled and the expelling State's discretion to control the entry of any alien into its territory in accordance with its immigration law. The last clause of paragraph 1 also took into account the fact that, in certain cases, the circumstances on the basis of which an alien had originally been granted an entry or sojourn permit might no longer exist. However, the expelling State must exercise in good faith its discretion to decide on readmission; for instance, the expelling State should not be allowed to invoke a provision of domestic legislation that would regard the mere existence of an expulsion decision as a bar to readmission. Such a limitation was clearly reflected in paragraph 2 of the draft article, which stated, "In no case may the earlier unlawful expulsion decision be used to prevent the alien from being readmitted". The commentary would emphasize that point and refer to article 22, paragraph 5, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, on which the text of draft article 29, paragraph 2, had been based.

11. Lastly, the commentary would indicate that draft article 29 was without prejudice to the legal regime of the responsibility of States for internationally wrongful acts, which was referred to in draft article 31, including the rules governing various forms of reparation.

12. Draft article 30 was currently entitled "Protection of the property of an alien subject to expulsion". As mentioned previously, the text of paragraph 1 of the draft article originally proposed by the Special Rapporteur, which set out the prohibition of expulsion for confiscatory purposes, had been moved to Part Two of the draft articles and had become draft article 12.

13. Consequently, draft article 30, as provisionally adopted by the Drafting Committee, consisted of only paragraph 2 of the initially proposed draft article. The Drafting Committee had considered a proposal, made during the plenary debate in 2011, which sought to replace the term "property" with "property rights".¹¹⁵ However, after careful consideration, the Committee had deemed it preferable to retain the generic reference to "property" and to avoid the notion of "property rights", which was still controversial in human rights law. The text provisionally adopted by the Drafting Committee was largely based on the one originally proposed by the Special Rapporteur. However, the Drafting Committee had considered it appropriate to strengthen the formulation of the general obligation enunciated in the draft article by replacing the words "shall protect" with the words "shall take appropriate measures to protect". In addition, the Drafting Committee had decided to replace the phrase "to the extent possible", which appeared in square brackets in the original text, with "in accordance with the law". It had concluded that the former phrase, which had been

criticized by various Commission members and several States, might have had the effect of unduly weakening the protection, whereas the phrase "in accordance with the law" satisfactorily addressed cases in which the expelling State might have a legitimate interest in limiting the disposal by the alien of his or her property. Such cases might include, for instance, restrictions placed on the disposal of illegally acquired property, including assets produced by criminal or other unlawful activities. The commentary would address that point and provide some clarifications concerning the reference to the requirement that the alien should be allowed to dispose freely of his or her property even from abroad. Furthermore, at the recommendation of the Special Rapporteur, the Drafting Committee had decided to delete the last phrase of the original text, which had referred to the obligation to return the property of an expelled alien at his or her request or that of his or her heirs or beneficiaries. It had done so in response to concerns expressed during the plenary debate in 2011 and reiterated in the Drafting Committee. The point had been made, in particular, that an obligation to return the alien's property was incompatible with the right of the expelling State to expropriate the alien's property provided the conditions of international guarantees (in particular, the payment of adequate compensation) had been met. Moreover, forms of reparation other than restitution could also be utilized in the event of the loss or destruction of an alien's property. For the time being, draft article 30 was included in Part Five of the draft articles, entitled "Legal consequences of expulsion". However, the Commission could consider whether to move it to chapter II of Part Three, placing it after draft article 20.

14. Draft article 31 was now entitled "Responsibility of States in cases of unlawful expulsion". The inclusion in the draft articles of a provision referring to the legal regime of the responsibility of States for internationally wrongful acts, which was proposed by the Special Rapporteur in the second addendum to his sixth report,¹¹⁶ had found broad support in the Commission. The formulation originally proposed referred, in that context, to the "legal consequences" of an unlawful expulsion; however, the Special Rapporteur had subsequently presented the Drafting Committee with a revised version of the draft article, which referred directly to the engagement of the international responsibility of the expelling State as a result of an unlawful expulsion. The text of the draft article as provisionally adopted by the Drafting Committee indicated that the expulsion of an alien in violation of international obligations engaged the international responsibility of the expelling State. As stated in draft article 31, the obligations referred to were those deriving from the draft articles or any other rule of international law. The commentary to draft article 31 would address the obligation to provide reparation as a consequence of the international responsibility incurred by the expelling State in the event of an unlawful expulsion.

15. Lastly, draft article 32 was entitled "Diplomatic protection", as had originally been proposed. It set forth the right of the State of nationality of an alien subject to

¹¹⁵ *Yearbook ... 2011*, vol. II (Part Two), para. 244; draft article G1 is reproduced at *ibid.*, para. 221, footnote 567.

¹¹⁶ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1-2; draft article I1 is reproduced in *Yearbook ... 2011*, vol. II (Part Two), para. 223, footnote 569.

expulsion to exercise diplomatic protection in respect of that alien. Apart from minor linguistic changes, the text retained by the Drafting Committee corresponded to that originally proposed by the Special Rapporteur. Draft article 32 was to be understood as a generic reference to the legal institution of diplomatic protection, which was well established in international law. The general conditions and modalities for the exercise of diplomatic protection in accordance with international law were applicable to the protection exercised by the State of nationality in respect of an alien subject to an expulsion decision. The commentary would clarify that point, while also referring to the articles on diplomatic protection adopted by the Commission in 2006,¹¹⁷ the text of which appeared as an annex to General Assembly resolution 62/67 of 6 December 2007, and to relevant case law.

16. Mr. SABOIA recalled that the Special Rapporteur, in his third report,¹¹⁸ had proposed a draft article 4 entitled “Non-expulsion by a State of its own nationals”. The draft article had been generally well received by the plenary Commission and had been referred to the Drafting Committee;¹¹⁹ unfortunately, the Drafting Committee had not been able to reach agreement on it and had decided not to include the draft article in its report to the Commission. The argument advanced had been that the topic under consideration was the expulsion of aliens but that the proposed draft article entailed dealing with questions related to the right of States to establish rules about nationality.

17. In his own view, such a provision would not at all jeopardize the rights of States. Conversely, by excluding it, the Commission would deprive itself of the opportunity to follow the path cleared for it by important universal as well as regional human rights instruments and would deny itself the chance to contribute to the codification and the progressive development of international law in an area in which individual rights had frequently been violated. In that and other areas, the Commission must be careful to preserve the balance between the rights of the State and those of the individual. In the light of the extensive research carried out by the Special Rapporteur, which was contained primarily in paragraphs 34 to 39 of his third report, one could only conclude that the prohibition of the expulsion by a State of its own nationals should be seen as a necessary corollary to the provisions of article 12 of the International Covenant on Civil and Political Rights, article VIII of the American Declaration of the Rights and Duties of Man (Bogota, 1948)¹²⁰ and article 2 of Protocol No. 4 to the European Convention on Human Rights, among others.

18. Furthermore, as affirmed by the Special Rapporteur in paragraph 39 of his third report:

Given the abundant national and international practice mentioned above and doctrinal opinion on the subject, which is long-standing and

¹¹⁷ The draft articles and commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), chap. IV, paras. 49–50.

¹¹⁸ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

¹¹⁹ *Ibid.*, vol. II (Part Two), paras. 188 and 226–232; draft article 4 is reproduced at *ibid.*, para. 197, footnote 322.

¹²⁰ See www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm.

nearly unanimous, there is cause to be—at the very least—cautious about the statement that “[a] general rule of customary international law forbidding the expulsion of nationals does not exist”.¹²¹

That comment left the impression that, in the Special Rapporteur’s view, there were at least some grounds for considering that the prohibition of the expulsion of one’s own nationals was sufficiently established in practice as to be considered a customary rule of international law.

19. He wished to draw the Commission’s attention to the fact that the Drafting Committee had taken a decision on an important substantive issue, one which, in principle, should have been referred to the plenary. Without wishing to reopen the debate on the question, he nevertheless requested to have the summary record reflect his conviction that international law prohibited a State from expelling its own nationals. He wished to thank the Special Rapporteur for having proposed to the Drafting Committee what was currently draft article 9 (Deprivation of nationality for the sole purpose of expulsion), which made it possible to retain at least some elements of a general rule prohibiting the expulsion by a State of its own nationals.

20. In conclusion, he agreed with all the draft articles adopted by the Drafting Committee.

21. The CHAIRPERSON invited the Commission to adopt the text of draft articles 1 to 32, provisionally adopted by the Drafting Committee on first reading and contained in document A/CN.4/L.797.

PART ONE. GENERAL PROVISIONS

Draft article 1 (*Scope*)

22. Mr. GEVORGIAN said that he wished to reserve his position with regard to paragraph 1, since it was only in the light of the Commission’s solution to a number of other questions raised in various other draft articles that he could give his opinion on the appropriateness of dealing with the question of the lawful or unlawful presence of an alien in the territory of a State.

Draft article 1 was adopted, subject to that comment by Mr. Gevorgian.

Draft article 2 (*Use of terms*)

Draft article 2 was adopted.

Draft article 3 (*Right of expulsion*)

23. Ms. ESCOBAR HERNÁNDEZ said that she planned to submit several editorial changes to the Secretariat concerning the Spanish version of the draft article.

24. Mr. GEVORGIAN said that the Russian text of the draft article did not correspond perfectly to the English and that he, too, planned to submit a number of editorial changes. That being said, the very substance of the draft article gave rise to certain doubts in his mind. With regard to the phrase “Expulsion shall be in accordance with the present draft articles and other applicable rules of

¹²¹ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581, p. 118.

international law”, he wondered whether such wording was appropriate and whether the expulsion decision should not instead be in accordance with domestic law, which itself should be in accordance with international law.

25. Mr. HMOUD (Chairperson of the Drafting Committee) said that the Drafting Committee had decided, as a matter of legal principle, to refer to the rules of international law. Even if it was presumed that, as a general rule, any expulsion decision had to be in accordance with domestic law, it could nevertheless happen that the domestic law of a particular State was not in conformity with international law. It had thus been decided to specify, as a precautionary measure, that the expulsion procedure must be in accordance with international law, in order to take into account the situation in which a State’s domestic law was not consistent with the rules of international law.

On that understanding, draft article 3 was adopted.

Draft article 4 (*Requirement for conformity with law*)

Draft article 4 was adopted.

Draft article 5 (*Grounds for expulsion*)

Draft article 5 was adopted.

PART TWO. CASES OF PROHIBITED EXPULSION

Draft article 6 (*Prohibition of the expulsion of refugees*)

26. Mr. MURPHY said that he wished to raise several of the concerns that he and other Commission members had expressed in plenary meetings but that the Drafting Committee had not been able to address. He had a particular concern regarding draft article 6, paragraph 2.

27. First of all, nowhere in the draft articles was there a definition of the term “refugee”, and it was therefore not clear whether the text covered “refugees” as defined in the 1951 Convention relating to the Status of Refugees or as defined in the 1967 Protocol relating to the Status of Refugees, which had significantly altered the definition given in the Convention. The definition of “refugee” had been further amended by regional instruments in Africa and Latin America, basically in order to include persons who had fled war or other violence in their home country. Among such instruments was the 1969 OAU Convention governing the specific aspects of refugee problems in Africa and the 1984 Cartagena Declaration on Refugees.¹²² He understood that in the commentary, the Commission would clarify that it employed the term “refugee” as it was defined in the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol thereto, and not as defined by regional instruments.

28. Paragraph 2 was not in conformity with the 1951 Convention, article 32 of which provided that the Contracting States must not “expel a refugee lawfully

in their territory save on grounds of national security or public order”. Refugees who were unlawfully in the territory of a Contracting State fell outside the scope of article 32, although they were protected by other articles of the Convention, in particular articles 31 (Refugees unlawfully in the country of refuge) and 33 (Prohibition of expulsion or return (“refoulement”). The *travaux préparatoires* confirmed that the authors of what became article 32 had intended to confine the limitation on expulsion solely to those refugees who had been lawfully admitted. Draft article 6, paragraph 2, took no account of the express language of article 32 of the Convention, nor of the intention of its drafters.

29. Draft article 6, paragraph 2, did not reflect *lex lata*, and there was nothing in the Special Rapporteur’s report to suggest that there was sufficient State practice in support of its contents. At best, it could be considered as an attempt to engage in the progressive development of the law, although it was regressive rather than progressive, in that it undermined the meaning of the phrase “a refugee lawfully in their territory”. That phrase had been chosen deliberately by the drafters of the 1951 Convention in order to avoid implying a requirement of residence or domicile. Indeed, the drafters had set aside the phrase commonly used in the French legal tradition (“*résidant régulièrement*”), which was thought to be too restrictive. The expression “lawfully in their territory” was meant to be much broader, since it potentially covered someone whose presence in the territory had lasted for only a few hours.

30. The Commission seemed to assume in draft article 6, paragraph 2, that the phrase “lawfully in their territory” was too narrow and that paragraph 2 could fix it. Yet that phrase was not narrow, and the apparent assertion to the contrary did nothing to improve matters. In particular, if the Commission indicated in the commentary that the phrase covered only persons who had been granted refugee status by the State in question, then it would be departing radically from the meaning given to that phrase in the 1951 Convention. Even if other Commission members disagreed with him on that point and insisted that paragraph 2 constituted progressive development, there could be no disagreement that, by putting forward paragraph 2, the Commission was saying that the 1951 Convention was wrong, or at least inadequate, and that article 32 of that Convention was improperly drafted and needed fixing. Furthermore, it was saying so, even though there was no evidence either in State practice or in the academic literature that there was a problem with the operation of that article. In addition, the Commission was saying that article 32 needed to be fixed in a way that was not consistent with the approach taken by States when they enacted national laws that were in line with draft article 6, paragraph 2. In paragraphs 73 and 74 of his third report,¹²³ the Special Rapporteur noted that some States had adopted national laws that provided for rights like the one that appeared in paragraph 2, but also that there were restrictions on that right. In France, for example, the right was not recognized when the sole purpose of an alien’s application for refugee status was to thwart a deportation order. Ultimately, to claim that the 1951 Convention needed to be fixed or was inadequate would be a rather

¹²² Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems, held in Cartagena, Colombia, 19–22 November 1984; the text of the conclusions of the declaration appears in OEA/Ser.L/V/II.66 doc. 10, rev. 1. OAS General Assembly, fifteenth regular session (1985), resolution approved by the General Commission at its fifth session on 7 December 1985.

¹²³ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/581.

striking statement on the part of the Commission, since the Convention established a multilateral treaty regime to which 145 States had become parties. Far from being a dormant instrument out of touch with contemporary developments, its implementation was closely monitored by the Office of the United Nations High Commissioner for Refugees (UNHCR), and more States were becoming parties to it every year: 12 had acceded since 2000, the most recent being Nauru in 2011. As far as he knew, none of those States had indicated a problem with the language of article 32, nor had the terms of that article been altered by the regional instruments that sought to complement and implement the 1951 Convention. The comments made by representatives of States in New York in the autumn of 2011 suggested that they were troubled that the Commission might alter the terms of major human rights treaties such as the 1951 Convention. For example, the Netherlands had cautioned that deviations from regimes such as the 1951 Convention “could cause uncertainty as to which international legal regime applied in a specific situation”.¹²⁴ He himself had gone through prior instruments drafted by the Commission to try to identify an instance in which the Commission had sought to rewrite a key provision of a major multilateral treaty to which the vast majority of States were parties, but he could find no such example. For those reasons, draft article 6, paragraph 2, should be deleted, and he hoped that it would be possible to do so on second reading.

31. A related but broader problem with the draft articles was that the Commission was deviating in other ways from the terms agreed upon in the major human rights instruments: not just the 1951 Convention relating to the Status of Refugees, but also the International Covenant on Civil and Political Rights, the 1954 Convention relating to the Status of Stateless Persons and some regional human rights instruments. It was unlikely, given those divergences, that States would welcome or implement the outcome of the Commission’s efforts. The most glaring example was perhaps the Commission’s failure to recognize the ability of States to derogate from their human rights obligations in times of public emergency. Many of the obligations embodied in the draft articles—including the obligation not to expel aliens except in certain circumstances and obligations concerning detention and relating to family life—were drawn from treaties that allowed for derogation from those obligations in the event of public emergency. It was well known that article 4 of the International Covenant on Civil and Political Rights provided as follows:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation ...

Among the articles from which it was possible for States to derogate was article 13 of the Covenant, which related to the expulsion of aliens. Article 15 of the European Convention on Human Rights and article 27 of the American Convention on Human Rights contained comparable provisions.

¹²⁴ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 23rd meeting (A/C.6/66/SR.23)*, para. 47.

32. That was just one example of the broader problem. It was regrettable that nowhere in the draft articles did the Commission indicate that they were without prejudice to the provisions set forth in the major multilateral human rights treaties, which carefully balanced the rights of individuals with those of States. It was possible that the Commission regarded the provisions of draft article 3 as leaving intact the rights and obligations set forth in existing treaties; if so, perhaps that could be reflected in the commentary. Furthermore, it was possible that the language of draft article 8 left intact the rights and obligations set forth in existing treaties that concerned refugees and stateless persons. Again, if that was the Commission’s intention, perhaps it could be reflected in the commentary. However, if that was not the Commission’s intention in draft articles 3 and 8, it would rightly be criticized for attempting to alter core instruments of international human rights law to which the vast majority of States had acceded. He hoped that those concerns would be reflected in the commentary and that the problems identified would be remedied on second reading.

33. The CHAIRPERSON, recalling that members’ comments must relate exclusively to draft article 6, pointed out that the issue appeared to be a matter of interpretation and that the provisions of draft article 8 might allay Mr. Murphy’s concerns. He wished to know whether the issue had been discussed in the Drafting Committee and whether the Chairperson of the Drafting Committee and the Special Rapporteur had any comments to make in that regard.

34. Mr. HMOUD (Chairperson of the Drafting Committee) said that, at its fifty-ninth session, the Commission meeting in plenary had decided to refer draft article 6 to the Drafting Committee and, as a matter of progressive development, to include paragraph 2¹²⁵ relating to refugees unlawfully present in the territory of the State and the protection to be afforded them. Mr. Murphy had raised a number of substantive points and had partially answered them himself by referring to draft articles 3 and 8, the very purpose of the latter being to state that the rules laid down in the draft articles were without prejudice to the provisions of conventions relating to refugees and did not undermine the protections and guarantees provided for in human rights instruments, particularly those enjoyed by States. It was important to submit paragraph 2 for comment to the international community precisely because it pertained to progressive development: if the Commission confined its work to the codification of existing international law, half of that work would be mere duplication of effort, not to mention the fact that its mandate would have to be adjusted.

35. Mr. KAMTO (Special Rapporteur) said that he was always open to comments from other Commission members that helped to advance his work, but he disputed Mr. Murphy’s arguments, which were inaccurate. Draft article 6, paragraph 2, in no way ran counter to either article 32 of the 1951 Convention relating to the Status of Refugees, which dealt with refugees lawfully present in a State, or article 31, which dealt with the expulsion of refugees who were unlawfully present. It attempted to take into consideration international practice as it had evolved since 1951 by integrating the relevant regional legal instruments, including those of Africa and Latin America that had been

¹²⁵ *Yearbook ... 2007*, vol. II (Part Two), paras. 235–237.

adopted in 1969 and 1985. Most of the instruments dated back some 40 or 50 years, during which some practice had emerged. He had sent his work to UNHCR and had spoken with the staff of that organization, who believed that codification should take into account the reality on the ground. Draft article 6, paragraph 2, merely stated that a refugee who was unlawfully present in the territory of a State and had applied for refugee status could not be expelled so long as his or her application was pending—something that concurred with actual practice. Of course, that could not be said to be a customary rule, but it should at least be possible to agree that it involved progressive development. There was no question of dismantling the 1951 Convention, and it was not true that States that wished to accede to the Convention might perceive the draft articles as putting up an obstacle to their accession. Mr. Murphy perhaps lacked the necessary detachment from the work carried out to date; he had extracted from the reports on the topic only the parts that supported his argument, whereas it was the reports as a whole as well as aspects of practice that needed to be taken into account. The plenary Commission had discussed the issues at great length: Mr. Murphy would find in the summary records on the work of the five previous sessions all the elements needed to justify the existence of draft article 6, paragraph 2, which corresponded to the actual practice of those who dealt with refugees.

36. Mr. KITTICHAISAREE said that he had certain reservations regarding the expression “refugee unlawfully present in the territory of the State”, which appeared in draft article 6, paragraph 2, and proposed to replace the word “refugee” with “alien”. The reason was that, once an alien had obtained refugee status, he or she was lawfully present in the territory of the State. If an alien did not obtain refugee status, he or she was not a “refugee” in the strict sense of the word.

37. Sir Michael WOOD said that Mr. Murphy had raised an important point about draft article 6, paragraph 2. He agreed that the wording of the paragraph did give rise to some difficulties, and he endorsed the points made by Mr. Kittichaisaree. He, too, found it curious that an alien should be considered a refugee before having obtained refugee status, but those were issues that could be settled on second reading and in the light of comments to be made in the Sixth Committee in 2012 or thereafter.

38. Mr. KAMTO (Special Rapporteur) said that he could not allow the Commission to say that it was not possible for a refugee to be present unlawfully in the territory of a State. Contrary to what Mr. Kittichaisaree and Sir Michael Wood had affirmed, article 31 of the 1951 Convention relating to the Status of Refugees, entitled “Refugees unlawfully in the country of refuge”, dealt precisely with that situation. There was thus nothing new about that notion.

39. The CHAIRPERSON suggested that the Commission should adopt draft article 6, and in so doing, indicate that it had given rise to differences of opinion that would be spelled out in the summary record of the meeting.

It was so decided.

Draft article 6 was adopted.

Draft article 7 (*Prohibition of the expulsion of stateless persons*)

Draft article 7 was adopted.

Draft article 8 (*Other rules specific to the expulsion of refugees and stateless persons*)

40. Mr. PARK, pointing out that the English expression “by law” had been translated into French as “*par le droit*” or “*par la loi*”, said that he knew from having attended the meetings of the Drafting Committee that the choice of those terms had been weighed very carefully. It was his understanding that one of the terms designated international and domestic law, whereas the other referred solely to domestic law. He wished to know if it would be possible, on second reading, to dispel any uncertainties that those terms might create.

41. Mr. HMOUD (Chairperson of the Drafting Committee) said that the commentary would clarify the meaning of the phrases but that the words “*par la loi*” in French did not refer exclusively to domestic legislation.

Draft article 8 was adopted.

Draft article 9 (*Deprivation of nationality for the sole purpose of expulsion*)

Draft article 9 was adopted.

Draft article 10 (*Prohibition of collective expulsion*)

Draft article 10 was adopted.

Draft article 11 (*Prohibition of disguised expulsion*)

Draft article 11 was adopted.

Draft article 12 (*Prohibition of expulsion for purposes of confiscation of assets*)

Draft article 12 was adopted.

Draft article 13 (*Prohibition of the resort to expulsion in order to circumvent an extradition procedure*)

Draft article 13 was adopted.

PART THREE. PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

CHAPTER I. GENERAL PROVISIONS

Draft article 14 (*Obligation to respect the human dignity and human rights of aliens subject to expulsion*)

Draft article 14 was adopted.

Draft article 15 (*Obligation not to discriminate*)

Draft article 15 was adopted.

Draft article 16 (*Vulnerable persons*)

Draft article 16 was adopted.

CHAPTER II. PROTECTION REQUIRED IN THE EXPELLING STATE

Draft article 17 (*Obligation to protect the right to life of an alien subject to expulsion*)

Draft article 17 was adopted.

Draft article 18 (*Prohibition of torture or cruel, inhuman or degrading treatment or punishment*)

42. Mr. McRAE, noting that, in the English version, the adjective “inhuman” was misspelled—the final letter “e” was missing—asked whether the Commission was doomed to repeat an error made years previously in the title of a convention, or whether it could correct it.

43. Sir Michael WOOD said that he was not convinced that it was an error and that he would prefer the matter to be decided on second reading.

It was so decided.

Draft article 18 was adopted.

Draft article 19 (*Detention conditions of an alien subject to expulsion*)

44. Mr. FORTEAU said it was rather surprising that draft article 19 did not contain any rule on the right to place in detention a person subject to an expulsion procedure. He recalled that in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice had made two fundamental contributions: First of all, in paragraph 77 of its judgment, it had stated that the prohibition of arbitrary arrest and detention applied not only to measures that deprived individuals of their liberty in the context of criminal proceedings, but also, in principle, to such measures in the context of an administrative procedure and, specifically, of an expulsion procedure. In paragraph 82 of the judgment, the Court had further stated that arrest and detention aimed at allowing an expulsion measure, without any defensible basis, must be characterized as “arbitrary” within the meaning of international law. When it came to the second reading, the Commission should consider incorporating such a provision in draft article 19 or as a draft article 18 *bis* that would cover prohibition of arbitrary arrest or detention for the purpose of carrying out an expulsion procedure.

45. Mr. McRAE proposed the deletion of the reference to paragraph 2 (a) in paragraph 3 (b), since that seemed to exclude paragraph 2 (b), although it was also applicable. Paragraph 3 (b) would then read, “Subject to paragraph 2, detention shall end ...”.

46. Mr. HMOUD (Chairperson of the Drafting Committee) said that although the matter had not been considered during the current session, he saw no problem with the deletion of the reference to paragraph 2 (a).

47. Mr. KAMTO (Special Rapporteur) said that he would go along with whatever the Commission decided.

Draft article 19, as thus amended and with a minor editorial correction in the French text, was adopted.

Draft article 20 (*Obligation to respect the right to family life*)

Draft article 20 was adopted.

CHAPTER III. PROTECTION IN RELATION TO THE STATE OF DESTINATION

Draft article 21 (*Departure to the State of destination*)

Draft article 21 was adopted.

Draft article 22 (*State of destination of aliens subject to expulsion*)

48. Mr. TLADI proposed the deletion, in paragraph 1, of the expression “where appropriate”, which seemed superfluous insofar as the will of the State prevailed in all cases over that of the alien subject to expulsion.

49. Mr. HMOUD (Chairperson of the Drafting Committee) said that the purpose of the expression was precisely to indicate that there was a hierarchy and that the will of the alien was subject to that of the receiving State and the expelling State.

Draft article 22 was adopted.

Draft article 23 (*Obligation not to expel an alien to a State where his or her life or freedom would be threatened*)

50. Mr. PETER, after thanking the Chairperson of the Drafting Committee for his clear introductory statement and the Special Rapporteur for his willingness to accommodate the diverse views expressed, said that he wished to discuss paragraph 2, in which the words “that does not apply the death penalty” posed a problem owing to the indirect message they sent to States. Did the phrase mean that a State whose legislation still provided for capital punishment was free to expel an alien to another State where the legislation also prescribed such punishment? Was it even desirable to draw a distinction between States where the death penalty was applied and those where it was not, if such a distinction gave the impression that one group was not obliged to behave in the same way as the other group? As a body of independent experts, the Commission must certainly be aware of the efforts being carried out within the United Nations to achieve the abolition of the death penalty, including the resolutions adopted by the General Assembly calling for a moratorium on executions.¹²⁶ Paragraph 2, which as currently drafted implied that States wishing to continue to apply the death penalty could do so, should therefore be amended, and he proposed that at the start of the paragraph, the words “that does not apply the death penalty” should be deleted.

51. Mr. HMOUD (Chairperson of the Drafting Committee) said that paragraph 2, according to which an alien could not be expelled to a State that applied the death penalty, was generally consistent with the provisions of the legislation in force in States that had abolished the death penalty or had applied a moratorium. A more general provision would most probably give rise to reservations by States that continued to apply the death penalty. In any event, it was a question of legal policy and the Commission had to make a decision on it.

52. Mr. KAMTO (Special Rapporteur) said that the provision did more than simply pose a problem of legal policy or of the message to be sent to the international community; it raised legal issues. While Mr. Peter’s concern was legitimate in terms of human rights, the Commission’s job was to survey the state of contemporary international law. Neither customary international law nor treaty law established any rule prohibiting the death penalty, however:

¹²⁶ General Assembly resolutions 62/149 of 18 December 2007, 63/168 of 18 December 2008 and 65/206 of 21 December 2010, entitled “Moratorium on the use of the death penalty”.

that was why campaigns for its abolition were conducted, as Mr. Peter himself had pointed out. As for the General Assembly resolution calling for a global moratorium on executions, also mentioned by Mr. Peter, it did not call on States to prohibit the punishment. The Commission was a body of independent experts responsible for explicating the state of existing law, and the issues it addressed were primarily legal as opposed to political.

53. Sir Michael WOOD said that the Special Rapporteur was right to recall that the issues before the Commission were above all legal ones. Nonetheless, Mr. Peter had raised a very important point by questioning the indirect message sent to States in paragraph 2. Perhaps his concerns could be met by drawing on the solution adopted by the drafters of the International Covenant on Civil and Political Rights. Faced with the same problem, in that article 6 of the Covenant presupposed that some States continued to apply the death penalty, the drafters had considered it useful to specify, in paragraph 6 of the article, that nothing in the article should be invoked to delay or to prevent the abolition of capital punishment by a State party to the Covenant.

54. The CHAIRPERSON said that he was in favour of paragraph 2 because it encouraged States which did not apply the death penalty to consider its abolition. He therefore proposed that the paragraph should be retained and that the points just made by the Special Rapporteur should be explained in a commentary to the paragraphs of the draft article.

It was so decided.

Draft article 23 was adopted.

Draft article 24 (*Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment*)

Draft article 24 was adopted.

CHAPTER IV. PROTECTION IN THE TRANSIT STATE

Draft article 25 (*Protection in the transit State of the human rights of an alien subject to expulsion*)

Draft article 25 was adopted.

PART FOUR. SPECIFIC PROCEDURAL RULES

Draft article 26 (*Procedural rights of aliens subject to expulsion*)

55. Mr. FORTEAU said that it seemed to him that paragraphs 1 (b) and 1 (d) might be too restrictive. The draft articles defined expulsion as a formal act or conduct whose effect was to compel an alien to leave the territory. As currently drafted, paragraphs 1 (a) and 1 (b) limited the right to effective remedies solely to the right to challenge an expulsion decision, not the expulsion itself in more general terms. Perhaps the word “decision” could be deleted from both paragraphs in order to align them with the broader formulation used in article 13 of the International Covenant on Civil and Political Rights, which allowed the alien to submit reasons against his or her expulsion.

56. Mr. KAMTO (Special Rapporteur) said that while Mr. Forteau’s comment seemed justified, draft article 26

and the rights it guaranteed were based on various international conventions, General Assembly resolutions and European Union directives. The commentary could provide some clarifications to take into account Mr. Forteau’s concern.

57. Mr. PETRIČ drew attention to paragraph 1 (f), which established the right of the alien to have the free assistance of an interpreter if he or she could not understand or speak the language used by the competent authority. If the Commission wished the draft articles to become treaties ratified by a sufficient number of States, it must keep in mind that it might be difficult, even impossible, for small States to comply with that type of provision. Instead of recasting the entire paragraph, he suggested that the words “as appropriate” could simply be inserted.

58. Mr. HASSOUNA said that several of the draft articles mentioned procedural rights or guarantees “provided by law”, without further explanation, and it was not clear whether that meant national or international law. It would be useful to clarify that point in the commentaries to the draft articles in question.

59. The CHAIRPERSON said that he took it that the Commission wished to adopt draft article 26.

It was so decided.

Draft article 26 was adopted.

Draft article 27 (*Suspensive effect of an appeal against an expulsion decision*)

Draft article 27 was adopted.

Draft article 28 (*Procedures for individual recourse*)

Draft article 28 was adopted.

PART FIVE. LEGAL CONSEQUENCES OF EXPULSION

Draft article 29 (*Readmission to the expelling State*)

Draft article 29 was adopted.

Draft article 30 (*Protection of the property of an alien subject to expulsion*)

Draft article 30 was adopted.

Draft article 31 (*Responsibility of States in cases of unlawful expulsion*)

60. Sir Michael WOOD proposed that, in the English version, the verb “engages” should be replaced with the word “entails”, in order to align the text with that of the articles on State responsibility.

It was so decided.

Draft article 31 was adopted, subject to that editorial amendment to the English text.

Draft article 32 (*Diplomatic protection*)

Draft article 32 was adopted.

Draft articles 1 to 32 contained in document A/CN.4/L.797, as amended, were adopted.

61. Mr. KAMTO (Special Rapporteur) said that he wished to extend his warm thanks to the current Chairperson of the Drafting Committee and to his predecessors, Mr. Vázquez-Bermúdez and Mr. Melescanu, for their remarkable work and the patience and skilfulness with which they had conducted the proceedings resulting in the document before the plenary Commission. He also wished to thank all those who had contributed to the work of the Drafting Committee and had helped to improve and enrich the draft articles. Even though the outcome was not perfect, the Commission now had a firm grounding, a guide, for what was not an easy topic. Lastly, he thanked the Secretariat for its outstanding work and the assistance provided to the different Chairpersons of the Drafting Committee and to himself; the quality of the Drafting Committee's report to the plenary Commission was also largely attributable to the Secretariat. Some minor adjustments might need to be made to the first part of the report so as to reflect, in a more balanced fashion, all the efforts that had contributed to the current outcome. That could easily be done by the Secretariat, in liaison with the Special Rapporteur and under the benevolent eye of the Chairperson of the Drafting Committee.

Treaties over time¹²⁷ (A/CN.4/650 and Add.1, sect. E)

[Agenda item 8]

REPORT OF THE STUDY GROUP

62. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that during the first part of the current session, the Study Group had begun its consideration of the third report by its Chairperson, entitled "Subsequent agreements and subsequent practice of States outside of judicial or quasi-judicial proceedings".¹²⁸ The Study Group had also addressed the format of future work on the topic and the possible outcome of such work. Some members had noted that although the report was based on a wealth of material and many States had expressed interest in the topic, only a limited number had provided examples of their practice, as the Commission had requested.¹²⁹ Members had also noted that the first three reports¹³⁰ by the Chairperson of the Study Group were interrelated and that the legal analysis and discussion would benefit from their being treated together. Several members had said that in view of the preparatory work that had been accomplished and of the need to focus the work on a specific outcome, the time had come for the Commission to change the format of its work on the topic and to appoint a special rapporteur.

¹²⁷ The study plan on the subject is reproduced in *Yearbook ... 2008*, vol. II (Part Two), annex I, p. 152, and the text of the preliminary conclusions of the Chairperson of the Study Group revised in the light of the debates held in the Study Group is in *Yearbook ... 2011*, vol. II (Part Two), para. 344.

¹²⁸ Document ILC(LXIV)/SG/TOT/INFORMAL/1/Rev.1; available only in English with distribution limited to members of the Commission.

¹²⁹ *Yearbook ... 2010*, vol. II (Part Two), paras. 26–28.

¹³⁰ See consideration of the preliminary report of the relevant jurisprudence of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction in *Yearbook ... 2010*, vol. II (Part Two), paras. 348–352, and *Yearbook ... 2011*, vol. II (Part Two), paras. 337–338; for consideration of the second report on jurisprudence under certain international economic regimes, international human rights regimes and other regimes, see *Yearbook ... 2011*, vol. II (Part Two), paras. 339–341.

63. He, like some members, considered that States might have commented more substantively on the topic if the reports and summaries of the debates, which had not been published in accordance with the procedure used for study groups, had been available to them. That was why he would welcome a change, at the current stage, in the format for the work on the topic that would allow the Commission to focus on the outcome of such work. It had first been necessary to identify, use, arrange and analyse the main sources of information on the topic, something that had been done in the first three reports and the discussion on them. Those reports could now be merged into a single document that could be made available to States and considered in plenary session.

64. A change in the format of the work would enable the Commission to more sharply define the scope of the topic. One of the main reasons why the Commission had decided to pursue its consideration of the topic within the format of a study group had been so as to determine whether the topic should be approached with a broad focus—which would entail an in-depth analysis of the termination and the formal amendment of treaties—or whether the topic should have a narrower focus on specific aspects relating to subsequent agreements and practice. Now that the Study Group had concluded that it would be preferable to limit the topic to the narrower issue of the legal significance of subsequent agreements and practice, one of the main reasons for the Study Group to exist was gone.

65. Assuming that the format for work on the topic would be changed as he recommended, he proposed that a report bringing together the three first reports should be prepared for the next session. The report should take into account the discussions in the Study Group and should also contain specific conclusions or guidelines. Once the document had been considered by the Commission at its sixty-fifth session in 2013, and after the discussion in the Sixth Committee on the Commission's report on its work, one or two further reports should be drafted on the practice of international organizations and the jurisprudence of national courts, as originally envisaged. Those reports would contain additional conclusions or guidelines, together with commentaries, that would supplement or modify, as appropriate, the work done based on the first reports. The Commission would thus be able to complete its work on the topic during the current quinquennium, on the understanding that the topic would remain within the scope of the law of treaties. The main focus would be on the legal significance of subsequent agreements and subsequent practice for the interpretation of treaties (art. 31 of the 1969 Vienna Convention on the law of treaties).

66. The members of the Study Group, who had endorsed his proposals, recommended that the plenary Commission should change the current format for consideration of the topic and appoint a special rapporteur. They had also agreed that the question of the exact title of the topic should be discussed and resolved before the close of the current session and that in the meantime the Study Group should continue its work.

67. The CHAIRPERSON thanked Mr. Nolte for his report, in which the Study Group on treaties over time recommended that the format for consideration of the topic

should be changed and that a special rapporteur should be appointed. It was his understanding that the Study Group had made that recommendation with Mr. Nolte, its current Chairperson, in mind. He therefore asked whether the Commission wished to adopt the Study Group's recommendation to consider the topic as a "regular" topic and to appoint Mr. Nolte as Special Rapporteur.

68. Sir Michael WOOD said, first of all, that the members of the Study Group had been careful to avoid the word "regular", which implied that there were some topics that were irregular. Secondly, the Study Group had proposed that the title of the topic should be amended. That was a matter that would need to be dealt with at a later stage, unless Mr. Nolte had a proposal to make.

69. The CHAIRPERSON said that Mr. Nolte had proposed that the matter should be taken up at a later stage.

70. Mr. GEVORGIAN said that he was not certain that he had understood correctly: it seemed to him that Mr. Nolte had made a somewhat different proposal at the end of his report. He himself thought it would be difficult to appoint a special rapporteur without knowing the title or the precise scope of the topic.

71. Mr. NOLTE (Chairperson of the Study Group on treaties over time) explained that the document distributed to the members of the Commission was the same as the one discussed by the Study Group. Any changes made were in response to comments by members of the Study Group. As far as the title was concerned, it had been agreed that it would not be entirely new or completely different. The Study Group had agreed that the expression "subsequent agreements and subsequent practice" should appear in the title but had not taken any decision as to whether an element of the original title, namely "Treaties over time", should be retained. His impression was that such matters were not urgent and that the Commission could resolve them at a later date.

72. The CHAIRPERSON asked whether Mr. Nolte agreed that the topic should be retained and would be willing to become Special Rapporteur.

73. Sir Michael WOOD pointed out that the last two paragraphs of the document read out by Mr. Nolte reflected the position of the Study Group: a new title should be adopted and a special rapporteur appointed at the same time. He proposed that the Commission should decide on the matter on Friday, 1 June 2012.

74. The CHAIRPERSON, after reading out the relevant passage in the document, said that he would prefer the Commission to take a decision there and then.

75. Mr. NIEHAUS said that the Study Group's recommendation was clear and that the Commission should go along with it.

76. Mr. HMOUD proposed that the Commission should start by appointing Mr. Nolte as Special Rapporteur, which would give the Study Group time to continue its work and to take a decision on the title.

77. Mr. ŠTURMA asked whether it would be unusual for the Commission to agree on a provisional title, to be amended subsequently. If such a solution was possible, he shared Mr. Hmoud's view and proposed that the new title should appear in brackets.

78. Mr. KITTICHAISAREE said that the question must be put in context. For example, what procedures would be used for future meetings of the Study Group if a special rapporteur was appointed now?

79. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that the appointment of a special rapporteur would in no way change the working methods of the Study Group.

80. Mr. PETRIČ said that the Commission should go along with the position of the Chairperson of the Study Group. As for the title, the Commission could deal with that on Friday, 1 June or during the second part of the session.

81. Mr. WISNUMURTI urged the Commission to be pragmatic. The original title was too poetic and it should be changed; Mr. Nolte should then be appointed Special Rapporteur. The problem could thus be resolved without delay.

82. Ms. JACOBSSON, endorsing the remarks of the previous speaker, said that she saw no reason to defer the decision.

83. Mr. NOLTE (Chairperson of the Study Group on treaties over time), responding to a request from the Chairperson to repeat the proposed title, said that he had not in fact made such a proposal, out of respect for the Study Group. As he had indicated, the title should contain the notion of "subsequent agreements and practice". Some members of the Study Group would prefer the title to make it clear that the study focused on the interpretation of treaties, but in his own view, it was important not to limit the scope of the topic. He therefore proposed the following title: "Subsequent agreements and subsequent practice in respect of treaties".

84. Mr. HMOUD said that he had no objection to the Commission's appointing Mr. Nolte as Special Rapporteur straight away. It was with regard to the title of the topic that he would prefer to wait.

85. The CHAIRPERSON said that he found it rather strange to appoint a special rapporteur when the topic did not yet have a title. The Commission should first agree on the topic and then appoint a special rapporteur.

86. Sir Michael WOOD said that the Commission should appoint the special rapporteur and ensure that the title reflected what should be the main focus of the topic, namely the interpretation of treaties. He was not in favour of the title just proposed, because it would encompass amendments to treaties, which was not the desired objective.

87. Mr. KAMTO said that he had participated in the work of the Study Group and that what were now being discussed were merely procedural matters. It was clear to him that the Study Group wished Mr. Nolte to be appointed Special Rapporteur, and the Commission did

not seem to have any objections to that, but he failed to see why the Commission needed to take urgent action. A proposal to amend the title of the topic had been made, without any explanation as to when the change would be made or in what context. He endorsed the comments by Mr. Hmoud and the Chairperson and said he would be uncomfortable with appointing a special rapporteur when the topic had not yet been defined.

88. The CHAIRPERSON said that, regrettably, the Commission was not able to take a decision now on the matters at hand, but it was out of the question that it should do so the following Friday. It would accordingly need to take up those matters during the second part of the session.

89. Mr. NIEHAUS said that he did not understand where the problem lay: as far as the title was concerned, it would suffice to follow the Study Group's recommendation. In his view, the Commission should accept the title proposed by Mr. Nolte, on the understanding that it could amend it subsequently, and it should appoint a special rapporteur.

90. The CHAIRPERSON said that the only solution was to schedule another plenary meeting so that the Commission could settle the matter.

91. Sir Michael WOOD proposed that a plenary meeting should be held on Thursday, 31 May 2012.

92. The CHAIRPERSON urged the members of the Commission to come to an agreement so that a decision could be taken on Thursday, 31 May 2012.

The meeting rose at 6 p.m.

3136th MEETING

Thursday, 31 May 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Treaties over time (*continued*) (A/CN.4/650 and Add.1, sect. E)

[Agenda item 8]

1. The CHAIRPERSON recalled that at the 3135th meeting, the Chairperson of the Study Group on treaties over time had presented an oral report on the work of the Study Group during the first part of the current session. In particular, he had reported that the

Study Group had adopted a recommendation that the Commission should change the format of its work on the topic and appoint a special rapporteur. According to the Study Group, it would be understood that the main focus of the topic would be on the legal significance of subsequent agreements and subsequent practice for the interpretation of treaties (1969 Vienna Convention on the law of treaties, art. 31) and related matters, as had been explained in the original proposal for the topic.¹³¹

2. During the debate in the Commission, the recommendation of the Study Group had received general support, and it had been proposed that Mr. Nolte should be appointed Special Rapporteur. At the same meeting, there had also been a debate as to whether it would be appropriate, should the recommendation of the Study Group be followed, to decide at the same time on the title under which consideration of the topic would continue.

3. He had been informed that, following informal consultations conducted by the Chairperson with members of the Study Group, general agreement had been reached that the title of the topic should be "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

4. Accordingly, if he heard no objection, he would take it that the Commission wished (a) to change, with effect as from the sixty-fifth session, the format of the work on that topic as suggested by the Study Group; and (b) to appoint Mr. Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

It was so decided.

The meeting rose at 10.20 a.m.

3137th MEETING

Friday, 1 June 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON recalled that the provisional programme of work for the second part of the session,

¹³¹ *Yearbook ... 2008*, vol. II (Part Two), annex I, para. 11.

* Resumed from the 3133rd meeting.

which had been issued the week before, would undoubtedly be modified and that the final programme for the first two weeks would be issued at the beginning of the second part of the session. He invited the Chairperson of the Working Group on the long-term programme of work to read out the list of members of the Group.

2. Mr. McRAE (Chairperson of the Working Group on the long-term programme of work) said that members of

the Working Group would be Mr. Caffisch, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Singh, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood and Mr. Šturma (*ex officio*).

The meeting rose at 10.15 a.m.

SUMMARY RECORDS OF THE SECOND PART OF THE SIXTY-FOURTH SESSION

Held at Geneva from 2 July to 3 August 2012

3138th MEETING

Monday, 2 July 2012, at 3.05 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters¹³² (A/CN.4/650 and Add.1, sect. C, A/CN.4/652,¹³³ A/CN.4/L.812)¹³⁴

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his fifth report on the protection of persons in the event of disasters contained in document A/CN.4/652.

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that his fifth report on the protection of persons in the event of disasters comprised several chapters. The introduction briefly described the Commission's progress on the topic since he had presented his preliminary report in 2008.¹³⁵ The practical results were plain to see; on the basis of the proposals that he had put forward in his second¹³⁶ and

¹³² At its sixty-second session (2010), the Commission provisionally adopted draft articles 1 to 5 and commentaries thereto (*Yearbook ... 2010*, vol. II (Part Two), paras. 330–331). At its sixty-third session (2011), the Commission provisionally adopted draft articles 6 to 11 and commentaries thereto (*Yearbook ... 2011*, vol. II (Part Two), paras. 288–289).

¹³³ Reproduced in *Yearbook ... 2012*, vol. II (Part One).

¹³⁴ Mimeographed; document available from the Commission's website.

¹³⁵ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

¹³⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615.

fourth¹³⁷ reports, the Commission had provisionally adopted 11 draft articles with commentaries thereto. He hoped that draft article 12, on which it had not been possible to take a decision at the sixty-third session owing to a lack of time, would be adopted at the current session.

3. He then provided a detailed summary of the views expressed on the topic in the Sixth Committee by States and organizations during the sixty-sixth session of the General Assembly (paras. 10–54). Section A of that chapter recorded general comments, while sections B, C, D, E and F summarized the remarks of States and international organizations with regard to the 11 draft articles already provisionally adopted by the Commission and the proposed draft article 12.

4. Section G summarized the comments made orally in response to the question that the Commission had decided, in the absence of the Special Rapporteur, to pose in chapter III, section C, of its report on the work of its sixty-third session,¹³⁸ namely, whether States' duty to cooperate with the affected State in disaster relief matters included a duty on States to provide assistance when requested by the affected State. Paragraph 68 of his fifth report reflected his own position on the matter.

5. The Commission's report on the work of its sixty-third session also asked for information concerning the practice of States on the topic, including examples of domestic legislation.¹³⁹ No written answers had been received on either of those matters when the fifth report was drafted, but since then Belgium had sent a communication in which it had provided a detailed description of Belgian State practice with regard to domestic legislation and international agreements on mutual assistance and had explained the reasons for its negative answer to the Commission's question on the duty to provide assistance.

6. Many speakers in the Sixth Committee had likewise replied to that question in the negative (A/CN.4/650 and Add.1, para. 39), a position with which he agreed,

¹³⁷ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

¹³⁸ *Yearbook ... 2011*, vol. II (Part Two), para. 44.

¹³⁹ *Ibid.*, para. 43. See also *Yearbook ... 2008*, vol. II (Part Two), para. 31.

having analysed the relevant practice prior to drawing up his proposal for draft article 12. That was why the draft article was cast in terms of a “right to offer assistance” and not a “duty to provide assistance”. On the other hand, the tentative phrase “the Commission has taken the view that States have a duty to cooperate”, which introduced the question in paragraph 44 of its report on the work of the sixty-third session,¹⁴⁰ was misleading, since the Commission had already decided by consensus that draft article 5 should unequivocally set forth the duty to cooperate, a duty that was one of the seven principles proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, annexed to General Assembly resolution 2625 (XXV) of 24 October 1970.

7. The growing concern of States and international organizations to regulate the different phases involved in responding to disasters and their manifold consequences had been demonstrated once again by the special attention that the General Assembly had paid to that matter at its sixty-sixth session and by its adoption of no less than a dozen resolutions addressing various aspects of the subject and specific situations that had arisen in various parts of the world.

8. The competent international organizations and the components of the International Red Cross and Red Crescent Movement had stepped up their mandated activities in 2011. The third session of the Global Platform for Disaster Risk Reduction and the 31st International Conference of the Red Cross and Red Crescent had taken place in that year. At the Conference, the International Federation of Red Cross and Red Crescent Societies (IFRC) had presented a pilot version of a Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.¹⁴¹ It was hoped that the final version could be adopted by the end of the current year.

9. The outcome document of the United Nations Conference on Sustainable Development (Rio+20), entitled “The future we want”,¹⁴² contained provisions in paragraphs 186 to 189 on disaster risk reduction. Heads of State and of Government and high-level representatives reaffirmed their commitment to the Hyogo Framework for Action 2005–2015,¹⁴³ recognized the importance of early warning systems, encouraged donors and the international community to enhance international cooperation in support of disaster risk reduction in developing countries and committed themselves to undertaking and strengthening in a timely manner risk assessment and disaster risk reduction instruments. They likewise stressed the importance of stronger interlinkages among disaster risk reduction, recovery and long-term

development planning and called on all stakeholders to take the appropriate and effective measures to reduce exposure to risk for the protection of people, infrastructure and other national assets from the impact of disasters.

10. In view of the comments made in the Sixth Committee, he had considered it wise to analyse the duty to cooperate in greater detail in an entire chapter of his fifth report (paras. 79–116). As he had demonstrated in previous reports, cooperation played a central role in the context of disaster relief and was imperative if disaster response were to be rapid and efficient. Admittedly, the nature of cooperation was shaped by its purpose. In the context of providing disaster relief, the duty to cooperate had to strike a fine balance between three important principles of international law if it were to prove legally and practically effective. First, the duty to cooperate must not impinge on the national sovereignty of the affected State. That aspect was examined in section A of the report, entitled “The nature of cooperation and respect for the affected State’s sovereignty”. Second, the duty to cooperate imposed an obligation of conduct on assisting States. That obligation of conduct was covered in section B. Third, as was explained in section C entitled “Categories of cooperation”, cooperation had to be relevant and confined to offering the various forms of assistance required in the event of a disaster. A perusal of the relevant international instruments had shown that the duty to cooperate encompassed a multitude of technical, scientific and logistical activities, which included coordination of communications and information-sharing as well as the provision of scientific and technical expertise to boost the response capacity of the affected State and provision of personnel, supplies and equipment. In more recent instruments, the focus had shifted to disaster preparedness, prevention and mitigation.

11. In the light of the considerations set out in that chapter of the report, he had arrived at the conclusion that there were grounds for including an additional draft article highlighting the significance of the duty to cooperate established in draft article 5. The provisional title of the new draft article A (para. 116) was “Elaboration of the duty to cooperate” and it read as follows:

“States and other actors mentioned in draft article 5 shall provide to an affected State scientific, technical, logistical and other cooperation, as appropriate. Cooperation may include coordination of international relief actions and communications, making available relief personnel, relief equipment and supplies, scientific and technical expertise and humanitarian assistance.”

12. Its wording was closely modelled on that of paragraph 4 of article 17 (Emergency situations) of the articles on the law of transboundary aquifers¹⁴⁴ adopted by the Commission at its sixtieth session in 2008. The close similarity of the texts was justified in that article 17, paragraph 4, provided for the duty to cooperate when other States experienced an emergency. The definition of “emergency” was given in paragraph 1 of the same article

¹⁴⁰ See footnote 138 above.

¹⁴¹ The pilot version of November 2011 is available from [http://www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20\(English\).pdf](http://www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20(English).pdf).

¹⁴² General Assembly resolution 66/288 of 27 July 2012, annex.

¹⁴³ Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolution 2, “Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters”.

¹⁴⁴ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

and had been drawn from article 28 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. The commentary to article 28, paragraph 1, of the draft articles on the law of the non-navigational uses of international watercourses explained what elements had to be present for there to be an emergency,¹⁴⁵ a notion that was akin to that of a disaster as defined in draft article 3 on the topic under consideration. While both draft article 17, paragraph 4, and his proposed draft article A listed the same four categories of cooperation discussed in points 1 to 4 of section C of the chapter in his fifth report on the development of the obligation to cooperate, neither article referred to cooperation in disaster preparedness, prevention and mitigation. In his own topic, the reason for that temporary omission was that elements of legal relevance to the pre-disaster phase that were not excluded from the scope of the draft articles would be considered in a subsequent report.

13. The duty of the affected State and assistance providers to consult each other in order to determine the duration of external assistance was another facet of the duty to cooperate. That duty was evident from the description of practice regarding termination of assistance to be found in the penultimate chapter of the report. Although the affected State and the actors providing assistance retained the right to express their wishes as to when it should end, the duty to cooperate obliged both sides to consult one another on the matter. Consultations could be held before the provision of assistance or in the course of it, at the initiative of either party. Draft article 14, entitled “Termination of assistance”, read as follows:

“The affected State and assisting actors shall consult with each other to determine the duration of the external assistance.”

14. On concluding his introduction of his fourth report¹⁴⁶ in 2011, he had emphasized that it was quite clear that the affected State could make its acceptance of an offer of assistance subject to certain conditions that guaranteed the full exercise of its sovereignty, and he had announced that he would examine those conditions in his fifth report.¹⁴⁷ He had devoted a chapter on the conditions for the provision of assistance by addressing the issue from three points of view (paras. 117–181). Section A concerned compliance with national laws. Section B dealt with identifiable needs and quality control, and section C examined limitations on conditions under international and national law.

15. There was no sharp dividing line between those conditions on the provision of assistance. They existed side by side and might overlap to a certain extent. In general terms, they were reflected implicitly or explicitly in the draft articles already provisionally adopted by the Commission. For example, the element of identifiable needs was mentioned in draft article 2, which stated: “The purpose of the present draft articles is to facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.” Similarly, paragraph 2 of draft article 9

(Role of the affected State) alluded both to the need to comply with national laws and to limitations on conditions under national law in its wording: “The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.” To some extent, reference was made to both of those aspects in draft article 10 on the duty of the affected State to seek assistance when a disaster exceeded its national response capacity. Draft article 2, which demanded full respect for the rights of affected persons, draft article 4 on the relationship of the draft articles with international humanitarian law, draft article 6 on humanitarian principles in disaster response, draft article 7 on human dignity and draft article 8 on human rights all touched on the other element of section C, namely, limitations on conditions under international law. The principle underlying the notion of setting conditions on the delivery of assistance was established in draft article 11, paragraph 1, which stipulated that the provision of external assistance required the consent of the affected State. The affected State’s power to set the conditions that had to be met by any offer of assistance was the corollary to its central role in providing disaster relief, a role recognized in draft article 9, paragraph 1, which stipulated: “The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.”

16. In the light of the foregoing, the question arose whether it was necessary to formulate a series of provisions covering the conditions that could be imposed in the various areas in which assistance might be provided and the modalities of providing it in each of those areas. That question could only be answered after an attempt to identify and assess the range of possible conditions, which was the aim of the chapter on the conditions for the provision of assistance.

17. Section A of the chapter dealt with compliance with national laws, focusing on two aspects: first, the obligation of assisting actors to comply with national laws; and second, the need for the affected State to make exceptions to facilitate prompt and effective assistance. Under the first aspect, the Special Rapporteur also considered the obligation of actors providing assistance to cooperate with the national authorities of the affected State and discussed in particular the responsibilities of the head and other personnel of the relief operation. Under the second aspect, he considered the obligation of the affected State to provide the relevant information on laws and regulations to assisting actors and discussed the need in some instances to exempt relief operations from compliance with national laws relating, in particular, to privileges and immunities, visa and entry requirements, customs requirements and tariffs, quality of goods and equipment, and freedom of movement.

18. Section B discussed how the affected State might condition the provision of assistance on the identifiable needs of the persons concerned and the quality of assistance. Section C dealt with limitations on conditions under international and national law, with emphasis on core humanitarian obligations and human rights. The discussion of reconstruction and sustainable development was included because, as the commentary to draft article 1

¹⁴⁵ *Yearbook ... 1994*, vol. II (Part Two), p. 129.

¹⁴⁶ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

¹⁴⁷ *Ibid.*, vol. I, 3102nd meeting, para. 25.

explained, the scope *ratione temporis* of the draft articles was not only limited to the immediate post-disaster response but also encompassed the recovery phase, including reconstruction.¹⁴⁸ A reference to sustainable development was justified, as the link between that concept and the phases of the disaster cycle was being increasingly emphasized in relevant declarations and resolutions of the United Nations and conferences held under its auspices, including the recent Rio+20 Conference. Lastly, section C included a discussion of the obligations that an affected State's own laws might impose with regard to the setting of conditions.

19. This chapter demonstrated that the setting of conditions by the affected State on the provision of assistance constituted a specific exercise of a power stemming immediately and directly from the duty of the affected State, by virtue of its sovereignty, to ensure the protection of persons and provision of disaster relief and assistance on its territory, as stated in draft article 9, paragraph 1. Consequently, for the purposes of the draft articles, it would suffice to specify that the affected State could impose conditions on the provision of assistance within certain limits, using a general and simplified formulation. The Special Rapporteur in his third report¹⁴⁹ had proposed a draft article 8 entitled "Primary responsibility of the affected State", which read in part as follows: "The State retains the right, under its national law, to direct, control, coordinate, and supervise such assistance within its territory."¹⁵⁰ That draft article incorporated the phrase "under its national law" from the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, thus emphasizing that the appropriate way for the affected State to exercise its operational control was through its own legal system. The Commission, however, when provisionally adopting the text of the proposed draft article 8 as current draft article 9 (Role of the affected State), had eliminated the phrase "under its national law". The Drafting Committee had explained that, while an earlier version of the paragraph had referred to the source of the primary role as being "under its national law", that phrase had been deleted since it was not always the case that internal law existed to regulate the matter, nor that such law always covered all of the relevant aspects. That position was reflected in paragraph (6) of the commentary to draft article 9.¹⁵¹

20. The position taken by the Commission was understandable in the context of a provision outlining the role of the affected State. However, in the very different context of the imposition of conditions on the provision of assistance, he thought it useful to propose the inclusion of a new draft article that would cover the whole matter in a general and simplified way. The draft article would reaffirm the right of the affected State, by virtue of its sovereignty and as an expression of its consent, to impose conditions on the provision of assistance, conditions that must be in keeping with national and international law.

The draft article 13 that he proposed in paragraph 181, which was entitled "Conditions on the provision of assistance", therefore read as follows:

"The affected State may impose conditions on the provision of assistance, which must comply with its national law and international law."

21. In addition to the growing interest shown by States, international entities and non-governmental organizations in the topic of disasters, the academic world was increasingly focusing on legal regulation of the disaster cycle. The Commission could take satisfaction in the fact that the increased attention to the issue coincided with the Commission's undertaking of, and rapid progress in, the development of draft articles on the protection of persons in the event of disasters. He recalled that a former Commission member had called the topic an idea that, while it might seem attractive at first sight, should be eliminated from the programme of work as the Commission did not have the means or the expertise to examine it thoroughly. However, the Commission, by adopting 11 draft articles in two successive sessions (2010 and 2011), had demonstrated that it was fully capable of bringing its work on the topic to fruition.

22. Individual Commission members had also been involved in a number of initiatives related to the topic of disasters, and the recently published *Challenges of Contemporary International Law and International Relations: Liber Amicorum in Honour of Ernest Petrič* included three essays in which members of the Commission referred to its work on the topic of the protection of persons in the event of disasters.¹⁵² One essay, by Mr. Perera, had stressed the balanced nature of the draft articles provisionally adopted thus far.¹⁵³

23. The third essay in the above-mentioned *Liber Amicorum* was by another Commission member, Mr. Vasciannie,¹⁵⁴ who had been the author of the question posed to States by the Commission in 2011 and the driving force behind the transformation of the commentaries to draft articles 10 and 11 into summaries of the debate. In the section of his essay in the *Liber Amicorum* that dealt with the protection of persons in the event of disasters, Mr. Vasciannie focused on two issues that, in his view, the Commission had not been able to resolve.¹⁵⁵ The first was whether States could use force to ensure that a State affected by a disaster was obliged to accept outside assistance. The discussion had not actually occurred in the terms Mr. Vasciannie described, as could be seen from the summary records of the Commission's meetings. In any case, the issue had been definitively resolved by the Commission, which had, from the start, supported the position that the Special Rapporteur had explicitly and unequivocally espoused in his reports, namely that the

¹⁴⁸ *Yearbook ... 2010*, vol. II (Part Two), p. 185, paragraph (4) of the commentary.

¹⁴⁹ *Ibid.*, vol. II (Part One), document A/CN.4/629.

¹⁵⁰ Reproduced, *ibid.*, vol. II (Part Two), footnote 1339.

¹⁵¹ *Yearbook ... 2011*, vol. II (Part Two), p. 158.

¹⁵² M. Pogačnik (ed.), *Challenges of Contemporary International Law and International Relations: Liber Amicorum in Honour of Ernest Petrič* (Nova Gorica, Slovenia, European Faculty of Law, 2011).

¹⁵³ *Ibid.*, "The role and contribution of the ILC in meeting challenges of contemporary international law and international relations", pp. 313–325, in particular pp. 322–324.

¹⁵⁴ *Ibid.*, "The International Law Commission: A Caribbean perspective", pp. 385–404.

¹⁵⁵ *Ibid.*, pp. 402–404.

notion of the “responsibility to protect” did not apply in the context of the response to disasters. As paragraph 164 of the report of the Commission on the work of its sixty-first session indicated,¹⁵⁶ the Commission had endorsed the Special Rapporteur’s position on the issue.

24. The second issue raised by Mr. Vasciannie concerned the duty to cooperate, a fundamental principle of international law enshrined in the Charter of the United Nations. In his critique of the principle in his essay, Mr. Vasciannie, to support his position, had quoted a text supposedly adopted by the Drafting Committee. Unfortunately, the provision reproduced in his article was not the version presented by the Drafting Committee at the sixty-first session and provisionally adopted by the Commission at the sixty-second session as draft article 5 (Duty to cooperate).¹⁵⁷

25. In closing, he wished to stress that the topic at hand, unlike some others included in the Commission’s current programme of work, had been included, not at his suggestion or that of any other member of the Commission, but at the suggestion of the Commission secretariat, which was an integral part of the Office of Legal Affairs. The secretariat, like the Commission, had been of the view that the topic fell under the rubric of “new developments in international law and pressing concerns of the international community”,¹⁵⁸ one of the criteria for selecting topics that was established by the Commission at its fiftieth session. He, as Special Rapporteur, had drafted his five reports, not as part of a personal crusade, but to enable the Commission to develop a balanced approach to the issue and to build the momentum needed for rapid progress—both of which it had done. He hoped that in its future work on the topic, the Commission would be able to maintain that approach and that momentum so as to consolidate the gains achieved thus far through its collegial efforts.

26. Mr. MURASE said that he agreed with the substance of draft article A as proposed by the Special Rapporteur. However, he would like to see the duty to cooperate approached from a different angle. In fact, he would like for the formulation of the draft articles, in general, to be more practical, rather than to consist merely of an enumeration of abstract concepts such as solidarity, impartiality, neutrality and, in particular, the duty to cooperate. While no one would object to the general proposition expressed in draft article A, in his view, the Commission’s approach should be more relevant to the actual needs of the international community and should utilize actual disaster situations as a basis for determining what type of cooperation was required.

27. Immediately following disasters of great magnitude, such as the earthquake and tsunami off the Pacific coast of Tohoku that struck Japan in 2011, military forces often provided the only means of effective relief. As self-supporting units, they were well organized and could carry out widespread operations swiftly and systematically. They were also well equipped with communications and other technologies, commanded a high level of

expertise and large numbers of trained personnel and had at their disposal helicopters, hospital ships and other essential equipment. Non-governmental organizations and volunteers, on the other hand, were not usually self-supporting and therefore could not alone provide adequate relief in the immediate aftermath of a disaster.

28. In the case of Japan, the scale of the 2011 earthquake had far exceeded the country’s national response capability, and Japan had gratefully accepted offers from other countries to send their military personnel to the affected regions, which had helped to save many lives. However, inviting a foreign military force into one’s territory without a status-of-forces agreement was a sensitive matter. Even in respect of countries such as the United States of America, with which Japan had concluded a security treaty that allowed for the stationing of United States troops on Japanese soil, the relief operations conducted by those troops in 2011 technically fell outside the scope of that treaty and its related status-of-forces agreement. It would have been desirable for Japan to have concluded a status-of-forces agreement that focused specifically on disaster relief activities with the United States and the other countries that had provided it with assistance using military personnel and supplies. The absence of such an agreement made it difficult both for countries sending and for those receiving military personnel.

29. It was clearly out of the question for States to send military forces without the consent of the affected State. After the 2008 cyclone that had struck Myanmar, France and the United States had sent naval ships carrying humanitarian supplies to help cyclone victims but had been denied permission to enter Yangon Port by the Government of Myanmar. Regardless of the good intentions of those and other States offering assistance, the humanitarian supplies provided in that case should have been delivered by commercial ships, instead of military vessels, in the absence of relevant agreements with the affected State.

30. Accordingly, he proposed that the Commission should elaborate a model status-of-forces agreement for humanitarian relief operations in the event of disasters, which could be attached to the draft articles on the current topic. Even though such a model related to the pre-disaster phase and might be regarded as falling outside the scope of the project as envisaged by the Special Rapporteur, it would nonetheless be a useful contribution by the Commission.

31. In the period immediately following a disaster, an affected State often lacked the capacity to negotiate a status-of-forces agreement. When Japan had sent its Self-Defence Forces to Indonesia and Thailand in the aftermath of the 2005 tsunami, all sides had tried to negotiate such an agreement, but to no avail. If they had had a model status-of-forces agreement elaborated by the Commission, they could have agreed to apply it provisionally until such time as an individual agreement had been worked out. Such a model agreement could also have helped to expedite the preparation of the definitive agreement.

32. He wished to draw attention to the “Indonesian-Australian paper: a practical approach to enhance regional cooperation on disaster rapid response”, which had been

¹⁵⁶ *Yearbook ... 2009*, vol. II (Part Two), p. 137.

¹⁵⁷ *Yearbook ... 2010*, vol. II (Part Two), p. 172, and pp. 188–190 for the commentary thereto.

¹⁵⁸ *Yearbook ... 1998*, vol. II (Part Two), para. 553.

endorsed on 10 October 2011 by the East Asia Summit and the Association of Southeast Asian Nations (ASEAN) Regional Forum. Paragraph 17 of that proposal stated that “EAS participating countries should consider mechanisms to allow rapid deployment and acceptance of assistance personnel and supplies, including through the development and use of voluntary model arrangements and/or binding bilateral agreements, taking into account the existing mechanisms in the region”.¹⁵⁹

33. The Commission could develop a model status-of-forces agreement for disaster relief operations that was similar to the United Nations model status-of-forces agreement for peacekeeping operations,¹⁶⁰ which was intended to facilitate swift reception and deployment. The 1990 model provided details on such aspects as exemptions from entry and departure procedures; freedom of movement; the wearing of uniforms; exemption from duties or taxes and export-import restrictions on goods and equipment; communications; the use of vehicles, vessels and aircraft; and temporary domestic legal status, including immunity from the jurisdiction of the host country and the settlement of claims. In the recent practice of the Security Council, the model status-of-forces agreement was applied provisionally until the conclusion of an individual agreement between the relevant parties.

34. It was unclear what the Special Rapporteur had intended when characterizing the duty to cooperate as an “obligation of conduct and not result” in paragraphs 86 and 88 of his fifth report. In his view, the general and discretionary nature of the duty to cooperate did not reach the level of either an “obligation of result” or an “obligation of conduct”, as understood in the context of the regime of State responsibility. The expression “obligation ... of conduct and not result”¹⁶¹ did appear in paragraph (4) of the commentary to draft article 17, paragraph 2, of the final draft articles on the law of transboundary aquifers, which set forth the specific obligations of the States concerned, but it did not appear in paragraph (9) of the commentary to draft article 17, paragraph 4, which set forth a general duty of cooperation.

35. Although he agreed with the substance of draft article 13 (Conditions on the provision of assistance), it was also important to ensure the necessary derogations from national law in the event of disasters. For example, rescue dogs should be permitted to enter an affected State without undergoing the normal quarantine procedure, and foreign medical doctors should be permitted to work in an affected State without licences and certificates. That principle should be reflected in draft article 13 as a saving clause.

36. With regard to draft article 14 (Termination of assistance), he was not sure that it was necessary to state the obvious, and he was concerned at the use of the word “shall” in that context. That said, he was in favour of referring all the draft articles to the Drafting Committee.

¹⁵⁹ Available from the website of the Ministry of Foreign Affairs of Indonesia (<https://www.kemlu.go.id/Documents/Indonesian%20-%20Australian%20Paper/Indonesia-Australia%20Paper%20-%20A%20Practical%20Approach%20to%20Enhance%20Regional%20Cooperation%20on%20Disaster%20Rapid%20Response.pdf>).

¹⁶⁰ Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General (A/45/594).

¹⁶¹ *Yearbook ... 2008*, vol. II (Part Two), p. 41.

37. Mr. FORTEAU said that he welcomed the attention that the Special Rapporteur had paid to the questions of prevention and preparedness in paragraphs 114 and 115 of his report—a matter that the Commission had emphasized at its sixty-third session. It would be useful to incorporate more explicit reference to those questions in the draft articles, especially in draft article A proposed by the Special Rapporteur in his fifth report.

38. In order to address what might be called “legal” prevention or preparedness, the Commission should consider adding a provision enumerating the various types of domestic laws that States could enact in order to enable them to offer or receive assistance in the event of disasters, since such legislation was an important factor in determining the operational success of assistance efforts. Along those lines, paragraph 11 of the fifth report cited a number of examples of domestic legislation. The inclusion of a reference to the pilot version of a Model Act being developed by IFRC,¹⁶² mentioned in paragraph 190 of the fifth report, might be quite useful in that regard. Mr. Murase’s proposal to provide a draft model status-of-forces agreement was a good example of legal prevention and deserved serious consideration.

39. With regard to draft article A, the Special Rapporteur’s proposed inclusion of a non-exhaustive list of the means of cooperation might be debatable, since the normative scope of that provision was unclear. Nonetheless, the list did provide some very useful specifics, which might even be supplemented. For instance, it seemed legitimate to include a reference to financial assistance, which could be one of the means used by other States to help the affected State cope with a disaster. In addition, it might be necessary to include a paragraph stipulating that assisting States should consult affected States in order to determine what kind of assistance the latter considered to be most appropriate, following the example of the Inter-American Convention to Facilitate Disaster Assistance cited in paragraph 113 of the fifth report. Draft article A should also lay down certain requirements concerning the conduct of the affected State in terms of the duty to cooperate. The Special Rapporteur had given several such examples in paragraphs 101, 102 and 108 of his report, but the obligations of the affected State were not currently covered by draft article A.

40. That said, draft article A posed a fundamental problem, which the Special Rapporteur described in paragraph 81 of his report as “an attempt to identify the contours of the duty of cooperation”. In other words, draft article A was intended to elaborate on draft article 5. In reality, however, that was not the case, as draft article A did not deal with the duty to cooperate, as such. Rather, it proposed—which was quite different—a duty to provide cooperation, in other words, to provide assistance. Thus, what draft article A was elaborating on was not draft article 5 at all—it was draft article 12 (The right to offer assistance), which was still under consideration in the Drafting Committee. By referring in the title of draft article A to the “duty to cooperate” and defining it in the text of the draft article using the words “provide ... cooperation”, the Special Rapporteur seemed to be saying that States had a duty to

¹⁶² See footnote 141 above.

provide assistance. Yet, in paragraph 68 of his report, he reaffirmed his conclusion that “the duty to cooperate in relief matters does not currently include a legal duty for States to provide assistance when requested by an affected State”. That contradiction should be resolved.

41. He himself was inclined to think that the Commission should accept the idea that there was such a duty, by stipulating it in draft article 12 and elaborating on it in draft article A, for the sake of balance or parallelism between the duties. It would be difficult to impose an international obligation on the affected State to provide assistance to its population without imposing a parallel obligation on other States when a disaster exceeded the affected State’s response capability. In his view, it was necessary to impose such parallel duties, especially given the definition of “disaster” in article 3, which referred *inter alia* to “widespread loss of life”.

42. To maintain that there was no duty on the part of States members of the international community to provide assistance in the event of disasters could, in certain respects, be seen as a step backward, at least in relation to some areas of existing international law. Moreover, paragraphs 71 and 72 of the fifth report mentioned a number of precedents in treaties that seemed to contradict the notion that relief efforts undertaken by the assisting State were always of a voluntary nature. That did not imply that the duty had to be formulated in absolute or unconditional terms: one could, for example, limit the duty to provide assistance “to the extent of the capabilities of each State” and “as far as circumstances permit”.

43. With regard to draft article 13 on conditions on the provision of external assistance, he proposed, first of all, that at the very beginning of the sentence a reference should be inserted to the effect that the draft article was to be applied subject to the obligations set out in draft articles 9 (Role of the affected State), paragraph 1, and 11 (Consent of the affected State to external assistance), paragraph 2. The placement of conditions on the provision of assistance should not have the effect of circumventing the duty to ensure the protection of persons, nor should it constitute an indirect means of arbitrarily refusing assistance.

44. Second, the current wording of draft article 13 seemed much too brief and failed to reflect all of the important elements discussed in the chapter of the fifth report on the conditions for the provision of assistance. He thus proposed that the draft article should be expanded to include more detail or should be supplemented by other draft articles in order to address the following issues: the obligation of assisting actors to comply with national laws; the corresponding obligation of the affected State to ensure the protection of assisting entities and personnel; the obligation of the affected State to assess the extent and nature of its needs; and the principle whereby the operational modalities of assistance could or should be governed by agreements concluded between the interested parties.

45. Third, the question of the interrelationship between the rules on assistance and the other rules of international or national law seemed to warrant the development of a more precise formulation of the rule set forth in draft article 13. In particular, it was difficult to conceive of the

affected State as having the duty to ensure “the waiver of national laws as appropriate”, as stated in paragraph 119 of the fifth report. To request a State to derogate from its national laws was incompatible with the principle of the rule of law, unless by “waiver” what was meant in that context was to adopt national emergency legislation as a means of allowing for the provision of external assistance. But to condition the delivery of external assistance on the adoption of such legislation was to risk wasting precious time, or even to prevent such assistance from being delivered precisely when it was most urgently needed.

46. Consequently, he wished to propose a different approach consisting of a two-phase provision that would stipulate (a) that, as a matter of principle, assistance operations must be carried out in compliance with international law and the national laws of the affected State; but (b) that when compliance with those rules risked undermining assistance operations, the foregoing principle must allow for exceptions, the legal basis of which would be either the applicable derogation clauses in international or national law or the rules relating to a situation of distress or necessity, as those terms were embodied in articles 24 and 25 of the articles on responsibility of States for internationally wrongful acts.¹⁶³

47. Draft article 14 (Termination of assistance) appeared to be entirely acceptable and desirable. It would nevertheless be advisable to supplement it in three different ways. First of all, the draft article should recall the principle discussed in paragraph 182 of the Special Rapporteur’s fifth report, whereby the affected State retained control over the length of time during which the assistance would be provided, and assisting actors were obliged to leave the territory of the affected State upon request. Second, it should specify that that principle applied provided the request to leave the territory of the State did not constitute an arbitrary refusal of consent to external assistance. That followed from the provision set out in draft article 11, paragraph 2, which should, to some extent, also be reflected in draft article 14. Third, it might be necessary to specify that, in the event of withdrawal, the concerned parties must cooperate in order to ensure an orderly departure from the territory of the affected State, with regard to the repatriation of goods and persons.

48. Subject to those reservations, which flowed directly from the extensive practice compiled by the Special Rapporteur, he was in favour of referring the draft articles to the Drafting Committee.

49. Mr. TLADI said that, as a new member of the Commission, in addition to commenting on the current report, he would also comment briefly on the draft articles already provisionally adopted by the Commission. His views on the Special Rapporteur’s fifth report were in large part influenced by his general stance on the preceding draft articles.

50. At the outset, he wished to express his opinion that the protection of persons in the event of disasters was an important topic, given the frequency, magnitude and

¹⁶³ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

potentially grave consequences of disasters. He was of the view that the Special Rapporteur's decision to adopt a human rights approach to the topic, which had since been endorsed by the Commission, was the correct one. He was also of the view that the critical principle that should run like a golden thread throughout the consideration of the topic was that of cooperation.

51. While he agreed for the most part with the content of the draft articles provisionally adopted thus far and generally shared the views expressed by the Special Rapporteur, in respect of the few provisions on which he disagreed with them his disagreement was particularly strong. During the Commission's consideration of the topic of expulsion of aliens, he had spoken about the need to strike a balance between State sovereignty and the protection of human rights. He had stated that such a balance could not always be struck in the same way and that the context and the state of development of different areas of law significantly affected how that balance was struck. Accordingly, he proposed that that balance in the draft articles should be reconsidered. Furthermore, he remained unconvinced that draft articles were necessarily the most useful form that the final product could take. That view had also been expressed by some delegations in the Sixth Committee, most notably the United Kingdom¹⁶⁴ and the Islamic Republic of Iran.¹⁶⁵

52. With regard to substance, the draft articles included many self-standing provisions that did not create particular rights or obligations, or set out any particular standards in the context of the protection of persons in the event of disasters. Put another way, those provisions were not operational in any meaningful way; rather, they appeared to lay down general principles intended to inform the interpretation of the text as a whole. Yet it was not clear, for example, what was served by having draft article 8 proclaim that persons affected by disasters were "entitled to respect for their human rights" as if that had ever been in doubt. That wording almost suggested that the development of international human rights law over the past 60 to 70 years had somehow excluded persons affected by natural disasters. A similar comment could be made about draft articles 6 and 7. He thus proposed the addition of a separate provision that would enumerate all the principles underlying the draft articles that were deemed relevant to their interpretation as a whole. There was no reason why the principle of cooperation, provided for in draft article 5, could not also be dealt with in that manner.

53. The most operative provisions of the text adopted thus far were draft articles 8 to 12. Central to all was the attempt to balance the key principles underlying the provision of humanitarian assistance in situations of disasters, namely respect for the sovereignty of the affected State and the need to ensure adequate assistance to those affected. How that balance had been struck had been the subject of much comment in the Sixth Committee, and delegations had been divided on the issue. The delegation of Pakistan had made an interesting comment regarding draft articles 10 and 11, in which it had seemed to imply that a State affected by

disaster might not seek assistance.¹⁶⁶ He wondered what would make a reasonable State that had determined that a disaster exceeded its national response capacity refuse to seek assistance unless it was compelled to do so by a legal obligation. Admittedly, that was a matter of policy, but it concealed a real legal question that underlay the sovereignty/cooperation balance. The same question underlay the intended meaning of the word "arbitrarily" in draft article 11, paragraph 2. Unless a definition was provided for that term, draft article 11 would remain meaningless. Arbitrariness, as a legal concept, referred to irrational decisions or decisions made without justification. However, a State always had a justification for its actions, even though one might question the soundness of the justification or disagree with it.

54. The real issue of law, which draft article 11 did not, and probably could not, address was whether under international law a State was entitled to decide from whom it would or would not accept assistance and under what conditions. No State would ever be unwilling to request and accept assistance in the event of a disaster that it could not handle. However, it was conceivable that States might not be willing, for political reasons, to request and accept assistance from a given State or group of States. That raised the question of whether the draft article implied that a State was obliged to accept assistance from States with which it did not enjoy good relations.

55. Commenting on draft articles 10 and 11 in the Sixth Committee, IFRC had noted that, under international law, States were free to be selective about where they addressed requests for assistance and from whom they accepted offers of assistance.¹⁶⁷ Thus, unless the Commission was willing to suggest otherwise, draft articles 10 and 11, beyond restating general principles of cooperation, would be of little practical effect. In that connection, he would draw attention to the statement made by the delegation of Israel in the Sixth Committee, namely that the relationship between the affected State and third States should be understood, not on the basis of rights, but rather in terms of international cooperation.¹⁶⁸

56. During the Commission's deliberations on the topic at its sixty-third session, Mr. Dugard had referred to Myanmar as an example of a State that had withheld consent—arguing in effect for a duty to accept assistance.¹⁶⁹ His own research in international news websites had confirmed that the Government of Myanmar had provided reasons for not accepting assistance from United States, French and United Kingdom warships and had insisted on the right to distribute aid itself, as mentioned by Mr. Murase earlier. Could that be considered as arbitrarily withholding consent? The issue was about who provided assistance and under what conditions, and not whether those conditions were accepted. To insist on a duty to provide assistance would require the Commission to address the issue, and he was doubtful that it was in a position to do so. It was certainly not an issue that could be resolved through the commentaries.

¹⁶⁶ *Ibid.*, 25th meeting (A/C.6/66/SR.25), para. 7.

¹⁶⁷ *Ibid.*, para. 41.

¹⁶⁸ *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 33.

¹⁶⁹ *Yearbook ... 2011*, vol. I, 3103rd meeting, para. 56.

¹⁶⁴ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 23rd meeting (A/C.6/66/SR.23)*, para. 45.

¹⁶⁵ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 50.

57. That the relationship between the affected State and third States was better conceptualized in terms of cooperation than in terms of rights and duties was buttressed by the views of the Special Rapporteur and the comments of States in the Sixth Committee on the question of whether there was a duty to provide assistance. If imposing a legal duty to receive assistance was so critical to the international community's provision of effective humanitarian assistance in times of disaster, he wondered why there was such near universal objection to recognizing a duty to provide assistance, as Mr. Forteau had advocated. He was not convinced by the reasons advanced, which were based on the limits of the capabilities of third States. In accordance with draft article 10, the duty to request assistance was conditional upon the limitations of the affected State. There was thus nothing to prevent the insertion of a similar qualifier concerning the duty to provide assistance, when assistance was requested, or requiring that such assistance should not be arbitrarily withheld, as also mentioned by Mr. Forteau.

58. However, he was by no means suggesting that the draft articles should impose such a duty. On the contrary, he considered that insistence on a right/duty relationship was neither helpful nor necessary, and that conclusion had implications for the form that the Commission's work on the topic should take.

59. He had serious doubts about the extent to which the duty not to withhold consent arbitrarily reflected State practice. In his fourth report,¹⁷⁰ the Special Rapporteur referred to a few instruments that, presumably, formed the basis of draft article 11. To begin with those instruments that explicitly postulated such a duty, the Guiding Principles on Internal Displacement¹⁷¹ did not constitute State practice; they were a set of principles compiled by the representative of the Secretary-General on internally displaced persons. However, beyond the question of form, Guiding Principle 25, paragraph 2, on which draft article 11 was based, was itself problematic: According to the annotations to the Principles,¹⁷² Guiding Principle 25, paragraph 2, was based on the Geneva Conventions and the Protocols thereto. Those instruments provided that relief action should be subject to the agreement of the parties concerned (art. 70, para. 1, Protocol I); that the occupying Power should agree to relief schemes (art. 59, para. 1, Fourth Geneva Convention); and that relief action should be undertaken subject to the consent of the high contracting party (art. 18, para. 2, Protocol II).

60. It was simply not justified, on the basis of those provisions, to conclude that there was a general legal obligation not to arbitrarily refuse assistance. Article 59 of the Fourth Geneva Convention evidently applied to territories under occupation. In such situations, it was conceivable that an occupying Power might have an interest in denying assistance to the population in its territory; a legal obligation "to agree" to relief schemes was thus understandable. However, whether it was legally coherent to extend that duty to situations not under occupation was doubtful.

¹⁷⁰ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

¹⁷¹ E/CN.4/1998/53/Add.2, annex.

¹⁷² W. Kalin, *Guiding Principles on Internal Displacement: Annotations* (Washington, D.C., American Society of International Law and the Brookings Institution, 2008), p. 115. Available from www.brookings.edu/wp-content/uploads/2016/06/spring_guiding_principles.pdf.

61. That the obligation "to agree" was limited to situations under occupation was also clear from other provisions on which Guiding Principle 25, paragraph 2, was purportedly based. Neither Protocol I, article 70, nor Protocol II, article 18, paragraph 2, obliged the affected State "to agree"; nor was any duty placed on such affected States not to arbitrarily withhold consent. Under their provisions, assistance was subject to the agreement of the States concerned, without qualifying the agreement in the manner proposed in draft article 11 and Guiding Principle 25.

62. According to the Special Rapporteur's fourth report, the Guiding Principles had been welcomed by the General Assembly. In fact, in its resolution 62/153 of 18 December 2007, the General Assembly had recognized the Principles as a framework and had encouraged relevant actors to apply them. Moreover, since the resolution spoke chiefly of standards and their application and avoided referring to the Principles in the context of law, the extent to which the Assembly had endorsed the Principles seemed limited to their more practical aspects relating to the facilitation of cooperation. Also, while the Assembly had encouraged States to adopt legislation implementing the Principles, the Special Rapporteur had not cited any legislation that would imply a duty to accept assistance. Lastly, although the Assembly had adopted a dozen resolutions on humanitarian assistance at its sixty-sixth session, not once had it referred to the type of duty mentioned in draft article 11.

63. In paragraph 60 of his fourth report, the Special Rapporteur sought to rely on the general provision set forth in article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights. Apart from the fact that paragraph 60 put forward an overly generous interpretation of the provision, it was not clear why, if article 2 implied a duty not to refuse assistance, it could not also be applied to impose a duty to provide assistance.

64. The Special Rapporteur had rightly observed that cooperation played a central role in the context of disaster relief. It was in drawing the contours of the cooperation principle that the work of the Commission could be of practical use to States, and not in creating rights and obligations that neither existed in practice nor offered any utility. He endorsed the factors identified by the Special Rapporteur as important for elaborating on the duty to cooperate.

65. Concerning draft article A, while he found the list of specific areas in which third States should provide assistance acceptable and welcomed the inclusion of the words "and other cooperation", he considered the obligatory tone of "States and other actors ... shall provide ... cooperation" to be curious for a number of reasons: first, simply because it appeared to create a legal obligation to provide assistance, when, in fact, the draft articles made it clear that there was no such obligation; second, because the language of the draft article appeared to remove the discretion of the assisting State to determine the nature of the assistance that it could or would provide. He did not believe that the addition of the phrase "as appropriate" resolved the problem: he understood the phrase as referring to the appropriateness of the category of assistance for the disaster and not as qualifying the

willingness or ability to provide a specific category of assistance. However, that was a matter that could be taken up in the Drafting Committee.

66. The conditions on the provision of assistance were also important, since they dealt with practical issues, such as access to the disaster area, without which humanitarian assistance would be difficult, if not impossible. While he welcomed many of the issues raised by the Special Rapporteur, he could not endorse the approach taken, because he disagreed with the point of departure of the draft articles, namely the right/duty relationship between the affected State and the assisting State. The right/duty approach was immediately apparent when the Special Rapporteur stated in paragraph 117 of the fifth report that he would consider the conditions that an affected State might place on the provision of assistance, suggesting that the conditions that might be placed were finite. In fact, the reverse was true. Although there were some conditions that might not be placed, as a general rule the affected State could place whatever conditions it deemed necessary. Draft article 13 accurately reflected that position of international law, and therefore his criticism was directed less at the draft article than at the substance of the report.

67. Thus, while he considered that draft article 13 was appropriate, although he would prefer it to be drafted as a guideline, a number of the issues covered in paragraphs 120 to 181 of the fifth report, including the duty to facilitate the entry of assistance teams, needed to be fleshed out, not as conditions that might be imposed, but as various categories of cooperation, as Mr. Forteau had suggested. For example, the duty of assisting States to cooperate implied a duty to perform specific tasks, as enumerated in draft article A, but the corollary of that duty of cooperation was that the affected State had the duty to facilitate assistance. Issues relating to visa requirement waivers and provision of assistance had nothing to do with imposing conditions on rendering assistance; rather, they flowed from cooperation to facilitate the assistance. Such cooperation should define the relationship between the assisting State and the affected State, and any duties identified must be those ensuing from and necessary to give effect to that cooperation.

68. He wished to be clear that there was no general obligation on affected States to do any of the things mentioned in paragraphs 120 to 181. However, once assistance was offered and accepted, the duty to cooperate implied the duty to facilitate entry, whether through the waiver of existing laws or the use of exceptions provided for in them. The Special Rapporteur relied for many of his assertions in that respect on several agreements, including the 2005 ASEAN Agreement on Disaster Management and Emergency Response and the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. Yet, it was clear that their provisions were based on the "request, offer and acceptance" model of providing assistance. Thus, while in his fifth report the Special Rapporteur seemed to suggest that there was a general obligation to allow entry of personnel, supplies and/or equipment, such a duty of cooperation flowed only from agreement between the affected State and the assisting State on the rendering of assistance.

69. Those were some of the practical details that could benefit from consideration with a view to framing an instrument that would be helpful to States as they cooperated to render assistance to persons affected in the event of disasters. Focusing on rights and duties, in the manner of the draft articles, where the rights and duties had no normative content or value, was not helpful. As to the final form of the Commission's work on the topic, he was not convinced that a legal instrument in the form of a convention that spelled out esoteric legal obligations with little practical value was what the international community needed. In that connection, he endorsed Mr. Murase's call for a more practical approach that would be beneficial to the international community, with details of the different categories of cooperation and assistance required in the event of disasters.

70. Mr. AL-MARRI said that the Special Rapporteur was to be commended on his fifth report. The protection of persons in the event of disasters and the determination of the rights and duties of affected States were obligations covered by international and national legislation, rules and practice. The report and the recommendations were invaluable because they were balanced and based on actual State practice. The report also provided useful information on the relationship between the Guiding Principles and the draft articles. Draft articles 13 and 14 warranted the Commission's full support. Having followed with interest the statements made thus far, he hoped that the debate would take into account the responsibility of the affected State, especially in ensuring access to relief and its proper management. He wished to emphasize that point in particular, since, over the years, some States had been seen to refuse external assistance, despite being unable to assist their own disaster-stricken populations.

71. Mr. KITTICHAISAREE, after commending the Special Rapporteur on his impressive work, said that he wished to reserve his position on the specific provisions of the draft articles and focus on another issue. From the debate in the Sixth Committee, it was evident that there were conceptual differences on the topic, which the Special Rapporteur had reflected in the report. It appeared that 13 delegations had welcomed establishing as legal, and not merely moral or political, the duty of the affected State to seek assistance under draft article 10 (see para. 24 of the fifth report), while 19 other States had opposed the idea that the affected State was placed under a legal obligation to seek external assistance in cases where a disaster exceeded its national response capacity (*ibid.*, para. 28).

72. One of the recurring themes in the Sixth Committee had been that the Commission's work on the topic did not involve the concept of the "responsibility to protect". Delegations had endorsed the Commission's view, based on the position of the Secretary-General, that the concept of the "responsibility to protect" fell outside the scope of the topic and applied only to four specific crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁷³ However, the delegation of Poland had argued that the time had come to consider extending the concept to include

¹⁷³ Report of the Secretary-General on implementing the responsibility to protect (A/63/677).

natural catastrophes.¹⁷⁴ Several States had observed that the use of the term “duty” in draft article 9 was welcome for various reasons, especially in order to avoid any confusion with the concept of “responsibility” (*ibid.*, para. 23).

73. It appeared that Member States were concerned that the Commission might confuse the two regimes. In most cases, an affected State had a genuine interest in protecting persons in its territory, but there were extreme cases where the authorities might have the malicious intent not to seek assistance in order to defy the opposition, as had happened in Darfur, where crimes against humanity did indeed entail the “responsibility to protect”.¹⁷⁵

74. He therefore suggested that the Commission should consider adopting a different approach. First, there would be a general regime for States that were not in an extreme situation, where there was a general presumption that they had the sovereign right to seek external assistance from whom, when and as they wished. Second, for “hard core” States, the Commission would need to review carefully the provisions of draft article 10 and draft article 11, paragraph 2, as they applied to situations where the disaster exceeded the national response capacity and the State withheld its consent arbitrarily, unreasonably or maliciously. If the Commission adopted such an approach, more Member States would likely be willing to endorse the Special Rapporteur’s recommendations. It should be noted that even the ASEAN Agreement on Disaster Management and Emergency Response, cited frequently in the report, did not impose legal obligations on its members, but merely listed best practices for them to follow.

75. Mr. PARK thanked the Special Rapporteur for the introduction of his fifth report, which would undoubtedly contribute to the development of international law, in particular on the fundamental principles relating to relief and assistance, the duties of States affected by natural disasters and the right of access of various actors. It was always difficult to strike a balance between the principles of the protection of victims and the sovereignty of affected States. He would like to know which of those two principles the Special Rapporteur viewed as being of primary importance. It was also important to learn lessons from past experience, such as the reasons for the lack of success of the International Relief Union established by the League of Nations in 1927. In the future, he would also welcome some proposals on the privileges and immunities of persons involved in relief and aid work.

76. On more specific matters, he had a suggestion on how to resolve the tension between draft articles 10 and 11, which dealt with the duty to seek assistance and the requirement of consent. The key to resolving the conflict was needs assessment, as discussed in paragraph 151 of the report. In his view, the matter warranted a separate draft article. However, needs assessment should not be left to the affected State, but should be done by a neutral international institution. In that connection, he referred members to the IFRC Model Act for the Facilitation and

Regulation of International Disaster Relief and Initial Recovery Assistance,¹⁷⁶ mentioned in paragraph 190 of the report, which enshrined a similar concept.

77. With respect to the relationship between draft article 5 and proposed draft articles 12 and A, it was interesting that most States had responded negatively to the Commission’s question regarding the duty to provide assistance to States affected by disasters when requested. Draft article 12 referred to the right to offer assistance; in other words, there was a right with no corresponding duty. However, draft article 5 concerned the duty to cooperate. The Special Rapporteur had endeavoured to seek a practical solution in the form of new draft article A. Nevertheless, he would appreciate further clarification regarding the relationship between draft article 5 and new draft article A. Was the purpose merely to elaborate or was it to establish a limitation?

78. In conclusion, he wondered whether the Commission could still hold that there was no duty to provide assistance in the event of very serious natural disasters entailing such heavy casualties that there might be grounds for the Security Council to intervene.

The meeting rose at 6 p.m.

3139th MEETING

Tuesday, 3 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to continue their examination of the Special Rapporteur’s fifth report on the protection of persons in the event of disasters (A/CN.4/652).

2. Mr. HASSOUNA congratulated the Special Rapporteur on his well-documented report, which furnished a sound basis for debating important issues of law and policy. At that stage in its work, the Commission should not have

¹⁷⁴ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 21st meeting (A/C.6/66/SR.21)*, para. 85.

¹⁷⁵ See Security Council resolutions 1706 (2006) of 31 August 2006 and 1769 (2007) of 31 July 2007.

¹⁷⁶ See footnote 141 above.

reopened a substantive debate of the 11 draft articles and commentaries thereto that it had already adopted or of the draft article under consideration; it should have waited until the second reading to do so. However, since all the draft articles were interrelated and since some members of the Sixth Committee and some of the current members of the Commission had expressed their views on a number of those texts, he in turn wished to comment briefly on the main draft articles contained in the Special Rapporteur's report. He hoped that the current debate would help to lay the groundwork for the second reading.

3. In paragraph 43 of its report on the work of its sixty-third session,¹⁷⁷ the Commission had announced that it would welcome any information concerning the practice of States on the topic under consideration. The unfortunate fact that initially only three States—Austria,¹⁷⁸ Hungary¹⁷⁹ and Indonesia¹⁸⁰—and, subsequently, Belgium, had outlined their national legislation on disaster relief showed that, despite the topic's importance and urgency, most States had no legislation in that field. Most members agreed that the Commission's overall approach to the subject under discussion must strike a balance between the need to protect persons affected by disasters and respect for the principles of State sovereignty and non-interference. In order to attain that goal, humanitarian assistance to persons in need must always remain neutral and objective and should never become politicized. In addition, that assistance must be based at all times on the principles of solidarity and cooperation among the actors concerned.

4. With regard to the role of the affected State, which formed the subject of draft article 9, and its duty to seek assistance, as provided for in draft article 10, the question arose of who was responsible for determining, first, if a disaster situation requiring action existed and, second, if the affected State was meeting its obligations under the draft articles. It was also necessary to ascertain whether making that assessment was a role reserved for the political organs of the United Nations, or whether individual States were allowed to check whether a State's disaster response was adequate, and to ascertain who decided whether a disaster exceeded the national response capacity of the affected State. Those were key questions, and the answer to them could be given only by a neutral international body, or by a similar authority established for the purpose of overseeing the protection of persons in the event of disasters, as he had already said in earlier debates. His view was shared by Mr. Gaja, a former member of the Commission, and by Mr. Park, who had made a similar proposal at the previous meeting.

5. Draft article 11 stipulated that the affected State's consent to external assistance could not be withheld "arbitrarily". That term was too vague and should be clarified either in the text or the commentary. The same issues arose in connection with that draft article: Who assessed the arbitrary nature of the refusal and what consequences did it have? In addition, that draft article, by underlining the need to obtain the affected State's consent to outside assistance,

clearly presupposed the existence of a Government in the affected State. But if the natural disaster had destroyed the Government, was consent still required? In the event of an armed insurrection, whose consent took precedence? Could a State that recognized a Government in exile use the latter's consent as a basis for providing aid? Those were all questions that the Commission would have to address.

6. Draft article 12, whose purpose was to acknowledge the international community's legitimate interest in protecting persons in the event of a disaster, provided that States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations had the right to offer the affected State assistance in coping with a disaster. That assertion merely recognized a factual reality and had no real legal value. In that article, it would therefore be better to say that the international community might offer assistance to the affected State on the basis of the principles of solidarity and cooperation. With regard to the Commission's question whether States' duty to cooperate with the affected State in matters of disaster relief included a duty for States to provide assistance to the affected State at the latter's request, the Special Rapporteur's analysis of international practice confirmed that there was currently no legal duty of that kind and that the provision of assistance by one State to another, at the latter's request, was premised on the voluntary character of the assisting State's help. The Special Rapporteur had, however, highlighted the fact that, although there was no duty to provide assistance at a State's request, there might be a duty to give "due consideration" to requests for assistance from an affected State. Given that, in the Special Rapporteur's view, there was some evidence of practice to support that position, it would be appropriate to draw up an additional draft article underscoring that duty. That provision would not only be in line with the progressive development of international law, but would also bring out the need for the requested State to fulfil its duty to cooperate in accordance with the principle of good faith.

7. In the chapter of his report on elaboration on the duty to cooperate, the Special Rapporteur had attempted to outline the duty to cooperate with greater clarity and to explain its content in greater depth. Since cooperation played a central role in the context of disaster relief, it had been expressly mentioned in several United Nations resolutions, multilateral conventions and regional and bilateral agreements. For example, General Assembly resolution 57/150 of 16 December 2002 encouraged the strengthening of cooperation among States in the fields of disaster preparedness and response at the regional and subregional levels. At the Seventeenth Summit of the League of Arab States held in Algeria on 22 and 23 March 2005, the participants had advocated the creation of a mechanism for coordination and cooperation among Arab Governments and intergovernmental and non-governmental organizations. In 2008, the members of the League had agreed to set up that mechanism and to adopt a programme for its implementation at the national and regional levels.¹⁸¹

¹⁷⁷ *Yearbook ... 2011*, vol. II (Part Two), p. 20.

¹⁷⁸ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 23rd meeting (A/C.6/66/SR.23), para. 23.

¹⁷⁹ *Ibid.*, 24th meeting (A/C.6/66/SR.24), para. 58.

¹⁸⁰ *Ibid.*, para. 71.

¹⁸¹ Decision No. 295 of the Council of Arab Ministers responsible for the Environment, twentieth session, 20–21 December 2008. In 2009, members of the Arab League of States approved the development of an Arab strategy for disaster risk reduction and the establishment of an Arab regional platform for disaster risk reduction (see, among others, www.unisdr.org/ArabStates).

That agreement was based on cooperation during the three phases of disaster control: preparedness, response and recovery.

8. In his analysis of the duty to cooperate, the Special Rapporteur had noted that the focus of recent conventions had shifted from a primarily response-oriented model to one resting chiefly on prevention and preparedness. At the previous meeting, he had mentioned the outcome of the United Nations Conference on Sustainable Development (Rio+20), which had been devoted to the environment, where participants had called for greater cooperation in measures to reduce the risks of disasters in developing countries, such as the establishment of early warning systems.¹⁸² Although draft article A, as proposed, on the duty to cooperate, listed various elements that were usually inherent in cooperation in disaster assistance, it did not address the issue of cooperation in disaster prevention and mitigation. While the Special Rapporteur had promised to examine those aspects in a future report, it would be appropriate to mention *ex ante* cooperation in the draft article in question.

9. In the chapter of the report on the conditions governing the provision of assistance, the Special Rapporteur had referred to reconstruction and sustainable development. When a disaster happened, it was first necessary to offer shelter to displaced persons, second to focus on rebuilding and only then to protect the environment. To be realistic, sustainable development should be no more than a long-term goal. The wording of draft article 13, on conditions on the provision of assistance, was too general and too vague; it should be more specific and precise. The reformulated text could comprise two paragraphs which would read as follows:

“1. The affected State may impose conditions on the provision of assistance, insofar as these conditions do not serve as an arbitrary or unreasonable limit on the provision of aid.

“2. Affected States should not arbitrarily or unreasonably use national law or international law as a barrier to the provision of aid, if to do so would endanger the safety or well-being of persons affected by the disaster.”

10. Draft article 14 on the termination of assistance should also consist of two paragraphs, which might read as follows:

“1. Affected States and assisting actors shall consult with each other to determine the duration of the external assistance.

“2. Termination of assistance by the affected State or assisting State should not be made arbitrarily or unreasonably.”

11. With those drafting suggestions, he was in favour of sending all the draft articles to the Drafting Committee. Lastly, with regard to the Special Rapporteur's comments at the previous meeting with regard to the chapter of his report on related developments or, more specifically,

the criticism expressed by some members and former members of the Commission of the topic under consideration or of his approach, he personally believed that members or former members of the Commission should abstain from public comment on the Commission's current draft articles, which were not a final product that had been presented to the General Assembly, but a work in progress subject to revision. He also wished that the Special Rapporteur's statement had been made in the presence of the persons concerned, since that would have afforded an opportunity for an intellectual dialogue that would probably have led to a lively debate.

12. Mr. PETRIČ said that, although it was unusual to revert to draft articles that had already been adopted, it was interesting to hear the views of new members who had not participated in the Commission's deliberations during the previous quinquennium, for those comments had been well meant and would certainly help to enhance the quality of the final product. The Special Rapporteur's fifth report contained a summary of the Commission's earlier work and of the debates and States' reactions in the Sixth Committee. It had to be remembered that the Committee had been in favour of studying the topic under consideration from the outset and that States had always shown their general approval of that work. The way in which the international community coped with disasters that did considerable damage and sometimes wiped out hundreds of thousands of lives in the space of a few days was a burning issue if ever there was one, for the international community bore collective, shared responsibility by virtue of the principles of solidarity and humanity.

13. The fact remained that it was a difficult topic. At the previous meeting, Mr. Park had noted the underlying “tension” between the sovereignty of the affected State and the protection of persons, a tension that had been palpable throughout the Commission's work on the subject. When two opposing but equally important principles were at stake—in the current context they were State sovereignty, on the one hand, and the protection of persons and their human rights, on the other—that always created a difficult situation for both those drafting the law and those applying it. The thorny question of how to arrive at a proper balance had been a constant concern of the Commission over the years. For example, it had been necessary to bear in mind the ever-present, two-way pull between State sovereignty and human rights when drafting all the international human rights instruments. Similarly, State sovereignty vied with the right of peoples to self-determination, those being two equally valid principles of international law grounded in the Charter of the United Nations; the difficulty lay in striking a balance between them in the actual texts drafted by the international community. The same was true of the principle of States' domestic jurisdiction and the international community's involvement in certain situations. Back in the thirteenth century, Thomas Aquinas had already pondered the question of balance in law. In internal law, a balance also had to be established between the protection of human rights and the protection of public order and State security, or more specifically between the right to information and the freedom of the press and the protection of human dignity. Since such competing interests were to be found over and over again in law, the Commission must always seek to achieve a proper balance.

¹⁸² General Assembly resolution 66/288 of 27 July 2012, annex, para. 187.

14. All the principles involved—sovereignty, protection, etc.—were continuously evolving. Sovereignty was no longer only Westphalian sovereignty, that is, a right of States, but was increasingly seen in terms of an obligation—primarily an obligation to protect the population of a State from violence and human rights violations and, in the case in question, from the effects of disasters and the suffering caused by them. In the 1950s, States, their legal departments and eminent legal writers had held that under Article 2, paragraph 7, of the Charter, apartheid was an internal matter for the Union of South Africa, the old name for the Republic of South Africa. However strange that might seem, that was what people who were authorities in international law had been wont to say.¹⁸³ Attitudes then changed and the view had been taken that apartheid was a problem of concern to the whole of the international community.¹⁸⁴

15. The Commission must, of course, base its work on the principle of cooperation, and the draft articles must encourage and promote cooperation among States and make it possible. If all concerned—the affected State and the States and entities supplying assistance—acted in good faith, that was to say solely in the interests of protecting persons affected by the disaster, cooperation would be smooth and effective, in which case efforts to establish a legal balance between rights and obligations might prove unnecessary. Another function of law, including international law, was, however, to regulate situations where rules or principles might be breached and where the protagonists might not necessarily act in good faith. In the event of a disaster, States and the other actors usually acted in good faith, but if their action was to be efficient some, mainly practical, rules had to be established in international law. At the previous meeting, Mr. Murase, Mr. Tladi and Mr. Park had suggested that the Special Rapporteur should reflect on the possibility of adding draft articles on some practical aspects. Since the beginning of its work on the topic under consideration, the Commission had liaised closely with IFRC, which had plainly stated that it was competent to deal with practical matters and that there was no point in the Commission doing so. Perhaps that was why the Special Rapporteur had not gone very far in that direction. To some extent, he personally agreed with those who were in favour of going further by adding draft articles on practicalities. The Commission still had time to do so, because it would complete the second reading in 2016.

16. In some cases, States and other entities acted in bad faith, *mala fide*. A further function of the law was to establish principles and rules making it possible to distinguish right from wrong, lawful from unlawful, and good faith from bad faith. When disaster struck, States generally acted in good faith and displayed solidarity, humanity and a spirit of cooperation—but that was not always true and a single major national disaster could imperil hundreds of thousands of lives. Even if such situations were rare, they had to be covered by rules specifying the rights

and duties of those concerned. Some speakers at the previous meeting had mentioned events in Myanmar and Darfur. Reference might also be made to Ethiopia, where famine had killed more than a million people between 1984 and 1986, although the Mengistu Government had maintained that there could be no such thing as famine in socialist Ethiopia. Conversely, in Sri Lanka, several “relief organizations” had had ulterior motives.

17. In the subject under consideration, it was vital to draw a dividing line between good faith and what was lawful, on the one hand, and bad faith and what was unlawful, on the other, and to define the rights and duties of the affected State and the rights and duties of the States and other entities that provided assistance. In order to draw that legal dividing line, it was obviously necessary to arrive at a balance between the existing principles of international law. That balance would depend on how far the Commission and States were prepared to go towards progressive development and it could be established only if the recognized principles of international law were respected; the principle of sovereignty of the State was still—and would always remain, despite its evolution—the foundation on which the international community relied in order to function. All the same, it was vital to respect the principle of the protection of persons, their human dignity and their human rights, which had become an integral part of international law as a result of the Martens clause and the Charter of the United Nations.

18. As far as the protection of persons in the event of disasters was concerned, the Commission had achieved a satisfactory balance, which could be summarized by saying that the affected State had the primary duty, by virtue of its sovereignty, to take measures to protect its population in the event of a disaster. In view of the principle of humanity, other States, and international and non-governmental organizations had the right to offer—as opposed to the right to provide—assistance in keeping with the principle of solidarity. The affected State was bound to seek outside assistance only when it lacked the capacity, or the will, to give effective protection to persons affected by a disaster. It did not have to accept the assistance offered and could refuse it, provided that it did not do so arbitrarily, in bad faith or in breach of its duty to protect the affected persons. The principle of sovereignty meant that entities offering assistance did not have the right to provide it without the consent of the affected State. They could provide help only if that State consented to all aspects of the assistance at all stages. The affected State could, by virtue of its sovereignty, withhold its consent to assistance or to some aspects thereof. It was simply bound not to withhold its consent arbitrarily or in bad faith. Entities offering assistance must respect the sovereignty of the affected State. The affected State and entities offering assistance had a duty to cooperate in protecting persons in the event of a disaster. When accepting and providing assistance they had to act in good faith and solely in the interest of protecting persons affected by the disaster.

19. On account of their well-balanced nature, the draft articles that had been provisionally adopted might shape international law on the rights and duties of those concerned, namely the affected State and the States, international organizations and non-governmental organizations offering

¹⁸³ See, among others, the reports of the United Nations Commission on the Racial Situation in the Union of South Africa, A/2505 and Add.1, A/2719 and A/2953.

¹⁸⁴ See, among others, General Assembly resolutions 1375 (XIV) of 17 November 1959 and 1761 (XVII) of 6 November 1962 and Security Council resolution 134 (1960) of 1 April 1960.

disaster relief in the best interests of the victims. Such codification and progressive development of the law would represent a big step forward in protecting persons, human dignity and human rights in the worst disaster scenarios and would help to ensure that international solidarity could be shown in circumstances where it was most needed.

20. Turning to draft articles 12, 13 and 14 and draft article A proposed by the Special Rapporteur, he drew attention to the fact that the Commission,¹⁸⁵ meeting in plenary session, had examined draft article 12, on the right of States and other actors to offer assistance, as proposed in the Special Rapporteur's fourth report¹⁸⁶ and had then referred it to the Drafting Committee, but the Committee had not had time to adopt it provisionally.¹⁸⁷ It therefore still had to be discussed and adopted. The wording of that draft article should clearly indicate that it concerned no more and no less than a "right to offer assistance". "Offering" assistance never meant "providing" assistance. As a result of its sovereignty, the affected State was free to accept or reject all or some of the offers of assistance that it might receive from States or other entities, international or non-governmental organizations or private bodies, no matter what form the offers took. In fact, it was debatable whether such a provision was really necessary, because it merely confirmed what happened in reality, in other words when a disaster occurred, States and other entities offered their assistance to the stricken State in accordance with the principles of solidarity and humanity. In that case, they were acting as sovereign, independent entities—unless special agreements existed (such as multilateral or bilateral treaties) under which the obligations of mutual assistance might have been accepted in advance.

21. Offers of assistance must not be regarded as interference in the internal affairs of the affected State, or as an infringement of its sovereignty. The affected State had the primary responsibility to protect persons in the event of a disaster in its territory and it could accept or reject the offers of assistance made to it, by virtue of its sovereignty. It had freedom of choice and of action. The only restriction on that freedom was set forth in draft article 11, which had been provisionally adopted and which stipulated that a State should not withhold its consent to external assistance arbitrarily, if it was unable or unwilling to provide the requisite disaster relief. The offering of assistance in the event of a disaster was a well-established and welcome practice in the contemporary world. As the Institute of International Law had confirmed in its 2003 resolution on humanitarian assistance, "States and organizations have the right to offer humanitarian assistance to the affected State".¹⁸⁸ The right to offer assistance did not therefore conflict with the principle of State sovereignty or constitute interference.

22. Devoting one provision to the right to offer assistance might act as an incentive for those in a position

¹⁸⁵ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643, para. 109.

¹⁸⁶ *Ibid.*, vol. II (Part Two), paras. 278–283.

¹⁸⁷ *Ibid.*, para. 272, and *ibid.*, vol. I, 3116th meeting, para. 18.

¹⁸⁸ Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), p. 263, at p. 271 (para. 1 of chap. IV of the resolution on humanitarian assistance). Available from the Institute's website (<http://justitiaetpace.org>).

to propose help. Just as the affected State could accept or decline an offer of assistance, other States could choose whether to offer assistance, according to their means and degree of solidarity. It was, however, in the interests of the entire international community to protect persons when a disaster occurred. The principles of humanity and solidarity also meant that the provision of such protection should be deemed a common responsibility. The right to offer assistance should be seen in that broader context and should be reinforced by the codification and progressive development of international law.

23. At the Commission's sixty-third session in 2011, it had been suggested that the Commission should also examine the possibility of establishing a "duty to offer assistance".¹⁸⁹ That idea had been rejected by the General Assembly's Sixth Committee, because such a duty would negate the noble principle of solidarity that was rapidly gaining ground. In his opinion, it would give rise to practical problems and pose insoluble theoretical questions, such as the scope of such a duty, the nature of the assistance to be offered, etc. On the other hand, it was true that in the contemporary world, in view of the principles of humanity and solidarity, offering assistance should be regarded as a moral duty.

24. It was unclear how international law could lay down a "duty to offer assistance" for other entities, especially international and non-governmental organizations. Nevertheless, in draft article A, on the duty to cooperate, the Special Rapporteur seemed to be heading in that direction. That was taking matters too far. There should be no legal obligation to accept or supply assistance. The draft articles should establish a balance between the duty to seek (no more than seek) assistance and the right to offer assistance. The draft articles that had already been provisionally adopted did so. However, in the context of the protection of persons in the event of disasters, either in draft article 5, paragraph 2, or in a separate article, it would be necessary to elaborate on the duty to cooperate, a general principle of international law rooted in the Charter, on the basis of the material used by the Special Rapporteur when he had drawn up draft article A.

25. As other members had already said, either the body of draft article 13 or the commentary thereto should make it plain that the conditions with which the affected State could surround the provision of assistance must comply first and foremost with national legislation and international human rights law. In addition, that draft article, perhaps in a second paragraph, should explicitly allow the affected State the possibility to derogate from its own laws and even from its international obligations, or to suspend their application, as Mr. Hassouna had suggested, in order to permit the genuine protection of affected persons and, especially, in order to ensure that foreign assistance could be rapidly channelled to the stricken population. The protection of persons, their life, their dignity and their fundamental rights should be the prime aim of that and all the other draft articles.

26. There was still time to choose what form the draft articles should take. That choice would also depend on the views expressed by States in the Sixth Committee. Work

¹⁸⁹ *Yearbook ... 2011*, vol. II (Part Two), para. 283.

could continue along its present lines, in other words the drawing up of draft articles, pending a decision on whether to turn them into guiding principles or a legal instrument.

27. Lastly, as some members had suggested, it would be useful to introduce into the draft articles provisions concerning practical aspects of protecting persons in the event of disasters in order to facilitate the provision of rapid and effective assistance to the stricken population. The Commission had hitherto somewhat neglected those practical aspects, but the Special Rapporteur probably intended to take steps in that direction in the future.

28. Mr. WISNUMURTI congratulated the Special Rapporteur on the quality of his fifth report. Once again, the Special Rapporteur had lent impetus to the debate on the topic by proposing three new draft articles underpinned by a detailed analysis of various aspects of the draft articles as a whole and an extensive survey of bilateral and multilateral treaties and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.¹⁹⁰ He also had to be congratulated on his accurate analysis of the views expressed by States in the Sixth Committee. In their comments on the draft articles already adopted by the Commission, as could be seen from the Special Rapporteur's report, delegations in the Sixth Committee had commended the Commission for its efforts to strike a balance between the need to protect persons affected by disasters and respect for the principles of State sovereignty and non-interference. Positive comments and suggestions had also been made with regard to draft articles 5, 6, 7 and 8. The Special Rapporteur had been congratulated on his recognition of the key role played by the principles of humanity, neutrality, impartiality and non-discrimination in the coordination and implementation of disaster relief, principles which the Commission had embodied in draft article 6. States had also expressed approval of draft article 9 (Role of the affected State), which rested on the principle of the sovereignty of the affected State and set forth the affected State's duty to ensure the protection of persons and the provision of disaster relief and assistance in its territory.

29. However, as noted in paragraph 28 of the Special Rapporteur's fifth report, the debates in the Sixth Committee on draft article 10 and on the duty of the affected State to seek assistance had revealed a wide divergence of views. Some States had been opposed to draft article 10, which placed the affected State under a legal obligation to seek external assistance. In their opinion, that obligation might infringe State sovereignty and undermine international cooperation and solidarity. Furthermore, it would be devoid of any basis in international law, customary law or State practice. Some members of the Commission shared that view, and he personally thought that imposing such an obligation would run counter to the Commission's consistent efforts to reconcile the need to protect persons affected by a disaster with respect for the principle of State sovereignty. It would also undermine

the affected State's legitimate right, as a sovereign State, to decide for itself whether it needed outside assistance and to keep all options open. Another undesirable effect of the duty to seek assistance was that a State that failed to comply with it might unjustifiably be held responsible for an internationally wrongful act. The current wording of draft article 10 therefore contradicted the provisions of draft article 11, which required the consent of the affected State to external assistance, a principle that was strongly grounded in international law.

30. In addition, it was obvious that, in practice, no affected State had ever refused outside assistance, even when it had sufficient response capacity. The only exception was, perhaps, Myanmar, which had not totally balked, since it had accepted neighbouring countries' assistance. Hence, there were grounds for serious doubts about the usefulness of draft article 10 as it stood.

31. In the light of the foregoing, he strongly encouraged the Commission to heed the objections raised in the Sixth Committee and to re-examine draft article 10 with a view to making its provisions acceptable to Member States. One solution might be to ask the Drafting Committee to replace the mandatory phrase "has the duty to seek assistance" with the hortatory expression "should seek assistance". Moreover, the concerns expressed in the Sixth Committee showed that the phrase "to the extent that a disaster exceeds its national response capacity" raised problems of interpretation and assessment. It was up to the affected State to decide whether a disaster exceeded its national response capacity, but the words "to the extent" might be interpreted differently. For that reason, it would be preferable to revert to the original wording suggested in the Special Rapporteur's fourth report, i.e. "if the disaster exceeds its national response capacity".

32. It seemed from the Special Rapporteur's analysis that there was general agreement on the wording of draft article 11 (Consent of the affected State to external assistance). The proposals put forward by some delegations warranted the Commission's attention, especially the proposal of Thailand to recast paragraph 2 to read, "Consent to external assistance offered in good faith and exclusively intended to provide humanitarian assistance shall not be withheld arbitrarily and unjustifiably",¹⁹¹ and the proposal of the Netherlands to substitute the adverb "unreasonably" for the word "arbitrarily".¹⁹²

33. As noted in paragraph 52 of the Special Rapporteur's report, many representatives in the Sixth Committee had been of the opinion that the duty to cooperate did not include a duty for States to supply assistance to the affected State when it so requested. They had argued that such a duty had no basis in international law, customary law or practice. The Special Rapporteur's reply was that the provision of assistance by one State to another State that requested it was premised on the voluntary character of the assisting State's action. He personally endorsed the Special Rapporteur's conclusion that the duty to cooperate in relief matters did not currently

¹⁹⁰ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2011). Available from [www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf).

¹⁹¹ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 24th meeting (A/C.6/66/SR.24), para. 91.

¹⁹² *Ibid.*, 23rd meeting (A/C.6/66/SR.23), para. 48.

encompass a legal duty for States to supply assistance at the affected State's request. On the other hand, like some representatives in the Sixth Committee, he was in favour of drafting a provision that placed a requested State under an obligation to give due consideration to any request for assistance that it received.

34. He thanked the Special Rapporteur for clarifying the content of draft article 5 (Duty to cooperate) in draft article A, which rested on a thorough analysis of the relevant instruments in the United Nations system, multilateral conventions and bilateral and regional agreements. He subscribed to the idea, put forward by the Special Rapporteur in paragraph 81 of his fifth report, that States' duty to cooperate in the provision of disaster relief had to strike a balance between three important aspects: first, it must not impinge on the sovereignty of the affected State; second, it must take the form of an obligation of conduct on States offering assistance; and third, it must be relevant and limited to disaster relief assistance by encompassing the various specific elements that normally made up cooperation in that matter. Those three aspects were elucidated in the report that discussed the nature of cooperation and respect for the sovereignty of the affected State and therefore the relationship between draft article A, as proposed, and draft article 9 on the role of the affected State. Another important element dealt with in the report was the definition of categories of cooperation in the provision of emergency relief assistance.

35. The Special Rapporteur's analysis of the various aspects of the duty to cooperate required under draft article 5 had also served as the basis for draft article A. The fact that it was modelled on article 17, paragraph 4, of the articles on the law of transboundary aquifers¹⁹³ gave it even greater weight. As draft article A elaborated on the duty to cooperate, its provisions should be incorporated as a second paragraph in draft article 5.

36. Draft article 13 (Conditions on the provision of assistance), as proposed by the Special Rapporteur, was a logical extension of the principles contained in draft articles 9 (Role of the affected State) and 11 (Consent of the affected State to external assistance). For the purpose of drawing up the latter draft article, the Special Rapporteur had conducted extensive research into multilateral treaties, United Nations instruments, State practice and other sources. In that context, he had examined some exceptions to the affected State's right to condition the provision of aid on compliance with its national law. Those exceptions included the need for the affected State to waive provisions of its law in order to facilitate the prompt and effective provision of assistance in compliance with its duty to ensure the protection of persons in its territory. Although that exception was based on practice, in some circumstances a departure from the law might cause constitutional problems. Waiving rules, such as those on privileges and immunities, on visa and entry requirements, or on customs duties and tariffs, did not pose that type of problem. He therefore agreed with the Special Rapporteur's statement in paragraph 145 of his report that an absolute requirement that

the affected State should waive its laws in all circumstances would prevent it from exercising its sovereignty in order to protect its population and persons in its territory and under its authority. The affected State should therefore try to determine whether, in the circumstances, the waiver in question was reasonable and it should weigh its obligation to provide prompt and effective assistance against that to protect its population.

37. Lastly, he thought that draft article 14 (Termination of assistance), as proposed by the Special Rapporteur, would ensure legal certainty when it came to actually giving assistance. The draft article would, however, be more precise if it also spoke of the need for the affected State and the providers of assistance to agree on a termination procedure. To that end, the draft article should be amended to read, "The affected State and the assisting actors shall consult with each other to determine the duration of, and the procedure for terminating, the external assistance".

38. Sir Michael WOOD thanked the Special Rapporteur for his fifth report and said that, like many other members who had stressed the importance of the practical aspects of protecting persons in the event of disasters, he trusted that once the basic principles had been established, attention could focus on those practical issues. There was ample material, in terms of texts and empirical data from organizations that specialized in disaster relief, that should be studied in order to see what contribution the Commission could make. Simply incorporating the work already done, or referring to it, could send an important signal.

39. Mr. Tladi had said some rather harsh words about the very general provisions that had already been adopted, despite the fact that he had agreed with what he had termed the Commission's "human rights" approach to the topic. In response to those comments, he personally wished to defend the general provisions in question and to express his doubts about that description. He did not agree with the notion of "striking a balance between sovereignty and the protection of human rights". Human rights obligations already took account of the principle of sovereignty; some, such as the prohibition of torture, were absolute, but most were qualified and might even be subject to derogation in an emergency. There was therefore no need for any further balancing.

40. In the context of protecting persons in the event of disasters, the real balance that always had to be struck was not between human rights and sovereignty but, as Mr. Tladi had also put it, between the key principles underlying the provision of humanitarian assistance in disaster situations, namely respect for the sovereignty of the affected State, on the one hand, and the need to ensure adequate assistance to those affected, on the other.

41. The topic inevitably raised important issues of principle that went to the heart of debates about the nature of the contemporary international legal system. At the same time, some eminently practical questions had to be addressed that, depending on the answers to them, might quite literally mean the difference between life and death for persons caught in disasters. If the Commission was to live up to the responsibility it had taken upon itself by tackling the topic, it would have to address both issues of

¹⁹³ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

principle and practical matters. Differences of view over potentially intractable issues of principle must not stand in the way of finding solutions to practical matters, such as ways of facilitating relief efforts that could make a real difference on the ground.

42. Rights, duties and cooperation had to be dealt with simultaneously. It was likewise necessary to bear in mind the nature of the topic under consideration. One of the criteria guiding the Commission's selection of topics was that "the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments ... and pressing concerns ...".¹⁹⁴ The Commission's approach to the topic lay almost exclusively in the field of progressive development, not codification. That did not mean that it should ignore basic principles of international law, but it did suggest that the Commission should be prepared to approach those principles in a contemporary and progressive spirit.

43. The lively debate in the Sixth Committee had been evidence of the importance attached to the subject by States and other actors. States and organizations had amply commented on the draft articles adopted hitherto. The Commission must carefully study those remarks and also take account of new members' comments at the appropriate stage. It could do so during the second reading or, if the Special Rapporteur thought that it would be helpful, some suggestions could be considered even before then, as the Commission had done in the past for other topics.

44. In paragraphs 55 to 78 of his report, the Special Rapporteur considered States' responses to the question put to them by the Commission in its report on its work at its sixty-third session,¹⁹⁵ concerning a possible duty to assist. In that respect, he agreed with the Special Rapporteur and the vast majority of States that no such duty existed and that it would be unrealistic to impose one in the draft articles.

45. The Special Rapporteur devoted a chapter of his report to the duty to cooperate, which already formed the subject of draft article 5. He had done so partly in response to comments made in the Sixth Committee. He was proposing a draft article modelled rather closely on article 17, paragraph 4, of the draft articles on the law of transboundary aquifers.¹⁹⁶ That article 17 concerned emergencies that were under way, and the new draft article A also covered natural disasters that had already happened. Yet, as the Special Rapporteur had explained, contemporary texts on the subject paid equal, if not more, attention to disaster preparedness. That raised a general issue of which the Commission had already taken note, for example in the commentary to draft article 1, but which it had still not addressed properly, in other words to what extent the draft articles should cover the pre-disaster phase.¹⁹⁷ He wondered if the Special Rapporteur intended to propose any articles on that subject.

¹⁹⁴ *Yearbook ... 1997*, vol. II (Part Two), para. 238, and *Yearbook ... 2006*, vol. II (Part Two), para. 256.

¹⁹⁵ *Yearbook ... 2011*, vol. II (Part Two), paras. 43–44.

¹⁹⁶ See footnote 193 above.

¹⁹⁷ *Yearbook ... 2010*, vol. II (Part Two), paragraph (4) of the commentary, p. 185.

46. In draft article A, the words "cooperate" and "cooperation" did not seem to have the same meaning as in draft article 5. The latter was concerned with the duty to cooperate, an important if little understood principle of general international law, which was embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁹⁸ But, in draft article A, the word "cooperation" seemed to mean something more specific, namely assistance that was provided or made available. For that reason, draft article A did not elaborate on the duty to cooperate, but was more concerned with the question of whether there was a duty to provide assistance and with the content of that duty. In addition, while draft article 5 concerned only the affected State's duty to cooperate, draft article A spoke of a duty incumbent on States generally and on "the other actors mentioned in draft article 5", but the nature of the duty proposed in the latter draft article was not entirely clear. The Special Rapporteur said that it sought to impose a duty of conduct and not of result. But upon whom precisely was the duty imposed? Which States were required to provide cooperation? Did all States have to do so? That would hardly make sense. Did it mean other affected States, States in the region, or States that had special ties or existing commitments *vis-à-vis* the affected State? Was it limited to States that possessed a capacity to assist? Draft article A apparently sought to impose that duty on all the "other actors mentioned in draft article 5". That was a very wide range of persons: the United Nations and other competent intergovernmental organizations, IFRC, the International Committee of the Red Cross (ICRC) and "relevant non-governmental organizations". Could the Commission really provide for obligations on all such "other actors" in the draft articles?

47. In that chapter and the one on the conditions for the provision of assistance in his fifth report, the Special Rapporteur referred to many practical aspects of cooperation and had emphasized how important it was that the affected State should not put barriers in its way. There were many anecdotal stories of relief supplies and workers being held at a border and therefore being unable to proceed although time was of the essence, of customs duties being imposed or of visas being required. Although in some cases those delays might be justified, affected States should certainly do all that they could to facilitate the delivery of relief equipment and supplies.

48. That chapter contained a detailed and well-balanced consideration of the thorny question of the conditions that the affected State might impose on the provision of assistance. It dealt with a whole range of important matters that other members had already mentioned. He had been disappointed by the corresponding draft article, draft article 13, which was set out in paragraph 181 of the report. He found it thin and uninformative. It was very short, which was not necessarily a bad thing; the Special Rapporteur had called it "simplified" and Mr. Forteau had termed it "lapidary". But, as many other members had said, it was essential that the Commission should propose a more elaborate provision on that subject, possibly with a number of separate paragraphs,

¹⁹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

or even separate articles, that reflected the points made in that chapter of the report. The Commission should carefully examine Mr. Murase's suggestion that it should think about drawing up a model agreement on the status of the armed forces and others engaged in disaster relief. It would be helpful if the Special Rapporteur could propose an elaborated version of draft article 13, either in plenary session when he responded at the end of the debate, or in the Drafting Committee, or in a forthcoming report. Such a proposal could include the elements suggested during the debate by Mr. Murase, Mr. Forteau, Mr. Tladi and other members, and it could also draw on the memorandum by the Secretariat on that subject.¹⁹⁹ If the Commission decided to adopt a more practical approach, it would be useful if the Secretariat could prepare a further addendum to that document describing the most recent developments, although budgetary restraints would probably prevent it from doing so.

49. The last draft article proposed in the fifth report, draft article 14, concerned the termination of assistance. That was an important practical issue and the draft article rightly placed some emphasis on consultation. However, it seemed to go too far, in that it appeared to require consultation as a condition for termination, in other words, neither the affected State nor the assisting State could unilaterally decide to terminate assistance.

50. As for the form that the final output would take, he agreed with Mr. Tladi that it would be preferable to draw up guidelines rather than draft articles.

51. He wished to make only two comments on the learned articles written by members or former members of the Commission: first, learned articles should not be taken too seriously; and second, unlike Mr. Hassouna, if he had understood him correctly, he was of the opinion that Commission members were perfectly entitled to write articles about ongoing work and those articles were even useful, provided they were accurate and respectful.

52. In conclusion, he was in favour of referring the three draft articles proposed in the Special Rapporteur's fifth report to the Drafting Committee. He asked the Special Rapporteur to indicate, even tentatively, when he spoke at the end of the debate, how he viewed future work on the topic.

53. Mr. ŠTURMA said that the purpose of the work on the topic was apparently to draft general principles that would not be self-executing and that might necessitate the adoption of specific implementing measures such as international agreements or national legislation. Their final form might therefore be that of a framework convention or of guiding principles. It would be up to the Commission to decide at a later stage.

54. While he agreed with an approach based on human rights and cooperation, to a certain extent he also subscribed to the concerns expressed by some Commission members about laying down duties and rights in the draft articles. In positive international law there was no absolute,

unqualified duty to provide or accept assistance. That was why the reference to cooperation had to be understood as an obligation of conduct and not of result. Both the affected State and the State offering assistance had an obligation to negotiate and cooperate in good faith while taking into consideration identified needs and available capacity. Cooperation also presupposed a certain level of transparency with regard to the scale of the disaster, needs and the capacity of the affected State.

55. The current draft articles seemed to strike a proper balance between State sovereignty and the necessity of protecting persons in the event of disasters. Exceptions from sovereignty must, however, be allowed in the event of large-scale disasters when the affected State did not possess the requisite capacity.

56. The Commission had been right to draw a distinction between the topic under consideration and the notion of the responsibility to protect, even if the suffering caused to many victims by a *mala fide*, arbitrary or discriminatory refusal of assistance could bring about a situation comparable to that warranting the application of the principle of the responsibility to protect. As Mr. Petrič and Sir Michael had pointed out, it could be a matter of life and death for many people.

57. Moving on to the new draft articles proposed in the report under consideration, he was of the opinion that both the form and the substance of draft article A required some amendment. Its relationship with draft article 5 and the nature of the duty to cooperate required clarification. Another drafting issue was the possible incorporation of other forms of assistance. Last but not least, it would be necessary to determine the position of draft article A. In his view, it should constitute the second paragraph of draft article 5. All those issues could be settled, however, by the Drafting Committee.

58. He agreed with Mr. Forteau that draft article 13 was justified, because it provided additional guarantees of the affected State's sovereignty, which might require the imposing of certain conditions on the provision of assistance. International law and national law should not, however, be put on the same footing, because internal law had to be in conformity with international law. An additional provision, either an article or a paragraph, appeared to be necessary in order to remind a State that requested or accepted assistance that it had a duty to adopt the appropriate legislative, administrative or other measures to facilitate the supply of assistance.

59. He concluded that the topic was not a "bad idea" and that work should continue in order to produce a result that met the international community's real needs.

60. Mr. McRAE said that, in his report, the Special Rapporteur had provided a thorough analysis of the views expressed by Governments in the Sixth Committee at the sixty-sixth session of the General Assembly in 2011. The great interest shown in the topic by the members of the Sixth Committee was certainly welcome and constituted an additional reason why the Commission should produce a useful result. At that stage of the work, States' views should not, however, be treated as a straitjacket causing

¹⁹⁹ Document A/CN.4/590 and Add.1-3; available from the Commission's website, documents of the sixtieth session (2008).

the Commission to wonder whether 6 or 10 States supported the wording of a particular draft article.

61. Before commenting on the Special Rapporteur's fifth report, in particular on the new draft articles proposed therein, he wished to make some general remarks about the topic, especially in the light of the debate at the previous meeting. In dealing with the topic, the Special Rapporteur had always had to maintain a delicate balance between trying to protect the interests of persons affected by disasters and not giving the impression that he was unduly interfering in the sovereignty of States. From the outset, the Special Rapporteur had defined the topic in terms of the protection of individuals and indeed that had been his primary focus. At the same time, he had taken great care in his reports and in the draft articles that he had proposed not to go too far in the direction of protection, so as not to arouse concerns about sovereignty. As Mr. Petrič had already said, those concerns had been at the heart of the debate from the start. A few years earlier, he had himself observed that there was a danger of the topic becoming the protection of States and not the protection of persons in the event of disasters.

62. Draft articles 10 and 11 called for some comments in that connection. They had been carefully drafted and were the result of a hard-fought compromise. The affected State had a duty to seek assistance, but had no positive obligation to accept it; its sole obligation was not to reject it arbitrarily. During the debate in the plenary session and in the Drafting Committee at the Commission's previous session, no one had been able to think of an example of a situation where a State that had been unable to respond to a natural disaster on its own had not requested or utilized external assistance. Draft article 10 therefore merely reflected practice. Similarly, no one had been able to give an example of a State that had arbitrarily refused the assistance offered to it. Mr. Petrič had mentioned a situation where a State had denied the existence of a disaster, but that situation was not covered by either draft article 10 or draft article 11. The case of Myanmar was often quoted but, as Mr. Tladi had explained at the previous meeting, a careful study of the matter had shown that that was not what had happened in Myanmar in 2008. In addition, when a State with which the affected State had substantial political divergences sent a warship to the affected State's territorial waters shortly after a natural disaster, and said that it was there to help, there was every reason to be suspicious. Saying "no" might have been unfortunate and possibly prompted by a misunderstanding of the motives of the State in question, but it could not be called arbitrary. Furthermore, he did not subscribe to the criticism that the word "arbitrary" was unclear. That term was often used in domestic law and, if it were accompanied by appropriate examples in the commentary, it would give the necessary guidance as to when a State could, or could not, refuse assistance. The delivery of assistance by a warship from a "friendly" country that there was every reason to mistrust was the type of scenario that had been envisaged by Mr. Vasciannie, who had been an eloquent and effective advocate of ensuring that sovereignty issues were not neglected. To oblige the affected State unconditionally to accept assistance would open the door to political interference disguised as disaster relief. It was precisely that threat to sovereignty that must concern Commission members.

63. In that regard, Mr. Murase's approach was much more pragmatic. He had recommended the working out of practical arrangements that could be used in the event of a disaster in order to ensure that assistance reached those who needed it, in other words, which focused on the protection of persons without too much concern for sovereignty when a disaster had already occurred. Of course, a model agreement on the status of armed forces in the event of a disaster might be very useful in that respect. The important point was that both draft articles 10 and 11 were consistent with State practice. Disaster-stricken States did ask for help. They did not fail to request or accept assistance, nor did they reject it arbitrarily, as Mr. Vasciannie had himself recognized. If there was an example of what Mr. Petrič had termed *mala fide* behaviour, it was not the sort of behaviour that the Commission should endorse by refusing to formulate draft articles. State practice showed that the obligations set out in draft articles 10 and 11 reflected what States actually did. Care therefore had to be taken not to suggest that there were no obligations in that sphere and not merely to describe cooperation and best practices. How could persons be protected in the event of a disaster if no one had any obligation to act in a way that would ensure their protection? By saying that States could do what they wanted, provided that they complied with a general obligation to cooperate, the Commission was not really filling its role. If the objective was to protect persons in the event of disasters, asking States to continue to do what they were already doing did not seem to impinge unduly on their sovereignty. The Commission's task was to identify legal obligations that existed already, or that should be formulated as progressive development. In that respect, it mattered little whether the outcome of its work took the form of draft articles or draft guidelines, since in the final analysis it would be up to Governments to decide what to do with the text that the Commission adopted.

64. Those comments, to the effect that it was undesirable for the Commission to refrain from placing the affected State under an obligation, applied equally to making it a duty of States to offer or supply assistance. The Commission had to be cautious about drawing too many conclusions from what had been said in the Sixth Committee. If States were asked if they had an obligation to do something that they were not required to do under any treaty, they would probably say "no" and would almost certainly reply as they had done to the question put to them by the Commission the previous year. What States said in the Sixth Committee was certainly important. The Special Rapporteur's analysis of those statements was helpful and the Commission must bear it in mind when adopting the draft articles at first and second reading. It was not, however, the only factor that had to be taken into consideration, because State practice was not determined by asking States for their opinions in the Sixth Committee. State practice was ascertained by rigorous research, not by conducting an opinion poll.

65. He therefore agreed with Mr. Forteau that, for consistency's sake, States must at least be placed under an obligation to supply assistance. Of course, that could not be an unqualified obligation and it could be applied only to the States that had the capacity to fulfil it. Once again, if one disregarded what States said in the Sixth Committee and looked at what they did, many of them took pride

in offering assistance and were quick to do so. Obliging States to offer or provide assistance was not incompatible with their practice, for it amounted to saying that States must do what they were already doing. If that constituted progressive development of the law—by adding *opinio juris* to States' consistent practice—then it was entirely appropriate positive development in the context of draft articles seeking to protect persons.

66. In fact, although in the provisions proposed in his fifth report the Special Rapporteur had apparently not wished to place States under an obligation to supply assistance, as several members had pointed out, that was precisely what draft article A did. It was certain that that fact had not escaped the Special Rapporteur who, by calling that obligation an obligation of conduct and not of result, was undoubtedly trying to do surreptitiously what he felt he could not do overtly. But, as Mr. Murase had said, that would not work, because the provision of the draft articles on the law of transboundary aquifers on which draft article A was based did not lay down an obligation of conduct.²⁰⁰ Why should the Commission not give States with the capacity to do so the moderate obligation of providing the assistance that they supplied in any case? Moreover, as other members had pointed out, draft article A posed another problem. Although it apparently referred to cooperation, in fact it concerned assistance. While it was useful to indicate the kind of assistance that could be provided, that provision did not elaborate on the obligation to cooperate. Perhaps it was a question of title and perhaps that draft article should simply be self-standing and not refer to draft article 5, as it did in its current wording. As draft articles 10 and 11 concerned the scope of the obligation to cooperate, draft article A could be a self-standing article on the provision of assistance. As long as the general objective of the draft article was understood, that matter could be sorted out in the Drafting Committee.

67. Like other members, he was of the opinion that draft article 13 only partly covered the chapter of the report that offered a very useful description of the various conditions governing assistance. If the current wording of draft article 13 were retained, its substance would be in the commentary and not in the body of the article itself. Essentially, the report set out what was expected of the affected State and of the other States and entities providing assistance in order to ensure that help was supplied efficiently and without undue interference in the internal affairs of the affected State. Facilitating the delivery of cross-border assistance, immigration and customs issues, the agreement on the status of armed forces to which Mr. Murase had referred, the obligation to respect local law and the identification and assessment of needs were all matters that could be covered more explicitly in draft article 13. He therefore endorsed Sir Michael's proposal that the Special Rapporteur should draw up a more comprehensive draft article addressing those questions for submission to the Commission meeting in plenary session or to the Drafting Committee.

68. As other members had commented, as it stood, draft article 14 was unsatisfactory in that it gave the

impression that the State providing assistance had some sort of veto on the termination of that assistance. That was not what the Special Rapporteur had intended, since in paragraph 182 of his report he made it clear that the affected State retained control over the duration of assistance. That should be plainly stated in draft article 14. Ultimately, it was up to the affected State to decide how long assistance should last, although in practice the precise date of its termination would be the subject of consultations between the affected State and the assisting State. There was no doubt that the purpose of those consultations should be to ascertain if the situation had improved enough to make further assistance unnecessary. Again, that was a point that could be elaborated on in the Drafting Committee.

69. Subject to those considerations, he was in favour of referring the proposed draft articles to the Drafting Committee. He also subscribed to the proposal that the Special Rapporteur should say how he thought work should continue. He encouraged the Special Rapporteur to press on and not to be sidetracked by occasional criticism of his work, or disagreement with it.

70. Mr. MURPHY said that he echoed the congratulations addressed to the Special Rapporteur on his fifth report on the protection of persons in the event of disasters, which recorded the progress made on the topic and contained some new draft articles backed by extensive research. The synthesis of the comments made by States in the Sixth Committee was very useful since in the future it might serve as a model for Commission reports on the topic under consideration and on other subjects. The topic in question was of extraordinary importance, because every month, if not every week, terrible disasters occurred in various parts of the world. Some were caused by nature—earthquakes, tsunamis, volcanic eruptions, droughts or epidemics—or others by humans—the mismanagement of resources or the intentional infliction of deprivation as a means of securing or maintaining governmental power. If the Commission were able to provide useful rules or guidance that would help to promote cooperation among States to enable them to cope with those disasters, its efforts would have been worthwhile.

71. He would confine himself to some very general comments on the new draft articles proposed in the fifth report, which should be referred to the Drafting Committee. He looked forward to discussing them in detail once the Committee had examined them. Like the other new members of the Commission, he wished to say a few general words about the draft articles as a whole.

72. First, he concurred that States had no duty under existing international law to provide assistance in response to a request from an affected State. The Special Rapporteur stated in paragraph 53 of his fifth report that such a binding obligation would constitute "unacceptable interference in a State's sovereign decision-making". He was personally more of the opinion that, since that obligation was not supported by any consistent State practice or *opinio juris*, it would be misguided to assert such a duty in a draft article. At the same time, he endorsed other members' reservations about framing some articles

²⁰⁰ See footnote 193 above.

in terms of States' "rights" or "duties", especially in the context of seeking assistance (draft article 10), offering assistance (draft article 12) or accepting assistance (draft article 11). Although the terms "right" and "duty" did not appear in the new draft article A, it laid down that States "shall provide" certain forms of cooperation, which in reality was tantamount to establishing a duty. An approach based on the notions of a "right" or a "duty" was problematical because, as the Special Rapporteur's impressive research had shown, the existence of rights or duties was scarcely borne out by State practice or supported by *opinio juris*. States certainly did regularly seek, offer or accept assistance in the event of a disaster, and various international instruments (most of which were not binding) did promote and facilitate it. Nevertheless, it did not seem that, either in their statements in the Sixth Committee or generally speaking, States considered that the seeking, offering or accepting of assistance reflected rights or duties flowing from international law. Of itself, consistent State practice did not create rights or duties under international law, and it would be inadvisable to tell States that the fact of voluntarily offering assistance in disaster situations created a binding obligation under international law to do so in the future. Establishing such a duty might dissuade them from offering assistance, which was not the Commission's objective. It was also doubtful whether those "rights" and "duties" also applied to international organizations or non-State actors, as provided for in draft article A. That being his position regarding *lex lata*, he disagreed with Sir Michael and thought it unwise to abandon any concern with State practice. While the Commission certainly had a mandate to pursue the progressive development of international law, it should not ignore *lex lata* if it wanted States to regard its work as useful and acceptable.

73. Another problem related to the identification of "duties" was the consequences for a State if it failed to abide by them. Normally, failure to perform a duty had some kind of repercussion. In the context of the topic under consideration what would be the consequences if an affected State refused outside assistance and other States considered that its decision was "arbitrary" within the meaning of draft article 11? How could the States concerned react if the affected State failed to abide by its duty to accept such assistance? It was hard to see how the existence of a duty to provide assistance could be asserted, if that question could not be answered. In any case, he doubted that it was useful to identify such rights and duties in the sphere of disaster relief. The affected States normally would seek and accept assistance. In short, it would be better not to focus unduly on determining rights and duties and to opt for wording that simply encouraged States to offer and accept the requisite assistance at times of disaster.

74. He joined with the other members of the Commission who had thought that the draft articles should include more practical measures. He fully supported the suggestion put forward by Mr. Murase at the previous meeting that a model agreement on the status of armed forces should be drawn up. Such an agreement might serve as a basis for affected States to consent to the presence of foreign military forces in their territory for disaster relief operations. If the Commission were able to produce a template making it

possible to reach rapid agreement on such an agreement, it would provide a much more useful service than if it formulated abstract rights and duties. Taking Mr. Murase's proposal one step further, he noted that, while the use of military units was of major importance at the time of a disaster, non-military relief also had a significant role to play. Both military and civilian efforts could be paralysed by the lack of a ready-made agreement with the affected State on the status of such personnel and its equipment within the country. If the Commission were to draw up a standard agreement on the status of armed forces, it should therefore take care to include provisions covering non-military relief efforts.

75. Lastly, although to the best of his knowledge there was no precedent for doing so, the Commission should complete its work by drafting a two-part text. The first would consist of a series of guidelines or principles of the kind found in the current draft articles, modified as appropriate, and the second would comprise several model agreements that would serve as templates in order to help assisting and affected States quickly to reach bilateral agreements on practical arrangements when a disaster arose.

76. Mr. HASSOUNA said that he wished to clarify one point in his statement that had, perhaps, been misunderstood by Sir Michael. He had not meant to suggest that members and former members of the Commission should not publish articles or comments in public. On the contrary, such action should be welcomed, because it helped to publicize the Commission's role and important contribution to international law. He had simply meant that members and former members should wait until the Commission had decided on the outcome of its work, especially in the case of preliminary deliberations and while the different approaches to, trends in and possible options for dealing with a topic were still being ironed out in meetings, be they private or public. If that were not done, members' conclusions would be based on the wrong premises, would distort the image of ongoing work and would run counter to the Commission's efforts to improve its working methods.

77. Sir Michael WOOD thanked Mr. Hassouna for his clarification and agreed with him that members or former members of the Commission should abstain from drawing conclusions in public with regard to questions that had been debated in the Drafting Committee or, more generally, in private meetings. On the other hand, he did not see why they should not comment on matters that had been debated in public meetings on which there were summary records.

78. The CHAIRPERSON said that it was up to each member to express himself or herself in such a way as not to jeopardize the objectives of the Commission's current work and to decide how far to go when referring to the Commission's public deliberations in learned articles.

The meeting rose at 12.55 p.m.

3140th MEETING

Wednesday, 4 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies

[Agenda item 12]

STATEMENTS BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Belliard, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), and invited them to address the Commission.

2. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law), outlining the history of CAHDI for the benefit of new members of the Commission, explained that the Committee had originally been established as a subcommittee of the European Committee on Legal Cooperation. It had become a full committee, reporting directly to the Committee of Ministers, in 1991. Twice a year, CAHDI convened meetings of the legal advisers to the ministries of foreign affairs of 55 States and representatives of several international organizations. It was responsible for examining questions related to public international law, conducting exchanges of views and coordinating member States' approaches to various issues in the area of international law and also for issuing legal opinions. Its terms of reference for the period 2012–2013 were largely similar to those for the preceding two years, except that it could henceforth supply opinions at the request of the Committee of Ministers or of the other steering or *ad hoc* committees, provided that such requests were transmitted through the Committee of Ministers. The renewal of its terms of reference had provided CAHDI with an opportunity for reviewing its priorities and reaffirming the importance that it attached to the requests for opinions or exchanges of views addressed to it. Emphasis had also been placed on the role of CAHDI as European Observatory of Reservations to International Treaties and as the administrator of several databases on State immunities, the organization and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs and the implementation of United Nations sanctions. Liaising with the International Law Commission and the Sixth Committee and maintaining contact with the lawyers and legal services of other international bodies or organizations were also regarded as crucial activities.

3. CAHDI had been very busy over the previous 12 months. It had held its 42nd meeting in September 2011 and its 43rd meeting in March 2012. At those meetings it had responded to several requests for opinions or exchanges of views and had twice been consulted on the preliminary draft report of the Secretary General of the Council of Europe on the outline of the Council of Europe convention review, since one of the Secretary General's prime concerns had been to review the relevance of those conventions and to present a comprehensive report for the Committee of Ministers by the end of September 2011. At the 42nd meeting, delegations, while agreeing on the importance of that work, had found that they needed more time to prepare a detailed legal analysis of the report. At its 43rd meeting, CAHDI had held a substantive exchange of views on the report and had adopted observations in which it had stressed that, since the Council of Europe was a regional organization, it should first try to encourage its own member States to ratify its conventions before considering the accession of non-members. CAHDI had noted a lack of consistency in the way conventions were classified in the preliminary draft report and had therefore suggested that more States might be prompted to become parties to the conventions if they were arranged in four groups: conventions with numerous ratifications and considered as key; conventions with few ratifications but considered as key; other active conventions; and inactive conventions. CAHDI was in favour of using objective classification criteria for each group. It had likewise suggested a non-exhaustive classification of Council of Europe conventions to take account of the divergence of views among member States on the matter. Furthermore, it had recommended that each group should contain examples of conventions on which all delegations agreed and that the steering committees should be regularly consulted on the classification of conventions in order to determine whether the system should be altered in the light of developments. Lastly, it had drawn attention to the competence of States parties to conventions, especially with regard to provisions on reservations, the implementation of monitoring mechanisms or the denunciation of a convention. Those observations had been largely taken into account in the report that the Secretary General had submitted to the Committee of Ministers.²⁰¹

4. At the request of the Steering Committee for Human Rights (CDDH), CAHDI had given an opinion on the introduction of a simplified procedure for the amendment of certain provisions of the European Convention on Human Rights. In particular, CDDH had asked CAHDI to look into the question of whether the adoption of a statute of the European Court of Human Rights incorporating certain provisions of the Convention and possibly including other elements not present in the Convention would be compatible with public international law and member States' internal law. The underlying aim was to allow some provisions relating to the Court to be amended without requiring the cumbersome ratification of such modifications by national parliaments.

5. A draft opinion highlighting the main issues raised by such a simplified procedure had been adopted by CAHDI at

²⁰¹ "Report by the Secretary General on the review of Council of Europe conventions" (information document, SG/Inf(2012)12). Available from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ca7b0.

its meeting in September 2011. The first question concerned the legal process for introducing the procedure. One solution would be to supplement the Convention with a clause specifying the provisions that could be amended in that manner, while the other would be to adopt a statute of the Court. In both cases, a protocol amending the Convention would have to be adopted and ratified by all member States in a procedure that complied with their internal law.

6. The second question concerned the simplified procedure for amendment itself, namely the nature of the provisions that could be amended by it and the conditions governing their adoption. It appeared that provisions susceptible to amendment in that manner should be limited to those relating to organizational questions having no impact on the rights and obligations of States or of applicants. That would be the only way to avoid cumbersome approval procedures in some States. As for the method of adoption, information supplied by various delegations on internal law requirements had shown that most would prefer unanimous adoption. CAHDI had, however, indicated that other solutions might be contemplated if they obtained general approval. Delegations had insisted that those replies in no way prejudged the need, or not, for certain member States to transcribe the provisions thus adopted into national law. The Committee had considered that it was unable at that stage to conduct a more in-depth analysis of the question put to it by CDDH. It was, however, prepared to reconsider an actual draft proposal once it had been drawn up and to give its opinion on it; it had not yet been asked to do so.

7. Turning to relations between CAHDI and other organizations, she said that contacts with the lawyers and legal services of other international bodies or organizations had related to topics frequently discussed in CAHDI.

8. Mr. Stephen Mathias, Assistant Secretary-General for Legal Affairs of the United Nations, had discussed the question of the responsibility to protect with CAHDI. He had reported on developments in the international criminal courts and the International Residual Mechanism for Criminal Tribunals and had also emphasized the importance of fairness and transparency in United Nations sanctions regimes. In that connection, he had commended the work done by Ms. Kimberly Prost,²⁰² Ombudsperson of the Security Council Committee established pursuant to Security Council resolution 1267 (1999) of 15 October 1999. Mr. Luis Romero Requena, Director-General of the Legal Service of the European Commission, had given a talk on the legal order of the European Union and international public law during which he had drawn attention to the fact that European Union law must be interpreted in the light of customary international law, which limited its scope. He had also outlined the adjustments that would be necessary to allow the Union, as a supranational organization, to accede to the European Convention on Human Rights. Mr. Maurizio Moreno, President of the International Institute of Humanitarian Law, San Remo, had talked about his institute and described the challenges faced by international humanitarian law as a result of the changing

nature of traditional warfare. Lastly, Mr. David Scharia, of the Counter-Terrorism Committee Executive Directorate of the United Nations, had informed CAHDI about the longstanding cooperation between the Committee and the Council of Europe.

9. CAHDI followed the Commission's work closely. Topics that were regularly included on the CAHDI agenda included the immunity of States and of international organizations and the law and practice of reservations to treaties and interpretative declarations. Although its database focused more on State immunity, CAHDI frequently held exchanges of views on the immunity of State representatives. States regularly informed it of developments in their case law on the subject. The Committee therefore welcomed the appointment of a new Special Rapporteur on that topic. In its capacity as European Observatory of Reservations to International Treaties, CAHDI regularly scrutinized a list of reservations that might be subject to objections and thus participated actively in the "reservations dialogue". It often referred to the Guide to Practice on Reservations to Treaties,²⁰³ which was a mine of information on a very complex subject.

10. In 2011, CAHDI had been pleased to hear Ms. Escobar Hernández's presentation of the work of the Commission at its sixty-third session, and it looked forward to Sir Michael Wood's presentation of the work of the sixty-fourth session. The 44th meeting of CAHDI, to be held in Paris in September 2012, would be followed by a seminar on the topic of judges and customary international law, which had been prompted by the inclusion of Sir Michael's topic, "Formation and evidence of customary international law", in the Commission's programme of work. CAHDI greatly valued its exchanges of views with the Commission.

11. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)), describing major developments at the Council of Europe in the field of public international law, said that from November 2011 to May 2012 the Committee of Ministers had been chaired by the United Kingdom of Great Britain and Northern Ireland, one of the founding members of the Council and the first State to have ratified the European Convention on Human Rights. During the United Kingdom chairpersonship, the Committee had focused its attention on reform of the European Court of Human Rights and strengthening the implementation of the European Convention on Human Rights; reform of the Council of Europe, which comprised, in addition to the legal aspects mentioned by the previous speaker, budgetary, organizational, institutional and political facets; and strengthening of the rule of law.

12. In May, the chairpersonship had passed to Albania for the first time since that country had joined the Council of Europe in 1995. Like its predecessors, Albania would strive to maintain continuity in the Committee's priorities. For that reason, the reform of the organization, which had been launched by the Secretary General in 2009 and enjoyed the support of all member States, would remain a central concern of the Committee.

²⁰² The Office of the Ombudsperson was established pursuant to Security Council resolution 1904 (2009) of 17 December 2009 and Ms. Prost was appointed by the Secretary-General on 3 June 2010 (S/2010/282).

²⁰³ *Yearbook ... 2011*, vol. II (Part Two), paras. 75–76, and *ibid.*, vol. II (Part Three).

13. The Secretary General's preliminary report on the subject, to which he had referred at the Commission's sixty-third session,²⁰⁴ had sought to distinguish between key conventions and inactive conventions; suggest conventions that it would be useful to update; promote the accession of the European Union and, possibly, of non-member States to Council of Europe conventions; and propose measures aimed at giving a higher profile to Council of Europe conventions, increasing the number of accessions and strengthening their impact. The Secretary General's final report²⁰⁵ on the subject was currently being considered by the Rapporteur Group on Legal Co-operation.

14. Turning to the activities of the Treaty Office, he said that the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (Medicrime Convention), adopted by the Committee of Ministers on 8 December 2010 and opened for signature in Moscow on 28 October 2011, had already been signed by 15 States. The Convention was the first binding legal instrument to criminalize the counterfeiting, manufacturing and distribution of medical products that were marketed without authorization or failed to meet safety standards. It was open to all countries and offered a framework for international cooperation and enhanced coordination at the national level. In May 2012, the Council of Europe and the Danish Medicines Agency had organized a conference during the Danish Presidency of the Council of the European Union to call attention to the importance of signing and ratifying the Convention.

15. On 13 June 2012, the Committee of Ministers had adopted the Fourth Additional Protocol to the European Convention on Extradition, which, in addition to updating some of the Convention's provisions, was designed to strengthen international cooperation on the matter of extradition. It would be opened for signature on 20 September 2012. The Third Additional Protocol to the Convention, aimed at simplifying and accelerating the extradition procedure when the person concerned consented to extradition, had entered into force on 1 May 2012.

16. A joint study²⁰⁶ conducted in 2009 by the Council of Europe and the United Nations had shown that trafficking in organs, tissues and cells and human trafficking for the purpose of organ extraction were problems of global proportions that violated basic human rights and posed a direct threat to individual and public health. The Committee of Experts on Trafficking in Human Organs, Tissues and Cells had therefore been mandated to prepare a draft criminal convention against trafficking in human organs and, if necessary, a draft additional protocol to the draft convention concerning trafficking in human tissues and cells.

17. The process of modernizing the Convention for the protection of individuals with regard to automatic processing of personal data had begun in January 2011 with a public consultation to identify the concerns of Governments, civil

society and the private sector in that area. One of the main goals of the process was to address the challenges that the use of new information and communication technologies posed to private life. The Consultative Committee of the Convention was considering proposals aimed at updating the Convention and would transmit those approved to the Committee of Ministers.

18. Accession of the European Union to the European Convention on Human Rights had been a key issue for the Council during the past year. An informal working group of 14 experts, half of whom were from European Union member States, had in June 2011 transmitted a draft accession agreement²⁰⁷ and related documents to the CDDH, which had in turn transmitted those documents to the Committee of Ministers for consideration. On 13 June 2012, the Committee of Ministers had decided to task CDDH with pursuing negotiations with the European Union with a view to finalizing the legal instruments detailing the accession procedure. The *ad hoc* group established for that purpose had met on 21 June 2012 and planned to hold two more meetings in 2012.

19. Among the high-level meetings and conferences organized by the Council of Europe during the past year had been the seventeenth session of the Council's Conference of Ministers responsible for Local and Regional Government, held in Kyiv in November 2011 and focusing on local communities' response to the recession in Europe, transboundary cooperation and the partnership between the Committee of Ministers and the Conference of Ministers. During the United Kingdom chairpersonship, the Committee had organized a high-level conference on the future of the European Court of Human Rights, held in Brighton in April 2012, which had assessed the progress made since the two previous conferences on the same subject and had made specific recommendations pertaining to aspects of the Court's work, including the possibility of amending the European Convention on Human Rights to give the Court the power to issue, on request, advisory opinions on the interpretation of the Convention in specific cases.

20. Lastly, he wished to inform the Commission that the Council would hold its 31st Conference of Ministers of Justice in Vienna in September. The theme of the Conference would be "Responses of justice to urban violence".

21. The Council of Europe attached great importance to cooperation with the Commission and remained convinced that such cooperation could contribute significantly to the development of international law.

22. The CHAIRPERSON thanked Mr. Lezertua for his presentation and invited members of the Commission to pose any questions they might have for Ms. Belliard or Mr. Lezertua.

23. Sir Michael WOOD asked Ms. Belliard how she perceived the relationship between the Council of Europe and the European Union in the field of public international law and whether she thought that the Council of Europe

²⁰⁴ *Yearbook ... 2011*, vol. I, 3101st meeting, para. 16.

²⁰⁵ See footnote 201 above.

²⁰⁶ Council of Europe/United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (Strasbourg, 2009). Available from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805ad1bb>.

²⁰⁷ "Draft revised explanatory report to the agreement on the accession of the European Union to the European Convention on Human Rights" (CDDH-UE(2011)08).

was the more active body in that field. Regarding the classification of conventions into four categories, he wished to know whether that classification had been made public.

24. Addressing Mr. Lezertua, he observed that he had been barred from accessing certain parts of the CAHDI website because he was not a member; he therefore wished to have more information about the site and its development. He noted also that representatives of 55 States had attended the CAHDI session, yet the Council of Europe had only 47 members. He would therefore welcome more information about the status of the eight participating States that were not Council members.

25. Mr. MURASE said that the Commission was perceived by many as increasingly outdated and marginalized within the United Nations treaty-making process. Whereas he himself had joined the Commission three years ago with great hopes and ambitions, he had since become disillusioned by such phenomena as a lack of transparency, the slow pace of progress and the dearth of appropriate topics. While those were matters internal to the Commission, he wished to draw attention to certain issues relating to the work of the Sixth Committee, as it was his understanding that CAHDI played a coordinating role in some matters relating to that Committee.

26. When he had served on the Sixth Committee secretariat in the 1980s, he had been impressed by the degree to which delegations were well versed in the items under consideration, including the work of the Commission. In contrast, at the most recent session of the Committee, which he had attended as a representative of his country, he had noted that many Committee members were less experienced delegates who frequently commented on the Commission's work without having read the relevant background documentation. There were moves afoot to use the United Nations Educational, Scientific and Cultural Organization (UNESCO) as an alternative to the Sixth Committee as a treaty-making forum.

27. The Sixth Committee was also, under article 15 of the Commission's statute, responsible for proposing appropriate topics to the Commission, yet the Commission had not received any such proposals from the General Assembly. The election of Commission members also fell within the General Assembly's purview, and in his view the membership needed to be reformed, with more attention to gender balance and the possible introduction of generation quotas; the issue of absenteeism also needed to be tackled. He therefore hoped that at its meetings, CAHDI would consider the points he had just raised.

28. Mr. HASSOUNA asked Ms. Belliard whether CAHDI sometimes issued advisory opinions on important points of international law without being requested to do so by the Committee of Ministers. He also wished to know whether CAHDI had considered establishing relations with organizations other than those mentioned in her presentation, in particular with regional organizations. In his view, an exchange of views between CAHDI and such organizations would be of mutual interest.

29. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said that

CAHDI played an essential role in the relations between the Council of Europe and the European Union in the field of public international law. The European Union's legal services were increasingly confronting issues relating to public international law; disputes brought before the Court of Justice of the European Union and the European Court of Human Rights attested to that.

30. Regarding the classification of conventions into four categories, she said that the goal of that exercise had been to identify key conventions that member States—and perhaps non-member States—should be encouraged to join and also to identify instruments that had become obsolete. While the classification was proving difficult to implement, the concept was sound and should be pursued. The list in the Secretary General's draft report on the review of conventions was deliberately non-exhaustive in order to circumvent debates regarding its contents.

31. Referring to Mr. Murase's comments, she said that CAHDI was a discussion forum, not a decision-making body. While it might sometimes be in agreement with the United Nations Secretariat, there was no attempt to establish joint positions. Replying to Mr. Hassouna, she said that CAHDI set its own agenda and could comment in its reports on any issue that in its view merited it. She acknowledged that CAHDI should perhaps develop closer ties with more international bodies, especially regional organizations; it should be noted, however, that since CAHDI held only two sessions a year, with full agendas that could accommodate only a limited number of guests, it was difficult in practice to add organizations to the programme.

32. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)) said that consideration of the question on why the European Union had acceded to a relatively small number of Council of Europe conventions had been suspended pending agreement of the terms of its accession to the European Convention on Human Rights. Once that issue had been settled, it would be possible to resume talks aimed at identifying obstacles to its accession to other Council of Europe conventions.

33. The draft report by the Secretary General on the review of Council of Europe conventions provided for a number of measures, including the promotion of specific conventions, the introduction of a convention-oriented dimension into the Council's programme of work and the regular review of Council of Europe conventions by steering committees with a view to assessing their relevance.

34. A decision had recently been taken to restructure the CAHDI website in order to make needed improvements. He hoped that the next time representatives of CAHDI visited the International Law Commission, its members could report that they had found the improvements helpful.

35. In addition to representatives of Council of Europe member States, participants in the regular meetings of CAHDI included representatives of States having observer status with the Council of Europe, namely Canada, the Holy See, Japan, Mexico and the United States of America. Observer States were frequent participants at regular

meetings of CAHDI, which showed that interest in the work of CAHDI extended beyond European borders. The Committee of Ministers resolution of 9 November 2011 on intergovernmental committees and subordinate bodies, their terms of reference and working methods, contained in document CM/Res(2011)24, governed the details of participation in regular meetings of Council of Europe committees such as CAHDI, including attendance by non-member States that did not have observer status with the Council.

36. CAHDI determined its own meeting agendas and addressed its reports directly to the Committee of Ministers; it could, at its own initiative, request that issues it identified should be considered at the highest level of the organization.

37. Mr. NOLTE said it was his understanding that when the various Council of Europe conventions were placed into categories such as categorization did not produce any legal effect. Yet he failed to see how it was possible to escape the conclusion that when a convention was classified as “inactive”, for instance, and States parties unanimously expressed their agreement with such a categorization, its provisions were thus obsolete and deprived of any legal force. In such cases, then, the designation “inactive” would seem to have legal effects. He requested clarification of that point.

38. Mr. KITTICHAISAREE pointed out that a Council of Europe secretariat memorandum dated 14 March 2011 and prepared by the Directorate General of Human Rights and Legal Affairs contained an opinion of the European Committee on Crime Problems regarding the principles of universal jurisdiction and *aut dedere aut judicare*.²⁰⁸ That Committee had held that, since there was no international consensus on the definition and scope of the principle of universal jurisdiction, as the exercise of universal jurisdiction was in practice often subject to legal limitations defined in national legislation, the Council of Europe should maintain its neutral stance in relation to that principle and should reinforce the application of the principle of *aut dedere aut judicare* as a means of prosecuting war crimes effectively in cases where universal jurisdiction could not be exercised. He asked whether, in keeping with that opinion, the Council of Europe had made progress in reinforcing the application of the principle of *aut dedere aut judicare*.

39. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law), replying to Mr. Nolte, said that the classification of Council of Europe conventions did not produce legal effects *per se*. The mere fact of designating a treaty a “key convention”, for example, did not mean that if some member States had not ratified it they were nonetheless bound by its provisions. The lists of conventions classified by CAHDI were merely indicative, and the relevant Council of Europe steering committees were responsible for managing the outcome of the reviews of the conventions. Although many different

criteria were used in assessing the relevance of Council of Europe conventions, any action taken on the basis of those assessments was taken on a case-by-case basis.

40. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)), replying to Mr. Kittichaisaree, said that the provisions of many Council of Europe conventions reflected the principle of *aut dedere aut judicare*, and he would furnish the Commission with a list of them.

41. Mr. KAMTO asked how Council of Europe conventions to which the European Union acceded were implemented within the Union’s legal system. It would be useful to know which body was responsible for compliance with the provisions of those conventions and which body was responsible for monitoring compliance. He also wished to know whether States that requested observer status with the Council of Europe were required to be member countries of the Organisation for Economic Co-operation and Development (OECD).

42. Ms. ESCOBAR HERNÁNDEZ said that exchanges of experience and information between CAHDI and the Commission were important for both bodies. In view of the decision to improve the CAHDI website, she wondered whether any consideration had been given to providing external users with access to Council of Europe databases containing information supplied by individual member States and organized by subject, some of which was directly relevant to the work of the Commission.

43. She asked what the prospects were for reviving the informal consultations on the subject of the International Criminal Court that had previously been held under the auspices of the Council of Europe. Such an initiative might be timely, given that the first review conference on the Rome Statute of the International Criminal Court had been held in 2010 and the tenth anniversary of the Statute’s entry into force had been observed on 1 July 2012.

44. Mr. MURPHY asked whether the CAHDI database on State practice regarding State immunities contained information that would be directly relevant to the work of the Commission on personal immunity. He would welcome any information that the representatives of CAHDI could provide on the exchange of national practices that had taken place at the March 2012 meeting of CAHDI on possibilities for ministries of foreign affairs to raise public international law issues in procedures pending before national tribunals and related to immunities of States or international organizations.

45. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law), replying to Mr. Kamto’s question on the status of treaties under European Union law, said that as soon as the European Union acceded to a treaty it formed part of the Union’s legal system. Since the European Union had international legal personality, it had responsibility under international law for all the agreements it concluded, under the supervision of the European Court of Justice. When the European Union became party to the European Convention on Human Rights, its application would also be monitored by the European Court of Human Rights.

²⁰⁸ “Opinion of the European Committee on Crime Problems (CDPC) on Parliamentary Assembly recommendation 1953 (2011) on the obligation of member states and observer states of the Council of Europe to co-operate in the prosecution of war crimes” (CDPC (2011) 5). See in particular paras. 10–11. Available from the Council’s website (www.coe.int).

46. Replying to Ms. Escobar Hernández's question concerning the International Criminal Court, she said that CAHDI had not had any contact with the Court recently, but it planned to re-establish such contact in the future.

47. Replying to Mr. Murphy, she said that CAHDI did discuss issues relating to immunities. Such discussions were very open and did not result in detailed reports that the Commission would find particularly useful.

48. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)) said that observer status in the Council of Europe was governed in the first instance by Statutory Resolution (93) 26 on observer status, adopted by the Committee of Ministers on 14 May 1993, which posed no limitations based on geographical origin or any other status on States applying for observer status. Observer States were entitled to participate in virtually all the activities of the Council. Any State could be granted observer status provided that it was willing to accept the fundamental principles of the organization, namely democracy, the rule of law and the enjoyment of human rights and fundamental freedoms, and wished to cooperate with the Council of Europe in the promotion and defence of those principles.

49. It was also possible to request the Secretary General to grant observer status for a particular committee, such as CAHDI. That was a simpler procedure, which conferred on the requesting State the right to participate in the work of the committee concerned without the right to vote.

50. Another option was to become a special invitee of the Parliamentary Assembly, a status granted by the members of the Assembly to certain States based on their parliamentary relations with the Assembly. However, such status was confined to their participation in the Assembly and did not allow for any intergovernmental activities.

51. Lastly, most Council of Europe conventions now had clauses allowing the Committee of Ministers to invite non-member States that were not observer States to accede to the convention in question and participate in relevant activities, including follow-up mechanisms. Some conventions had elicited significant support and interest, such as the Convention on the transfer of sentenced persons.

52. Turning to the issue of the website raised by Ms. Escobar Hernández, he said that while some databases contained information provided by member States, access to them was, as a rule, for CAHDI members only. The Committee could certainly look into the possibility of opening up some of those databases after a certain period of time had elapsed and the information in question was no longer too recent. The issue was a sensitive one, however, as States provided information on a confidential basis. The consensus of members would thus be required before steps could be taken to open up access to the public, the Commission or international organizations.

53. He agreed with Ms. Belliard that the time had come to re-establish contact with the International Criminal Court. As far as the informal consultations were concerned, he assumed that Ms. Escobar Hernández had been referring to the several rounds of consultations held to facilitate the

ratification of the Rome Statute by the Council of Europe member States. Those consultations had come to an end following the entry into force of the instrument.

54. In response to Mr. Murphy, he said that the current database contained information on issues relating to State immunities only, but that during CAHDI in camera proceedings, information on cases relating to the immunity of international organizations or State officials was also discussed. Such information could not be entered in the database without the express consent of CAHDI. However, meeting reports were published, following their approval by the Council of Ministers.

55. The CHAIRPERSON thanked Mr. Lezertua and Ms. Belliard for their statements.

Protection of persons in the event of disasters (continued) (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

56. Mr. SABOIA congratulated the Special Rapporteur on his fifth report, which, as usual, was clear, well researched and objective. He thanked him also for his comprehensive and well-argued presentation, which had clarified some of the issues that had given rise to differences of opinion during the discussion in the Sixth Committee at the sixty-sixth session of the General Assembly. At the current advanced stage of the debate on the topic, he would focus his comments on issues that appeared to have raised doubts and concerns among members, as well as on the newly proposed draft articles.

57. The report contained a detailed account of the extensive debate held in the Sixth Committee on the draft articles already provisionally adopted (paras. 10–54). The account was indeed useful, as the Commission needed to be mindful of the opinions of States; however, he agreed with Mr. McRae that discussions in the Sixth Committee should not become a straitjacket for the Commission. Members were expected to bring their own best judgment and work on the topic to the Commission.

58. Draft articles 10 and 11 had elicited many comments and some concern, even though the discussion of those texts had been formally concluded. Their provisions had been carefully crafted to articulate a delicate balance of obligations and rights that addressed the paramount issue of protection of persons while stressing the primary role of the affected State and the need to respect its sovereignty and avoid interfering in its internal affairs. He saw no contradiction between the two articles. As paragraph (1) of the commentary²⁰⁹ made clear, draft article 10 related to draft articles 9 and 5. It was a corollary of the understanding that sovereignty conferred rights upon States and imposed obligations on them, as Judge Álvarez had indicated in a separate opinion in the *Corfu Channel* case. The protection of persons was therefore a duty of States and, according

²⁰⁹ *Yearbook ... 2011*, vol. II (Part Two), p. 158.

to several international instruments and the comments of treaty monitoring bodies cited in the commentary to draft article 10, the affected State had a duty to seek assistance, to the extent that the disaster exceeded its national response capacity. However, that was without prejudice to the affected State's retention of its primary role and right to choose from among other States, the United Nations and other actors the assistance that was most appropriate to its specific needs.

59. Draft article 11 (Consent of the affected State to external assistance) articulated a qualified consent regime in the field of disaster relief operations that was based on the concept of the dual nature of sovereignty entailing both rights and duties, as explained in paragraphs (1) and (3) of the commentary. Several speakers had argued that the word "arbitrarily" in paragraph 2 of the draft article was vague and difficult to define in practice. In paragraph (7) of the commentary,²¹⁰ the Special Rapporteur had established several possible criteria for determining whether a decision to withhold consent was arbitrary. Moreover, during the discussion in the Sixth Committee, a constructive suggestion had been made by the delegation of Thailand,²¹¹ which he suggested might be borne in mind when the draft articles were revised on second reading.

60. Offering some general comments on the plenary debate during the current session, he endorsed the view that it was not appropriate to speak of a balance between sovereignty and human rights; the real balance must be between respect for the rights of the affected State and the need to provide assistance to persons in need. Human rights rules were standards agreed among States for the protection of individuals or groups; they stood alone as obligations of all States towards persons under their jurisdiction and had no element of reciprocity. They were universal, interdependent and a legitimate matter of concern for the international community.

61. He thanked Mr. Petrič for having recalled the dynamic nature of concepts such as domestic jurisdiction. Article 2, paragraph 7, of the Charter of the United Nations had, until the 1960s, prevented the Organization from tackling the crime of apartheid and any complaints regarding human rights violations. Under political pressure, legal opinion had subsequently shifted, and it had been determined that apartheid was a matter of concern to the international community as a whole.²¹² That had paved the way for the current United Nations system of human rights monitoring that had evolved as a result of treaties and the work of the human rights bodies.

62. He had been surprised by the comment that there was no point in referring to the human rights of persons affected by disasters, as no one had ever called such rights into question. Persons affected by disasters were quite likely to be subjected to treatment that affected their rights and their dignity, particularly when a disaster resulted in

protracted displacement under difficult conditions. Of course, it did not necessarily follow that the affected State, overwhelmed by the effects of the disaster, was to blame for all the suffering endured by its population; nevertheless, there was certainly justification for bearing human rights in mind, even while conceding that certain derogations were unavoidable.

63. Without going into detail, he wished to endorse the position taken by the Special Rapporteur in the chapter of his report on the question posed by the Commission in chapter III of its report on the work of its sixty-third session²¹³ (paras. 55–78).

64. As regards the following chapter on elaboration on the duty to cooperate, he concurred with the analysis provided by the Special Rapporteur in paragraphs 79 to 116 of the report and the conclusion that, in the present context, the duty to cooperate was an obligation of conduct rather than an obligation of result. The duty to cooperate was an important cornerstone of the United Nations system, particularly where economic, social and humanitarian issues were concerned. However, it should be emphasized that in some cases, when such a duty was defined by measurable goals or obligations subject to the supervision of the treaty monitoring bodies, the duty to cooperate might also comprise elements of an obligation of result.

65. It had been suggested, with regard to section C of that chapter, which described the categories of cooperation relevant for disaster relief assistance, that reference should be made to cooperation in other areas, in particular preparedness and prevention, as well as in post-disaster phases, such as reconstruction and sustainable development. However, it should not be overlooked that the extent of the personal damage suffered in disasters was often the result of poverty, including a lack of safe and adequate housing and access to drinkable water and sanitation. He would be in favour of a specific reference to such factors. In any event, the Special Rapporteur had stated his intention to deal with pre- and post-disaster phases at a later stage.

66. He expressed support for draft article A, which provided a more specific elaboration of the duty to cooperate in the context of disaster relief. He assumed that the list contained in the draft article was not exhaustive and that the Commission might incorporate in it some of the suggestions made during the plenary debate such as Mr. Forteau's suggestion to include a reference to financial assistance.

67. He agreed that draft article 13 required more substance as well as a possible word of caution to the effect that conditions imposed should not impair the timely and efficient provision of assistance. However, that matter could be addressed in the Drafting Committee.

68. He shared the view that draft article 14 was in need of some improvement, for the sake of accuracy and consistency with the assumption that the affected State retained the power to determine when assistance should be terminated.

²¹⁰ *Ibid.*, p. 162.

²¹¹ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 24th meeting (A/C.6/66/SR.24)*, para. 91.

²¹² See, among others, General Assembly resolutions 1375 (XIV) of 17 November 1959 and 1761 (XVII) of 6 November 1962, and Security Council resolution S/134 (1960) of 1 April 1960.

²¹³ *Yearbook ... 2011*, vol. II (Part Two), paras. 43–44.

69. In response to the comments made with regard to the need to make greater reference to the operational aspects of assistance, he recalled that IFRC had specifically requested that the Commission should leave operational matters aside,²¹⁴ as it would risk duplicating the Federation's rules²¹⁵ in areas where its expertise was incontestable. The Commission's task had instead been defined as the provision of a broad general framework of legal rules on the applicable principles of law and the rights and duties of the main actors. Thus, while Mr. Murase's proposal to draft a model status-of-forces agreement for disaster situations was very interesting and might well be useful, the Commission must determine whether such a task would entail a change in the scope of the topic; the Special Rapporteur's views on that proposal would be most welcome.

70. In conclusion, he recommended the referral of the three draft articles to the Drafting Committee and reiterated his thanks to the Special Rapporteur for his outstanding contribution.

The meeting rose at 12.45 p.m.

3141st MEETING

Thursday, 5 July 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Choung Il Chee, former member of the Commission

1. The CHAIRPERSON said that it was his sad duty to inform members of the Commission of the death of Mr. Choung Il Chee on 1 May 2012. A member of the Commission from 2002 to 2006, eminent jurist and member of various university associations, Mr. Chee had participated in several important international conferences, including on fisheries and the environment. A professor of international public law at Hanyang University in Seoul, he had also been the author of many publications and articles and had made a substantial contribution to the literature of international law. His vast experience, in-depth knowledge and friendly and collegial manner would be remembered by everyone who knew him.

²¹⁴ See the second report of the Special Rapporteur, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 28.

²¹⁵ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2011). Available from [www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf).

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

2. Mr. PARK expressed thanks, on his own behalf and on behalf of the Permanent Mission of the Republic of Korea to the United Nations Office at Geneva, to members of the Bureau and, more generally, members of the Commission for having taken the initiative to organize the tribute to Mr. Chee. After finishing his studies at the University of Seoul, Mr. Chee had studied international law and international relations at Georgetown University and New York University in the United States of America, where he had taught for 10 years. He had then returned to the Republic of Korea in the mid-1970s, where he had also taught and had carried out important research work. An expert in fisheries, he had participated in a number of conferences on maritime law and had left behind him several authoritative publications in Korean and English.

3. Mr. MURASE said that he had been saddened to hear of the death of Mr. Chee, whom he had encountered several times at meetings of the Japan branch of the International Law Association in Tokyo. He had been a sincere, frank and direct man who hated hypocrisy more than anything. He had made no secret of his feelings about Japan's colonial past in Korea, which he condemned. He sometimes brought up the subject during the Commission's meetings, departing from the topic under discussion, something which he had every right to do, however, since his country had been subjected to such horrendous atrocities. As he himself abhorred hypocrisy, he could understand Mr. Chee's angry reaction and would have reacted the same way. The death, on 15 July 1907, of the Korean diplomat Yi Jun, who had gone to The Hague to plead for Korean independence at the second International Peace Conference, had deeply affected Mr. Chee, who had eloquently argued that such events should not happen again.

4. Mr. CANDIOTTI joined all speakers who had expressed their sorrow at the death of Mr. Chee. He had had the honour of sitting next to Mr. Chee from 2002 to 2006 and remembered a friendly, affable man with a solid knowledge of international law who was particularly committed to the work of the Commission. On behalf of the Group of Latin American and Caribbean States, he expressed his condolences to Mr. Chee's family and to the Republic of Korea.

5. Mr. KAMTO said that the successive announcements of the deaths of former members of the Commission served as a reminder of the fragility of the human condition. There was one lesson that current members could learn: they must perform their tasks to the best of their ability, with rigour and courtesy, in order to preserve the best possible memories of the moments they shared. He had had the privilege and honour of being well acquainted with Professor Chee, who had joined the Commission in 2002, after his own arrival, and had sat near him. He remembered a delightful man with a thorough knowledge of the international situation in the aftermath of the Second World War, and he recalled their conversations about the 1960s, when the Republic of Korea had been at the same level of development as a number of African countries.

6. Mr. Chee had been always ready to help. He had been a man of scruples, with great human qualities, and had exuded honesty. He would remember him fondly, and on behalf of the Group of African States, he requested Mr. Park to convey condolences to Mr. Chee's family and warmest regards to the Government of the Republic of Korea.

7. Mr. PETRIČ said that when he himself had joined the Commission, Mr. Chee had no longer been a member. He had met him twice, however, and had seen that, in addition to his solid legal knowledge, his thinking went far beyond the field of law, revealing a thorough knowledge of international relations and political issues—an essential quality for a jurist. On behalf of the Eastern European and other States, he offered condolences to the deceased's family and to the Government of the Republic of Korea.

**Protection of persons in the event of disasters
(continued) (A/CN.4/650 and Add.1, sect. C,
A/CN.4/652, A/CN.4/L.812)**

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

8. Mr. NIEHAUS thanked the Special Rapporteur for his fifth report on the protection of persons in the event of disasters. The document, which was particularly well reasoned, would be a valuable tool for future work on an issue that was topical, as could be seen from the successive natural or man-made disasters that threatened the life of thousands—indeed hundreds of thousands—of people and called for rapid and effective responses. The Commission's work would be useful if the outcome consisted of clear, detailed rules that could help solve major problems.

9. Sir Michael had been right to recall that discussion on the draft articles that had already been adopted should not be reopened and that the Commission must concentrate instead on the content of the fifth report, particularly draft articles A (Elaboration of the duty to cooperate), 13 (Conditions on the provision of assistance) and 14 (Termination of assistance). It would not be easy, since those new draft articles were closely bound up with issues such as the need to promote humanitarian principles and cooperation while ensuring compliance with the principles of State sovereignty and non-interference, on which discussion would probably need to be resumed. In view of the very nature of the topic, the Commission must develop rules that could be implemented rapidly; and they would therefore need to be simple and specific. In that regard, Mr. Murase's proposal to draw up a model status-of-forces agreement, to be applied provisionally until a final agreement had been drafted, was worthy of support.

10. There could, and should, be cooperation in numerous areas, all of which were equally important. For that reason, draft article A on the duty to cooperate was valuable and timely. Draft article 13, which addressed the need to strike a proper balance between the provision of assistance and compliance with the principles of State sovereignty and non-interference, was also worthy of support. The ideas put forward on needs assessment in paragraphs 151 to 153 of the report were of the utmost importance, as were those

on quality control in paragraphs 154 to 156. Experience showed that even where there was a genuine desire to assist, relief assistance of insufficiently high quality could be harmful for recipients. The specific information provided in paragraphs 157 to 160 on the scope and type of assistance was also essential.

11. Another issue that was just as important as needs assessment and quality control, and which arose unfortunately in many areas of activity, in particular that of humanitarian action and cooperation, might also need to be addressed: the issue of corruption. On some occasions in the recent and not so recent past, international assistance had ended up benefiting officials and members of corrupt Governments more than the intended recipients. In 1972, for example, following the earthquake that had destroyed the capital of Nicaragua, Managua, the massive international assistance provided had been largely siphoned off to benefit the family of the dictator Somoza. More recently, following the earthquake in Haiti, part of the international assistance provided had been diverted to other countries and then distributed, for a fee, to victims who should have received it free of charge. Enabling donors to carry out appropriate controls to ensure that such admittedly rare acts were not repeated should therefore be envisaged.

12. With regard to draft article 14, he said that it was important to specify when the assistance was to be terminated by providing for consultations, the modalities for which needed to be determined, between the affected State and the assisting actors. The argument that all States should offer humanitarian assistance, except when it might seriously jeopardize their own economic, social or political conditions, raised the issue of who was to determine the capacity of States. If, as one might imagine, it was up to a State that was supposed to provide assistance to do so, then its objectivity might be called into question: yet another reason why States should be left free to provide, or not, the assistance requested by an affected State. Lastly, it was clear that the right of the affected State to make the provision of assistance subject to certain conditions must be exercised in accordance with its national legislation and international law, as stated in draft article 13. With those comments, he was in favour of referring the draft articles under discussion to the Drafting Committee.

13. Mr. NOLTE joined his colleagues in congratulating the Special Rapporteur, who had presented yet another excellent, thoroughly researched report that in his view was heading in the right direction. The report elucidated the complex and tragic dimensions of the topic, of which Mr. Petrič had spoken so movingly. Before addressing the three new draft articles proposed by the Special Rapporteur, he wished to make his position clear on a few general points raised by the Special Rapporteur himself in his description of the debate in the Sixth Committee and by members of the Commission.

14. Like Mr. McRae and others, he did not wish to reopen past discussion and decisions, but rather to contribute to a reaffirmed consensus that it was not a question of seeking a balance between sovereignty and human rights in the abstract, but of determining the relative importance of the applicable principles and

rules in specific situations and with respect to specific questions. Sir Michael had usefully reminded the Commission of that point of departure.

15. Draft article 10, which concerned the duty of the affected State to seek assistance if the disaster exceeded its national capacity, had been criticized by quite a number of States in the Sixth Committee. Should the Commission discount those statements, as Mr. McRae seemed to believe, and rather emphasize the fact that in practice, States uniformly did seek assistance when a disaster exceeded their national capacity? Or should it follow the view, expressed by Mr. Murphy and others, that practice alone did not demonstrate the existence of the necessary *opinio juris*? The question could not be answered solely by assessing practice and *opinio juris*: the general context of the existing human rights obligations, whether treaty based or customary, must also be taken into account. The fundamental human rights obligation of States to ensure the right to life, to physical integrity and to food necessarily implied that States must seek assistance if a disaster exceeded their national capacity; that did not mean, of course, that States would have to accept any kind of assistance. Taking those legal considerations into account, it could be stated that the actual uniform or quasi-uniform State practice of seeking assistance in cases when a disaster exceeded national capacities was underpinned by a general *opinio juris*. In that sense, the duty to seek assistance, as articulated in draft article 10, was not a new obligation that the Commission would “impose”, but a well-established rule of international law. Draft article 10 thus did not create any additional grounds for State responsibility, and he agreed with Mr. McRae that the Commission could confidently retain the formulation.

16. Some States and new members of the Commission had criticized the wording of draft article 11, paragraph 2, according to which consent to external assistance by the affected State should not be withheld arbitrarily; that raised the classic question of who was to decide that consent had been “arbitrarily” withheld. It was true that the formulation of a legal standard, even one as broad and imprecise as “arbitrarily”, necessarily implied that its applicability was not determined unilaterally by those States to which the standard applied. However, that also meant that the applicability of the standard could not be determined unilaterally by another State or States in accordance with their preferences. The standard in question, which was relatively flexible, was the minimum that should be respected by States, which had the human rights-based obligation to protect life and physical integrity and provide for the basic nutritional needs of the population. Mr. Tladi believed that draft article 11 would remain meaningless unless the word “arbitrarily” was defined. However, the advantage of that word was that it left much room for discretion, while forcing the parties concerned to justify their position in the light of the overall goal of effective disaster relief.

17. Some members thought that draft article 12 on the right to offer assistance reflected a narrow focus on rights and duties, whereas the most important practical issue was cooperation. That criticism could, of course, be applied to all the other draft articles that articulated legal rights and duties in an area where so much depended on voluntary

cooperation, generosity and openness among States and other actors. However, any opposition between the articulation of rights and duties and the encouragement of voluntary cooperation was a false opposition. It was true that the Commission should be mindful of the practical usefulness of its work, a point to which he would return later, but it should also exercise its specific competence, which was to articulate and develop legal principles and rules. The right to offer assistance was not a right that could in any way inhibit the voluntary dimension of the provision of assistance.

18. The same was not true for a possible duty to provide assistance; it was therefore not surprising that States had been virtually unanimous in saying that no such duty existed. Establishing a duty to provide assistance would raise difficult questions of the allocation of responsibility and the determination of the relative capacity of different States. The Commission should therefore not take that route. That being said, it was conceivable that certain situations might arise in which specific States had specific duties to provide assistance. For example, the territory of a State affected by a disaster might be surrounded by that of another State, in which case the neighbouring State could have a duty to permit the delivery of assistance by other States or actors. Such permission would not only be a precondition for the delivery of assistance by third States, but would itself be a form of assistance, which could be conditioned in such a way that it implied no costs for the neighbouring State. More generally, third States could even be said to have a duty to prevent, within the framework of international law and according to their capacities, the commission of the gravest forms of human rights violations in other States. That concept, introduced by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, could be developed and applied in the future to certain extreme disaster situations. The Commission should avoid expressing a view on a possible duty to provide assistance, in order to leave room for developments in that area.

19. With regard to draft article A on the duty to cooperate, like many other speakers he had observed a disparity between the rich body of material in the report and the rather limited corresponding draft article. He encouraged the Special Rapporteur to be more ambitious and to try to further flesh out that important text. The principle of cooperation was an accepted legal principle and could imply, in certain situations, fairly concrete obligations, depending on the nature and importance of the goal to be achieved. In that context, the distinction between obligations of conduct and obligations of result was not necessarily very helpful. The goal of providing effective and timely assistance was, after all, the paramount consideration. That goal should be stressed; in certain situations, it could also imply obligations of result. Again, like other speakers, he was sceptical as to how useful it would be to take article 17, paragraph 4, of the articles on the law of transboundary aquifers²¹⁶ as

²¹⁶ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

a model. That paragraph was formulated as a unilateral obligation, whereas in explicating the duty to cooperate, the Commission should stress the reciprocal nature of the obligation. The fact that “scientific” cooperation was listed in article 17, paragraph 4, as the first possible form of cooperation was perhaps understandable in the specific context of transboundary aquifers, but it would not seem to be a priority matter in most disaster situations.

20. A number of speakers had noted that draft article 13 relating to conditions that might be placed on assistance was rather limited in view of the extensive material presented by the Special Rapporteur in his report. Again, the Special Rapporteur and the Commission should try to go further along a number of avenues. It should be made clear that the waiving of rules in disaster situations was not only a question of goodwill and generosity but that it also raised important questions concerning the rule of law. Laws could not, and should not, be easily set aside, even in disaster situations, and the Commission should not be seen to encourage a facile disregard of the law in exceptional situations. The real issue was whether there were procedures in certain domestic legal systems that triggered emergency regimes under which certain legislation applicable in normal situations could be suspended. That was a question of preparedness, relating to the pre-disaster phase. In addition, according to paragraph 173 of the report, the principle of sustainable development would support the imposition by the affected State of the condition that assistance must ameliorate, not just restore, previous conditions. As a matter of strict logic, such a condition might be seen as fulfilling the principle of sustainable development, but there was some doubt as to whether it was really helpful in most cases and whether the Commission should be seen to encourage the formulation of conditions that could deter States and actors from providing assistance.

21. With regard to draft article 14, he shared the view of previous speakers that its current formulation could give rise to the misunderstanding that consultations were a necessary condition for the termination of assistance. However, it was not sufficient to merely articulate the right of the affected State to unilaterally terminate the assistance. Given that it was very difficult to formulate a draft article on termination that would not give rise to contradictory interpretations or misunderstandings, he wondered whether draft article 14 should not simply be dropped, on the assumption that the termination of assistance was covered by the general rules on the requirement of consent, the duty not to arbitrarily withhold consent and the right to impose conditions. Another possibility would be to include in draft article 14 a “without prejudice” clause referring to the general principles set out earlier in the text.

22. Lastly, Mr. Murase’s proposal that the Commission should draw up a model status-of-forces agreement and attach it to the body of the draft articles was a very interesting and valuable one. Such a model agreement could indeed be a very useful practical instrument. It was perhaps not advisable, however, to limit the Commission’s work to drafting a model status-of-forces agreement, since that might give the misleading impression that disaster relief was typically and

primarily a military matter. He also wondered whether it would be possible or advisable for the Commission to draw up a full-fledged model status-of-forces agreement. For those two reasons, it was perhaps preferable for the Commission to prepare a set of basic rules on foreign personnel involved in disaster relief that could facilitate the elaboration and negotiation of specific agreements among the parties concerned. In any case, he agreed with Mr. Saboia that it was largely up to the Special Rapporteur to decide whether the Commission should draw up a model agreement of any kind. The same was true regarding the extent to which the Commission should address other practical questions. The Special Rapporteur had usefully reminded the Commission that IFRC had invited it to be mindful of the respective forms of expertise of each body.²¹⁷ Perhaps, as Sir Michael had suggested, the Commission should limit itself to referring to the work of bodies such as IFRC, which had practical expertise that was generally acknowledged.

23. Mr. GEVORGIAN said that the Commission’s work on the topic was very timely, given the frequency and increasing gravity of disasters that cost thousands of people their lives and caused serious material damage. The importance of the topic was confirmed by the fact that, despite its complex nature, the draft articles formulated so far by the Commission had been well received on the whole by the Sixth Committee. As to the form the result of the work should take—draft articles, recommendations or guidelines—it was too early to decide: the Commission would be in a better position to do so at a later date.

24. It was difficult to evaluate the draft articles contained in the fifth report without an in-depth knowledge of matters of principle, and in particular the balance to be struck between sovereignty and cooperation. In that regard, he endorsed the view expressed by Sir Michael concerning the principle of sovereignty and States’ human rights obligations. In the light of the discussion in the Sixth Committee, it was very important that the Commission should address that aspect in a circumspect manner and based on the rules of international law currently in force. It was unlikely that new rules, for example a legal duty to provide assistance, would receive the support of Member States. One must be realistic: the discussion in the Sixth Committee had shown that States were against establishing, in draft article 10, a duty of the affected State to seek assistance. As many speakers, in particular Mr. Hassouna, had rightly said, that raised a whole range of legal issues, including who was authorized to determine that a disaster had taken place or that the disaster exceeded the response capacity of the affected State.

25. Furthermore, if strict legal duties were established, a State failing to fulfil them would incur international responsibility, which raised other issues that could not necessarily be properly addressed. Article 10 should therefore be reformulated, not as a legally binding duty but as a provision intended to guide the action of States. To ensure maximum flexibility, article 10 should set out a moral and political duty and not a legal obligation in the strict sense of the term.

²¹⁷ See the second report of the Special Rapporteur, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 28.

26. Similarly, many States had rejected the idea of a duty to provide assistance. As rightly stated by the Special Rapporteur in paragraphs 55 to 78 of his report, in positive international law, States had no legal duty to provide assistance when requested by an affected State. The offer of assistance should be seen within the framework of the implementation of the principle of cooperation between States with a view to the protection of persons in the event of disasters.

27. With regard to the specific arrangements for such cooperation, the work carried out by the Special Rapporteur as reflected in the chapter of his report on the conditions for the provision of assistance was extremely useful, particularly when it came to the conditions that could be imposed by the affected State on that assistance. It was important that draft article 13 should establish the idea that in exercising its sovereignty, the affected State could impose conditions on the provision of assistance. As many members had noted, the draft article was extremely concise: it should be elaborated further in order to prevent affected States from interpreting it too broadly, making their consent to assistance subject to conditions that rendered their consent meaningless.

28. With regard to draft article A, he supported the approach adopted by the Special Rapporteur, who had based that provision on article 17, paragraph 4, of the articles on the law of transboundary aquifers. However, as many members had noted, the term “cooperation” appeared to be used in draft article A in a different sense than in draft article 5, to which draft article A referred. In addition, the words “shall provide” suggested a duty that did not correspond to practice. In his view, the text should be worded so as not to be interpreted as establishing a legally binding duty to provide assistance.

29. Draft article 14 on the termination of assistance also appeared to establish a legal obligation of consultation between the affected State and the assisting actors. That did not seem logical: the provision of assistance required the consent of the affected State, which could impose conditions, but once the assistance had begun, none of the parties could terminate it without consultation. In his view, termination of assistance should be envisaged in a sufficiently flexible way so that an affected State that believed it no longer required assistance, or a State considering that it no longer had the capacity to provide assistance, could terminate the assistance.

30. Mr. Murase’s proposal that the Commission should draw up a model status-of-forces agreement for the entities that provided assistance in the event of disasters was an interesting one. Annexed to the draft articles, such a text would be extremely useful in practice. In the course of his professional duties, he had often fielded difficult questions relating to assistance in the event of disasters: for example, on bringing medicines from abroad into the territory of the affected State in the context of medical assistance or on the quarantine rules applicable to search and rescue dogs and the related documentation required. Dozens of similar questions arose in disaster situations and needed to be answered quickly. For that reason, a model agreement would be very useful, but the Commission was not necessarily the most suitable body to draw up such

an instrument, since the issues involved were extremely technical.

31. Mr. KAMTO said that, from the outset, the Special Rapporteur’s fifth report on the protection of persons in the event of disasters had sparked a lively debate reflecting both concern over general aspects and intense interest in the technical details of the draft articles, particularly the three that had been proposed most recently.

32. Generally speaking, there were two main themes in the discussion: the approach followed by the Special Rapporteur and the vexed issue of the form that the Commission’s final product should take. With regard to the approach, the Special Rapporteur had summarized, in detail and in a remarkably thorough way, the observations formulated by States in the Sixth Committee. Mr. Murphy had rightly held that analysis up as exemplary. However, he himself agreed with Mr. McRae who, supported by Mr. Saboia, had pointed out that the comments of States should not force the Commission into some sort of “Procrustean bed”: the Commission was not a sounding board for every little squeak made by States in the Sixth Committee. It should be attentive, but not subservient, to the Sixth Committee: otherwise, it would lose its own identity and its *raison d’être*. The Commission was and would remain a body of experts—one that was at the service of States, true, but one that hewed to the highest standards of international law. It was on that basis—and not its ability to do the diplomatic or political work of the Sixth Committee—that the Commission would command the respect of the Committee and those that followed its work.

33. The question of the form the final product of the Commission’s work should take was related to the approach to the work and was the logical consequence of the Commission’s obsession with the Sixth Committee. The Commission had a statute that defined its mandate, but lately it seemed to be neither progressively developing nor codifying the law. With its new membership, in particular, the Commission appeared amenable to codification—and codification alone—in only those areas where the rules were so well established in international law that it took no effort to identify them: they were self-evident truths. As soon as international law needed to be progressively developed to any extent in a given area, the Commission lost its nerve. It preferred to hide behind such strange legal entities as study conclusions, guides, guidelines or general principles that were so general that they offered very little practical assistance to States. He was not against innovation: indeed, he admired the imaginative thinking of certain Commission members. It was also true that the final form the work would take would significantly shape its content. The Commission should, wherever possible, propose to States a body of standards that could provide legal order in a given domain, but it should also move international law forward in certain areas. For that reason, he fully supported Mr. Saboia’s proposal that the Special Rapporteur should be asked rather than told what the final form of his work should be. He should try to propose, wherever possible, practical and specific rules based on the international practice acquired over more than a quarter of a century of humanitarian assistance, or “interference”, by the international community. ICRC

and other relevant organizations could contribute to the Commission's work, where possible, but they could not treat it as their own domain. While ICRC had competence in the implementation of international assistance, the progressive development and codification of international law fell to the Commission.

34. In legal and technical terms, disasters implicated and tested the limits of both the territorial jurisdiction and the sovereignty of the affected State. Under international law, a sovereign State was obliged to exercise control over its territory and everything that occurred within it; similarly, the State had a duty to protect its residents. Other States, which were prohibited under international law from encroaching on the first State's jurisdiction, were not immediately involved: they could only intervene if requested to do so by the affected State. That principle had been clearly established by the Special Rapporteur.

35. On the other hand, the duty to cooperate, the existence of which in international law was indisputable—at least as a general principle, and in some areas as a specific norm and rule of law that was directly applicable and binding—could not be imposed on States in the event of a natural disaster. States were not obliged to cooperate in absolute terms; they were supposed to cooperate as far as possible since, as other speakers had pointed out, no duty to cooperate in the event of natural disasters had been objectively established in positive law. To say that States had a duty to cooperate in the exploitation of shared resources or the protection of an endangered species was one thing, but to say that they had a duty to cooperate by providing assistance in the event of disasters was another. In both cases, it was a duty to cooperate—whether to achieve results or to provide the necessary means was irrelevant. While cooperation was a fairly firm obligation in the context of relations between the affected State and United Nations bodies and Red Cross and Red Crescent Societies, it could be more flexible in the context of relations among States and between third States and the affected State.

36. The principle of the duty to cooperate was established in draft article 5, and the task in draft article A was therefore not to affirm that principle but to explain what the content or substance of cooperation should be. Replacing the current title of draft article A by wording such as "Content of the duty to cooperate" would perhaps accomplish that task.

37. With regard to draft article 13 (Conditions on the provision of assistance), the terse reference to "international law" appeared all the more imprecise given that it was not yet known which rules of international law applied to disasters. Instead of the phrase "which must comply with its national law and international law", the expression "which must comply with its national law and the current draft articles as well as other rules of international law" would be more comprehensive and more appropriate.

38. Lastly, as other members of the Commission had noted, the current wording of draft article 14 on termination of assistance was much too succinct. The text could be expanded, taking into account a number of suggestions.

The current text could constitute paragraph 1, and two other paragraphs could be added, with the following wording:

"2. The affected State may terminate assistance at any time, if prolonging the assistance might jeopardize its national security and independence.

"3. The external assistance provider shall not remain in the territory of the affected State beyond the date of termination of assistance set by that State."

39. The reference to national independence in paragraph 2 of his proposal was based on the fundamental principle that assistance, or cooperation, in the event of a disaster, must respect the sovereignty of the affected State and must in no way be intended to jeopardize its independence. Security was mentioned because of practical considerations. The principle set out in his paragraph 3 was intended to reassure the affected State that, on the one hand, the sole aim of the assistance provided to it in the event of a disaster was to help it deal with a critical situation and that, on the other hand, when a date for termination of assistance had been fixed—either at the initiative of the affected State, which considered that there was no longer any reason for the assistance to continue or for the assistance provider to remain on its territory, or by mutual agreement with the assistance provider—the date would be respected.

40. The proposals were largely based on the analysis carried out by the Special Rapporteur in paragraphs 184 to 186 of his fifth report. He was in favour of referring draft articles A, 13 and 14 to the Drafting Committee.

41. Ms. JACOBSSON, after commending the Special Rapporteur on his fifth report on the protection of persons in the event of disasters and the valuable summary of the debate in the Sixth Committee he had included therein, said that she was impressed with the way he had managed to focus on the protection of the individual while maintaining the basic presumption that the State had the primary role in the direction, control, coordination and supervision of disaster relief and assistance in its territory.

42. In introducing his report, the Special Rapporteur had referred to the "cycle of a disaster" as a recurring concept in the documents of the United Nations, IFRC and other organizations, rightly considering that the concept should also be reflected in the work of the Commission.

43. Mr. Murase's proposal that the Commission should draw up a model status-of-forces agreement was worthy of consideration, given the important contribution made by military personnel to assistance operations. However, in some countries, including hers, the emergency response structure was different: civilian authorities were in charge of emergency planning and relief operations, at both national and international level. That did not mean, of course, that military personnel and equipment were not involved. In her view, a model status-of-forces agreement was not enough; a more comprehensive model agreement was required, as reflected in certain bilateral treaties Sweden had concluded in that area. She gave the example of the cooperation agreement recently concluded between

Sweden and Latvia on collaboration within the field of emergency prevention, preparedness and response,²¹⁸ which contained both an article on general conditions for border crossing and one on situations when the assistance providers were military personnel, State ships and aircraft and military vehicles, in which case special permission for entry was required.

44. While a model status-of-forces agreement could be of great practical use, a model assistance agreement was also essential. Assistance agreements were most often concluded before a disaster occurred and covered all three phases of the disaster, before, during and after—in other words, the entire cycle of disaster. They often provided for cooperation measures such as common training and exercises that not only served a practical purpose but were also an important way of reducing tension between countries.

45. She suggested that a model assistance agreement and a model status-of-forces agreement could be annexed to the draft articles on the protection of persons in the event of disasters. They would not necessarily run counter to the Model Act²¹⁹ and the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance²²⁰ developed by IFRC in 2011 and 2007 respectively, since those documents had different purposes.

46. Like the Special Rapporteur, she thought that it was difficult to establish the existence—at least in customary international law—of a duty to provide assistance when requested by the affected State. However, States had concluded bilateral and regional agreements in which they undertook to provide assistance to other States, mainly neighbouring States. Sweden, for example, had signed numerous bilateral treaties on a variety of matters relating to the initiation of cooperation between the parties in the event of an emergency.

47. She was not convinced that the lack of responses to the request for information from States on their national legislation meant that there was a lack of legislation. It was perhaps necessary to put the question differently and ask what kind of bilateral and regional agreements existed and how they were reflected in national legislation and in practice.

48. Similarly, she was not convinced of the need to task an independent body with assessing compliance by States with their obligations under draft articles 9 and 10. If a State failed to fulfil its obligations under international law, the usual diplomatic recourse and dispute settlement procedures would be available. She did not see the value

of setting up a new body for that purpose, nor what kind of body it would be. For obvious reasons, none of the existing bodies or organizations—ICRC, IFRC or United Nations entities or institutions—could take on that role. Bilateral treaties on mutual assistance often included dispute settlement provisions, which had an important preventive effect.

49. Like other members of the Commission, she did not believe that a balance needed to be struck between human rights and State sovereignty. Human rights existed irrespective of whether or not a State's sovereignty was infringed. Reciprocity was not required. The fact that a State might derogate from its obligations did not mean that human rights ceased to exist.

50. She welcomed the fact that the Special Rapporteur had chosen to elaborate, in a new draft article, what the duty to cooperate implied. Some members had argued that the examples of cooperation given in draft article A did not correspond to what was usually meant by “duty to cooperate”. She understood that view. However, cooperation between States could take many forms. A duty to cooperate was enunciated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,²²¹ and there were numerous treaty-based obligations to cooperate. In both cases, a failure to meet the obligation was a breach of the law. The fact that different forms of cooperation existed did not present a problem in the context of the Commission's work. The only thing that needed to be done was to change the title of the draft article, which could be renamed, for example, “Cooperative measures”, a title used in many intergovernmental agreements.

51. The reasoning behind draft article 13 (Conditions on the provision of assistance) was clear and consistent. The draft article was based on existing agreements, model laws and guidelines, including the IFRC Model Act, something that lent it weight, in view of the fact that the rationale behind it was already widely accepted.

52. Like other members of the Commission, she would like to see an expanded version of draft article 13, elaborating in greater detail on the obligation of assisting actors to cooperate in compliance with national legislation and identifiable needs and quality control. In addition, the limitations on conditions under international and national law should be addressed in a separate draft article 13 *bis*, in which it should be clearly stated that the affected State could not make the provision of assistance subject to conditions that ran counter to principles of humanity, neutrality, impartiality and non-discrimination, with the reasons being given in the commentary to the draft article. That would provide an opportunity to clarify the relation between non-discrimination and the requirement of meeting specific needs. Equally, limitations could not be imposed on human rights unless they were derogable. The fact that disasters implicated numerous human rights, such as the rights to food and water and the right to adequate housing—as the Special Rapporteur had stated

²¹⁸ Agreement between the Government of the Republic of Latvia and the Government of the Kingdom of Sweden on collaboration within the field of emergency prevention, preparedness and response (Riga, 17 June 2002), United Nations, *Treaty Series*, vol. 2301, No. 41019, p. 283.

²¹⁹ The pilot version of November 2011 is available from [http://www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20\(English\).pdf](http://www.ifrc.org/PageFiles/88609/Pilot%20Model%20Act%20on%20IDRL%20(English).pdf).

²²⁰ IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2011). Available from [www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf).

²²¹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

in paragraph 170 of his report—was one thing; accepting that such rights could be subject to a general limitation was quite another.

53. She welcomed the fact that the Special Rapporteur had specifically cited the Hyogo Framework for Action 2005–2015²²² and mentioned the need to adopt a gender perspective, since taking into account the specific needs of men and women, as well as cultural diversity and other elements, would make the assistance much more effective, rapid, suitable and cost-effective. While gender aspects were increasingly being mainstreamed in humanitarian assistance, they were being left out to some extent in disaster situations, as had been observed at the most recent International Conference of the Red Cross and Red Crescent, held in 2011.

54. Like others, she was of the opinion that draft article 14 required further elaboration since as currently drafted, its implications were not entirely clear. She would be in favour of the three draft articles proposed by the Special Rapporteur being sent to the Drafting Committee.

55. Ms. ESCOBAR HERNÁNDEZ commended the Special Rapporteur on his solid, well-reasoned fifth report on the protection of persons in the event of disasters, which would further advance the Commission's work. As the Special Rapporteur had rightly highlighted in his reports, the duty to cooperate, and more generally the principle of cooperation, went to the very core of the issue of protection of persons in the event of disasters; she therefore welcomed the importance now being attached to it in the fifth report. The care with which the Special Rapporteur had sought to strike a balance between the need for assistance and respect for State sovereignty was also to be commended.

56. The attempt that could be discerned in draft article A to take into consideration the practical aspects of assistance was also very commendable. However, and notwithstanding the fact that the wording of the new draft article appeared on the whole to be acceptable, she did not share the Special Rapporteur's point of view concerning the nature of the text and its relationship to the duty to cooperate. In her view, the duty to cooperate (covered in draft article 5) and the forms of cooperation (draft article A) were different in nature. Draft article 5 was structural and established a principle, while the new draft article A was operational. The new text did not explain the duty to cooperate but set out what it entailed. While it could usefully be included within the draft articles as a whole, deciding where it should be placed was a task that should no doubt be given to the Drafting Committee.

57. She found the arguments advanced by the Special Rapporteur in his report with regard to draft article 13 and conditions on the provision of assistance to be very cogent. However, draft article 13 mentioned only extremely limited conditions, mostly linked to compliance with national law and international law. While it could be interpreted in a different, less restrictive way if the two parts of the text were taken separately, the fact remained

that it did not cover all the essential questions relating to conditions for assistance raised by the Special Rapporteur in his report. Perhaps the Special Rapporteur could consider rewording the draft article and adding a paragraph or preparing additional draft articles. Treating the issue of conditionality in a more comprehensive manner would enhance the legal safety net, avert the ever-present threat of arbitrariness and strengthen the legal regime for the protection of persons in the event of disasters.

58. With regard to draft article 14, there was no doubt that the termination of assistance was a situation in which the dialectical relationship between protection of persons in the event of disasters and respect for State sovereignty clearly arose, as did the need to strike a balance between the two. The context in which termination occurred was important: the affected State had accepted the assistance of a third State and had been able to impose conditions on the provision of the assistance. Important work had been carried out by various actors and the persons affected had started to receive help, giving rise to expectations and probably also rights that would be threatened by the termination of assistance. All those elements needed to be taken into account when deciding to terminate assistance. From that point of view, draft article 14, while useful, seemed quite limited, being concerned more with the definition of the overall duration of assistance than with the time at which assistance ended and the circumstances and conditions in which it could be terminated. The Special Rapporteur might find it useful to draw up additional proposals that took into account the various aspects that came into play in the termination of assistance and to review the wording of draft article 14.

59. In addition, she found Mr. Murase's proposal that the Commission should draw up a model status-of-forces agreement well worthy of consideration. Armed forces very often took part in relief operations in the event of disasters, and in some countries, such as Spain, military units were tasked with assistance in emergency situations or natural disasters. Mr. Nolte's proposal to broaden the Commission's work to include the definition of the legal status of the various categories of personnel involved in the provision of assistance was also very interesting.

60. With regard to whether the Commission's consideration of protection of persons in the event of disasters should be expanded to include certain forms of cooperation relating to disaster preparedness, prevention and mitigation, she said that the way the discussion of the subject was evolving and its handling by the Special Rapporteur attested to its importance. The Special Rapporteur might indeed wish to give it more in-depth consideration in future.

61. Lastly, she recommended that, in view of the obvious value of the draft articles submitted by the Special Rapporteur in his fifth report, they should be submitted to the Drafting Committee.

62. Mr. SINGH said that the Special Rapporteur had helpfully summarized the comments made by States in the Sixth Committee's discussions on the topic. As the Special Rapporteur had indicated, delegations had emphasized the topic's importance and timeliness in the light of the rising number of losses produced by natural

²²² Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolution 2, "Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters".

disasters and had recognized that the Commission's work of codification and progressive development would greatly contribute to the development of disaster response law. They had commended the Commission's efforts to clarify the specific legal framework pertaining to access in disaster situations, something that would help to improve the efficiency and quality of humanitarian assistance and mitigate the consequences of disasters. As the Special Rapporteur had noted, several representatives had praised the Commission for striking the proper balance between the need to protect persons affected by disasters and respect for the principles of State sovereignty and non-interference. Some delegations had emphasized that responses to disasters should always be based on full respect for the sovereignty of the affected State and that humanitarian assistance must not be allowed to be politicized or used as an excuse for interfering in the internal affairs of the affected State. The importance of international solidarity in the event of disasters had also been emphasized. With regard to the question posed by the Commission in its report on the work of its sixty-third session (2011), namely on whether the duty of States to cooperate with the affected State in disaster relief matters included a duty to provide assistance when requested by the affected State,²²³ the Special Rapporteur, after discussing the responses of States and examining a number of international agreements on disaster mitigation, rightly reaffirmed his conclusion that the duty to cooperate in disaster relief matters did not currently include a legal duty for States to provide assistance when requested by an affected State. The responses of States from which assistance was requested were generally based on their capacity to provide such assistance, and in practice, States did provide assistance in the event of disasters on the basis of the principle of solidarity. In paragraph 80 of his report, the Special Rapporteur rightly emphasized the fact that cooperation played a central role in the context of disaster relief and that it was an imperative for an effective and timely response to disaster situations. That essential role called for further elaboration of the functional requirements of the duty to cooperate outlined in draft article 5 and the kind of coordination required by affected States and assisting actors. The Special Rapporteur noted that in identifying the contours of the duty of cooperation, the nature of cooperation had to be shaped by its purpose, which in the current context was to provide disaster relief assistance, and that States' duty to cooperate in the provision of disaster relief must strike a fine balance between three important aspects, with which he himself agreed: such a duty could not encroach upon the sovereignty of the affected State; it had to be imposed on assisting States as a legal obligation of conduct; and it had to be relevant and limited to disaster relief assistance.

63. With regard to draft article A, which was based on a detailed and comprehensive study of the nature of the duty to assist States as well as the categories of assistance, he agreed with the Special Rapporteur's enumeration of the specific areas in which third States should provide assistance. The inclusion of the words "other cooperation" was useful, as it provided flexibility in responding to the needs of particular situations. The wording of draft article 13 concerning conditions on the

provision of assistance was appropriate, since the affected State retained the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory. However, as some members had pointed out, the article needed further elaboration.

64. The Special Rapporteur had noted that in determining the extent of appropriate conditions, it was necessary to reiterate the core principles of State sovereignty and non-intervention and that the affected State could impose conditions on the provision of assistance, including compliance with its national laws and fulfilling demonstrated needs. He had, however, emphasized that the core principles of State sovereignty and non-intervention should be considered in the light of the responsibilities undertaken by States, in the exercise of their sovereignty, with regard to other States and individuals within a State's territory and control. Therefore, any condition imposed by the affected State must be reasonable and must not undermine the duty to ensure the protection of persons in its territory. Furthermore, the affected State had a corresponding duty to facilitate the prompt and effective delivery of assistance, which might include the waiver of national laws as appropriate. In paragraphs 120 to 181 of the report, the Special Rapporteur examined in detail a number of issues, such as the duty to facilitate entry of assistance teams, equipment and tools, which needed to be more concretely reflected in the text.

65. Draft article 14 on termination of assistance was also a useful and practical provision, since the consultations it envisaged would allow the affected State and the assisting State to make the necessary practical arrangements, including for continuing any relief work that might still be required after the withdrawal of the assisting State: that aspect should be reflected in the draft article. Mr. Kamto had proposed the insertion of a new provision on unilateral termination of assistance by the affected State in the event of non-compliance with the conditions imposed. In his own view, that was a different matter which, while important, should be covered in a separate draft article. Mr. Murase's proposal that the Commission should draw up a model status-of-forces agreement was interesting. He shared Mr. Nolte's view that such an agreement should not be limited to military personnel but should include all foreign disaster relief personnel.

66. Mr. CANDIOTI said that, generally speaking, he agreed with the way the Special Rapporteur was tackling the topic. Draft articles 1 to 12 had been adopted on first reading and did not require further consideration. He shared the Special Rapporteur's views concerning the question raised by the Commission in chapter III of its report on the work of its sixty-third session (2011): the duty to cooperate in the event of disasters did not currently mean that States had a legal obligation to provide assistance. True, there was a duty to offer assistance, but not necessarily to provide it, unless there were specific agreements for such a duty or unless the duty was imposed by the relevant international disaster relief organizations. With regard to the wording of the issues on which the comments of States would be of particular interest to the Commission, it was essential to ensure closer cooperation between the Commission's Rapporteur, who was responsible for chapter III of the Commission's annual report, and the special rapporteurs, chairpersons of working

²²³ *Yearbook ... 2011*, vol. II (Part Two), para. 44.

groups and others. In the chapters of his own report on elaboration on the duty to cooperate and the conditions for the provision of assistance, the Special Rapporteur had presented a remarkable analysis of the duty to cooperate and of the conditions on the provision of assistance that brought to light the complexity of, and the problems posed by, those issues, but also a number of possibilities in respect of the provision of assistance in the event of disasters. The new draft articles proposed by the Special Rapporteur, in particular draft articles A and 13, should perhaps be supplemented by texts that gave examples or set out the main forms and arrangements for cooperation. As regards the conditions on the provision of assistance, one might thus consider inserting a separate draft article giving examples and listing various conditions on such provision. There would be nothing exceptional about doing that: the articles on the law of transboundary aquifers contained an article of that type that cited the factors to be taken into account to ascertain the fair and reasonable use of aquifers. Similarly, the recent articles on the effects of armed conflicts on treaties contained an indicative list of treaties whose subject matter suggested that they remained in force in the event of armed conflict.²²⁴ Like other members, he believed that draft articles A and 13 should be supplemented and fleshed out in order to specify the scope and meaning of international cooperation, showing what it entailed in terms of assistance and protection of persons in the event of disasters. Draft article 14 could also be improved on the basis of the proposals that had been made. In conclusion, he was in favour of referring the three draft articles contained in the fifth report to the Drafting Committee.

67. Mr. KITTICHAISAREE said that the title of the topic under discussion, protection of persons in the event of disasters, spoke for itself and that the approach adopted was clearly based on persons and not on the sovereignty of the State. In 2011, Thailand had been hit by floods that had been among the worst in its history—they had affected some 60 provinces and had sometimes lasted several months. After that disaster, the National Human Rights Commission of Thailand had held a seminar to record the stories of those who had been most seriously affected. Three lessons had been drawn from the seminar, to which he fully subscribed, and which the Commission should take into account in view of the importance of the experiences of persons who had actually lived through a disaster. First, such persons had the right to receive prompt, accurate information from the Government and the competent bodies, in order to be able to deal with the disaster and thereby attenuate the negative effects and suffering. Second, they should be able to truly participate in disaster prevention and management and be provided by the Government with appropriate opportunities to do so before, during and after disasters. Third, the Government must provide protection from disasters and bring rapid, appropriate and non-discriminatory relief to affected persons, in strict compliance with human rights.

68. That being said, sovereign States had a legitimate interest in protecting their national interests and national security. The Commission therefore needed to strike an appropriate balance between draft article 10, under which

the affected State had a duty to seek assistance, and draft article 11 on consent of the affected State to external assistance, particularly paragraph 2, under which consent to external assistance should not be withheld arbitrarily. The word “arbitrarily” had given rise to much discussion in the Sixth Committee. If the question was viewed from the standpoint of the sovereign State, the latter might understandably be concerned with the need to preserve national security and the national interest. In addition, the phrase “exceeds its national response capacity” was perhaps not appropriate, given the risk of wounding national pride by assuming that a State had only a limited capacity to protect its population and of undermining that State’s status as a recipient of foreign investment. After all, if the State was unable to prevent industrial centres from being affected by floods, that meant it could not protect foreign investment. It would lose credibility, while the cost of insurance would increase. That was an aspect that had not yet been fully explored.

69. In draft article 12 (The right to offer assistance), the term “right” should be replaced by “positive duty”. With regard to draft articles A, 13 and 14, he agreed in principle with the approach adopted by the Special Rapporteur and would make proposals when the texts were reviewed. Lastly, if the Commission ruled out the possibility of reconsidering the draft articles it had provisionally adopted on first reading, he was afraid that the Sixth Committee would ask it to draw up draft guidelines on the subject rather than draft articles on which a future convention might be based.

70. Mr. TLADI said that he was taking the floor again in order to respond in one statement to all of the comments he wished to address, rather than speaking at the end of each intervention. First, Sir Michael had taken issue with his comment that it was necessary to strike a balance between human rights and sovereignty in the draft articles, arguing that human rights had their own internal balancing mechanism and that trying to balance them in any other way was dangerous. That was legally problematic from a number of perspectives. First, human rights were not, *a priori*, internally balanced: the “mechanism” referred to by Sir Michael was not inherent in human rights at all and actually consisted of the limitations imposed in human rights instruments drawn up through negotiations. Second, even if human rights contained an internal balance—whatever was meant by that—the same was true of sovereignty. That was not an absolute concept either, and nobody was seeking to balance it with anything else. In fact, very few legal concepts were absolute. While Sir Michael seemed to have made his comments in a humorous vein, they were nevertheless reflected in the records, and he himself therefore wished to correct certain inaccuracies. Whether Sir Michael’s statement about the nature of human rights was true or false, the fact remained that in the first part of the session, in the context of the expulsion of aliens, he himself, supported by Mr. Saboia, had said that it was necessary to strike a balance between human rights and sovereignty. At the first meeting of the second part of the session, he had indicated that it was necessary to strike a balance between the key principles underlying the provision of humanitarian assistance in the event of disasters, namely respect for the sovereignty of the affected State and the need to assist affected persons.

²²⁴ General Assembly resolution 66/99 of 9 December 2011. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2011*, vol. II (Part Two), paras. 100–101.

Sir Michael had also suggested that the draft articles in question—presumably draft article 11, paragraph 2, and draft article 10, which were the only provisions that he himself considered to be problematic—were in reality not based on State practice, but that the Commission should retain them nonetheless. That contradicted Mr. McRae's arguments, to which he would revert later. Sir Michael's remark was curious for a number of reasons. First, the Commission's summary records showed that it was Sir Michael who consistently insisted that State practice should be the basis for the Commission's work, as could be seen in the interesting debates he had had with Mr. Dugard on the matter. He for one would be pleased if Sir Michael adopted the same approach when the Commission came to consider the immunity of State officials from foreign criminal jurisdiction. Second, and contrary to Sir Michael's assertion, the draft articles in question had in fact been based on State practice, according to the Special Rapporteur's fourth report. Assuming that Sir Michael was correct and that the purported basis for the articles was not State practice, then what was the basis for those texts? Sir Michael had declined to offer an alternative basis on the grounds that he did not want to get into the substance of matters that had already been discussed.

71. He himself was going to play devil's advocate. Perhaps Sir Michael, in his desire to ensure the greatest protection to those affected by disasters, would contend that the draft articles were based on logic. However, as he had noted earlier and Mr. McRae had amplified the point, States did not as a rule refuse assistance, especially when a disaster exceeded their capacity. It was therefore hard to see how the obligations set out in draft articles 10 and 11 could be based on the desire to ensure maximum protection. Mr. Petrič had rightly noted that there could be situations in which Governments acted in bad faith. However, in those exceptional cases, which he would describe as "situations of lunatic Governments", it was doubtful, as had been observed by Mr. Murphy, that Governments would be convinced by esoteric obligations alone, unaccompanied by coercive measures, when even the threat of collective action generally had little effect. All of that led, inexorably, to a single conclusion: draft article 10 and draft article 11, paragraph 2, were not based on the practice of States, nor were they based on any necessity.

72. Mr. McRae had made the point that "arbitrariness" was a common concept in law: he had mentioned the law of the World Trade Organization (WTO) as an example. However, that organization had a dispute settlement mechanism capable of clarifying such vague and indeterminate terms as arbitrariness, whereas the draft articles drawn up by the Commission did not envisage a dispute settlement mechanism of any kind, let alone one like that of WTO. As Mr. Hassouna had noted, in a system where the content of a text was governed by its interpretation, important and sensitive questions such as the ones under consideration should not be left solely to the good faith of States. Mr. Nolte had put forward an excellent argument about the point of using arbitrariness as a criterion: it was precisely because there would always be a reason for not accepting assistance that arbitrariness could not be considered a relevant criterion. The problem was knowing whether the reason was a convincing one, not whether a reason existed. If the affected State refused assistance for a reason that was

not deemed adequate by most of the actors involved, what happened? He doubted whether a debate on the suitability of the reason for a State's refusal to accept assistance would help persons affected by a disaster very much, as in the example of Ethiopia cited by Mr. Petrič. Even if the obligation set out in draft article 11, paragraph 2, had existed at the time, that country would probably not have agreed to the calls for it to accept foreign assistance.

73. Contrary to the views expressed by Sir Michael, Mr. McRae had suggested that the draft articles were indeed based on State practice. The practice he cited was the fact that States routinely and consistently offered and accepted assistance. Mr. Murphy, eloquently parrying that argument, had contended that that was not the kind of practice that could lead to the creation of rights and duties. More importantly, if States were so willing to receive and offer assistance, then why was there any need for the provisions in question to be grounded in rights and duties? Mr. McRae believed that the fact that States regularly agreed to seek assistance should create a duty to provide assistance. However, States had generally rejected that point of view, which Mr. Forteau alone among all the Commission's members espoused. Mr. Nolte had raised a very interesting point, namely that existing human rights instruments already provided for the duty to seek assistance and the duty not to refuse assistance in an arbitrary manner. However, he himself found it hard to believe that the right to life, for example, constituted a manifestation of *opinio juris* in favour of the duty to seek assistance and the duty not to refuse assistance in an arbitrary manner. The case law of the International Court of Justice showed clearly that *opinio juris* must be based on a specific rule and that one could not use one rule to create another: if that was the case, then the right to life would require the prohibition of the death penalty.

74. Lastly, since Sir Michael had found his comments harsh, he wished to state that he endorsed the aim of the draft articles, which was to encourage States to seek, offer and accept assistance. However, he doubted that the best way to proceed was to adopt an approach based on rights and duties, and he would be proposing amendments when the draft articles were considered on second reading.

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

[Agenda item 1]

75. Mr. McRAE (Chairperson of the Drafting Committee) said that the Drafting Committee on protection of persons in the event of disasters would consist of Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Murase, Mr. Nolte, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Wisnumurti and Sir Michael Wood, who had been members at the previous session, and Ms. Escobar Hernández, Mr. Forteau, Mr. Kittichaisaree, Mr. Murphy, Mr. Park and Mr. Tladi, new members of the Commission, and Mr. Šturma (*ex officio*).

The meeting rose at 1 p.m.

* Resumed from the 3137th meeting.

3142nd MEETING

Friday, 6 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his fifth report on the protection of persons in the event of disasters (A/CN.4/652).

2. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the debate had been enriched by lengthy and substantive discussion of the very basis and aims of the draft articles and the degree to which the 11 draft articles thus far provisionally adopted fulfilled those aims. Although it had not, perhaps, been fully recognized as such, the exchange of views had in fact represented an attempt to reopen discussion of draft articles that had already been adopted on first reading after four years of intense, collective effort to reconcile opposing positions. However, the participants in the debate had acknowledged, in keeping with the long-standing practice of the Commission, that their comments could be considered during the second reading of the draft articles as a whole, in the light of comments from States after the text had been presented to the Sixth Committee of the General Assembly. In the meantime, the opinions expressed during the past week would be reflected in the summary records of the proceedings, and the Special Rapporteur would take them into account at the appropriate time.

3. The question of the final form of the draft articles had been raised several times. The Commission had not taken a position on the matter, as the decision would be in the hands of the General Assembly. That the Commission was proceeding by formulating draft articles in no way prejudged that decision. The resulting texts could ultimately be presented in whatever form was deemed most suitable—whether a convention or a guide to practice.

4. The summary in the fifth report of the comments made by States and international organizations in the Sixth Committee had inspired some Commission members to discuss

the role such comments should play in the Commission's work. He concurred with, and not contradicted, the opinion expressed by several members that such comments constituted an important element but not a determining factor in the Commission's work on a task entrusted to it by the General Assembly.

5. With regard to the three draft articles proposed in his fifth report, Commission members had unanimously decided to refer them to the Drafting Committee, acknowledging that their specific comments could be addressed during the drafting process. It had been suggested that draft articles A and 13 should be supplemented with provisions reflecting the various elements on which they were based, presented systematically. Draft article 13, in particular, should set forth in a non-exhaustive manner, as was done in draft article A, the principal areas that fell within the article's scope of application. He agreed with that approach and proposed to make the corresponding drafting suggestions for draft articles A and 13 in the Drafting Committee.

6. In response to some of the comments on draft article A, he wished to clarify that, while draft article 5 established in general terms the duty to cooperate in the context of disaster response, draft article A specified the main areas in which such cooperation should take place. Some of the misgivings expressed during the recent debate had had to do with the use of the expression "shall provide" in the first sentence of draft article A, which seemed to imply an obligation to provide particular forms of assistance, rather than an elaboration of the duty to cooperate set out in draft article 5. The solution was to delete the words "shall provide" and make the necessary adjustments to the text, and he would propose that solution in the Drafting Committee. A few years ago, the Commission had taken a similar approach in the articles on the law of transboundary aquifers.²²⁵ Just as article 7 of those articles enshrined the general obligation to cooperate in the use and protection of transboundary aquifers, draft article 5 of the text under consideration did the same in the context of disasters. Furthermore, just as articles 16 and 17 of the articles on the law of transboundary aquifers detailed areas in which the obligation would manifest itself, draft article A of the current draft performed a similar function for disasters.

7. The debate had yielded other useful suggestions for improving the wording of draft articles 13 and 14, which he would highlight for the Drafting Committee. His flexibility in taking into account a wide array of suggestions from Commission members reflected his belief that a Special Rapporteur's role entailed bringing together the various positions in order to achieve the best possible expression of the collective will of the Commission, rather than rigidly imposing personal preferences. On that basis, he proposed that draft articles A, 13 and 14 should be referred to the Drafting Committee accompanied by the various

²²⁵ General Assembly resolution 63/124 of 11 December 2008, annex. The draft articles on the law of transboundary aquifers adopted by the Commission and commentaries thereto appear in *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

drafting proposals submitted by members, including the alternative wording suggested for draft article 13.

8. It had been suggested that the Commission should annex to the draft articles a model agreement based on the model status-of-forces agreements between the United Nations and countries hosting peacekeeping operations.²²⁶ It had also been suggested that a similar model agreement could be elaborated to cover non-military actors providing assistance. While such highly detailed models were of practical interest, in his view their drafting fell outside the Commission's purview, and at any rate outside the Special Rapporteur's mandate.

9. He intended to devote most of his next report to the topics of prevention, preparedness and disaster mitigation. In preparing draft articles, he would bear in mind some of the comments made during the consideration of the fifth report—for example, those regarding measures that should be included in national legislation and measures to protect relief workers, especially United Nations personnel. In a future report, he would also propose draft articles on use of terms and miscellaneous provisions preserving the position of the United Nations, IFRC and ICRC.

10. If, once the Drafting Committee had adopted revised versions of draft articles A, 13 and 14, the Commission found them inadequate, he would be happy to submit more detailed suggestions. In conclusion, he thanked those members who had participated in the discussion of the fifth report for their contributions.

11. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to refer draft articles A, 13 and 14 to the Drafting Committee.

It was so decided.

The meeting rose at 10.30 a.m.

3143rd MEETING

Tuesday, 10 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction²²⁷ (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce her preliminary report on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/654).

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that since she was addressing the Commission in plenary meeting for the first time in her capacity as Special Rapporteur for the topic of immunity of State officials from foreign criminal jurisdiction, she wished to make two brief statements before introducing her preliminary report. First of all, she was grateful to the members of the Commission for having appointed her Special Rapporteur, which was an honour and a genuine privilege. She would do everything within her power to carry out her task and dared to hope that by the end of the current quinquennium her work would have been up to the Commission's expectations. Second, she wished to express her acknowledgement and gratitude to Mr. Kolodkin, the previous Special Rapporteur for the topic, both for the work that he had done over five years and for his valuable contributions—the three reports²²⁸ that, together with the memorandum²²⁹ by the Secretariat, formed the historic basis of the Commission's work—which must be taken duly into account as the Commission considered the topic.

3. The preliminary report had been issued in all the official languages of the United Nations. However, a number of editorial corrections should be made to the Spanish text: in paragraphs 66 and 73, the French word “*fonctionnaire*” should be replaced with “*représentant de l'État*”, while in paragraph 70 the term “*ratione personae*” should be replaced with “*ratione materiae*”; similarly, in the English version, the word “immunity” in the third sentence of paragraph 49 should be changed to “impunity”, the word “contention” in paragraph 54 should be changed to “consensus”, and in paragraphs 66 and 73, the French word “*fonctionnaire*” should again be replaced with “*représentant de l'État*”. As the improperly used terms could mislead the reader, she urged members to kindly take note of the corrections she had indicated.

4. The preliminary report had three chapters. In the introduction, she briefly outlined the work done by the Commission on the topic thus far. Afterwards, she described the progress made with regard to the substance of the topic, and she set out the main elements of the reports submitted by Mr. Kolodkin and the main thrust of the debates that had

²²⁷ At its 3132nd meeting on 22 May 2012, the Commission appointed Ms. Escobar Hernández, Special Rapporteur, to replace Mr. Kolodkin, who was no longer a member of the Commission.

²²⁸ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

²²⁹ A/CN.4/596 and Corr.1 (document available from the Commission's website).

²²⁶ Model status-of-forces agreement for peace-keeping operations: Report of the Secretary-General (A/45/594).

taken place in the Commission and in the Sixth Committee of the General Assembly. In the following chapter, she had endeavoured to list the issues on which consensus had not been reached and which should therefore be considered as requiring further consideration by the Commission. Lastly, she proposed a systematic workplan that reflected her view of how she ought to deal with the topic in her future reports, with regard to both substance and method of work. She also recalled that on 30 May 2012 she had held open informal consultations with the members of the Commission, which could be considered to constitute an initial informal debate on the topic. She had included the opinions expressed on those occasions in her report to the extent possible, given the advanced state of her text, which she had already drafted, and the preliminary nature of the report. As the members of the Commission all had copies of the report, there was no need for her to summarize it, and she therefore proposed to focus her presentation on certain methodological or substantive points she thought should be emphasized in order to help the Commission engage in a more structured discussion, although in doing so she obviously had no intention of limiting or directing the debate. Out of a desire for clarity and simplicity, she had structured her statement into two groups of observations, one dealing with methodology and one with substantive issues.

5. First of all, with regard to the current state of the topic, an essential consideration, since it determined the form that future work would take, she said it was impossible, notwithstanding the significant preparatory work already accomplished, to say that the issues under consideration had been settled and that a final solution could be seen, or that the debates held so far had been conclusive. On the contrary, the reports of the preceding Special Rapporteur and the debates in the Commission and the Sixth Committee had shown that the topic under consideration was very complex, and that its principal points were far from eliciting even the beginnings of a consensus. Consequently, while future work should necessarily take account of Mr. Kolodkin's three reports, consideration should also be given to the views expressed by Commission members and by States on the subject of those reports. In particular, the points of view and perspectives expressed thus far, which were many and varied, should be taken into account, or else the Commission's work might be impeded. It was thus imperative to begin by identifying the very few points on which there was consensus and the numerous points on which views diverged; that was what she had tried to do in her preliminary report, which offered a new point of departure for the Commission.

6. Second, she wished to make an observation of a methodological nature that also recalled in a general way the Commission's mandate. In Mr. Kolodkin's reports and in the debates in the Commission, including the informal consultations held in May, and in the Sixth Committee, the question had arisen as to whether the topic ought to be dealt with solely from the standpoint of *lex lata* or whether it should be looked at from the standpoint of *de lege ferenda* as well—in other words, whether the Commission ought to limit itself to a simple exercise in codification or also undertake to engage in the progressive development of international law. As on many other questions, there was a divergence of views, even if it seemed to her that the majority wished to follow

both approaches simultaneously. Without wishing to enter into an ongoing debate in the Commission and focusing her comments only on the topic under consideration, she did not believe that the topic could be dealt with solely from the perspective of *lex lata* or of codification. Rather, as had been stated countless times during the past quinquennium, while the topic was indeed a classic subject of international law, it must be dealt with in the light of new developments and the changes that had taken place in international law during the last third of the twentieth century. It could not have escaped the notice of any educated observer that the current legal situation was not the same as the one that had prevailed during the first half of the twentieth century or even during the two decades that had followed the Second World War. Indeed, the changes that had taken place in the past three decades alone and the new practices that had developed during the same period clearly showed that the international community was once again interested in a topic that until recently had been considered to be incidental, not to say irrelevant and negligible. To overlook those changes in the international community and contemporary international law would have the effect of diluting the Commission's work, rendering it pointless and unproductive, since it would fail to take into account new legal principles, values and realities in which the notion of immunity in general and immunity from criminal prosecution in particular were evolving and must continue to evolve. In the light of those considerations, she believed that the Commission must approach the topic under consideration from the dual standpoint of codification and progressive development—even if, for practical reasons, it would seem logical to consider first, but not exclusively, the elements that were related to codification, that is, the elements of *lex lata*.

7. Third, she believed that the topic must be dealt with in such a way that the draft articles that the Commission adopted formed a coherent part of the international legal system as a whole. Such a systematic approach to the topic within the framework of the international legal order implied that the Commission was looking at the relationship between the immunity of State officials from foreign criminal jurisdiction and the structural principles and legal values that protected and served international law. In his three reports, Mr. Kolodkin had made a detailed analysis of the problem of the legal basis for such immunity and the principles and values that underlay it. Yet the debates in both the Commission and the Sixth Committee had shown a need to take account also of other values and principles of the international community that were recognized and protected by international law, such as the protection of human rights and the combating of impunity. That was why, without seeking to modify the scope of the topic under consideration, she felt that it could not be addressed without taking into account the balance between the various international values and legal principles involved and, more particularly, without taking into account (as a matter of principle, if that was possible) the new developments that had occurred in international criminal law in recent decades. That dynamic new branch of international law was not limited, after all, to the establishment of a genuine system of international criminal jurisdiction but also encompassed the establishment or reinforcement of national techniques

for combating impunity in general and the most serious international crimes in particular, particularly the rules for attributing competence to national courts and techniques for international legal cooperation and assistance, which were equally important. Even if that did not necessarily result in an automatic transposition into the topic at hand of all the principles and norms that could be invoked in an international criminal court with regard to immunity, it was equally clear that they could not be simply ignored whenever immunity was invoked in national courts. The same held true, albeit at a somewhat different level, for the unequal relationship that existed between State responsibility and individual responsibility and between State immunity and individual criminal immunity. That relationship must be given special treatment when considering the topic, once again in the light of the essential principles and values of the international legal system, if the Commission did not wish to elaborate a set of draft articles on immunity from foreign criminal jurisdiction that, rather than address problems that arose in practice, introduced incoherent and controversial new elements into the system. She was truly convinced that the mandate and the very nature of the Commission required its members to help to bring about, through their work, a strengthening of the systemic nature and coherence of the international legal system, and that that objective must be reflected in her future reports.

8. Lastly, it was necessary to structure the debate on the topic in the Commission and in the Sixth Committee. As she had noted at the beginning of her statement, that debate had in her view taken on an overly general form, which had not facilitated a harmonization of the divergent points of view on various aspects of the topic. She herself believed that the topic was an extremely complex and sensitive one, and that it was difficult, if not impossible, to approach it from a methodological standpoint as a whole. The Commission would do well to tackle the various aspects of the topic on a step-by-step basis—in other words, by taking up groups of clearly defined issues in succession, a method that would allow her to submit annual reports on different substantive issues. Those reports ought to cover the draft articles that dealt with each issue analysed, with a view to eliciting a concrete debate within the Commission and, in due course, the Sixth Committee. She was fully aware that many of the substantive issues to be considered in the future were cross-cutting in nature and were thus recurrent in the work of the Commission; however, she was convinced that a new effort to take up those issues systematically would make it possible to progress rapidly, surely and in a predictable and efficient manner. It was to that end that she had circulated an informal document during her informal consultations. That was also why she had grouped those issues into four major categories in the last chapter of her report; those groups would be dealt with in the reports she planned to submit to the Commission at forthcoming sessions.

9. She had wanted first of all to draw members' attention to those methodological considerations in order to stress both the importance she attached to them and the fact that whatever position the Commission took on the matter would have an impact on the way the various substantive aspects of the topic were dealt with. While her report was of a preliminary nature, she had nevertheless included in it substantive issues that lay at the heart of

the topic. She had tried to list those issues and, more precisely, the specific issues on which no consensus could be seen to exist, either in Mr. Kolodkin's reports or in the debates to which those reports had given rise. She had also, in the penultimate chapter, identified elements that might indicate the direction in which the future work of the Commission ought to go. Without entering into the details of that chapter, she thought it was essential to mention the fundamental issues she would discuss in future reports, spelling out the main problems that each one posed, which were discussed more fully in the preliminary report. First, the Commission should consider the distinction drawn between immunity *ratione personae* and immunity *ratione materiae* and the consequences that that distinction might have for the possible establishment of two distinct legal regimes, each applicable to one type of immunity. Second, the debate should focus on the eminently functional nature of those two types of immunity and the scope and meaning that that functional dimension had or should have for each of those categories and for the corresponding legal regime to be established. Third, the Commission would have to determine which persons enjoyed immunity *ratione personae* and whether or not it was useful to draw up a list of such persons, specifying, where necessary, whether the list was open or restrictive. Fourth, the notion of "official act" would have to be defined for the purposes of immunity from foreign criminal jurisdiction, bearing in mind issues relating to the possible coexistence of double responsibility of the State and the individual and double immunity of the State and the individual, both of which flowed from such "official acts". Consideration would also have to be given to the implications that that would have for determining which category of State officials could enjoy immunity. Fifth, the place of exceptions to immunity *ratione personae* and immunity *ratione materiae* would have to be studied, and the Commission would have to determine whether it could enumerate the various norms and principles that might apply to each of the two categories of immunity. Sixth, it would be necessary to determine how much weight to give to the protection of the international community's legal principles and values and, in particular, to efforts to address the most serious international crimes, in terms of limits or exceptions to each of those types of immunity. Lastly, the Commission would have to study the rules of procedure that would have to be put in place for such immunity to be duly enjoyed in a specific case. Such rules should also cover jurisdictional and procedural norms in the strict sense as well as, quite probably, the rules governing forms of international legal cooperation and assistance between States.

10. Even if the issues that she had just enumerated had been discussed to some extent in the three reports prepared by Mr. Kolodkin, she believed that the answers to those questions had not been sufficiently discussed or justified. Moreover, the debates in the Commission and the Sixth Committee had shown that a single, consensual answer to those questions did not exist, and that they should therefore be treated in greater depth in her future reports. That was why her preliminary report contained a workplan in which the issues she had mentioned were divided into four main groups that allowed them to be addressed systematically. The four groups also corresponded to the amount of time available for work

during the current quinquennium, which should allow the Commission to complete its consideration of the topic within that time. In order to make optimum use of the time available, then, members should plan to deal with certain issues in a cross-cutting manner and should not expect that the order given would always be followed.

11. In conclusion, she recalled that her preliminary report was a “transitional” report, which was intended to ensure that all the work done on the topic in the past would be duly taken into account while also ensuring that all future work would take effectively into account all the views expressed thus far by Commission members and by States. She had no intention of doing away entirely with the excellent work that had been done in the past but wished to propose a new road that would make it possible to address the many questions that had been raised during the preceding quinquennium, the goal being to provide an effective legal response to what was felt as a need by States and the international community, who had demonstrated in many different ways the high degree of importance they attached to the topic of immunity of State officials from foreign criminal jurisdiction—in particular, by expressly asking the Commission, through the General Assembly, to give priority to the topic in its programme of work. Furthermore, the topic’s importance was closely linked to the defence of the principles and values that underlay it. For that reason, the Commission ought to deal with it in a balanced and cautious manner, without overlooking the new realities and trends in international law that had emerged in recent years at both the national and international levels, particularly in the area of criminal responsibility for the most serious international crimes. In any event, that work could only be accomplished through the collective effort of a collegial body such as the Commission. She therefore looked forward with great interest to the comments and observations members would make following her introduction.

12. Mr. NOLTE said that the Special Rapporteur’s report was truly a “transitional” report, as she herself had called it. The Commission must be grateful that she had found the time and the energy to prepare the report in the short time between her appointment as Special Rapporteur and the beginning of the second part of the session. Although the report was not very long, it contained a great many important elements. The report sought, to use the Special Rapporteur’s words, to prepare the ground for a “structured debate” and had “methodological and conceptual clarification” as its goal. Thus it did not contain any clear proposals regarding substantive questions, except where the Special Rapporteur identified an existing consensus. It was apparently limited to setting out methodological, conceptual and structural questions with a view to outlining a plan for the future work of the Commission. It was indeed necessary to pursue that goal, and the Special Rapporteur deserved praise for her efforts and for the valuable basis that her report offered for the Commission’s debate. However, as the topic under consideration was a difficult one in many ways, and because the Commission was at the stage of discussing general orientation, he wished to express a number of caveats. Methodology and conceptual clarifications must remain neutral and should not prejudice substantive issues. He was not saying that the Special Rapporteur had chosen clarifications that were not neutral:

he simply wished to ensure from the outset that the choice of methodological approach or conceptual distinctions did not tilt in favour of certain substantive conclusions, for such conclusions would have to be justified independently on the basis of additional sources.

13. His first caveat concerned the fact that the Special Rapporteur appeared to be suggesting that the Commission should pursue an abstract and systematic method that entailed deducing conclusions from certain conceptual distinctions; that approach reminded him of the traditional civil law approach. The report did not contain many references to specific judgments or legislative acts that might constitute the basis for an analysis of practice, and he was aware that that was not its purpose. However, a practice-oriented and inductive style of reasoning was necessary to arrive at a solid determination of international law, whether the Commission sought to identify *lex lata* or propose *lex ferenda*. While he valued abstract and systematic reasoning, coming as he did, like the Special Rapporteur, from the civil law tradition, he wished to emphasize that abstract categories had their foundations in empirical developments and must therefore be justified accordingly. He did not doubt that the Special Rapporteur was conscious of that methodological question, but he thought that it would be worthwhile to raise the issue at an early point in the discussion. That question could become relevant in practical terms in dealing with the relationship between the international responsibility of the State and the international responsibility of individuals, which the Special Rapporteur addressed in paragraph 59 of her report, and possibly the distinction between “official acts” and “unlawful acts”, made in paragraph 67.

14. His second caveat concerned the fact that in paragraph 29 of her report the Special Rapporteur spoke of “a tendency to limit immunities and their scope”. That reference, and others in the report, could be understood to constitute a new version of the “trend argument” that had often been used in the past to limit the immunity of States and their officials. That argument should be used with caution. For example, the International Court of Justice had recently rejected, in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the contention of the Italian courts that a trend existed in international law towards a restriction of the immunity of the State in the particular area under consideration, and had shown that, on the contrary, the immunity of the State had been reaffirmed in recent years. There were in fact indications that a similar development may have taken place with regard to the immunity of State officials from foreign criminal jurisdiction. That argument had been developed in an article that was about to be published in the *American Journal of International Law*, which had been based on an extensive analysis of jurisprudence of many countries from the past 15 years.²³⁰ Such a trend towards reaffirmation of immunity before national criminal jurisdictions, if it actually existed, would be compatible with the trend towards the restriction of immunity before international jurisdictions. In that connection, it would be important to take account of the decisions of the International Criminal Court of 12 and

²³⁰ I. Wuerth, “Pinochet’s legacy reassessed”, *American Journal of International Law*, vol. 106, No. 4 (October 2012), pp. 731–768.

13 December 2011 on the non-existence of immunity for State officials before international jurisdictions under customary international law (*The Prosecutor v. Omar Hassan Ahmad Al Bashir*), which had given rise to sharp protests from the African Union Commission. More generally, he suggested that the International Law Commission should pay close attention to what it meant when it spoke of a trend.

15. That brought him to his third caveat: The Special Rapporteur, in her report, often spoke of the “values” of the international community that should be given effect, particularly the value of endeavouring to prevent impunity. The question at hand was not whether to give effect to the values of the international community—that was undeniable—but deciding how to give them effect. The issue of “responsibility to protect” offered an appropriate analogy. That responsibility certainly represented a value of the international community, but for the purposes of international law the decisive question was this: Who had the competence to give effect to that value? Certainly, the State on whose territory international crimes were being committed did—that State even had an obligation to protect—as did the United Nations, but third States did not. That had been the conclusion reached in the 2005 World Summit Outcome.²³¹ Perhaps the situation with regard to the immunity of State officials from foreign criminal jurisdiction was structurally similar. However, the “value” argument could not be so easily transposed to the rules and principles of international law. Rules of international law, such as the rules on immunity, also represented values. It was not sufficient simply to balance values against each other; such a balancing process must take place within the framework of general rules relating to the formation and evidence of customary international law. Needless to say, the Commission would also have to discuss in greater depth the more or less legal nature of the values to which the Special Rapporteur was referring.

16. A fourth caveat concerned the interrelationship of different aspects of the law of immunity and different aspects of international law in general. In her workplan, the Special Rapporteur proposed to break the topic down into several different issues to be taken up in sequence. That, of course, was a useful method that had been successfully employed in other contexts, but the Commission must remember that those issues were interrelated and continue to take that interrelatedness into account. Thus, for example, the distinction between immunity *ratione personae* and immunity *ratione materiae* derived from a common legal source, which was the immunity of the State. Likewise, while the topic under consideration concerned only immunity in criminal matters, that did not mean that developments in the area of immunity in civil matters were irrelevant for the Commission’s purposes. Immunity in both criminal and civil matters derived from the same legal basis, and it was sometimes difficult to determine whether a case related to criminal or civil jurisdiction. By looking at the interrelationship of different aspects of the law of immunity, it was possible to identify “grey areas”, as the Special Rapporteur called them in her report, that must be acknowledged and addressed.

17. A fifth caveat had to do with terminology. In paragraphs 34 and 62 of her report, the Special Rapporteur drew a distinction between those who held that immunity was “absolute” and those who maintained that it was “restricted”. He did not believe that such a distinction was helpful in the current context, and it could even be misleading. In fact, the question was not at issue, since it was now largely agreed that absolute immunity no longer existed. After all, the previous Special Rapporteur had reminded the Commission of the widely recognized “forum State exception”, according to which a State could not claim immunity for acts that one of its officials had committed on the territory of the forum State. The question, then, was not one of an “absolute” versus a “restricted” conception of immunity, but rather what had to be determined was the extent to which immunity should be restricted.

18. His sixth caveat concerned an interesting remark that the Special Rapporteur made in paragraph 27 of her report, namely that “the statements made by some members of the Commission who spoke on the topic [of the justification for immunity] did not make a sufficient distinction between the application of the two bases—functional and representative—for immunity *ratione personae* and immunity *ratione materiae*”. That remark suggested that the Special Rapporteur believed that a functional justification was in some way inherently more limited than a representative justification of immunity. Yet what was meant by “functional” was very much a matter of definition and did not necessarily imply a restrictive interpretation. It was certainly true, as the Special Rapporteur noted in paragraph 57 of her report, that the functional immunity of State officials was “linked to preservation of the principles and values of the international community”, but that was a rather general point that did not address a difficult aspect of the question, which was whether the primary function of immunity changed depending on developments in efforts to combat impunity.

19. A seventh caveat related to the question of possible exceptions to immunity *ratione materiae*. In paragraph 68 of her report, the Special Rapporteur focused on cases “involving the violation of *jus cogens* norms or the commission of international crimes” and stated that “there appears to have been greater support for a potential exception in the case of immunity *ratione materiae* than in that of immunity *ratione personae*”. But perhaps *jus cogens* norms should be dealt with differently from international crimes and a distinction should be made between different types of international crimes where immunity was concerned. Lastly, he wished to recall that the suggestion made at the sixty-third session by Mr. Gaja to the effect that exceptions to immunity might be derived from different kinds of treaties had enjoyed some support among Commission members.

20. His eighth caveat concerned the procedural aspects of immunity. Unlike the Special Rapporteur, who remarked in her report that the Commission had so far discussed the procedural aspects less than the substantive aspects, he recalled that the Commission had discussed them quite extensively at the previous session. He also believed that substance and procedure were closely related in that area. If, for example, it should be possible to identify procedural rules that would have the effect of pressuring States not

²³¹ General Assembly resolution 60/1 of 16 September 2005, “2005 World Summit Outcome”, paras. 138–139.

to invoke their immunity in certain cases, then the need to recognize certain exceptions might not arise in the same way. He wondered whether it might not in fact be wiser to begin by dealing with the procedural aspects of the topic, thereby enhancing the chances of reaching a consensus on certain substantive issues.

21. Lastly, in paragraph 48 of her report, the Special Rapporteur maintained that the debate in the Sixth Committee had produced “a wide range of views concerning the role to be played by a study *de lege lata* or *de lege ferenda*”. It had been his impression, however, that almost all States in the Sixth Committee had expressed the wish to see the Commission produce an analysis of the *lex lata*, which did not preclude the fact that some States might also have thought it advisable for the Commission to formulate considerations *de lege ferenda*. His sense, however, was that States wished to have a clear picture of what distinguished considerations of *lex lata* and *lex ferenda*. That was also his personal preference, as he tended to disagree with the Special Rapporteur when she stated in paragraph 77 of her report that “the topic of the immunity of State officials from foreign criminal jurisdiction cannot be addressed through only one of these approaches”. He did agree that the topic could and should be addressed through both approaches, but he thought that the two approaches should, in the interest of transparency, be used for analytical purposes as separately as possible. That did not preclude the Commission from taking into account “new approaches” and “evolving” aspects of international law, which the Special Rapporteur mentioned in paragraph 48 of her report, but the Commission should have the courage to decide whether those new trends had the character of *lex lata* or *lex ferenda*. Otherwise it would be doing what the Italian courts had done in the cases that had given rise to the decision of the International Court of Justice in the *Jurisdictional Immunities of the State* case, in which the Court had corrected the absence of a distinction between *lex ferenda* and *lex lata*.

22. Mr. HUANG commended the Special Rapporteur for having managed in such a short time to submit a preliminary report that was extremely rich, concise, logical and well structured, and which contained a workplan for the quinquennium that had clear objectives. The new approach that she was proposing would no doubt give greater vigour to the Commission’s debate on the immunity of State officials and would foster progress on the topic.

23. The Commission had prepared several draft articles on the topic, which had become an integral part of the Vienna Convention on Diplomatic Relations²³² and the Vienna Convention on Consular Relations,²³³ and some of which had been used in the United Nations Convention on Jurisdictional Immunities of States and Their Property.²³⁴ However, no harmonized norms existed yet on the very important question of the immunity of

State officials from foreign criminal jurisdiction. The first task was to gather and compile information on State practice, and the Commission had a positive role to play in that undertaking. It should therefore give priority to the topic under consideration, in accordance with General Assembly resolution 66/98 of 9 December 2011 (para. 8).

24. The question inevitably arose as to the link between the work done by the previous Special Rapporteur, Mr. Kolodkin, to whom the Commission owed a great deal, and that done by Ms. Escobar Hernández. Mr. Kolodkin’s three reports contained a study of State practice, case law and various theories, as well as detailed analyses.²³⁵ The new Special Rapporteur should base her work on that done by Mr. Kolodkin and not start from scratch, as that would amount to a waste of resources and undermine the Commission’s effectiveness.

25. There was also the question of methodology: in the context of the topic under consideration, the Commission should gear its work towards codification rather than the progressive development of international law. The question of immunity, which touched on basic principles of international relations and international law, was a highly complex and sensitive one. By emphasizing the development of rules on immunity, the Commission would generate undue controversy; it would find it difficult to reach a consensus quickly, and even if it did obtain some result, it would be difficult to guarantee universal recognition. Under those conditions, the Commission should instead orient its work towards the compilation of existing practice and rules at the international level, and the preparation of clear guidelines. It should not be overly ambitious.

26. Lastly, international treaties should not serve as a pretext for not applying the rules of immunity. In addition, the Commission should bear in mind that the topic was limited to the immunity of State officials from foreign criminal jurisdiction and did not cover the immunity of diplomatic or consular personnel. Emphasis should therefore be placed on the rules of customary international law. Similarly, exemptions or exceptions that States could claim under treaties were not part of the topic.

27. Mr. MURASE said he understood that two major issues had been raised at the sixty-third session (2011): one was determining which State officials enjoyed immunity from foreign criminal jurisdiction and the other was determining which crimes should be excluded from immunity. Those two questions had been put to the Member States in chapter III of the Commission’s report to the General Assembly²³⁶ in order to elicit their views. He was somewhat puzzled that the Special Rapporteur had made no reference in her preliminary report to the crimes to be excluded from the draft articles on the topic (a question that was different from the question of *jus cogens*, which was touched on briefly in the report). Unless the Commission had a clear idea of the types of crimes that were covered by the topic, no useful discussion could take place. He assumed that the crimes in question were only the most serious crimes under international law, but he would be grateful for any clarification from the Special Rapporteur on that point.

²³² *Yearbook ... 1958*, vol. II, document A/3859, chap. III, para. 53, draft articles on diplomatic intercourse and immunities and commentaries thereto.

²³³ *Yearbook ... 1961*, vol. II, document A/4843, chap. II, para. 37, draft articles on consular relations and commentaries thereto.

²³⁴ *Yearbook ... 1991*, vol. II (Part Two), para. 28, draft articles on jurisdictional immunities of States and their property and commentaries thereto.

²³⁵ See footnote 228 above.

²³⁶ *Yearbook ... 2011*, vol. II (Part Two), paras. 37–38.

28. With regard to the question of which State officials should enjoy immunity, he agreed with the idea of limiting it to the troika (Head of State, Head of Government and minister for foreign affairs), but also felt that a limited number of members of Government or possibly parliament could perhaps be included, in keeping with article 27, paragraph 1, of the Rome Statute of the International Criminal Court, which stipulated that “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility”. He disagreed with the idea that the troika should enjoy comprehensive immunity. The Commission should remain consistent with its past work on that question and the rather “restrictive” approach it had taken, at least for crimes under international law. The draft Code of Crimes against the Peace and Security of Mankind, which the Commission had adopted in 1996, provide in its article 7 (Official position and responsibility) as follows:

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.²³⁷

The same position was taken in the Rome Statute of the International Criminal Court, article 27, paragraph 2, which provided as follows:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

He believed that a person charged with serious crimes should be treated on the same footing whether he or she was convicted by an international tribunal or by a national court, and from that perspective he thought that the Commission should align itself with the Rome Statute.

29. A hidden but important question was that of control over prosecutorial discretion. To prevent any abuse, adequate safeguards must be provided. Prosecutors in both international and national criminal justice systems were required to exercise their discretionary powers transparently. Recalling the Guidelines on the Role of Prosecutors,²³⁸ he said that at the national level the establishment of guidelines for prosecutors in the form of laws or regulations might be the most effective way of preventing arbitrary or aggressive exercise of prosecution against foreign Heads of State. Other guidelines could be prepared to prevent the abuse of prosecutorial discretion by international prosecutors. He hoped that the Special Rapporteur and the Commission would consider including that question in the Commission’s programme of work on the topic.

30. Like Mr. Nolte, he was a bit concerned with the expression “system of values” in paragraph 72 of the Special Rapporteur’s preliminary report (subpara. 1.2), and

he hoped and trusted that that did not imply the imposition of Western values on the rest of the world.

31. Lastly, he expressed concern regarding the argument in paragraph 77 of the report concerning *lex lata* and *lex ferenda*. As an organ for codification and progressive development, the Commission did not have a mandate for the exercise of *lex ferenda*. The Special Rapporteur seemed to equate “progressive development” with “*lex ferenda*”, which was not correct. While the Commission’s codification work was based on customary international law, progressive development was carried out on the basis of emerging rules of international law; that was different from the making of new laws, which was what *lex ferenda* usually implied. The Commission itself had not always used the term *lex ferenda* correctly, and it had to a certain extent led the Sixth Committee astray in that regard. Particular caution should therefore be taken when using the expression “progressive development” as it related to the Commission’s mandate.

32. Mr. KITTICHAISAREE agreed with the Special Rapporteur that the topic must be approached from the perspective of *lex lata* at the outset and from that of *lex ferenda* at a later date, as needed. Many States had advocated such a two-step approach. The question then arose as to what *lex lata* was, and when and how a rule incorporated in an international instrument became a rule of customary international law of general application.

33. With regard to general issues of a methodological and conceptual nature, which formed the first group of issues to be considered under the Special Rapporteur’s proposed workplan, he believed that the distinction between immunity *ratione materiae* and immunity *ratione personae* should be retained in order to narrow the material scope of the former and the temporal scope of the latter. Personal immunity and functional immunity could coexist, for example, in the case of a person entitled to personal immunity who discharged his or her official functions and thus enjoyed functional immunity. Moreover, as Mr. Nolte and Mr. Murase had pointed out, the Commission should be careful in balancing immunity with the system of values and principles of contemporary international law. One could ask, for example, whether the principle that there could be no immunity for serious crimes of concern to the international community as a whole could override the principle of democracy, whereby a democratically elected Government decided, for the sake of national reconciliation, to grant amnesty to perpetrators of such crimes and asserted the immunity of its officials in foreign courts.

34. Another issue to be considered was the relationship between immunity on the one hand and the responsibility of States and the criminal responsibility of individuals on the other. Functional immunity derived from the need to allow State agents to perform their official duties. It had been argued by Mr. Kolodkin that a State official discharging official duties on behalf of his or her State could not be called to account for any violation of international law he or she might have committed while performing those duties, for such acts were attributable to the State, which alone could be held responsible at the international level. However, some States, such as France, had suggested that

²³⁷ Yearbook ... 1996, vol. II (Part Two), p. 26.

²³⁸ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990, Report prepared by the Secretariat (A/CONF.144/28/Rev.1, United Nations publication, Sales No. E.91.IV.2), Guidelines on the Role of Prosecutors, p. 189.

it was necessary to determine whether a State official had acted in an official capacity and to consider the extent to which an “act of an official as such” differed from an “act falling within official functions”;²³⁹ others, such as Spain, preferred a restrictive interpretation of the term “official acts”. He himself thought that it all depended on whether such an act could be attributed under international law to the State that the author of the act was representing. He disagreed with Mr. Kolodkin, who had contended that State officials had immunity *ratione materiae* for unlawful acts and acts *ultra vires* performed in an official capacity; he believed that State officials were not entitled to immunity *ratione materiae* if the act was unlawful or *ultra vires* under the law of that State.

35. However, States could only incur responsibility if the acts in question were attributable to them. The International Court of Justice had clearly established that principle in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case and the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, in which it had had to settle the crucial question of whether the Bosnian Serbs who had committed acts of genocide had been *de facto* agents or organs of the Government of the Federal Republic of Yugoslavia for the purpose of determining whether or not those acts incurred State responsibility. The Court had held that there was no proof of any genocidal intent on the part of that State, either on the basis of a concerted plan or on the grounds that the events revealed a consistent pattern of conduct that could only have pointed to the existence of such intent. As a corollary, unlawful acts committed by State officials could be directly attributed to the State only if they had been ordered, connived at or condoned by the State, or if they could be attributed through a joint criminal enterprise or the notion of command responsibility. Thus, as many members had maintained at the previous session, State responsibility and individual criminal responsibility might overlap, but each had a separate existence.

36. It had been argued that attribution of State responsibility might be relevant in determining whether a State official was entitled to immunity *ratione personae*. However, that argument was not well founded, as immunity *ratione personae* derived from the position of the person in question and not from the official nature of the act that incurred that person’s individual criminal responsibility. As the International Court of Justice had recalled in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case, the rationale for personal immunity was the need to ensure the effective performance by State officials of their representation functions throughout the world. The Court had reaffirmed in that case that the troika (i.e. Head of State, Head of Government and minister for foreign affairs) as well as diplomatic and consular agents enjoyed *de lege lata* immunity *ratione personae* for any official act they had performed while in office, and even after they left office. Some States favoured limiting immunity *ratione personae* to the troika so as not to disrupt the balance between

immunity and the growing desire to prevent impunity for international crimes; others, however, felt that it should be extended to other State officials, such as ministers for whom international travel was intrinsic to their functions. In the light of those conflicting positions, any extension of immunity *ratione personae* must clearly be justified. A compromise might be obtained by allowing every State the freedom to grant such immunity to any foreign State official on an official visit for the duration of that visit.

37. Accordingly, he viewed immunity *ratione personae* from foreign criminal jurisdiction in the following manner: it was accorded to Heads of State, Heads of Government and ministers for foreign affairs; it was granted to diplomatic and consular agents in accordance with the applicable rules of customary international law or treaties; and it could be granted by a State to representatives of another State on an official visit, subject to certain conditions, as necessary. Any person entitled to immunity from foreign criminal jurisdiction enjoyed such immunity while in office, even when on a private visit or acting in a private capacity. Provided that it had jurisdiction under international law, a court of one State could try a former official of another State in respect of acts committed prior or subsequent to his or her term of office as well as in respect of acts committed in a private capacity during the term of office.

38. As to the absolute or restricted nature of immunity *ratione personae* and, in particular, the role that international crimes should or should not play, he recalled that there had been a consensus in both the Commission and the Sixth Committee that international law needed to balance stability in international relations with the need to hold the perpetrators of crimes proscribed by peremptory norms accountable for their acts. However, as Germany had contended, the violation of a *jus cogens* norm, which was part of substantive law, did not necessarily remove immunity, which fell in the realm of procedural law. For several States, the current state of customary international law was to deny immunity to the perpetrators of international crimes (genocide, war crimes and crimes against humanity), including to the troika. Conversely, other States considered that while the denial of immunity could be found in treaties, such as the Rome Statute of the International Criminal Court and the Convention against torture and other cruel, inhuman or degrading treatment or punishment, it was not part of general customary international law. That had also been the view taken by Mr. Kolodkin.

39. The recent judgment in the *Jurisdictional Immunities of the State* case could open up possibilities for denying State officials immunity from foreign criminal jurisdiction. Certain judges had in fact expressed dissenting opinions, contending that in those exceptional circumstances where immunity might prevent the victims of international crimes from obtaining an effective remedy, or where no other means of redress was available, domestic courts should set aside immunity, irrespective of whether or not the acts in question were acts of State. While the Court’s judgment concerned jurisdictional immunities of the State and not of its officials, it could be argued that the principle of the immunity of State officials derived from the principle of the sovereign equality of States, and thus if a State was denied immunity, then its officials could not enjoy it either.

²³⁹ *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee, 20th meeting (A/C.6/66/SR.20)*, para. 44.

40. He submitted, as a matter of general principle, that immunity should not impede the criminal prosecution of State officials, provided that such prosecution did not pose a threat to the stability of international relations and that it did not worsen or prolong the suffering endured by the population in the State of the official concerned. In order to strike a balance between immunity and the need to combat impunity for international crimes, the Commission might wish to contemplate a provision on the relationship between immunity and impunity that was based on the jurisprudence of the International Court of Justice and would set out the following principles: immunity granted under customary international law or applicable treaty obligations remained opposable before the courts of a foreign State even where those courts had jurisdiction *ratione personae* or *ratione materiae* over the case in question; immunity served as a procedural barrier to criminal prosecution, whereas impunity absolved a person of individual criminal responsibility under substantive criminal law; as a general principle, no person was above the law, and an individual's official position did not relieve the individual of criminal responsibility or mitigate the applicable punishment; and immunity did not preclude prosecution of the individual who enjoyed it in a State having criminal jurisdiction, provided that such prosecution was not inconsistent with the obligation of that State under international law.

41. With regard to immunity *ratione materiae*, he believed, in the light of what he had said thus far, that functional immunity had the following components: it was accorded to all State officials discharging their official duties or acting in an official capacity; "official acts" in the current context meant any act that was attributable to the State represented by the person performing the act; and State officials did not enjoy functional immunity when they committed an act attributable to the State that was unlawful or *ultra vires* under the law of that State.

42. Finally, with regard to the procedural aspects of immunity, which had been presented in the third report²⁴⁰ by Mr. Kolodkin, he noted that they had not been as contentious, nor had they elicited as many comments, as the substantive aspects. They were nevertheless interrelated with them, since some procedural aspects might have to do with the seriousness of the crime allegedly committed by the State official. It might therefore be appropriate for the Commission to focus on reaching a consensus on the substantive aspects of immunity before proceeding to consider its procedural aspects.

43. Mr. TLADI said he believed that the topic under consideration was one of the most important on the Commission's agenda and certainly the most sensitive. He was confident that the draft articles that the Commission would produce would have a significant impact on the development of international law. It was to be hoped that they would contribute positively to the fight against impunity and not erode the progress achieved in that area thus far.

44. In his second report,²⁴¹ in which he had set out his approach to the topic, Mr. Kolodkin had listed a number of

questions that South Africa had drawn to the Commission's attention in 2009. Those questions were critical for the Commission's future work. The first—and the crucial—question was whether ministers for foreign affairs and other State officials enjoyed the same immunities as Heads of State under customary international law.²⁴² The previous Special Rapporteur had proceeded from the assumption that the troika—and even officials beyond the troika—enjoyed immunity *ratione personae* and that such immunity was subject to no exception. Yet the Commission's reports on the work of previous sessions indicated that there was no agreement on that question. It was thus premature to proceed to other aspects of the question, such as exceptions and waivers, in the absence of a common understanding of the categories of officials who benefited from immunity *ratione personae*. There was sufficient doubt on that point to warrant a thorough analysis of State practice in that regard. Members would recall that in 1991, in its draft articles on jurisdictional immunities of States and their property,²⁴³ the Commission had been unwilling to treat the immunities of ministers for foreign affairs as being on a par with those of Heads of State. Similarly, in its resolution on immunities from jurisdiction and execution of Heads of State and Government in international law, the Institute of International Law was not willing to extend immunity *ratione personae* to ministers for foreign affairs.²⁴⁴ He was not making the point that not all members of the troika were entitled to immunity *ratione personae*. A careful study was warranted nevertheless, bearing that premise in mind.

45. In paragraph 63 of her report, however, the new Special Rapporteur also seemed to be arguing that the troika enjoyed immunity *ratione personae*, the only question being whether other officials beyond the troika could do so as well. It was true that in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had declared that ministers for foreign affairs and possibly other officials enjoyed the same immunities as Heads of State and of Government. It should be recalled, however, that several judges had dissociated themselves from that view, noting that the issue was far from clear under customary international law, or that nothing in precedent, *opinio juris* or legal writing supported that proposition.²⁴⁵

46. Notwithstanding the real doubt suggested by those diverging views, the Court had concluded that the immunities of ministers for foreign affairs were the same as those of Heads of State. Consequently, any discussion of who enjoyed immunity must therefore begin at that point. However, the Court had produced no State practice or *opinio juris*—and the Commission would surely touch on that question when it considered the topic of the formation and evidence of customary international law—but had based itself entirely on the "nature of the functions exercised by a Minister for Foreign Affairs". That approach was problematic: Claiming that the immunity of

²⁴² *Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee*, 15th meeting (A/C.6/64/SR.15), para. 69.

²⁴³ See footnote 234 above.

²⁴⁴ Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), p. 743. Available from the Institute's website (<http://justitiaetpace.org>).

²⁴⁵ Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 80.

²⁴⁰ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646.

²⁴¹ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, para. 9.

a Head of State could be extended to a minister for foreign affairs for policy reasons was not sufficient to establish the existence of such immunity in law. More importantly, by using functionality, the Court obfuscated the *raison d'être* of immunity *ratione personae*. Heads of State did not enjoy absolute immunity simply by virtue of their functions; traditionally, they did so because they were seen as the personification of the State. The sovereign immunities of States were thus vested also in the person of the Head of State. Ministers for foreign affairs, in contrast, did not personify the State in any way. It would thus be incorrect to extend, by analogy, the immunities attaching to Heads of State to ministers for foreign affairs. In other words, while ministers for foreign affairs might well enjoy similar immunities, those immunities could not be extended by virtue of analogy with Heads of State.

47. Any assertion of such immunities must be proven to exist in customary international law. In the absence of such proof, it was difficult to conclude that ministers for foreign affairs and Heads of State enjoyed the same immunities. State practice in that regard was insufficient, and in their joint separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal concluded that the immunities of ministers for foreign affairs and other high-ranking officials had generally been considered in the literature to be merely functional, a view that had been taken up by the Commission in its draft articles on jurisdictional immunities of States and their property and by the Institute of International Law in its resolution on immunities from jurisdiction and execution of Heads of State and of Government in international law.

48. Even if there was no customary rule in the law as it existed that extended the immunities enjoyed by Heads of State to ministers for foreign affairs, the question might well be asked whether the Commission should propose that question as an area of development, given the nature of the functions of ministers for foreign affairs as described by the Court in the aforementioned judgment. It was true that a minister for foreign affairs served as the head of his or her Government's diplomatic activities, represented the Government in international forums, had full powers *ex officio* and had to travel frequently to perform those functions. Nevertheless, such policy considerations would have to be replaced in the context of the emergence of a new value-laden international law, which, while acknowledging the principle of sovereignty and concepts associated with it, such as immunity, sought to move beyond them in the direction of legal humanism and recognition of an international society. In that new value-laden international law, concepts such as *jus cogens* and *erga omnes* obligations served to temper some of the harsh consequences of sovereignty, including the impunity that could arise from an undue emphasis on immunities—what Mr. Nolte had referred to as the “trend argument”. An important implication of the emergence of that new approach was the aggressive fight against impunity and the promotion of justice and accountability, particularly in connection with the most serious crimes of concern to the international community.

49. In truth, the *jus cogens* argument could be said to cut both ways: the question could be asked whether, given their centrality to traditional international law based on

inter-State/bilateral relations, immunities were not part of *jus cogens*. He doubted that that was the case, and that would certainly go against the very idea of “forbidden treaties” advanced by Alfred von Verdross in the 1930s.²⁴⁶ As an aside, he would add that if one held that immunities were part of *jus cogens*, then one should discount the idea that immunity was itself a limitation of sovereignty, as the Permanent Court of International Justice had recalled in the famous judgment in the “*Lotus*” case.

50. Leaving aside the notion that immunity could also be part of *jus cogens*, an idea that he did not support, it was difficult to refute the assertion that thus far not much practice or *opinio juris* had been advanced to the effect that officials other than Heads of State and of Government had absolute immunity. Consequently, as Mr. Dugard had observed, whatever policy direction the Commission chose to go in would in fact involve some progressive development. He disagreed with Mr. Nolte's desire to create a deep divide between *lex lata* and *lex ferenda*. While values did not necessarily translate into rules, they must nevertheless be taken into account in the formulation of rules.

51. The Special Rapporteur had recalled the recent judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case and had usefully referred in her report to the separate and dissenting opinions, which were important as a “subsidiary means for the determination of rules of law”, in accordance with Article 38 of the Statute of the Court. The case in question was not directly relevant to the topic under consideration, since it concerned the immunities of the State rather than those of its officials. It was nevertheless worth considering, and he wished to draw attention to several points that he hoped the Special Rapporteur would highlight from that case.

52. First, the majority judgment and several individual opinions had accepted the distinction between *acta jure imperii* and *acta jure gestionis* as a matter of law. If State immunity, from which the immunity of State officials derived, should permit the restrictions implied by that distinction, it would be antithetical for the ancillary immunity of State officials not to be similarly restricted—in that connection, the dissenting opinion of Judge Yusuf, particularly paragraphs 21 to 23 thereof, was instructive. Second, it would be difficult to conceive of modern international law, which was concerned with humanity and eradicating the scourge of serious international crimes, permitting restrictions to immunity for commercial interests while seeking an absolute view of sovereignty when it came to responding to serious international crimes. Third, it should be noted that Judge Gaja, a former member of the Commission and an *ad hoc* judge in the case, had undertaken a survey of State practice in relation to the “tort exception” to State immunity. While that practice applied to State immunity, the Commission might draw inspiration from it in developing the law on the current topic, particularly in the absence of firmly established State practice. The Commission might also seek inspiration in the Court's treatment of the tension

²⁴⁶ A. von Verdross, “Forbidden treaties in international law: comments on Professor Garner's report on ‘the law of treaties’”, *American Journal of International Law*, vol. 31, No. 4 (October 1937), pp. 571–577.

between *jus cogens* and immunities; however, it should not overlook the dissenting opinion of Judge Cançado Trindade in the *Jurisdictional Immunities of the State* case or the joint separate opinion of Judges Higgins, Kooijmans and Buergethal and the dissenting opinion of Judges Oda, Al-Khasawneh and Van den Wyngaert in the *Arrest Warrant of 11 April 2000* case. Lastly, he wished to draw attention to the common misconception that the judgment in the last-mentioned case implied that anything done by a person enjoying immunity *ratione personae* was covered *ad infinitum*, whereas one could in fact infer from paragraph 61 of the judgment that officials, including Heads of State, could be prosecuted once they left office for non-official acts committed while in office. That important restriction would he hoped be reflected in future reports and draft articles.

53. Mr. EL-MURTADI SULEIMAN GOUIDER thanked the Special Rapporteur for her preliminary report on a particularly important and complex topic, which raised sensitive issues and practical difficulties. The four main substantive issues that the Special Rapporteur proposed to take up were all equally important and sensitive. The Commission must be given the time it needed to consider them as well as the observations made by members during the current meeting. It was important that in her work the Special Rapporteur should make a careful distinction between international responsibility of the State and individual international responsibility, which was essential in the context of the topic. Her approach whereby she would propose draft articles gradually as each of the issues was considered seemed to be the right one, and it was in fact too soon to formulate any proposals regarding the form the final outcome of the work on the topic should take.

54. Mr. PETER said that he wished first of all to welcome the participants in the International Law Seminar. With regard to the topic before the Commission, he commended Ms. Escobar Hernández for having risen to the challenge set by the Commission by preparing within a short period of time a transitional report in which the number of footnotes showed that she had already made a detailed analysis of the questions that the topic raised. Since the report was a preliminary one, he would not go into detail about the issues identified but would limit himself to a few observations regarding the last chapter, on the workplan, in which the Special Rapporteur recalled that the topic had been on the Commission's programme of work for six years and that three reports had been submitted by the previous Special Rapporteur, Mr. Kolodkin.²⁴⁷ It appeared that the Special Rapporteur did not intend to ignore those reports, which was good news, but it would be interesting to learn more about the way in which she planned to move forward, given that questions already settled in international law had been discussed for a long time. Accordingly, the Special Rapporteur should not go back to square one but should focus on current issues in order to bring the work to completion in the time allotted and ensure that it met the international community's expectations.

55. It would also be interesting to know how the Special Rapporteur intended to approach the issue of the absolute or restricted nature of immunity *ratione materiae* (item 3.3

of the workplan announced in para. 72 of the report) and immunity *ratione personae* (item 2.3). It should be noted in that regard that exceptions to the general rule of immunity already existed and that the question of absolute immunity was no longer an issue, as Mr. Nolte had pointed out. The importance of the principles established in the Rome Statute of the International Criminal Court and of new principles, such as universal jurisdiction and even the responsibility to protect, that were gaining ground should not be underestimated. Those principles made it possible to find at least partial answers to the question of the immunity of State officials. While the Commission explored the question of who might enjoy immunity, presidents in office and the prime ministers of certain African countries were being stripped of theirs and were being hunted throughout the world like any other criminal under ordinary law. They were the subject of arrest warrants issued by national courts and not simply summonses to appear in court. He also wished to draw the Special Rapporteur's attention to the 2009 report of the African Union–European Union Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction,²⁴⁸ which she should take into account when she considered the question of how that principle should be applied in the fairest and least discriminatory manner throughout the world. More generally, it was important to know the extent to which the Special Rapporteur intended to take account of the aforementioned exceptions to the principle of immunity, for the relevance and usefulness of the Commission's work to the international community depended on it.

56. Ms. Escobar Hernández had made a smooth transition in taking over from the previous Special Rapporteur on the topic, but it would be interesting to know what rules governed, in a general way, the handing over of topics and the way in which they were assigned, as well as whether the Commission, once a topic had been officially included in its agenda, was required to complete its work on the topic or could decide of its own accord to abandon it.

The meeting rose at 12.55 p.m.

3144th MEETING

Thursday, 12 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

²⁴⁷ See footnote 228 above.

²⁴⁸ Council of the European Union, document 8672/1/09 Rev.1, annex, 16 April 2009 (<http://register.consilium.europa.eu>).

Immunity of State officials from foreign criminal jurisdiction (continued) (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the newly appointed Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction (A/CN.4/654).

2. Mr. PARK pointed out that the divergence of opinion among States with regard to immunity continued to form an obstacle to the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which had been elaborated by the Commission²⁴⁹ and adopted by the General Assembly in its resolution 59/38 of 2 December 2004. Contrary to the Commission's expectations, as of July 2012 only 13 of the 30 States needed for its entry into force had ratified the Convention.²⁵⁰ Since a similar divergence of viewpoints might also arise with regard to the immunity of State officials from foreign criminal jurisdiction, the Commission should be extremely careful when charting the future course of its work. It should initially focus on *lex lata* and make a study of State practice, particularly national case law. *Lex ferenda* could be taken into consideration if that was generally deemed to be necessary. It might be the case, in the context of *lex ferenda*, that the immunity of State officials did not extend to international crimes or other grave violations of international law.

3. In determining the scope of immunity, the first step was to identify the persons who enjoyed immunity *ratione personae*. To extend immunity *ratione personae* to high-ranking officials other than the troika (Head of State, Head of Government and minister for foreign affairs) might be extremely problematic. Each State had its own ministerial and administrative structure, and the functions of an official in one State did not always correspond to those of a counterpart in another. A court in the forum State, meaning the State that might exercise criminal jurisdiction, would be hard pressed to determine whether a particular official did or did not enjoy immunity *ratione personae*. Questions would inevitably arise, such as whether it was the conclusion drawn by the forum State, or rather by the State of nationality of the official, that took precedence, and whether the forum State had to accept the conclusion reached by the State of nationality of the official. The extension of immunity *ratione personae* beyond the troika might also conflict with current efforts, in the interests of the international community, to limit immunity.

4. As regards immunity *ratione materiae*, the Commission must look into possible exceptions to the immunity of State officials through an analysis of national and international case law. The recent judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* and its judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* were prime areas for research. The case law of the International Criminal Court was not relevant, but national case law was of great importance because it could help to shed light on any possible exceptions to criminal immunity that currently existed under general international law. If the Commission did not find State practice to be uniform and consistent, then the extent to which *lex ferenda* should be taken into consideration in future would have to be decided.

5. Referring to paragraph 57 of the report, he said that the Special Rapporteur appeared to view the purpose of immunity as being the preservation of the principles, values and interests of the international community. He was not sure, however, that that was the case. In positive international law, the concept of immunity was based on the principles of the sovereign equality of States and territorial sovereignty. The purpose of immunity was to enable the State to function properly and to ensure the stability of international relations. The values and interests of the international community could, however, be considered from the standpoint of *lex ferenda*.

6. In its debate on the preliminary report²⁵¹ of the former Special Rapporteur in 2008, the Commission had settled on the term "official" in English ("*représentant*" in French).²⁵² However, as the Special Rapporteur suggested, the Commission might consider using a term that more clearly reflected the basis for immunity *ratione materiae*. Possible alternatives included the terms "agent", which had been adopted by the Institute of International Law in its 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes;²⁵³ "State organ", as found in the 2001 articles on responsibility of States for internationally wrongful acts;²⁵⁴ and "State official", as had been suggested by the Special Rapporteur.

7. In his view, the term "State official" was appropriate for the topic under consideration. The International Court of Justice had used the term in its 2012 judgment in the *Jurisdictional Immunities of the State* case to which he had just referred. In terminology, what mattered most was not the label but the definition of the term to be used. It was therefore important to specify what the Commission meant by "State official" and which persons were to be included in the various categories of State officials enjoying immunity from foreign criminal jurisdiction. One objective in defining the term "State official" was

²⁴⁹ *Yearbook ... 1991*, vol. II (Part Two), para. 28, draft articles on jurisdictional immunities of States and their property and commentaries thereto.

²⁵⁰ *Multilateral Treaties Deposited with the Secretary-General* (the paper version of this publication was discontinued in August 2011, whereas the online version is updated daily and is available from <http://treaties.un.org/Pages/ParticipationStatus.aspx>), chap. III.13.

²⁵¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601.

²⁵² *Ibid.*, vol. II (Part Two), para. 306; see also para. 288.

²⁵³ Institute of International Law, *Yearbook*, vol. 73, Session of Naples (2009), p. 226. Available from the Institute's website (<http://justitiaetpace.org>).

²⁵⁴ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77.

to maintain a balance between the principles underlying immunity, namely sovereign equality and territorial sovereignty, the first being functional and the second representational in nature.

8. Mr. GÓMEZ ROBLEDÓ said that he agreed with the Special Rapporteur's proposed approach of going step by step yet clearly delineating the main themes to be addressed.

9. All matters related to the legal regime governing the immunity of diplomatic and consular officials, as well as officials on special mission, should be viewed as falling outside the scope of the current topic: they were already covered by the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on special missions, respectively. Those treaties nevertheless set out the essence of the institution of immunity and embodied various aspects of customary international law.

10. That point was relevant in view of the position, held by some, that immunity was absolute, a position that admitted of no exceptions to immunity and was tied to the personification of the State as the beneficiary of immunity. But representation of the State was quite different from personification of the State in the sense that sovereignty was vested in the ruler—sovereignty having shifted in today's world from the ruler to the nation.

11. The treaties he had just cited struck a reasonable balance between recognizing immunity as an essential element in maintaining friendly relations and cooperation among States—and thus stability in international relations—and acknowledging the need to ensure that perpetrators of an offence—whether the State itself, one of its officials or both—were held accountable for their actions. In the current transitional phase of the Commission's consideration of the topic, it was accordingly worth bearing the purpose of immunity in mind.

12. From a modern perspective, immunity from jurisdiction rested on two assumptions. The first was that immunity was eminently functional, in that it enabled States to operate fully as sovereign States. The domestic law of States regarding the immunity of officials was irrelevant for the purposes of the current analysis. All that mattered were those aspects that ensured the functional nature, and hence the stability, of inter-State relations.

13. The second assumption was that immunity from jurisdiction was not absolute and the State could exercise its jurisdiction over a person who enjoyed immunity in respect of acts allegedly constituting a crime. Between those two extremes lay a regime that could not be limited to an exercise *de lege lata* but had to allow also for some inclusion into the broader sphere *de lege ferenda*.

14. There was no doubt that mere doctrinal trends did not amount to rules of law. But certain developments in both international and regional legislation and case law over the past 15 years were more than trends and had the potential to alter the interpretation of immunity that had formerly prevailed. The functional nature of immunity was thus becoming the foundation of a legal regime

of immunity of State officials from foreign criminal jurisdiction that did not conflict with other principles and values of the international community that were in the process of incorporation into international law, as the Special Rapporteur had rightly pointed out in paragraph 58 of her preliminary report.

15. With regard to immunity *ratione personae*, the Commission must take steps to identify other entities capable of enjoying immunity, apart from the members of the troika. In today's world, a minister of trade was called upon to perform functions that had previously corresponded to those of the minister for foreign affairs. Accordingly, rather than to establish an exhaustive list that would not be capable of withstanding the test of time, it might be better to identify certain relevant criteria.

16. The most important question was whether immunity *ratione personae* was absolute or restricted in nature. Second, in respect of immunity *ratione materiae*, it would be useful to look into what should be understood by "State official". In his view, the relevant criterion was whether an act could be attributed to, or responsibility borne by, the State of nationality of the official.

17. Lastly, having cited paragraph 69 of the report on the procedural aspects of immunity, he said that the actual cases in which immunity must be respected, could be invoked to good effect or could be waived needed to be identified. If the purpose of immunity was to ensure the proper functioning of inter-State relations, then it was precisely when the authorities of a State in which a foreign official was present committed an act that infringed the inviolability of his or her person that it was most important for the scope and procedural aspects of immunity to have been clearly delineated. Certainly, the State of nationality of the official must take all steps to ensure that immunity was fully respected as soon as there were any signs that measures pertaining to the preparatory phase of judicial proceedings were being initiated.

18. Mr. MURPHY said that he supported the Special Rapporteur's proposal to prepare and submit draft articles following a step-by-step approach, with the aim of concluding a first reading of the draft articles in the course of the current quinquennium. To his mind, the best approach would be to prepare a small number of draft articles that addressed the core issues, rather than a larger number that provided detailed rules on all aspects of the topic.

19. He also supported the Special Rapporteur's view that it was not helpful to decide *ab initio* whether the project should be approached from the perspective of *lex lata* or *lex ferenda*. As was the case for all of the Commission's work, there would no doubt be elements of both in the project. He agreed with the Special Rapporteur's assessment that, initially, it would be useful to consider *lex lata* so as to see whether any settled State practice existed and, subsequently, to decide whether it was appropriate to move in a new direction.

20. It was important to maintain the scope of the topic as it currently stood. As the Special Rapporteur had indicated, the topic did not deal with questions concerning immunity from international criminal jurisdiction, immunity of an

official from the jurisdiction of the State of his or her nationality or immunity from the civil jurisdiction of another State.

21. While the topic must necessarily take into account the immunities that existed in treaty relations, it was concerned with identifying the relevant rules of customary international law, not treaty law. Those customary rules did not prevent States from according in their national law greater immunity than what was required under international law. The Commission's task was not to consider whether international law required a State to exercise criminal jurisdiction in certain circumstances: rather, it was to focus on whether a State, if it chose to exercise criminal jurisdiction, must nevertheless accord immunity to the official concerned.

22. The Special Rapporteur should maintain the distinction between immunity *ratione personae* and immunity *ratione materiae* in her methodological approach, as it appeared from paragraphs 54 to 58 of her report that she was inclined to do. He agreed with her assertion that the two types of immunity had the same general purpose, to allow for the continued performance of representative or other governmental functions and for stability in international relations. In his view, the existence of those immunities flowed to a large extent from the broader notion that States were generally immune from the national jurisdiction of other States, through both State immunity and official immunity, unless certain exceptions applied. That did not mean that State immunity and official immunity were identical, but he believed that they were both based on a presumption that, as a matter of customary international law, it was problematic for one State to pass judgment on another in its national courts, since that implicated not only the individual but also the other State. As the International Court of Justice had asserted in its 2008 judgment in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, a claim of immunity for a government official was, in essence, a claim of immunity for the State, from which the official benefited. Indeed, that was why a State could waive the official's immunity: it was meant to protect the State, not the official.

23. With respect to immunity *ratione personae*, it appeared that customary international law accorded it to all members of the troika during their term of office, not merely to the Head of State and Head of Government. Such immunity had the main benefit of allowing a limited number of leading State officials to engage freely in inter-State relations. All the more reason, then, for it to be held by an incumbent foreign minister, whose work focused on promoting inter-State relations and who travelled to foreign jurisdictions more regularly than did the Head of State or Head of Government.

24. Covering all three members of the troika was consistent with the Court's reasoning in its 2002 judgment in the case concerning the *Arrest Warrant of 11 April 2000*, in which it had grouped the holders of the three posts together as enjoying full civil and criminal immunities while in office. Although it had not used the term "immunity *ratione personae*", the Court had seemed to be referring to that type of immunity by focusing on the status of the "incumbent" foreign minister, not on the specific conduct

of the foreign minister at issue in the case, and by indicating that a different situation arose after the minister ceased to hold office. The inclusion of all three troika members was also consistent with the Court's 2006 judgment in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*. Such reasoning likewise seemed to be prevalent in national court proceedings.

25. Turning to the question of whether immunity *ratione personae* under customary international law extended to other senior officials while in office, he said that current State practice and domestic case law seemed to point to only the troika. Furthermore, immunity *ratione personae* was a very powerful immunity, covering both official and private acts—hence the need for caution about expanding the pool of beneficiaries and thereby inviting the very inter-State frictions that immunity rules sought to avoid. Lastly, assuming that the alleged offender must be present in the territory of the foreign jurisdiction, the immunities of officials who were not part of the troika might be addressed through other means, such as special mission immunity.

26. However, in paragraph 51 of its judgment in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had referred to "holders of high-ranking office ... , such as" the troika, which suggested broader coverage. If the principal value of immunity *ratione personae* was to allow certain sitting officials to engage freely in representative functions on the international stage, and if that was accomplished regularly by ministers other than foreign ministers, then perhaps immunity *ratione personae* should be regarded as extending to a limited number of other senior officials. The problem was how to identify them. Although it might be possible to do so by specific office, such as ministers of defence or of trade or commerce, such an approach might be problematic given the differences in ministerial names and functions worldwide. In paragraph 53 of its judgment in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice described the foreign minister as someone serving as the State's representative in international negotiations and intergovernmental meetings, explaining that his or her immunity was necessary "to ensure the effective performance" of such a role. The reasoning in paragraphs 51 and 53 of that judgment might be combined, so that immunity *ratione personae* would apply to the troika and to "holders of high-ranking office" when such immunity was necessary to ensure the effective performance of their functions on behalf of their respective States.

27. As the Special Rapporteur correctly observed in paragraph 62 of her report, immunity *ratione personae* covered all acts performed by the beneficiary, whether in an official or private capacity. The reasoning behind that assertion could be found in paragraph 55 of the Court's judgment in the *Arrest Warrant of 11 April 2000* case. An important question was whether, absent a waiver by the State of nationality or in a treaty regime, there were any exceptions to immunity *ratione personae*, including when there were allegations of serious international crimes. The Court had addressed the matter in paragraphs 56 to 58 of its judgment in the *Arrest Warrant of 11 April 2000* case and, after a careful review of State practice, had found that no such exceptions existed in customary international law.

28. Much attention had been paid to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant of 11 April 2000* case. They had not dissented, however, from the Court's findings on immunity, including that there were no exceptions to the rule according immunity to an incumbent foreign minister. Indeed, the Court's decision that a sitting foreign minister was immune even when faced with allegations of having committed serious international crimes had been accepted by the majority of judges. Of the three who had voted against the immunity finding, Judge Oda had done so principally on grounds of admissibility of the case and had simply said that customary international law on immunity was not clear. Only Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert could be fairly said to have definitively opposed the Court's finding that there was no exception to the rule on immunity for serious international crimes.

29. As far as immunity *ratione materiae* was concerned, customary international law appeared to accord it to a State official for acts performed in his or her official capacity, both during and after the person held office. However, such immunity did not extend to acts not performed in an official capacity, including acts committed before the person assumed office. He agreed with the Special Rapporteur on the need to analyse carefully the relationship between the rules on State responsibility and the rules on the immunity of officials in determining whether an official was acting in his or her official capacity. The International Court of Justice had established a link between a State's assertion of immunity and its responsibility for conduct when it had stated, in its judgment in *Certain Questions of Mutual Assistance in Criminal Matters*, that the State notifying a foreign court that, for reasons of immunity, judicial proceedings should not go forward against its State organs was assuming responsibility for any internationally wrongful act committed by such organs.

30. It was plausible to ask whether allegedly criminal conduct could be attributed to the official's State as a matter of State responsibility. If the answer was no, then the official's conduct could not be considered an "official act" and there should be no immunity *ratione materiae*. When considering that point, the Special Rapporteur might wish to explore the way that official acts were treated in the context of diplomatic, consular and other immunities, compared with in the rules on State responsibility, in order to ensure consistency in different domains of immunity.

31. If the conduct could be attributed to the State, then there were at least three possibilities that he invited the Special Rapporteur to consider in her future work. First, the conduct was *per se* an "official act" and therefore, in all circumstances, the official was entitled to immunity *ratione materiae*. Second, the conduct was *per se* an "official act", but there were some exceptional circumstances where immunity *ratione materiae* was denied, such as when the conduct was a serious international crime. Third, the fact that the conduct could be attributed to a State did not indicate *per se* that it was an "official act" for the purposes of immunity *ratione materiae*; it was then necessary to rely upon a different standard, possibly one derived from another area of international law governing immunity.

32. On the subject of whether serious international crimes should be regarded under customary international law as acts that by their nature could not be performed in an "official capacity", he noted that, in their joint separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal had discerned a trend in that direction. However, they had been cautious in how they characterized the trend, saying that it was "increasingly claimed" that serious international crimes could not be regarded as official acts and that the idea was only gradually finding expression in State practice. Since the Court had not addressed the matter in the *Arrest Warrant of 11 April 2000* case or in any other judgment, he encouraged the Special Rapporteur to do so, although he found it somewhat strange to characterize serious international crimes, by definition, as not constituting "official" acts. International criminal tribunals, including the International Criminal Court, seemed to assume that serious international crimes were or at least could be undertaken in an "official capacity". Indeed, the purpose of article 27 of the Rome Statute of the International Criminal Court was to deny immunity to persons acting in an "official capacity". Furthermore, the idea that State officials who were involved in genocide or crimes against humanity were not engaging in "official" acts seemed to downplay the role of the State, as though those officials were renegade actors who had suddenly decided to engage in bad acts in their private capacity. Thus, if there was a move to codify an exception to immunity in that area, it might be better to characterize the commission of serious international crimes as "potentially official" acts, but to deny their perpetrators immunity.

33. A further question was whether customary international law regarded those who were alleged to have committed serious crimes, even as official acts, as not being entitled to immunity *ratione materiae* in national criminal courts. In its 2012 judgment in the *Jurisdictional Immunities of the State* case, the International Court of Justice had found that customary international law did not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it was accused or the peremptory nature of the rule that it was alleged to have violated. Although the Court had made a point, in paragraph 91 of its judgment, of saying that it was assessing only State immunity, not official immunity, its basic reasoning was relevant to the Commission's work on the topic, on several grounds.

34. First, the Court saw a problem in stripping away State immunity based on the allegation of a serious international crime, because doing so invited a litigant to craft the allegations skilfully solely to negate the immunity. In essence, the Court was saying that allowing litigation to proceed whenever the commission of heinous acts was alleged would deprive an immunity regime of much of its purpose, as it would no longer shield the State from exposure in national courts. That same reasoning might be applied to immunities of State officials. The problem of "artful pleading" arose whenever immunities were being restricted, however: a crafty lawyer could always tailor allegations to fit whatever exceptions were available. The solution did not necessarily lie in denying the existence of an exception to immunity, but instead, in requiring the prosecutor to make a *prima facie* showing that the official

was not entitled to immunity, thereby allowing the court to screen out baseless accusations.

35. Second, with reference to *jus cogens*, the Court had concluded that an allegation of a violation thereof did not alter existing rules on State immunity from national jurisdiction and that a *jus cogens* rule and an immunity rule addressed two different issues and were not in conflict. The *jus cogens* rule might establish that the act was substantively unlawful, but that did not mean that the illegal act, as a procedural matter, could be litigated in a national court. Again, the same reasoning seemed relevant to the immunity of officials and, if so, refuted arguments concerning *jus cogens* advanced by Lord Millet in the *Pinochet* (No. 3) case; by the Italian Court of Cassation in the *Lozano v. Italy* case; and by the dissenting judges in the case of *Al-Adsani v. the United Kingdom* [GC] before the European Court of Human Rights. Moreover, if a *jus cogens* rule should supersede immunity *ratione materiae*, then, logically, it should also supersede immunity *ratione personae*—yet few seemed to take that position.

36. Third, the Court had not agreed that stripping away State immunity whenever necessary to ensure accountability was appropriate. It had found no evidence that the right to State immunity was conditional upon the availability of a venue other than national courts for pursuing redress. By the same token, State officials should not be denied the immunity to which they were entitled before national courts simply because it might be difficult to prosecute in another forum. In the *Arrest Warrant of 11 April 2000* case, the three judges who had appended a joint separate opinion had also taken that position, as borne out by paragraph 79 of that text. Of course, recognition of immunity *ratione materiae*, even for allegations of serious crimes, did not necessarily lead to impunity. An official might be prosecuted in his or her own State; that State might waive immunity on an *ad hoc* basis or through a treaty regime; or immunity might not apply to prosecution before an international criminal court.

37. Lastly, the basic methodology of the Court had been to conduct a survey of practice in national courts, and it had found no support for the proposition that State immunity could be limited based on the gravity of the violation. In other words, it had assumed the existence of State immunity, then looked for an exception based on State practice. The Commission might wish to do the same with regard to immunity *ratione materiae*. The Special Rapporteur should accordingly revisit carefully the practice of national courts, relating to immunity *ratione materiae*, taking account of the research done by Mr. Kolodkin and the Secretariat as well as subsequent developments. For example, in some cases where former officials had been prosecuted by foreign courts for serious international crimes, a defence of immunity had not been raised, or immunity had been waived by the official's State, making those cases weak support for the existence of a rule under which immunity *ratione materiae* was denied.

38. If State practice was not settled, then perhaps there was some sign of a trend towards a new rule, *de lege ferenda*, whereby immunity *ratione materiae* was denied

when an official was charged with a serious international crime. That became a question of legal policy, in which the potential for disruption of friendly relations among States must be weighed against the desire to avoid impunity for heinous crimes. To mediate between the two, any new rule might be limited in certain ways. It might allow only for the State where the crime was committed or whose nationals were harmed by the crime to deny immunity, or for a State to deny immunity in cases when the offender was physically present or the prosecution had been authorized by the minister of justice or a comparable State official. However, several of the points raised with regard to the *Jurisdictional Immunities of the State* case would seem to militate against acknowledging the existence of a new rule: for example, the need to avert divergences between State and official immunities whereby a State could not incur liability for harm caused by serious international crimes, but the State's official could be subject to criminal prosecution for the same crimes.

39. He agreed with the Special Rapporteur that procedural aspects of immunity should be an element of work on the topic and that many of those covered in Mr. Kolodkin's third report²⁵⁵ were uncontroversial. Ultimately, developing a single procedural regime should be feasible, although the final approach to the substantive aspects might need to be differentiated. While he understood the Special Rapporteur's inclination to deal with substantive elements first and procedural ones later, he considered that there were aspects of procedure such as the degree of discretion granted to a prosecutor that, if resolved at an early stage, might facilitate consensus on substantive issues.

40. Mr. TLADI said that two points raised in Mr. Murphy's highly interesting statement required clarification. First, if he had understood Mr. Murphy correctly, it appeared that under customary international law the troika had immunity *ratione personae*. His argument seemed to be based partly on the proposition that it was necessary to assume the existence of immunity *ratione personae* and to prove exceptions to such immunity. While he had no difficulty with that particular assertion, he would stress that it did not necessarily flow from the general assumption of immunity that all members of the troika had immunity *ratione personae*.

41. Second, Mr. Murphy had rightly recalled that only Judges Al-Khasawneh and Van den Wyngaert had been able to find exceptions to immunity under international customary law. Even though, in their joint separate opinion in the *Arrest Warrant of 11 April 2000* case, Judges Higgins, Kooijmans and Buergenthal had been unable to find any such exceptions, it was important to recall that their point of departure had been not immunity *ratione personae* but immunity *ratione materiae*. Indeed, they had entered into a discussion of whether the commission of serious international crimes constituted official acts precisely because they considered that foreign ministers were entitled to immunity *ratione materiae*.

42. Mr. KAMTO said that while he endorsed Mr. Tladi's remarks, he wished to point out that the judgment in the

²⁵⁵ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646.

Arrest Warrant of 11 April 2000 case had not clearly defined the temporal scope of immunity, in other words whether the State official's immunity produced its effects only during that person's term of office or continued to do so thereafter. It was difficult to tell whether the reference in the judgment to "complete immunity" related to immunity *ratione materiae* or immunity *ratione temporis*.

43. Mr. Murphy had referred to article 27 of the Rome Statute of the International Criminal Court. That provision made it clear that official capacity did not exempt a person from criminal responsibility. Article 27, paragraph 2, stated that

[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Hence, if a Head of State or a minister for foreign affairs committed an offence, immunity as a State official was no longer operative.

44. Mr. PETRIČ said that, to some extent, he agreed with Mr. Tladi's view regarding the troika. While he did not disagree with Mr. Murphy's comments, it should not be forgotten that immunity *ratione personae* was connected not with the function but with the status of an official who personified State sovereignty. The Commission should therefore define immunity *ratione personae* very narrowly.

45. Mr. SABOIA said that the Special Rapporteur's carefully prepared preliminary report was a good starting point for further consideration of the complex topic of immunity of State officials from foreign criminal jurisdiction. It would enable the Commission to draw on aspects of the previous Special Rapporteur's reports, which it largely supported, while exploring ways of going beyond his strictly *de lege lata* approach. The technical aspects of his reports had been generally well received, but his summaries and conclusions had not been discussed or endorsed and therefore the current Special Rapporteur was in no way bound by them.

46. There was consensus that it was useful to differentiate between immunity *ratione personae* and *ratione materiae*, both of which served the same purpose, namely to preserve principles, values and interests of the international community as a whole. Several legal issues remained open to debate, however. He agreed that, in view of the differences between the two types of immunity, establishing separate legal regimes for them would help to avoid confusion and grey areas. He also supported the Special Rapporteur's view that, as both categories of immunity had an essentially functional basis, the Commission should focus on the key element of functionality.

47. He did not share some members' critical attitude to an approach that would take account of the international community's values and trends in international law. Law did not exist in a vacuum: its purpose was to preserve and promote the values that were important to society, including that of justice. *Pacta sunt servanda* was one example of a norm derived from an ethical value. Trends should not be ignored either, especially as exceptions to immunity were not a new issue. When the Commission

had drawn up the draft Code of Crimes against the Peace and Security of Mankind,²⁵⁶ it had devoted an article, article 7, to the individual criminal responsibility of officials, including Heads of State, for the commission of crimes listed in that instrument. Similarly, when it had formulated the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal ("Nuremberg Principles"),²⁵⁷ it had included a principle concerning the responsibility of Heads of State for the commission of grave international crimes (Principle III).

48. Developments such as the establishment of international criminal tribunals and the International Criminal Court, the increasing interest in clarifying the nature and content of universal jurisdiction and the growing recognition of the coexistent and complementary nature of the universal responsibility of States and the criminal responsibility of individuals should not be disregarded. At a lecture given at The Hague Academy of International Law, Professor Cançado Trindade,²⁵⁸ who had since become a judge of the International Court of Justice, had suggested that grave international crimes were most often planned and committed under the command of the State apparatus and that the elements of intention and guilt on the part of individuals and the State therefore made both sides criminally responsible. Like Hans Kelsen and Sir Elihu Lauterpacht, he had taken the view that the compartmentalization of responsibility regimes was an obstacle to the realization of justice.

49. During the debate on the current topic, many references had been made to the judgments of the International Court of Justice in the *Arrest Warrant of 11 April 2000* and *Jurisdictional Immunities of the State* cases. The separate or dissenting opinions on both judgments contained important elements of *opinio juris* pointing to nascent trends in international law that should be also taken into account. Another significant case, to which Judge Cançado Trindade had referred in his dissenting opinion in the *Jurisdictional Immunities of the State* case, was that of *Al-Adsani v. the United Kingdom* [GC]. While the European Court of Human Rights had upheld the immunity granted to Kuwait, the vote had been very close, and in their joint dissenting opinion, eight judges had concluded the following:

In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.²⁵⁹

50. Although most of the rapidly emerging trends and developments in the law and practice of the United Nations had a political basis, they could not fail to have an

²⁵⁶ *Yearbook ... 1996*, vol. II (Part Two), para. 50.

²⁵⁷ *Official Records of the General Assembly, Fifth Session, Supplement No. 12 (A/1316)*, paras. 95–127. The Nuremberg Principles are reproduced in *Yearbook ... 1985*, vol. II (Part Two), para. 45.

²⁵⁸ See A. A. Cançado Trindade, "International law for humankind: towards a new *jus gentium* (I and II)", *Collected Courses ...*, vols. 316 and 317 (2005).

²⁵⁹ Joint dissenting opinion of Judges Rozakis and Cafisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić, para. 1, which was endorsed by Judge Loucaides.

impact on international law. For example, the notion of a responsibility to protect and its application by the Security Council had resulted in decisions under Chapter VII of the Charter,²⁶⁰ and thus binding on all countries, which authorized the use of force, the establishment of no-fly zones and the imposition on States and Heads of State or Government of sanctions such as blocking their accounts and preventing them from travelling abroad. Those actions were a response to a perceived need for urgent measures to contend with massive, systematic violations of human rights that not only threatened international security but also constituted unacceptable international crimes. Such actions were also indicative of an excessive widening of the Security Council's competence, contrasting with the General Assembly's slow pace in adopting international law instruments. Unless the scope of international law were expanded to enable it to respond to such challenges and prevent and repress grave crimes of international concern, action would continue to be dictated by political impulses that were frequently inappropriate or selective.

51. With reference to the questions raised in the preliminary report, he said that he was against expanding the troika and thought that the list of persons who enjoyed immunity should be closed. When other high officials travelled abroad, they were usually sent in a capacity such that they would be covered by the immunities granted to the heads and members of special missions.

52. He was in favour of exceptions to the troika's immunities in the cases mentioned in paragraph 64 of the preliminary report of the Special Rapporteur and of exceptions to the immunity *ratione personae* of less high-ranking officials when they had allegedly committed grave crimes of international concern. At the same time, there was a need to avoid the risk that high officials and representatives of a sovereign State might be exposed to vexatious or politically motivated criminal prosecution in a foreign State. High thresholds must therefore be set for presumptions of evidence against the alleged offender. It would also be advisable to consult sources such as the statutes of the International Criminal Court and of other international tribunals and the Guidelines on the Role of Prosecutors²⁶¹ to see what safeguards they provided, although ensuring foreign courts' compliance with those safeguards would be a major challenge.

53. The Commission should strive to arrive at a more restrictive definition of the circle of officials who were covered by immunity *ratione materiae* than that offered by the previous Special Rapporteur in his reports. The articles on responsibility of States for internationally wrongful acts²⁶² might offer some clues. While article 4 gave a very broad definition of the organs of a State, article 5 introduced more restrictions regarding persons or entities exercising elements of governmental authority. The expressions "provided the person or entity is acting in that capacity in the particular instance" and "governmental authority" might serve as a starting point for restricting the categories

of officials entitled to immunity *ratione materiae*. The term "governmental authority" might also help to establish some elements of a definition of an "official act", which, in turn, would supply a basis for limiting categories of acts that could give rise to immunity *ratione materiae*.

54. He was in favour of the comprehensive, substantive workplan suggested in the last chapter and of the step-by-step approach proposed in paragraph 75 of the report. Initially, it might be wise for the Commission to approach the topic by considering *lex lata*, but an analysis *de lege ferenda* was also essential and would contribute to a more balanced result consistent with the Commission's dual mandate to codify and progressively develop international law.

55. Mr. WISNUMURTI said that the fresh methodological and conceptual approaches proposed in the Special Rapporteur's preliminary report would help the Commission to find common ground and achieve further progress.

56. Focusing on some of the questions raised in the report, he said that it would be futile to become embroiled in a debate on whether to examine the topic from the perspective of either *lex lata* or *lex ferenda*, or whether to take both aspects into consideration. It would be logical for the Commission to continue its work on codification, but at the same time it should not ignore progressive development and the international community's need to promote peace and justice by combating impunity. Caution and prudence were, however, of the essence in such a politically charged field.

57. As for immunity *ratione personae* and immunity *ratione materiae*, a clear distinction should be drawn between personal and functional immunity, and a separate legal regime should be established for each. Separate treatment would enable the Commission to gain a clear understanding of their respective nature and make it easier to draft articles pertaining to them. He agreed that immunity *ratione personae* and immunity *ratione materiae* had a functional link to the general purpose of preserving the principles and values of the international community, although it was necessary to be cautious about what was meant by that phrase; a broad interpretation would be counterproductive. In his opinion, it referred specifically to the international community's need to fight impunity.

58. Another issue deserving the Commission's attention was the relationship between the international responsibility of a State and the international responsibility of individuals. The definition of "official act" and the attribution of that act to the State were of central importance in that respect. The elements mentioned in paragraph 60 of the report had to be taken into account when considering the notion of "official acts" and its link to State responsibility.

59. As far as the list of persons possessing immunity *ratione personae* was concerned, customary international law established that such immunity was held by Heads of State, Heads of Government and ministers for foreign affairs. He disagreed with the view that ministers for foreign affairs did not have personal immunity, because

²⁶⁰ See, in particular, resolutions 1970 (2011) of 26 February 2011 and 1973 (2011) of 17 March 2011, para. 9.

²⁶¹ See footnote 238 above.

²⁶² General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

as the highest government officials in charge of foreign affairs, they represented the State, and personal immunity was essential for the discharge of those duties. On the other hand, it was doubtful whether there was any need to widen personal immunity to take in senior officials other than the troika.

60. Whether immunity *ratione personae* was absolute or restricted was a more difficult issue, since it was necessary to decide whether restrictions on or exceptions to personal immunity should apply to acts contrary to *jus cogens* and whether an exception should cover Heads of State or of Government while they were in office, after their term of office, or in both cases. While exceptions were necessary in addressing impunity, it was important to take account of the need to safeguard stability in international relations and to ensure the right balance between the two concerns.

61. The question of whether immunity *ratione materiae* was subject to exceptions or restrictions was also a controversial matter that had to be addressed. There had been greater support for a possible exception in the case of immunity *ratione materiae* than in that of immunity *ratione personae*. The Commission would have to examine the scope of functional immunity as well as the definitions of “official” and “official act”. At the same time, it must determine whether one set of procedural rules should cover both personal and functional immunity, or if two separate sets of rules were necessary. Lastly, the workplan proposed in paragraph 72 of the report would be a useful tool to enable the Commission to advance in its work on the topic and to guide the Special Rapporteur in preparing her next report.

62. Mr. HASSOUNA said that the preliminary report, while concise, was clear and comprehensive. The Special Rapporteur had stated her intention to build on the work of Mr. Kolodkin who, despite a sometimes subjective approach, had always demonstrated flexibility and deserved thanks for his important contribution. As to the approach to be taken to the topic, he said that he supported the view, widely expressed in discussions in the Commission and in the Sixth Committee, that the Commission should strike a balance between the need to uphold the principle of immunity and the need to preclude immunity for serious crimes under international law.

63. The points of contention identified in the report and the workplan were key issues that needed to be addressed for the work on the topic to be comprehensive. Differentiating the regime of immunity *ratione materiae* from the regime of immunity *ratione personae* might dispel persisting uncertainty regarding the beneficiaries and scope of the two types of immunity. It also seemed important to define what constituted an “official act”: that, too, would help to clarify the scope of the two immunities, and an analysis of the attribution of an “official act” to a State would elucidate the relationship between immunity and State responsibility. In that effort, it would be helpful to highlight any correlation with the Commission’s work to develop the United Nations Convention on Jurisdictional Immunities of States and Their Property. For the purposes of that Convention, representatives of a State acting in their official capacity were assimilated to

the State itself. The commentary to the relevant provision (art. 2, para. 1 (b) (iv)) explained that the phrase “in that capacity” was meant to make it clear that such immunities were accorded to representatives for their representative capacity *ratione materiae*.²⁶³

64. With regard to the definition of an “official act”, the report suggested that the Commission might find it useful to distinguish between official acts and unlawful acts. However, the relevance of that distinction had been questioned in the memorandum by the Secretariat on immunity of State officials from foreign criminal jurisdiction.²⁶⁴ The analysis there indicated that if unlawful or criminal acts were considered, as a matter of principle, to be “non-official” for the purposes of immunity *ratione materiae*, the very notion of immunity would be deprived of much of its content. Immunity covered all activities related to official functions, irrespective of their legality, since its rationale was to prevent States from sitting in judgment over the acts of other sovereign States.

65. The current Special Rapporteur was right in planning to continue to survey and analyse the practice of States with respect to the immunity of State officials from foreign criminal jurisdiction, so as to take into account practice not reviewed by her predecessor. Special attention should be given, in that context, to the recent ruling of the International Court of Justice in the *Jurisdictional Immunities of the State* case. The legal analysis therein, though it pertained to State immunity, might provide a helpful framework for considering several issues. The Court, for example, had elaborated on the *opinio juris* and the State practice relevant in the context of immunity and had analysed the relationship between *jus cogens* and State immunity.

66. While the need to ground the results of work on the current topic in State practice was beyond question, it was also important to understand immunity’s place in the system of values and principles of contemporary international law. The suggestion in the report that the rationale underlying immunity should be elaborated was worthy of support, because the boundaries between *lex lata* and *lex ferenda* were often contentious. A clear account of the place of immunity in contemporary international law would be useful in evaluating various trends, such as possible exceptions to immunity in cases of *jus cogens* violations or international crimes.

67. While he supported the Special Rapporteur’s proposal to approach the topic step by step, a road map and a time frame should be developed to point the way forward and respond to the General Assembly’s request that the Commission should give the topic priority in its programme of work.

68. Ms. JACOBSSON said that the Special Rapporteur’s preliminary report was well reasoned and well structured and, together with the introduction, outlined a constructive way for the Commission to proceed with the topic. She supported the Special Rapporteur’s proposal to tackle

²⁶³ *Yearbook ... 1991*, vol. II (Part Two), draft articles on jurisdictional immunities of States and their property, para. 28, in particular paragraph (17) of the commentary to draft article 2, para. 1 (b) (v).

²⁶⁴ A/CN.4/596 and Corr.1, para. 160 (document available from the Commission’s website).

the various aspects of immunity in clusters, which would speed up the work.

69. Of the principal points of contention relating to substantive aspects of the topic listed in paragraph 53 of the report, she herself attached particular importance to the relationship and the distinction between the international responsibility of the State and the international responsibility of individuals and their implications for immunity.

70. The Special Rapporteur suggested that the procedural aspects of immunity discussed in paragraphs 69 and 70 of the report should be taken up after the substantive ones, when a decision could be made on whether a single procedural regime or two—for immunity *ratione personae* and immunity *ratione materiae*—were needed. The issue of immunity was intrinsically linked to procedure, however. Perhaps, instead of taking the traditional approach to a topic—tackling first substance, then procedure—it would be better to start with procedure. Such an approach had several advantages. Procedural matters were less controversial; irrespective of how many procedural regimes were chosen, many of the provisions would be the same; and, finally, being able to visualize the procedural structure would make it easier to agree on the substantive part.

71. Turning to specific aspects of the report, she said that the Special Rapporteur was right to consider functional immunity as the cornerstone of immunity and to plan to address what constituted an “official act”. Her reference to the interests, values and principles of international law and the international community reflected her view that immunity could not be addressed solely from a *lex lata* perspective. The Special Rapporteur appeared to be saying that the Commission’s task was to address the question of immunity against the backdrop of the Commission’s mandate, a statement that was neither new nor revolutionary. The same point had been made by the previous Special Rapporteur in his syllabus.²⁶⁵ He had emphasized two concepts: first, that State officials should bear responsibility for crimes and that a State should be able to exercise its criminal jurisdiction in respect of suspected perpetrators of crimes; and second, that officials acting on behalf of their States should be independent *vis-à-vis* other States in order to ensure that relations between States were stable and predictable. He had then asserted that the Commission could make a contribution to ensuring a proper balance between those concepts through the codification and progressive development of international law.²⁶⁶ It was on that basis that the Commission had decided to include the topic in its long-term programme of work. The Special Rapporteur made the same point in paragraph 58 of the report.

72. Regarding the workplan in the last chapter of the report, she noted that the definition of an “official act” under item 3.2 would also be relevant under item 2.2. The Special Rapporteur also needed to consider the inclusion of a “without prejudice” clause with respect to international crimes, perhaps giving examples of such crimes, in order to preclude an extensive discussion of what was meant by the term “international crimes”.

73. Mr. HMOUD said that the preliminary report was well written and well researched and reflected a deep understanding of the issues involved. It indicated that the Special Rapporteur intended to formulate conclusions on the basis of doctrine, practice and jurisprudence, rather than to start from legal and methodological premises and endeavour to prove them.

74. While he agreed that the Commission should take into account its past work on the topic and the research material contained in the reports of the previous Special Rapporteur, the approach taken in those reports had been adversarial and one dimensional. The rulings of both domestic and international courts indicated an absence of uniform State practice or rules of customary international law. On the contrary, there were many grey areas that needed to be addressed if the Commission was to move forward, as the Special Rapporteur noted in her report.

75. He did not think that the Commission’s work on the topic, and any draft articles that might result therefrom, should be divided on the basis of relevance to codification or to progressive development. Such an approach would be fruitless and would ignore the fact that the legal issues involved were interrelated. Rather, as the Special Rapporteur suggested, the Commission should study the distinction between immunity *ratione personae* and immunity *ratione materiae*, looking carefully into their respective foundations and the functionality that was common to the two.

76. However, the personification of the State that was a basis for immunity *ratione personae* should be construed as being limited. In its ruling in the *Arrest Warrant of 11 April 2000* case, the International Court of Justice had noted that the immunities accorded to ministers for foreign affairs were not granted for their personal benefit but to ensure the effective performance of their functions on behalf of their respective States. The Court had not discussed the distinction between the two forms of immunity, which was significant considering that the case involved core international crimes. Had the Court been convinced that an act attributed to a minister for foreign affairs was an act of State, and that the minister would thus be immune from jurisdiction, it would have said so instead of relying on the functionality argument. The Court had also stated that it could not deduce, from State practice, any exception under customary international law to the rule according immunity to incumbent ministers for foreign affairs, and that the immunity ended once the official left office.

77. In its ruling in the *Jurisdictional Immunities of the State* case mentioned earlier by Mr. Hassouna, the Court had again had a chance to rule that the act of an official and that of the State were identical for the purposes of immunity in the case of serious crimes under international law. Instead of doing so, it had emphasized that it was addressing only the immunity of the State itself from the jurisdiction of other States’ courts and that the question of whether, and if so to what extent, immunity might apply in criminal proceedings against a State official was not at issue. By so doing, the Court had distinguished between the act of a State and the act of an official, even if the act might be susceptible to dual attribution.

²⁶⁵ *Yearbook ... 2006*, vol. II (Part Two), annex I.

²⁶⁶ *Ibid.*, paras. 17–18.

78. Jurists who preferred to see absolute immunity granted on the basis of *ratione materiae* in cases of serious international crimes argued that such acts were as much acts of State as acts of the officials who committed them. They would deny the existence of responsibility even if the State attributed an act to itself to shield its official from responsibility and even if the other requirements for responsibility were met. Ignoring the fact that, in adopting the articles on responsibility of States for internationally wrongful acts,²⁶⁷ the Commission had rejected the notion that a State might commit an international crime, they falsely asserted that if one prosecuted the official concerned in a foreign court one would be prosecuting the State. They also ignored the fact that such logic had been rejected when the Nuremberg Tribunal and the International Military Tribunal for the Far East (the Tokyo Tribunal) had been established and when the Rome Statute of the International Criminal Court had been adopted.

79. In short, it was very doubtful that customary international law accorded immunity *ratione materiae* with regard to the most serious crimes. In fact, the joint separate opinion issued in the *Arrest Warrant of 11 April 2000* case by judges Higgins, Kooijmans and Buergenthal seemed to indicate that no rule regarding immunity *ratione materiae* existed, though certain emerging trends could perhaps be discerned.

80. Nevertheless, the Commission should study the scope of crimes, other than the most serious international crimes, that might also preclude immunity *ratione materiae*, which in turn might entail determining what constituted an “official act”. There was no agreement in jurisprudence on what constituted an official act for the purposes of determining which crimes lay within or outside the scope of immunity. The Commission could make a contribution in that regard, keeping in mind the fact that the default position was that there were no rules governing immunity as long as the crimes for which immunity operated had not been defined.

81. Regarding the Special Rapporteur’s question about whether the list of officials for the purposes of immunity *ratione personae* should be closed or open and which officials should be on the list, he said that the answer depended on whether the functions of a particular official were essential for the proper functioning of the State and its sovereignty.

The meeting rose at 1 p.m.

3145th MEETING

Friday, 13 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang,

Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to pursue its consideration of the preliminary report of the new Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/654).

2. Mr. ŠTURMA said that he approved of the Special Rapporteur’s approach. She had rightly chosen first to examine the basic and often conflicting values underpinning the legal rules on immunity. Immunities, both of States and of State officials, reflected the fundamental principle of State sovereignty in inter-State relations. However, immunity no longer had an absolute, but a functional character. That was why it had to be justified by States’ fundamental values and functions. The concern to preserve peaceful, friendly relations traditionally formed part of those values, but they had been supplemented by others, such as the determination to prevent impunity for the most serious crimes. From that perspective, reference to *jus cogens*, or to other principles and rules of international law, did not necessarily imply the replacement of *lex lata* by *lex ferenda*. Of course, it was necessary to maintain a distinction between them, but the Commission could not confine itself to the former and ignore the development of international law. Hence, there was a need to reconcile the principle of immunity with other existing principles and values.

3. The Commission must base its work on case law and, possibly, on national legislation on immunities, since it also reflected State practice. But it had to be remembered that the Commission’s role was to set forth general rules, whereas judicial bodies, such as the International Court of Justice, had to apply the rules to a specific case. In the absence of treaties, the Commission’s chief task would be that of codifying the rules of customary international law. It must also take account of its earlier work, especially the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission at its forty-eighth session²⁶⁸ and the Rome Statute of the International Criminal Court.

4. The distinction between immunity *ratione personae* and immunity *ratione materiae* was crucial to the topic under consideration. Although both might be regarded as functional rather than absolute, they had different purposes. The former protected the most high-ranking

²⁶⁷ See footnote 262 above.

²⁶⁸ *Yearbook ... 1996*, vol. II (Part Two), para. 50.

State officials, while the latter protected other persons when they performed official acts. The number of persons enjoying immunity *ratione personae* must therefore be kept to a minimum. The prevailing trend was to reserve that form of immunity for the members of the troika, but not to rule out the possibility of restricting the personal immunity of ministers for foreign affairs.

5. On several occasions, the International Court of Justice had affirmed the idea that immunity did not mean impunity and that, as a procedural rule, it did not shield its beneficiaries against possible prosecution. Even a procedural rule could, however, hinder the administration of justice if a State were unwilling to try its national and no foreign court were competent to do so. The Rome Statute of the International Criminal Court itself rested on the principle of complementarity. It was worth thinking about possible exceptions to the immunity *ratione personae* of the highest State representatives, but without compromising other underlying values, in particular the stability of State relations. The risk of retaliatory measures was sufficient to warrant not giving States a *carte blanche* unilaterally to decide that a given crime justified the waiving of immunity *ratione personae*.

6. Immunity *ratione materiae* was the most important area requiring the codification and progressive development of rules on immunity from foreign criminal jurisdiction. Three main issues arose in that context. Who were the persons entitled to such immunity? What constituted an “official act”? Were there any possible exceptions? As far as the first question was concerned, it was already possible to posit that immunity should be granted to only a limited number of State officials or agents whose official acts were performed in that capacity. In that respect, the analogy with the articles on responsibility of States for internationally wrongful acts²⁶⁹ was of only limited value, because attribution based on the criterion of function applied only to State responsibility, but was of no avail when it came to the immunity of persons who, although they were not State officials, exercised some public authority, or acted under the effective control of the State. In addition, civil and public service rules and regulations varied widely, with some people (such as teachers in the national education system) being regarded as officials in some countries, but not in others. Clearly, those persons did not have immunity, although they were public servants. How should State representatives therefore be defined for the purpose of determining whether they enjoyed immunity from foreign criminal jurisdiction? Perhaps the solution lay in distinguishing between acts *jure imperii* and acts *jure gestionis*, a distinction that was already well established in the law on State immunities. That test would also serve to define official acts. In other words, the only persons who would enjoy functional immunity were those who performed official acts of State (*jure imperii*) that could not be accomplished by private persons or entities.

7. However, not all acts of State were automatically covered by immunity. The most difficult task was that of

determining the scope of exclusions. It would be going too far to exclude all unlawful or *ultra vires* acts. Immunity, like responsibility, presupposed that the person in question could commit unlawful acts for which they were liable to prosecution, otherwise the notion would be meaningless. Only the most serious crimes under international law, such as torture, genocide and crimes against humanity, must therefore be excluded from the scope of official acts covered by immunity *ratione materiae*. It seemed impossible to argue under contemporary international law that those acts belonged to State functions that were protected by immunity. A list of those acts could be drawn up on the basis of *jus cogens*, customary international law and even some treaties, but to prevent it from becoming too long, reference should be made essentially to the draft Code of Crimes against the Peace and Security of Mankind and the Rome Statute of the International Criminal Court.

8. The Commission should focus on the substantive aspects of immunity, which were the most problematical and controversial, before tackling the related procedural aspects.

9. Mr. HUANG said that he wished to address three substantive aspects of immunity, namely scope, exceptions and procedure. In the view of Mr. Kolodkin, the previous Special Rapporteur, immunity *ratione personae* was absolute, but it applied only to persons while they were still in office. It was not, however, necessarily limited to the traditional troika. Immunity *ratione materiae* applied to all State representatives when they performed official acts. That was the commonly accepted rule under customary international law, which had been upheld by the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. The immunity of State officials from foreign criminal jurisdiction was an established principle, even if a variety of sometimes unpersuasive arguments were advanced in favour of waivers. Some exceptions that were not laid down under international law nevertheless reflected a growing trend.

10. A court must heed a person’s immunity right from the beginning of proceedings and must notify the State concerned because, save in the case of the troika, it was that State alone that could decide whether to waive immunity. Once immunity had been lifted, it could not be restored. But lifting immunity did not prevent the person concerned from evading his or her responsibility and, conversely, while immunity barred judicial measures, it did not exonerate that person from all criminal responsibility.

11. During the debate many members had contended that the commission of international crimes or breaches of *jus cogens* rules entailed the loss of immunity. He disagreed. As the International Court of Justice had stated in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, immunity was a procedural rule that did not have the status of *jus cogens* rules relating to genocide and other international crimes. A State and its representatives did not therefore automatically lose their immunity, for it might be held that the latter flowed from State immunity. The Commission should rely on that case law.

²⁶⁹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

12. Similarly, as a procedural rule, immunity had a validity of its own that was not comparable with values such as international justice or the fight against impunity. The international community considered that international crimes were subject to universal jurisdiction, but that rule was not yet accompanied by a procedure that could take precedence over the rule on immunity under international law. In other words, justice on the merits could be done only at the expense of procedural justice.

13. Immunity was granted on the basis of criteria inherent in immunity itself and not in the light of the seriousness of the act. Some people were of the view that an international crime should not be regarded as an official act performed in the context of State representation, but the distinguishing feature of an official act was precisely the fact that it was performed in an official capacity, irrespective of its seriousness. In reality, atrocities could be perpetrated only by the State apparatus and with its resources as part of State policy; they therefore necessarily constituted an official act.

14. The rule of immunity was neutral and was not conducive to impunity. There were several reasons for that; usually they were a matter of policy. Policy measures were therefore required. Exceptions to immunity would not prevent crimes; they merely undermined the stability of inter-State relations. Given the current state of international relations, there was no saying what consequences inappropriate exceptions might have.

15. In short, the commission of international crimes did not entail the loss of immunity for State officials no matter how serious the act was. That had been the position of the previous Special Rapporteur who had strongly emphasized that the troika immunity *ratione personae* was absolute by its very nature and that other State representatives' immunity *ratione materiae* should also be maintained. That had also been the position of the Institute of International Law in its resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes²⁷⁰ and of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*, where the Court had stated, in paragraph 59, that

although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law ... These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

16. Mr. McRAE said that, since the purpose of the report under consideration was to secure a transition between the earlier work done under the guidance of the previous Special Rapporteur and the work that would be undertaken during the quinquennium that was beginning, it was premature to make detailed comments on substantive aspects of the topic. He approved of the workplan proposed by the Special Rapporteur, who had rightly decided to

build on her predecessor's comprehensive reports.²⁷¹ His answer to those members who thought that the Commission should first focus on the procedural—and less contentious—aspects of the subject was that it would be inadvisable to postpone the consideration of substantive issues until the following session, especially as several members had already alluded to them in their statements. However, the decision on the order to follow lay with the Special Rapporteur.

17. He wished to make two comments. First, with regard to methodology, the Special Rapporteur's reference to the "values and principles of international law" had given rise to some concern, since it was unclear who would have the competence to define those values. But in fact the Commission constantly referred to them, because legal discourse was implicitly or explicitly all about values. The question at the heart of the topic under consideration, namely whether the value of relations between States took precedence over the value of combating impunity, was fundamentally a debate about the international community's values and principles. Legal language and methodology masked, but did not obliterate, the essential policy choices that were made individually and collectively in the course of a debate. The only current difference was that the Special Rapporteur admitted that state of affairs quite openly. It could be said that that shift in discourse, far from being subjective and dangerous as some people feared, was, as those familiar with feminist scholarship would understand, a natural consequence of women being involved more broadly in the discussion of international legal issues. Instead of pretending to hold a debate free of any such concerns, the Commission must consciously endeavour to reconcile the values and principles at stake while at the same time proceeding in a cautious and practice-oriented manner, as Mr. Nolte had recommended.

18. His second comment was related to the question raised in the last paragraph of the Special Rapporteur's report, namely that of the balance between codification and progressive development. He agreed with, among others, Mr. Murase and Mr. Petrič that care had to be taken not to equate progressive development with *lex ferenda*. When the members of the Commission engaged in progressive development they did not simply identify what they would like the law to be, or what they thought it should be. Nor was there a clear divide between codification and progressive development; equating the latter with *lex ferenda* tended to diminish the worth of a central element of the Commission's mandate.

19. For that reason, he did not share the opinion that seemed to be implicit in the Special Rapporteur's suggestion that the Commission should first focus on *lex lata* before concerning itself with *lex ferenda*, in other words that it should decide first what could be codified before determining what must be progressively developed. As Mr. Tladi had pointed out, progressive development was a much subtler process, which could not be clearly distinguished from codification. Of course,

²⁷⁰ Institute of International Law, *Yearbook*, vol. 73, Session of Naples (2009), p. 226. Available from the Institute's website (<http://justitiaetpace.org>).

²⁷¹ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

from time to time, the commentary to a particular article indicated that the provision in question was more in the nature of progressive development than codification—that was true, for example, of the general commentary to the draft articles on the responsibility of international organizations²⁷²—but that was an exception and not the rule. As Mr. Hmoud had said, the Commission was not in the habit of indicating what part of its work came under the heading of the codification of *lex lata* and what part amounted to progressive development. Mr. Tladi had rightly held that its work consisted in analysing practice, case law, Governments' statements in the Sixth Committee and elsewhere, and the views of scholars in order to ascertain how to achieve consensus on what would be an appropriate form for the codification of the topic before it.

20. It was not the Commission's task first to identify the law and then to apply it, as if it were a court. Hence, as Mr. Tladi had said, separate and dissenting opinions to the decisions of international judicial bodies might well be as important for the Commission as majority opinions. Even if a well-reasoned separate or dissenting opinion did not have the same legal status, it might have more significance for the Commission's work than a poorly reasoned majority opinion that was not supported by practice.

21. He therefore encouraged the Special Rapporteur to continue her work without any preconceived ideas about whether she should take stock of *lex lata* and, having undertaken an objective analysis of what had been said and done in that area by States, international and national courts and scholars, including what had been widely accepted and what seemed to be emerging trends and in the light of all that and of what she perceived to be the relevant values and principles of contemporary international law, to propose what she regarded as the appropriate draft articles. Some members would see her conclusions as *lex lata*, while others would regard them as progressive development, but ultimately it would be up to the Commission to decide, which it usually did by consensus, whether by adopting what had been proposed, it would be properly fulfilling its mandate progressively to develop and to codify international law.

22. Mr. FORTEAU said that he intended first to examine questions of methodology. Then he would comment on the substantive aspects that appeared to be of greatest importance for the structure of the topic, but he would not deal in detail with all the substantive issues raised by it. At the outset, he wished, however, to comment on the position that the Commission should adopt on possible exceptions to immunity in the event of an international crime. That was a very complex matter that warranted thorough consideration. As the real problem was that of knowing whether an exception could be made to immunity not when an international crime had been committed but when it was alleged that such a crime had been committed, it was essential to reflect on the procedural guarantees that should surround such exceptions, in order to avoid any abuses. It was very difficult to differentiate between the substantive aspects and the procedural aspects of that question.

23. Turning to methodology and the approach to be adopted, he fully subscribed to the Special Rapporteur's preliminary comments in paragraphs 5, 51 and 75 of her report, where she said that it was essential to clarify the terms of the debate, to continue work in a structured manner and, above all, in the coming years to address each of the various groups of questions one by one. In such a sensitive area, it seemed crucial not to jumble everything together, for deliberations would then become bogged down in theorizing instead of being focused on the actual consideration of draft articles. The discussion had to centre on drafting proposals and not expressing positions of principle.

24. As for the approach to be adopted, he agreed that it was necessary to draw on recent case law, especially on the judgment rendered on 3 February 2012 by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State* between Germany and Italy, a judgment that should be used not only for the purpose of drawing analogies or borrowing methodology but also for learning some basic lessons about the intrinsic effects of *jus cogens* on the rules regarding immunity. All the same, it was necessary constantly to bear in mind the fact that that judgment concerned State immunity from civil jurisdiction and not the immunity of State officials from criminal jurisdiction.

25. Moreover, the Commission's work should not be confined to recording the findings of certain international judicial bodies. As the Special Rapporteur rightly said in paragraph 77 of her preliminary report, the Commission should simultaneously pursue the codification and the progressive development of the law in that sphere. What he had just said did not mean that he was taking sides as to the final solutions that would be adopted. Care would have to be taken not to turn the distinction between codification and progressive development into two opposing notions of the law on immunity, one of which would be conservative and the other progressive. As everyone realized that there was some uncertainty as to the law in that area, some progressive development would be unavoidable. In that context, the Commission would have to ensure that an appropriate equilibrium was maintained between the various interests at stake and, in the words of paragraph 48 of the report under consideration, it would have "to strike a balance between the need to preserve stability in international relations and the need to avoid impunity for serious crimes of international law".

26. In that connection, the Commission would certainly have to ask itself if it intended to codify the law on immunity as it stood, or if it should extend its analysis to the relationship between that law, on the one hand, and other legal rules that might interact with it, on the other. The Special Rapporteur mentioned that aspect from the perspective of the relationship with other values in paragraph 58. The other, perhaps main, issue was that of the interconnection between different kinds of legal rules, i.e. those relating to immunity, other rules that might restrict their application, especially the right to obtain a judicial determination and treaty-based rules that might have an impact on the customary rule of immunity such as, for example, article 98 of the Rome Statute of the International Criminal Court and the possible interpretation thereof. It

²⁷² *Yearbook ... 2011*, vol. II (Part Two), para. 88, see in particular paragraph (5) of the general commentary.

must be remembered that the codification of custom in that case was taking place within a specific treaty-based context that had to be borne in mind.

27. As far as the substantive aspects of the topic were concerned, he agreed with the Special Rapporteur that, at least initially, it would be wise to maintain the distinction between immunity *ratione personae* and immunity *ratione materiae*, since it introduced some clarity into the debate, and to establish two separate legal regimes. It was, however, doubtful whether those two kinds of immunity shared the same basis or had the same purpose, as paragraph 57 of the report postulated. While immunity *ratione personae* ensured that the beneficiary could exercise his or her functions unhindered, the purpose of immunity *ratione materiae* was more to prevent one State sitting in judgment over the sovereign activities of another. That was not the same thing and probably explained why the two immunities were not identical and why immunity *ratione personae* covered private acts.

28. With regard to immunity *ratione personae*, on the whole he approved of the approach adopted by the Special Rapporteur in paragraphs 63 and 64 of her report with one substantial qualification: he had two reasons for thinking that it would be wrong to attempt to draw up a list of persons enjoying immunity. First, such a list would not necessarily be of any use, because the duties of the highest State officials differed from one country to another, as Mr. Murphy had pointed out. The second reason why it seemed inadvisable to draw up a list was that the International Court of Justice had not proceeded in that manner in the case concerning the *Arrest Warrant of 11 April 2000*. It had based its findings on a general test from which it had drawn the legal consequences in the particular case of the minister for foreign affairs in question. Paragraph 53 of that judgment made it clear that the extent of immunity depended on the nature of that person's functions. It would be worth reflecting on that criterion.

29. Three comments had to be made about immunity *ratione materiae*. First, in respect of the distinction drawn in paragraph 18 of the report under consideration between the official and personal nature of conduct, he, like Mr. Šturma, wondered if there were not a third category lying somewhere between the other two. What happened when an act performed in the context of official functions constituted a private or commercial act? It was necessary to ponder the extent to which the distinction between *jure gestionis* acts and *jure imperii* acts came into play in the sphere of State officials' immunity in criminal law.

30. Second, with reference to paragraph 66 of the report, the definition of the persons who enjoyed immunity *ratione materiae* seemed to be a non-issue, or at any rate a secondary issue. The problem was not so much one of knowing if a given category of person was entitled to immunity *ratione materiae*, but if a given kind of act conferred immunity *ratione materiae* under criminal law on the perpetrator, irrespective of who that person was. In his opinion, that element was likely to produce an effect, in particular at the procedural level. If most weight was given to the nature of the act rather than to the status of the person who had performed it, it was incumbent upon the State and not the individual to claim immunity during proceedings. At all

events, that seemed to be the opinion of the International Court of Justice in the judgment that it had rendered on 4 June 2008 in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, in which it stated, in paragraph 188, that a claim of immunity *ratione materiae* was "in essence" a claim of immunity for the State. Moreover, in paragraph 196 the Court made it clear that it was up to the State that intended to claim immunity on behalf of one of its organs to inform the authorities of the other State concerned of that fact. However, it did not necessarily follow that the regime of immunity of State officials exactly matched the regime of State immunity, if only because it was the criminal law aspect of the former that was of interest to the Commission, whereas the latter, State immunity, was of concern to civil courts.

31. Third, the issue of the relationship with State responsibility was raised in paragraphs 59 and 60 of the Special Rapporteur's preliminary report. Those were two self-contained areas, even if they were linked in some respects. They were self-contained insofar as there were no exact parallels between the law of responsibility and the regime of immunity, since recent developments in international criminal law meant that an individual State agent and a State could both be prosecuted for the same act, at least as far as the most serious crimes were concerned. Of course, if an act were not official, there would be neither immunity nor State responsibility, but the opposite would not necessarily be true. Even if an act were official and entailed State responsibility, there would be nothing to prevent the formulation of a provision stipulating that immunity under criminal law would not apply. In that connection, it might be recalled that in its work on the jurisdictional immunities of States and their property at the end of the 1990s, the Commission had decided not necessarily to align the law on immunities on the arbitration regime under the law on State responsibility. That decision, which had been wise at the time, would be equally wise in the context of the current topic.

32. Mr. WAKO said that, although in general he approved of the working method advocated by the Special Rapporteur in paragraph 75 of her report, which consisted in addressing each of the various groups of questions in turn, he agreed with Mr. Nolte on the need to recognize that those issues were interrelated and, in particular, to take account of the distinction between immunity *ratione personae* and immunity *ratione materiae*.

33. With regard to immunity *ratione personae*, which protected high-level State officials from virtually any suits in foreign courts while they were still in office, it had been said that the members of the troika, in other words the Head of State, the Head of Government and the minister for foreign affairs, enjoyed that immunity, but he agreed with Mr. Tladi that the office of a minister for foreign affairs was not coextensive with that of a Head of State. It was even doubtful, when the Head of Government and Head of State were not the same person, whether the Head of Government automatically enjoyed that immunity. The only person who could enjoy it was the Head of State who personified the State. The Special Rapporteur should not therefore proceed on the assumption that all members of the troika possessed immunity *ratione personae*, but should study the matter in closer detail.

34. In principle, both the Head of Government (if he or she were not the Head of State) and the minister for foreign affairs should enjoy immunity *ratione materiae*. The list of beneficiaries of that immunity should not, however, be closed because the structure of Governments in the contemporary world was more complex than it had been in the nineteenth or twentieth centuries. Economic relations and foreign trade had become central to relations among States and when peace and security were at stake, it was often the ministers of defence and security that played the leading role in external relations. Rather than compiling a list of State representatives who enjoyed immunity *ratione materiae*, the Special Rapporteur might wish to establish a criterion for identifying the beneficiaries of that immunity.

35. According to paragraph 12 of the report under consideration, the scope of the topic was only the immunity of the officials of one State from the criminal jurisdiction of another and did not encompass international criminal jurisdiction. He was therefore pleased that, in paragraph 60 of her report, the Special Rapporteur stated that the question of individuals' international criminal responsibility and the potential implications thereof for the immunity of State officials from foreign criminal jurisdiction was "essential" and that the Commission might wish to address that issue at the beginning of the quinquennium. In that connection, he recalled Mr. Peter's statement that the concept of universal jurisdiction, in other words the competence of a national court to try a person suspected of committing a serious international crime, even if neither the suspect nor the victim was a national of the forum State, should figure prominently in the workplan. It was not enough simply to investigate the legal and sociological bases for the immunity of State officials from foreign criminal jurisdiction, as the Special Rapporteur suggested should be done in paragraph 73 of the report under consideration. Universal jurisdiction was a sensitive area and the concerns that had been expressed about its politicization had led to the setting up in 2009 by the African Union and the European Union of an advisory Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction. The indictment of African leaders by low-level judges, sitting alone in some rural area of a developed country and without any particular competence in international law, had greatly tarnished the image of universal jurisdiction in the developing countries. It was therefore not surprising that the above-mentioned group of experts, which had included Mr. Peter, had recommended that the member States of the African Union and the European Union should consider the adoption of legislation to specify an appropriate level of court at which proceedings in respect of such crimes could be instituted.²⁷³ The group had also recommended the provision of specialist training in the investigation, prosecution and judging of such crimes. The Commission, with the Special Rapporteur's assistance, could contribute by formulating international standards to guide investigators, prosecutors and judges who exercised universal jurisdiction. That was the only way to put an end to the improper exercise of that jurisdiction that Judge *ad hoc* Bula-Bula had described as "'variable geometry'

jurisdiction, selectively exercised against some States to the exclusion of others" (para. 104) in his separate opinion on the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000*.

36. It would be essential to conduct extensive research in order to ascertain whether the concept of universal jurisdiction existed in customary international law. Unfortunately, the International Court of Justice had not expressed an opinion on the subject in the case concerning the *Arrest Warrant of 11 April 2000*, since the parties had decided that that issue was not a point of contention. Some judges had, however, stated their viewpoint. For example, the President of the Court, Judge Guillaume, had emphasized in his separate opinion that international law knew only one true case of universal jurisdiction, that of piracy, and that international conventions provided for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country (para. 12). In his view, apart from those two instances, international law did not accept universal jurisdiction, let alone universal jurisdiction *in absentia*. In his dissenting opinion, Judge Oda had considered that the law on universal jurisdiction was not sufficiently developed (para. 12). Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion had contended that there was no established practice in which States exercised universal jurisdiction, but that that did not necessarily indicate that such an exercise would be unlawful (para. 45). The category of international crimes in respect of which universal jurisdiction could be exercised was not clearly established. For some people it encompassed only piracy, crimes covered by some international treaties, such as the war crimes forming the subject of the 1949 Geneva Conventions and, possibly, genocide. Those treaties did not, however, establish universal jurisdiction *per se*, but obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

37. Generally speaking, the immunity of State officials gave rise to the same kind of difficulty. In the article entitled "Pinochet's legacy reassessed", to which Mr. Nolte had referred, Ingrid Wuerth concluded that some seminal decisions of national and international courts had definitely ruled in favour of State immunity and the immunity of the serving Head of State before foreign courts, even in cases concerning human rights violations.²⁷⁴ That undermined the main arguments against immunity and ran counter to some decisions rendered after the *Pinochet* case that had denied immunity. Wuerth had argued that customary international law, as it stood, did not allow any exception to functional immunity on the basis of human rights law or international criminal law. In addition, it would be advisable to be cautious when analysing national courts' case law on the matter because, in most cases, the State that could have relied on immunity failed to do so, either because it was in favour of prosecution for policy reasons, or because it could put forward other pleas regarding jurisdiction.

²⁷³ Report of the Technical Ad Hoc Expert Group, Council of the European Union, document 8672/1/09 Rev.1, annex, 16 April 2009.

²⁷⁴ I. Wuerth, "Pinochet's legacy reassessed", *American Journal of International Law*, vol. 106, No. 4 (October 2012), pp. 731–768, in particular p. 739.

38. Prosecutions by the International Criminal Court, special tribunals or regional courts certainly did not fall within the scope of the topic. It would, however, be useful to study them as well as prosecutions based on certain treaties, with a view to progressively developing the law in an area that was of vital importance to the struggle against impunity. As the world was becoming a global village, it was essential to gain a better understanding of those issues and to regulate them. The question was not that of codification versus progressive development. As Mr. McRae had rightly pointed out, there was no clear divide between those two notions in the context of the topic under consideration, and progressive development would in fact be central to the Commission's work. The Commission should therefore agree to develop the law in such a way as to promote good relations among States and to strengthen measures against impunity. In that connection, he hoped that the Special Rapporteur would heed the call of the Assembly of the African Union to the Commission to take up the concept of universal jurisdiction so as to assist its development, as the Commission had done in other areas of international law, including State responsibility.

39. The Commission would also have to define the notion of an "official act". Not all official acts should be covered by immunity. The Commission would therefore have to determine the cases that were not covered, in other words the cases that constituted an exception to the rule of immunity. In that respect, international conventions adopted since the Second World War—such as the Convention on the Prevention and Punishment of the Crime of Genocide—or texts such as the statutes of the International Tribunal for the Former Yugoslavia²⁷⁵ and of the International Tribunal for Rwanda,²⁷⁶ and, of course, the Rome Statute of the International Criminal Court, appeared to show that no State officials, not even Heads of State and Heads of Government, could claim immunity when they were accused of the commission of the most serious international crimes. That position would seem to be established in practice and to form part of *jus cogens*, but it would be up to the Commission to make sure of that.

40. Mr. NIEHAUS commended the Special Rapporteur on her very clear, well-structured preliminary report, which facilitated consideration of the topic. The latter was of major importance, as had been evidenced by the General Assembly's request that it should be considered as a matter of priority. It was axiomatic that the Commission should base its work on the three reports drawn up by the previous Special Rapporteur,²⁷⁷ which provided a useful insight into State practice, case law and legal writings and the ensuing issues. The stress placed by the Special Rapporteur on the need to take account of those reports and of the comments made on them in the Commission and in the Sixth Committee was therefore welcome. The transitional report submitted by the Special Rapporteur, which set out to clarify the terms of the debate hitherto and to identify the main points of controversy, would greatly enhance the quality of the forthcoming debate.

²⁷⁵ Security Council resolution 827 (1993) of 25 May 1993; the statute is reproduced in the annex to the Secretary-General's report (S/25704).

²⁷⁶ Security Council resolution 955 (1994) of 8 November 1994.

²⁷⁷ See footnote 271 above.

41. In her report, the Special Rapporteur had also laid out the main issues requiring examination and proposed a workplan. She recapitulated the main points developed by the previous Special Rapporteur, which, to judge by members' statements, did not raise any difficulties. First, it was plain that the right of a person possessing immunity not to be subjected to foreign jurisdiction formed the counterpart to a foreign State's obligation not to exercise its jurisdiction over that person. Hence immunity was a limit placed on sovereignty in the interests of good inter-State relations and the expression of a common will to develop and strengthen those relations.

42. In the light of the foregoing, the theoretical distinction between immunity *ratione personae* and immunity *ratione materiae* was crucial. In the opinion of some proponents of the general tendency to limit the scope of immunity in international relations, immunity *ratione personae* had to be reserved for the troika comprising the Head of State, the Head of Government and the minister for foreign affairs. Limiting the enjoyment of immunity *ratione personae* to those high-level officials seemed to contribute to security and be part of customary law. While that did not pose a problem as far as the Head of State and the Head of Government were concerned, the position was different with regard to the minister for foreign affairs. Several members had also drawn attention to the fact that other high-ranking State officials, for example ministers of defence, of labour or of health, were often prominent on the international stage, and since in their view it was illogical to treat them any differently to the minister for foreign affairs, they recommended extending immunity beyond the troika.

43. One proposal for dealing with the complex issue of determining who enjoyed immunity *ratione personae* had been that the conditions for granting it should be laid down in detail; that seemed problematical in view of the diversity of State systems. It would be better for the Commission to continue to base its work on the traditional notion of the troika. There was no doubt that a State official possessed immunity *ratione materiae* for acts performed in an official capacity, in other words when the State official acted as such.

44. The question of whether immunity was absolute or, on the contrary, whether exceptions to immunity existed when *jus cogens* rules had been breached or when international crimes had been committed was crucial. The idea that immunity could cover such acts was difficult to accept. It was therefore essential to reaffirm forcefully that immunity must not lead to impunity. That was the reason why the thesis of absolute immunity was indefensible. As for the most appropriate term to describe the beneficiary of immunity, rather than choosing from "official", "agent" or "representative", it would be better precisely to determine the criteria that that person must meet in order to enjoy immunity.

45. Another vital question was that of the procedural aspects of immunity. In that respect, the Special Rapporteur was right to ask in paragraphs 69 and 70 of her report whether it was necessary to establish a single procedural regime for both immunity *ratione personae* and immunity *ratione materiae* or whether,

on the contrary, separate procedural rules should be formulated to take account of the specific characteristics of each of those immunities. The workplan proposed in paragraph 72 of the report was clear, simple and useful. It covered the main questions that had to be examined while at the same time recognizing that the Commission could not and should not ignore earlier work on the subject. The Special Rapporteur's proposal that draft articles should be submitted to the Commission as work progressed deserved support. Lastly, on the question of whether the approach should be that of *de lege lata* or *de lege ferenda*, the Special Rapporteur was quite right to say that the subject could not be addressed through only one of those approaches and that it would be advisable to begin with *lex lata* considerations and include an analysis *de lege ferenda*, as needed, at a later date.

46. Sir Michael WOOD commended the Special Rapporteur on her preliminary report and paid tribute to the outstanding contribution made by the previous Special Rapporteur, Mr. Kolodkin.

47. In paragraphs 37, 48 and 77 of her report, the Special Rapporteur had rightly highlighted the question of the *de lege lata* as opposed to the *de lege ferenda* approach, in other words the distinction between the codification and progressive development of the law—as Mr. Petrič had helpfully explained—which was crucial to the topic and which the Commission should try to maintain, because its work pertained to a set of rules of international law that were chiefly applied by domestic courts, usually in urgent and sensitive cases; it was not always easy to distinguish between restatements of existing international law and proposals for new rules. The Commission should at the very least reach a clear decision on whether it aimed to do more than simply restate the law.

48. If it decided to go beyond the existing law, it would have to endeavour to propose rules that were acceptable to States and therefore to formulate well-reasoned, cautious and well-balanced proposals. At the previous meeting, Mr. Park had quoted the example of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. The small number of ratifications of that instrument was due not to the fact that States did not approve of its substance, but to its complexity and the need to reconcile the views of many ministries and stakeholders. The Commission's proposals on the topic under consideration might well be incorporated into a convention in due course. The effectiveness of that convention would depend on its ability to attract wide participation. While a degree of progressive development might sometimes eventually be seen to ripen into customary international law, even in the absence of a convention that had entered into force, it was unlikely that that would be the case in the field under consideration if the Commission departed radically from positive law.

49. Before commenting in detail on the preliminary report, he wished to express his agreement with an important point made by Mr. Nolte. It had sometimes been said, especially in the writings, that a trend was emerging towards the restriction of the immunity of State officials from criminal jurisdiction. That tendency was mentioned by the Special Rapporteur in paragraph 29 of her report. Some

people considered that that “trend” had begun with the attempt of English courts to execute an extradition warrant against the former President of Chile, Augusto Pinochet, which had culminated in a decision of the House of Lords of 24 March 1999. The notion of a “trend” was, however, something of a myth, or perhaps wishful thinking, because the *Pinochet* decision had not been widely followed, or even understood. A case could be made for saying that, in practice, the trend went in the opposite direction. The case concerning *Pinochet*, in which seven Law Lords had each given a different opinion, was hardly an authority for general propositions about international law in the field of immunities. In the end, the House of Lords had focused on the interpretation and application of a specific treaty, the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, to which Chile, the United Kingdom and Spain were parties. The House had considered that the member States concerned had implicitly waived immunity from criminal jurisdiction, since acts of torture within the meaning of the Convention could be committed only by persons acting in an official capacity. It was far from clear how far that exception would apply to other international crimes, such as war crimes. In the later cases concerning *Jones and Mitchell v. Saudi Arabia* and *Jurisdictional Immunities of the State*, which, admittedly, had been civil and not criminal cases, the House of Lords and the International Court of Justice had been careful not to draw conclusions from the *Pinochet* case.

50. Turning to the preliminary report, he said that he was grateful to the Special Rapporteur for summarizing the previous Special Rapporteur's three reports and the debates held in the Commission and in the Sixth Committee in 2008 and 2011. Those debates had revealed broad agreement on a number of points. The Special Rapporteur had, perhaps, overstated the differences when she referred to “rare points of consensus” in paragraph 54 of her report. On the contrary, he would like to think that there was rather more common ground within the Commission. For example, the members of the Commission seemed to agree that immunity was an institution resting on customary international law and that the question of immunities flowing from *ad hoc* treaty rules—and, it might be added, from the corresponding rules of customary international law—did not fall within the scope of the topic. The Commission was not concerned at all with the immunities that might be enjoyed by members of diplomatic missions, consular posts or special missions, or by official visitors, representatives of international organizations or military personnel. It seemed equally clear that the Commission was not addressing the question of immunity before courts other than national courts. Immunity before international criminal courts and tribunals was governed by the statutes of the judicial bodies concerned. Appearing before an international criminal court or tribunal and appearing before a national court were two very different matters. As a result, the special rules applying to international criminal courts and tribunals, for example article 27 of the Rome Statute of the International Criminal Court, were of little relevance to the Commission's work. Lastly, there also appeared to be consensus on the importance of the distinction between immunity *ratione personae* and immunity *ratione materiae*.

51. While on the scope of the topic, he wished to point out that the question of universal jurisdiction had not been studied as such, although it undoubtedly formed a significant part of the background to the topic and highlighted its importance. Some people had asked whether the Commission should also deal with the inviolability of the person. He believed that the Commission should do so. Inviolability was very closely related to immunity and the former often proved to be of more practical importance, since lack of respect for it might cause more immediate, severe damage to international relations than the opening of criminal proceedings.

52. In the penultimate chapter of her preliminary report on issues to be considered, the Special Rapporteur mentioned studies by private bodies and noted some developments in international law such as the establishment of international criminal courts and tribunals. That background information was interesting, but possibly of limited significance. On the other hand, the Special Rapporteur rightly emphasized the importance of the judgment rendered by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State*. In that connection, the Commission should also look at the separate and dissenting opinions to that judgment—Judge Yusuf’s opinion was particularly enlightening—even if they did not have the same weight as the judgment itself.

53. In paragraphs 54 to 58 of her report, the Special Rapporteur correctly noted the general agreement on the conceptual distinction between immunity *ratione personae* and immunity *ratione materiae*. She therefore considered it necessary to treat separately the two legal regimes applicable to those two forms of immunity. He agreed with that approach. She then went on to suggest that there was a degree of unity between the two regimes. That might well exist. On the other hand, he failed to see how the Special Rapporteur’s theoretical considerations in paragraphs 57 and 58, in particular the statement that the purpose of the two types of immunity was to preserve principles, values and interests of the international community as a whole, were of any practical significance for the Commission’s work. The usefulness of a debate on those issues was indeed doubtful. The emphasis placed on the functional basis of all forms of immunity, to the exclusion of any other bases, such as representation, sovereign equality and non-interference, which still played a major role, was problematic. He was not convinced that a value-oriented debate would be fruitful. If the Commission decided to embark upon such a debate, it must not forget the values protected by immunity that were likewise central to the topic. When prosecuting authorities were independent of the executive, or when private persons might obtain arrest warrants, there was a great risk that international relations might be seriously disrupted. In that context, immunity continued to play a substantial role in preserving friendly relations among States.

54. With regard to immunity *ratione personae*, which the Special Rapporteur considered in paragraphs 61 to 64 of her report, it would first be necessary to determine the class of persons who were entitled to such immunity. While he understood the arguments of the members who took a different view, he considered that there was no doubt that, under contemporary customary international

law, serving Heads of State, serving Heads of Government and serving ministers for foreign affairs enjoyed personal immunity while they held office. He therefore disagreed with Mr. Wako that only Heads of State, but not Heads of Government, should enjoy immunity *ratione personae*, for that would constitute serious discrimination against States where the Head of State did not exercise executive functions. Some members had questioned the soundness of the finding of the International Court of Justice that, in its judgment in the case concerning the *Arrest Warrant of 11 April 2000*, had said that the personal immunity of ministers for foreign affairs was “firmly established” (para. 51). In practice, what the Court had said in 2002 had been widely accepted by States because it reflected the current state of international law. Far from questioning the Court’s decision, States had supported it. That was unsurprising, for the decision had been adopted by a large majority and the underlying reasoning was persuasive—even though the Court had reasoned largely by analogy. The fact that some authors criticized the outcome was also unsurprising, for it was much more interesting to criticize a decision of the Court than to agree with it. In that connection, there had been many references to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the case concerning the *Arrest Warrant of 11 April 2000*. It was vital to note precisely what they said in paragraphs 83 and 84 of their opinion; they did not say that ministers for foreign affairs were entitled only to functional immunity. They said that there was broad agreement in the literature that a minister for foreign affairs was “entitled to full immunity during official visits in the exercise of his function” and that during private travels,

he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled.

However, in the same case, the Court had also clearly indicated that the class of officials entitled to immunity *ratione personae* went beyond the three high office holders in question. With regard to that form of immunity it was essential to clarify the scope of what the previous Special Rapporteur had aptly termed a “narrow circle of high-ranking officials”.²⁷⁸ Mr. Murphy had helpfully set out the legal policy reasons for and against going beyond the troika. He agreed, however, with Mr. Gómez Robledo that it was necessary to widen the circle beyond the troika and to identify criteria to that end. Mr. Niehaus was perhaps right that that would be difficult, but the Commission must undertake that task and, in order to do so, it could base itself on the judgment rendered in the case concerning the *Arrest Warrant of 11 April 2000*, which contained some helpful guidance. Several decisions delivered by national courts had borne out the fact that immunity *ratione personae* had to be extended to members of the Government for whom foreign travel was essential. It was important that a State could be represented *vis-à-vis* other States at the political level by persons of its choice. In the contemporary world, where international cooperation was intensifying in so many fields and where government structures were rapidly changing, a State

²⁷⁸ *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, para. 94 (i).

could not be represented internationally by persons of its choice unless a group wider than the troika was free to travel. Those persons might be the ministers of foreign trade and of defence who did indeed have immunity *ratione personae*, as a number of English courts had decided. If the Commission thought that that was going too far, it could possibly base its work, for example, on the reasoning of the joint separate opinion in the case concerning the *Arrest Warrant of 11 April 2000* and apply a regime of qualified personal immunity to persons other than the troika. Some people sometimes suggested that, under existing law, there might be exceptions to the immunity from foreign criminal jurisdiction of persons enjoying immunity *ratione personae*, but he could see no basis for such exceptions. Unlike some other members, he did not believe that the Commission should propose *de lege ferenda* exceptions to immunity *ratione personae*.

55. As far as immunity *ratione materiae* was concerned, as many members had already said, the Commission would have to address the question of what was meant by the term “official”. That should not cause any serious problems. In that respect, he agreed with the analysis made by Mr. Forteau. It would be more difficult to define “an official act”, but the link with the articles on responsibility of States for internationally wrongful acts²⁷⁹ might be of assistance. Acts that were attributable to States for the purposes of responsibility were official acts for the purposes of immunity. They included illegal or even criminal acts. In the *Pinochet* case, for example, members of the House of Lords had not apparently had any difficulty in holding that there was immunity in respect of the charge of conspiracy to murder.

56. The Commission must also examine the question of what other exceptions might be made in the context of immunity *ratione materiae*. Mr. Kolodkin had proposed one, which the Commission should consider, namely the case in which the act had been committed in the territory of the forum State. Should other exceptions be allowed? Mention had been made of international crimes, whatever that meant, grave international crimes, the “core crimes” covered by the Rome Statute or serious breaches of obligations arising under *jus cogens*—an expression used in a completely different context in the draft articles on State responsibility. As the terms “international crimes”, “crimes under international law”, “grave crimes under international law” or “breaches of *jus cogens*” were imprecise, the Commission would have to define the acts in question carefully if it intended to make exceptions when they had been committed.

57. As far as the workplan was concerned, like other previous speakers, he welcomed the Special Rapporteur’s emphasis on the need for a systematic, structured debate on the topic. The earlier debates in 2008 and 2011 had of necessity been of a general nature, and members had commented on a wide range of issues. Mr. Kolodkin had not proposed draft articles, although he had helpfully provided a summary at the end of each of his reports. The time had arrived to move beyond the stage of

general comment. As he had already said, he was not convinced that an abstract discussion of conceptual issues would serve any real purpose, and he doubted that the Commission would be able to agree on general and abstract propositions. Attempting to do so would only complicate its task. For that reason, the Commission must concentrate on the specific rules that applied, or should apply, and, as the Special Rapporteur had said in paragraph 52 of her report, it should identify the principal remaining points of controversy, which he understood to mean specific points, not vague conceptual ones.

58. The preliminary report contained three lists of issues: in paragraph 73, a list of questions that had been submitted to members during informal consultations on 30 May 2012; five sets of issues set out in the five parts of the penultimate chapter of the report; and a workplan suggested in paragraph 72. It seemed that the questions listed in paragraph 73 had been superseded by the more refined questions in the penultimate chapter on issues to be considered, which would provide a good agenda for the Commission’s future work. The third list constituted the workplan proposed in paragraph 72. For the reasons he had already given, he invited the Special Rapporteur to consider whether it would be useful to address separately the questions listed in section 1, with the possible exception of question 1.1, for the others would naturally arise in the course of the Commission’s consideration of later questions. On the other hand, he agreed with the rest of the workplan, and he concurred with what Ms. Jacobsson had said at the previous session about the importance of procedure. But, like Mr. McRae, he was not sure that the Commission should take up procedural aspects first in isolation. On the contrary, it should perhaps deal with the procedural aspects of immunity as it considered points 2 and 3 on the workplan proposed in paragraph 72 and, if necessary, while it was examining substantive issues. Lastly, in paragraph 5 of her report, the Special Rapporteur suggested a programme of work that she considered “necessary to pursue in the future in order to complete work on the topic during the current quinquennium”. That would be a laudable objective, but to complete a second reading by 2016 would be a big challenge. It would therefore be helpful if the Special Rapporteur could indicate more precisely the time plan that she had in mind for the remaining sessions of the quinquennium, especially the points that she expected the Commission to cover in the two sessions in 2013 and 2014.

59. Mr. MURASE, referring to his citation of article 27 of the Rome Statute of the International Criminal Court, said that he realized that it pertained to a special regime and that the question of immunity before national tribunals had to be seen in a different light. Nevertheless, he believed that a strong argument in favour of merging both regimes was that a person who had been charged with certain international crimes had to receive similar treatment irrespective of whether he or she was being tried by a national or international court.

60. Sir Michael WOOD said that that issue could be discussed when the Commission considered the substance of the topic. He believed that there were different considerations behind prosecution depending on whether the case was being heard before a national or an international court.

²⁷⁹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

61. Mr. CANDIOTI congratulated the Special Rapporteur for producing an excellent report in such a short time. The report, while concise, duly addressed all the aspects of interest to the Commission as it continued its consideration of the question at hand; additionally, as it was clear, structured and well founded, it would provide a solid basis for continuing the Commission's work. He also paid tribute to the valuable contribution made on the one hand by Mr. Kolodkin, who had submitted three high-quality legal reports²⁸⁰ during the past quinquennium, and on the other hand by the Secretariat, which in 2008 had drawn up an excellent memorandum²⁸¹ that, as Sir Michael had suggested, would perhaps be usefully updated through the addition of an annex. The deliberations at the Commission and the opinions expressed by the States in the Sixth Committee highlighted the highly complex nature of the subject and the major divergences that resulted from some of its fundamental and very sensitive aspects. As the Special Rapporteur had said, the preliminary report provided a fresh starting point. The approach put forward to progress towards the drafting of proposed articles to overcome those difficulties was the right one. In accordance with its statute, the Commission was responsible for promoting the progressive development and codification of that important part of general international law that was still pending. Of course, account must be taken of its previous work in the field in question, which had included various instruments ranging from the conventions on diplomatic relations, on consular relations and on special missions of the 1960s to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. It would perhaps eventually be necessary to review those instruments, in particular to maintain the coherence and harmony of the principles and rules of general international law on immunities, while taking into account recent developments. Obviously, as the Special Rapporteur had noted, in recent decades the criminal immunity of high State officials in particular had attracted renewed interest, while at the same time new values, principles and institutions had emerged that the Commission could not ignore if it wished to make a useful contribution. The Special Rapporteur had rightly stated that, as in other cases, the Commission must first analyse the treaties, legislation and practice of States to find areas of agreement in national and international case law and doctrine, later specifying and supplementing such elements with the progressive development that it would deem appropriate. He agreed that it was necessary to structure the consideration of pending questions, dealing with them as successive groups and moving ahead step by step, and he thus thanked the Special Rapporteur for proposing in paragraph 72 of her preliminary report a workplan that provided an orderly and systematic treatment of the draft articles.

62. As for the substantive questions addressed in the report, he wished to make only a few general observations. The distinction traditionally drawn between immunity *ratione personae* and immunity *ratione materiae* apparently provided an acceptable starting point for organizing the work. As indicated in paragraph 58 of the

report, the two types of immunity had a functional nature, which corresponded with the contemporary approach to the law of immunity. In principle, only Heads of State and of Government, and possibly ministers for foreign affairs or external relations, should benefit from immunity *ratione personae*, by virtue of the important functions they performed as representatives of the State. That was one of the controversial points now rightly raised by Mr. Tladi and other members of the Commission. The possibility of extending such immunity to other representatives must be the subject of an in-depth study. It must be borne in mind that immunity was in itself an exception to the territorial criminal jurisdiction of the State and was thus a limit on the sovereignty of that State. As such, it must be interpreted in narrow terms. He agreed with other members of the Commission that it would be very complicated to draw up a list of other persons benefiting from immunity *ratione personae*. In any event, it would be preferable to list clear criteria to ascertain who such beneficiaries were, while maintaining a restrictive approach to the matter.

63. As indicated in paragraph 67 of the preliminary report, special attention should be paid to the definition of an "official act". The proposal made by Mr. Šturma to consider the distinction between acts *jure imperii* and acts *jure gestionis* was of interest. It would also be useful to bear in mind the comments made by Sir Michael concerning the analogy with the articles on responsibility of States for internationally wrongful acts. As for the need referred to in paragraph 66 of the report to employ more specific terminology, it would be more appropriate to use the term "representative", proposed along with other possibilities such as State "agent" or "body", as a replacement for "official".

64. Determining exceptions to immunity—in other words offences for which no kind of immunity could be claimed—was obviously one of the crucial elements of the subject under consideration. At the previous session of the Commission, Mr. Dugard, quoting Felix Frankfurter, had recalled that construction was not an exercise in logic or dialectic, but a choice.²⁸² The Commission, under the leadership of the Special Rapporteur, must decide between two positions that heretofore had been difficult to reconcile: either it would restrict itself to codifying immunity as much as possible in the conventional sense, or it would reconcile respect for the principle of sovereign equality and the maintenance of normal relations among States with the need to establish appropriate limits to immunity so that the most serious crimes that affected the whole of the international community did not go unpunished *de facto*, and so that justice and the rule of law would actually prevail. He endorsed the arguments other members of the Commission had put forward so eloquently. He too believed that the time had come for the Commission, in accordance with its mandate to codify and develop progressively international law, to choose the second option.

65. Mr. KAMTO, noting that Ms. Escobar Hernández was the first woman named as Special Rapporteur since the establishment of the Commission, congratulated her

²⁸⁰ See footnote 271 above.

²⁸¹ A/CN.4/596 and Corr.1 (document available from the Commission's website).

²⁸² F. Frankfurter, "Some reflections on the reading of statutes", *Columbia Law Review*, vol. 47, No. 4 (May 1947), pp. 527–546, at p. 529. For the intervention by Mr. Dugard, see *Yearbook ... 2011*, vol. I, 3086th meeting, para. 31.

on her remarkable preliminary report. As for how to deal with the subject at hand, as he had already indicated in 2011, the Commission must strike a balance between two needs: on the one hand, the need to ensure stability in relations among States and, on the other hand, the need to fight impunity. The Special Rapporteur had captured that problem, as was evident in paragraphs 27 to 34 of her report. With regard to the methodology, he agreed with those members of the Commission who had pointed to the dovetailing between codification and progressive development, or *lex lata* and *lex ferenda*, although he sometimes had trouble grasping the very subtle distinction drawn by Mr. Petrič between progressive development and *lex ferenda*.

66. He wished to make three main points. First, the distinction between immunity *ratione personae* and immunity *ratione materiae* was no doubt useful from the methodological point of view, at least as a basic conceptual approach to the subject, but it would very quickly become clear that the problem was more complex than that and that such a distinction would not always hold. In many situations, the two kinds of immunity overlapped. Second, immunity apparently belonged to the State. But what might seem obvious in the case of *ratione materiae*, where it was firmly established that the State could lift immunity, was not so clear when it came to *ratione personae*: Could the State lift the immunity of a member of the troika? Third, procedural aspects were an important part of the subject. The Special Rapporteur had understood that and had referred to it very briefly in paragraphs 69 and 70 of her report. On that score, the analysis presented by Mr. Kolodkin in his third report²⁸³ warranted the Commission's full attention. The question could be raised whether immunity was mandatory, a means imposed on the judge even when the person benefiting from the immunity did not invoke it. The International Court of Justice apparently would have it so but the national case law of certain States went against that rule. He pointed to the decisions rendered under Swiss and French case law, in particular those handed down a few years earlier in the case concerning the recovery of Mobutu's assets²⁸⁴ and much more recently in the so-called "ill-gotten gains" affairs involving three African Heads of State. In the case in question, the Paris public prosecutor's office had received a complaint from Transparency International and Sherpa against the three Heads of State for misappropriation and embezzlement of public funds, with the money hidden in banks in France, which allowed the persons in question to acquire an enormous amount of property. The investigating judge at the Paris Tribunal had rejected the complaint for lack of *jus standi*, and the decision had been upheld by a 2009 decision of the Paris Court of Appeal. However, in a decision handed down on 9 November 2010, the Court of Cassation had overturned the decision of the Court of Appeal, ordering that the case should be investigated.²⁸⁵ The counsel of the persons

²⁸³ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646.

²⁸⁴ See "Chronologie du blocage des avoirs Mobutu en Suisse (1997–2009)", annex 2 to the draft federal law on the restitution of assets of politically exposed persons obtained by unlawful means (www.admin.ch/opc/fr/federal-gazette/2010/2995.pdf) of 28 April 2010.

²⁸⁵ For information concerning the progress made in this case, see www.transparency-france.org/ewb_pages/div/Chronologie_Biens_mal_acquis.php (in French only).

in question had not directly or principally invoked the immunity of the Heads of State in question. In any event, it could be deduced from the decision of the French Court of Cassation, the highest court in France, that invoking immunity was not mandatory. Should immunity then be invoked *in limine litis* at the risk of losing its benefits if it were reserved for use later in the proceedings? That was one of the questions that the Special Rapporteur could address. While her efforts to produce the workplan proposed in paragraph 72 were to be praised, it should be borne in mind that the complexity of the subjects and the way deliberations developed within the Commission always led to adjustments to initially established plans.

67. Lastly, the discussion on principles and values suggested by the preliminary report and so well described by Mr. McRae in his statement could not be avoided. However, as Sir Michael had suggested, such a discussion should not be held in abstract terms. There was no interest in pursuing the subject unless the discussion was founded specifically on possible treaty provisions, on case law and to a certain extent on doctrine, as demonstrated by Mr. Nolte and Mr. McRae. On the other hand, he did not go so far as to endorse the position put forward by Mr. McRae when he said that it was sometimes necessary to place the individual or dissenting opinions of some judges of the International Court of Justice at the same level as the decisions of the Court, as he considered that to be going too far.

The meeting rose at 1 p.m.

3146th MEETING

Tuesday, 17 July 2012, at 10.05 a.m.

Chairperson: Mr. Bernd NIEHAUS (Vice-Chairperson)

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)*

[Agenda item 12]

STATEMENTS BY REPRESENTATIVES OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW

1. The CHAIRPERSON welcomed the representatives of the African Union Commission on International Law (AUCIL), Mr. Tchikaya and Mr. Getahun, and invited them to address the Commission.

* Resumed from the 3140th meeting.

2. Mr. TCHIKAYA (African Union Commission on International Law), after conveying the best wishes of the AUCIL President, Mr. Adelarudus Kilangi, who was unable to attend, said that it was indeed an honour to address the International Law Commission, which played a crucial role in international relations, peace and security. In his statement, he would focus on two issues: the reasons for the establishment of AUCIL and its working methods.
3. On 4 February 2009, the member States of the African Union had adopted the statute of AUCIL on the occasion of the fiftieth anniversary of the independence of African States. Yet the need to establish AUCIL had been mentioned in the African Union Non-Aggression and Common Defence Pact, which was adopted in 2005. In July 2009, the 11 members of the Commission, including one woman, had been elected. The principal objectives of AUCIL were twofold: to undertake activities relating to the codification and progressive development of international law from the African perspective; and to provide advice to the member States of the African Union and its policy organs on legal matters. It was in the latter respect that AUCIL differed from other international law commissions.
4. AUCIL had been established as an independent consultative body, in accordance with article 5, paragraph 2, of the Constitutive Act of the African Union. Basically, it functioned in two ways. First, when a general legal issue was referred to it for consideration, it followed an approach similar to that of the International Law Commission: A rapporteur was appointed, who conducted studies, consulted member States and drafted a preliminary report that was considered by the plenary Commission. Then, subject to the approval of the African Union administrative hierarchy, the report was transmitted to the Assembly of the African Union. Second, when the advice of AUCIL on a particular legal issue was sought by another body, private and often extensive discussions were held to consider all aspects of the issue in depth; if necessary, a vote was taken.
5. The achievements of AUCIL since the start of its work in 2010 were significant. Aside from the adoption of its rules of procedure on 19 May 2011, at the request of the Peace and Security Council of the African Union, the Commission had issued a legal opinion on certain aspects of the situation in Libya and on the scope, legal implications and obligations of Member States of the United Nations and of the member States of the African Union under Security Council resolutions 1970 (2011) and 1973 (2011), of 26 February and 17 March 2011, respectively.
6. In addition, since AUCIL was also empowered to issue opinions on its own initiative, AUCIL had at its previous session addressed the matter of the situation in Mali. A rapporteur had been appointed for that purpose and studies relating to the question were under way.
7. AUCIL was unique for a number of reasons, including its limited membership and the fact that it could conduct studies on topics that it considered particularly important on its own initiative. Examples of such topics included piracy in Africa; the harmonization of ratification procedures; frontier disputes; immunity of State officials; and the Rome Statute of the International Criminal Court. Last but not least, at the African Union Summit in Kampala in 2010, the Government of Ghana had requested a study on the legal bases for reparation for slavery and other damage inflicted in Africa.
8. Mr. GETAHUN (African Union Commission on International Law) said that since one of the African Union's primary objectives was the integration of the continent, part of the mandate of AUCIL was to contribute, through studies, to the progressive development and codification of international law in Africa, to enable African decision makers to harmonize laws and to revise treaties that had been in existence since the establishment of the Organization of African Unity in 1963. The inception of AUCIL was directly related to maintenance of peace and security in Africa, since, as Mr. Tchikaya had noted, its foundations lay in the African Union Non-Aggression and Common Defence Pact.
9. Currently, AUCIL was involved with tasks relating to its recent establishment, including the finalization of its working methods. Some of the original members had since been called to higher office elsewhere; one had already been replaced, and further elections would be held in January 2013.
10. One of the main priorities of AUCIL, in accordance with the mandate set forth in its statute, was the carrying out of studies on legal issues. Studies had been undertaken on the immunity of officials in the light of decisions taken at African Union summits concerning the implementation of the Rome Statute of the International Criminal Court, as well as on universal jurisdiction in the context of the actions of some States against African officials visiting Europe.
11. As Mr. Tchikaya had noted, AUCIL was also mandated to issue legal opinions. Although it had already issued one legal opinion, the way in which legal advice should be sought and processed by policy organs had not yet been finalized.
12. High priority was also accorded to the teaching and dissemination of international law. Some studies had been completed, and one result had been the draft legislation to permit the implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.
13. Under article 25, paragraph 3, of its statute, AUCIL was requested to establish close cooperation with the International Law Commission in order to promote cooperation in international law on the African continent. As a first step in establishing a formal framework for cooperation, he suggested that the Commission should select a few members to attend AUCIL sessions and intersessional activities. Arrangements could also be made to exchange information on studies and publications and to invite members of other bodies to organize joint events, such as seminars.
14. One matter of concern was the need for a formal arrangement to ensure good relations between the

secretariats of the two bodies. AUCIL did have its own secretariat, and a secretary had been appointed six months previously. However, AUCIL did not have the same resources as the International Law Commission, and while it had signed a memorandum of understanding with the United Nations Secretariat, a separate arrangement with the International Law Commission secretariat would help it to benefit from the latter's experience.

15. Mr. TLADI said that it was a particular pleasure to welcome the representatives of AUCIL, since he had been involved in negotiating its statute in 2008. He nevertheless had some observations to make. First, as the importance of State practice was clearly spelled out in its statute, it would be interesting to know what approach AUCIL took to the sometimes inconsistent State practice of the member States of the African Union. For example, member States might take one decision in the Assembly of the African Union, but adopt a different position on the substance and direction of law in other forums and even in their domestic legislation. Furthermore, since the harmonization of ratification procedures had been mentioned as a priority, he wondered how the pronouncements of the Assembly *vis-à-vis* the ratification of instruments could be reconciled with the differing constitutional provisions of member States. A similar situation obtained with regard to some of the other study topics mentioned, such as frontier disputes and the implementation and interpretation of treaties. He enquired whether AUCIL had already devised a strategy to address such problems.

16. Second, he wished to know whether any publicity was given to the work of AUCIL, which was surely of interest to bodies in addition to the International Law Commission.

17. Lastly, one aspect of its work that distinguished AUCIL from the International Law Commission was its ability to provide legal advice to the policy organs and member States of the African Union. In that connection, he wondered what relationship existed between AUCIL and the Office of the Legal Counsel of the African Union.

18. Mr. EL-MURTADI SULEIMAN GOUIDER said that, despite having been involved in the drafting of the AUCIL statute, he had learned much about the institution's establishment and mission from the presentation just delivered. AUCIL had a very broad mandate and that clearly posed some problems, in particular in connection with the provision of legal advice. A further problem lay in the fact that AUCIL could issue opinions on its own initiative, including on sensitive issues such as border disputes and political matters referred by other bodies. However, he applauded the efforts made thus far.

19. Nevertheless, he did wish to know how AUCIL struck a balance between its work on the codification and progressive development of international law and the need to bear in mind the African perspective, particularly with regard to the issuing of legal opinions and the selection of topics on its own initiative.

20. Mr. MURASE said that AUCIL and the Asian–African Legal Consultative Organization (AALCO) seemed to have a common goal, namely the transformation

of international law, which was traditionally dominated by Western States, into an international legal order that was more just towards Asian and African countries. At the annual session of AALCO that had taken place recently in Abuja, the topics considered by the International Law Commission had been discussed. He suggested that AUCIL should establish close working ties with AALCO in order to avoid any duplication of effort. Furthermore, it would be desirable if the visits of representatives of AUCIL and AALCO to the International Law Commission could coincide in the future.

21. He enquired how AUCIL envisaged the results of its work being implemented outside the framework of the African Union, since there seemed to be no reference to that eventuality in its statute, and international law should be applicable universally. He wished to know, in that connection, what relationship AUCIL had with the Sixth Committee.

22. Mr. TCHIKAYA (African Union Commission on International Law) said that Mr. Tladi had highlighted a problem that had become apparent to AUCIL at its very first session in 2010: the different legal approaches taken by different States. The problem was of particular significance since AUCIL had no case law to guide it in its codification work. It would therefore seek solutions based on the outcome of discussions in AUCIL aimed at ensuring harmony among the member States of the African Union.

23. He noted that studies conducted on the harmonization of ratification procedures had revealed the existence of differences not only in internal ratification procedures but also in the views of States and Governments with regard to international rights in general. Approximately one third of all treaties signed and negotiated in the context of the African Union had yet to be ratified, a situation that was clearly problematic. The results of a survey had shown that States failed to ratify treaties after signature for a variety of reasons, including changes in Government and attitudes, knowledge of international law and the rigorous nature of the treaty texts. That situation was a matter of particular concern because of the overall context of political and legal integration in which the African Union operated. The difference in approaches adopted by States was a *de facto* situation that must be lived with, but States must nonetheless be reminded of their duty to ratify treaties they had signed.

24. He agreed that AUCIL activities needed to be better publicized. The AUCIL website was currently in the process of being set up. In the meantime, therefore, it would be advisable to access information *via* the African Union website.

25. Mr. GETAHUN (African Union Commission on International Law), addressing Mr. Tladi's question regarding State practice, said that AUCIL found guidance for its work in an area in its statute that mandated it to “consider mechanisms for making evidence of customary international law more readily available”²⁸⁶

²⁸⁶ African Union, Executive Council, fourteenth ordinary session, 16–30 January 2009, Statute of the African Union Commission on International Law (EX.CL/478 (XIV)a), art. 6, para. 13.

through the compilation and publication of documents on State practice. However, AUCIL was still at the stage of developing its working methods, and he urged the International Law Commission to bear with it and support it where possible.

26. One member of AUCIL was in charge of developing its working methods, including methods relating to the publicizing of its work. AUCIL was unclear, however, as to how many of its documents should be made public, as some documents were intended for African Heads of State and of Government, and the Assembly had to decide whether such documents could be issued publicly.

27. With regard to legal opinions, he pointed out that AUCIL was not tasked with giving legal advice but rather with preparing legal studies on matters of interest to the African Union, and it tended to take more of a doctrinal than an interpretative approach in such studies. In the case of the opinion that had been issued on the matter of Libya, some Commission members had been unhappy about the way in which the Commission had been approached for its opinion: it appeared that some of the requesting parties had anticipated a certain outcome that they could use to support a particular political position. Looking at the preparation of legal studies from that perspective made AUCIL seem more like a legal department than a collegial body of experts providing independent opinions. He noted also that the number of issues on which AUCIL was asked to give opinions was considerable, a situation that had the capacity to undermine its work. What was most important about the issuing of legal opinions was that it was intended to reflect an African perspective.

28. With regard to Mr. Murase's question as to how the work of AUCIL would be used outside the framework of the African Union, he said that AUCIL had no direct relations with the Sixth Committee. However, opinions issued by AUCIL could help the African States to consolidate their views on various issues in the United Nations, an important consideration, given that Africa represented one of the largest regional blocs within the Organization.

29. Mr. WAKO welcomed the establishment of AUCIL, which would encourage an "African reading" of issues of international law. International law was not confined to Africa, but was a global matter, and the contribution of African States to the development of international law would be enhanced by the work of AUCIL. He therefore hoped that the current visit by members of this African institution would be the first of many. In fact, AUCIL might well be better placed to determine State practice regarding issues of international law than the International Law Commission itself, which often encountered difficulty in eliciting information and views from States. Moreover, the international community itself was becoming truly global, and input from AUCIL in determining trends in international law would be very useful.

30. With regard to the subject of universal jurisdiction, for example, he recalled that at its eleventh ordinary session, the Assembly of the African Union had expressed the hope that the International Law Commission would take up that topic with a view to helping AUCIL to

develop it.²⁸⁷ He hoped that AUCIL would give priority to that topic, since an internationally uniform approach to serious international crimes would be more effective than addressing the issue through national standards, which tended to be more politicized.

31. With regard to the issuing of legal opinions, he acknowledged that that task was mandated by the AUCIL statute; he therefore wished to know how AUCIL differed from the African Court of Justice and Human Rights in that respect. He was pleased to note that the representatives of AUCIL had recognized the problematic nature of that particular task.

32. The relations between AUCIL and the International Law Commission could be improved in many areas, and exchanges of ideas on a number of topics could be useful. He urged AUCIL to submit its annual reports to the Commission, which already received the reports of such bodies as the Inter-American Juridical Committee and AALCO, much of whose work was similar to that of AUCIL. All those regional organizations had an important role to play in the progressive development of international law.

33. Mr. PETER also welcomed the visit by representatives of AUCIL but offered a word of caution: AUCIL was a young institution and could thus afford to be adventurous. It should not model itself on the International Law Commission but should do its own work; if anything, it might identify the contribution that Africa could make to the Commission. African countries had in fact contributed much to the development of international law, yet their contribution had largely gone unnoticed. For example, the concept of the exclusive economic zone, which was an important feature of the law of the sea regime, had been developed by the African States. Aspects of international humanitarian law such as alternative dispute settlement mechanisms and truth and reconciliation commissions also bore a distinctly African stamp.

34. He agreed with Mr. Tladi that AUCIL had a duty to encourage African States to be consistent in their approach to international law. States could not ratify an international instrument and then decide not to comply with it. AUCIL should be hard on States in urging compliance.

35. He acknowledged the challenges facing AUCIL. The first was funding, which was crucial to the its independence. Once regional institutions had been established, it was not right to look to outside sources to fund them, although he noted that the African Union was doing much better in supporting its own bodies. The other challenge was for AUCIL to retain its independence by not bowing to political pressures. In so doing, it would gain the respect of Africa and the world.

36. Mr. KAMTO wished to know how the members of AUCIL were selected and whether any member State of the African Union could propose an item for consideration.

²⁸⁷ See Assembly of the African Union, eleventh ordinary session, 30 June–1 July 2008, Sharm El-Sheikh, Egypt, "Decisions, declarations, tribute and resolution" (Assembly/AU/Dec.193–207 (XI)), decision 199 (XI) on the report of the Commission on the abuse of the principle of universal justice (Doc. Assembly/AU/14 (XI)); available from <http://au.int/en/decisions/assembly-african-union-eleventh-ordinary-session>.

He also said that he would be grateful to have a copy of the AUCIL statute.

37. With regard to the work of AUCIL, he wished to know what form the outcome of studies done by special rapporteurs took: Did AUCIL issue reports or conclusions? He welcomed the information just provided on the way in which AUCIL intended to publicize the results of its work, for that information was important to legal scholars and to the International Law Commission. At the same time, since AUCIL was an independent expert body, he questioned the need to keep its work confidential.

38. State practice was very important in international law. Given the paucity of examples of African States practice available to the International Law Commission, he wondered whether African States were more responsive to AUCIL when it came to requests for examples of such practice. More generally, he wondered whether AUCIL planned to study the topics included in the agenda of the International Law Commission, as AALCO did.

39. Lastly, he shared Mr. Wako's concerns regarding the issuing of legal opinions: the question was one that merited careful study, as that task appeared to duplicate the work of the African Court of Justice and Human Rights, and AUCIL already had a very full agenda. As Mr. Wako had cautioned, there was always the risk that States could make use of such opinions for political ends.

40. Mr. HASSOUNA said that the establishment of AUCIL went hand in hand with the establishment of the African Society of International and Comparative Law and showed the importance that Africa attached to international law. He hoped that AUCIL would also study the topics considered by the International Law Commission and adopt views on them that it would then communicate to the Commission. Such important cooperation would enrich the Commission's own debates.

41. He noted that one of the items on the AUCIL agenda was the review of treaties. The question of why countries signed treaties and then failed to ratify them was a vexing one, not just for Africa but for the United Nations as well. He urged the African Union, through AUCIL, to exchange experiences with other regional and international organizations on that subject.

42. Lastly, he noted that the question of peace and security in Africa, which was of concern to AUCIL, was not an area of study for the International Law Commission, which endeavoured to avoid political issues, believing that political questions could create divisions among the membership. Yet if approached from a strictly legal point of view, the consideration of such questions could lead to the settlement of disputes, and he would be interested in hearing what success AUCIL had experienced in that area. He urged AUCIL and, more broadly, the African Union to maintain close coordination with the United Nations, which was the primary body having responsibility for peace and security in the world.

43. Mr. TCHIKAYA (African Union Commission on International Law) thanked Commission members for their questions regarding the work of AUCIL. He observed

that most rules of international law applied in Africa since 1960 had been developed outside the region; thus the very existence of AUCIL was due to the fact that there was a need in the area of international law for a body that was connected to African realities and spoke for Africans.

44. He wished to assure Mr. Wako that the question of universal jurisdiction was under consideration in AUCIL, and a special rapporteur on that topic had been appointed.

45. AUCIL members were nominated by States, and their eligibility was determined in accordance with criteria set out in the AUCIL statute. The Executive Council, which was composed of African ministers of justice, then proceeded to a vote.

46. The work of special rapporteurs took the form of reports or studies that were discussed by Commission members; they were then approved by the Executive Council and transmitted to the Assembly for adoption. Any State could submit a topic for consideration; proposed topics were then approved by the Executive Council and the Permanent Representatives' Committee.

47. There was no reason why AUCIL could not consider topics on the agenda of the International Law Commission, particularly if they were of special interest to Africa. It was entirely possible for AUCIL to transmit its views on those topics to the Commission.

48. Discussions regarding the conditions for the publication of texts on the AUCIL website were currently under way,²⁸⁸ but many documents were already available from the African Union website.

49. When the AUCIL statute had been drafted, it was unlikely that any thought had been given to the matter of whether AUCIL would be encroaching on the jurisdiction of what had been at the time the African Court on Human and Peoples' Rights if it gave advisory opinions. The fact that it could give advice meant that there were two possible sources from which a legal opinion could be sought. Like the International Law Commission, AUCIL was physically close to its parent organization. AUCIL met in Addis Ababa, the seat of the African Union, whereas the sessions of the African Court of Justice and Human Rights were held in Arusha, United Republic of Tanzania. To some extent, a parallel could therefore be drawn between the situation of the African Court of Justice and Human Rights and that of the International Court of Justice.

50. On issues specific to Africa, or requiring a purely African opinion, it was logical that the organs of the African Union should be able to seek the advice of AUCIL.

51. Mr. PETRIČ welcomed the establishment of AUCIL, which represented a major step towards the establishment of the rule of law in Africa and had worldwide implications. It was important to note, however, that the International Law Commission and AUCIL had different mandates. As a new body, AUCIL would be wise to draw on the 60 years of experience gained by the International Law Commission, but as it was operating in a completely different context it

²⁸⁸ <http://pages.au.int/category/special-pages/aucil>.

should also explore new avenues. As a subsidiary body of the General Assembly, the International Law Commission had a fairly narrow mandate confined to the codification and progressive development of international law. While there were plenty of opportunities for cooperation between the two bodies in that sphere, institutional cooperation would be somewhat restricted by the main difference in their terms of reference—namely, that AUCIL could give advisory opinions in response to requests from individual States—and by the fact that its work had a substantial political dimension.

52. All the legal systems of the world were represented in the International Law Commission. The eight members of the Commission who hailed from Africa had made a substantial and very valuable contribution to the codification and progressive development of international law. He therefore wondered if there were other means by which AUCIL could help to ensure that ideas from Africa were incorporated in the work of the International Law Commission. Two possible ways in which AUCIL might contribute to the development of general international law would be to give active support to the African members of the International Law Commission and to encourage African States to respond more frequently to the questions that it directed to them.

53. Mr. KITTICHAISAREE said that he agreed with Mr. Peter that AUCIL must be independent and that Africa should contribute more to the field of international law because it was a continent rich in wisdom and human capability. South America had produced the Calvo Doctrine; why was there not something similar from Africa? As Mr. Murase had suggested, it might be useful for AUCIL to liaise more closely with AALCO. At the Third United Nations Conference on the Law of the Sea, AALCO had coordinated the position of African and Asian States on the exclusive economic zone. It had also done much to protect the rights and interests of landlocked and disadvantaged States and to secure equitable shares from deep-seabed mining.

54. Africa could best protect its interests if it had peace and internal stability. He therefore urged AUCIL to push for the rule of law in Africa as a means of forestalling the abuse of universal jurisdiction. If African States did enough to prosecute criminals in their own courts, there would be no need for the International Criminal Court to intervene. For that reason, he welcomed reports that the Government of Senegal had expressed its willingness to prosecute Hissène Habré, the former dictator of Chad, in its courts with the African Union's help.

55. Mr. GETAHUN (African Union Commission on International Law) said that he agreed with Mr. Kittichaisaree's comments regarding universal jurisdiction; while it was necessary to avoid politicization and the victimization of African officials, it was equally vital to fight impunity on the African continent. AUCIL was therefore directing its efforts at combating impunity by encouraging prosecution by national courts and the exercise of jurisdiction at the regional level.

56. The term "advisory opinion" did not appear anywhere in the AUCIL statute. The opinions of AUCIL could not be

compared with the advisory opinions delivered by a court. AUCIL was an independent advisory organ that helped the other organs of the African Union to formulate policy. For that purpose, it conducted studies on legal matters of interest to the Union and its member States.

57. According to article 11 of the AUCIL statute, members were elected by secret ballot by the Executive Council. That decision was then referred to the Assembly for final approval. A maximum of two candidates could be proposed from each member State. Geographical distribution and gender representation had to be taken into account when electing new members to AUCIL.

58. There was no real danger that AUCIL would copy the work of the International Law Commission, because its history and mandate were completely different. AUCIL had to be innovative if it was to fulfil its responsibilities. Africa's contribution to international law could best be enhanced not only by cooperation between AUCIL and the International Law Commission but also through the conferences of the African Society of International and Comparative Law and various other mechanisms, such as meetings of ministers of justice and for foreign affairs.

59. The two Commissions had different agendas, but there were possible areas of overlap. For example, he had submitted a report to AUCIL on a model law on internally displaced persons. One of the sources he had consulted in order to define the term "disasters" had been the reports of the Commission's Special Rapporteur on the protection of persons in the event of disasters. While AUCIL did not systematically refer to the work of the International Law Commission, it did on some occasions use its texts as a resource.

60. The establishment of AUCIL and the studies it produced were not likely to fragment international law, but rather offered an opportunity for Africa to contribute actively to many areas of international law through the adoption of norms that represented radical progressive development. One example thereof was the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). It was unlikely that such a binding instrument would ever be adopted at the level of the United Nations. Another example was the African Charter on Democracy, Elections and Governance, which had introduced to international law the principle that an unconstitutional change of Government must be rejected (art. 3, para. 10, and arts. 23–26).

61. AUCIL was trying to promote the integration of the African States by filling gaps in regional integration, harmonizing laws and regulating certain activities—in other words, by doing what was necessary to lay the foundations of a United States of Africa. It had developed procedures that allowed members to read special rapporteurs' reports before they were published. Once those reports had been formally adopted, they became Commission reports.

62. The number of questions raised at the current meeting showed that there was much that could be discussed by the two Commissions. While he was pleased that the process had been initiated, more regular, structured discussions about ideas rather than resources would be needed in the

future. The comments of the International Law Commission would be conveyed to AUCIL members, and he hoped that members of the International Law Commission would attend AUCIL meetings.

63. The CHAIRPERSON thanked the representatives of AUCIL for their visit and for their suggestions regarding ways to strengthen relations between the two Commissions.

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)

64. Mr. GEVORGIAN commended the Special Rapporteur for presenting her substantive preliminary report so soon after her appointment. The Commission and the previous Special Rapporteur had already done a substantial amount of important work on the topic. The Commission's further deliberations should be guided by the previous Special Rapporteur's thorough analysis of existing practice and theory. The appointment of a new Special Rapporteur should not lead the Commission to change tack, as disregarding earlier work would be a pointless waste of resources.

65. Turning to the substantive questions raised in the report, he said that as far as methodology was concerned, he supported the distinction drawn between immunity *ratione personae* and immunity *ratione materiae*. Fortunately, there was a consensus within the Commission on that matter. That distinction would make it possible to tackle the subject in an orderly manner and to take account of the specific legal regime of each category. He agreed with Mr. Forteau, Mr. Nolte and Sir Michael that paragraph 57 of the report dwelt too much on the "functional nature" of the immunity of State officials from foreign criminal jurisdiction. As Mr. Murphy and a number of other speakers had rightly pointed out, immunity was also underpinned by the important principles of the sovereign equality of States and non-interference in internal affairs. The functional nature of immunity *ratione materiae* had to be seen from that perspective.

66. He agreed with the Special Rapporteur's suggestion that the Commission should adopt a phased approach. Dividing issues into groups and proceeding step by step would not prevent the Commission from gaining an overall picture or a clear idea of the direction to take.

67. The Commission's future work would have to take the form of draft articles of a convention. There was no other option, since it was too difficult an issue to be dealt with in guidelines or through "soft law". He had been struck by Mr. Park's reference to the United Nations Convention on Jurisdictional Immunities of States and Their Property. Unlike Sir Michael, who thought that the failure to secure enough ratifications for that Convention to enter into force was due to the fact that domestic ratification procedures were extremely complex, he personally believed that

it was due to the fact that the Convention touched on a matter that was too sensitive for many States. He did not know of any Government that would officially proceed on the assumption that States had absolute immunity. While there was general agreement that State immunity was functional in nature, States were apprehensive about becoming a party to a binding legal instrument. The Commission found itself in a tricky situation because it was dealing with a difficult subject that straddled the border of functionality and non-functionality.

68. In the context of possible restrictions on immunity, the Special Rapporteur had referred a number of times in her report (e.g. paras. 29 and 60) to the need to bear in mind and to accept "new aspects of international law related to the effort to combat impunity" and to "a tendency to limit immunities" (para. 29). It was true that a trend towards the restriction of immunity was clearly emerging, but it was reflected in the existence of international courts and their action, notwithstanding the long hiatus between the Nuremberg Tribunal and the establishment of the more recent international criminal tribunals. A reverse trend could be discerned when cases were referred to national courts. When attempts had been made in Spain, Belgium and the United Kingdom to prosecute foreign Heads of State, internal legislation had been adopted to restrict that possibility.

69. As far as a general trend was concerned, the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, which was of significance for the Commission's future work on the topic, had upheld the existing international legal rule and the position taken by the Court some years earlier in the cases concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

70. As the Special Rapporteur had pointed out, the Commission had to premise its consideration of the topic on certain values, such as the stability of international relations and the fight against impunity. While those were complex values at the political and philosophical levels, at the legal level they were extremely complex. It was easy to say "no peace, no justice", but that maxim had not always prevailed. Of course, he subscribed to that view, but putting theory into practice might prove difficult. The Commission needed to find the delicate balance between the two.

71. The immunity of a State official from foreign criminal jurisdiction meant immunity from criminal proceedings, but not from the substantive law of a foreign State and still less from the law of the State that that official had been serving. Hence, the existence of immunity did not mean that it was impossible to initiate or pursue criminal investigations and proceedings at the national level against a given high official. Of course, the State that the official enjoying immunity was serving or had been serving would always face a serious dilemma when that person was about to be prosecuted by a foreign court, namely whether it should invoke immunity with regard to the acts of which a Head of State stood accused, in which case they would become acts of the State itself, with all the consequences that would entail.

72. He supported the proposal made by the Special Rapporteur in paragraph 63 of her report that the Commission should consider the question of whether immunity *ratione personae* could be extended to persons other than the troika. That circle could certainly be widened, not by listing the persons in question, but by establishing particular categories. As far as immunity *ratione materiae* was concerned, the Commission would have to look for objective criteria for determining what constituted an “official act”.

73. As to whether the topic should be approached from the perspective of codification or progressive development, he agreed with Mr. Murphy that the formulation of rules *de lege ferenda* was a very serious matter of legal policy that called for an extraordinarily careful approach, and he also agreed with Mr. Huang and Sir Michael that the Commission must be extremely cautious about any progressive development of international law in that respect. As there had been no unanimity in the Sixth Committee or in the Commission as to whether the latter should consider the topic with a view to progressive development, it would be sensible, as suggested in the report, to start by codifying existing rules of international law and only then to move on to the progressive development of “grey areas” or issues that were insufficiently regulated but on which there was consensus or wide agreement.

The meeting rose at 12.40 p.m.

3147th MEETING

Friday, 20 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Wako, Mr. Wisnumurti.

Immunity of State officials from foreign criminal jurisdiction (concluded) (A/CN.4/650 and Add.1, sect. A, A/CN.4/654)

[Agenda item 5]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the new Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction. He gave the floor to Ms. Escobar Hernández to resume the debate on that topic.

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) thanked the members of the Commission for their reception of her preliminary report and for their constructive comments. Before turning to methodological considerations and the workplan, she would first summarize the points made with regard to substantive issues.

3. At the outset, it should be emphasized that all the members were in favour of maintaining a distinction between immunity *ratione personae* and immunity *ratione materiae*. At the same time, they recognized that both had a functional dimension, which was founded on the desire to preserve the sovereign equality of States and the stability of international relations. As far as some members were concerned, the attribution of immunity *ratione personae* to the highest-ranking State officials or representatives was justified by the fact that the latter represented or even personified the State, but at least one member contested that argument on the reasoning that the concept of State personification was no longer compatible with the modern principle of State sovereignty based on the people.

4. With regard to immunity *ratione personae*, a number of members were in agreement that its scope must be limited to the so-called troika: Heads of State, Heads of Government and ministers for foreign affairs. However, some members had reservations about granting immunity to ministers for foreign affairs; others, conversely, did not rule out the possibility of extending immunity to other high-level government officials whose mandates involved foreign relations. On the other hand, reservations were expressed about such an extension itself, in view of the difficulty of categorizing persons whose functions were governed by the national law of each State. In any event, there was general agreement that a system of lists was not workable and that it was preferable to establish criteria for the possible extension of immunity *ratione personae* to persons other than the troika, since such an extension could, moreover, be limited to specific periods or circumstances, such as special missions. A large number of members felt that the main criterion for determining who could enjoy immunity *ratione materiae* was the official or non-official nature of the act in question. In addition, the use of the expression “State officials” to designate those who enjoyed immunity appeared to have garnered the most votes.

5. The concept of an “official act” had itself elicited particular attention, and some members were of the view that it had implications not only for immunity *ratione materiae* but also for immunity *ratione personae*. It was emphasized that an official act was necessarily carried out on behalf of the State and in the exercise of the functions assigned to one of its representatives. All were in agreement that it was important to define the term “official act” in order to determine the scope of immunity, yet the definition itself was controversial. It was therefore necessary to identify which criteria could be used to characterize an act as “official”. To that end, several members recommended using the criteria set out in the articles on responsibility of States for internationally wrongful acts²⁸⁹ and the United Nations

²⁸⁹ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

Convention on Jurisdictional Immunities of States and Their Property, but others were opposed to making that transposition. The question also arose as to whether unlawful or *ultra vires* acts fell into the category of official acts. Lastly, a proposal had been made to use as a basis the distinction between *acta jure imperii* and *acta jure gestionis*, perhaps even including *acta jure gestionis* that might nevertheless be performed in an official capacity and that might engage the criminal responsibility of their author.

6. The subject that had clearly given rise to the liveliest debate was that of possible exceptions to the immunity of State officials from foreign criminal jurisdiction, in particular in the case of international crimes. Many members were categorically opposed to protecting those acts with immunity since doing so would counteract the effort to combat impunity under the terms in which such an effort was prescribed by contemporary international law. It was therefore necessary to determine which crimes fell outside the scope of immunity, possibly according to their seriousness; however, several members felt that that criterion was completely irrelevant in the present circumstances. The Special Rapporteur was of the opinion that crimes warranting derogation from immunity were those that the international community as a whole considered to be particularly grave or widespread, such as genocide, war crimes and crimes against humanity.

7. Generally speaking, it seemed difficult to overlook recent tendencies in international law relating to the international criminal responsibility of the individual. One member stressed that it was unacceptable to take into account trade issues in identifying exceptions to the immunity of the State while at the same time disregarding international crimes in identifying exceptions to the immunity of State officials. For some members, treaty regimes such as the Rome Statute of the International Criminal Court were not useful in identifying possible exceptions, but others expressed the contrary view that they reflected tendencies that the Commission could not afford to overlook. In any event, the question of exceptions should be handled with caution and by taking into account State practice and the previous work of the Commission.

8. The Special Rapporteur's proposal to refer to the values and principles of contemporary international law had also led to an intense exchange of views. A number of members found such an approach to be useful for striking the necessary balance between, on the one hand, the desire to preserve the sovereign equality of States and, on the other, the stability of international relations and the desire to combat impunity. However, others had disagreed, finding that a study based on metalegal aspects and "tendencies" in the international legal system was inappropriate. One member had suggested speaking of "legal policy". On the whole, however, no one had been expressly opposed to taking those values and principles into consideration; the more difficult problem lay in identifying them. In that regard, it was possible to identify two main schools of thought within the Commission. Some members felt that the relevant values and principles were limited to the sovereign equality of States, territorial integrity and the stability of international relations—precisely what immunity was intended to protect. Other

members felt that the above-mentioned principles and values must be combined with other, newer ones that had emerged in recent decades and that had found expression in various norms of international law, one of which was the effort to combat impunity in respect of the most serious international crimes. At the same time, immunity placed a limitation on the sovereignty of the State in terms of the range of the latter's jurisdiction—a fact that must also be taken into account.

9. In summary, a non-restrictive reference to existing values and principles—strictly in relation to their legal aspects and taking into account their place in the international legal system—was thus endorsed by consensus, which the Special Rapporteur welcomed. Yet, in that instance as well, it was advisable to proceed with caution, using as a basis State practice, international norms and the evolution of international law. In particular, it was necessary to keep to the values and principles that were shared by the international community as a whole. It was not, in any circumstances, a matter of imposing "Western values"—a fear that had been expressed by one member of the Commission. In any case, no one appeared to exclude the effort to combat impunity from the values and principles to be taken into account, which was particularly important given the diversity of cultures and legal systems represented within the Commission.

10. Several members had expressed support for the Special Rapporteur's proposal to analyse the relationship between the responsibility of the State and that of the individual, as well as its implications for immunity, and particularly the relationship between the immunity of the State and that of the individual. In that connection, some members endorsed the idea of drawing on the judgment of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, but others felt that that decision did not relate to the immunity of State officials.

11. Much importance was assigned to the procedural aspects of immunity, and there was general agreement that they merited consideration. Opinions were nonetheless divided as to when might be the best time to do so. Although most members endorsed the Special Rapporteur's proposal to address substantive issues first, others would prefer to consider procedural issues earlier without necessarily distinguishing them from substantive issues of immunity.

12. Lastly, it should be noted that two members had mentioned the need to address the issue of universal jurisdiction in the context of the Commission's work on the immunity of State officials from foreign criminal jurisdiction. They had referred to a report on the subject prepared by the technical expert group set up jointly by the African Union and the European Union.

13. In conclusion, the Special Rapporteur noted that the Commission had by no means reached a consensus on the substantive issues addressed in her preliminary report, as was evidenced by the debates. However, those issues were the subject of a structured inquiry that should be continued during forthcoming sessions on the basis of an in-depth study.

14. Turning to the exchange of views on methodology and the workplan, the Special Rapporteur recalled the transitional nature of her preliminary report, the purpose of which was to present the methodological foundations of the work she proposed to carry out during the present quinquennium. A number of members had highlighted the importance of methodological considerations at the present stage of the Commission's work and had made useful comments in that regard. Nevertheless, the debate had, for the most part, remained focused on the approach proposed in the report and its immediate outcome, the workplan. One member had questioned the neutrality of that approach, emphasizing that the latter should not in any way influence the substantive debate. It might be argued, however, that no approach could be neutral given that, by definition, the concept of an approach implied choosing to take a particular course of action in pursuit of a particular goal. It was therefore illusory to consider that the object and ultimate goal of the Commission's work or the angle from which a topic was addressed could be neutral, especially in the context of drafting texts—an exercise that to a large extent involved the Commission's mandate of the codification and progressive development of international law.

15. As often happened during the Commission's debates, the first methodological question that had been raised by members was what share of the work on the topic should be devoted to the codification and the progressive development of international law, and whether precedence should be given to analysing *lex lata* or *lex ferenda*. On the whole, members had agreed that it was not possible to address the topic exclusively from one of those two angles. They were of the view that, owing to the very nature of the issues under consideration, the Commission could not limit itself to what was set out in *lex lata* and should proceed to developing the law. They endorsed the cautious approach recommended by the Special Rapporteur, which consisted of beginning with *lex lata* considerations and later including an analysis *de lege ferenda*, while at the same time taking into account the evolution of international law. Without calling that approach into question, some members felt that it was necessary to refrain from making a clear distinction between *lex lata* and *lex ferenda*, or between the codification and progressive development of the law. They stressed that the Commission was not required to specify which part of its work pertained to the codification and which pertained to the progressive development of the law, inasmuch as its mandate encompassed both aspects. Its task was merely to produce a coherent set of draft articles that had been agreed by consensus. One member felt that it was necessary, on the contrary, to make an adequate distinction between *lex lata* and *lex ferenda*; others argued that the concepts of “analysis *de lege ferenda*” and “progressive development of international law” were not used with the necessary degree of accuracy in the Commission's work.

16. Second, members had endorsed the approach of drawing on the work of the previous Special Rapporteur in order to identify the remaining key issues of contention that called for new responses. They had generally supported the proposal that the various groups of issues should be addressed separately and sequentially. However, it was emphasized that an excessive compartmentalization

of the issues to be examined risked obscuring certain problems. Third, a majority of the members had approved the workplan—and the four main groups of issues to be considered to which it referred—as contained in the last chapter of the report. Some members, without calling the workplan into question, had recommended the specific approach of dealing with general issues in a cross-cutting fashion concurrently with the other issues that were specific to the topic. As previously stated, some were of the view that the procedural aspects of the topic should be addressed at the outset, at the same time as the substance. Finally, clarification was sought on the strategy envisaged by the Special Rapporteur and on the schedule for the development of the topic.

17. Lastly, with regard to the Commission's future work, the first point to note was that the workplan and the four groups of issues to which it referred, which were set out in paragraph 72 of the preliminary report, appeared to remain valid. One member had questioned the strategy envisaged by the Special Rapporteur, even though it was clearly explained in that paragraph. Second, for the purposes of studying the issues put forward, the Special Rapporteur would draw on State practice, international and national case law, the rules and principles of the relevant international law and relevant doctrine. Taking as her basis the work of the previous Special Rapporteur²⁹⁰ and the study by the Secretariat,²⁹¹ as well as any area of the Commission's work that pertained to the topic, the Special Rapporteur would endeavour to gain a “fresh perspective” as a way of resolving the remaining controversial issues.

18. Third, practical solutions would be offered to States, in particular to authorities concerned with issues relating to the immunity of State officials from foreign criminal jurisdiction, namely judges and prosecutors. The Special Rapporteur therefore proposed that future reports should include draft articles based on a coordinated and exhaustive approach to the immunity of State officials from foreign criminal jurisdiction. Along those lines, the proposal to elaborate a guide for prosecutors seemed somewhat premature—draft articles that gave the relevant authorities the necessary practical guidelines would no doubt suffice. Fourth, equal importance should be given to the codification and the progressive development of international law since the topic was to be studied from the perspective of both *lex lata* and *lex ferenda*. Fifth, with regard to the schedule for the development of the topic, when the Special Rapporteur had raised the possibility of completing the work during the present quinquennium, she had had in mind the adoption of a set of draft articles on first reading. Given that the issues to be addressed were complex and difficult, the Commission should take the comments of States into account before considering the draft on second reading, which could be completed in a short amount of time. The Special Rapporteur recognized the need to allow, where appropriate, for the possibility of changing the workplan in the light of future debates in the Commission and in the Sixth Committee. In any

²⁹⁰ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

²⁹¹ A/CN.4/596 and Corr.1 (document available from the Commission's website).

case, the next report would be chiefly devoted to the issues enumerated in paragraph 72, subparagraphs 1 and 2, of the preliminary report. Lastly, in response to several members who had pointed out that it was the first time in the history of the Commission that a woman had been appointed Special Rapporteur, Ms. Escobar Hernández, while welcoming that development, expressed the hope that the composition of the Commission in future might more closely reflect the proportion of women in the community of lawyers of international law, which was significantly higher.

The meeting rose at 11.55 a.m.

3148th MEETING

Tuesday, 24 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Formation and evidence of customary international law²⁹² (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited Sir Michael Wood (Special Rapporteur) to present his note on formation and evidence of customary international law (A/CN.4/653).

2. Sir Michael WOOD (Special Rapporteur) said that uncertainty about the process of formation of rules of customary international law was sometimes seen as a weakness in international law generally. It was an easy target for those who sought to play down the importance and effectiveness of international law, or even to deny its nature as law. Perhaps the Commission's study of the topic would contribute to the acceptance of the rule of law in international affairs.

3. A more prosaic reason for engaging in the topic was to offer guidance (not prescription) to those who, although they were not necessarily specialists in international law, were called upon to apply it, in other

²⁹² At its sixty-third session, the Commission included the topic in its long-term programme of work and recommended the preparation of a draft on the topic (*Yearbook ... 2011*, vol. II (Part Two), paras. 365–366, and annex I). At the current session, it decided to include the topic in its programme of work and appointed Sir Michael Wood, Special Rapporteur (see above, 3132nd meeting).

words judges in both the highest and the lower domestic courts. Some arbitrators in investment cases might likewise have little instinctive understanding of how to identify rules of customary international law. Explaining to a domestic judge why something was, or was not, a rule of customary international law could be quite challenging when there was no firm reference point, apart from some rather brief pronouncements by the International Court of Justice. Guidance might also be helpful for lawyers operating primarily within national systems, but who might occasionally encounter public international law in their day-to-day work. He therefore hoped that the Commission's work on the topic would assist judges and lawyers practising in a wide range of fields.

4. His preliminary note should be read together with annex I to the Commission's report on its work at its sixty-third session,²⁹³ which contained the syllabus and an extensive, but by no means comprehensive, list of materials and writings.

5. As the proposal to include the topic in the Commission's programme of work had been discussed in 2010 and 2011 in the Working Group on the long-term programme of work for the quinquennium, current and former members of the Commission had already supplied some very useful input. He looked forward to receiving more input during the current debate, since work on the topic was a collective endeavour.

6. The aim of the note was to stimulate an initial debate. After the introduction, the Special Rapporteur listed seven preliminary points that might be covered by a report in 2013. Those points were of varying degrees of importance, but each should be covered. Section A referred to the Commission's ground-breaking work on the topic in 1949²⁹⁴ and 1950.²⁹⁵ It had been almost the Commission's first task and one prescribed by its statute. That very practical work was still relevant and formed the basis for many United Nations publications in the field of international law, including some of the admirable publications prepared by the Codification Division.

7. In addition, there might be much to learn from the Commission's work on other topics, especially when it was largely engaged in codification. Over the years, the Commission had presumably gained considerable experience in identifying rules of customary international law. As the Commission had a dual mandate, namely

²⁹³ *Yearbook ... 2011*, vol. II (Part Two), p. 183.

²⁹⁴ Memorandum submitted by the Secretary-General, "Ways and means of making the evidence of customary international law more readily available: preparatory work within the purview of article 24 of the statute of the International Law Commission" (A/CN.4/6 and Corr.1; available from the Commission's website). For the Commission's consideration of the subject at its first session, see *Yearbook ... 1949*, 31st meeting, paras. 89 *et seq.* (the working paper prepared by the Secretariat on the basis of the memorandum submitted by the Secretary-General (A/CN.4/W.9) is reproduced in footnote 10 to para. 89). See also the Commission's report to the General Assembly, *ibid.*, paras. 35–36.

²⁹⁵ *Yearbook ... 1950*, vol. II, document A/3116, Report of the International Law Commission covering its second session, Part II, "Ways and means for making the evidence of customary international law more readily available", paras. 24–94. See also document A/CN.4/16 and Add.1 (article 24 of the statute of the International Law Commission: working paper by Manley O. Hudson), *ibid.*, pp. 24 *et seq.*

progressive development and codification, he was unsure how easy it would be to identify the Commission's practice in that regard, but the effort should be made.

8. Section B drew attention to the London statement of principles applicable to the formation of general customary international law,²⁹⁶ which might be of interest when considering what form the Commission's output on the topic should take. It might also help in identifying the range of issues that should or should not be covered. It was, however, necessary to bear in mind the fact that the London statement had been drafted some years earlier and no doubt reflected the views of the rapporteurs and members of the International Law Association. It remained to be seen whether the Commission's conclusions would be similar to those reached in the year 2000, some of which had proved to be controversial. The Commission would also need to examine such other efforts as had been made in order to deal with the subject comprehensively.

9. Sections C to F of the chapter concerned Article 38 of the Statute of the International Court of Justice; questions of terminology; the importance of customary international law; and the various theories regarding the formation of customary international law, such as the supposed distinction between "traditional" and "modern" approaches. He hoped that the Commission would not dwell too much on theory, but would focus mainly on practical aspects of the topic.

10. Under section G on methodology, he had emphasized the approach of the International Court of Justice and its predecessor, the Permanent Court of International Justice. In addition to looking at what the International Court of Justice had said about methodology, it would be necessary to scrutinize what it had done in particular cases and what it had, or had not, taken into account when considering whether a rule of international law existed. The Commission would also have to study the approach of other international courts and tribunals and of domestic courts.

11. Although State practice in regard to the formation of customary international law was undoubtedly extensive, it might not be easy to identify, since States rarely articulated their views on the subject, unless they were involved in litigation, and the extent to which their arguments in the course of litigation represented their practice was an interesting question. The Commission should nevertheless try to determine when it was that States regarded themselves as legally bound by international custom.

12. The experience of those who had tried to identify customary international law in specific fields could make a significant contribution to the Commission's work on the topic. In that context, he was thinking, for example,

²⁹⁶ "London statement of principles applicable to the formation of general customary international law", and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: www.ila-hq.org/en/committees/index.cfm/cid/30). See also the debate in plenary, pp. 922–926 (*ibid.*). The "London statement" also appears on pp. 712–777 (*ibid.*); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid.*).

of the study on customary international humanitarian law published by ICRC in 2005.²⁹⁷ The legal literature on the formation of customary international law might also shed light on the subject. All basic textbooks addressed the matter, as did some important monographs, and there was a vast array of articles covering the identification of rules in particular fields. There were probably as many different theories about the relationship of practice to *opinio juris* as there were writers on the subject. One major issue dividing writers was whether to regard statements as State practice combined with *opinio juris*, or only as indicative of *opinio juris*. Some had concluded that State practice and *opinio juris* were not really two things that had to be proved separately, but were two separate requirements that might be combined. Such different approaches sometimes led to similar results, but not always.

13. The following chapter of the note examined the scope and possible outcomes of the topic. Those were related but distinct issues. He would be grateful for confirmation that the opinion that he had expressed in paragraphs 20 to 22 of his note was generally shared. As he had indicated in paragraph 23, his initial thinking was that the formation and identification of *jus cogens* did not really belong to the topic.

14. His tentative view of how to proceed was set out in paragraphs 24 to 27 of his note. Although he had suggested that the outcome of the Commission's work might take the form of a set of conclusions with commentaries, guidelines might be an equally appropriate term. Whatever they were called, the conclusions or guidelines should not be unduly prescriptive. The Commission would have to find the right balance between helpful guidance and overly restrictive rule-making, which would accord with the views of the Sixth Committee as summarized in paragraph 3 of his note. The Commission would not be drafting a "Vienna convention on customary international law", because a convention in that field would be inappropriate and inconsistent with the need to retain the necessary degree of flexibility. It should not try to produce a comprehensive text requiring many years of work, but should aim to complete the topic within the current quinquennium, if possible.

15. He was fully aware of the inherent difficulty of the topic and of the need to approach it with a degree of caution. Nevertheless, the outcome should be relatively straightforward, clear and understandable by all those who were confronted with rules of customary international law in their daily work, but who were not necessarily experts in public international law. The topic, like the law of treaties, formed part of the secondary rules of international law, although the distinction between primary and secondary rules was not always clear. However, saying that the Commission was addressing secondary rules emphasized that its task was not to determine substantive rules of law.

16. It would be appropriate to seek certain information from Governments, as that would help them to participate

²⁹⁷ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Rules) and vol. II (Practice) (Cambridge, United Kingdom, Cambridge University Press, 2005).

in the Commission's work at an early stage. That information could include, first, any official statements concerning the formation of customary international law in, for example, proceedings before international courts and tribunals or at the United Nations, within other international organizations or in national parliaments; second, any significant cases in national, regional or subregional courts that shed light on the formation of customary international law; and third, any writings or work done at universities and institutions other than those listed in annex I of the report of the Commission on the work of its sixty-third session (2011).²⁹⁸

17. He encouraged any member of the Commission who had any information or thoughts on any of the aforementioned matters to convey them to him at any time. In view of the fact that Secretariat studies had proved to be invaluable in the context of other topics, he proposed that the Secretariat should be asked to prepare a memorandum describing any earlier work done by the Commission that would be of relevance to the topic under consideration and would shed light on the Commission's understanding of the notion of customary law. The schedule contained in the last chapter of his note was very tentative and subject to review during the next session in 2013.

18. Mr. MURASE thanked the Special Rapporteur for his note, but said that he had already expressed some serious doubts about the topic of the formation and evidence of customary international law in the Working Group on the long-term programme of work. It was regrettable that at the current session it had proved impossible to discuss matters beyond those already on the syllabus, since numerous additional aspects of what was an important topic of international law would have benefited from in-depth analysis and discussion. Part of the Commission's work had always been to consider whether a particular rule had become established as customary international law in a specific field. For example, it was currently examining whether the principle *aut dedere aut judicare* had become part of customary law; it could do the same with the territorial tort exception to State immunity, the issue before the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. Its deliberations could bear fruit because, in each case, the Commission would be focusing on a specific rule. It would be impractical, if not impossible, to consider the whole of customary international law, even at a very abstract level.

19. His critical attitude to the issue stemmed from his participation in the Committee on Formation of Customary (General) International Law of the International Law Association, which had studied the subject for 15 years (from 1984 to 2000). If the Special Rapporteur were to use the London statement of principles applicable to the formation of general customary international law, which was a broad normative statement, as a model for his project, the project would be doomed to fail, because it would end up by stating the obvious or being ambiguous. Almost every guideline in the London statement contained a saving or contingent clause, either because there had been little agreement among Committee members on general

propositions or because they had had serious concerns about them in the light of cases involving issues of customary international law where the ruling had contradicted or been inconsistent with the general proposition in question. All the guidelines required further elucidation owing to their lack of clarity and conditional nature. States were likely to become confused if those guidelines were presented as authoritative, normative statements.

20. Legal advisers to States might well be alarmed by the idea of having to follow a set of guidelines developed by the Commission that were supposed to cover the whole spectrum of customary international law. The Commission had great authority and responsibility, but it was not an academic institution like the International Law Association. That was why, in 1998, the British Institute of International and Comparative Law had advised the Commission not to include the topic on its agenda.

21. Determining the existence of customary international law was predominantly a question of method. That was why he objected to the proposed title of the topic; the word "formation" was a dynamic concept that implied that the law was seen as a process, whereas the word "evidence" was static and premised on the idea that the law was made up of a body of rules. The term "formation" suggested a sociological process whereby a customary rule was created over a period of time. The word "evidence" meant stopping the clock and trying to ascertain the applicable law at that given moment. It was impossible to talk simultaneously of formation and evidence without causing some methodological confusion. In the Working Group, he had suggested that the Commission should confine the scope of the topic to the evidence of customary international law.

22. It would also be necessary to decide for whom the Commission's work on the topic was intended. There were four conceivable target audiences, the first being the Commission itself. The working paper of 1950 prepared under article 24 of the statute of the International Law Commission, "Ways and means for making the evidence of customary international law more readily available",²⁹⁹ had plainly been designed for use by the Commission itself, as at that initial stage it had been essential to identify appropriate material to be used as a common basis for the codification of customary international law. The 1950 document contained lists of treaty series, collections of judicial decisions and the like, but not much normative content, and had resembled the handout material that a tutor might give to a first-year law student.

23. The three other possible target audiences were States, especially those that were parties to a dispute requiring the interpretation and application of customary international law, whose position was subjective; third-party decision makers, in other words, judges who had to deliver a judgment on a dispute, whose position was intersubjective; and the detached observer, who wished to consider matters from an objective perspective. It was necessary to distinguish between the subjective, intersubjective and objective perspectives in order to avoid confusion.

²⁹⁸ See footnote 292 above.

²⁹⁹ See footnote 295 above.

24. The Commission should be careful about the relatively easy approach proposed by the Special Rapporteur, which consisted in examining the case law of international courts and tribunals, because when an international court dealt with a question of customary international law, its primary goal was to settle a dispute between the parties. To that end, it might examine the practice of a limited number of States. A student who wrote a dissertation citing evidence from only a small fraction of the countries of the world would not receive even a passing grade from his professor, because his paper would not have been based on the general practice of States, that being the criterion that had to be met before it was possible to say that a customary norm had been established. In the case concerning *Jurisdictional Immunities of the State*, to which the Special Rapporteur had referred in paragraph 18 of his note, the 10 instances of State practice had been the ones cited by the parties, Germany and Italy. The Court had not examined the practice of all the other States in the world. Although several judges, in separate or dissenting opinions, had remarked upon the lack of assessment of the “silence” of other States, the majority opinion was permissible because of the generally accepted presumption that the members of the Court knew the law (*jura novit curia*) and because their prime responsibility had been not to write an objective dissertation but to settle a dispute brought before it in the intersubjective context of judicial proceedings. In other words, the Court was primarily concerned with the customary law status of the relevant rule as asserted by the parties, on which it rendered its judgment. Hence the Court’s role in the debate surrounding customary international law was limited by its judicial function and was therefore significantly different from that of the Commission, whose work was aimed at the world at large.

25. While it was true that it was easy to collect the relevant passages of the case law of the International Court of Justice or the Permanent Court of International Justice, that approach could be misleading because judicial precedent covered only a limited area of international law. For that reason, the Special Rapporteur should vigorously research the 95 per cent of international law not covered by the case law of international courts.

26. Although it could generally be assumed that customary international law was universally recognized by all States, it was essential to bear in mind the subjective element entering into individual States’ recognition. Article 38 of the 1969 Vienna Convention on the law of treaties stipulated as follows:

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

There had been a major debate at the United Nations Conference on the Law of Treaties as to whether the phrase “recognized as such” was necessary and, if it was necessary, by whom the customary law character of the rule had to be recognized: the third State, some other States or the international community as a whole.

27. Extreme forms of individual recognition or non-recognition of customary norms, such as those reflected in persistent objections or unilateral measures, prompted

major questions about customary international law, including that of how much importance should be attached to recognition or non-recognition by specially affected States. Those questions should be set in the proper context. The concept of opposability functioned as a medium for the creation of new customary rules.

28. He was somewhat troubled by the expression “empirical research” used by the Special Rapporteur in paragraph 19 of his note. In the context of the topic under consideration, the Commission should not be conducting empirical research in the sense of sociology-of-law studies, but rather inductive research in the sense of Georg Schwarzenberger’s *The Inductive Approach to International Law*.³⁰⁰

29. The formation of customary international law was an informal process. As Roberto Ago³⁰¹ had pointed out, it was a spontaneous process. By definition, customary international law was unwritten law. Ambiguity was of the essence and, probably, the *raison d’être* of customary international law, which was useful because it was ambiguous. It might therefore be better to leave it as something ambiguous that could be clarified, if necessary, by a court when a specific rule was at issue between States.

30. Given the inherent difficulty and sensitivity of the topic, he hoped that the Commission would not be overambitious. For that reason, he proposed that the Special Rapporteur should take a step-by-step approach and start by considering the questions posed by article 38 of the 1969 Vienna Convention. The Commission might have to be content with a modest study that identified the inherent problems in an abstract manner. Many theoretical studies had been produced on the subject not only by Western academics, but also by scholars from other regions. The Commission’s consideration of the topic should therefore be broad-based and reflect the diversity of legal cultures throughout the world.

31. Mr. MURPHY said that it would indeed be useful to review the *travaux préparatoires* to Article 38, paragraph 1, of the Statute of the International Court of Justice, as the Special Rapporteur had suggested, though, of course, that would actually entail a review of the *travaux* associated with the corresponding article of the Statute of the Permanent Court of International Justice. The Special Rapporteur was also right to emphasize that an important element of the topic was the distinction between customary international law and other sources of international law—what could be termed general principles of law. As for the issue of terminology and the possible development of a lexicon of relevant terms, he encouraged the Special Rapporteur to consider the term “law of nations”, which appeared frequently in laws, judgments, publications and even constitutions, and to endeavour to clarify the relation of that term to customary international law.

³⁰⁰ G. Schwarzenberger, *The Inductive Approach to International Law* (London, Stevens and Sons, 1965).

³⁰¹ See, among others, R. Ago, “Science juridique et droit international”, *Collected Courses of The Hague Academy of International Law, 1956-II*, vol. 90, pp. 857–954, and “Positive law and international law”, *American Journal of International Law*, vol. 51 (1957), pp. 691–733.

32. While he supported the Special Rapporteur's proposal to give some attention to theory, he would caution against getting bogged down in theoretical distinctions of no practical value. There were two specific arenas to which he hoped the Special Rapporteur would pay special attention, and which were important because many analyses of customary international law, instead of establishing the actual practice of all or a majority of States worldwide, used certain surrogates. First, the existence of a customary rule was often inferred from the adoption by States of a resolution, usually in the framework of an international organization. Most such resolutions were not legally binding, so the key question was whether they were evidence of a rule of customary international law. The answer doubtless turned largely on the content of the resolution (including whether it truly embodied a legal view as opposed to a political preference); its acceptance at the time of adoption and thereafter; and its consistency with State practice. The decision of the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided useful guidance in that regard. Second, the existence of a customary rule was frequently inferred from the existence of a rule in a widely ratified treaty, which purportedly generated a customary obligation binding on States that had not adhered to the treaty. While widespread ratification of a treaty might indicate the existence of a settled rule of customary international law, presumably one must assess the degree of adherence to the treaty, the reasons for non-adherence and the practice of States not parties to the treaty. The Court's decisions in the *North Sea Continental Shelf* cases and in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* provided guidance on the issue. If the Commission's work on the topic resulted in an outcome that provided clarification with respect to the aforementioned two arenas in which custom was purportedly formed, it would constitute a remarkable legacy.

33. Difficulties might arise in assessing when the conduct of a particular State or group of States called for special attention with respect to customary law formation. One side of the coin was the concept of "specially affected States", whose positive participation was necessary for the formation of a particular norm; the other was the concept of the "persistent objector", which applied in situations where, even if a norm could be said to have developed, it did not apply to certain States because they consistently rejected it. Those concepts were important because they attempted to mediate between the values of community and sovereignty in international law. The Commission should avoid upsetting the apparently prevailing balance between those values.

34. He agreed that it would be best not to include a study of the concept of *jus cogens*. Though the concept might be relevant in some areas, it was not a creature of any one source of international law but rather a limitation on those sources, and furthermore it presented its own difficulties in terms of evidence, formation and classification, which were outside the scope of the topic.

35. He supported the proposed scope of the topic as set forth by the Special Rapporteur in paragraphs 21 and 22

of his note. He himself viewed the project as largely one of *lex lata*, with the Commission's goal being to clarify existing rules governing the formation and evidence of customary international law, not to propose new rules. As to the form of the project, he supported the crafting of a series of conclusions with accompanying commentaries. Lastly, he agreed that it would be useful to seek the kinds of information from States outlined in the footnote at the end of the first subparagraph of paragraph 27.

36. Since the Special Rapporteur had invited Commission members to assist him in identifying useful sources of State practice, he had provided him with a recent edition of a book he had authored, *Principles of International Law*,³⁰² containing information about sources on the practice of the United States relating to international law. As more and more information about State practice was becoming available online, it might be helpful for the Special Rapporteur or the Secretariat to catalogue the main relevant electronic databases and Internet sites.

37. Mr. TLADI said that he had supported the topic from the start because he had often wondered how domestic legal experts could be expected to make sense of customary international law when international lawyers, including judges of the International Court of Justice, often adopted conflicting approaches to the formation and evidence of customary international law. In many domestic systems, customary international law was automatically considered law, in contrast to treaties, which often had to be incorporated. Judge M'Kean in *Respublica v. De Longchamps* had stated that law "collected from the practice of different nations" was "in its full extent" part of the law of the United States, and Blackstone had made a similar comment about English law.³⁰³ In some legal systems, such as that of South Africa, the constitution provided that customary international law was part of the law of the land. He had therefore believed that by considering the topic the Commission could make a practical contribution.

38. In thinking more concretely about the topic, he had asked himself why, when the Commission had, during its first session in 1949, decided to take up the codification of treaty law,³⁰⁴ it had not also taken up the topic of customary international law. Treaty law and customary international law were perhaps the two most important topics in the study of international law, and it was worth asking why the body responsible for the progressive development and codification of international law had not, during its 63-year history, save for incidental references, addressed the formation of customary international law. He wondered if the topic was in fact inappropriate for treatment by the Commission. It was one thing to try to codify the body of

³⁰² S. Murphy, *Principles of International Law*, 2nd edition (Saint Paul, Minnesota, West Academic Press, 2012).

³⁰³ According to Sir William Blackstone, "the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land" (W. Blackstone, *Commentaries on the Laws of England in Four Books, Notes Selected from the Editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and Others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood in Two Volumes*, Book IV, chap. V (Philadelphia, J. B. Lippincott Co., 1893)). Available from http://oll.libertyfund.org/titles/2142#Blackstone_1387-02_801.

³⁰⁴ *Yearbook ... 1949*, report to the General Assembly (A/CN.4/13 and Corr.1-3), paras. 16 and 19.

law on which written law was based; trying to codify the body of law on which unwritten law was based was entirely different, even if the Commission was not embarking on codification in the classical sense. When the Commission began its work on treaties, it had expressed reservations about the wisdom of codifying treaty law, and only in 1961 had it moved towards true codification.³⁰⁵ While the change made sense for treaty law, it would be wise to maintain the course suggested by the Special Rapporteur for customary international law. At no point should the Commission consider codification proper.

39. He strongly agreed with the Special Rapporteur that the outcome of the Commission's work should be a set of conclusions or propositions, with commentaries. In keeping with the aim identified by the Commission during its previous session, he did not favour an approach that was at all prescriptive. The Commission should not attempt to evaluate the relative correctness of any of the several theoretical approaches to customary international law, which predated the existence of the Commission. Not only would such an effort be outside the scope of a project to establish practical guidelines for practitioners, he feared that it would fail given the divergent approaches to the formation of customary international law that he had detected during his first eight weeks of participation in the Commission's work.

40. During the Commission's consideration of the topic of treaties over time, he had said that the interpretation of treaties was an art, not a science—a view that had admittedly not been shared by all, but perhaps that was more a matter of degree than principle. While the fluidity of customary international law presented dangers, particularly for the uninitiated, its flexibility was a great strength and an essential feature that should be jealously guarded and not tampered with. It allowed international law, even treaty law under the influence of article 31, paragraph 3 (c), of the 1969 Vienna Convention, to evolve with State practice. With that in mind, he urged the Commission to approach its task with caution and realistic ambition.

41. The Special Rapporteur had raised an important point concerning the unity of international law and the consequent uniformity of the customary international law-making process. While not disagreeing with the Special Rapporteur, he would caution that that was yet another theoretical issue that the Commission should perhaps not try to resolve. The point should not be overstated. While the same theoretical process of practice and *opinio juris* was relied on to advance arguments about the existence of customary international law norms, "soft law", for example, played a bigger role in the formation of customary norms on environmental protection than, say, in the law relating to nuclear disarmament. If indeed the Commission's purpose was to elucidate States' tendencies and practice, then the question of whether different approaches existed should be answered on the basis of a study of practice; their existence should not be excluded *a priori*.

42. Another important question raised by the Special Rapporteur related to the topic of *jus cogens*, or peremptory norms of international law. He agreed with

the Special Rapporteur that *jus cogens* should be excluded from the topic, but his reasons were different. The Special Rapporteur wished to exclude *jus cogens* because such norms could be found in treaties as well as in customary international law, but that was equally true of norms of customary international law, which could also be found in treaties. Even when found in a treaty, a *jus cogens* norm derived its binding force from a source independent of and higher than the treaty. Both customary international law and treaty law were based on a theory of State consent, while *jus cogens* was, he suspected, based on something different. *Jus cogens* should be excluded from consideration of the topic because it introduced complexities that were entirely different from those found in customary international law. In particular, the identification of *jus cogens* could not be explained simply in terms of practice and *opinio juris*. Furthermore, he had heard some rather conservative notions of international law aired in the Commission and doubted that it would be able to reach agreement on various aspects of *jus cogens*. He hoped nonetheless that the Commission would in the future decide to tackle that classical yet modern concept.

43. He wished to conclude by mentioning what he believed would be at the heart of the Commission's work on the topic: the relevant weight, identification, expression and illustration of practice and *opinio juris* in the search for customary international law. He wondered whether the flexibility inherent in customary international law, which, as he had earlier said, should be jealously guarded, was actually embedded in the two elements of practice and *opinio juris*. In his view the study of the topic should consider the extent to which tribunals, especially the International Court of Justice, and States, when presenting arguments before courts or in diplomatic forums, actually relied on those two elements.

44. The notorious inconsistency of the International Court of Justice regarding how much weight to give each of those two elements was sometimes evident even within a single case and judgment. For example, in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the Court, faced with the questions of whether a minister for foreign affairs enjoyed immunity under customary international law and, if so, whether there were exceptions to such immunity, had adopted two different standards of rigour for the two questions. For the first, it had taken a nonchalant and flexible approach, not even referring to State practice or *opinio juris*. Yet in considering whether there were exceptions for international crimes, it had addressed the issue of which of the two elements it had found not to have been met. Indeed, it had been observed that there was an inverse relationship between the Court's finding that there was a rule of customary international law and its diligence in applying the elements. He hoped that the Commission would not be shy in addressing any legal implications of that inconsistency.

45. Ms. JACOBSSON said that she agreed with the Special Rapporteur's analysis of why the proposed topic was important. The outcome could be especially useful for practitioners in ministries of foreign affairs and litigators of State cases. She also agreed that the Commission should aim to produce, as the outcome, a set of conclusions with commentaries.

³⁰⁵ *Yearbook ... 1961*, vol. II, document A/4843, paras. 38–39.

46. However, the topic raised a number of challenging questions. The first was whether the process whereby customary international law was formed had changed with the great increase in the number of sovereign States. States in general had more difficulty in responding or objecting to the development of new norms; it was simply increasingly difficult to keep track of legal developments around the world, particularly in different regions. Another challenging problem was the relation of regional practice to the unity of international law as a system, and that, too, might have changed over the past 50 years. In the light of those changes, the Commission might have to think carefully about the consequences for the formation of international law of a State's silence on a particular development.

47. The distinction between the mere practice of States and State practice in the legal sense needed to be analysed more deeply. States might apply international law as a matter of policy, but reject a given norm because of conflict with a treaty or for other reasons, in effect treating international law as a sort of smorgasbord. The practice of applying international law for policy reasons but not as *opinio juris* presented challenges for interpretation.

48. She supported the proposal for a study by the Secretariat. She also thought that States could be approached with questions, but they would need to be carefully framed. She feared, for example, that the Special Rapporteur's proposal in the footnote at the end of the first subparagraph of paragraph 27 of the note to ask for official statements concerning the formation of international customary law might be misinterpreted as asking for their views on customary law itself rather than on its formation. She would also be reluctant to ask States about relevant work being done at national institutes, as in her experience Governments were simply too busy to respond to such requests.

49. She was confident that the Commission could learn from the mistakes made by the International Law Association³⁰⁶ and ICRC³⁰⁷ in their studies. Her last point was that any conclusions drawn up by the Commission should not prejudice future developments regarding the formation of international law.

Cooperation with other bodies (*continued*)*

[Agenda item 12]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

50. The CHAIRPERSON welcomed Mr. Peter Tomka, President of the International Court of Justice, and invited him to address the Commission.

51. Mr. TOMKA (President of the International Court of Justice) said that he was delighted to return to the Commission after 10 years and grateful for the opportunity to continue the long-standing tradition of cooperation and exchange of ideas. In fact, cooperation

and mutual assistance between the two institutions would be a theme of his presentation. In particular, he wished to highlight some recent Court decisions that were based on, or particularly relevant for, the Commission's work.

52. The Court's recent case law confirmed the existence of a well-established trend towards interaction between the two institutions and demonstrated the influence of the Commission's work on the Court's reasoning. That interaction was evident in the judgment of 20 July 2012 delivered by the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. In that case, Belgium had complained of Senegal's conduct and its failure to comply with its obligations under the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Belgium had maintained that Senegal, the country in which Mr. Hissène Habré, the former President of the Republic of Chad, had been living in exile since 1990, had not given effect to Belgium's repeated demands aimed at ensuring that Mr. Habré should be prosecuted in Senegal or extradited to Belgium for acts characterized as crimes of torture. Belgium had considered that Senegal, by failing to prosecute Mr. Habré or to extradite him to Belgium to stand trial, had breached its obligations under article 5, paragraph 2, article 6, paragraph 2, and article 7, paragraph 1, of the Convention.

53. It was not surprising that the law governing the international responsibility of States had played an important role in that case. It had also added to Belgium's submissions in that the latter had considered itself entitled to request a finding of wrongfulness owing to the breaches of the Convention against torture perpetrated by Senegal by virtue of article 42, subparagraph (b) (i), of the Commission's articles on responsibility of States for internationally wrongful acts,³⁰⁸ or at any rate under article 48 of that text.

54. In its judgment, the Court had touched on that aspect when it had addressed issues relating to the admissibility of Belgium's claims. Senegal had objected to the admissibility of those claims and had maintained that Belgium was not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to prosecute Mr. Habré or to extradite him, because none of the alleged victims of the acts attributed to Mr. Habré had been of Belgian nationality at the time when the acts had been committed, a contention that Belgium had not disputed.

55. Belgium, in its application, had requested the Court to adjudge and declare that its claim was admissible and had noted that "[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction" (see paragraph 65 of the judgment). In the oral proceedings, Belgium had claimed to be in a "particular position" since it had availed itself of its right under article 5 of the Convention against torture to exercise its jurisdiction and to request Mr. Habré's extradition (*ibid.*). Belgium's arguments on

³⁰⁶ See footnote 296 above.

³⁰⁷ See footnote 297 above.

* Resumed from the 3146th meeting.

³⁰⁸ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

that score had become even broader when its counsel, at the oral proceedings stage, had declared that “[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform” (*ibid.*).

56. The Court had noted that the divergence of views between the parties on that point raised the issue of Belgium’s standing. In addition, Belgium had based its claims not only on its status as a party to the Convention but also on “the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré” (para. 66). In considering whether being a party to the Convention was sufficient to entitle a State to bring a claim to the Court concerning the cessation of alleged violations by another State party of the latter’s obligations under that instrument, the Court had recalled that the object and purpose of the Convention against torture, as stated in its preamble, was “to make more effective the struggle against torture ... throughout the world”. Consequently, the Court had noted that, by virtue of their shared values, the States parties to the Convention “have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity” (para. 68). In the eyes of the Court, it therefore followed that the State in whose territory an alleged violator of a Convention was present was required to meet its obligations under that Convention. The Court observed as follows:

The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred (para. 68).

57. Drawing on the well-known case concerning *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, the Court had taken the question of common interest one step further:

That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest” in the protection of the rights involved ... These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case (para. 68).

58. In support of its reasoning, the Court had drawn a parallel between the Convention against torture and the Convention on the Prevention and Punishment of the Crime of Genocide, considering that the relevant provisions of the former were similar to those contained in the latter. In that regard, the Court had recalled its advisory opinion of 28 May 1951 on *Reservations to the Convention on Genocide*, in which it had observed that

[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention (p. 12 of the advisory opinion).

59. The Court had clarified that, in practical terms, the existence of that common interest implied that each State party to the Convention against torture was entitled to make a claim concerning the cessation of an alleged

breach by another State party. It had noted that if a special interest was required for that purpose, in many cases no State would be in the position to make such a claim. The Court’s judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* clearly stated that

any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end (para. 69).

The Court had therefore concluded that Belgium, as a State party to the Convention against torture, had standing to invoke the responsibility of Senegal for the alleged breaches of the obligations of Senegal under the Convention and that, in consequence, the claims of Belgium based on article 6, paragraph 2, and article 7, paragraph 1, were admissible. Given that conclusion, there had been no need for the Court to pronounce on whether Belgium also had a special interest that could support its claims.

60. After considering the merits, the Court had emphasized that “in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility” (para. 121). Adopting a perspective that was compatible with the Commission’s work, the Court had also emphasized the continuing nature of Senegal’s breaches of its obligations under the Convention, stating that Senegal was “required to cease this continuing wrongful act in accordance with general international law on the responsibility of States for internationally wrongful acts” (*ibid.*) and was to “take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it [did] not extradite Mr. Habré” (*ibid.*).

61. Another recent judgment, delivered by the Court on 19 June 2012 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, illustrated the importance of the Commission’s work in the area of State responsibility. The judgment on the question of compensation flowed from the judgment of 30 November 2010 on the merits in the same case. In its judgment on the merits of 2012, the Court had held that the Democratic Republic of the Congo had breached certain international obligations by virtue of the fact that Mr. Diallo, a Guinean national, had been detained on two separate occasions for a total of 72 days (para. 12 of the judgment). The Court had concluded that Guinea had failed to demonstrate that Mr. Diallo had been subjected to inhuman or degrading treatment during his detentions (*ibid.*). Additionally, the Court had found that Mr. Diallo had been expelled from the Democratic Republic of the Congo on 31 January 1996 and had received notice of his expulsion on the same day (*ibid.*).

62. In its judgment of 30 November 2010, the Court had said that the Democratic Republic of the Congo was required to pay compensation to Guinea for the injury suffered by Mr. Diallo as a result of the violation by the Congolese State of its obligations under a number of human rights conventions (para. 161). According to the judgment on the merits, the amount of compensation was to be based on the

injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995–1996, including the resulting loss of his personal belongings. Since the parties had failed to reach an agreement on the amount of compensation before the prescribed date, the Court had settled that issue in its judgment of 19 June 2012.

63. In its judgment of 19 June 2012, the Court had reiterated the formulation used in the case concerning the *Factory at Chorzów*, which was also reproduced in the commentary to the draft articles on responsibility of States for internationally wrongful acts,³⁰⁹ asserting that “[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law” (para. 13 of the judgment).

64. In order to assess the general principles governing compensation, particularly as they related to injury resulting from unlawful detention or expulsion, the Court had considered the practice of other international courts, tribunals and commissions, such as the European Court of Human Rights, the Inter-American Court of Human Rights, the Iran–United States Claims Tribunal, the Eritrea–Ethiopia Claims Commission and the United Nations Compensation Commission.

65. At that stage of the proceedings, Guinea had sought compensation under four heads of damage including one head of non-material injury and three heads of material damage: alleged loss of personal property, alleged loss of professional remuneration during detention and after expulsion, and alleged deprivation of potential earnings. In assessing the compensation claimed under the head of non-material damage, the Court had relied on analyses and examples of case law that were consistent with the work of the Commission on the subject of compensation and international responsibility, recognizing that “[n]on-material injury to a person which is cognizable under international law may take various forms” (para. 18).

66. In considering the pertinent and/or aggravating factors that had informed its decision on compensation, the Court had taken an approach consonant with positions held by the Commission and reflected in the commentary to the draft articles on responsibility of States for internationally wrongful acts. Relying on abundant case law from various international courts, the Court had concluded that “[q]uantification of compensation for non-material injury necessarily rests on equitable considerations” (para. 24). Ultimately, the Court had considered that the amount of US\$85,000 would provide appropriate compensation with regard to the non-material injury suffered by Mr. Diallo (para. 25).

67. As to the assessment of compensation to be paid by the Democratic Republic of the Congo for the alleged loss of Mr. Diallo’s personal property, the Court had again relied on the notion of equitable considerations and had looked at the case law of the European Court of Human

Rights and the Inter-American Court of Human Rights. On the basis of the foregoing reasoning, it had awarded the sum of US\$10,000 to Guinea under that head of damage (para. 36).

68. The Court had once again relied on the case law of various international courts to support its conclusion that a claim for income lost as a result of unlawful detention was cognizable as a component of compensation, even if estimation was necessary because the amount of the lost income could not be calculated precisely. Ultimately, however, the Court had held that “Guinea had not proven to the satisfaction of the Court that Mr. Diallo suffered a loss of professional remuneration as a result of his unlawful detentions” (para. 46).

69. With regard to the loss of professional remuneration allegedly suffered by Mr. Diallo in the period following his unlawful expulsion, the Court had been guided by its previous analysis, according to which the Congolese State could not be required to make compensation to Guinea for that head of damage. Invoking, *inter alia*, the Commission’s work and its commentary to draft article 36 of the draft articles on responsibility of States for internationally wrongful acts, the Court had explained as follows:

Guinea’s claim with respect to Mr. Diallo’s post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US\$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative ... Thus, the Court concludes that no compensation can be awarded for Guinea’s claim relating to unpaid remuneration following Mr. Diallo’s expulsion (para. 49).

70. The Court had recently delivered another judgment that illustrated particularly well the interaction between the Court and the Commission. The judgment of 3 February 2012 in the case concerning *Jurisdictional Immunities of the State* had raised two sets of interesting issues: one relating to State responsibility and the other to the Commission’s work in elaborating the draft articles³¹⁰ that provided the basis for the United Nations Convention on Jurisdictional Immunities of States and Their Property.

71. In that case, Germany had claimed that Italy had failed to respect the jurisdictional immunity to which Germany was entitled under international law by allowing civil claims to be brought against Germany in Italian courts seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War. Germany had further requested the Court to find that Italy had violated its jurisdictional immunity by taking measures of constraint against the Villa Vigoni, which was German State property situated in Italian territory and used as a German cultural centre, and by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those that had given rise to the claims brought before Italian courts.

72. In its judgment, the Court had drawn extensively on the Commission’s draft articles on responsibility of States for internationally wrongful acts and the commentary thereto, as well as its work on jurisdictional immunities

³⁰⁹ See the commentary to draft article 36 (Compensation), in particular paragraph (2) and footnote 511, *Yearbook ... 2001*, vol. II (Part Two), p. 99.

³¹⁰ *Yearbook ... 1991*, vol. II (Part Two), para. 28.

of States and their property, in order to determine whether Italy had breached its international obligations regarding jurisdictional immunities of States when its national courts had denied Germany the immunity to which it otherwise would have been entitled. The Court had begun by considering the relevance of the principles governing jurisdictional immunity within the broader framework of the rules of international law.

73. The Court had noted that the parties were “in broad agreement regarding the validity and importance of State immunity as a part of customary international law” (para. 58), but disagreed over the law to be applied. Germany had contended that the law to be applied was that which had determined the scope and extent of State immunity in the period between 1943 and 1945, at the time that the events giving rise to the proceedings in the Italian courts had taken place, while Italy had maintained that the law that had applied at the time the proceedings themselves had occurred should prevail. In addressing those issues, the Court had indicated that, in accordance with the principle stated in article 13 of the Commission’s articles on responsibility of States for internationally wrongful acts, “the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred” (*ibid.*). Since the claim before the Court concerned the actions of the Italian courts, it was the international law in force at the time of those proceedings that the Court had to apply. The Court had also emphasized that the law governing State immunity was essentially procedural in nature (*ibid.*). For those reasons, it had considered that it must examine and apply the law on State immunity as it had existed at the time of the Italian proceedings, rather than that which had existed in the period between 1943 and 1945 (*ibid.*).

74. Subsequently, the Court had had to address the question of whether there was a conflict between a rule, or rules, of *jus cogens* and the rule of customary law that required one State to accord immunity to another. In that instance, the Court had answered the question in the negative. Reiterating the procedural nature of the rules governing State immunity, the Court had concluded that those rules had no bearing on the legality of the acts committed by the German army during the Second World War, which were the acts underlying the proceedings in the Italian courts. It had further stated the following:

That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943–1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility ... For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility (*ibid.*, para. 93).

75. In addressing Germany’s final submissions and the remedies sought, the Court had again expressly relied on the Commission’s work in the area of State responsibility. In its fifth submission, Germany had essentially asked the Court to order Italy to take the steps necessary to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity

should become unenforceable and cease to have effect (para. 137). The Court had upheld Germany’s fifth submission and, in examining the consequences arising from it, had expressly referred to two provisions of the Commission’s articles on responsibility of States for internationally wrongful acts, namely subparagraph (a) of article 30 (Cessation and non-repetition) and article 35 (Restitution) (*ibid.*).

76. The United Nations Convention on Jurisdictional Immunities of States and Their Property, the draft articles of which had been elaborated by the Commission, had informed the Court’s reasoning in its judgment in the *Jurisdictional Immunities of the State* case. The Court had also referred to the significant State practice to be found in the judgments of national courts in the field of jurisdictional immunity. According to the Court, that practice was reflected in the domestic legislation of States, in the claims to immunity asserted by States before foreign courts and in “statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property]” (para. 55).

77. In the opinion of the Court, it was clear from that context that *opinio juris* relating to the rules governing the jurisdictional immunity of the State was reflected, in particular, in the assertion by States claiming immunity that international law accorded them a right to such immunity, in the acknowledgement by States granting immunity that international law imposed upon them an obligation to do so and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States (*ibid.*).

78. The Court had relied on conclusions drawn by the Commission more than 30 years previously in order to point to the prevalence of the relevant rule of customary international law. In its judgment, the Court referred to the conclusion reached by the Commission in 1980 that the rule of State immunity had been adopted as a general rule of customary international law solidly rooted in the current practice of States.³¹¹ Moreover, according to the Court:

That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity (para. 56).

79. Later in its judgment, the Court had turned to the question of whether national legislation that provided for a “territorial tort exception” expressly distinguished between *acta jure gestionis* and *acta jure imperii*, a question to which it had subsequently given a negative response. The Court had observed that the notion that State immunity did not extend to civil proceedings in respect of acts committed on the territory of the forum State that caused death, personal injury or damage to property had originated in cases concerning road traffic accidents and other insurable risks. The Court had further

³¹¹ *Yearbook ... 1980*, vol. II (Part Two), p. 142, paragraph (26) of the commentary to draft article 6 of the draft articles on jurisdictional immunities of States and their property.

noted that, among others, article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property also did not distinguish between *acta jure gestionis* and *acta jure imperii* in that context. It should be recalled that article 12 rendered the jurisdictional immunity of the State inapplicable

in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission (quoted in para. 69 of the judgment).

80. With that in mind, the Court had stated, “The International Law Commission’s commentary on the text of what became Article 12 of the United Nations Convention³¹² makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis*” (para. 64). After taking note of the views expressed by some States during the drafting of the Convention, the Court had considered that it was not called upon to resolve the question of whether there was in customary international law a tort exception to State immunity applicable to *acta jure imperii* in general, since the issue before it was “confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict” (para. 65).

81. As part of that analysis, the Court had considered that, although article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property—and the Convention as a whole—did not expressly exclude the acts of armed forces from its scope, the Commission’s commentary to the text of draft article 12 stated that the provision did not apply to situations involving armed conflicts.³¹³ That understanding had also been reiterated by the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property when reporting³¹⁴ to the Sixth Committee.³¹⁵ In addition, that understanding had not been the subject of any protest by States and had been reflected in the declarations made on ratification of the Convention by some States. The Court had thus endorsed that understanding of the rules governing jurisdictional immunity.

82. The Court had also noted that the maintenance of immunity was established in national jurisprudence in such circumstances, meaning that the State was entitled to invoke immunity “for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State” (para. 77 of the judgment). Referring to *opinio juris* that supported such an interpretation, the Court had noted that

³¹² *Yearbook ... 1991*, vol. II (Part Two), p. 45, paragraph (8) of the commentary to draft article 12.

³¹³ *Ibid.*, p. 46, paragraph (10) of the commentary.

³¹⁴ A/59/22.

³¹⁵ *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 13th meeting (A/C.6/59/SR.13), para. 36.

[t]he almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases (*ibid.*).

83. While considering the scope of jurisdictional immunity, the Court had also had to consider Italy’s claim that a limitation of that rule might follow from the gravity of the breach or the preemptory character of the rule breached, a possibility not provided for in the above-mentioned Convention or other relevant instruments, according to the Court. In that regard, the Court had noted that the absence of any such provision from the Convention was particularly significant.

84. The Court had further pointed out that the Working Group established by the Commission in 1999 in order to consider various developments in practice highlighted by the Sixth Committee had stated in its report that the issue of claims in the event of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens* should not be ignored.³¹⁶ However, it had not recommended any amendment to the text of the articles elaborated by the Commission. The matter had subsequently been considered by the Working Group of the Sixth Committee, which had decided that it was not yet ready for a codification exercise. During subsequent debates in the Sixth Committee, no State had raised any objection to that decision. In fact, the Court had concluded that such a history indicated that, at the time of adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2004, States had not considered that customary international law limited immunity in the manner suggested by Italy.

85. In 2011, the Court had rendered two substantive decisions. The first of those, the judgment of 5 December 2011 in the case concerning *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* raised some pertinent questions with respect to the work of the Commission. In that case, the former Yugoslav Republic of Macedonia (the “Applicant”) had claimed that Greece (the “Respondent”) had breached article 11, paragraph 1, of the 1995 Interim Accord³¹⁷ by objecting to the admission of the Applicant to the North Atlantic Treaty Organization (NATO). That provision reserved the right of Greece to object to any membership referred to in the provision if and to the extent that the former Yugoslav Republic of Macedonia was to be referred to in such organization or institution differently than in paragraph 2 of Security Council resolution 817 (1993).

86. The justifications advanced by the Respondent in response to the allegation that it had breached the 1995 Interim Accord contained references to aspects of the law of State responsibility. The Respondent had argued that any failure on its part to comply with its obligations under the Interim Accord could be justified as a countermeasure

³¹⁶ *Yearbook ... 1999*, vol. II (Part Two), annex, p. 172, para. 3.

³¹⁷ Interim Accord (New York, 13 September 1995), United Nations, *Treaty Series*, vol. 1891, No. 32193, p. 3.

pursuant to the law of State responsibility. The Respondent had asserted that the violations of the Applicant were serious and that its own responses were consistent with the conditions reflected in the articles on responsibility of States for internationally wrongful acts, which it described as requiring that countermeasures should be proportionate, should be taken for the purpose of achieving cessation of the wrongful act and should be confined to the temporary non-performance of the Respondent's obligation not to object. The Respondent had stated that it had repeatedly informed the Applicant of its positions.

87. For its part, the Applicant had called attention to the requirements set forth in the articles on State responsibility that countermeasures must be taken in response to a breach by the other State, must be proportionate to those breaches and must be taken only after notice to the other State. In the view of the Applicant, none of those requirements had been met. The Applicant was further of the view that the requirements for the imposition of countermeasures contained in the articles on State responsibility reflected general international law.

88. The Respondent had relied, in addition, on the *exceptio non adimpleti contractus*—which it had described as a general principle of international law—in support of its assertion that a State suffering breaches of treaty obligations had the right to suspend the execution of corresponding obligations in respect of the State at fault. In particular, the Respondent had argued that there was a synallagmatic relationship between its own obligation not to object under article 11, paragraph 1, of the Interim Accord and the obligations of the Applicant under articles 5, 6, 7 and 11 of the Accord. In short, the Respondent had considered that the breach on the part of the Applicant of its treaty commitments precluded the wrongfulness of any suspension by the Respondent of the execution of its obligations in response to that breach. Furthermore, the Respondent had contended that the conditions governing the *exceptio* were much less rigid than those relating to the suspension of a treaty or precluding wrongfulness by way of countermeasures, because exercise of the *exceptio* was not subject to any procedural requirements.

89. For its part, the Applicant had asserted that the allegedly customary status of the *exceptio* had not been demonstrated by the Respondent. It had further observed that the law governing State responsibility did not accept the *exceptio* as justification for suspending the execution of international obligations. It had argued instead that article 60 of the 1969 Vienna Convention should be applied in response to material breaches of treaty commitments. Furthermore, the Applicant had challenged the Respondent's argument aimed at drawing attention to a purported synallagmatic relationship between the obligations set forth in the relevant provisions of the Interim Accord.

90. In the end, the Court had found that the Respondent had failed to demonstrate that the Applicant had breached the Interim Accord, except in relation to the use of the symbol prohibited by article 7, paragraph 2. The Court had further observed that the Respondent had failed to show a connection between the use of the symbol in 2004 by the Applicant and the Respondent's objection to the Applicant's admission to NATO in 2008. Consequently,

the Court had stated that the arguments put forward by the Respondent did not indicate that the Respondent objected to the Applicant's admission to NATO "on the basis of any belief that the *exceptio* precluded the wrongfulness of its objection" (para. 161). In short, the Court had considered that the Respondent had failed to observe the conditions of application of the *exceptio*, as it had set them out in its own pleadings. Accordingly, the Court did not consider that it was called upon to determine whether the *exceptio* formed part of contemporary international law.

91. The last substantive decision worthy of note, although it did not touch upon the issues currently under consideration by the Commission, was the advisory opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. In the advisory opinion, the Court had felt it necessary to highlight a certain inequality in the process for reviewing judgments rendered by the ILO Administrative Tribunal, in the sense that only the Organization could seek the remedy and not the individual concerned. Although the United Nations had reformed its justice system, ILO had not. However, the time was ripe to do so, particularly since the Administrative Tribunal served as the tribunal not only for ILO, but also for many other organizations, including the Permanent Court of Arbitration.

92. That completed his review of the outcome of the Court's main judicial activities over the last 10 months. In their long history, the Court and the Commission, as the principal judicial and legal organs of the United Nations, respectively, had been mutually influential. While the Commission had studied carefully the judgments of the Permanent Court of International Justice and the International Court of Justice, with special rapporteurs taking them into account when drafting various proposals, the Court had not overlooked the work of the Commission, not only the conventions based on its codification efforts, but also its texts that had not become conventions, such as the articles on responsibility of States for internationally wrongful acts.

93. There was also the personal aspect of the relationship between the Court and the Commission, since of the Court's 103 judges to date, 34 had been members of the Commission, and 9 of those had become President of the Court. He expressed the hope that such fruitful cooperation, exchange of views and mutual influence would continue and flourish in the future.

94. The CHAIRPERSON thanked Mr. Tomka for his statement and invited questions and comments from members of the Commission.

95. Mr. KITTICHAISAREE, speaking as Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), said that the Group had been anxiously awaiting the judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. However, it appeared to be quite narrow in scope. He wished to ask Mr. Tomka, as a former member of the Commission, whether he considered that the Commission could make a meaningful contribution

in the area of the obligation to extradite or prosecute through the codification and progressive development of customary international law or treaty practice.

96. In his separate opinion on the case, Judge Abraham seemed to have set an unrealistically high threshold for evidence of *opinio juris*. In its recent discussion of the topic “Formation and evidence of customary international law”, the Commission had observed that there were now nearly 200 States, which made it more difficult to determine *opinio juris*. In his separate opinion, Judge Abraham seemed to assert that some States claimed universal jurisdiction over certain crimes of their own volition and on the basis of a sovereign decision, without considering themselves bound to do so. With all due respect, that was not a very realistic assertion.

97. Sir Michael WOOD said that he had two queries relating to procedural matters. First, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, as Judge Abraham had noted in his separate opinion, an exceptional number of questions had been put to the parties. He asked whether there was an increasing trend for the Court to ask questions; that would not be an unwelcome development, since questions could be very helpful both for the Court and the parties concerned in framing the case.

98. Second, he observed that quite often correspondence of a substantive nature was not posted on the Court’s website, making it somewhat difficult to follow the Court’s decisions. One example included the letters sent in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* as written responses to questions put at the provisional measures and merits stages. It might be useful if such information could be posted on the website in future.

99. Mr. PETRIČ said that his question concerned the legal validity of the Court’s advisory opinions on important issues, such as its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Although such opinions were based on the same rules of law, and were adopted following similar procedures by the same persons, he wondered what their real impact was compared with judgments. As a judge of a national constitutional court, he would find it difficult to deal one day with an advisory opinion that might not be taken seriously and the following day with a judgment that was binding.

100. Mr. TOMKA (President of the International Court of Justice), in response to Mr. Kittichaisaree, said that it was for the Commission to decide whether it could draw inspiration for its future work from the judgment in *Questions relating to the Obligation to Prosecute or Extradite*. The Court was not in such a comfortable position as was the Commission: it could not select topics, but had to consider the cases submitted to it. Moreover, it could not engage in theoretical debates; it had to decide specific cases and consider only those issues relevant to its decision. In its judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the Court had interpreted the Convention against torture, and in particular the obligations under article 6, paragraph 2,

and article 7, paragraph 1. The Court had found that the principal obligation under article 7 was to submit the case for prosecution and that extradition was not strictly speaking an obligation but an option available to the State that, if chosen, relieved it of its obligation to prosecute.

101. It was not appropriate for him to comment on the views of his colleagues: some were prolific writers, while others expressed their views only when necessary. He would therefore prefer to refrain from commenting on the separate opinion of Judge Abraham. Opinions and judgments should speak for themselves. His role as President of the Court was simply to remind colleagues that in their opinions they should not disclose the confidential nature of deliberations, and that the purpose of a separate opinion was not to criticize the judgment, but to explain why the judge concerned could not endorse the interpretation or the conclusions of the Court. It was for the reader to draw his or her own conclusions as to whether the Court’s conclusion or the separate opinion provided a more convincing analysis of the situation and the rules in question.

102. Replying to Sir Michael, he confirmed that there was an increasing trend for members of the Court to ask questions of the parties. The Court’s policy regarding questions from individual members was that the judge in question informed colleagues of his or her intention to put a question, and they could offer advice on the content of the question. However, for questions put on behalf of the Court, the majority of members had to agree on the content beforehand.

103. When the Court’s website had originally been set up, only its judgments had been posted; subsequently the pleadings of the parties had been added, but without their annexes, namely the presentation of the facts and legal arguments. Currently, a debate was under way on whether to post the written pleadings of the parties. As to Sir Michael’s specific suggestion, he recalled that selected correspondence was, in fact, published in bound volumes containing the written pleadings and transcripts of all the arguments, although not until some time after the Court handed down its decisions.

104. Turning to the question by Mr. Petrič, he said that some advisory opinions were followed by the organs that had specifically requested them, which was indeed their intended purpose. Generally speaking, the Court acceded to requests from the General Assembly for advisory opinions. Most judges considered that by issuing advisory opinions the Court was making its contribution to the work of the United Nations. However, personally speaking, he was not always convinced that there was a real need on the part of the requesting organ for such opinions: it was often simply a question of a majority of Member States prevailing in the voting process that resulted in the adoption of the relevant General Assembly resolution. For example, in 2010, when the Court had issued an advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, five judges had taken the view that the Court should have exercised its discretion and declined the request for an advisory opinion. They had considered that the question was not of relevance to the ongoing work of the General Assembly, as had been demonstrated

by resolution 64/298 of 9 September 2010: although the draft resolution had provided for an item on the follow-up to the advisory opinion to be placed on the agenda of the General Assembly, following heated negotiations and a change in the sponsorship of the resolution, the paragraph containing the decision to include the item had been deleted.³¹⁸

105. Mr. FORTEAU said that he had two questions concerning how the Court had dealt in its jurisprudence with the articles on responsibility of States for internationally wrongful acts. First, in its recent judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the Court had referred only to its jurisprudence of 1951 and 1970 on the question of Belgium's standing, without reference to articles 42 and 48 of the articles on responsibility of States for internationally wrongful acts. He wondered whether the Court had not considered it necessary to include such a reference or whether it had doubts as to the customary status of those two provisions.

106. Second, concerning the obligation to cease wrongful acts, he noted a certain inconsistency in the jurisprudence of the Court. In its 2009 judgment in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court had based the obligation to cease wrongful acts not on the law of responsibility, but on the need to comply with the judgments of the Court, and had indicated that it would not mention that obligation in the operative part of its judgment, unless it was appropriate and special circumstances so required. However, in its judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the Court had based the obligation to cease wrongful acts on State responsibility and had mentioned that obligation in the operative part of the judgment, without explaining under what circumstances it was required. He therefore wondered whether the precedent established in 2009 was no longer valid and the obligation to cease wrongful acts would systematically be mentioned in judgments on the basis of State responsibility.

107. Mr. HMOUD asked, first, how the Court coped with its workload from the logistical, legal and financial standpoint and whether the General Assembly provided for all its needs. Second, he observed that while the Commission was currently considering the immunity of State officials from foreign criminal jurisdiction, the Court's judgment in *Jurisdictional Immunities of the State* had considered the issue of the immunity of States from the standpoint of civil but not criminal jurisdiction. He would appreciate clarification regarding the Court's reasoning in that case and whether it considered that those two issues were related.

108. Mr. McRAE said that, at one time, concerns had been expressed about the proliferation of international tribunals and the potential problems of overlapping jurisdiction they might pose for the International Court of Justice. Although the former President of the Court, Dame Rosalyn Higgins, had said during her last visit to the Commission that it was no longer an issue, he wondered whether the situation might have changed in the light of

the substantive decision handed down recently by the International Tribunal for the Law of the Sea (ITLOS).

109. Mr. TOMKA (President of the International Court of Justice) said, in response to Mr. Forteau's questions, that it was not always necessary to refer specifically to the number of the article but rather to its substance. A careful reading of the judgment in *Questions relating to the Obligation to Prosecute or Extradite* showed that the Court's views closely reflected the content of article 48 of the articles on responsibility of States for internationally wrongful acts. It was generally helpful to have former members of the Commission as members of the Court, since they tended to draw more on the work of the Commission, although that was not always the case. The one judge who had argued vehemently that article 48 of the articles on responsibility of States for internationally wrongful acts did not reflect customary international law was a former member of the Commission. The Court did not always consider all possible legal issues, but only what was strictly necessary for deciding the case, as when the issue of the standing of Belgium had been raised.

110. Concerning the obligation to cease wrongful acts, the Court did tend to rely on the Commission's articles on responsibility of States for internationally wrongful acts. If the 2009 judgment in the *Dispute regarding Navigational and Related Rights* was not specific enough on that point, one explanation might be the composition of the drafting committee. In any event, that was the only case in which he had not fully participated owing to health problems.

111. In reply to Mr. Hmoud, he said that the Court was kept busy: there were currently 11 cases on the docket, and it had taken five substantive decisions in less than one year. Hearings for two cases had already taken place in 2012, and more were scheduled for later in the year and in 2013. The workload of the Court was increasing, and it simply had to work harder to prevent States from waiting too long to have their cases heard.

112. The case concerning *Jurisdictional Immunities of the State* was not about State or individual criminal responsibility but about providing compensation to victims. It was in that context that the Court had examined the jurisdictional immunity of the State and not by distinguishing criminal jurisdiction from civil jurisdiction. On the other hand, the Court had made a point of mentioning that if there were any outstanding issues in terms of compensation to the victims, they should be resolved through bilateral negotiations.

113. In response to Mr. McRae, he said that, personally, he saw no reason to fear the proliferation of international tribunals. As was borne out by recent developments, ITLOS had not departed from the established jurisprudence of the Court in matters of maritime delimitation in its judgment in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*. In fact, it had followed very closely the jurisprudence of the Court, including by referring to its judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. Meanwhile, in the Court's pending

³¹⁸ Document A/64/L.65, limited distribution.

case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the parties had referred to the recent judgment handed down by ITLOS and the Court was studying that decision.

114. The CHAIRPERSON thanked Mr. Tomka, on behalf of the Commission, for his interesting statement and the wealth of information provided, including in response to the questions raised.

The meeting rose at 1.10 p.m.

3149th MEETING

Wednesday, 25 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)

[Agenda item 12]

STATEMENT BY THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Stewart, of the Inter-American Juridical Committee, and invited him to address the Commission.

2. Mr. STEWART (Inter-American Juridical Committee) said that he was pleased to report on the recent activities of the Inter-American Juridical Committee. Given that Commission members had been provided with a very detailed annual report of the Committee's activities for 2011,³¹⁹ he would limit his remarks to a few of the most important issues addressed by the Committee that year.

3. As set forth in the 1948 Charter of the Organization of American States (OAS), the Inter-American Juridical Committee was the principal advisory body of OAS. Composed of 11 members who were elected by the OAS General Assembly as independent experts, it provided advice or opinions on specific issues of regional or global concern, worked on the harmonization of laws among the OAS member States, prepared draft conventions or other instruments, conducted studies of legal problems related to regional integration, proposed conferences and meetings on international legal matters and cooperated with other

entities engaged in the development or codification of international law.

4. The Committee had prepared many notable instruments, including the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica", the Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance (1971) and the Inter-American Convention on extradition (1981). More recently, it had helped to prepare the Inter-American Convention on the Law Applicable to International Contracts (1994), the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999), the Inter-American Convention against Corruption (1996) and the Inter-American Democratic Charter (2001), all of which reflected a shared commitment to democracy, which was of great importance in the region. Since 1974, the Committee had been organizing a highly regarded annual course for young lawyers from OAS member States that made a substantial contribution to the promotion and development of international law throughout the region. The theme of the 2011 course had been "International law and democracy".

5. In contrast with the Commission, the Committee had always emphasized issues of private international law in its work, as had its predecessor, the Permanent Commission of Jurisconsults. In keeping with that aspect of its work, the Committee organized Inter-American Specialized Conferences on Private Law, known as "CIDIP conferences", which dealt with such varied topics as the choice of law in contractual matters, the enforcement of arbitral awards, proof of foreign law, international recovery of child support, extracontractual civil liability, electronic registries for the implementation of the Model Inter-American Law on Secured Transactions and international consumer protection. Through the years, the CIDIP conferences had resulted in the adoption of 26 instruments, which had helped to create an effective legal framework for judicial cooperation and added legal certainty to regional cross-border transactions in civil, family, commercial and procedural matters.

6. The recent work undertaken by the Committee covered a wide range of topics, six of which were particularly important and might be of interest to the Commission. First, the Committee had prepared a study of ways to strengthen the regional human rights system, which was a critical area in which it had long played an active role by providing advice for the preparation of a regional instrument on new forms of discrimination. The Committee's report contained a number of recommendations regarding the powers and responsibilities of the system's principal organs, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In it, the Committee had also formulated a number of comments and suggestions relating to the friendly settlement of cases and the issuance of precautionary measures. It had also identified new measures that the Court and Commission might usefully take in promoting human rights and had proposed mechanisms for the effective follow-up and enforcement of judgments. Lastly, the Committee concluded in that study that it was vital for more States to

³¹⁹ Document OEA/Ser.G-CP/doc.4695/12; available from www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2011.ENG.pdf.

ratify the inter-American human rights instruments, and it included various proposals for financing the Court and the Commission.

7. Second, the Committee had prepared a study on the freedom of thought and expression. More specifically, it had been asked by the OAS General Assembly to study the importance of guaranteeing the freedom of thought and expression, in accordance with applicable principles of international law, in view of the fact that the free and independent media carried out their activities guided by ethical standards that could in no circumstances be imposed by the State. A particular focus of the concerns underlying the General Assembly's request was the growing utilization of the Internet to convey information and the threat of restrictions on the free flow of information. After extensive discussions, the Committee had adopted a report that provided an analysis of article 13 of the American Convention on Human Rights, its relationship to the strengthening of democracy, the limitations on the freedom of thought and expression and the penalties to be applied for denial of that freedom. The report stressed that the freedom of thought and expression was an essential element of democracy and that freedom of the press offered one of the best ways to know and to judge the ideas, attitudes and accomplishments of political leaders. It emphasized, however, as was reflected in the decisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, that the freedom of expression was not absolute and had to be balanced by other recognized rights, such as the right to honour. It also stressed that States must never engage in prior censorship and suggested some guiding criteria for respecting the freedom of expression, stressing that good journalism always reflected a commitment to the truth, independence before all public, political and economic powers, and the capacity to acknowledge one's mistakes. According to the report, the best way to guarantee the freedom of expression was the ethical practice of good journalism. Such freedom applied to the Internet in the same way as to all other media.

8. Third, the Committee had prepared a report on citizen participation in a democratic system, in which it described 13 mechanisms of direct citizen participation that had been established in various countries in the region. While recognizing the importance of those mechanisms, the report drew attention to some of their limitations and offered suggestions for ensuring respect for the constitutional order and citizens' rights. The report emphasized that the distinction between "representative democracy" and "participatory democracy" could be misleading. Representative democracy did not imply the rejection of citizen participation, but on the contrary invited citizens to take an active part in the democratic decision-making process. The mechanisms of direct participation were not substitutes for the institutions of representative democracy but rather strengthened and invigorated them.

9. Fourth, the Committee had undertaken a comparative analysis of the principal legal instruments of the inter-American system related to peace, security and cooperation. Although the region had enjoyed more than 50 years of relative stability, the maintenance of regional peace and security remained one of the principal goals of

the Organization, which gave special importance to the principle of non-intervention and the peaceful resolution of disputes. In its report, the Committee had taken stock of the security situation from a multidimensional perspective and had addressed new threats, such as terrorism; transnational organized crime; trafficking in migrants, drugs and small arms; climate change; and cybercrime. It had concluded by emphasizing the need to adopt new tools and innovative mechanisms that took into account the new realities in the region.

10. Fifth, over the past several years, the Committee had focused particular attention on issues related to the rights to access public information, to privacy and to the protection of personal data. Those rights were necessary for a healthy democratic system and for ensuring respect for human rights in the digital age. The Committee had helped to draft a model law on access to public information and its accompanying implementation guide, both of which had been adopted in 2010. In 2012, it had adopted a proposed statement of principles for privacy and personal data protection in the Americas. Globalization and the digital revolution posed unique challenges to traditional concepts of privacy. Addressing those challenges involved striking the proper balance between contending interests and principles. Hence, the right to privacy, the freedoms of speech, opinion and expression, and the free flow of information across borders must be balanced with the need for security of every State. Taking into account the work of other international organizations and the initiatives of OAS member States, the Committee had crafted a statement of 12 principles for privacy and personal data protection that could guide further work in that area by member States. The principles included transparency, consent, confidentiality and, most importantly, accountability. Parameters had been established for access to and correction of information, handling of sensitive information, responsibility of persons or entities in charge of managing the information, cross-border use of information and publicizing exceptions. Those principles provided a sound basis on which member States could frame their domestic approaches and adopt legislation.

11. Sixth, the Committee had taken up a topic that fell clearly within the sphere of private international law; it concerned a matter of considerable importance to economic development in the Americas, where the cost and length of time needed to complete the formalities of incorporation posed serious obstacles to the creation of new businesses. The past decade had seen the emergence in various countries around the world of new forms of hybrid corporate organizations, which facilitated the creation of microenterprises, as well as small and medium-sized enterprises. Taking note of an initiative by the Government of Colombia to encourage the use of that new form of business and of the work of Mr. Francisco Reyes Villamizar, the Committee had endorsed a proposed model law on simplified stock companies. Its aim was to provide shareholders with limited liability, except when they used the corporate veil in order to perpetrate acts of fraud or abuse. The proposed model also provided protection for third parties, along with effective and inexpensive oversight by external auditors and fairly simple rules for liquidation and dissolution.

12. Over the past year, the Committee had also adopted a guide to principles of access to justice in the Americas, which set out innovative ways to ensure the independence of the judiciary and respect for the rights of all citizens, in view of the increased demand for justice and the inadequate resources to handle it. The guide contained proposals on the training and selection of judges, modernization and independence of the judicial system, ensuring the effectiveness of judicial remedies, guaranteeing equal access to justice in all spheres, alternative judicial mechanisms, attention to vulnerable groups and recognition of multiculturalism.

13. In 2011, the Committee had also adopted a guide of principles regarding cultural diversity in the development of international law, the aim of which was to facilitate the incorporation of cultural diversity into domestic legal systems and to ensure its constitutional and legal recognition. The guide invited OAS member States to preserve the linguistic heritage of the region, restore areas destroyed by natural disasters, create institutions and mechanisms intended to protect cultural heritage and take cultural diversity into account in regional integration processes. The guide also defined the role of civil society, non-governmental organizations and the private sector in the promotion of diversity. Lastly, the Committee had also adopted a resolution on the relationship between asylum and refugee status, which urged States to ensure that the conditions for acquiring refugee status in domestic law were properly accessible and consistent with the relevant principles of international law.

14. Five new items had been included in the agenda of the eighty-first session of the Committee. The first concerned the preparation of a guide for regulating the use of force and the protection of people in situations of internal violence that did not qualify as armed conflict. In several countries of the region, safety and security were seriously threatened by criminal organizations and politically motivated mass demonstrations. The aim of that effort was to elaborate a practical legal framework for responding to domestic violence in situations that did not qualify as conflicts and for enabling law enforcement authorities to maintain public order and protect themselves, while at the same time respecting human rights. At its forthcoming session, the Committee would also prepare a study on human rights, sexual orientation and gender identity. The Committee's approach to the study would likely be from the standpoint of non-discrimination in order to identify the relevant legal principles. The Committee would also consider the preparation of model legislation on the protection of cultural property in the event of armed conflict. At the direction of the OAS General Assembly, the Committee had been working for several years on ways to promote respect for international humanitarian law in the hemisphere. The model legislation would help States parties to the relevant international instruments—notably, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols—to comply with their obligations and would assist States that had not ratified those instruments to adopt appropriate protective legislation. At that same session, the Committee would begin drafting general guidelines for border integration, with a view to facilitating cross-border cooperation

in various situations in the hemisphere. Lastly, the Committee would begin considering possibilities for new initiatives in the field of private international law, which could include, for example, international commercial and investment arbitration, immunities, and the application of international law by domestic courts.

15. The brief overview of the Committee's work he had just given illustrated the wide range of topics that were considered, even though these obviously focused on the main problems faced by OAS member States. As stated previously, the Committee's work was not confined to traditional topics of public international law. Given that it was called on to examine new challenges that arose daily in the context of transborder cooperation, the Committee was clearly inclined to concentrate on practical topics, such as consumer protection, access to public information, the right to asylum and the struggle against contemporary forms of discrimination.

16. It was well known that international law no longer governed only relations between States or international organizations and that the concept of public order at the international level must be appreciated in a much broader context. It must be concerned with a wide range of international activities, including those undertaken by non-State actors—whether individuals or groups of individuals—ranging from trade, cultural and family matters, and even criminal activity, to consumer and environmental protection and the settlement of private civil and commercial disputes. In fact, it was difficult to think of an economic, social or cultural activity that did not have an international dimension and that did not, in one way or another, give rise to an international legal issue. The rapid advances in technology, communication and commerce posed unique challenges for the international legal system. Threats to international peace and security no longer came only from nation States but had an increasingly multidimensional character that transcended national boundaries and demanded extraordinary collective efforts. The process of development and efforts to eradicate poverty involved closely interrelated aspects of economic, social and cultural rights that must be carefully considered. Lastly, the protection and promotion of internationally recognized human rights were essential elements for building a democratic order.

17. In all of those areas, the traditional distinction between international and domestic law, and between public and private law, had been eroding. As a result, in carrying out its mandate, the Committee had taken a broad view, addressing the problems and issues of greatest relevance to the Organization and in respect of which it could make the most significant and positive contributions. That said, at times, the pace of the Committee's work and the breadth of its agenda seemed quite daunting, and it would be gratifying for the Committee to have more time and resources to consider issues in greater depth and detail. As a former practitioner and government lawyer turned scholar, he had come to value the opportunity for thoughtful reflection on complicated problems. For the Committee, the continual challenge was to strike the proper balance between study and analysis of the issues, on the one hand, and providing practical guidance on quickly evolving problems, on the other.

18. In conclusion, he wished to thank the Commission for having afforded him the opportunity to present the work of the Inter-American Juridical Committee. The Committee attached considerable importance to strengthening the dialogue between itself and the International Law Commission and would be delighted to receive a representative of the Commission at the forthcoming regular session of the Committee to be held in Rio de Janeiro, Brazil, as well as at the annual course on international law to be held concurrently with it. Perhaps the two bodies might also discover other ways in which they could work together.

19. The CHAIRPERSON invited the members of the Commission to put questions to Mr. Stewart.

20. Mr. VALENCIA-OSPINA said that he had been invited several times to lecture at the annual course on international law, which was held in Rio de Janeiro under the auspices of the OAS Department of International Law. He could attest to the importance attached in the Americas to the lectures, which were generally published in a separate volume each year. Relations between the Committee and the Commission had been strengthened through personal ties, as evidenced by the fact that several former members of the Commission, such as Mr. Baena Soares and Mr. Herdocia Sacasa, had been members of the Committee. The Committee, in its earlier form, had preceded the Commission, inasmuch as the activities of the codification and progressive development of international law had been included among the objectives of OAS since the 1930s, even though the Organization as such had not yet been constituted, its Charter not having been signed until 1948. In any case, many of the topics that the Committee had considered and the methods that it had adopted had subsequently been taken up by the Commission.

21. The inter-American contribution to the development of public and private international law was no longer to be proved, but, without reiterating the themes that were already familiar to members, he wished to recognize the ongoing pioneering work of the Committee. Mr. Stewart had successfully summed up the essence of the Committee's efforts to codify and progressively develop international law: although the Committee's work focused on areas of interest to the region, it was nevertheless universal in scope, and the Commission could usefully follow the Committee's example. As Mr. Stewart had indicated, the Committee no longer confined itself to traditional topics of international law, its aim being to understand the current realities of society and find legal solutions to the interdependent problems to which they gave rise. It therefore dealt with topics that transcended borders and could be of universal interest, despite being framed in regional terms. Although the International Law Commission had a universal calling, it appeared, on the contrary, still to be very attached to the idea that the process of the codification and progressive development of international law must deal chiefly, if not exclusively, with traditional subjects of international law. To some extent, the Commission gave the impression that it had become a body that continued to seek all possible angles for codifying and developing what the 1969 Vienna Convention had already completed and one that approached topics that were somewhat innovative with a degree of apprehension. Perhaps in its future work, the

Commission could find inspiration in some of the topics on the Committee's agenda.

22. As to the promotion of democracy, a subject that was dear to the hearts of all Latin Americans, Mr. Stewart had said that there was no link between citizens' participation in democracy and the regrettably frequent tendency in Latin America of some leaders to remain in power through constitutional reforms adopted by parliament or by referendum. He would appreciate clarification of the Committee's views on that matter.

23. Mr. HASSOUNA, referring to the relationship between the Inter-American Juridical Committee and the International Law Commission, said Mr. Stewart had noted that the Committee's mandate and interests differed from those of the Commission in that the Committee dealt primarily with topics of interest in the Americas. He had also noted that the Committee would be open to furthering its relations with the Commission, as evidenced by its invitation for a representative of the Commission to attend the Committee's forthcoming regular session. He wished to know whether that meant that the Committee might take a look at the topics on the Commission's agenda and make observations that could enrich the Commission's debates on them. He also wished to know whether the Committee, which, to a certain extent represented the inter-American legal system, had relations or cooperated with other regional legal bodies, such as the European legal institutions, AALCO or AUCIL, from which the Commission had recently welcomed a delegation. If that was the case, he asked whether it had any plans to enhance that cooperation for the mutual benefit of the organizations, since such an exchange of experiences and knowledge would undoubtedly be useful to them all.

24. Mr. STEWART (Inter-American Juridical Committee) said he welcomed the fact that the Commission was contemplating the possibility of holding future consultations with the Committee, and he would inform his colleagues of that development. The two bodies obviously had several features in common: both had a mandate to promote the progressive development of international law, even if they had differing approaches and priorities, inasmuch as the Committee's work was of a more practical and immediate nature. Given that cooperation between the two bodies could be mutually beneficial, it would be worthwhile exploring what forms such cooperation might take in practice.

25. The Committee had not yet begun to cooperate with other regional legal bodies, even though it kept up with new developments on the African continent and in Europe, for example. Nonetheless, Mr. Hassouna's suggestion was very interesting and would be given due consideration. With regard to Mr. Valencia-Ospina's question concerning the relationship between participative democracy and the tendency of certain regimes to maintain power by questionable means, the Committee had been called upon to examine that problem by the OAS General Assembly. It had taken care not to give its opinion on the situation in relation to a particular country and to refrain from declaring one form of democracy to be preferable or better than another. That said, it would be a mistake to claim that participative democracy was an adequate substitute

for representative democracy when it meant that citizens did not have a chance to express their position with regard to those in power but only to participate through other forms of involvement in government. Regimes that attempted to perpetuate their role in power while claiming to be democratic were not actually democracies, since, irrespective of the particular form it took, democracy presupposed that citizens exercised their sovereignty. Lastly, the Committee did not have the opportunity to address issues of public international law very often, but it followed the Commission's work closely and would be happy to contribute to it in one way or another.

26. Mr. NIEHAUS thanked Mr. Stewart for his exhaustive and very thought-provoking report. He asked for clarification of the role played by the Inter-American Institute of Human Rights in the inter-American system for the protection of human rights and how the Institute coordinated its work with that of other organs, such as the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. He also wished to know whether the Institute had already addressed—or was planning to address—the jurisdictional issue that had arisen in the hemisphere, namely that certain regional bodies, such as the Central American Court of Justice, were exceeding their authority and attempting to impose their decisions on countries that were not members of the Central American system.

27. Mr. GÓMEZ ROBLEDÓ said that the Inter-American Juridical Committee played an important role because it provided legal services not only to the Organization but also to individual member States. In 2013, a special session of the OAS General Assembly would be devoted to strengthening the inter-American human rights system. In conjunction with the intergovernmental preparatory work under way at OAS headquarters, the Committee had drafted a report that had been very favourably received by OAS member States and that would no doubt help them to take complex decisions in that area. He recalled that the Committee issued advisory opinions, which could allow for the friendly settlement of disputes, as had occurred in the famous case in the 1990s involving Mexico and the United States of America.³²⁰ He also recalled the important role of the model legislation prepared by the Committee in various fields of private and public international law, especially given the fact that most legal systems in the Americas were dualist in nature. Lastly, he noted that the Committee sometimes met in locations other than at headquarters and suggested that the Commission could perhaps follow its example.

28. Mr. HMOUD, noting that the Inter-American Juridical Committee was one of the most active legal organizations in the region, asked whether there was a risk that human rights protection would be lowered in the context of efforts to combat illegal armed groups involved in criminal activities. He also asked whether the guide that the Committee planned to prepare would serve to strengthen human rights protection, given that such situations of violence did not qualify as armed conflicts under international case law.

³²⁰ Legal opinion on the decision of the Supreme Court of the United States of America (CJI/RES.II-15/92).

29. Mr. STEWART (Inter-American Juridical Committee) said that he wished to respond to the questions posed by Mr. Niehaus concerning the role of the Inter-American Institute of Human Rights in the inter-American system for the protection of human rights, including in relation to the Inter-American Court of Human Rights, and whether the Institute coordinated its work with that of other bodies. Speaking in his personal capacity, he would venture to say that the Institute acted on its own initiative. The Committee had often been confronted with difficult situations as a result of the fact that certain bodies fiercely protected their independence. The other question posed by Mr. Niehaus with regard to the Central American Court of Justice and other regional or subregional bodies that exceeded their authority had not been examined directly by the Committee but it did plan to take up issues of border integration, which had to do with regional or subregional initiatives. As things currently stood, it was impossible to say whether the emergence of new institutions would promote respect for the rule of law or challenge it.

30. Responding to Mr. Gómez Robledo, who had referred to the future special session and the Committee's advisory opinions, he confirmed the importance of the Committee's role in strengthening human rights and the influence of the opinions it issued. As to the Committee's practice, also mentioned by Mr. Gómez Robledo, of holding meetings in locations other than at its headquarters, it afforded the Committee the opportunity—apart from generally being very well received—to hear the views of law professors, judges and lawyers that it might not otherwise hear.

31. In response to Mr. Hmoud, he explained that it was precisely to avoid any lowering of human rights protection that the Committee planned to draft a guide for regulating the use of force in situations of internal violence. Those situations were giving rise to more and more substantive and complex issues of international law, given that the groups involved were increasingly heavily armed and that what had once consisted of nothing more than street violence at times resembled genuine armed conflict. Many institutions were studying those issues, including UNODC, and States had begun to respond to them in various ways. The Committee would take those factors into account. In his own view, the principal aim of such efforts should be to ensure the protection of human rights (including those of the members of the armed groups), even if the police must also be able to perform their job. It was a question of striking the right balance.

32. Mr. ŠTURMA asked what the legal status was of the Inter-American Democratic Charter and whether institutional mechanisms had been put in place to supervise its implementation.

33. Mr. SABOIA said that he had planned to ask the same question as Mr. Hmoud and was satisfied with the answer given. In order to illustrate the overlap between the Committee's work and that of the Commission, he recalled that the Commission had just completed its first reading of the draft articles on the topic of expulsion of aliens, certain provisions of which dealt with the status of refugees and asylum seekers. He requested information—even though Ms. Escobar Hernández would probably raise the same issue—on the work being carried out by the Inter-American

Juridical Committee in the area of the incorporation of international immunities in domestic law.

34. Mr. WAKO, noting that the work of the Inter-American Juridical Committee was very similar to that of the Commission inasmuch as it was also concerned with the progressive development of international law, requested information on the report mentioned in the 2011 annual report³²¹ on the role of cultural diversity in the development of international law. His impression was that the Inter-American Juridical Committee was concerned above all with monitoring cooperation between OAS member States and the International Criminal Court but he wondered whether the Committee might go a step further and identify areas in which the Rome Statute of the International Criminal Court possibly warranted a review. Lastly, given that the question of internal conflicts had been included on the agenda of the Inter-American Juridical Committee, he would like to know the Committee's opinion regarding limitations on the freedom of expression. On the African continent, in any case, internal armed conflicts often had an ethnic dimension and were frequently motivated by hate speech. It would be interesting to know what the Committee would recommend in terms of reconciling the freedom of expression with the need to prohibit incitement to hatred.

35. Ms. ESCOBAR HERNÁNDEZ said that, like Mr. Saboia, she wished to know to what extent international immunities had been incorporated into domestic legislations. She also wished to know whether, in the course of its report on strengthening the inter-American human rights system, the Committee had provided for a mechanism of cooperation and exchange of views with the organs of the inter-American system charged with the protection of human rights, in particular the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the permanent secretariats that served them.

36. Mr. STEWART (Inter-American Juridical Committee) said that he would try to provide a brief answer to Mr. Šturma's question on the Inter-American Democratic Charter. The Charter was not a treaty but rather a declaration with significant normative force. The mechanisms that oversaw its implementation were essentially political in nature. One State could not initiate proceedings against another State for violating the Charter. In his view, proper compliance with the most important obligations was possible even when efforts to monitor such compliance were not enforced by law.

37. In response to Mr. Saboia's question concerning the overlap between the work of the Committee and that of the Commission in certain areas, he cited the example of an applicant whose request for asylum and refugee status had been denied because the applicant had not followed established procedures. The Committee had declared that denial to be unjustified on the grounds that it was inconsistent with the obligations of States and that the procedures could not be invoked as grounds for denying an individual access to the process to which he or she was entitled under international law.

38. The issue of immunities under international law was a topic of obvious interest within the inter-American legal system, whether it addressed immunities of the State or those of individuals. However, the Committee had not yet decided to include the topic on its agenda, and he did not know what form the topic might take if it did.

39. With regard to the question posed by Mr. Wako concerning cultural diversity, he drew attention to the Committee's report on the subject, which emphasized the rights of indigenous peoples in order to ensure that attention was given to preserving the rights of all peoples that made up multicultural societies, indigenous and otherwise.

40. The Committee had not proposed any amendments to the Rome Statute of the International Criminal Court; rather, it had focused on the ratification of the Statute and the incorporation of its provisions into domestic law.

41. Lastly, the Committee had not yet taken up the issue of freedom of expression and internal armed conflicts. With regard to the question posed by Ms. Escobar Hernández about strengthening the human rights system, the Committee cooperated and exchanged views with the other bodies concerned, but on an informal basis, and such cooperation was sometimes difficult.

Organization of the work of the session (concluded)*

[Agenda item 1]

42. The CHAIRPERSON thanked the representative of the Inter-American Juridical Committee for his report and informed the members of the Commission that informal consultations had been held with a view to considering the advisability of including the topic "Protection of the atmosphere", which had been included in the Commission's long-term programme of work, in its current programme of work. Those consultations would no doubt continue at the next session. In addition, the Bureau was planning to hold informal consultations on another subject included in the long-term programme of work, "Protection of the environment in relation to armed conflicts", also with a view to its inclusion in the Commission's long-term programme of work. Lastly, the Chairperson informed the members that, owing to his new responsibilities, Mr. Vasciannie had resigned from the Commission with immediate effect.

The meeting rose at 11.40 a.m.

3150th MEETING

Thursday, 26 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba,

³²¹ See footnote 319 above.

* Resumed from the 3141st meeting.

Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*concluded*)

[Agenda item 12]

STATEMENT BY THE SECRETARY-GENERAL OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The CHAIRPERSON welcomed Mr. Mohamad, Secretary-General of the Asian–African Legal Consultative Organization (AALCO), and invited him to address the Commission.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that one of the Organization’s statutory functions was to study the topics dealt with by the Commission and to forward to it the views of its member States. The fulfilment of that mandate over the years had helped to forge a close relationship between the two bodies, which were also customarily represented at each other’s sessions.

3. A half-day special meeting on selected items on the Commission’s agenda had been convened at the fifty-first annual session of AALCO, held in Abuja, Nigeria, from 18 to 22 June 2012. The topics discussed at the meeting had been “Protection of persons in the event of disasters” and “Immunity of State officials from foreign criminal jurisdiction”. The panellist for both topics had been Mr. A. Rohan Perera, a former member of the Commission; Mr. Djamchid Momtaz, also a former member of the Commission, had shared his thoughts on the topics.

4. In his paper on the topic “Protection of persons in the event of disasters”, Mr. Perera had observed that the protection of victims of natural disasters and the fundamental principle of respect for sovereignty and territorial integrity fell under customary international law and were covered by Article 2, paragraph 7, of the Charter of the United Nations. He had summarized the main points of contention and consensus that had emerged from the Commission’s consideration of draft articles 10 to 12 of its text on the topic. The middle ground that seemed to surface from the range of views expressed was that the right of an affected State to request international assistance was associated with the duty of third States and organizations to consider such requests, but not necessarily to accede to them. The Commission had also emphasized the fact that the right of the international community to offer assistance could be combined with encouragement to make such offers of assistance on the basis of the principle of international cooperation and solidarity.

5. In his paper on the topic “Immunity of State officials from foreign criminal jurisdiction”, Mr. Perera had indicated that the Commission’s debate had centred on three principal issues: the general orientation of the topic, the scope of immunity and the question of whether

there were exceptions to immunity with regard to grave crimes under international law. Highlighting the views of States during the debates in the Sixth Committee, he had said that, in principle, they had endorsed the Special Rapporteur’s intention to approach the topic from the standpoint of *lex lata*, but that once the gaps had been identified, the Commission should proceed to the next stage, the *lex ferenda* perspective.

6. With regard to the scope of the immunity of State officials from foreign criminal jurisdiction, Mr. Perera had noted that there was a broad degree of consensus within the Commission that the troika enjoyed immunity *ratione personae*. It was with regard to other categories of State officials that the Commission was required to move into uncharted territory. The challenge was to strike a delicate balance between the need to expand, albeit cautiously, the categories of State officials to be granted jurisdictional immunity *ratione personae*, on the one hand, and the need to avoid a liberal expansion of such categories that could be conducive to an environment of impunity under the cover of immunity, on the other.

7. Regarding exceptions to the immunity of a State official, Mr. Perera had recalled the Special Rapporteur’s opinion that it was pertinent only with regard to immunity *ratione materiae*, concerning acts performed in an official capacity in the context of crimes under international law, but not to immunity *ratione personae*, which covered acts performed both in an official or personal capacity. Lastly, he had suggested that the recent judgment by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, in which it had held that there could be no conflict between rules substantive in nature and rules on immunity, which were procedural, had clear implications for the Commission’s ongoing work.

8. Mr. Momtaz had reiterated the need for AALCO member States to become active in responding to questions raised by the Commission. For example, the Special Rapporteur on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)” had asked whether the basis of State practice was to be found in treaty obligations or obligations arising from customary international law. Other questions, relating to protection in disaster situations, included whether States had the duty to offer assistance and whether the obligation of an affected State to accept assistance was limited to assistance from subjects of international law, thus excluding assistance from non-governmental organizations.

9. Lastly, on the topic of immunity of State officials from foreign criminal jurisdiction, Mr. Momtaz had noted that article 27 of the Rome Statute of the International Criminal Court did not accord immunity to any Head of State, minister for foreign affairs or other high-ranking State official and that, in its recent ruling in the *Jurisdictional Immunities of the State* case, the International Court of Justice had insisted on the jurisdictional immunity of States before national tribunals.

10. In the deliberations at the special meeting, delegations from China, Indonesia, Japan, the Islamic Republic of Iran, Malaysia, the Republic of Korea,

Saudi Arabia, Kuwait and India had made a number of important points. Given that a large number of Commission members were from Asian and African States, several delegations had expressed the hope that their active participation in the Commission's work would help to reflect more prominently the views and aspirations of those States in the progressive development and codification of international law.

11. One delegation had mentioned that it planned to express in the Sixth Committee, during the sixty-sixth session of the General Assembly, its views on the United Nations Convention on Jurisdictional Immunities of States and Their Property and on the articles on the law of transboundary aquifers. The delegation had suggested that, given the coexistence of differing rules in the field of environmental law and in order to avert the fragmentation of international law, the Commission should include the topic of protection of the atmosphere in its agenda for the current session.

12. Concerning the topic "Protection of persons in the event of disasters", many delegations had observed that humanitarian assistance should be undertaken solely with the consent of the affected State and with the utmost respect for the core principles of international law, such as sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of the State. One delegation had suggested that AALCO should initiate contact with ASEAN regarding mechanisms of disaster management and emergency response under the ASEAN Agreement on Disaster Management and Emergency Response.

13. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", a number of delegations had expressed the view that the Commission should focus exclusively on the codification of existing rules of international law, rather than on an exercise of progressive development.

14. In conclusion, he informed the Commission that his Organization would continue to cooperate with it actively with a view to bringing the voice of Asia and Africa to bear on its work and contributing to that work in a substantial manner.

15. Mr. EL-MURTADI SULEIMAN GOUIDER said that AALCO was among the leading legal organizations and one that most diligently took into account the Commission's work. The relationship between the two bodies was a significant one, and he looked forward to even closer cooperation with AALCO in the future.

16. Mr. HASSOUNA said that if the Commission had been informed, prior to its sixty-fourth session, about the outcome of AALCO's special meeting, it would have been able to take into account in its debates the views expressed by AALCO member States. He suggested that AALCO should consider holding its annual sessions prior to those of the Commission. Since the Secretary-General had just completed his first term at the head of AALCO, he asked what had been the Organization's main achievements during that period and what were his future objectives and aspirations for AALCO.

17. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said he agreed that it was unfortunate that the fifty-first annual session of AALCO had been held too late for the outcome to be taken into account at the Commission's current session. He would redouble his efforts to ensure that future annual sessions of AALCO were held in April.

18. In his first four years as Secretary-General of AALCO, he had endeavoured to learn how the Organization functioned, to maintain good housekeeping and to ensure that AALCO remained a relevant organization. In his second term, he would focus on substantive matters, particularly those relating to the work of the Commission. AALCO would be involved in some of the research to be undertaken by the Commission, in particular with regard to new topics, which would be included in the Organization's programme of work.

19. Mr. SINGH said that the agenda for the fifty-first annual session of AALCO had contained an item on the environment and sustainable development, and AALCO had held a special meeting on the law of the sea and the international legal challenges entailed by responses to piracy. One of the recommendations to emerge from that meeting had been that technical assistance should be provided by the AALCO secretariat to member States in enacting anti-piracy legislation. He asked how the secretariat planned to undertake that task.

20. Mr. WISNUMURTI said that the re-election of the current Secretary-General of AALCO augured well for continued constructive cooperation between that body and the Commission. He welcomed the news that AALCO intended to work even more closely with the Commission in future and said that it would be useful if AALCO could provide a report summarizing the main trends in the views expressed by member States at its annual sessions.

21. Mr. VALENCIA-OSPINA, after congratulating Mr. Mohamad on his re-election, said that over the years, AALCO had provided useful input on many of the topics considered by the Commission. The Organization's discussions on the Commission's draft articles had been instrumental in shaping the views of a fairly large group of Member States of the United Nations. As Special Rapporteur on the topic of protection of persons in the event of disasters, he had attended, and greatly appreciated, the AALCO meetings held in New York in parallel with those of the Sixth Committee. He asked what type of relationship AALCO envisaged with AUCIL.

22. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization), responding to Mr. Singh's question, said that AALCO was going to look into organizing a conference to commemorate the thirtieth anniversary of the United Nations Convention on the Law of the Sea, a conference which, it was hoped, would coincide with the fifty-sixth anniversary of the foundation of AALCO in November 2012.

23. Concerning Mr. Wisnumurti's request for a report summarizing the main trends in the views of member States, he pointed out that AALCO had a very small secretariat but said that it would do its best to accede to the request.

24. In reply to Mr. Valencia-Ospina's question about the relationship that AALCO envisaged with AUCIL, he said that AALCO had signed a memorandum of understanding with the African Union and would continue to cooperate with it in areas of common interest.

25. Mr. HMOUD, highlighting the importance of cooperation between AALCO member States and the Commission on all aspects of international law, said that the organization of AALCO meetings and seminars in parallel with those of the Sixth Committee helped to raise awareness of legal issues. Better links should be established among AALCO member States during the intersessional period. AALCO should facilitate the holding of legal workshops by member States. Lastly, participants from other African and Asian States that were not AALCO members should be invited to participate in its activities.

26. Mr. KITTICHAISAREE recalled that, during an AALCO intersessional meeting of experts held in New Delhi, he had suggested that the Organization should work towards consolidating the positions on legal issues of Asian and African States. Such States now numbered more than 100, and their patterns of State practice might crystallize into regional and eventually international customary law. He suggested that the AALCO observer in New York should organize brainstorming sessions on issues of concern to both the Commission and AALCO. The outcome of such sessions could be submitted to the Sixth Committee for its discussions of topics studied by the Commission. Lastly, the AALCO website should contain information on the positions of member States on different aspects of international law relevant to the work of the Commission.

27. Ms. ESCOBAR HERNÁNDEZ said that the discussion at the fifty-first annual session of AALCO of her topic, "Immunity of State officials from foreign criminal jurisdiction", had been based mainly on the approach the Commission had taken at its sixty-third session but had also touched upon many of the issues she had highlighted in her preliminary report presented at the current session (A/CN.4/654). As consideration of the topic had now entered a decisive phase, AALCO member States should be apprised of her intention to submit substantive reports containing draft articles, with the aim of adopting the draft articles on first reading by the end of the current quinquennium. She reiterated her thanks to AALCO for its interest in her topic and looked forward to the results of its work on that and other topics studied by the Commission.

28. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said that he had taken note of all the points raised by Mr. Hmoud. He would ensure that, under his leadership, the important relationship between the Commission and AALCO flourished and the work of the latter remained relevant.

29. Due account would also be taken of Mr. Kittichaisaree's comments on the need to consolidate the positions of AALCO member States on legal issues and of his suggestions for the AALCO website. AALCO currently had difficulty in obtaining access to some sources, particularly national laws and declarations made by member States, but it was working on the problem. The AALCO observer in New York certainly made an

invaluable contribution; it was to be hoped that more activities could be organized in New York in future.

30. He thanked Ms. Escobar Hernández for the information provided on the immunity of State officials from foreign criminal jurisdiction and looked forward to her participation in a future AALCO meeting.

31. Mr. SABOIA asked whether the interest expressed by one delegation in discussing the United Nations Convention on Jurisdictional Immunities of States and Their Property at a future session of the General Assembly was part of an effort to promote the entry into force of that Convention.

32. Mr. KAMTO said that the unanimous re-election of Mr. Mohamad as Secretary-General of AALCO was ample proof of how much AALCO member States appreciated his leadership skills. AALCO made an important contribution to the work of the Commission, and the meetings it organized in New York in parallel with those of the Sixth Committee were very useful and should be continued.

33. As he had been unable to attend the fifty-first annual session of AALCO in Abuja, he welcomed the very detailed and clear account of its proceedings. Very little had been said about his topic, "Expulsion of aliens", however. Was that cause for pessimism, because the topic had not aroused much interest, or optimism, indicating that AALCO was satisfied with the work he had done thus far?

34. Sir Michael WOOD said that AALCO had a long, distinguished history in the field of international law. One reason for its importance was that it represented a very wide range of States from a vast geographical area; another was its openness to observers at its annual sessions and at its meetings in New York. Given the importance of those meetings, he wished to know what was being planned for the next one, in late 2012. He asked if any efforts were being made to extend the Organization's membership to additional African and Asian States and to increase the number of observers. Lastly, he enquired about the procedures for obtaining observer status.

35. Mr. WAKO said that the activities of AALCO were of greater direct relevance to the Commission's work than those of any other regional organization, none of which had a mandate for both the codification and the progressive development of international law and for contributing to the topics under discussion in the Commission, as did AALCO. For that reason, it would be advisable for the relationship between AALCO and the Commission to be made more dynamic. AALCO should invite Commission members from the African and Asian regions to its meetings. It would also be useful for the Commission's special rapporteurs to be invited to the AALCO meetings at which their topics were discussed, as that would give them a clearer understanding of the thinking of the Organization's members. AALCO's input to the Commission's work was sufficiently important to warrant holding its annual session in April of each year. A representative of AALCO should attend a Commission meeting in the first part of the session, rather than at the end of the second part of the session.

36. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) thanked all the members of the Commission for their input and feedback. He explained that the statement to which Mr. Saboia had referred had been made by a delegate at the annual session and did not reflect the position of AALCO.

37. In response to Sir Michael’s questions, he said that AALCO was trying to widen its membership. It had established an Eminent Persons Group to help to recruit more members. It often received enquiries from African and Asian States about how to become members and was trying to do better in facilitating their entry. International organizations and non-member States could attend the annual sessions of AALCO as observers.

38. He had taken note of the three points made by Mr. Wako. The dates for the organization’s annual sessions were set by the State hosting the event and AALCO itself had little say in the matter. It would, however, try to persuade States hosting future annual sessions to hold them in April and to invite the members and special rapporteurs from the Commission, in order that they could interact with member States of AALCO.

Formation and evidence of customary international law (continued)* (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPPORTEUR (continued)

39. Mr. HASSOUNA commended the Special Rapporteur on the clear, well-structured note (A/CN.4/653) in which he had introduced the Commission to the very important topic of the formation and evidence of customary international law. Entire areas of international law were still governed by custom, notwithstanding the considerable growth in the number and scope of treaties. In the absence of a centralized international legislature, the corpus of written norms was often plagued by lacunae, something which heightened the need for unwritten rules to fill the gaps. While treaties themselves sometimes referred to customary law, customary norms were sometimes relied upon in order to interpret or supplement the provisions of treaties. Since the formation and evidence of customary norms raised some very complex issues, the Commission’s guidance would be extremely useful for practitioners. Drafting a set of conclusions accompanied by commentaries, as suggested by the Special Rapporteur, would be the most appropriate outcome for the Commission’s work. Those conclusions should focus on the formative process of customary international law and take account of its flexibility and constant evolution.

40. It would be wise to explore some background material in preparation for work on the topic. The Commission’s own report, dating back to 1950, on “Ways and means for making the evidence of customary international law more readily available”³²² could be reappraised in the light of

the current features of the international legal system. The findings of the International Law Association³²³ and the study on customary international humanitarian law published by ICRC in 2005³²⁴ could also be reviewed. The contentious issues, including that of methodology, warranted further analysis.

41. The note by the Special Rapporteur drew attention to the need to clarify certain notions such as the term “general international law”, which had a different connotation from “customary international law”. Concerns regarding terminology should be addressed at the outset, in order to ensure consistency in the Commission’s work. The establishment of a short lexicon of the relevant terms in the six official languages of the United Nations would probably be very useful.

42. The Special Rapporteur’s suggestion that the Commission should examine theories of custom was welcome. It had sometimes been said that custom raised the issue of how law was created because, unlike conventional law-making through the conclusion of treaties, customary norms were not laid down by a deliberate effort of will, but grew through a process consisting of practice and belief.

43. The identification of rules of customary international law had been greatly advanced not only by the case law of the International Court of Justice and the Permanent Court of International Justice, the two sources of guidance suggested by the Special Rapporteur, but also by the findings of other international courts and tribunals. For example, on 16 February 2011, in the case concerning *Ayyash and others*, the Appeals Chamber of the Special Tribunal for Lebanon had issued an interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, which had ruled that

a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community ... to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged (para. 85).

The decisions of international courts should be subjected to critical appraisal, however, and whenever there were doubts about their consistency, the factors underlying the variations should be analysed.

“Ways and means for making the evidence of customary international law more readily available”, paras. 24–94. See also document A/CN.4/16 and Add.1 (article 24 of the statute of the International Law Commission: working paper by Manley O. Hudson), *ibid.*, pp. 24 *et seq.*

³²³ “London statement of principles applicable to the formation of general customary international law”, and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: www.ila-hq.org/en/committees/index.cfm/cid/30). See also the debate in plenary, pp. 922–926 (*ibid.*). The “London statement” also appears on pp. 712–777 (*ibid.*); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid.*). The six interim reports by the Committee contain more detailed information.

³²⁴ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Rules) and vol. II (Practice) (Cambridge, United Kingdom, Cambridge University Press, 2005).

* Resumed from the 3148th meeting.

³²² *Yearbook ... 1950*, vol. II, document A/3116, Report of the International Law Commission covering its second session, Part II,

44. With regard to scope, the Special Rapporteur argued in paragraph 21 of his note that the role of customary international law in the interpretation of treaties was not part of the topic. Although it was true that the issue had been dealt with in other contexts, it might well be relevant to the topic under consideration, since it was an intrinsic element of the relationship between customary international law and treaties.

45. The Special Rapporteur was right in thinking that the topic should cover the whole of customary international law, because it could give rise to legal norms in all fields of international law. He agreed with the Special Rapporteur that the emergence of new peremptory norms of general international law, *jus cogens*, lay outside the scope of the topic, but thought it would be desirable to explain why that was so.

46. The participation of States in the formation of customary international law required further investigation—it was related to the interpretation of States' silence. The grounds on which customary norms would become binding on States that had not participated in their formation needed to be identified.

47. Lastly, he agreed with the tentative schedule proposed by the Special Rapporteur for the Commission's further consideration of the topic.

48. Mr. PETRIČ said that he supported the work being done on the topic, work that should focus on promoting a better understanding of the formation of customary international law and helping practitioners of the law to find evidence of custom. The Commission would thereby be performing a useful service: since the rules of customary international law were not written rules, disputes often arose over them. He agreed with the statement in paragraph 3 of the Special Rapporteur's note that the outcome of the work should be a practical guide with commentaries, meant for judges, government lawyers and practitioners. Judges and lawyers used the law in different ways, however, the former attempting to find solutions to legal problems, and the latter acting as advocates, seeking to prove points.

49. He agreed with the Special Rapporteur that the case law of international courts, in particular the International Court of Justice, should be the focus of the Commission's research. In trying to uncover evidence of existing customary international law, the Commission should pay attention, in addition, to contemporary State practice. In the past several decades, the number of new States had doubled, and State practice was currently being created by nearly 200 States, not a mere 40 or so as in the past. In dealing with unilateral acts of States, special attention should be paid to those that had legal effects *per se*, such as protest and recognition, and were accordingly particularly influential in the development of customary international law.

50. The desire expressed by the Special Rapporteur in paragraph 10 of his note to hear the initial views of members of the Commission on the topic was a good approach. Referring to paragraph 12, he said that to date, the Commission had endeavoured to establish rules of customary international law solely in relation to specific

topics on its codification agenda. It had not, and should not, seek to produce a "Vienna convention on customary international law", as had been pointed out earlier.

51. He agreed with the comment in paragraph 13 that the work of the International Law Association was relevant, but, as Mr. Murase had said, the Association's conclusions were extremely cautious. That, in his own view, should alert the Commission to the need for it to be cautious, too. The terminology used in relation to customary international law needed to be clarified. Several formulations appeared in paragraph 14; in his own country, the "generally accepted principles of international law" were cited in the Constitution as being directly applicable by the courts. Developing a lexicon of relevant terms, as suggested in paragraph 15, would thus indeed be useful.

52. Paragraph 14 also referred to the distinction between customary law and "soft law". Customary law had a different formal origin than that of treaties, yet it had the same quality and power. "Soft law", however, was not law at all. "Soft law" instruments such as declarations and resolutions could eventually develop into treaties through codification, or become part of customary international law through State practice and the growth of *opinio juris*. They sometimes repeated or reconfirmed rules and principles that were already customary law, for example, those set out in the Charter of the United Nations. However, the role of "soft law" instruments in the formation and establishment of evidence of customary international law should not be an avenue for the Commission's research.

53. He endorsed the description, in paragraph 17, of the ultimate aim of the Commission's work: to provide practical aid to those called upon to investigate rules of customary international law. He likewise agreed with the comment in paragraph 18 that the case law of international courts and tribunals was the most reliable guidance on the topic. However, the case law of the highest national courts the world over—not just in Europe and North America, but also in Africa and Latin America, not just in English and French, but in other languages as well—should not be neglected. A great deal of useful doctrine was available in the German and Russian languages, for example. He was aware of the difficulties involved in using such sources, but perhaps the Secretariat could provide some assistance.

54. With reference to paragraph 19, he said that while empirical research into State practice was important, certain diplomatic notes and statements like those relating to a *fait accompli* were obviously biased: they were aimed at proving that the State's case was based on customary international law. He therefore thought that deductive reasoning should also be brought to bear on the topic.

55. Concerning the description of the scope of the topic in paragraph 20, he said that the guiding rules must be general rather than prescriptive, flexible rather than strict. With regard to the idea, mentioned in paragraph 22, of breaking customary international law into separate specialist fields, he said it seemed to him *prima facie* that such a differentiation in approach might lead to confusion and inconsistencies. Some small degree of differentiation might be useful to practitioners, however, depending on the techniques to be proposed as practical guidance.

56. He agreed with the Special Rapporteur that the topic should not extend to the emergence of *jus cogens* and that at the start of its work, the Commission should seek to develop a series of propositions with commentaries. At a later stage, if the results of its research were promising, it could easily turn to drawing up conclusions. While neither propositions nor conclusions would have legal force, they would be backed by the authority of the Commission.

57. He endorsed the proposed four stages of work as a good approach and said that he looked forward to work on the topic, which had exciting theoretical dimensions and went to the roots of international law. The Special Rapporteur's note showed that he was aware of the possible difficulties involved and was therefore proposing a safe initial approach based on modest objectives.

58. Mr. FORTEAU, offering his first thoughts in response to the Special Rapporteur's query about the possible outcomes to the work on the topic, said that he agreed that the Commission should not be overly prescriptive and that it should aim at producing a practical guide in the form of conclusions with commentaries. The workplan proposed in paragraph 27 of the note seemed suited to bringing about that result, although the scheduling seemed a bit ambitious. Specifically, he thought it would be difficult, in a single year (2014), to discuss State practice and *opinio juris*, two major components of custom that raised a whole series of very complex problems. Similarly, the third report to be submitted in 2015 was to cover a number of matters that were widely divergent and might well merit separate consideration.

59. The first step the Commission should take was to decide what might be the value added of its consideration of the topic. The International Law Association had already adopted principles applicable to the formation of customary international law.³²⁵ Could the Commission add or subtract significantly from those? He had initially had his doubts on that score, but after having heard Mr. Murase's critique of the principles, he now thought it would be useful to clarify the lacunae that had been pinpointed.

60. He agreed with the Special Rapporteur's suggestion in his introductory statement that the Commission should not linger too long on theoretical or conceptual matters. Indeed, he saw no need to delve into the definitions listed in paragraph 14 of his note, the terminological issues raised in paragraph 15 or the role of customary international law within the international legal system, as suggested in paragraph 16. All those questions were better suited to academic debates than to codification work. In fact, he did not see how the formation of custom fell within the Commission's mandate and thought the focus should be on the much more practical matter of identifying customary international law, meaning the specific evidence of custom. He endorsed Mr. Murase's remarks on that point. In addition, he thought that the distinction drawn in paragraph 20 between "formation" and "evidence" of customary international law was by no means clear.

61. The initial objective of the project should be to provide a practical guide that described, for international

lawyers and particularly for domestic authorities, the legal techniques to be employed in determining whether a given rule was or was not a rule of customary international law. To that end, it might be useful to update the report on "Ways and means for making the evidence of customary international law more readily available" adopted by the Commission at its second session in 1950.³²⁶ It would be particularly useful if international lawyers who ran into a problem to which a rule of customary international law was alleged to apply could know where to look to elucidate the matter. Domestic lawyers sometimes had to confront such challenges, especially in countries where resources for legal services were limited. They, too, would greatly benefit from guidance on where to look for the relevant materials among the proliferation of existing sources, not only repertoires of national practice but also electronic resources. He endorsed Mr. Petrič's remark about the need to take into account the practice of countries throughout the world written in various languages.

62. He agreed with Mr. Tladi that the emergence of *jus cogens* should not be covered under the topic. He did not agree, however, with the reasoning advanced by the Special Rapporteur in paragraph 23 in support of the same conclusion. *Jus cogens* rules were by definition part of customary law. However, determining whether a rule was part of customary law was not the same as determining whether a rule of customary law was, in addition, not subject to derogation by way of a treaty. That was a valid distinction, even though, regrettably, the International Court of Justice had not made it very clearly when it had stated, in paragraph 99 of its judgment of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, that the prohibition of torture was part of customary international law and had become a peremptory norm (*jus cogens*).

63. At the end of paragraph 22 of his note, the Special Rapporteur suggested that special techniques might be appropriate for the identification of particular rules of customary international law. The impact of special or particular rules was not just a question of techniques, however. For example, the approach to determining that a customary rule existed in international criminal law might be affected by the principle whereby there could be no crime without some basis in law. Similarly, the regime applicable to the identification of customary rules might or might not be identical to the regime applicable to the modification through custom of a customary rule. One might expect the latter regime to be more stringent than the former, insofar as the modification of an existing rule was involved.

64. Paragraph 18 of the Special Rapporteur's note, concerning methodology, seemed to exclude the practice of regional courts, although the Special Rapporteur had slightly corrected that impression in his introductory statement. Still, such practice deserved to be considered, for two reasons: to find out how judges in regional courts went about identifying customary rules and to look into possible discrepancies in judicial practice. It was noteworthy, for example, that in its judgment of 23 March 2010 in the case of *Cudak v. Lithuania* [GC] (paras. 60

³²⁵ See footnote 323 above.

³²⁶ See footnote 322 above.

et seq.), the European Court of Human Rights had given a slightly different interpretation of the customary law applicable to immunity in respect of labour contracts concluded with an embassy than had the Court of Justice of the European Union in its judgment dated 19 July 2012 in the case of *Ahmed Mahamdia v. People's Democratic Republic of Algeria* (paras. 54 *et seq.*). The Commission might also do well to look into the specific effect of codification treaties on the finding of evidence of custom.

65. Lastly, the Guide to Practice on Reservations to Treaties had made a start on the study of the effects of reservations to treaties on customary law, particularly in guidelines 3.1.5.3 and 4.4.2, and those ideas merited elaboration.

Programme, procedures and working methods of the Commission and its documentation (continued)* (A/CN.4/650 and Add.1, sect. G)

[Agenda item 10]

66. Mr. MURASE, referring to the discussion with the Secretary-General of AALCO, said that he had been encouraged by the enthusiastic support shown by AALCO member States for the inclusion in the Commission's programme of work of the topic of protection of the atmosphere, for which he had written the syllabus.³²⁷ As he understood it, however, a decision had been taken to pursue informal consultations, at the Commission's next session, on whether to include the topic. He requested clarification of the basis for that decision.

67. Mr. HMOUD, speaking as a member of the Bureau, said that the proposal to include the topic had been discussed extensively in informal consultations, but the idea had met with some resistance, primarily concerning the scope of the topic and the possible outcome of its consideration.

The meeting rose at 1 p.m.

3151st MEETING

Friday, 27 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Formation and evidence of customary international law (continued) (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the Special Rapporteur's note on formation and evidence of customary international law (A/CN.4/653).

2. Ms. ESCOBAR HERNÁNDEZ said that the topic under consideration was of great interest in numerous respects, including a practical one, which was of priority for the Commission. As pointed out by the Special Rapporteur, it sometimes happened that State bodies, and not only the courts, had to take decisions on questions relating to international custom although they did not have the requisite expertise in international law. Thus, a practical guide or conclusions would be of great use to them.

3. Moreover, such interest was not limited to the domestic sphere: the formation and evidence of customary international law had acquired growing importance in recent years and concerned the international community as a whole, including regional organizations. That was attested to by the work of the International Law Association and the London statement of principles applicable to the formation of general customary international law,³²⁸ to which the Special Rapporteur had referred, but also the February 2012 decision of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, which had given rise to an interesting debate on the invocation of custom and on ways of identifying evidence of its existence, as well as by the fact that CAHDI had planned to devote a meeting of its September 2012 session to the treatment of custom by national and international courts. Thus, it was particularly appropriate for the Commission to consider the topic.

4. For the moment, the Special Rapporteur's objective was not to analyse the substance of the problems posed in connection with the formation and evidence of international customary law, but simply to identify them and to promote a debate on their subject. She therefore would confine herself to posing several questions.

5. In paragraph 16 of his note, the Special Rapporteur evoked customary international law as "law", but it was difficult to see how it could be understood otherwise,

³²⁸ "London statement of principles applicable to the formation of general customary international law", and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: www.ila-hq.org/en/committees/index.cfm/cid/30). See also the debate in plenary, pp. 922–926 (*ibid.*). The "London statement" also appears on pp. 712–777 (*ibid.*); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid.*). The six interim reports by the Committee contain more detailed information.

* Resumed from the 3132nd meeting.

³²⁷ *Yearbook ... 2011*, vol. II (Part Two), annex II.

unless reference were made to other areas, such as “soft law” or relations with other international legal acts. In paragraph 18, he referred to codification efforts by non-governmental organizations; there again, one might ask what exactly he had in mind. Perhaps he was thinking of private codification, because he mentioned the writings of publicists, or of other exercises, such as the study of ICRC on international humanitarian law³²⁹ in its customary dimension, but in that case the reference to “non-governmental organization” was inappropriate, given the ICRC’s very specialized nature. In any event, the question arose as to whether such codification was sufficiently relevant and authoritative for the Commission to take it into account in its work. A consideration of private codification usually presupposed a substantive analysis, whereas the exercise that the Commission was planning to undertake was basically one of methodology: to study the formation of custom and evidence of its existence.

6. The Special Rapporteur’s approach, which involved a study that was essentially practical and not theoretical, was welcome, because the objective was to assist States and judicial authorities in addressing questions relating to the application of custom or the identification or evidence of its existence. That was why the part devoted to the conceptual and theoretical approach to the formation of customary international law, planned for the first report, should be rather restricted (although it was still useful), because the theoretical postulates were relatively well known and because above all an empirical assessment of practice was needed.

7. Needless to say, it was important to analyse case law, in particular that of the international tribunals, without neglecting domestic courts, although their contribution to custom was of course smaller. Other non-judicial manifestations of State practice might also be relevant. An analysis of practice must cover all States, judicial systems, cultures and languages. The Special Rapporteur also undertook to examine the relationship between custom and treaties, which might be useful, although the question was not controversial, and he might also add the relationship between custom and other international acts, such as the great diversity of resolutions of international organizations and the unilateral declarations of States, which, although they could not be termed sources of international law, nevertheless contributed to demonstrating the existence of a custom. The Special Rapporteur had rightly decided to leave out rules of *ius cogens*, but should include regional customary practice to avoid creating a lacuna, regardless of how small. It would also be useful to analyse the question of custom in relation to international organizations, and in that framework to consider their contribution not only to the formation of a custom that bound them, but also to the identification of a custom, regardless of whether they were bound by it.

8. She had reservations about the schedule for the development of the topic. It would of course be desirable for the Commission to complete its work during the current quinquennium, but the topic was very complex and had been the subject of considerable debate in recent decades,

and it would be a Herculean task to cover it in four years, even if the Commission confined itself to the formulation of conclusions. In any event, the proposed schedule must not have an impact on the methodology. The Special Rapporteur appeared to be contemplating a sole reading for the adoption of the final product. That would take the form of a practical guide or conclusions, and not draft articles, but a sole reading might deprive the Commission of an invaluable tool, namely the comments of States. It was true that States would formulate observations in the Sixth Committee every year on the successive reports, but it would also be useful to have their opinion on the final product, the formation and evidence of custom being a very sensitive subject and a source of controversy.

9. She also pointed out that the word “*documentación*” used in the Spanish version of the title did not correspond to the tenor of the topic. Instead, as noted by Mr. Forteau concerning the word “*preuve*” in the French version, “*prueba*” should be used in the Spanish version, in line with Article 38 of the Statute of the International Court of Justice.

10. Mr. GEVORGIAN said that the Special Rapporteur’s note on formation and evidence of customary international law contained a sufficiently elaborated work schedule for the coming quinquennium and was an excellent basis for structuring the debates in the Commission. The topic was very important and of great current relevance, because, at national level, the work of the Commission would assist practitioners of law and jurists, who rarely were required to identify and apply rules of customary international law. He agreed with the Special Rapporteur about avoiding pitfalls and in particular that the Commission should not rely solely on academic sources. That said, the Special Rapporteur’s approach reflected a certain optimism. He personally agreed that the result of the Commission’s work should be clearly defined and should focus on practical conclusions, without dwelling too much on details or theory, because otherwise there was a risk that more questions would be posed than answers given, which would not be of great use. It should also be recalled that customary law was essentially unwritten and that the Commission’s work should not undermine its inherent flexibility.

11. With regard to the concerns expressed by Mr. Murase, who had cautioned that the Commission might end up stating the obvious, he personally thought that elements that might seem obvious to the members of the Commission might not necessarily be obvious to domestic judges, who might be required to apply rules of customary international law for the first time in a specific case. Mr. Murase had also said that if he were a legal adviser, he might well be alarmed that the Commission was developing guidelines to cover rules of customary law. On the contrary, he personally would welcome it if the Commission considered the subject, because practical guidelines presented as authoritative by the Commission would be of great assistance to those called upon to identify rules of customary law. As stressed by the Special Rapporteur, decisions by international jurisdictions were evidence of such rules, but there was also, and above all, doctrine. However, there was no unanimity in that regard: some believed that elements of doctrine established the existence of a customary rule, while others did not.

³²⁹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Rules) and vol. II (Practice) (Cambridge, United Kingdom, Cambridge University Press, 2005).

12. More specifically, he agreed with the proposed format for the Commission's work, the conclusions of which would have to be formulated in a detailed and clear-cut manner. He also agreed that a large part of the work of the quinquennium would need to be devoted to the topic. As to method, he believed, like Mr. Murphy and Mr. Murase, that it was important to be cautious and not to base the study of the topic solely on the decisions of international courts and tribunals: indeed, in the case concerning *Jurisdictional Immunities of the State*, the International Court of Justice had relied in its judgment on the practice of only 10 States, and in the "*Lotus*" case, the judgment rendered by the Permanent Court of International Justice had been based on the practice of only 6. Thus, it could not be concluded, despite appearances, that generalized State practice existed. The customs established had subsequently been the subject of criticism, because they had been accused, and rightly so, of being illegitimate and undemocratic and of reinforcing the political and economic *status quo*. The Commission, which must produce authoritative guidance for national and international judges, would do well to take those comments into account in its future work.

13. With regard to paragraph 13, he agreed with those members who believed that the work of the International Law Association was very important and should be taken into account in order to avoid repeating its mistakes. The criticism voiced by Mr. Murase on the London statement of principles applicable to the formation of general customary international law was well taken. The work awaiting the Commission was complex, but that did not mean that the task could not be accomplished. The questions referred to in paragraphs 14 and 16 of the Special Rapporteur's note might be of some interest, but the Commission should not dwell on them, because that might give rise to an overly theoretical debate, which would be contrary to the task with which the Commission had been assigned, namely to produce authoritative guidance. Concerning paragraph 15, he agreed that it would be useful to establish a lexicon in the languages of the United Nations; the Commission should use existing terms, while not neglecting to consider practice. He agreed with other members of the Commission who argued that there was no need to consider the emergence of new norms of *jus cogens*, apart from a few aspects. He subscribed to the idea set out in paragraph 27 of seeking information from States, but also endorsed the comment by Ms. Jacobsson that careful consideration should be given to the formulation of questions.

14. Concerning the title of the topic, the search for evidence of the existence of norms, and their identification, was inherent to the study of the process of the formation of customary international law. It was precisely that study that would make it possible to determine what relations existed between components of custom, such as State practice and *opinio juris*, and what role the latter played in the emergence of international rules. That would help ascertain where to look for evidence of the existence of a customary international rule.

15. He also pointed out that the Russian version should use the word "*Идентификация*" ("identification") rather

than "*Свидетельство*" ("proof") for the English word "evidence", the translation of which apparently also posed problems in the Spanish version and perhaps also in the French version.

16. Mr. HMOUD said that the topic of formation and evidence of customary international law was difficult and complex, and it was important to define its scope; otherwise the exercise would be overwhelming. He was certain that the Special Rapporteur would ensure that the scope was limited and focused so that the result would be a useful tool for States and other international and national actors. There was no need to dwell too much on theory, and it would be preferable to focus on the practical outcome, which, as the Special Rapporteur had indicated, should be a set of conclusions, with commentaries, that set out the grounds and basis for any particular conclusion. While theory would indicate the basis for any conclusion, it was the practice that laid the cornerstone of the topic and that should be the centre of attention. He agreed with the point made by the Special Rapporteur in paragraph 24 of his note that the outcome should not be a series of hard-and-fast rules but should elucidate the process of the formation and determination of rules of customary international law. The Special Rapporteur had rightly stressed that it was essential not to be overly prescriptive. It was important to achieve that balance or at least to strive to do so; otherwise, the Commission's work might not gain the necessary acceptance of the relevant actors.

17. The Special Rapporteur had indicated that he intended to focus on the jurisprudence of international courts and tribunals, in particular that of the International Court of Justice and the Permanent Court of International Justice. They were of course a primary source for guidance on the topic, but he wondered to what extent their judgments could help in identifying a rule of customary international law. Several cases that had been brought before the Permanent Court of International Justice and the International Court of Justice, such as the *S.S. "Wimbledon"*, "*Lotus*", *Nottebohm*, *Fisheries*, *Fisheries Jurisdiction* and *North Sea Continental Shelf* cases, could provide useful guidance on evidence of practice, but sometimes international courts did not indicate how they had reached the conclusion that a rule was customary and provided little or no reasoning on how they had arrived at their determination. They explained that they had come to their conclusions based on what they had "noticed" in State practice or what a particular jurist had said or because the articles of the International Law Commission on a particular subject indicated the existence of a rule. Recently, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice had avoided the question of the existence of a customary basis of a certain rule altogether, and one judge had written a separate opinion on that point that had not provided any evidence on his conclusion regarding the customary basis.

18. In his research of evidentiary standards, the Special Rapporteur should draw on a wide range of sources, including the writings of jurists, public sources and the work of independent sources.

19. On the other hand, in relation to the “formation” aspect of the topic, the extensive jurisprudence of international judicial bodies could be the primary source for determining the elements for the creation of customary rules. The views of States could be very useful, and the Special Rapporteur should perhaps draft a specific set of questions for States in that regard. Legal departments in foreign ministries could assist by providing the Commission with their views on how a customary rule was formed. Those inputs would enable the Commission to make rapid progress on the topic.

20. National judicial bodies, in particular those that were well versed in international law, could constitute a valuable source of information for either aspect of the topic. However, few national judicial systems had the necessary expertise, and he cautioned the Special Rapporteur against relying on certain sources. After all, customary international law was of a general nature, and the views of a limited number of judicial systems did not necessarily reflect the general view of States with regard to the formation of a particular rule or to the evidence of its existence.

21. Regional rules could be used in the consideration of the topic, but their value should be seen within the context and particularity of each region. That was important, since regional institutions and judicial bodies often made determinations on customary rules of a general character. Those sources could be more relevant within the framework of so-called special customary international law, which the Special Rapporteur should also address. He encouraged the Special Rapporteur to examine the relation between general and special customary international law, especially given the emergence of regional structures with their own self-contained legal regimes.

22. Concerning the scope of the topic, the Special Rapporteur stated in paragraph 22 of his note that the same basic approach to the formation and identification of customary international law applied regardless of the field of law under consideration. In the footnote to paragraph 27 referring to the second report scheduled for 2014, he referred to the question of whether the criteria for the identification of a rule of customary law could vary depending on the nature of the rule or the field to which it belonged. His own preference would be for the latter approach, which would be very beneficial for certain specialized judicial, quasi-judicial and treaty bodies.

23. The Special Rapporteur should reconsider his intention not to examine preemptory norms of international law. As pointed out by a number of other members, those were essentially customary rules, and the fact that they might exist in a treaty did not change their nature. He did not prescribe to the view that dealing with the formation and evidence of *jus cogens* would be seen as being “overly progressive” or politically improper, because the Commission would not be determining which rules were considered *jus cogens* or the legal value of such rules versus other obligations.

24. Two issues should be addressed. The first was the transformation of “soft law” into customary international law, which was of particular importance with regard to General Assembly resolutions. While there had been

extensive debate on the status of such resolutions, the pronouncement of the Commission on “soft law” would have a direct impact on deciding what conditions must be met for General Assembly resolutions to become customary international law, including temporal and substantive aspects. The second issue concerned the impact of lack of universality of certain treaties on the determination of whether the treaty obligations contained therein reflected customary international law.

25. Mr. WISNUMURTI said that the topic was interesting, but not easy. The formation of customary international law was a dynamic process, while evidence of customary international law was static in nature. Yet the two aspects were closely related, and it was important for the work on the topic to address both. However, Mr. Forteau had been right to stress that efforts should focus more on the identification of evidence. Customary international law was difficult to identify, in particular for domestic courts, and that was where the topic was most important.

26. As indicated by the Special Rapporteur in his note, the topic had gained support in the Sixth Committee. Such support was essential for the Commission and the Special Rapporteur to be able to move ahead in the right direction with its work on the topic.

27. The Special Rapporteur had done well to raise the issue of customary international law as a source of public international law, and he approved the Special Rapporteur’s intention to address the relationship between customary international law and treaties in his first report. It was also important to clarify the relationship of “customary international law” and “general international law”, and of “general principles of law” and “general principles of international law”, as suggested in paragraph 14 of the note. A common understanding of the terminology used was also necessary from the outset of substantive work on the topic.

28. On methodology, he agreed with the Special Rapporteur that the first report should include a descriptive survey of how international judicial bodies dealt with customary international law as well as a survey of the case law of national courts, the codification efforts by non-governmental organizations and the writings of publicists. A study of State practice, from which customary international law was basically derived, should also be part of the first report.

29. The scope of the topic needed to be set at an early stage of work. That would prevent overlap with the Commission’s work on other topics. It would be reasonable for the scope of the topic to cover the whole of customary international law, which included different fields of law.

30. He agreed with the Special Rapporteur and other members that the emergence of new preemptory norms of general international law, or *jus cogens*, was a separate matter that should not be part of the work on the topic. It would be useful to explain why that was so.

31. It was clear that prescribing rules would not be the best option for an outcome of the work on the topic but that, as suggested in the Sixth Committee, the Commission

should aim to provide a practical guide to customary international law for judges, government lawyers and practitioners.

32. He approved the schedule for the development of the topic suggested by the Special Rapporteur in his note.

33. Mr. McRAE said that the topic under consideration was a real challenge, because it gave rise to differences of opinion with regard to approach, perspective and emphasis.

34. A common language had to be developed, but above and beyond the lexicon idea, a common understanding was needed on whether the aim of the exercise was the formation of rules of substance or rules of procedure and, indeed, whether the aim was the formation of rules at all. The Special Rapporteur avoided that difficulty to a certain extent by talking about reaching conclusions, but the difficulty might re-emerge in subsequent work on the topic.

35. The Special Rapporteur had emphasized that the aim was to assist national judges, arbitrators and other practitioners who were frequently called on to find and apply customary international law, although they were not sufficiently trained to do so. That aim was laudable, but in order to attain it, the Commission would have to produce an outcome that had the authority of the articles on responsibility of States for internationally wrongful acts.³³⁰

36. Mr. Forteau had argued that the Commission should focus on the evidence of customary international law and not on its formation. If by that he meant that the Commission should limit itself to directing judges and decision makers to where they could find customary international law, then that was too narrow. The Commission should not simply state that customary international law was found in State practice and *opinio juris*, but should also explain how to evaluate that practice and the difficult question of what constituted *opinio juris* and its relationship to practice. Those were questions that were at the core of customary international law and on which the Commission must provide guidance, as the Special Rapporteur himself had recognized in his introduction of the topic.

37. However, if the result of the Commission's work on the topic were to have the same authority as the articles on responsibility of States for internationally wrongful acts, two important aspects must be taken into consideration. First, its work would be judged only in part as a function of whether it was understandable for judges and arbitrators. The crucial criterion was whether it would be seen by the broader international law community as fully reflecting and perhaps resolving conflicting views on customary international law. To attain that goal, it was important to be mindful of the points made by Mr. Murase concerning the expectations of many scholars, for example the need to broaden research beyond judicial decisions, the different subjective and objective perspectives from which the issues could be viewed, the paucity of State practice on which rules of customary international law were often identified,

the intrinsic value of ambiguity in the whole of the customary international law process and the difficulty of moving from the specificity of finding a rule of customary international law to the elaboration of a consensus on the methodology for finding that rule. Second, although the Commission might seek to avoid theoretical debates on the topic, the test of its success would be whether it would be seen as having dealt adequately with those debates. As already pointed out by a number of members, changes in the structure of the international community meant that new aspects must be taken into consideration in identifying the State practice that was at the basis of customary international law and in understanding the consensual basis of customary international law. The age-old debate about the relative balance between State practice and *opinio juris* had to be confronted, and the views of the naysayers about the binding nature of customary international law had to be taken into consideration.

38. The Special Rapporteur's pragmatism was a valuable starting point, but the Commission should keep open the possibility of going much further into theory and practice in order to achieve a set of propositions, conclusions or guidelines that would gain wide acceptance. There was no point in repeating what could be found in any standard work on public international law.

39. It would be premature to put questions to States before the Special Rapporteur had defined the scope of the topic more precisely and indicated where there might still be gaps.

40. Mr. GÓMEZ ROBLEDÓ recalled that, in countries of Latin law, the transposition of international law in domestic law only concerned treaties. For example, the Constitution of Mexico did not make any reference to customary rules or general principles of law. However, today international law covered virtually all aspects of life, and domestic judges were thus constantly called upon to apply it. That was why, in the context of the recent constitutional reform, the Supreme Court of Mexico had introduced a verification of compliance with treaties at all levels: judges must ensure that their decisions were in conformity not only with domestic law but also with international law. In that connection, the Supreme Court had ruled that the decisions of the Inter-American Court of Human Rights were binding in the national territory, but a domestic judge would simply not know what to do when faced with a decision by the Inter-American Court that evoked the existence of a rule of customary law. The work envisaged by the Special Rapporteur would thus be very useful in helping domestic judges identify customary rules. Consequently, greater emphasis should be placed on evidence than on formation, although the two were closely related. In that connection, he agreed with Ms. Escobar Hernández that the word "*documentación*" in the Spanish version of the title of the topic should not be used to designate the issue concerned, namely evidence or identification of a customary rule.

41. He was pleased that the Commission was addressing the topic, and although it would have to wait until States in the Sixth Committee considered the utility of the work, he had no doubt that the Special Rapporteur would succeed in convincing them.

³³⁰ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

42. Mr. PARK recalled that “formation” was the process by which rules of customary international law developed and that “evidence” consisted in identifying them. A balance needed to be found between the two aspects of the topic, but given that the Commission’s aim was to provide guidance for practitioners, it would be preferable to focus on evidence. The Commission’s work, which would result in a practical guide, with commentaries, for judges, government lawyers and practitioners, would help dispel a number of ambiguities. The questions most often posed by national practitioners included these: how to identify a customary international law, especially when a Government had not yet ratified an international convention and was called upon by another State to respect one of its provisions on grounds that it reflected international custom; the effect of acquiescence in the international order, in particular in the process of the formation of customary international law, and the importance of the duration of silence and omission; with regard to the burden of proof, the question whether a national judge must rely solely on practice to determine the existence of an international customary rule or whether he must also examine *opinio juris* and, if so, how; the relationship between customary international law and treaties; the legal status of resolutions adopted by international organizations, in particular the United Nations General Assembly; and the distinction between *lex lata* and *lex ferenda* and the link with codification work.

43. The Special Rapporteur had rightly pointed out that the theoretical underpinnings of the topic were important, but it would not be appropriate to dwell too much on the details. As to methodology, in the Special Rapporteur’s view the most reliable guidance on the topic was likely to be found in the case law of international courts and tribunals, particularly the International Court of Justice and the Permanent Court of International Justice, but it should be borne in mind that the consideration of international and national case law was not an easy task, given the differences of opinion that existed even in international case law. For example, in the “*Lotus*” case, the Permanent Court of International Justice had considered, in 1927, that custom was the product of the consent of States, whereas in the cases concerning the *North Sea Continental Shelf*, the International Court of Justice had been of the view that custom was the expression of an objective rule.

44. Apart from the practice of States and international organizations, the practice of States that were not recognized by the international community as a whole should also be taken into account. As to the scope of the work, the Special Rapporteur had ruled out *jus cogens* from the outset, a position that was already shared by most members, but as the work should result in guidelines for national practitioners, it should provide a minimum of explanations, by indicating, for example, that *jus cogens* not only was defined in article 53 of the 1969 Vienna Convention, but also existed to a certain extent in international custom. The Special Rapporteur should also contemplate the inclusion of the subject of regional customary law in the scope of the topic.

45. Mr. KAMTO said that, given the Special Rapporteur’s remarkable qualities as an international jurist and, indeed, as a legal expert, it was certain that he would succeed in ensuring that the Commission made the most of the topic

under consideration. Although it was not obvious that the customary process in the domestic legal system was the same as in the international legal system, it was not irrelevant that the Special Rapporteur came from a culture that placed emphasis on custom, namely the common law tradition. In his note, the Special Rapporteur had sought to map out the itinerary that he intended to follow. In his oral introduction, he had evoked the ICRC study on customary humanitarian law,³³¹ which it would have been preferable to refer to specifically in his note. Thus, it might have been better for section B of the chapter on preliminary points to have been entitled “Work of other organizations on the formation of customary international law”, which would have made it possible to mention not only the work of the International Law Association³³² and ICRC, but all other work of a similar nature, notably that of the Princeton Project,³³³ but also that of academic institutions. He entirely agreed with the point made by Mr. Murase at the 3148th meeting on the title of the topic, and he was not convinced that the Commission had an interest in considering both the formation and evidence of customary international law. Mr. Murase had presented a cogent argument to which a number of members had subscribed and which reflected his own point of view. However, he believed that it was necessary to speak of “identification” or, to be more precise, the “method of identification” of customary international law rather than “evidence” of custom or of customary international law, because the concept of evidence was more restrictive and would not permit the Commission to cover all the basic aspects of the topic as outlined by the Special Rapporteur in his note.

46. With regard to the possible outcomes of the Commission’s work, he agreed with the aim proposed by the Special Rapporteur in paragraph 24 of his note, namely to provide guidance and practical advice rather than hard-and-fast rules. He had reservations about Mr. McRae’s proposal that the Commission should elaborate a text that was as authoritative as its articles on responsibility of States for internationally wrongful acts, because the current exercise was of a different nature. As to the approach, he was pleased that, as shown in paragraph 17, the Special Rapporteur did not entirely rule out a consideration of theoretical aspects, although his introduction of the note might have given the opposite impression. While not contesting the importance of the practical use of the Commission’s work, he personally believed that it could not allow itself to consider a topic by relying solely on the case law of international, regional and national jurisdictions. After all, the teachings of the most qualified publicists of the various nations were referred to in Article 38 of the Statute of the International Court of Justice, if only as a subsidiary means for the determination of rules of law. In sum, it was the outcome that must be practical, not the study itself. The schedule of work proposed in paragraph 27 of the note did not call for any particular comment: it was purely indicative, and thus open to adjustments as a function of the development of the topic and the circumstances.

³³¹ See footnote 329 above.

³³² See footnote 328 above.

³³³ Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs (Princeton, New Jersey, Princeton University, 2001).

47. Turning to the substance, he pointed out that a customary rule was difficult to establish because its formation often gave rise to disputes and its determination was a source of conflict; hence the importance of the question of the evidence of custom. As one writer had put it, in international law, jurists knew how to make treaties, but they did not really know how to make customs.³³⁴ Sometimes judges identified rules by mysterious means, as the International Court of Justice had done in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, before correcting itself through its judgment of 3 February 2012 in the case concerning *Jurisdictional Immunities of the State*, in particular paragraph 55. In other cases, they had preferred to avoid becoming involved in the identification of custom, as reflected in the position set out by the WTO Appellate Body in its report on *EC Measures concerning Meat and Meat Products (Hormones)*. However, their role remained determinant in the identification of customary rules. After all, once a judge had found that a rule was a rule of customary law, even if he or she had not shown by what method he or she had arrived at that conclusion, his or her decision must be taken note of: that clearly showed, as he had already pointed out, that the human will sometimes played a role in the determination of a customary rule.

48. With regard to the criteria of quantity, i.e. the number of States participating in the formation of custom, and quality, i.e. the participation or non-participation of “States whose interests are specially affected”, to quote the phrase used by the International Court of Justice in the cases concerning the *North Sea Continental Shelf* (para. 74), the question arose whether one of those two criteria could take precedence over the other, in which circumstances and in which conditions. In addition to those two criteria, a spatial or geographical criterion should be added which could serve as the basis for the determination of a regional or local custom.

49. The boundary between a customary rule and a rule that came under the heading of progressive development was an important and even fundamental point for the Commission itself. It happened that, in many cases, a rule proposed as coming under the heading of progressive development was also based, like a customary rule, on considerable State practice, which was often convergent but not unanimous. The question then arose as to whether the distinction between rules of customary law and rules that came under the heading of progressive development was based on the existence of an *opinio juris* in the case of custom and its absence in the case of *lex ferenda*. With regard to the passage of a rule from unwritten to written form, i.e. the transformation of customary law through codification into treaty law, Judge Herczegh had recalled in his declaration on the advisory opinion rendered by the International Court of Justice in 1996 in the case concerning the *Legality of the Threat or Use of Nuclear Weapons* that such an operation made it possible to remove some of the weaknesses inherent in customary law by conferring upon it the precision of treaty law, but at the same time—and that was the risk of an imperfect

transcription—codification could subtract from or add to customary rules or even result in their transformation. There would then be two customary norms having the same objective, with one remaining at the stage of customary law and the other crystallized by codification. The Commission’s work should lead it to examine the status of each of those rules, both of which claimed to be customary. In other words, the Special Rapporteur should perhaps consider whether the identification of a customary norm through the codification process left intact the possibility of a non-treaty identification, for example by means of case law. To be sure, the International Court of Justice had affirmed in its 1986 judgment on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* that it “will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content” (para. 179). However, the Commission was not concerned with the content of a rule, but with its identification. Thus, the question was whether the reference to a codified treaty rule could serve as evidence or as a means of identifying the custom of a State that was not party to a convention and had not even participated in its negotiation.

50. With regard to the question of the respective importance of practice and *opinio juris* in the formation of custom, whereas practice was in general relatively easy to identify, that was not true for *opinio juris*. As noted by Mr. Park, the role played by acquiescence in the determination of *opinio juris* needed to be examined. The question also arose whether intent played a role in that regard and, if so, in what way; at the 3148th meeting, Ms. Jacobsson had raised a similar point concerning the consequences of silence. Those questions were not purely rhetorical, and positive international law was not particularly clear or consistent on whether, for example, consent expressed during the negotiation of an international treaty and which emerged as early as the phase of the *travaux préparatoires*, i.e. before the signing of the final text, constituted *opinio juris*. In that connection, Sir Robert Jennings had posed the question of whether the protesting State (or States) could exclude itself (themselves) from the generality of that law and had pointed out that the question was largely answered by the observation that *opinio juris sive necessitatis* was indeed the product of consensus, not of consent.³³⁵ The Commission should examine whether case law was clear in that regard and, if not, what proposals should be made.

51. In paragraph 23 of his note, the Special Rapporteur had referred to *jus cogens* solely in order to rule it out, because he believed that it should not be dealt with. Although that argument had been supported by many members of the Commission, he personally feared that it was premature to take such a decision, because it was not certain that the Commission could really avoid a consideration of formation and identification of *jus cogens* as an element of customary international law. In the case concerning the *Prosecutor v. Anto Furundžija*,

³³⁴ P.-M. Dupuy, “L’unité de l’ordre juridique international: cours général de droit international public (2000)”, *Collected Courses of The Hague Academy of International Law 2002*, vol. 297, p. 160.

³³⁵ See R. Jennings, “What is international law and how do we tell it when we see it?”, *Annuaire suisse de droit international*, vol. 37 (1981), pp. 59–88; see also his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua*.

the International Tribunal for the Former Yugoslavia had written, in its judgment of 10 December 1998, that

the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force (para. 153).

By writing that “this principle has evolved into”, the Tribunal was implying the existence of a process or formation, without indicating how that process or formation operated. Moreover, it enunciated various categories of customs—local, special and general—concerning which the Commission should examine whether they were all formed in the same manner. But if, according to the Tribunal, States could not derogate from *jus cogens* even through the intermediary of a general custom, did that mean that a customary norm of *jus cogens* was formed differently from a general custom? Clearly, that aspect of the question was not so simple.

52. Mr. NOLTE congratulated Sir Michael on his appointment as Special Rapporteur for the topic of formation and evidence of customary international law, the most daunting and ambitious topic on the Commission’s agenda. In his note, the Special Rapporteur had provided an outline for future work, and although much could be said about possible alternatives on how to approach the topic, it was the Special Rapporteur’s prerogative to go forward as he had proposed. Members who had already spoken had made many valuable comments on a number of specific points, which he did not want to repeat or comment upon further at the current stage of the preliminary debate, since his remarks essentially concerned the title of the topic. Mr. Forteau had proposed that the Special Rapporteur should focus on the evidence of customary international law rather than on its formation, and he had argued that the main interest of practitioners would lie in having a better understanding of how to identify customary international law and that the Commission would engage in an academic exercise if it tried to explain the “formation” of customary international law. Thus, Mr. Forteau had addressed a distinction that Mr. Murase had introduced into the debate when he had distinguished between a “snapshot” perspective, which sought to identify the state of customary international law at a given point in time, and a broader perspective that aimed to explain the process by which customary international law came about. Personally, he fully understood that it was most important for States and practitioners to be able to identify customary international law at any given point in time. Thus, he did not disagree with Mr. Forteau insofar as that must be a main element of the Commission’s work on the topic. He did not, however, subscribe to the idea that a clarification of the “formation” of customary international law would be less important and would be merely an academic exercise. States and practitioners did not only want to know by which means customary international law could be identified, they also wanted to know how to explain to their national courts and other bodies why and under which circumstances those means led to the conclusion that a particular rule

was or was not a rule of customary international law. Of course, in trying to explain the formation of customary international law, the Commission ran the risk of becoming involved in a discussion of certain general questions of principle, but that was inevitable in the current exercise. If the Commission did not deal with such issues, it would not meet the expectations of States and the international community at large, and the result of its work might be called into question too easily.

53. To cite one example, during the current session the Commission had again taken up, under the guidance of a new Special Rapporteur, the topic of immunity of State officials from foreign criminal jurisdiction. One important aspect of that topic was whether a sufficiently strong trend could be discerned to identify a development in customary international law. Much depended on which factors were taken into account to identify such a trend. Were those factors only, or mainly, specific decisions by courts, Governments and legislatures, or also general values and policy statements, and parallel developments in related areas, such as that of international criminal jurisdiction? In his view, it would be futile to try to tackle the issue by merely seeking to define which of those factors were relevant for the identification of a rule of customary international law at a given point in time. Instead, it was necessary to explain how a possible new rule of customary international law was formed in order to make sense of the diverse factors at work. That required some thinking at a more general level. Otherwise, the Commission would miss the essential characteristic of customary international law, namely the fact that, in contrast to other sources of international law and different forms of national law, customary international law was both the result and the element of a process—a characteristic that must also be taken into account when States and other actors sought to identify a rule of customary international law at a particular moment in time.

54. Another important aspect was that, as indicated by the Special Rapporteur, one of the main goals, and perhaps the main goal, was to give national courts guidance on how to proceed when they were called upon to apply customary international law. Mr. Petrič and other members had underscored the importance of that aspect. Mr. Petrič had drawn the Commission’s attention to the fact that many national constitutions accorded customary international law a special place in their national legal orders, often higher than treaty law. That suggested that the willingness of national courts to identify and apply a rule of customary international law in accordance with those constitutional rules might depend on how well an authoritative body, such as the International Law Commission, could explain the specific and binding nature of customary international law. If the Commission merely adopted a “snapshot” approach or established a technical list of sources of evidence, it would miss that important dimension of customary international law.

55. The objective of the Commission’s work on the formation and evidence of customary international law must not only be to provide practical guidance for judges and other actors who were not familiar with customary international law, but also to provide a considered opinion for those who were. Debates at academic level in a number

of countries reflected a deep concern of a practical nature: today, national jurists and judges asked themselves what the particularities of customary international law were and whether it was legitimate to accord it a special status in the domestic legal system. For example, the ease or, on the contrary, the difficulty with which customary rules evolved had a considerable impact on their legitimacy and authoritative value at both international and national level. The Commission must bear in mind that its work would have implications for the legitimacy and authoritative value of customary international law, both in domestic legal systems and beyond, and it must therefore justify each of its conclusions.

56. He agreed with Mr. Petrič that it would be useful for the Special Rapporteur to explore sources of law in languages other than English and French, for example the decisions of the German Constitutional Court.

The most-favoured-nation clause (A/CN.4/650 and Add.1, sect. F)

[Agenda item 9]

ORAL REPORT OF THE STUDY GROUP

57. Mr. McRAE (Chairperson of the Study Group) recalled that the Commission had decided to reconstitute the Study Group on the most-favoured-nation clause at the current session and that the Study Group had held six meetings. The overall objective of the Study Group was to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in arbitral decisions in the area of investment law particularly in relation to provisions concerning the most-favoured-nation clause. It was considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law. The Study Group sought to elaborate an outcome that would be of practical utility to those involved in the investment field and to policymakers. It was not its intention to prepare any draft articles or to revise the 1978 draft articles adopted by the Commission on the most-favoured-nation clause.³³⁶

58. To date, the Study Group, in order to illuminate further the contemporary challenges posed by the most-favoured-nation clause, had considered several background documents. It had had before it a working paper on “Interpretation of MFN clauses by investment tribunals”, which he had prepared. That document was a restructured version of the 2011 working paper on “Interpretation and application of MFN clauses in investment agreements”, taking into account recent developments and the discussions of the Study Group in 2011.³³⁷ In the course of the discussion of that paper, there had been an exchange of views on whether the nature of the tribunal had a bearing on how it went about treaty interpretation, in particular whether the mixed nature of arbitration constituted a relevant factor in the interpretative process. The Study Group had also had before it a working paper on “Effect of the mixed nature

of investment tribunals on the application of MFN clauses to procedural provisions”, prepared by Mr. Forteau.

59. The Study Group had also had before it an informal working paper on model most-favoured-nation clauses post-*Maffezini*, examining the various ways in which States had reacted to the *Maffezini* decision, including by specifically stating that the most-favoured-nation clause did not apply, or did apply, to dispute resolution provisions, or by specifically enumerating the fields to which the most-favoured-nation clause applied. It had also had before it an informal working paper providing an overview of most-favoured-nation-type language in headquarters agreements conferring on representatives of States to the Organization the same privileges and immunities granted to diplomats in the host State. Those informal papers, together with an informal working paper on bilateral taxation treaties and the most-favoured-nation clause that had not been discussed by the Study Group, were still a work in progress and would continue to be updated to ensure completeness.

60. The working paper on the effect of the mixed nature of investment tribunals on the application of most-favoured-nation clauses to procedural provisions had offered an explanation of the mixed nature of arbitration in relation to investment, an assessment of the particular modalities of the application of the most-favoured-nation clause in mixed arbitration and a study of the impact of such arbitration on the application of the most-favoured-nation clause to procedural provisions. It had been considered that the mixed nature of investment arbitration operated on two levels, because the parties to the proceedings, being a private claimant and a respondent State, were not of the same nature. Moreover, it had been argued that the tribunal in such an instance was a functional substitute for an otherwise competent court of the host State. Mixed arbitration was thus situated between the domestic plane and the international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration. It had a private and a public element to it.

61. It had been recognized in the working paper on the interpretation of most-favoured-nation clauses by investment tribunals that, notwithstanding a reliance on treaty interpretation or the invocation of the interpretative tools under the 1969 Vienna Convention, there was little consistency in the way in which investment tribunals actually went about the interpretative process, or necessarily in the conclusions that they reached. Accordingly, the working paper had reviewed further the approaches taken by investment tribunals to try to identify factors that appeared to influence such tribunals in interpreting most-favoured-nation clauses and to identify certain trends.

62. Those factors and trends included the following: (a) drawing a distinction between substance and procedure, by enquiring into the basic question whether in principle a most-favoured-nation provision could relate to both the procedural and the substantive provisions of the treaty; (b) interpreting the most-favoured-nation provision in relation to the dispute settlement provisions of the treaty as a jurisdictional matter, where there was an implication in some cases of an alleged

³³⁶ *Yearbook ... 1978*, vol. II (Part Two), pp. 19 *et seq.*

³³⁷ See *Yearbook ... 2011*, vol. II (Part Two), paras. 351–360.

higher standard for interpreting whether the scope of a most-favoured-nation clause was one of agreement to arbitrate, while in some other cases a differentiation was made between jurisdiction and admissibility, in which case a provision affecting a right to bring a claim, which was a jurisdictional matter, was distinguished from a provision affecting the way in which a claim had to be brought, which had been construed as going to admissibility; (c) adopting a conflict of treaty provisions approach, whereby tribunals took into account the fact that the matter sought to be incorporated into the treaty had already been covered, in a different way, in the basic treaty itself; (d) considering the treaty-making practice of either party to the bilateral investment treaties, in respect of which a most-favoured-nation claim had been made, as a means of ascertaining the intention of the parties regarding the scope of the most-favoured-nation clause; (e) considering the relevant time at which the treaty had been concluded (principle of contemporaneity) as well as the subsequent practice to ascertain the intention of the parties; (f) assessing the influence on the tribunal of the content of the provision sought to be ousted or added by means of a most-favoured-nation clause; (g) acknowledging an implicit doctrine of precedent, a tendency influenced by a desire for consistency rather than any hierarchical structure; (h) assessing the content of the provision invoked in order to determine whether, in fact, it accorded more/less favourable treatment; and (i) considering the existence of policy exceptions.

63. On the basis of his working paper, which had also offered a tentative analysis of the direction that the Study Group might wish to take, the Study Group had begun an exchange of views addressing three main questions, namely (a) whether in principle most-favoured-nation provisions were capable of applying to the dispute settlement provisions of bilateral investment treaties; (b) whether the conditions set out in bilateral investment treaties under which dispute settlement provisions could be invoked by investors were matters that affected the jurisdiction of a tribunal; and (c) what factors were relevant in the interpretative process in determining whether a most-favoured-nation provision in a bilateral investment treaty applied to the conditions for invoking dispute settlement.

64. The Study Group had recognized that whether a most-favoured-nation provision was capable of applying to the dispute settlement provisions was a matter of treaty interpretation to be answered depending on the circumstances of each particular case. Each treaty provision had its own specificities that had to be taken into account. It had been appreciated that there was no particular problem where the parties explicitly included or excluded the conditions for access to dispute settlement within the framework of their most-favoured-nation provision. The question of interpretation had arisen, as in the majority of cases, when the most-favoured-nation provisions in existing bilateral investment treaties were not explicit as to the inclusion or exclusion of dispute settlement clauses. It had been suggested that at a minimum, there was no need for tribunals when interpreting most-favoured-nation provisions in bilateral investment treaties to enquire into whether such provisions in principle would not be capable of applying to dispute settlement provisions.

Post-*Maffezini*, it would be prudent for States to give an indication of their preference.

65. In the context of its further work, the Study Group would continue to examine the various factors that had been taken into account by the tribunals in interpretation, with a view to considering whether recommendations could be made in relation to (a) the ambit of context; (b) the relevance of the content of the provision sought to be replaced; (c) the interpretation of the provision sought to be included; (d) the relevance of preparatory work; (e) the treaty practice of the parties; and (f) the principle of contemporaneity. It had been considered that it would be necessary to give further attention to aspects concerning interpretation of the most-favoured-nation clause beyond *Maffezini*, and to question whether additional light could be thrown on the distinction made in the case law between jurisdiction and admissibility, who was entitled to invoke the most-favoured-nation clause, whether a particular understanding could be given to “less favourable treatment” when such provision was invoked in the context of bilateral investment treaties, and whether there was any role for policy exceptions as a limitation on the application of the most-favoured-nation clause.

66. The Study Group was aware that it had previously identified the need to study further the question of most-favoured-nation clauses in relation to trade in services under the General Agreement on Trade in Services (GATS) and investment agreements, as well as the relationship between most-favoured-nation, fair and equitable treatment, and national treatment standards. Those would be kept in view as the Study Group progressed in its work. It had also been recalled that the relationship between the most-favoured-nation clause and regional trade agreements was an area that was anticipated for further study. It had also been suggested that there were other areas of contemporary interest, such as investment agreements and human rights considerations. However, the Study Group had been mindful of the need not to broaden the scope of its work and had therefore been cautious about exploring aspects that might divert attention from its work on areas that posed problems relating to the application of the provisions of the 1978 draft articles.

67. The Study Group had shared views on the broad outlines of its future work. It was envisaged that for the next session of the Commission, a report would be prepared for the Study Group, providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and, where appropriate, making recommendations, including possible guidelines and model clauses. The two working papers constituted preparatory documents to form part of that report. The Study Group remained optimistic that its work could be completed within the next two or three sessions of the Commission.

68. The CHAIRPERSON said he took it that the Commission wished to take note of the oral report of the Study Group.

It was so decided.

Provisional application of treaties³³⁸

[Agenda item 6]

ORAL REPORT OF THE STUDY GROUP

69. Mr. GÓMEZ ROBLEDÓ (Chairperson of the Study Group on provisional application of treaties) said that the Study Group had met on 19 and 25 July 2012 to initiate a dialogue on a number of issues that could be relevant for the consideration of the topic during the current quinquennium. It had had before it his informal document outlining some preliminary elements. Those elements were to be read together with the syllabus, prepared by Mr. Giorgio Gaja, which had been reproduced in annex III to the Commission's report on the work of its sixty-third session (2011).

70. In opening the discussions, he had indicated that he intended to submit his first substantive report at the Commission's sixty-fifth session and that, in his view, the basis for consideration of the topic should be the work undertaken by the Commission on the topic concerning the law of treaties, as well as the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention. The Study Group had addressed the following questions: (a) the procedural steps that would need to be considered as preconditions for provisional application and for its termination; (b) the extent to which article 18 of the 1969 Vienna Convention, which established the obligation not to defeat the object and purpose of a treaty prior to its entry into force, was relevant to the regime of provisional application under article 25 of the Vienna Convention; (c) the extent to which the legal situation created by the provisional application of treaties was relevant for the purpose of identifying rules of customary international law; and (d) whether it would be useful to request from States information regarding their practice and, if so, what should be the focus of the questions to be asked.

71. Concerning the relationship between articles 18 and 25 of the 1969 Vienna Convention, the majority of members who had taken the floor on that point had been of the view that provisional application under article 25 went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. Although related insofar as they both had to do with the period preceding the entry into force of the treaty, those two provisions gave rise to different legal regimes and should be treated as such.

72. As to the question concerning the relevance of the situation created by the provisional application of treaties for the purpose of identifying rules of customary international law, the general feeling had been that aspects relating to the formation and identification of customary international law should be excluded from the scope of the topic. An analysis of the customary status of article 25

of the 1969 Vienna Convention could, however, be envisaged.

73. The Study Group had considered that it would be premature to seek information from States; when the time came, questions on their legislative, diplomatic, judicial and parliamentary practice could be posed in the form of a questionnaire. According to one view, it would be preferable to limit any request for information to relevant domestic laws on the matter. However, it had been stressed that the Commission could not ignore the position of States regarding provisional application. In that regard, a view had been expressed that it would suffice to have a sample of relevant State practice.

74. Other points addressed during the discussions had included, for instance, the exact meaning of "provisional application of a treaty"; the various forms and manifestations covered by that legal institution; the legal basis for the provisional application of a treaty, namely article 25 of the 1969 Vienna Convention itself or a parallel agreement to the treaty; the question of which organs were competent to decide on provisional application and the connection of that issue with article 46 of the Vienna Convention on provisions of internal law regarding competence to conclude treaties; whether the legal regime of provisional application was the same for different types of treaties; whether the provisional application of a treaty generated legally binding obligations, the breach of which would entail the international responsibility of the State(s) concerned; and the modalities and effects of the termination of the provisional application of a treaty with an emphasis on its retrospective perspective. The general feeling had been that it was premature for the Commission to take a decision on what the final outcome of work should be. The possibility of elaborating draft articles had been mentioned by some members, but other possible forms, such as guidelines and model clauses, had also been alluded to and should not be excluded at the current stage.

75. Some members had mentioned the possibility of requesting the Secretariat to prepare a memorandum on the topic. He believed that it would be very useful to have a memorandum of the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention. He therefore proposed that a mandate should be given by the Commission to the Secretariat for the preparation of such a memorandum.

76. The CHAIRPERSON said he took it that the Commission wished to take note of the oral report of the Study Group on provisional application of treaties and to approve the recommendation contained therein.

It was so decided.

The meeting rose at 12.55 p.m.

³³⁸ This topic had been included in the Commission's long-term programme of work in 2011 (*Yearbook ... 2011*, vol. II (Part Two), paras. 365–367), on the basis of a proposal having appeared in annex III of the Commission's report on its work at the same session (*ibid.*).

3152nd MEETING

Monday, 30 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Formation and evidence of customary international law (*concluded*) (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPporteur (*concluded*)

1. Sir Michael WOOD (Special Rapporteur), summing up the first debate on the new topic “Formation and evidence of customary international law”, said that, overall, Commission members had welcomed the topic, and their preliminary views had confirmed the broad thrust of the note he had prepared, which was contained in document A/CN.4/653. Speakers had drawn attention to the importance of customary international law within the constitutional order and domestic law of many States. It was important that public international law should form part of the core curriculum at law schools and be part of continuing legal education for lawyers and judges alike.

2. Mr. Murase had expressed serious doubts about the topic, suggesting that it was impractical, if not impossible, to consider the whole of customary international law, even on a very abstract level, and the Commission was bound to fail in that regard, since it would end up either stating the obvious or stating the ambiguous. However, as Mr. Gevorgian had pointed out, what was obvious to the Commission was not necessarily obvious to everyone. A clear, straightforward set of conclusions by the Commission could constitute an important reference for those lawyers, many of whom lacked experience in the area, who were confronted by issues of customary international law. As to the issue of ambiguity, Mr. Murase had seemed to be referring to the difficulty of reaching conclusions that could apply across the whole field of customary international law, at least not without a great number of saving clauses. Saving clauses, however, had proven to be very useful, not least in the Commission’s work. It was not his intention to consider the substance of customary international law but rather to examine systemic rules concerning the identification of such law.

3. He was fully aware of the inherent difficulty of the topic and of the need to approach it with a degree of caution, and he wished to assure colleagues that he shared their concern that the work of the Commission should

not be overly ambitious in that area. He would work towards an outcome that would be useful, practical and—hopefully—well received.

4. With regard to the suggestion by Mr. Murase that the Commission should look at possible intended, or “target”, audiences, he said that he did not entirely understand the relevance of the differentiation between subjective, “intersubjective” and objective perspectives. To him, such a distinction came close to a denial of law. Yet if law was to have any meaning, the accepted method for identifying it must be the same for all; a shared, general understanding was precisely what the Commission might hope to achieve. In contrast to Mr. Murase’s description of the approach taken by the International Court of Justice, he did not believe that courts felt bound to determine the existence of a rule of customary international law solely on the basis of arguments advanced by one or even both of the parties appearing before it; rather, courts had a theory about what customary international law was and how it was formed that was brought to the bench regardless of what the parties said. Judge Abraham, in his separate opinion in the recent case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, also seemed to have rejected the “intersubjective” perspective.

5. There had been broad agreement that the ultimate outcome of the Commission’s work on the topic should be practical. The aim was to provide guidance for anyone, particularly those not expert in the field of public international law, faced with the task of determining whether a rule of customary international law existed. It was not the Commission’s task to resolve theoretical disputes about the basis of customary law or the various theoretical approaches to be found in the literature to its formation and identification; as Mr. Hmoud had said, practice—not theory—was the cornerstone of the topic. Initially, at least, the main focus should be on ascertaining what courts and tribunals, as well as States, actually did in practice, and in that regard he agreed with Mr. Petrič, Mr. Kamto and others who had rightly stressed the need to consider the practice of States from all the principal legal systems of the world and from all regions. At the same time, as Mr. McRae and others had pointed out, the eventual practical outcome must be grounded in detailed and thorough study, including of the theoretical underpinnings of the subject, if it was to be accepted as being to some degree authoritative.

6. There had been general agreement that the outcome of the Commission’s work on the topic should be a set of propositions, conclusions or guidelines. The Commission would not be drafting a “Vienna convention on customary international law”; it would not be appropriate to be unduly prescriptive. As many speakers had emphasized, it was a central characteristic of customary international law—and one of its strengths—that its formation was a flexible process. He did not agree, however, with the position expressed by one speaker that ambiguity was part of the essence of customary international law, which seemed to be a statement about the substance of the law as much as about the process of identification. Ambiguity in the rules of international law was not, in his view, an inherently good quality; it was not the way to assure

the rule of law in international affairs. Flexibility in the process of formation of customary law should not lead to ambiguity in the substance of the law. While it had been pointed out that approaches to customary international law could change over time, the objective was to explain the current process and, as Mr. Murphy had said, help to clarify the current rules on formation and evidence of international law, not to advance new rules.

7. There had been broad agreement with what he had said regarding the scope of the topic in paragraphs 20 to 22 of his note and general support for the development of standardized terminology, with a glossary of terms in the official languages of the United Nations. Views were divided as to whether the Commission should open what Mr. Park had referred to as the Pandora's box of *jus cogens*. Most, though not all, speakers had seemed to think that *jus cogens* should not be addressed head on, although it might be necessary to refer to it in relation to particular aspects of the project. The matter could be revisited as the topic progressed.

8. Many suggestions had been made as to what could be covered under the topic. They included a study of the origins of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice (or, rather, the corresponding provision of the Statute of the Permanent Court of International Justice) and how it had been understood by the courts; the relationship between custom and treaty, including the impact of widely ratified though not universal treaties (in that connection, article 38 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was particularly relevant); the relationship between custom and general principles of law; the distinction between customary international law and general international law; the question of regional custom; the effect of resolutions of international organizations; the role of the practice of subjects of international law other than States, in particular international organizations such as the European Union; the relationship between "soft law" and custom; the extent to which approaches might differ in different areas of the law; the importance, or not, to be accorded to inconsistent practice; the relevance of acquiescence, silence and acts of omission; and the concepts of "specially affected States" and "persistent objector".

9. With regard to the comments made concerning the use of the words "formation" and "evidence" in the title of the topic, including the translation of the latter word into other languages, he said that whatever words were used, the topic should cover both the method for identifying the existence of a rule of customary international law—for example, State practice plus *opinio juris sive necessitatis*—and the types of information that could be used as the raw material for conducting an analysis of customary international law, as well as the places where such information could be found. It was important to get the title right so that it reflected as clearly as possible what the Commission intended to consider under the topic.

10. If he had understood correctly, Mr. Forteau and others had suggested that the main issue to be addressed under the topic was the method to be followed for the

identification of existing rules of customary international law. He shared that view. The word "identification" would perhaps have been a better word to use in the English title of the topic, and he was open to the possibility of amending the title at a later stage. Meanwhile, he agreed with those who thought that the inclusion of the word "formation" was useful: determining whether an allegedly emerging rule existed might well involve a consideration of the modalities of the formation of customary rules in international law. As some speakers had said, the two aspects could not be entirely separated.

11. Mr. Hassouna had suggested that the Commission might wish to reappraise its 1949 preparatory study within the purview of article 24 of its statute on "Ways and means of making the evidence of customary international law more readily available",³³⁹ which was still the basis for important ongoing activities. In response to a query from Ms. Escobar Hernández regarding paragraph 16 of his note, he explained that the paragraph was intended for those who seemed to deny the binding force of customary international law. With regard to paragraph 18, he said that the wording "codification efforts by non-governmental organizations" was intended to cover the work of the International Law Association³⁴⁰ and any other collective efforts of a non-governmental nature, including the work of ICRC³⁴¹ and the Institute of International Law.³⁴²

12. He shared the views of colleagues who had emphasized the importance of drawing on writings from as wide a range of authors as possible, in various languages, and looked forward to assistance from Commission members and possibly also from organizations with which the Commission enjoyed a close relationship.

13. There had been broad agreement on the proposed plan of work on the topic for the quinquennium, which was purely indicative and subject to adjustment. While the projected reports for 2014 and 2015 might prove to be overly ambitious, it was important to approach State practice and *opinio juris* at the same time, given the interconnections between them. The point made by Ms. Escobar Hernández that States should have an opportunity to comment on the complete set of conclusions or guidelines before their adoption would be

³³⁹ Document A/CN.4/6 and Corr.1 (available from the Commission's website or *Yearbook ... 1949*).

³⁴⁰ "London statement of principles applicable to the formation of general customary international law", and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: www.ila-hq.org/en/committees/index.cfm/cid/30). See also the debate in plenary, pp. 922–926 (*ibid.*). The "London statement" also appears on pp. 712–777 (*ibid.*); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid.*). The six interim reports by the Committee contain more detailed information.

³⁴¹ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Rules) and vol. II (Practice) (Cambridge, United Kingdom, Cambridge University Press, 2005).

³⁴² Institute of International Law, *Yearbook*, vol. 62, Part II, Session of Cairo (1987), resolution and conclusions of the Thirteenth Commission on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective, p. 66.

borne in mind. It would be useful, notwithstanding the doubts expressed by Mr. McRae, for the Commission to ask States for information about their practice that could not otherwise be readily obtained. A number of speakers had made the valid point that the Commission should not rely exclusively on the pronouncements of international courts and tribunals but should pay particular attention to State practice, including the practice of all organs of the State. He had taken due note of the comments made by Ms. Jacobsson and Mr. Gevorgian regarding the footnote that appeared at the end of the first subparagraph of paragraph 27 of the note and suggested that the request to States could be simplified to read as follows: "The Commission requests States for information on their State practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation. Such practice might include: (a) official statements before legislatures, courts and international organizations; and (b) decisions of national, regional and subregional courts." He hoped that the Commission would be ready to mandate the Secretariat to prepare, if possible in time for the sixty-fifth session, a memorandum identifying elements in the Commission's previous work that could be of particular relevance to the topic.

The obligation to extradite or prosecute³⁴³ (*aut dedere aut judicare*) (A/CN.4/650 and Add.1, sect. D)

[Agenda item 3]

REPORT OF THE WORKING GROUP

14. Mr. KITTICHAISAREE (Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)) said that the Working Group had held five meetings to evaluate the progress of work on the topic and to explore possible future options for the Commission to take. The Working Group had based its work on the four informal working papers prepared by its Chairperson.

15. Some members had wished to have a clearer picture of the issues involved in order to facilitate an appropriate response by the Commission. It had been suggested that the Commission might find it useful to harmonize the multilateral treaty regimes relating to the obligation to extradite or prosecute. However, some members had noted that the obligation to extradite or prosecute operated in so many different ways in different treaty regimes that any attempt at harmonization outside such treaty frameworks would not be meaningful. Not much would be gained from elaborating draft articles on existing provisions in multilateral treaties.

³⁴³ Between 2006 and 2011, the Commission examined four reports from the Special Rapporteur, Mr. Zdzislaw Galicki (*Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571 (preliminary report), *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585 (second report), *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/603 (third report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/648 (fourth report)). In 2009, the Commission established an open-ended Working Group, with Mr. Alain Pellet as Chairperson, which defined a general framework to consider the topic (*Yearbook ... 2009*, vol. II (Part Two), para. 204). The Working Group was reconstituted at the sixty-second session, with Mr. Enrique Candioti as Chairperson (*Yearbook ... 2010*, vol. II (Part Two), paras. 337–340), and at the present session with Mr. Kriangsak Kittichaisaree as Chairperson.

16. A second possible course of action that had been suggested was for the Commission to assess the interpretation, application and implementation of extradite-or-prosecute clauses. However, some members had argued that the issue involved was one of fact and was not something that could be resolved by the Commission.

17. A third possibility would be to conduct a systematic survey and analysis of State practice that would show that a customary rule reflecting a general obligation to extradite or prosecute was emerging, or that the obligation to extradite or prosecute was a general principle of law. However, some members had questioned the usefulness of such an endeavour, pointing out that draft article 9 of the draft Code of Crimes against the Peace and Security of Mankind,³⁴⁴ adopted by the Commission at its forty-eighth session in 1996, already contained an obligation to extradite or prosecute for core crimes. If the Commission wished to postulate a general obligation in order to cover a wider range of crimes, it would have to delve into the general consideration of extradition law as well as broad matters relating to the exercise of prosecutorial discretion, areas in which practice varied considerably, thereby calling into question the existence of such a general obligation.

18. It had been acknowledged by some members that the main obstacle to progress on the topic had been the lack of basic research on whether the obligation to extradite or prosecute had attained the status of customary law. They had noted that when the Commission had elaborated the draft Code of Crimes against the Peace and Security of Mankind, its adoption of draft articles 8 and 9 had constituted progressive development, driven by the need for an effective system of criminalization and prosecution rather than an assessment of actual State practice and *opinio juris*. It was understood that the inclusion of certain crimes in the draft Code did not affect the status of other crimes under international law, nor did it in any way preclude further developments in that important area of law. In that regard, those members had suggested that an analysis of how the law had evolved since 1996 could be useful.

19. There had been a consensus that, in general, the topic concerned the obligation to extradite or prosecute but not the extradition practices of States or an obligation to extradite, or the obligation to prosecute, *per se*. There had also been a consensus that exploring the possibility of the obligation to extradite or prosecute as a general principle of international law would not advance work on the topic any further than the avenue of customary international law.

20. On the relationship between the topic and universal jurisdiction, some members had emphasized that an analysis of universal jurisdiction would inevitably have to be undertaken, in view of the close relationship between the two. Some members had drawn attention to the ongoing work on the scope and application of the principle of universal jurisdiction being undertaken in the Sixth Committee. Several members had suggested that the Commission could proceed with an analysis of the role of

³⁴⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 31.

universal jurisdiction *vis-à-vis* the obligation to extradite or prosecute without waiting for the Sixth Committee to complete its work on universal jurisdiction.

21. With regard to the feasibility of the topic, some members had acknowledged the importance States attached to the topic, which was perceived as useful not only from a practical standpoint, in that it would resolve problems encountered by States in implementing the obligation to extradite or prosecute, but also because the obligation played a key coordinating role between the national and international systems in the overall architecture of international criminal justice. In that connection, some members had suggested that the Commission might, taking both progressive development and codification into account, focus its work on the obligation to extradite or prosecute as evidenced especially in multilateral treaties; that effort could address, *inter alia*, the material scope and the content of the obligation, the relationship between the obligation and other principles, the conditions for the triggering of the obligation, the implementation of the obligation and the relationship between the obligation and the surrender of the alleged offender to a competent international criminal tribunal. Other members, however, had urged caution, pointing to the complexity of the topic as justification for not taking any hasty decisions with regard to the appointment of a new special rapporteur and to whether, and how, to proceed with the topic.

22. The relevance of treaties and customary international law in the consideration of the topic had been highlighted. Several members had considered it prudent to await the judgment of the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* before taking any definitive positions, since that judgment might clarify some of the issues.

23. Some members had suggested that the Commission should terminate its work on the topic, arguing that it was an area of law to which the Commission was not currently able to make a substantial contribution. Those members felt that the Commission could provide reasoned explanations for its termination of the topic.

24. On 24 July 2012, the Working Group had conducted a preliminary review of the aforementioned judgment of the International Court of Justice, recognizing that an in-depth analysis would be required to fully assess the implications of that decision for the topic under consideration. The Working Group had requested its Chairperson to prepare a working paper, to be considered at the sixty-fifth session of the Commission, reviewing the various analyses conducted in relation to the topic in the light of that judgment as well as any further developments and observations made in the Working Group and in the Sixth Committee at the sixty-seventh session of the General Assembly. On the basis of its discussions at the Commission's sixty-fifth session, the Working Group would submit concrete suggestions to the Commission for consideration. It was envisaged that if the Commission should decide to continue its work on the topic, a new special rapporteur would be appointed; if, however, the Commission decided to terminate its work on the topic, it would need to provide explanations for its decision.

Treaties over time (*concluded*)* (A/CN.4/650 and Add.1, sect. E)

[Agenda item 8]

REPORT OF THE STUDY GROUP (*concluded*)**

25. Mr. NOLTE (Chairperson of the Study Group on treaties over time) said that in 2012 the Study Group had held a total of eight meetings, on 9, 10, 15, 16 and 24 May and on 19, 25 and 26 July.

26. At the Commission's 3135th meeting, he had presented his first oral report on some aspects of the work undertaken by the Study Group at its five meetings in May. Those aspects had been mostly related to the format and modalities of the Commission's future work on the topic. On that occasion, he had explained that the Study Group was recommending a change in the format of the work on the topic and the appointment of a special rapporteur.

27. At its 3136th meeting, the Commission had decided to change the format of its work on the topic as from its sixty-fifth session, as suggested by the Study Group, and to appoint him Special Rapporteur for the topic, which was to be entitled "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

28. His report at the current meeting would cover some aspects of the work done during the first part of the session that had not been addressed in his first oral report, as well as the work undertaken by the Study Group during its three meetings during the second part of the session.

29. At the current session, the Study Group had considered the third report of its Chairperson on subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings and had completed its consideration of the Chairperson's second report dealing with jurisprudence under certain special regimes as it related to subsequent agreements and subsequent practice.

30. The third report covered a variety of issues, including the following: the forms, evidence and interpretation of subsequent agreements and subsequent practice, as well as a number of general aspects concerning, *inter alia*, the possible effects of subsequent agreements and subsequent practice (e.g. how they might clarify the meaning of a treaty provision or confirm the degree of discretion left to the parties by a treaty provision); the extent to which an agreement within the meaning of article 31, paragraphs 3 (a) and 3 (b) of the 1969 Vienna Convention must express the legal opinion of States parties regarding the interpretation or application of the treaty; subsequent practice as a possible indication of agreement on the temporary non-application or temporary extension of the treaty's scope, or as indicating a *modus vivendi*; bilateral and regional practice under treaties with a fairly broad membership; the relationship between subsequent practice and agreements, on the one hand, and technical and scientific developments, on the other; the relationship between subsequent practice by the parties to a treaty and

* Resumed from the 3136th meeting.

** Resumed from the 3135th meeting.

the parallel formation of rules of customary international law; the possible role of subsequent agreements and subsequent practice in respect of treaty modification and the exceptional role that might be played by subsequent practice and subsequent agreements in terminating a treaty. The third report had also addressed other questions such as the influence of specific forms of cooperation on the interpretation of some treaties through subsequent practice, and the potential role played by conferences of the States parties and treaty monitoring bodies in relation to the emergence or consolidation of subsequent agreements or practice. In its analysis of those various issues, the third report provided some examples of subsequent agreements and subsequent practice, assessed those examples and attempted to draw some preliminary conclusions.

31. The Study Group's debate on the third report had been very rich. During the discussion, several members had touched on the general issue of the level of determinacy of the draft conclusions contained in the third report. While some members had been of the view that many of them were formulated in rather general terms, others had considered that certain conclusions were too determinate in the light of the examples identified in the report. In that regard, some members had observed that the main challenge facing the Commission in its future work on the topic would lie in attempting to elaborate propositions that had sufficient normative content yet preserved the flexibility inherent in the concept of subsequent practice and agreements.

32. A number of points had been raised in relation to the section of the report dealing with conferences of the parties. They included the extent to which such forums deserved special treatment in the consideration of the topic; whether a single notion of "conference of the parties" existed or whether that term covered a variety of different bodies whose only common feature was the fact that they were not organs of international organizations; the extent to which the conferral or non-conferral of decision-making or review powers on conferences of the parties had an impact on their possible contribution to the formulation of subsequent agreements or to the formation of subsequent practice in relation to a treaty; and the significance and relevance, in the current context, of consensus and other decision-making procedures that might be followed by conferences of the parties.

33. The Study Group had also considered six additional general conclusions proposed in its Chairperson's second report on jurisprudence under special regimes as it related to subsequent agreements and subsequent practice. The discussions had focused on the following issues: whether, in order to serve as a means of interpretation, subsequent practice must reflect the position of one or more parties regarding the interpretation of the treaty; the extent to which subsequent practice would need to be specific; the requisite degree of active participation in a practice and the significance of silence by one or more of the parties to the treaty with respect to the practice of one or more other parties; the possible effects of contradictory subsequent practice; the possibility of treaty modification through subsequent practice; and the relationship between subsequent practice and formal amendment or interpretation procedures.

34. In the light of those discussions in the Study Group, he had reformulated the text of what had become six additional preliminary conclusions by the Chairperson. They read as follows:

"1. Subsequent practice as reflecting a position regarding the interpretation of a treaty"

"In order to serve as a means of interpretation, subsequent practice must reflect a position of one or more parties regarding the interpretation of a treaty. The adjudicatory bodies reviewed, however, do not necessarily require that subsequent practice must expressly reflect a position regarding the interpretation of a treaty, but may view such a position as implicit in the practice.

"2. Specificity of subsequent practice"

"Depending on the regime and the rule in question, the specificity of subsequent practice is a factor that can influence the extent to which it is taken into account by adjudicatory bodies. Subsequent practice thus need not always be specific.

"3. The degree of active participation in a practice and silence"

"Depending on the regime and the rule in question, the number of parties which must actively contribute to relevant subsequent practice may vary. Most adjudicatory bodies that rely on subsequent practice have recognized that silence on the part of one or more parties can, under certain circumstances, contribute to relevant subsequent practice.

"4. Effects of contradictory subsequent practice"

"Contradictory subsequent practice can have different effects depending on the multilateral treaty regime in question. Whereas the WTO Appellate Body discounts practice which is contradicted by the practice of any other party to the treaty, the European Court of Human Rights, faced with non-uniform practice, has sometimes regarded the practice of a 'vast majority' or a 'near consensus' of the parties to the European Convention on Human Rights to be determinative.

"5. Subsequent agreement or practice and formal amendment or interpretation procedures"

"There have been instances in which adjudicatory bodies have recognized that the existence of formal amendment or interpretation procedures in a treaty regime does not preclude the use of subsequent agreement and subsequent practice as a means of interpretation.

"6. Subsequent practice and possible modification of a treaty"

"In the context of using subsequent practice to interpret a treaty, the WTO Appellate Body has excluded the possibility that the application of a subsequent agreement could have the effect of modifying existing treaty obligations. The European Court of Human Rights and the Iran-United States Claims Tribunal

seem to have recognized the possibility that subsequent practice or agreement can lead to modification of the respective treaties.”

35. The Study Group recommended that the text of those preliminary conclusions by its Chairperson, as reformulated in the light of the Group’s discussions, should be reproduced in the chapter of the Commission’s report on the topic “Treaties over time”, as had been done in the case of the first nine preliminary conclusions, which had been reproduced in the report of the Commission on the work of its sixty-third session (2011).³⁴⁵ The Commission’s report would indicate that the Study Group had understood those conclusions by its Chairperson to be of a preliminary nature, as they would have to be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur, which might include additional aspects of the topic, and of the future discussions within the Commission. In view of the Commission’s decision to change the future format of its work on the topic, he had not proposed the reformulation of the draft conclusions in his third report in the light of the Study Group’s discussions, since he would prefer to take those discussions into account when he prepared his first report as Special Rapporteur. That first report would synthesize the three reports that he had submitted to the Study Group.

36. The CHAIRPERSON said that he took it that the Commission wished to take note of the oral report of the Chairperson of the Study Group on treaties over time.

It was so decided.

Programme, procedures and working methods of the Commission and its documentation (concluded)* (A/CN.4/650 and Add.1, sect. G)

[Agenda item 10]

REPORT OF THE PLANNING GROUP (A/CN.4/L.798)

37. Mr. NIEHAUS (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.798), said that the Planning Group had held four meetings to consider section G (Other decisions and conclusions of the Commission) of the “Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat” (A/CN.4/650 and Add.1), General Assembly resolution 66/98 of 9 December 2011 on the report of the International Law Commission on the work of its sixty-third session, in particular paragraphs 22 to 28 thereof, General Assembly resolution 66/102 of 9 December 2011 on the rule of law at the national and international levels, and chapter XIII of the report of the International Law Commission on the work of its sixty-third session.³⁴⁶ The Planning Group’s report reflected the outcome of the Group’s deliberations. However, the Planning Group had also decided to prepare a detailed section on the rule of law in response to the request made by the General Assembly in its resolution 66/102. If the Planning Group’s

recommendations were approved by the Commission, they would be included in the Commission’s report on the work of its sixty-fourth session, in the chapter entitled “Other decisions and conclusions of the Commission”.

38. The CHAIRPERSON invited the members of the Commission to consider the report of the Planning Group, contained in document A/CN.4/L.798, section by section.

A. Programme, procedures and working methods of the Commission and its documentation

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

1. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 3

39. Sir Michael WOOD pointed out that the second sentence had been deleted because the Planning Group would probably be submitting reports throughout the quinquennium.

40. Mr. NIEHAUS (Chairperson of the Planning Group) confirmed that that was the case.

Paragraph 3, as orally revised, was adopted.

2. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIAL

Paragraph 4

Paragraph 4 was adopted.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 66/102 OF 9 DECEMBER 2011 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 5 to 11

41. Mr. NOLTE said that he believed that paragraph 10 had been deleted.

42. Mr. NIEHAUS (Chairperson of the Planning Group) said that Mr. Nolte was quite right.

43. Ms. JACOBSSON said that paragraph 8 seemed to be truncated, as it did not specify the participants of the high-level meeting. She suggested that the Secretariat should complete that paragraph.

Paragraphs 5 to 11, as orally revised and with the amendment suggested by Ms. Jacobsson, were adopted.

4. HONORARIA

Paragraph 12

44. Mr. CANDIOTI said that the words “the Planning Group” should be amended to read “the Commission”.

Paragraph 12, as amended, was adopted.

5. DOCUMENTATION AND PUBLICATIONS

Paragraphs 13 to 15

45. Sir Michael WOOD said that the Commission benefited enormously from the work of certain sections

³⁴⁵ *Yearbook ... 2011*, vol. II (Part Two), para. 344.

* Resumed from the 3150th meeting.

³⁴⁶ *Ibid.*, paras. 363–412.

of the Secretariat. In particular, the rapid progress with the publication of the *Yearbook of the International Law Commission* was the result of the hard work of the Publications, Editing and Proofreading Section in Geneva. The processing of the Commission's documents in Geneva and New York had been extremely efficient during the current session, notwithstanding the difficulties caused by the late submission of some reports. Last but not least, the Library in Geneva had greatly assisted the members of the Commission. He therefore proposed that three new paragraphs should be added to the section on documentation and publications. They would read as follows:

“16. The Commission welcomes the progress in the elimination of the backlog in the publication of the *Yearbook of the International Law Commission*. It commends the Publications, Editing and Proofreading Section for its efforts and encourages it to continue its valuable work in the preparation of this important publication.

“17. The Commission expresses its gratitude to the Documents Management Section, both in Geneva and New York, for their timely and efficient processing of the Commission's documents, often under narrow time constraints, which contributes to the smooth conduct of the Commission's work.

“18. The Commission wishes to express its appreciation to the Geneva Library, which assists its members very efficiently and competently.”

46. Mr. NIEHAUS (Chairperson of the Planning Group) said that he was in favour of the inclusion of the additional paragraphs proposed by Sir Michael.

47. Mr. VALENCIA-OSPINA said that the reference to the “Geneva Library” should be amended to make it clear that it referred to the library at the Palais des Nations and not to a municipal public library.

Paragraphs 13 to 15, as amended, were adopted.

6. TRUST FUND ON THE BACKLOG RELATING TO THE *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION*

Paragraph 16

Paragraph 16 was adopted.

7. ASSISTANCE OF THE CODIFICATION DIVISION

Paragraph 17

48. Mr. CANDIOTI said that in the first sentence, the words “Planning Group” should be replaced with “Commission”, since it was the Commission, and not the Planning Group, that expressed appreciation for the assistance of the Codification Division.

Paragraph 17, as amended, was adopted.

8. WEBSITES

Paragraph 18

Paragraph 18 was adopted.

B. Date and place of the sixty-fifth session of the Commission

Paragraph 19

Paragraph 19 was adopted.

The report of the Planning Group contained in document A/CN.4/L.798, as a whole, as amended, was adopted.

Protection of persons in the event of disasters (concluded)* (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

49. Mr. HMOUD (Chairperson of the Drafting Committee) said that the Drafting Committee had provisionally adopted five draft articles—draft articles 5 *bis*, 12, 13, 14 and 15—over the course of five meetings held from 5 to 11 July 2012. During the session, the Drafting Committee had also had before it a proposal for draft article 12 made by the Special Rapporteur in his fourth report³⁴⁷ in 2011, which the Committee had been unable to consider owing to a lack of time. In addition, the Drafting Committee had had before it draft articles A, 13 and 14, proposed by the Special Rapporteur in his fifth report (A/CN.4/652) and referred to the Drafting Committee at the 3142nd meeting. He wished to pay tribute to the Special Rapporteur, whose constructive approach and patient guidance had once again greatly facilitated the work of the Drafting Committee, and to thank the other members of the Commission for their active participation and significant contributions, as well as the Secretariat for its valuable assistance.

50. The five draft articles that had been provisionally adopted were contained in document A/CN.4/L.812, which read as follows:

“Article 5 bis. Forms of cooperation

“For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.

“Article 12. Offers of assistance

“In responding to disasters, States, the United Nations and other competent intergovernmental organizations have the right to offer assistance to the affected State. Relevant non-governmental organizations may also offer assistance to the affected State.

“Article 13. Conditions on the provision of external assistance

“The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles,

* Resumed from the 3142nd meeting.

³⁴⁷ *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/643.

applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.

“Article 14. *Facilitation of external assistance*

“1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance regarding, in particular:

“(a) civilian and military relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and

“(b) goods and equipment, in fields such as customs requirements and tariffs, taxation, transport and disposal thereof.

“2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.

“Article 15. *Termination of external assistance*

“The affected State and the assisting State, and as appropriate other assisting actors, shall consult with respect to the termination of external assistance and the modalities of termination. The affected State, the assisting State, or other assisting actors wishing to terminate shall provide appropriate notification.”

51. Draft article 5 *bis* was entitled “Forms of cooperation”, which the Drafting Committee had viewed as best reflecting the content of the draft article. It concerned the various forms of cooperation contemplated in the draft articles and was designed to elaborate on draft article 5, which dealt with the duty to cooperate generally, without establishing any additional legal obligations. The Drafting Committee had based its work on the Special Rapporteur’s proposal for a draft article A, contained in his fifth report. That draft article had been modelled on article 17, paragraph 4, of the articles on the law of transboundary aquifers, adopted by the Commission at its sixtieth session, which dealt with “emergencies”,³⁴⁸ a concept analogous to disasters. The Drafting Committee had decided to exclude the first sentence of the text originally proposed by the Special Rapporteur as it overlapped with draft article 5. In doing so, the Drafting Committee had understood that the provision nonetheless had to be read in the light of draft article 5 and, accordingly, that the element of reciprocity implicit in the duty to cooperate was equally applicable to it.

52. The Drafting Committee had therefore focused on refining the language of the remainder of the text, which was the second sentence of the Special Rapporteur’s initial proposal. It had also decided to include an explicit

reference to the purpose of the cooperation envisaged, namely the protection of persons affected by a disaster, in order to explain the thrust of the draft article. It had done that by inserting the opening phrase “For the purposes of the present draft articles”, which thus connected the provision, *inter alia*, with draft article 2 establishing the purpose of the draft articles as a whole.

53. The Special Rapporteur’s initial proposal had been formulated in terms of what States were obliged to do under the duty to cooperate established in draft article 5. On the basis of suggestions made during the debate in plenary meeting, the provision had been recast in more descriptive terms to indicate the forms of assistance contemplated in draft article 5. Accordingly, the earlier reference to “States and other actors ... shall provide” had been deleted.

54. With regard to specific forms of humanitarian assistance listed in the provision, the Drafting Committee had decided to tailor the formulation more closely to the context of disasters by placing the reference to humanitarian assistance, which appeared last in the articles on the law of transboundary aquifers, first in draft article 5 *bis*, since it was the most important form of cooperation in the event of disaster response. A reference to medical expertise had also been added. The Drafting Committee had decided to retain the reference to scientific cooperation, as an important type of cooperation, and had decided to use the word “resources” at the end of the provision, as an all-encompassing term that would include, but not be limited to, “expertise”, the word used in the Special Rapporteur’s initial text. The word “includes” was meant to indicate that the list was non-exhaustive in nature. It was also understood that the forms of cooperation were without prejudice to any decision that the Commission might take in the future, when it addressed the question of disaster prevention and risk reduction.

55. The Drafting Committee had decided to place draft article 5 *bis* immediately after draft article 5, given its link to that provision, but without prejudice to its possible incorporation into draft article 5, perhaps as a second paragraph, during the second reading.

56. Draft article 12 was entitled “Offers of assistance”. The earlier version suggested by the Special Rapporteur had included the words “right to” in the title, but the Drafting Committee had decided to delete that reference in keeping with its decision not to use such a formulation in connection with non-governmental organizations.

57. The Drafting Committee had proceeded on the basis of the text proposed by the Special Rapporteur in his fourth report. In the light of the plenary debate on that text, the Drafting Committee had agreed to draw a distinction between the respective positions of States and competent international organizations, on the one hand, and non-governmental organizations, on the other. That had been done by splitting the original text into two sentences and placing a different emphasis in each one.

58. The first sentence dealt with the position of States, the United Nations and other competent intergovernmental organizations. The Drafting Committee had taken the

³⁴⁸ General Assembly resolution 63/124 of 11 December 2008, annex. Draft article 17 and the commentary thereto appear in *Yearbook ... 2008*, vol. II (Part Two), pp. 40–42.

stance that the majority of the responses given by States to the question posed by the Commission in its 2011 report, as well as the views expressed in the plenary Commission, had given a clear indication that there was currently no legal obligation on States to provide assistance to affected States. In addition, referring to the actions of international organizations in terms of duties was complicated, since those organizations operated in terms of their respective mandates and competencies. The Drafting Committee had deleted the word “shall” from the Special Rapporteur’s original proposal in order to make that clear.

59. Accordingly, the Drafting Committee had chosen to follow the approach adopted by the Special Rapporteur in his proposal, which had focused on the right of States and international organizations to “offer” assistance, which should not *a priori* be regarded as interference in the internal affairs of the affected State. The key question faced by the Drafting Committee had been how best to word the text, namely, whether to use the term “right to offer” or to use another formulation, such as “can offer” or “may offer”. A plurality in the Drafting Committee had preferred the first formulation, and the Committee had eventually settled on the phrase “have the right to offer assistance”. That had been done for reasons of emphasis: while it had been the prevailing view of the Drafting Committee that States were not obliged to provide assistance, as a matter of policy they were to be encouraged to do so. The sense of the Drafting Committee had been that the words “have the right to offer” sent a signal to States and competent international organizations that not only could they offer assistance, but that they were in fact encouraged to do so.

60. He wished to place on record the fact that a minority in the Drafting Committee had had reservations about the use of the word “right”, preferring the more traditional terms “may” or “can”. According to that view, the nuance intended in the distinction between “right” and “may” was not conveyed by the actual meanings of the words and might in fact lead to unintended interpretations, including of the use of the word “may” in other draft articles.

61. The Drafting Committee had decided to use the word “may” in the second sentence in order to introduce a distinction regarding the position of non-governmental organizations, which were not considered to be on the same level as States and international organizations but were nevertheless free to offer assistance to the affected State. The Drafting Committee had been reluctant to recognize a “right” to offer assistance on the part of non-governmental organizations, given that the activities of such entities were governed by national law, which could place restrictions on offers of assistance. The Committee had considered making that point explicit in the draft article itself, but had decided instead to explain it in the commentary.

62. Draft article 13, entitled “Conditions on the provision of external assistance”, addressed the conditions that affected States might place on the provision of external assistance. In response to suggestions made during the plenary debate that the Drafting Committee should consider further elaborating draft article 13 that the Special Rapporteur had proposed in his fifth report, the Drafting Committee had based its work on a revised

proposal by the Special Rapporteur for two draft articles. The second draft article had been adopted as new draft article 14, which he would address later.

63. Draft article 13 consisted of four sentences. The first sentence recognized the basic rule that the affected State might place conditions on the provision of external assistance. The Drafting Committee had considered a proposal to delete the reference to “external” but had decided to retain it because the scope of the provision was limited to the assistance provided by third States or other assisting actors, such as international organizations, and did not cover assistance from internal sources. An earlier version had referred to conditions “imposed” on the provision of assistance, but the Drafting Committee had decided to adopt the formulation “may place conditions on”, which was more consistent with the voluntary spirit in which such assistance was provided yet recognized the right of the affected State to place conditions, not only in general terms, in advance of a disaster, but also in relation to specific offers of assistance made by specific actors during the response phase.

64. The second sentence identified the legal framework within which the permissibility of such conditions was to be evaluated, namely the draft articles, other applicable rules of international law and the national law of the affected State. The commentary would explain that the reference to national law should not be read as requiring the existence of national law. While there might be cases where national law was non-existent or insufficient, the Drafting Committee had worked on the assumption that most States had some national legislation that was applicable, albeit indirectly, to the special context of the response to disasters.

65. The third sentence established the basic requirement that conditions should be informed by the identified needs of the persons affected by a disaster, as well as by the quality of assistance being offered. The phrase “take into account” implied that conditions relating to the identified needs and the quality of assistance were not the only ones that States could place on the provision of external assistance. The word “identified” was understood as implying a duty to justify; it was not simply any assertion of needs, but rather the needs of the persons affected by the disaster that were identified and justified, according to the means available to the affected State, and on a continuing basis as the scale and impact of the disaster became apparent.

66. The last sentence placed the burden on the affected State, when formulating conditions, to indicate the scope and type of assistance sought. The Drafting Committee had also considered a suggestion that the last sentence should be moved to draft article 10 but had decided to defer that matter until the second reading.

67. Draft article 14, entitled “Facilitation of external assistance”, likewise had its origins in the Special Rapporteur’s proposed draft article 13. The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur for two new draft articles, the second of which was the text of draft article 14 before the Commission.

68. The Special Rapporteur's initial text had addressed the question of compliance with national law as a specific form of conditionality. However, the Drafting Committee had decided to amend the provision and approach the issue from the perspective of facilitation of assistance. In other words, while the text had initially dealt with waiving or making exceptions to national law, it now dealt more squarely with applying national law in order to facilitate assistance.

69. The phrase "take the necessary measures, within its national law", in paragraph 1, referred, *inter alia*, to legislative, executive and administrative measures, which could include actions taken under emergency legislation. It might also extend to non-legal, practical measures designed to facilitate assistance. The initial proposal had referred to the possibility that the affected State might waive its national law, which had proved difficult for some members of the Drafting Committee, since it could have been misinterpreted as contemplating the circumvention by States of their internal rules. It had also raised concerns about constitutional limitations on the possible waiving of internal rules. Moreover, the waiver of national law would not cover other scenarios, such as the extension of privileges and immunities. However, the possibility of a State waiving or suspending the application of its national legislation or regulations in order to facilitate the prompt and effective provision of external assistance was still covered by the concept of "necessary measures".

70. Examples of two particularly pertinent areas of assistance were listed in subparagraphs (a) and (b). The words "in particular" had been included to indicate that the lists in the two subparagraphs were not exclusive. Subparagraph (a) dealt with personnel and included a reference to military personnel, in recognition of the role played by the military in major disaster response operations. Subparagraph (b) dealt with goods and equipment. The commentary would elaborate on both categories, as well as on the use of search dogs.

71. Paragraph 2 emphasized the duty of the affected State to facilitate compliance with its national law by ensuring that its relevant legislation and regulations were readily accessible. That duty had been framed in flexible terms so as not to impose too onerous a burden on the affected State. The phrase "to facilitate the compliance with national law" introduced the element of conditionality, which was the subject of draft article 13, in the context of requirements established by the national law of the affected State.

72. Draft article 15, entitled "Termination of external assistance", had its origins in draft article 14 as proposed by the Special Rapporteur in his fifth report. The Drafting Committee had worked on the basis of a revised text prepared by the Special Rapporteur, which had taken into account the views expressed in the plenary debate and focused less on the issue of termination and more on that of the duration of the external assistance, which by definition would include its termination. The Drafting Committee, however, had brought the provision more into line with the Special Rapporteur's initial proposal, focusing on the point of termination of external assistance.

73. The provision consisted of two sentences. The first sentence was concerned with the requirement that

the affected State, the assisting State and other assisting actors, as appropriate, should consult each other regarding the termination of external assistance, including the modalities of such termination. In adopting that wording, the Drafting Committee had sought to strike a balance between recognizing the right of the affected State to terminate the external assistance it was receiving, a right implicit in the fact that that State played the primary role in disaster response (under draft article 9, paragraph 2), and not prejudicing the position of the various actors, including assisting States, that had provided, or were providing, such assistance.

74. Accordingly, the provision had not been drafted in terms of granting the affected State a unilateral right of termination. Instead, the Committee had recognized that assisting States and other assisting actors might themselves need to terminate their assistance activities. The provision thus preserved the right of any of the mentioned States or actors to seek to terminate the assistance being provided, on the understanding that such termination would be undertaken in consultation with the other States or actors, as appropriate.

75. The Drafting Committee had decided to retain the words "assisting actors", which were drawn from existing instruments, to describe international organizations and non-governmental organizations, on the understanding that more complete definitions would be provided in an article on the use of terms to be elaborated in the future. The provision was drafted in bilateral terms but did not exclude the scenario of multiple assisting States providing external assistance. The word "modalities" referred to the procedures to be followed in order to bring about the termination of external assistance.

76. The second sentence established a requirement of notification, which ought to be given by the party wishing to terminate the external assistance. The provision had deliberately been drafted in flexible terms to allow for notification to take place at any time before, during or after the consultation process.

77. The draft article should be read in the context of the entire set of draft articles, and in particular in the light of the purpose of the draft articles as set out in draft article 2, so that the termination of external assistance should not adversely affect persons affected by a disaster. In conclusion, he expressed the hope that the Commission would take note of the draft articles as presented.

78. The CHAIRPERSON said he took it that the Commission wished to take note of the draft articles contained in document A/CN.4/L.812.

It was so decided.

Draft report of the International Law Commission on the work of its sixty-fourth session

Chapter IV. *Expulsion of aliens* (A/CN.4/L.802 and Add.1)

79. The CHAIRPERSON invited the Commission to consider chapter IV of the draft report, beginning with the portion of the chapter contained in document A/CN.4/L.802.

A. Introduction

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 9 to 15

Paragraphs 9 to 15 were adopted, subject to the completion by the Secretariat of paragraphs 13 to 15.

C. Text of the draft articles on expulsion of aliens adopted by the Commission on first reading

1. TEXT OF THE DRAFT ARTICLES

Paragraph 16

Paragraph 16 was adopted.

80. The CHAIRPERSON drew attention to the fact that the title of section 2 and paragraph 17 had been accidentally omitted from the English version. They would be inserted subsequently by the Secretariat. He took it that the Commission wished to adopt the portion of chapter IV contained in document A/CN.4/L.802, as a whole, subject to its completion by the Secretariat.

It was so decided.

81. The CHAIRPERSON invited the members of the Commission to consider the portion of chapter IV contained in document A/CN.4/L.802/Add.1.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (A/CN.4/L.802/Add.1)

General commentary

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The general commentary to the draft articles was adopted.

PART ONE. GENERAL PROVISIONS

Commentary to draft article 1 (Scope)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

82. Mr. MURPHY said that he had no problem with the text of the paragraph as it stood, except that it failed to reflect a minority view that he and other Commission members had expressed both in the plenary and in the Drafting Committee, to the effect that the draft articles should not cover aliens unlawfully present in the territory of the expelling State. Indeed, most of the major multilateral treaties that addressed expulsion did not cover such aliens. He proposed that a sentence should be added to the end of paragraph (3) that would read as follows: "Some Commission members, however, favoured addressing

in these draft articles only aliens lawfully present in the expelling State, given that the restrictions on expulsion contained in the 1951 Convention relating to the Status of Refugees, the 1966 International Covenant on Civil and Political Rights, the 1955 European Convention on Establishment and the 2004 League of Arab States' Arab Charter on Human Rights³⁴⁹ are limited to such aliens."

83. Mr. KAMTO (Special Rapporteur) said that Mr. Murphy's proposal was not in line with the Commission's normal procedure. If it was decided to include Mr. Murphy's point of view in the commentary, it should be a short sentence that stated very clearly that it reflected the opinion of one member and not that of several Commission members. During the adoption of the commentaries to the draft articles, members should generally refrain from proposing what he would term "a commentary within a commentary".

84. Mr. PETRIČ said that in his first statement on the topic of expulsion of aliens several years earlier, he had stated his preference for an approach that dealt with the two categories of aliens separately, since aliens lawfully present in the territory of an expelling State enjoyed a high degree of protection that approximated that enjoyed by citizens, whereas aliens unlawfully present were in an entirely different situation. Although his view had not been accepted and the majority had considered that the two categories should be combined, if a new member was now raising the same point, then he believed that the commentary should state that two members of the Commission held that view.

85. Mr. GEVORGIAN said that he supported the views expressed by Mr. Petrič and Mr. Murphy, as they coincided with what had been his position during the debate on the draft articles. He had taken the floor on that very point and had said that he agreed with the content of the draft articles but disagreed with the definition of the term "alien" since, like Mr. Petrič, he believed that the two categories of aliens should be dealt with separately. He therefore supported the inclusion of a sentence in the commentary to that effect.

86. Mr. ŠTURMA (Rapporteur) suggested that the Commission should suspend its discussion of paragraph (3) and that the Special Rapporteur, Mr. Murphy and other interested Commission members should meet in order to draft language that would be acceptable to the Special Rapporteur and to the majority of the members.

87. Mr. KAMTO (Special Rapporteur) said that although Mr. Gevorgian and Mr. Petrič claimed to agree with Mr. Murphy, the latter's view was that the draft articles should not apply to aliens unlawfully present in the territory of an expelling State at all, whereas the other two were saying that the draft articles should address each category of aliens separately; those were two different arguments.

88. Even though he could understand the rationale behind the Rapporteur's suggestion to suspend consideration of the paragraph, it was not the way the Commission usually

³⁴⁹ Reproduced in document CHR/NONE/2004/40/Rev.1.

proceeded, in his experience. He was prepared to add a short sentence saying that one member had expressed the opinion that aliens illegally present should not be covered by the scope of the draft articles. On the other hand, there was nothing in the legal instruments listed in Mr. Murphy's proposed text that prohibited the inclusion of aliens illegally present in the territory of an expelling State in the scope of a set of general draft articles on the expulsion of aliens.

89. The CHAIRPERSON said that the Commission would suspend its discussion of paragraph (3) so that interested Commission members could draft a proposal for a briefly worded addition to paragraph (3).

Paragraph (4)

90. Mr. NOLTE proposed to delete the word "forcible" from the second sentence, given that the sentence concerned diplomats, consular officials and others who did not tend to be expelled forcibly, and the Commission could therefore convey what it meant without using the word "forcible". Another argument for deleting that word was that the concept of expulsion was not limited to forcible expulsion.

91. Mr. KAMTO (Special Rapporteur) recalled that paragraph 2 of the draft article indicated that the draft articles did not apply to aliens enjoying privileges and immunities under international law. Therefore, the only way such aliens could be required to leave the territory of an expelling State—whether their expulsion took place in spite of the immunity they enjoyed or was the result of their immunity not being recognized—was forcibly. As far as the normal comings and goings of diplomats to and from a foreign State were concerned, there was no need to provide for the eventuality of expulsion. However, since the Commission was excluding the expulsion of such aliens from the scope of the draft articles, it was necessarily their forcible expulsion that it was excluding.

92. Mr. NOLTE said that paragraph 2 of the draft article referred to a situation in which a diplomat was declared *persona non grata* and left the country without being forcibly expelled. The Commission's description of the purpose of that provision in paragraph (4) of the commentary should encompass the whole scope of the provision, which was not limited to forcible departure.

93. Ms. ESCOBAR HERNÁNDEZ suggested that the word "forcible" ("*forzosa*" in Spanish) could be replaced by "obligatory" ("*obligatoria*" in Spanish), since even when diplomats who had been declared *persona non grata* left a country voluntarily, they were nonetheless complying with their obligation to do so under that proscription.

94. Mr. ŠTURMA (Rapporteur) said that he supported the proposal made by Ms. Escobar Hernández. Alternatively, he suggested that the word "forcible" should be replaced by "involuntary", which did not convey the idea of the use of forcible means, such as deportation, and might address Mr. Nolte's concerns.

95. Sir Michael WOOD proposed that the word "forcible" should be replaced with "enforced", which did not necessarily connote the use of physical force.

96. Mr. KAMTO (Special Rapporteur) said that Mr. Nolte's argument was unconvincing because, in any case, a diplomat who was declared *persona non grata* was forced to leave the territory, and "force" in that sense did not necessarily mean physical force. He suggested that a formulation using the word "*constraints*" in the French version might solve the problem.

97. Mr. HASSOUNA proposed that the translation of "*contraint*" into English should be "compelled".

98. Ms. ESCOBAR HERNÁNDEZ proposed that its translation into Spanish should be "*obligada*" or "*obligatoria*".

99. Mr. NOLTE proposed that, in the last sentence, the word "constrained" should be replaced with "compelled".

It was so decided.

100. Sir Michael WOOD said that the placement in the second sentence of the phrase "including, as appropriate, members of their families" made it unclear as to which of the preceding categories of persons in the sentence it applied. The phrase might also apply, depending on circumstances, to other officials in the territory of a foreign State and to military personnel. He therefore proposed that it should be moved to the end of the second sentence. He further proposed that the words "posted abroad" in the second sentence should be replaced with "on mission", which would better correspond to the French version. He further proposed the deletion of the concluding clause "and whose presence in that territory is governed by specific agreements between the States concerned" in order not to exclude, for example, visits by officials on special mission that were not covered by specific agreements in the formal sense of the term. Taking into account all of his proposed amendments, the part of the sentence following "staff members of international organizations" might thus be reformulated to read, "and other officials or military personnel on mission in the territory of a foreign State, including, as appropriate, members of their families".

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraph (5)

101. Sir Michael WOOD proposed that the phrase "not excluded from the scope of the draft articles are" should be deleted from the first sentence and the phrase "are within the scope of the draft articles" added to the end of the sentence. That would give the sentence a positive, rather than a negative, tone.

102. The CHAIRPERSON, supported by Mr. GEVORGIAN and Mr. HMOUD, said that if Sir Michael's proposal was accepted, the English and other language versions of the text would not be exact translations of each other, since "are within" was not the same as "not excluded".

103. Mr. HMOUD (Chairperson of the Drafting Committee) proposed that the words "not excluded from the

scope of the draft articles” should be retained but moved to the end of the sentence.

It was so decided.

104. Mr. MURPHY said that in discussions held in the Drafting Committee, members had been of the view that persons who had been displaced across borders and were therefore aliens were also covered by the draft articles. He proposed that such displaced aliens should be included in the list of persons who enjoyed special protection under international law.

105. Mr. KAMTO (Special Rapporteur) said that he did not recall that the issue of whether to include such displaced persons in that list had been raised in the Drafting Committee.

106. Mr. HMOUD (Chairperson of the Drafting Committee) said that Mr. Murphy had raised that point, but that there had been no agreement either to include it or not to include it.

107. Mr. ŠTURMA said that the current wording made it clear that the list of persons who enjoyed special protection under international law was not exhaustive.

108. Mr. MURPHY said that every year, there were hundreds of thousands, and sometimes millions, of displaced aliens living outside their countries of origin. It was important for the Commission to decide whether it intended the draft articles to cover such persons or not. His understanding was that the Commission had concluded that they were not excluded from the scope of the draft articles. If that was the case, then they should be mentioned explicitly in the categories of aliens listed in the first sentence.

109. Mr. GÓMEZ ROBLEDO said that the point raised by Mr. Murphy deserved further consideration. He therefore suggested that discussion of paragraph (5) should be deferred until the next plenary meeting in order to give members sufficient time to reflect on it.

110. Mr. KAMTO (Special Rapporteur) said that the adoption of the commentaries should not be seen as an opportunity for individual members to reiterate comments they had made in a plenary meeting or in the Drafting Committee but which had not been endorsed. The Bureau should remind members that that was not in line with the Commission’s procedures. All of the points regarding which a formal request had been made—whether in the Drafting Committee or in the plenary meeting—for inclusion in the commentaries had been reflected. He could not agree to suspend consideration of paragraphs of the commentary in order to find agreement on an opinion expressed by one Commission member that he himself had not been formally asked to include in the commentaries.

111. As to the matter at issue, he recalled that it was at Mr. Murphy’s insistence that he himself had agreed to reconsider the wording of draft article 2, after it had already been provisionally adopted by the Commission, in order to include the phrase “or the non-admission of an alien”. Aliens who crossed borders for a short period of

time in massive numbers could not be included in the scope of the draft articles. The phenomenon of displaced aliens referred to by Mr. Murphy would more appropriately fall under the law of refugees.

The meeting rose at 1 p.m.

3153rd MEETING

Monday, 30 July 2012, at 3 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (*continued*)

Chapter IV. *Expulsion of aliens (continued)* (A/CN.4/L.802 and Add.1)

1. The CHAIRPERSON invited the Commission to continue its consideration of document A/CN.4/L.802/Add.1, which contained the text of the draft articles on expulsion of aliens and commentaries thereto adopted by the Commission on first reading at its sixty-fourth session.

C. Text of the draft articles on expulsion of aliens adopted by the Commission on first reading (*continued*)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*) (A/CN.4/L.802/Add.1)

Commentary to draft article 1 (Scope) (continued)

Paragraph (5) (*continued*)

2. Mr. GÓMEZ ROBLEDO recalled that at the last meeting Mr. Murphy had raised the issue of displaced persons, whose status was regulated by no binding instrument; as far as he knew, the only relevant document was a set of texts compiled by the representative of the Secretary-General submitted pursuant to resolution 1997/39 of the Commission on Human Rights,³⁵⁰ which had no more legal force than did that Commission’s resolutions. The categories of persons listed in paragraph (5) of the commentary (refugees, stateless persons and migrant workers and their family members) had a specific status under international law, unlike displaced persons, to whom no reference should accordingly be made in the draft articles. The displaced persons in question were understood to be persons displaced across borders, although any reference to internally displaced persons would also be inadvisable.

³⁵⁰ Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2, annex).

3. Mr. MURPHY said that he had recently spoken with the Special Rapporteur, who had agreed that it would be appropriate to mention displaced persons in the commentary. In response to Mr. Gómez Robledo's remarks, he cited the study by the Secretariat,³⁵¹ the Special Rapporteur's second report³⁵² and the resolutions in which the General Assembly had instructed UNHCR to provide humanitarian assistance to displaced persons.³⁵³ While some reference should be made to displaced persons, he could agree to it being done elsewhere in the text, for example in the commentary to draft article 2, which might be preferable for Mr. Gómez Robledo.

4. Mr. HASSOUNA said that he also thought reference should be made to displaced persons, who in today's world needed protection and a special status, as the General Assembly seemed to have recognized.

5. Mr. TLADI said that he had no objection to mentioning "displaced persons" in the commentary, depending on what was meant by that term. If it was non-nationals, in other words persons who had crossed an international border, then clearly they should also be covered by the draft articles.

6. Mr. KAMTO (Special Rapporteur) said that, as there were General Assembly resolutions that referred to displaced persons, they should be mentioned in the commentary, as Mr. Murphy was proposing, provided it was made clear that it was displaced persons in the sense of a specific General Assembly resolution that was meant.

7. Mr. MURPHY explained that he was proposing to insert the words "displaced persons" after "stateless persons" in paragraph (5), perhaps with a footnote citing the resolutions in which the General Assembly had requested UNHCR to provide humanitarian assistance to displaced persons.

8. Mr. GÓMEZ ROBLEDÓ said that he was not opposed to Mr. Murphy's proposal, provided that the reference to displaced persons was made in a separate sentence, since their situation was not regulated by international law.

Paragraph (3) (concluded)

9. The CHAIRPERSON invited the Commission to return to paragraph (3), which had been left in abeyance at the previous meeting. He asked Mr. Murphy if he wished to propose an additional sentence.

10. Mr. MURPHY explained that he had consulted the Special Rapporteur and other members of the Commission in the intervening period. He proposed the addition, at the end of paragraph (3), of this sentence: "Some Commission members, however, favoured only addressing in these draft articles aliens lawfully present in the expelling State, given that the restrictions on expulsion contained in relevant global and regional treaties are limited to such aliens." That new sentence would be accompanied by a footnote citing the relevant treaties.

³⁵¹ A/CN.4/565 and Corr.1 (document available from the Commission's website and eventually as a supplement to *Yearbook ... 2006*, paras. 160–162.

³⁵² *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

³⁵³ See, among others, resolution 67/149 of 20 December 2012.

11. Mr. KAMTO (Special Rapporteur), supported by Sir Michael, said that it was impossible to speak of "some Commission members" when only one member was concerned. It would be more accurate to say "the view was expressed ...".

Mr. Murphy's proposal was adopted subject to that drafting amendment.

Paragraph (3), as amended, was adopted.

12. Mr. TLADI requested clarification about the role played by minority opinions in the Commission's work and the way they were reflected in the commentaries.

13. Mr. CANDIOTI explained that diverging opinions voiced on first reading were not included in texts considered on second reading.

Commentary to draft article 2 (Use of terms)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

14. Sir Michael WOOD proposed that the final part of the first sentence, after the words "the criteria of attribution to be found", should be amended to read "in chapter II of Part One of the articles on the responsibility of States for internationally wrongful acts", and that a footnote should be inserted with a reference to the General Assembly resolution and *Yearbook ... 2001*, where the provisions in question were to be found.³⁵⁴

Paragraph (3), as amended, was adopted.

Paragraph (4)

15. Sir Michael WOOD said that the reference to the footnote at the end of paragraph (4) should be to paragraphs (3) to (7) of the commentary, not to paragraphs (3) and (4) thereof.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

16. Mr. NOLTE, supported by Mr. TLADI, said that a sentence should be inserted to indicate that the Commission had discussed the possibility of using a different term than "alien" in the English version. While that was not strictly necessary from a legal standpoint, the Commission's awareness of the potentially negative connotations of the term in some English-speaking countries should be indicated: over the years, the use of the term had evolved significantly.

³⁵⁴ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

17. Mr. FORTEAU said that the term “alien” appeared often, and with no negative connotations, in legal writings in the English language: for example, in *Oppenheim’s International Law*.³⁵⁵ In 1966, it had been included in the International Covenant on Civil and Political Rights and had never caused any difficulties in the practice of the Human Rights Committee, which was responsible for monitoring the Covenant’s implementation. The danger was of raising a non-issue that might cause unsuspected difficulties for the Commission.

18. Mr. KAMTO (Special Rapporteur), supported by Mr. CANDIOTI and Mr. SABOIA, pointed out the fact that the term “alien” was used in the title of the topic, which had been chosen more than 15 years earlier. Altering the title, which had after all been proposed by an English-speaking member of the Commission, Mr. Addo, was out of the question. The proposed addition had no place in the commentary, since it concerned only one language. At best it might be explained in a footnote that “alien” was to be understood in the strictly legal sense, as Sir Michael had suggested. His own opinion as Special Rapporteur, however, was that there were good legal reasons for not taking up the proposal.

Paragraph (6) was adopted without amendment.

Paragraph (7)

19. Sir Michael WOOD suggested the use of the phrase “special rights” rather than “special protection”, since the latter expression was used in other draft articles with reference to refugees, stateless persons and migrant workers.

Paragraph (7), as thus amended, was adopted.

The commentary to draft article 2, as amended, was adopted.

Commentary to draft article 3 (Right of expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

20. Mr. MURPHY said that the main multilateral instruments for human rights protection had to remain applicable independently of the draft articles. That was made clear in the text of draft article 3, but the commentary could be interpreted otherwise. He proposed to delete the second sentence in paragraph 2 and to amend the first to read, “The second sentence of draft article 3 is a reminder that the exercise of this right of expulsion is regulated by the present draft articles and by other applicable rules of international law”. A sentence to read “Other applicable rules also include rules in human rights instruments concerning derogations in times of emergency” should be appended at the end of the paragraph.

21. Sir Michael WOOD commented, with reference to what was currently the final sentence, that the prohibition against denial of justice was one of the principle rules

governing the treatment of aliens: the two could not be dissociated from one another.

22. Mr. TLADI endorsed that comment and proposed that the final sentence should be recast to read, “It is worth mentioning in particular some of the ‘traditional’ limitations that derive from the rules governing the treatment of aliens, including the prohibitions against arbitrariness, abuse of rights and denial of justice”.

The proposals by Mr. Murphy and Mr. Tladi were adopted.

Paragraph (2), as amended, was adopted.

The commentary to draft article 3, as amended, was adopted.

Commentary to draft article 4 (Requirement for conformity with law)

Paragraph (1)

23. Mr. PARK suggested that it might be explained what was meant by “conformity with law”.

24. Mr. KAMTO (Special Rapporteur) said that the reference was to the domestic law of the expelling State, as defined by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. When the word “law” covered both domestic law and international law, as it did elsewhere in the draft articles, that was made clear. In the context of expulsion, the requirement of conformity with the law necessarily referred to domestic law, as was explained in the next paragraphs, in particular paragraph (6).

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

25. Mr. VALENCIA-OSPINA said that the phrase “under the of law” in the first sentence of the English text was meaningless. The words “*sous l’empire du*” in the French text had apparently not been translated correctly.

26. Mr. KAMTO (Special Rapporteur) proposed that the phrase “*sous l’empire du droit*” should be translated by “in the framework of law”.

Paragraph (3) was adopted with that amendment to the English text.

Paragraph (4)

27. Mr. FORTEAU said that the ample practice cited in paragraph (3) of the commentary showed that the requirement of conformity with law applied, irrespective of whether a refugee or alien was lawfully present in the territory of the State concerned. Paragraph (4) was thus, to some extent, an exercise in progressive development; to emphasize that point, the verb “applies” could be replaced with “shall apply” in the first sentence.

Paragraph (4), as amended, was adopted.

³⁵⁵ R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th edition (Harlow, Longman, 1992).

Paragraph (5)

28. Mr. NOLTE proposed, for the sake of clarity, that in the first sentence of the English text, the word “formal” should be replaced with “procedural”.

Paragraph (5) was adopted with that amendment to the English text.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

29. Mr. FORTEAU noted that, in paragraph 70 of its judgment in the case concerning *Ahmadou Sadio Diallo*, the International Court of Justice stated that it substituted its own interpretation for that of the national authorities only when they made a manifestly incorrect interpretation of domestic law. That was likewise the position of the European Court of Human Rights. To take account of that fact, the phrase “the International Court of Justice and” could be inserted in the sixth sentence, before “European Court of Human Rights”, and the final two sentences could be deleted. Paragraph 70 of the judgment just mentioned should be cited in the footnote at the end of the paragraph.

Paragraph (7), as amended, was adopted.

The commentary to draft article 4, as amended, was adopted.

Commentary to draft article 5 (Grounds for expulsion)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to draft article 5 was adopted.

PART TWO. CASES OF PROHIBITED EXPULSION

Commentary to draft article 6 (Prohibition of the expulsion of refugees)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

30. Sir Michael WOOD proposed that the first two footnotes in the paragraph should simply refer to article 1 of the Convention relating to the Status of Refugees and article 1 of the Protocol relating to the Status of Refugees, respectively, without reproducing the contents of those articles, the texts of which were readily available.

That amendment was adopted.

31. Sir Michael WOOD proposed that, in the first sentence of the English text of paragraph (2), the words “in the light of” should be replaced with “having regard to”, in order to better reflect the French text.

That amendment to the English text was adopted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

32. Mr. MURPHY said that it should be made clear that the protection provided for in draft article 6, paragraph 2, constituted progressive development of the law. He therefore proposed that the phrase “progressive development of the law in the form of” should be inserted in the third sentence, after the word “constitutes”.

33. Mr. VALENCIA-OSPINA pointed out that the Commission had always avoided specifying which parts of its commentaries constituted codification and which amounted to the progressive development of law.

34. Mr. MURPHY said that that was not quite true. Paragraph (1) of the commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision) stated that the text was “undoubtedly progressive development of international law”. Reference was also made to the progressive development of law in paragraph (1) of the commentary to draft article 29 (Readmission to the expelling State).

35. Sir Michael WOOD said that the Commission had also mentioned progressive development of the law in its articles on responsibility of States for internationally wrongful acts³⁵⁶ and on the responsibility of international organizations.³⁵⁷ Nevertheless, it was perhaps not necessary to spell out the fact that draft article 6, paragraph 2, was an exercise in progressive development, as it was already indicated that the protection provided for therein reflected a trend in the legal literature and found support in the practice of some States. In order to meet Mr. Murphy’s concerns, the verb “constitutes” in the third sentence of the commentary could simply be replaced with “would constitute”.

36. Mr. VALENCIA-OSPINA said he found the fact that the commentaries to draft articles 27 and 29 did indeed refer to progressive development of the law to be problematic, because the Commission had already said on several occasions that no such distinction should be drawn. It was a question of legal policy that needed to be resolved.

37. Mr. KAMTO (Special Rapporteur) said that while the Commission did not usually indicate that a particular provision constituted progressive development of the law, he had included that information at the express request of the majority of the members of the Working Group on expulsion of aliens.

38. Mr. NOLTE endorsed Sir Michael’s proposal and suggested that, in the third sentence, the word “derogation”, which was a technical term used only in specific contexts, should be replaced with “departure”.

³⁵⁶ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77, paragraph (1) of the general commentary.

³⁵⁷ General Assembly resolution 66/100 of 9 December 2011, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, paragraphs (1)–(5) of the general commentary.

39. The CHAIRPERSON said that he took it that the Commission wished to adopt the proposals by Sir Michael and Mr. Nolte.

It was so decided.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

The commentary to draft article 6, as amended, was adopted.

Commentary to draft article 7 (Prohibition of the expulsion of stateless persons)

Paragraph (1)

40. Sir Michael WOOD proposed that in the English text the adjective "strict", which he found superfluous, should be deleted.

Paragraph (1) was adopted with that amendment to the English text.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

41. Mr. MURPHY proposed that the word "accordingly" should be replaced with "however" in the second sentence of the English text.

42. The CHAIRPERSON pointed out that the expression "*de ce point de vue*", used in the French text, meant neither "accordingly" nor "however", and that it might be better to translate it literally, using the phrase "from this point of view".

43. Sir Michael WOOD suggested that the expression, which seemed to be difficult to translate into English, should simply be deleted.

44. Mr. KAMTO (Special Rapporteur) recalled that the Commission aligned the various language versions on the original text drafted in the working language of the Special Rapporteur, and not vice versa. In the case in point, English should not be the Procrustean bed of French, because each language had its own specific rhythms, logic and way of presenting an argument.

45. Sir Michael WOOD said that there was no logical connection between the two sentences: the first was simply a statement of fact, expressing no particular viewpoint. It would therefore be preferable to delete the phrase "*de ce point de vue*" from all the language versions.

That proposal was adopted.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to draft article 7, as amended, was adopted.

Commentary to draft article 8 (Other rules specific to the expulsion of refugees and stateless persons)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft article 8 was adopted.

Commentary to draft article 9 (Deprivation of nationality for the sole purpose of expulsion)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to draft article 9 was adopted.

Commentary to draft article 10 (Prohibition of collective expulsion)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

46. Mr. NOLTE said that in the second sentence, the phrase "after and on the basis of which the decision to expel the group of aliens would be taken" should be deleted. It was confusing, for it suggested that the decision was on the collective expulsion of a group of aliens, rather than on the concomitant expulsion of several aliens.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft article 10, as amended, was adopted.

Commentary to draft article 11 (Prohibition of disguised expulsion)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft article 11 was adopted.

Commentary to draft article 12 (Prohibition of expulsion for purposes of confiscation of assets)

Paragraph (1)

Paragraph (1) was adopted.

The meeting rose at 6.05 p.m.

3154th MEETING

Tuesday, 31 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (*continued*)

Chapter IV. *Expulsion of aliens (continued)* (A/CN.4/L.802 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.802/Add.1.

C. *Text of the draft articles on expulsion of aliens adopted by the Commission on first reading (continued)*

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*) (A/CN.4/L.802/Add.1)

Commentary to draft article 12 (Prohibition of expulsion for purposes of confiscation of assets) (*concluded*)

Paragraph (2)

2. The CHAIRPERSON said that, at the previous meeting, Mr. Murphy had proposed that the phrase “seems contrary to” should be replaced with “implicates”. He wished to know if, after due consideration, the Commission had reached consensus on that amendment.

3. Mr. MURPHY said that the word “implicates” would be a useful way of bridging the different opinions within the Commission.

4. Mr. KAMTO (Special Rapporteur) said that, in the French version, the verb “*impliquer*” was not meaningful in the context of that paragraph.

5. Mr. FORTEAU proposed that the phrase “*mettre en cause*” or “*mettre en jeu*” should be used in the French version.

Paragraph (2), as amended, was adopted.

The commentary to draft article 12, as amended, was adopted.

Commentary to draft article 13 (Prohibition of the resort to expulsion in order to circumvent an extradition procedure)

Paragraph (1)

6. Mr. FORTEAU said that, in the second sentence, the words “and implemented” should be added after the phrase “a definitive decision is taken”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

The commentary to draft article 13, as amended, was adopted.

PART THREE. PROTECTION OF THE RIGHTS OF ALIENS SUBJECT TO EXPULSION

CHAPTER I. GENERAL PROVISIONS

Commentary to draft article 14 (Obligation to respect the human dignity and human rights of aliens subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

7. Mr. NOLTE said that in the debate on the topic, all members had agreed that human dignity was the foundation or source of inspiration for all human rights, but views had diverged as to whether it also constituted a specific human right. He therefore proposed that the first sentence should read as follows: “Divergent views were expressed by members of the Commission as to whether human dignity was the foundation or source of inspiration for human rights in general or also a specific human right.”

8. Sir Michael WOOD said that he agreed with the point made by Mr. Nolte, but that the idea would be more clearly expressed if, in the original wording of the sentence, the words “or rather” were replaced with the phrase “in addition to being”. The sentence would then read as follows: “Divergent views were expressed by members of the Commission as to whether human dignity was a specific human right in addition to being the foundation or source of inspiration for human rights in general.” In the next sentence, “often” should be replaced with “not infrequently”, to align it more closely with the French version.

Paragraph (2) was adopted with those two amendments.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft article 14, as amended, was adopted.

Commentary to draft article 15 (Obligation not to discriminate)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

9. Sir Michael WOOD proposed the deletion of the second sentence, since in some treaties the prohibition

of discrimination was an obligation of general scope, whereas in others it applied only to the rights set forth in the treaty in question. The next sentence would then begin thus: "As the prohibition of discrimination applies to the exercise of the right of expulsion ...".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

10. Mr. NOLTE, supported by Sir Michael, proposed the deletion of the word "subsequently" in the first sentence, because the Commission members who had proposed the expansion of the list of grounds for discrimination had done so in the normal course of the discussions. The use of the word "subsequently" might wrongly convey the impression that members had made that proposal out of order, or in unusual circumstances.

Paragraph (4), as amended, was adopted.

Paragraph (5)

11. Mr. McRAE said that in the last sentence, the phrase "it does not seem necessary to mention sexual orientation as a distinct ground" suggested that that was the general conclusion reached by the Commission, whereas it was the view of only some members. The phrase should therefore be amended to read, "some members were of the view that it was not necessary".

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

The commentary to draft article 15, as amended, was adopted.

Commentary to draft article 16 (Vulnerable persons)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

12. Sir Michael WOOD proposed the addition of the phrase "and special needs" after the word "vulnerabilities" in the second sentence.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

The commentary to draft article 16, as amended, was adopted.

CHAPTER II. PROTECTION REQUIRED IN THE EXPELLING STATE

Commentary to draft article 17 (Obligation to protect the right to life of an alien subject to expulsion)

The commentary to draft article 17 was adopted.

Commentary to draft article 18 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

The commentary to draft article 18 was adopted.

Commentary to draft article 19 (Detention conditions of an alien subject to expulsion)

Paragraph (1)

13. Sir Michael WOOD said that paragraph 1 (b) of the draft article, which stipulated that an alien subject to expulsion must be detained separately from persons who had been sentenced, stated only one of the consequences of the principle set forth in paragraph 1 (a), namely that the detention of an alien must not be punitive in nature. In the second sentence of the commentary to paragraph (1), the last clause should therefore read, "whereas subparagraph (b) sets out one of the consequences of that principle".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

14. Sir Michael WOOD said that the length of detention was an important rather than a sensitive issue. In the first sentence of that paragraph the word "sensitive" should therefore be replaced with "important".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

15. The CHAIRPERSON said that, since it was the Commission's practice to refer to a "Special Rapporteur", irrespective of the gender of the person in question, in the French version of the paragraph, "*Rapporteuse spéciale*" should be replaced with "*Rapporteur spécial*".

Paragraph (7) was adopted with that editorial amendment to the French version.

Paragraph (8)

16. Sir Michael WOOD suggested that, for the sake of clarity, it would be advisable to add a sentence at the end of the paragraph, which would read thus: "Paragraph 3 (b) is without prejudice to a right of the State to continue to detain the alien on grounds unrelated to expulsion." That sentence would cover the case where an alien was detained pending expulsion, expulsion then became impossible, but there were other grounds, such as national security, on the basis of which the alien could continue to be detained. The addition he was proposing made it clear that the statement in paragraph 3 (b) "detention shall end" referred only to detention with a view to expulsion.

17. Mr. TLADI, supported by Mr. KAMTO (Special Rapporteur), said that he was uncomfortable with the amendment proposed by Sir Michael. He proposed instead the addition of the phrase “in connection with expulsion” after the word “detention” in the first sentence, if the Commission’s intention was to ensure that a State was able to continue the detention of an alien subject to expulsion, but solely for other reasons unrelated to his or her expulsion. He would not, however, wish to include any language that seemed to detract from the essence of the article and that seemed to be a positive encouragement to the State to continue detention.

18. Mr. SABOIA asked for clarification of the phrase at the end of paragraph 3 (b), “except where the reasons are attributable to the alien concerned”.

19. Mr. McRAE said that part of the reason for the inclusion of that apparently obscure phrase was to leave open the possibility for continuing to detain an alien if there were factors other than the reason for expulsion that necessitated his or her detention.

20. Sir Michael WOOD said that, in the light of all the constructive comments made, he could go along with Mr. Tladi’s suggestion.

Paragraph (8) was adopted with that amendment.

The commentary to draft article 19, as amended, was adopted.

Commentary to draft article 20 (Obligation to respect the right to family life)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

21. Sir Michael WOOD said that the meaning of the words “*a contrario*” was somewhat obscure.

22. Mr. TLADI read out the text of article 17, paragraph 1, of the International Covenant on Civil and Political Rights, which was described in paragraph (5) as setting out a condition *a contrario*.

23. Mr. NOLTE said that the term “implicitly” would be more correct than “*a contrario*” and would better correspond to the purpose of the draft article, which was to ensure not only that interference must not violate the law, but also that it must be based on the law.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

The commentary to draft article 20, as amended, was adopted.

CHAPTER III. PROTECTION IN RELATION TO THE STATE OF DESTINATION

Commentary to draft article 21 (Departure to the State of destination)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

24. Sir Michael WOOD proposed the deletion of the lengthy quotation from the *Maal* case, which was extremely dated, in that it distinguished between persons who were gentlemen and others.

25. Mr. KAMTO (Special Rapporteur) said that he wished to retain the passage because it showed that as early as the nineteenth century there had been an awareness of the sacred character of the human person and the importance of the dignity of the human person.

26. Mr. NOLTE said that, while the language of the quotation might be outdated, its substance was extremely important and instructive.

Paragraph (4) was adopted.

Paragraph (5)

27. Sir Michael WOOD said that, in the passage quoted from section 5.2.1 of annex 9 to the Convention on International Civil Aviation, it was unclear what was meant by “an inadmissible passenger or”, and he therefore proposed its deletion.

28. Mr. KAMTO (Special Rapporteur) said that the important point being made in that paragraph was that the conditions under which a person was deported must not infringe his or her dignity.

Paragraph (5) was adopted.

Paragraph (6)

29. Mr. FORTEAU drew attention to the fact that in the first sentence the reference should be to paragraph 3 and not paragraph 4 of the draft article.

Paragraph (6) was adopted with that correction.

The commentary to draft article 21, as amended, was adopted.

Commentary to draft article 22 (State of destination of aliens subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

30. Sir Michael WOOD said that the phrase at the end of the first sentence “under a rule of international law, whether a rule of general international law or a treaty rule binding that State” was too narrow in scope. For example, a regional international law or a rule of customary law might not be a rule of general international law. He considered that the emphasis was supposed to be on treaty rules. Thus, for the sake of a more comprehensive listing, he proposed that the phrase should read “under a rule of international law, including a treaty rule binding on that State”.

31. The CHAIRPERSON suggested that a simpler solution would be to delete the phrase “whether a rule of general international law or a treaty rule binding that State”.

32. Mr. McRAE said that the deletion of those words would mean that the commentary added nothing to the draft article. As he understood the point that the Special Rapporteur had wished to make, a rule of international law might be a customary rule or a treaty rule. He liked the proposal made by Sir Michael, which expressed the point but placed emphasis on treaty rules.

33. The CHAIRPERSON said that the question seemed to be how one interpreted the words “rule of international law”.

34. Sir Michael WOOD said that his proposal would tie in with the footnote at the end of that phrase, which referred the reader to examples of treaty rules.

35. Mr. TLADI said that his recollection of the Commission’s deliberations was that, while some members had wished the emphasis to be placed on treaty law, the majority in the Drafting Committee had held the view that both treaty law and general international law should be covered. He would therefore prefer to retain the text as it stood or amend it along the lines suggested by the Chairperson.

36. Mr. KAMTO (Special Rapporteur) said that he agreed with Mr. Tladi that placing the emphasis on treaty law would not accurately reflect the discussion that had taken place in the Drafting Committee. He also endorsed Mr. McRae’s comment that truncating the phrase would not add anything to the draft article. He therefore proposed that the phrase should be reworded to read, “under a rule of international law, whether a treaty rule binding on that State or a rule of customary international law”. The content of general international law varied according to legal writers: some authors considered that it referred to customary law only, while others considered that it covered both customary and treaty law.

37. Mr. CANDIOTI said that the corresponding footnote should then read, “For examples of the first hypothesis ...”.

Paragraph (2), as amended by the Special Rapporteur and with that amendment to the footnote at the end of the first sentence, was adopted.

Paragraph (3)

38. Mr. HMOUD, referring to the phrase in the last sentence “the view was also expressed that the State of embarkation would have no legal obligation to receive the expelled alien”, proposed that the words “would have” should be replaced with the word “had”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

39. Mr. FORTEAU proposed that, in addition to the mention of draft articles 23 and 24, reference should also be made to draft article 6, paragraph 3.

Paragraph (5), as amended, was adopted.

The commentary to draft article 22, as amended, was adopted.

Commentary to draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

40. Mr. McRAE said that an essential part of the compromise agreement reached by the Commission had been the inclusion of a reference in draft article 15 to any other ground impermissible under international law. As currently worded, paragraph (3) of the commentary seemed to suggest that the issue of whether sexual orientation was a prohibited ground for discrimination had been dropped, which was not the case. He therefore proposed that the paragraph should end with the phrase “and the matter is any event covered by the words ‘any other ground impermissible under international law’”.

41. Mr. KAMTO (Special Rapporteur) said that Mr. McRae’s proposal would not reflect the outcome of the discussion in the Drafting Committee—that had been the position of some members, but not the Drafting Committee as a whole. He proposed that the text should be left as it stood, since, in any case, there was a footnote referring to paragraph (5) of the commentary to draft article 15, which explained the various viewpoints expressed. Alternatively, a new sentence could be added to the end of the paragraph to the effect that some members had considered that sexual orientation should not, under any circumstances, be included among the prohibited grounds of discrimination.

42. Mr. McRAE, acknowledging the point made by the Special Rapporteur, proposed that a sentence along the lines of the first sentence of paragraph (7) of the commentary to draft article 15 should be added.

43. Mr. WISNUMURTI said that he would prefer to retain the text of paragraph (3) as it stood.

44. Mr. NOLTE said that, as currently drafted, paragraph (3) did not accurately reflect the balance of the discussion and might give rise to misunderstandings.

45. Mr. CANDIOTI said, in the light of Mr. McRae’s earlier comments, that the footnote at the end of the paragraph should refer not only to paragraph (5), but also to paragraph (7) of the commentary to draft article 15, and that that should be taken into account when redrafting the text.

46. Following consultations, Mr. McRAE proposed that the second sentence of paragraph (3) should be amended

to read as follows: “Since divergent views were expressed by members of the Commission on this point, the approach taken in draft article 15 and explained in the commentary to that draft article was adopted here as well.” Such an amendment would obviate the need for a footnote to that sentence.

Paragraph (3), as amended and with the deletion of the corresponding footnote, was adopted.

Paragraph (4)

47. Sir Michael WOOD proposed that in the last sentence, the expressions “positive international law” and “positive law” should be replaced with the expressions “existing rule of international law” and “existing law”, respectively, as those terms seemed more appropriate in the context.

48. Mr. MURPHY said he believed that the Special Rapporteur had used the term “positive” because, in his fifth report,³⁵⁸ he had drawn a distinction between the obligations set forth in the International Covenant on Civil and Political Rights and the European Convention on Human Rights, on the one hand, and non-treaty obligations, on the other hand. He proposed that the word “positive” should be replaced with the word “treaty” in both cases.

49. Mr. KAMTO (Special Rapporteur) proposed the deletion of the word “positive” altogether.

50. Mr. MURPHY said that without the word “positive”, the sentence would seem to refer to a rule of customary international law, which was not what was said in the Special Rapporteur’s fifth report or the commentary to the draft articles. It might be preferable to delete the sentence.

51. Mr. CANDIOTI said that his preference was to opt for the word “treaty”, for the reasons given by Mr. Murphy. If the word “positive” was simply omitted, the expression would embrace every rule of international law, which was not the intention.

52. Mr. KAMTO (Special Rapporteur) said that the deliberations had not focused on whether reference should be made to treaty law or any other source of law, but on how far the law went on the issue of the prohibition of the death penalty. He thus proposed that the last part of the sentence should read, “while ... this prohibition now corresponds to a rule of international law, it would be difficult to state that international law, as it stands, goes any further in this area”. He recalled that during the discussion in the Drafting Committee, some members had referred to the General Assembly’s efforts to achieve the abolition of the death penalty and, failing that, to impose a moratorium. The ensuing General Assembly resolution was not treaty law, but it could perhaps be considered as evidence of a trend not to apply the death penalty.

53. Mr. NOLTE, supported by Mr. TLADI, said it was arguable that the issue went beyond treaty law and thus he was not in favour of Mr. Murphy’s proposal to replace

“positive” with “treaty”. He expressed support for the Special Rapporteur’s proposal.

54. Mr. MURPHY said that both the memorandum by the Secretariat³⁵⁹ and the fifth report approached the issue solely in the context of specific treaty regimes containing certain kinds of obligations. Paragraph (4) of the commentary alluded to the International Covenant on Civil and Political Rights, which did not express the rule in question, although the Human Rights Committee had adopted a view that such a rule existed in that particular treaty regime. However, nowhere in any of the Commission’s prior documentation had the Special Rapporteur or anyone else established that the rule went beyond treaty law. The Special Rapporteur had even stated in his fifth report that it would not be appropriate to generalize the rule since it was not a customary norm. While he did not wish to enter into a substantive debate at the current juncture, at the same time he did not wish the Commission to draw a conclusion that expanded the scope of the prohibition to include general customary international law without carrying out the necessary research.

55. Mr. TLADI said that, ultimately, the commentary was the product of the Commission’s debate. During the debate, he had expressed the view that the obligation for a State that did not apply the death penalty not to expel an alien to a State where the person was threatened with the death penalty or the execution of a death sentence was a general rule of international law. In the Drafting Committee, several other members had shared that view, while others had even gone further by saying that there was a general rule of international law against the death penalty. The sentence in question referred to the narrower issue and was not as conclusive as Mr. Murphy suggested, since it opened with the phrase “it may be considered” and continued with the qualifying expression “within these precise limits”. What was important, however, was that it should reflect the discussions held in plenary Commission and the Drafting Committee. He would prefer to retain the original text of the sentence, but rather than to see an emphasis on treaty law, he would prefer to delete it.

56. Sir Michael WOOD, apologizing for having sparked such a lengthy debate, said that the simplest solution would be to delete the sentence. If it was retained, however, he proposed that the phrase “it may be considered” should be replaced with “some members of the Commission considered” in order to more accurately reflect the discussion.

57. Mr. KAMTO (Special Rapporteur) said that, although the proposal by Sir Michael would be the simpler solution, since it was the first reading of the draft articles, he would like to see how Member States reacted. He endorsed Mr. Tladi’s clarifications. On careful reading, the sentence did not establish a general rule. Mr. Murphy was correct about his views on the death penalty as set forth in the fifth report; he was firmly convinced that there was currently no general rule of international law prohibiting the death penalty. However, the expression “within these precise limits” referred to the situation of a State that

³⁵⁸ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/611.

³⁵⁹ A/CN.4/565 and Corr.1 (document available from the Commission’s website and eventually as a supplement to *Yearbook ... 2006*).

had abolished the death penalty; having done so, it had adopted a position under international law whereby it would not expel an alien to another State where there was the threat of execution without obtaining an assurance that a death penalty would not be carried out. He proposed that the sentence should be retained, but amended slightly to read, “While it may be considered that, within these precise limits, this prohibition now corresponds to a firm trend in international law, it would be difficult to state that the law goes any further in this area”.

58. The CHAIRPERSON said he would take it that the Commission was in favour of the Special Rapporteur’s proposal.

It was so decided.

59. Mr. MURPHY, referring to the penultimate sentence of paragraph (4), said that the reference to the views of the Human Rights Committee should be reformulated to make it consistent with the style used elsewhere in the commentaries. He therefore proposed the insertion of a new sentence, to read as follows:

“The Human Rights Committee has taken the position that, under article 6 of the Covenant, States that have abolished the death penalty may not expel a person to another State in which he or she has been sentenced to death, unless they have previously obtained an assurance that the penalty will not be carried out.”

Paragraph (4), as amended, was adopted.

Paragraph (5)

60. Mr. VALENCIA-OSPINA said that, in the first sentence, the word “undoubtedly” conveyed significantly greater emphasis than what had been agreed by the Commission with respect to a similar paragraph of the commentaries discussed at a previous meeting. Moreover, the explicit statement that draft article 23, paragraph 2, constituted progressive development added nothing to the understanding of the text—which was, after all, the purpose of the commentaries—and instead sent a political message to States. He was concerned that, if it was retained, the Commission would be working at cross purposes with itself, giving with one hand and taking away with the other.

61. Sir Michael WOOD said that the reference to progressive development to which Mr. Valencia-Ospina objected was an essential aspect of the compromise that had emerged from the Commission’s work on draft article 23, paragraph 2; personally, he was in favour of retaining it. Although it did not happen frequently, the Commission did sometimes refer to the rules it drafted as constituting progressive development. Examples could be found in the commentaries to the articles on responsibility of States for internationally wrongful acts,³⁶⁰ as well as in other texts the Commission had produced. The sensitivity and importance of the issue referred to in paragraph 2 made

it appropriate to classify it as progressive development. That said, he would have no problem deleting the word “undoubtedly”, which added unnecessary emphasis.

62. Furthermore, in view of the debate that the Commission had had on paragraph (4), in which opinions had differed as to whether the basic principle described constituted positive law, he proposed, in the first sentence, to insert the words “at least” so that the phrase would read, “constitutes progressive development in at least two respects”. He also proposed that in the last sentence, the qualifier “real” should be inserted before “risk” in keeping with the case law of international human rights courts, which, in that context, tended to use the expressions “real risk” or “substantive risk”.

63. Mr. PARK said that, in referring to “States that retain the penalty in their legislation but do not apply it”, an expression such as “for quite some time” or “for some time” should be added in order to be more precise about the length of time during which the State had refrained from applying the death penalty.

64. Mr. PETER said that he agreed that the rule set forth in draft article 23, paragraph 2, constituted progressive development, since it took into account the fact that there might be States that still had the death penalty on their statute books but no longer implemented it. Reiterating a request he had made during the plenary debate on draft article 23, he proposed the insertion of a footnote to paragraph (5) that would read as follows:

“However, it was noted that, by specifically addressing only States that do not apply the death penalty, it limits the security of the alien subject to expulsion, in the sense that States applying the death penalty are at liberty to send the alien where they please.”

65. Ms. JACOBSSON said that she fully shared Mr. Valencia-Ospina’s views. To say that the paragraph “undoubtedly constitutes progressive development” was tantamount to freezing the *status quo* of the abolition by States of the death penalty when, in reality, the course and pace of change relating to such abolition could not be foreseen. She therefore proposed that, in the first sentence, the expression “undoubtedly constitutes progressive development in two respects” should be replaced with “makes it clear that”, with appropriate editorial adjustments. She would reserve her opinion on Sir Michael’s proposal to insert the word “real” before “risk” until she had seen examples of the case law to which he had alluded, although her first inclination was to think that it was unnecessary.

66. Mr. NOLTE said that, since paragraph (5) was addressed not only to States but also to national courts, it should make very clear the authority on which paragraph 2 of the draft article was based. The particular circumstances covered by paragraph 2 made it legitimate for the Commission to clarify that it constituted progressive development. In the event, not only did he prefer to retain the reference to progressive development, but he also believed that it would be positively misleading not to include it. He supported Sir Michael’s proposed amendments to paragraph (5).

³⁶⁰ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77, paragraph (1) of the general commentary.

67. Mr. CANDIOTI said that he endorsed the views expressed by Mr. Valencia-Ospina and Ms. Jacobsson in favour of omitting the reference to “progressive development”. Its inclusion was inconsistent with the Commission’s tradition of not drawing a clear distinction between codification and progressive development in the rules that it enunciated, but rather of following a mixed approach. Moreover, for the Commission to engage in the progressive development of international law was not an exceptional or daring act, but rather was an integral part of the Commission’s mandate, as set forth in its statute and in the Charter of the United Nations. Perhaps a different formulation could be used in paragraph (5) to indicate that, to a certain extent, paragraph 2 of draft article 23 reflected an innovation or the introduction of a new standard, but the Commission should not feel compelled to notify the international community each time it engaged in progressive development. As a matter of fact, the Commission would increasingly be called on in the twenty-first century to engage in such development and actually had an important role to play in doing so, since nearly everything that could be codified as international law had already been codified.

68. Mr. KAMTO (Special Rapporteur) said that perhaps a more neutral formulation—but one that nevertheless reflected the emerging nature of the rule in paragraph 2 of draft article 23—might serve as a compromise between the views expressed by Mr. Valencia-Ospina, Ms. Jacobsson and Mr. Candiotti, which he shared, and the opposing viewpoints expressed by others. He therefore proposed that the word “consequently” should be replaced with “in short” and that the phrase “undoubtedly constitutes progressive development in two respects” should be replaced with “reflects a trend that reveals”, together with the resulting editorial adjustments made necessary by those amendments.

69. Mr. PETRIČ said that he fully agreed with Mr. Valencia-Ospina. All of the Commission’s work, including every draft convention it had produced, was a combination of codification and progressive development. Unlike Mr. Nolte, he would prefer not to characterize the provisions drafted by the Commission as constituting “progressive development”, since a statement to that effect by the Commission sent a message to the national courts that the rule concerned was of a lesser order than a rule resulting from codification. There had been many references to the distinction between *lex lata* and *lex ferenda* at the current session; it nonetheless bore repeating that *lex ferenda* referred to that which would become law in the future but was not law yet. Consequently, the Commission was most definitely not producing draft articles of *lex ferenda*, it was producing draft articles of law. He supported Sir Michael’s proposal to insert the word “real” before “risk” in the last sentence.

70. Mr. MURPHY said that he had seen no evidence to support the trend mentioned by the Special Rapporteur in his proposal. The point of the paragraph, and the reason why there were no footnotes containing any references, was that no body or person had stated that the two developments in question were part of an existing treaty regime. They were not part of the law and not part of the trends in the law. Therefore, in his view, the proposal did not work.

71. It was not clear to him whether some members were saying that the Commission should never speak of “progressive development”, which would not be in keeping with the Commission’s practice over the past 50 years. The phrase was used in situations where the Commission had little or no support for a proposal, in order to indicate its considered view as to where the law was going, or should be going. Rather than stating that the developments reflected a trend, a compromise solution could be to say “Consequently, paragraph 2 of draft article 23 would develop the law in at least two respects”, and continue with the remainder of the paragraph as it stood. He supported the amendments suggested by Sir Michael. However, rather than inserting the temporal language suggested by Mr. Park, he would prefer to insert the words “in practice” immediately after “do not apply it”.

Following a suggestion by the Chairperson, the Commission deferred its decision on paragraph (5) of the commentary to draft article 23.

Commentary to draft article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

72. Mr. MURPHY said that the italics in the last two sentences of the text should be removed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The commentary to draft article 24, as amended, was adopted.

CHAPTER IV. PROTECTION IN THE TRANSIT STATE

Commentary to draft article 25 (Protection in the transit State of the human rights of an alien subject to expulsion)

The commentary to draft article 25 was adopted.

PART FOUR. SPECIFIC PROCEDURAL RULES

Commentary to draft article 26 (Procedural rights of aliens subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

73. Mr. McRAE said that, at the beginning of the fourth sentence, the words “in legal writings” were unnecessary and should be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

74. Sir Michael WOOD said that, in the second sentence, the words “may violate” should be changed to “may raise questions under”, in order to ensure consistency with the subsequent quotation.

75. The CHAIRPERSON said that an indication should be given, in the French version, that the quotation by Manfred Nowak at the end of the paragraph was in fact a translation.

Paragraph (4), as amended, was adopted.

Paragraph (5)

76. Mr. FORTEAU said that, at the end of the footnote to the second quotation, the following text should be inserted: “See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of 30 November 2010, I.C.J. Reports 2010, para. 74.*”

77. Sir Michael WOOD said that, in the footnote to the paragraph below on article 13 of the European Convention on Human Rights, the text of article 6 of the Convention should be deleted, since it was readily available.

Paragraph (5), with those amendments to the footnotes mentioned, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

78. Mr. NOLTE said that, in the penultimate sentence, the expression “may not be construed” should be replaced by “must not necessarily be construed”, in order to avoid any ambiguity. In the same sentence, the qualifying phrase relating to the right to interpretation took away the very essence of that right. He would be in favour of replacing it with more abstract language.

79. Mr. PETRIČ said that he was in favour of retaining the original wording, bearing in mind the considerable problems of translation and interpretation faced by countries such as his.

80. The CHAIRPERSON said that, in the French version, the words “*ne saurait être*” corresponded to Mr. Nolte’s first proposal.

81. Mr. PETER said that he supported Mr. Nolte’s proposal, bearing in mind the importance of adequate and effective interpretation for defendants and aliens.

82. Mr. KAMTO (Special Rapporteur) said that the wording of paragraph (7) was an attempt to reflect the discussion in the Drafting Committee, bearing in mind the practical problems certain countries faced in the area of translation and interpretation. States should not be expected to provide translation and interpretation in all languages, including ones not commonly used. The idea was that aliens should either speak one of the languages spoken in the region, in which case an interpreter from a neighbouring country could be used; if not, they should speak a commonly used international language.

83. Sir Michael WOOD suggested, with regard to Mr. Nolte’s first proposal, that the words “may not be construed” should be replaced with “should not be construed”. With regard to Mr. Nolte’s second proposal, he suggested that, in order to meet the concerns of the various speakers, the phrase “provided that this can be done without impeding the fairness of the hearing” should be inserted after the words “at the international level”. It should be borne in mind that the context was one of expulsion hearings, not criminal trials.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

84. Sir Michael WOOD said that, in the second sentence of the footnote at the end of paragraph 9, the words “the arguments in” should be deleted. Generally speaking, while it had been helpful to include the references to the memorandum by the Secretariat³⁶¹ and the Special Rapporteur’s report, in this instance his sixth report,³⁶² that did not mean that the Commission endorsed all the arguments they contained. On second reading, the Commission should try to include all the necessary information within the commentaries themselves.

Paragraph (9) was adopted with that amendment to the footnote mentioned above.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

The commentary to draft article 26, as amended, was adopted.

Commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision)

Paragraph (1)

85. Sir Michael WOOD said that, in the second sentence, “in positive law” should be replaced with “in existing law”.

86. Mr. KAMTO (Special Rapporteur) said that the Commission might wish to harmonize the reference to “progressive development” in paragraph (1) of the commentary to draft article 27 with the wording he had suggested for paragraph (5) of the commentary to draft article 23. It could be stated that the paragraph reflected current trends in international law.

87. Sir Michael WOOD said that he did not agree that draft article 27 reflected trends in international law. He would be in favour of retaining the reference to “progressive development” in paragraph (1) of the commentary to that draft article, but without the word “undoubtedly”.

³⁶¹ See footnote 359 above.

³⁶² *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/625 and Add.1–2.

88. Mr. MURPHY recalled that no agreement had yet been reached regarding the use of the word “trend” in paragraph (5) of the commentary to draft article 23. The reason that the reference to “progressive development of international law” had been included in paragraph (1) of the commentary to draft article 27 was that, during the discussion in the Sixth Committee, most States had said that they did not have such a provision in their national law, at least not in the wide range of respects covered by the draft articles. The reference to progressive development involved the credibility of the Commission; there was no basis for asserting that the draft article was already law. He had no objection to deleting the word “undoubtedly”, and would even be willing to discuss the use of a term other than “progressive development”. The repeated effort to purge the phrase “progressive development” from the commentaries was, however, unfortunate.

89. Mr. TLADI said that the term “progressive development” should not be treated as if it were a bad term, for its use did not imply that there were no rules of law. There was a distinction between those rules or principles that were not law and the progressive development of law. That distinction had been made clear, for example in the commentary to the articles on diplomatic protection,³⁶³ specifically in paragraph (1) of the commentary to draft article 19, which read as follows:

There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to transformation into rules of law in the exercise of progressive development of the law.³⁶⁴

90. Mr. NOLTE said that nobody was suggesting that “progressive development” was a bad term. As Mr. Murphy had said, it was a question of the authority that the Commission assumed and asserted. The use of the term “progressive development” was shorthand for saying that the rule in question, or variant of the rule, was not sufficiently established in practice for the Commission to be able to state that it constituted codification of customary international law. The distinction between codification and progressive development existed in the Commission’s statute for a good reason and should not be obliterated.

91. Mr. VALENCIA-OSPINA said that, if he had understood correctly, the Commission was working towards a consensus formula for paragraph (5) of the commentary to draft article 23 that could serve as a model for paragraph (1) of the commentary to draft article 27. However, in paragraph (1) of the commentary to draft article 27, the phrase “undoubtedly progressive development of international law” had been used, while in paragraph (5) of the commentary to draft article 27, the phrase “exercise in the progressive development of international law” continued: “having regard to current trends in international law and to some national laws”. He wondered whether it might be useful to draw on the latter formula, which was in line with the proposal of the Special Rapporteur, in order to come up with wording that would be acceptable to all.

³⁶³ General Assembly resolution 62/67 of 6 December 2007, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2006*, vol. II (Part Two), paras. 49–50.

³⁶⁴ *Yearbook ... 2006*, vol. II (Part Two), p. 53.

92. Mr. KAMTO (Special Rapporteur) said that, regardless of what was finally decided on that point, no one should have the impression that rules were the product of the fertile imagination of the Special Rapporteur. While a trend might be insufficiently established, it was always based on some amount of practice. That was true of the rule on suspensive effect, which had been established formally in the legislation of a certain number of States; it was inaccurate to say that the discussions in the Sixth Committee had shown that no legislative provisions existed. He invited members to check the reports of the Special Rapporteur and the memorandum by the Secretariat, which revealed that a thorough study carried out on national legislation had shown that a certain number of States clearly established the suspensive effect of appeals. Other States had not taken a position either way. However, the fact that they had chosen not to do so did not mean that suspensive effect was not established, or that they were opposed to it. If the Commission did not want to say that a rule was based on a trend of international law, it could say that it was based on a trend resulting from the practice of certain States.

93. The CHAIRPERSON suggested that consultations should be held to achieve consensus on the wording of paragraph (5) of the commentary to draft article 1, paragraph (5) of the commentary to draft article 23, and paragraph (1) of the commentary to draft article 27.

It was so decided.

Paragraph (2)

94. Sir Michael WOOD said that, in the middle of the second sentence, regarding the potential obstacles to return, the words “especially those” should be changed to “including those”, since there were many other potential obstacles besides economic ones.

Paragraph (2), as amended, was adopted.

The meeting rose at 1 p.m.

3155th MEETING

Tuesday, 31 July 2012, at 3.05 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kitichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (*continued*)

Chapter IV. *Expulsion of aliens (concluded)* (A/CN.4/L.802 and Add.1)

1. The CHAIRPERSON invited the Commission to resume its consideration of document A/CN.4/L.802/Add.1, which contained the text of the draft articles and commentaries thereto adopted by the Commission on first reading at the current session. He suggested starting with paragraph (3) of the commentary to draft article 27 and recalled that the Commission would return to paragraph (1) later.

C. Text of the draft articles on expulsion of aliens adopted by the Commission on first reading (*concluded*)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*concluded*) (A/CN.4/L.802/Add.1)

Commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision) (*continued*)

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

2. Mr. VALENCIA-OSPINA pointed out that the last sentence of the paragraph raised the question of the reference to the progressive development of international law, to which the Commission had agreed to return later.

3. Sir Michael WOOD said that the entire paragraph should be deleted, because the resolutions of the Parliamentary Assembly of the Council of Europe were not particularly helpful in the current context.

4. Mr. KAMTO (Special Rapporteur) stressed that the idea was to take into account the evolution of law in the area under consideration and to show that at least one organization—the Council of Europe—had gone further than the others. He proposed the deletion of the last sentence, which referred to the progressive development of international law, but to retain the preceding sentence, which followed the quotation, to indicate that the Commission had set itself a limit in its work.

That proposal was adopted.

Paragraph (5), as amended, was adopted.

Commentary to draft article 28 (Procedures for individual recourse)

The commentary to draft article 28 was adopted.

PART FIVE. LEGAL CONSEQUENCES OF EXPULSION

Commentary to draft article 29 (Readmission to the expelling State)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

5. Mr. NOLTE suggested to add a sentence to allow for cases in which an expulsion decision that had been unlawful at the time at which it had been taken nevertheless had been cured later in accordance with the law, which

could occur, for example, if the required hearing had been insufficient or late. That might be useful to lawyers dealing with specific cases.

6. Mr. TLADI said that such an insertion might not be necessary, because if the expulsion decision had initially been unlawful but no longer was, the question of readmission no longer arose.

7. Mr. FORTEAU asked whether it might not be sufficient to say "... where the authorities of the expelling State, or an international body such as a court or a tribunal that is competent to do so, have found in a binding and final determination ...".

8. Following a discussion in which Mr. NOLTE, Mr. FORTEAU, Mr. KAMTO, Mr. ŠTURMA and the CHAIRPERSON took part, it was decided to insert, at the end of the first sentence, a footnote which read as follows:

"Such a determination is not present when an expulsion decision which was unlawful at the moment when it was taken is held by the competent authority to have been cured in accordance with the law."

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

The commentary to draft article 29, as amended, was adopted.

Commentary to draft article 30 (Protection of the property of an alien subject to expulsion)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

9. Mr. McRAE proposed that, in the quotation, the third paragraph of article 21 of the American Convention on Human Rights should be deleted, because it concerned usury, which was not relevant.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (6)

Paragraphs (3) to (6) were adopted.

The commentary to draft article 30, as amended, was adopted.

Commentary to draft article 31 (Responsibility of States in cases of unlawful expulsion)

Paragraph (1)

10. Sir Michael WOOD pointed out that that was the second reference to the articles on responsibility of States for internationally wrongful acts.³⁶⁵ He proposed that the paragraph should be simplified, as had been done for

³⁶⁵ General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

paragraph (3) of the commentary to draft article 2. The first sentence would remain unchanged, and the second sentence would read, “In this regard, draft article 31 is to be read in the light of Part Two of the articles on responsibility of States for internationally wrongful acts”, with a corresponding footnote reference. The following sentence would then read, “Part Two sets out the content of the international responsibility of a State, including in the context of the expulsion of aliens”, with a footnote reference to paragraph (5) of the general commentary to the 2001 articles, which stated that the articles applied to the whole field of international responsibility of States and that, being general in character, they were also for the most part residual.³⁶⁶ That made the point that the responsibility of States as defined in the 2001 articles also applied in the context of the expulsion of aliens.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

11. Mr. McRAE suggested that the words “One should also mention a new approach taken” at the beginning of the third sentence should be replaced with “A new approach was taken”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

12. Sir Michael WOOD said that in the second paragraph the Special Rapporteur made a distinction between the principle established by the Permanent Court of International Justice in the case concerning the *Factory at Chorzów* and the principle recalled by the International Court of Justice in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. In actual fact, those were two aspects of the same issue. Moreover, the sentence was too long, and he therefore suggested to delete it and simply to begin the second paragraph with the words “The Court further stated:”.

13. Mr. KAMTO (Special Rapporteur) said that he was opposed to that suggestion, because it was useful to show that the decision rendered by the International Court of Justice in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* was part of its jurisprudence. Perhaps the second paragraph could be divided into two or three sentences.

14. Mr. FORTEAU shared Sir Michael’s concern about the second paragraph and proposed the deletion of the words “the distinction between”.

That proposal was adopted.

Paragraph (6), as amended, was adopted.

The commentary to draft article 31, as amended, was adopted.

³⁶⁶ *Yearbook ... 2001*, vol. II (Part Two), p. 32.

Commentary to draft article 32 (Diplomatic protection)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

The commentary to draft article 32 was adopted.

15. The CHAIRPERSON suggested that the Commission return to paragraph (5) of the commentary to draft article 1, which had been left in abeyance at the 3153rd meeting, and to paragraph (5) of the commentary to draft article 23 and paragraph (1) of the commentary to draft article 27, the consideration of which had been left in abeyance at the preceding meeting.

Commentary to draft article 1 (Scope) (concluded)

Paragraph (5) (concluded)

16. Mr. MURPHY said that, following consultations with the Special Rapporteur and members of the Commission who had expressed a view on the subject, he proposed to add the following sentence at the end of the paragraph: “Displaced persons, in the sense of relevant resolutions of the United Nations General Assembly, are also not excluded from the scope of the draft articles.” He also proposed the insertion of a footnote that referred to General Assembly resolution 59/170 of 20 December 2004 as well as to the Special Rapporteur’s second report on the expulsion of aliens³⁶⁷ and the memorandum prepared by the Secretariat³⁶⁸ on the question.

Paragraph (5), as amended, was adopted.

The commentary to draft article 1, as amended, was adopted.

Commentary to draft article 23 (Obligation not to expel an alien to a State where his or her life or freedom would be threatened) (concluded)

Paragraph (5) (concluded)

17. Mr. NOLTE said that the first sentence should be amended to read, “Consequently, paragraph 2 of draft article 23 would develop the law in at least two respects”.

18. Mr. KAMTO (Special Rapporteur) said it would be preferable for the Commission not to use the phrase “develop the law”, because it was not consistent with the wording in article 1 of its statute, which spoke of “progressive development”.

19. Mr. NOLTE said that perhaps the word “undoubtedly” could be deleted to meet the concerns expressed by certain members about the reference to progressive development in the first sentence—to which he had no objection.

20. Mr. VALENCIA-OSPINA said that it was not for the Commission to indicate in the commentaries that its draft articles constituted progressive development, and he was opposed to any proposal in that regard.

³⁶⁷ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/573.

³⁶⁸ A/CN.4/565 and Corr.1 (document available from the Commission’s website and eventually as a supplement to *Yearbook ... 2006*).

21. Mr. HASSOUNA agreed that it was not the tradition of the Commission to refer to progressive development in the commentaries to its draft articles, but he did not see any problem in the current case. However, to improve the wording of the first sentence, he suggested to delete the word “undoubtedly” and to replace “constitutes” with “would constitute”.

22. Mr. McRAE proposed that the Commission should adopt the Special Rapporteur’s initial proposal and delete the word “undoubtedly”. On the other hand, he was opposed to the insertion of the words “at least”, which would give a much broader scope to the concept of progressive development.

23. Mr. PARK said that he was in favour of the deletion of the word “undoubtedly” and the insertion of the words “at least”. He also asked whether the Commission had taken a decision on the proposal that he had made at the previous meeting to insert the words “in practice” after “do not apply it”.

24. Sir Michael WOOD said that the words “real risk” reflected the case law of the European Court of Human Rights in the *Soering v. the United Kingdom* case, which related to both the death penalty and the death row phenomenon. In the first sentence, he thought it important to include the words “at least” to avoid a contradiction between paragraph (5) and paragraph (4). However, if that was not agreeable to Mr. McRae, an alternative might be to replace “Consequently” with “In addition”, since paragraph (5) was not a consequence of paragraph (4), but was something new.

25. Mr. PETRIČ endorsed Mr. McRae’s proposal as well as Sir Michael’s suggestion to insert the word “real” before “risk” in the last line.

26. Mr. MURPHY summarized the various proposals: to delete the word “undoubtedly” in the first line, to insert the words “in practice” after “do not apply it” in the fourth line and to add the word “real” before “risk” in the last line.

That proposal was adopted.

Paragraph (5), as amended, was adopted.

The commentary to draft article 23, as amended, was adopted.

Commentary to draft article 27 (Suspensive effect of an appeal against an expulsion decision) (concluded)

Paragraph (1)

27. Mr. MURPHY noted that the proposal was to delete the word “undoubtedly” in the first sentence and to replace the words “positive law” with “existing law”.

Those proposals were adopted.

Paragraph (1), as amended, was adopted.

The commentary to draft article 27, as amended, was adopted.

Section C of chapter IV, as amended, was adopted.

B. Consideration of the topic at the present session (concluded)*

28. The CHAIRPERSON said that the Commission, which had completed—with difficulty—the adoption on first reading of the draft articles on expulsion of aliens and commentaries thereto, should take a decision on the forwarding of the draft articles to Governments for comments. In line with Commission practice, that decision might read as follows:

“At its 3155th meeting, on 31 July 2012, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles (see sect. C below), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2014.”

It was so decided.

29. The CHAIRPERSON said that it was customary for the Commission to pay tribute in its report to the Special Rapporteur, and he proposed to do so with the following text:

“At its 3155th meeting, on 31 July 2012, the Commission expressed its deep appreciation for the outstanding contribution that the Special Rapporteur, Mr. Maurice Kamto, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on expulsion of aliens.”

It was so decided.

Section B of chapter IV, as a whole, was adopted.

Chapter IV, as amended, was adopted.

30. Mr. KAMTO (Special Rapporteur) thanked the Chairperson most warmly for his patience in conducting the work of the Commission, thereby enabling it to adopt the draft articles and commentaries thereto. Not wishing to contradict the Chairperson’s assessment that the text had been adopted with difficulty, he recalled that the Commission had seen worse cases and that both former and current members, through their cooperation, enthusiasm, discipline and commitment, had made a valuable and positive contribution to the conclusion of the work on the topic. He also thanked the successive Chairpersons of the Drafting Committee, who had demonstrated their authority and extraordinary mastery, and he expressed gratitude to the Secretariat, which, through the colossal study that it had completed at the beginning of the consideration of the topic and its priceless assistance throughout the work and in the preparation of the commentaries, had made it possible to adopt on first reading a text that, although not perfect, was of remarkably good quality. He hoped that the Commission would be able to re-examine the draft articles at its next two sessions and thus make an eagerly awaited contribution to that very sensitive and important topic.

The meeting rose at 4.40 p.m.

* Resumed from the 3152nd meeting.

3156th MEETING

Thursday, 2 August 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (*continued*)

Chapter V. Protection of persons in the event of disasters (A/CN.4/L.803)

1. The CHAIRPERSON invited the Commission to consider chapter V of the draft report as contained in document A/CN.4/L.803.

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

2. Mr. MURPHY said that the phrase in the second sentence “in its aspect related to persons in need of protection” seemed unnecessary and should be deleted.

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 7

3. Mr. FORTEAU suggested that the reference to the Commission’s question in section C of chapter III of its report on the work of its sixty-third session³⁶⁹ should be expanded to make it clear what the question concerned.

4. Mr. CANDIOTTI pointed out that the content of the question was explained in paragraph 11.

5. Mr. FORTEAU proposed that a footnote should then be inserted at the end of the first sentence of paragraph 7, referring to paragraph 11.

With the addition of the footnote, paragraph 7 was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

6. The CHAIRPERSON said that the words “took note of the report of the Drafting Committee” should be added at the end of the paragraph. The appropriate date and meeting number would be filled in by the Secretariat at a later date.

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the proposed text was too succinct. It did not explain the work done on the topic in plenary session and in the Drafting Committee, which had resulted in the provisional adoption of five draft articles. Two years previously, when he had raised the question of what seemed to be an anomaly in the presentation of the Commission’s work to the General Assembly, the Commission had decided to refer in its report to all the draft articles provisionally adopted during the session and to reproduce the full text of the draft articles in a footnote. He was aware that the Commission was inclined to reconsider some of its practices, but he hoped that it would maintain that particular one.

8. Mr. PETRIČ, after endorsing Mr. Valencia-Ospina’s comments, said that reference must be made to the draft articles considered and provisionally adopted by the Drafting Committee during the current session. Paragraph 9 referred to three new draft articles that had been proposed but not adopted, and that might well cause some confusion in the Sixth Committee.

9. Mr. SABOIA endorsed the comments by Mr. Valencia-Ospina and Mr. Petrič. The Commission had provisionally adopted a number of draft articles after a substantive debate in which the views of members had been taken into account. It was important that the Sixth Committee should be made aware of the work that had been done.

10. Mr. NOLTE said that any decision taken with regard to the topic in question should be without prejudice to the Commission’s other practices or future practice.

11. Sir Michael WOOD said that it must be made clear that the draft articles had been not adopted, but merely provisionally adopted, and not by the Commission, but by the Drafting Committee. Moreover, they were not yet accompanied by commentaries, which were essential to their understanding—they were not self-explanatory. Member States on the Sixth Committee could then decide whether they wished to comment on the draft articles at that juncture.

12. Mr. VALENCIA-OSPINA (Special Rapporteur) proposed, for the sake of expediency, that the Commission should amend the paragraph along the lines of paragraph 297 of the report of the Commission on the work of its sixty-second session.³⁷⁰ The text of the paragraph would read, “At its ... meeting, on ... July 2012, the Commission received the report of the Drafting Committee and took note of draft articles 5 *bis* and 12 to 15, as provisionally adopted by the Drafting Committee (A/CN.4/L.812)”. A footnote marker should be added at the end of that sentence and the footnote itself should read, “The draft articles provisionally adopted by the Drafting

³⁶⁹ *Yearbook ... 2011*, vol. II (Part Two), para. 44.

³⁷⁰ *Yearbook ... 2010*, vol. II (Part Two), p. 180.

Committee read as follows ...". The full text of the draft articles should be reproduced in the footnote.

Paragraph 10, as amended, was adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE FIFTH REPORT

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

13. Mr. NOLTE, referring to the seventh sentence, proposed that the order of the adjectives "scientific" and "technical" should be inverted.

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

14. Mr. MURPHY, referring to the penultimate sentence, proposed that the words "under the circumstances and balance" should be replaced with the words "in the light of". That would make it clear that a State had to weigh the desirability of waiving certain provisions of domestic law against its obligations to protect its population.

It was so decided.

15. Mr. NOLTE, supported by Mr. VALENCIA-OSPINA (Special Rapporteur), proposed the deletion of the adjective "natural" before the word "disaster" in the penultimate sentence, which was not solely about natural disasters.

It was so decided.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

2. SUMMARY OF THE DEBATE

(a) General remarks

Paragraph 16

16. Mr. TLADI said that, in order to reflect a view expressed by himself and other members of the Commission, the end of the second sentence, which read "and concepts such as the arbitrary withholding of consent, was best only applied in extreme cases" should be replaced with the words "in these few extreme cases where States did arbitrarily withhold consent, that a right-duty approach would assist persons affected by disaster". For similar reasons, he proposed that the phrase in the third sentence that read "was weakly grounded in State practice" should read "was not supported by State practice".

17. Mr. NOLTE said that, while he had no objection to the substance of Mr. Tladi's proposal, he thought that the

words "it was noted" in the third sentence should read "some members noted".

Paragraph 16, as amended by Mr. Tladi and Mr. Nolte, was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

Paragraph 19

18. The CHAIRPERSON suggested that, in the final sentence of the French version, the words "*mais d'autres ont exprimé des doutes quant à la faisabilité de cette proposition*" ["others expressed doubts about the feasibility of the proposal"] should be replaced with the phrase "*alors que d'autres ont exprimé des doutes quant à la possibilité de réaliser cette proposition*" ["others expressed doubts about the possibility of implementing the proposal"].

19. Sir Michael WOOD said that he could go along with that amendment as long as the word "feasibility", which conveyed exactly the right meaning in English, was retained in the English text.

It was so decided.

20. Mr. NOLTE proposed that in the first sentence, the definite article "the", before "Status of Forces Agreement", should be replaced with the indefinite article "a".

Paragraph 19, as amended, was adopted.

(b) Comments on draft article A

Paragraph 20

21. Mr. MURPHY proposed that in the second sentence, the word "third", before "and other actors", should be replaced with "States".

22. Mr. FORTEAU said the fact that draft article A referred to "States and other actors" lent support to Mr. Murphy's proposal.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

(c) Comments on draft article 13

Paragraph 24

23. Mr. NOLTE said that, in the second sentence, the word "core", before "principles", did not add anything to the meaning; he therefore proposed to delete it.

It was so decided.

24. Mr. PETRIČ queried the appropriateness of beginning the second sentence with the phrase "Agreement was also expressed", as it implied that a consensus had been reached on the view, which did not quite reflect the Commission's debate. He proposed to replace the phrase with an expression along the lines of "The view was expressed" or "It was generally felt that".

25. The CHAIRPERSON suggested that the words “by some members” should instead be inserted after the phrase “Agreement was also expressed” in order to address the point made by Mr. Petrič.

It was so decided.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

26. Mr. NOLTE said that in the third sentence the phrase “internal rules” should be replaced with “domestic legislation”, since paragraph 26 said that it was not easy to waive such requirements and that doing so could give rise to constitutional difficulties.

Paragraph 26, as amended, was adopted.

(d) Comments on draft article 14

Paragraphs 27 and 28

Paragraphs 27 and 28 were adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 29 to 31

Paragraphs 29 to 31 were adopted.

Paragraph 32

27. Mr. MURASE said that paragraph 32 seemed to suggest that a model status-of-forces agreement for disaster situations could be used to provide for the activities of non-military actors, whereas such agreements, by definition, did not cover such activities. By way of clarification, he proposed, first of all, to add the words “for peacekeeping operations” at the end of the first sentence. Second, given that it was necessary in the context of disasters to provide for the activities of military and non-military actors in separate agreements, he wondered whether the two issues should be addressed in separate paragraphs of the commentary.

28. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he could accept Mr. Murase’s first proposal, as it further clarified the purpose of the existing United Nations model status-of-forces agreement for peacekeeping operations.³⁷¹ However, with regard to the second proposal, he said that the model agreement to be used in disaster situations that the Commission was to prepare would draw upon the United Nations model but would differ in that it would cover the activities of both military and non-military actors. In order to clear up any ambiguity, he proposed that the phrase “to be prepared by the Commission” should be inserted after “However, such model agreement”.

29. In the last sentence, he proposed to replace the portion of the text that read “mandate of the Commission

to codify and progressively develop the applicable rules of international law”, which was vague, with “scope of this topic as it was approved by the Commission”.

It was so decided.

30. Mr. NOLTE proposed that, in the third sentence, the words “United Nations” should be inserted before “model status of forces agreement”.

It was so decided.

Paragraph 32, as amended, was adopted.

Paragraphs 33 and 34

Paragraphs 33 and 34 were adopted.

Section B, as amended, was adopted.

C. Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission

Paragraph 35

Paragraph 35 was adopted.

Section C was adopted.

Chapter V, as amended, was adopted.

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (A/CN.4/L.804 and Add.1)

A. Introduction (A/CN.4/L.804)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF THE PRELIMINARY REPORT

Paragraph 5

31. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that, in the second sentence, the words “about which there was no consensus” should be inserted before “to be considered”. She further proposed that, in the penultimate sentence, the words “including possible exceptions,” should be inserted after the second mention of “*ratione materiae*”.

Paragraph 5, as amended, was adopted.

Paragraph 6

32. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she wished to propose various amendments to paragraph 6 that would more accurately reflect her introduction to her preliminary report and the ensuing debates. Her first proposal was to reformulate the first part

³⁷¹ Model status-of-forces agreement for peace-keeping operations, Report of the Secretary-General (A/45/594).

of the first sentence to read, “In her introduction of the report, the Special Rapporteur underlined that the report was ‘transitional’ in nature and took into account the work carried out by the previous Special Rapporteur in his three reports³⁷² and by the Secretariat in its memorandum³⁷³ (which would continue to serve as useful texts for the future work of the Commission), as well as the progress in the debates of the Commission and the Sixth Committee”.

33. Second, she proposed, in the ninth sentence, to replace the phrase “that protect” with the preposition “of”; to insert the words “and of international law” after “international community”; and, in the Spanish version, to replace the expression “*en particular*”, which was excessively restrictive, with “*incluidos*”—a change that would not affect the English version.

34. Lastly, she proposed, in the tenth sentence, to replace “while also investigating the various techniques and relationships at both the national and international levels” with “at stake”, because the longer expression did not correspond to any of her interventions during the introduction of her preliminary report.

35. Mr. NOLTE asked for clarification regarding whether the Special Rapporteur wished her systemic approach to cover only principles and values relating to human rights or all values and principles.

36. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that where the word “including” appeared in the English version, the Spanish version contained the expression “*en particular*”. She had proposed to change it to “*incluidos*” because the latter conveyed the idea that what followed was a specific type of principle but did not exclude the possibility of taking others into account.

Paragraph 6, as amended, was adopted.

Paragraph 7

37. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed that the penultimate and last sentences should be reformulated to read as follows: “The Special Rapporteur recalled that each of these aspects had been addressed to some extent by the previous Special Rapporteur. Although no consensus had been reached on them, it would nevertheless be useful for the Commission to consider these controversial issues from a fresh perspective. To that end, the Special Rapporteur has announced that she intends to begin proposing draft articles in her next report.”

38. The CHAIRPERSON suggested that, in the third sentence, the expression “if any” should be deleted.

39. Sir Michael WOOD said that in the fourth sentence, the phrase “to figure out the actual scope of the functional nature of immunity” was unclear in the English version; he asked whether the Special Rapporteur could propose a way to improve it.

³⁷² *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

³⁷³ A/CN.4/596 and Corr.1 (document available from the Commission’s website).

40. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the Spanish text was clear, but that in order to address Sir Michael’s concern about the English text, she proposed that the words “the actual scope of the functional nature” should be replaced with “the functional dimension”, which was more general and better reflected the comments made during the debate, including her own, to the effect that all immunity had a functional nature.

Paragraph 7 was adopted with the amendments put forward by the Special Rapporteur and the Chairperson.

2. SUMMARY OF THE DEBATE

(a) General remarks

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

(b) Methodological considerations

(1) Progressive development of international law and its codification

Paragraphs 11 to 16

Paragraphs 11 to 16 were adopted.

(2) Systemic approach

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

41. Mr. NOLTE, referring to the first sentence, said that while he and Sir Michael had made comments regarding a “trend” argument, those comments had not been made in the context of a systemic approach. He would therefore favour removing paragraph 18 from the “Systemic approach” section and including it under a new section, to be entitled “Identification of trends”. The first sentence of the paragraph should be replaced with the following: “It was pointed out that the Commission should be cautious with respect to the contention that a ‘trend’ existed to limit immunities before national jurisdictions and their scope.” In the second sentence, the words “in relation to the practice” should be deleted. The third sentence should be deleted, since it did not refer to the “trend” argument, and the last sentence would remain unchanged. The aim of his proposal was to make clear the context in which the argument had been raised and discussed, and not to conflate it with another argument.

42. Mr. HMOUD said that he saw no problem with the proposal by Mr. Nolte. He would be in favour of inserting the following quotation from the judgment in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*:

The Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

He would also be in favour of adding a reference to the case concerning the *Arrest Warrant of 11 April 2000*

(*Democratic Republic of the Congo v. Belgium*) in relation to the “trend” argument; he would look for the exact quotation.

43. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she had no objection to those changes. She therefore proposed that, in the section entitled “Systemic approach”, paragraph 18 should be deleted and paragraph 19 should become paragraph 18. A new text combining the proposals of Mr. Nolte and Mr. Hmoud would form paragraph 19 of a new, separate section, and would read as follows:

“(3) Trends in international law

“19. Some members pointed out that the Commission should be cautious with respect to the contention that a ‘trend’ existed to limit immunities before national jurisdictions and their scope. Indeed, it was recalled that in *Jurisdictional Immunities of the State*, the International Court of Justice had rejected the contention of the Italian courts that a trend existed in international law according to which the immunity of the State was in the process of being restricted in the application of the territorial tort principle for *acta jure imperii*, when in fact there was a contrary trend reaffirming immunity before national criminal jurisdictions. Moreover, it was noted that the *Pinochet* decision, since it was rendered in 1999, had not been widely followed. Some other members referred to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in that they seemed to indicate that, at best, no rule exists in relation to immunity *ratione materiae* in terms of the most serious international crimes and that a trend pointing otherwise may exist.”

44. Sir Michael WOOD said that in the final sentence of the new paragraph, the words “in that”, after “Buergenthal”, should be replaced with “in the *Arrest Warrant of 11 April 2000* case, in which ...”.

45. Mr. TLADI said that he wondered whether the final sentence, which was rather ambiguous, adequately reflected the trend not to extend immunity.

46. Mr. HMOUD concurred with Mr. Tladi and suggested that the words “trend pointing otherwise may exist” should be replaced with the phrase “trend pointing towards no immunity may in fact exist”.

47. Mr. HASSOUNA suggested that the replacement phrase should instead read “a trend pointing to the absence of immunity”.

It was so decided.

48. Mr. CANDIOTI proposed the deletion of the words “since it was” in the sentence that read as follows: “Moreover, it was noted that the *Pinochet* decision, since it was rendered in 1999, had not been widely followed.”

It was so decided.

The new paragraph was adopted with the amendments suggested by Sir Michael, Mr. Candiotti and Mr. Hassouna.

Paragraph 18 [former paragraph 19]

Paragraph 18 was adopted.

(3) Values of the international community

Paragraph 20

49. Mr. NOLTE said that, in the first sentence, the words “translating the ‘values’ argument into” should be replaced with “translating ‘values’ into”. In the last sentence, before the word “a”, the words “to have” should be inserted.

Paragraph 20, as amended, was adopted.

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

(4) Identification of basic questions

Paragraph 23

Paragraph 23 was adopted.

(c) Substantive considerations

Paragraph 24

50. Mr. NOLTE said that in the phrase “of another State or its officials”, the word “of” should be replaced with “on”.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

51. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, in order to reflect the discussion during the general debate, the following sentence should be inserted at the end of the paragraph: “However, a number of members of the Commission pointed out that both immunity *ratione personae* and immunity *ratione materiae* had a clearly functional nature.”

52. Mr. NOLTE said that he saw no problem with the proposed addition, but would like the new sentence to be followed by another sentence: “Some other members questioned whether the term ‘functional’ was sufficiently clear to help resolve underlying and substantive issues.”

53. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) endorsed that proposal.

Paragraph 26, as amended, was adopted.

(1) Scope of the topic

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

54. Sir Michael WOOD said that in the second sentence, the phrase “the jurisdiction of the State of his or her own

nationality” should be replaced with the words “the jurisdiction of his or her own State”. The issue was not the nationality of the official but the fact that he or she was an official of a given State.

Paragraph 28, as amended, was adopted.

Paragraph 29

55. The CHAIRPERSON pointed out the need to move the footnote in paragraph 34 to paragraph 29 and to add a slightly different footnote to paragraph 34.

Paragraph 29 was adopted, subject to the changes to the footnotes.

Paragraph 30

56. Sir Michael WOOD said that the phrase “since aspects of inviolability were closely related to immunity” should be replaced with “since inviolability of the person was closely related to immunity”.

Paragraph 30, as amended, was adopted.

(2) Use of certain terms

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

57. Mr. NOLTE said that, in the first sentence, the word “conveyance” should be replaced with “convergence”.

58. Mr. TLADI said that the sentence was correctly worded as it stood. The reference was to the conveyance, not convergence, of meaning.

Paragraph 32 was adopted.

(3) Immunity *ratione personae*

Paragraph 33

59. Mr. FORTEAU said that in the first sentence, the words “*qui était fondée sur une loi*” did not correspond to the English “which was status based”. The French phrase should be replaced with the words “*qui était attachée à un statut*”.

Paragraph 33 was adopted with that amendment to the French text.

Paragraph 34

60. Mr. HMOUD said that, in the second sentence, the phrase “both aspects” had been erroneously written twice: that error should be corrected.

61. Mr. TLADI said that, towards the end of the first sentence, “canvassed” should be replaced with “assessed”, which was a more accurate term in the context.

62. Sir Michael WOOD said that he would prefer the word “explored” rather than “assessed” to be used.

63. The CHAIRPERSON said that Sir Michael’s proposal corresponded more closely to the French text.

Paragraph 34, as amended by Mr. Hmoud and Sir Michael, was adopted.

Paragraph 35

64. Sir Michael WOOD said that, in the second sentence, the words “in a limited fashion” should be deleted, and the phrase “to other high ranking holders of office” replaced with “to a narrow circle of high ranking holders of office”, which was closer to the wording used in the Special Rapporteur’s preliminary report. In addition, he would be in favour of deleting the phrase “including, it was suggested, members of the parliament”.

65. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that she agreed with all of the proposals by Sir Michael.

66. Mr. MURASE said that the reference to members of parliament had been his suggestion, on the basis of article 27 of the Rome Statute of the International Criminal Court. However, he had no objection to its deletion.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

(4) Immunity *ratione materiae*

Paragraphs 38 to 40

Paragraphs 38 to 40 were adopted.

Paragraph 41

67. Mr. MURPHY said that, in the final sentence, the words “that would not be” should be inserted before “subject to criminal prosecution”. That would better reflect the point made by some members that the view that the immunity of officials extended to the commission of unlawful acts was untenable.

68. Mr. HMOUD proposed that the following sentence should be inserted at the end of the paragraph: “The point was made that the Commission would be in a position to contribute positively in regard to the definition of an official act for the purposes of this form of immunity, noting that the default position is that there exists no rule on immunity if there was no agreement on the immunity for certain crimes.”

69. Mr. NOLTE endorsed the proposal by Mr. Murphy. As to Mr. Hmoud’s proposal, he believed that a different phrase should be used instead of “the point was made that”, since it had been Mr. Hmoud alone who had taken the view reflected in his proposal.

70. Mr. HMOUD said that if Mr. Nolte preferred, perhaps the words “a point was made” could be used.

71. Mr. ŠTURMA said that the addition proposed by Mr. Murphy for the final sentence was unnecessary. As now worded, the sentence said that an approach that completely excluded *ultra vires* acts was untenable, since

by definition immunity assumed that the person enjoying such immunity was capable of committing unlawful acts subject to criminal prosecution. The sentence simply indicated that the issue of immunity could be invoked.

72. Mr. SABOIA said that, during the plenary debate, he had expressed the view that war crimes committed by officials could be subject to prosecution. He supported the comments made by Mr. Šturma.

73. After a discussion in which Sir Michael WOOD, Mr. CANDIOTI and the CHAIRPERSON took part, Mr. HMOUD proposed that the new final sentence of paragraph 41 should read as follows: “A point was made that the Commission would be in a position to contribute positively in regard to the definition of ‘an official act’, if it took the view that, if there was no agreement on the existence of immunity in relation to a specific crime, then the position should be the lack of immunity.”

74. Mr. MURPHY recalled that he had proposed the insertion of the phrase “that would not be” between “unlawful acts” and “subject to criminal prosecution” because he believed that the idea that an official who committed an unlawful act had no immunity was untenable. By definition, immunity assumed that a person enjoying such immunity was capable of committing unlawful acts that would not be subject to criminal jurisdiction.

75. Mr. CANDIOTI drew attention to the fact that Mr. Murphy was talking about criminal jurisdiction whereas the text referred to criminal prosecution. The two were not synonymous. Mr. Šturma’s view on the wording of the sentence seemed the more logical approach.

76. The CHAIRPERSON announced that the discussion of paragraph 41 would be deferred until the next meeting and expressed the hope that the members of the Commission would be able to reach consensus in the intervening period.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

77. Sir Michael WOOD said that, in the third sentence, the words “was entitled” should be replaced with “enjoyed”. The Commission should not suggest that officials were entitled to immunity; rather, it was the State of the official that had immunity.

Paragraph 44, as amended, was adopted.

(5) Possible exceptions to immunity

Paragraph 45

Paragraph 45 was adopted.

Paragraph 46

78. Mr. HMOUD said that an appropriate footnote should be added with regard to the case concerning *Jurisdictional Immunities of the State*.

Paragraph 46 was adopted, subject to the addition of a footnote.

Paragraphs 47 and 48

Paragraphs 47 and 48 were adopted.

Paragraph 49

79. Mr. NOLTE proposed that, in the first sentence, the phrase “the alleged violation of” should be inserted between the words “the case involving” and “*jus cogens* norms”: the question of raising an exception to immunity arose not in every case involving *jus cogens* norms, but only in those where those norms might have been violated. In the same sentence, the word “individualized” should be deleted. In the final sentence, the word “sufficient” should be inserted between “no” and “support”, because without it the sentence was not entirely accurate: the court had found not a total lack of support for the proposition that there was a limitation on State immunity but insufficient support for that position. Lastly, the word “consistent” should be replaced with “widespread”.

80. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) expressed her agreement with all of those amendments.

Paragraph 49, as amended, was adopted.

Paragraph 50

81. Mr. TLADI proposed the addition, at the end of the paragraph, of a sentence to read as follows: “Other members of the Commission, however, pointed out that some dissenting and separate opinions of the Court did, in fact, find that *jus cogens* affected the rules relating to immunity.”

Paragraph 50, as amended, was adopted.

Paragraphs 51 and 52

Paragraphs 51 and 52 were adopted.

(d) Procedural aspects

Paragraphs 53 and 54

Paragraphs 53 and 54 were adopted.

(e) Final form

Paragraph 55

82. In response to a query from Sir Michael, Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that the second sentence should be corrected to read as follows: “There was nevertheless general support for the Special Rapporteur’s intention to prepare and submit draft articles on the topic, the first reading of which would be completed during the present quinquennium.”

83. Mr. NOLTE proposed that the start of the final sentence should be amended to read, “While recognizing that it was too early to indicate ...”.

Paragraph 55, as amended, was adopted.

The meeting rose at 1.05 p.m.

3157th MEETING

Thursday, 2 August 2012, at 3.05 p.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candiotti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Kitichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (*continued*)

Chapter VI. Immunity of State officials from foreign criminal jurisdiction (*concluded*) (A/CN.4/L.804 and Add.1)

1. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of the portion of chapter VI contained in document A/CN.4/L.804/Add.1.

B. Consideration of the topic at the present session (*concluded*)

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR (A/CN.4/L.804/Add.1)

Paragraph 1

2. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to amend the last sentence to read as follows: “She restated her will to take into consideration the work undertaken by the former Special Rapporteur³⁷⁴ and by the Secretariat in its memorandum,³⁷⁵ as well as the previous work of the Commission on related topics, while providing a new approach that would facilitate consensus in the Commission on the controversial aspects of the topic.”

Paragraph 1, as amended, was adopted.

Paragraph 2

3. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to amend the paragraph to read as follows:

“The Special Rapporteur also welcomed the general receptiveness, in the comments made, and the broad support given, to the methodology and approaches that she intended to pursue, including, in particular, the distinction between immunity *ratione personae* and *ratione materiae*, which was sought in the development of the topic, the proposed systematic approach and the treatment of the various blocks of questions in a successive fashion. In this connection, she stated that no methodological approach can be absolutely neutral

³⁷⁴ *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/601 (preliminary report), *Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631 (second report) and *Yearbook ... 2011*, vol. II (Part One), document A/CN.4/646 (third report).

³⁷⁵ A/CN.4/596 and Corr.1 (document available from the Commission’s website).

in the work of the Commission. She confirmed that she planned to proceed on the basis of a thorough review of the State practice, doctrine and jurisprudence, both national and international. She also stated that taking into account values and principles was necessary, the need being to focus on those that were widely held and reflected international consensus. The overall objective would be to take a balanced approach in addressing immunity that would not contradict efforts undertaken by the international community to combat impunity regarding the most serious international crimes. She also noted that the question of possible exceptions to immunity was going to be extremely important in the discussion of the Commission. It was noted that although notions like ‘absolute’ or ‘relative’ immunity had limitations analytically, they could, however, be useful in explaining and offering a clear distinction when the regime of possible exceptions was taken up by the Commission. In her view, only those crimes that are of concern to the international community as a whole, are egregious and are widely accepted as such on the basis of a broad consensus, including genocide, crimes against humanity and war crimes, could merit consideration in any discussion of possible exceptions. In that context as well, it would be crucial to examine State practice and the prior work of the Commission.”

Paragraph 2, as amended, was adopted.

Paragraph 3

4. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) proposed to amend the paragraph to read as follows:

“The Special Rapporteur concluded that, in the light of the debate, she was of the view that the workplan contained in paragraph 72 of her preliminary report continued to be entirely valid. She therefore expressed her intention to take up, in a systematic and structured manner, the consideration and analysis of the four blocks of questions identified in the proposed workplan, namely, general issues of a methodological and conceptual nature, immunity *ratione personae*, immunity *ratione materiae* and procedural aspects of immunity, in a concrete and practical way, by including in each of her substantive reports the corresponding draft articles. She indicated that, tentatively, her intention for next year was to address the general questions that are mentioned in section 1 of her workplan as well as the various aspects concerning immunity *ratione personae*. She also expressed the hope that it would be possible to conclude the first reading of the draft articles during the present quinquennium.”

Paragraph 3, as amended, was adopted.

5. The CHAIRPERSON suggested to return to paragraph 41 of chapter VI, which was contained in document A/CN.4/L.804.

2. SUMMARY OF THE DEBATE (*concluded*)

(c) *Substantive considerations (concluded)*

(4) *Immunity ratione materiae (concluded)*

Paragraph 41 (*concluded*)

6. Mr. MURPHY proposed to amend the third sentence to read as follows: “This approach, however, was perceived as untenable by some members since by definition immunity assumed that the person may enjoy immunity for such acts.”

Paragraph 41, as amended, was adopted.

Section B, as amended, was adopted.

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

Chapter IX. The obligation to extradite or prosecute (aut dedere aut judicare) (A/CN.4/L.807)

7. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.807.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

DISCUSSIONS OF THE WORKING GROUP

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

(a) Major issues facing the topic

Paragraph 8

8. Mr. MURPHY proposed the deletion of the phrase “so as to help frame an appropriate response by the Commission” at the end of the first sentence.

(a) Harmonization

9. Mr. KITTICHAISAREE proposed to replace the phrase “Secretariat’s memorandum on the relevant multilateral conventions”³⁷⁶ with “Secretariat’s survey of multilateral conventions which may be of relevance for the topic” so as to match the wording in paragraph 13.

(b) Interpretation, application and implementation

10. Sir Michael WOOD said that the word “chronic” in the last sentence should be replaced with “serious”, which was more appropriate.

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

(b) Relationship with universal jurisdiction

Paragraph 10

Paragraph 10 was adopted.

(c) Feasibility of the topic

Paragraph 11

11. Mr. FORTEAU suggested to replace, in the French version, the heading “Faisabilité du sujet” with “Caractère réalisable du sujet”.

Paragraph 11, as amended in the French version, was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Section B, as amended, was adopted.

Chapter IX of the draft report of the Commission, as amended, was adopted.

Chapter XI. The most-favoured-nation clause (A/CN.4/L.809)

12. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.809.

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted on condition that they were completed by the Secretariat.

1. WORK OF THE STUDY GROUP

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

13. Mr. FORTEAU said that it would be useful to specify for what purpose the arbitrators and counsel in investment cases involving most-favoured-nation clauses had been identified.

14. Mr. McRAE (Chairperson of the Study Group) said that he would submit a text to that effect to the Secretariat.

Paragraph 8 was adopted, subject to the amendment to be submitted by the Chairperson of the Study Group.

Paragraphs 9 to 18

Paragraphs 9 to 18 were adopted.

³⁷⁶ Yearbook ... 2010, vol. II (Part One), document A/CN.4/630.

Paragraph 19

15. Mr. FORTEAU said that at the end of the French version of paragraph 19, the words “*exceptions de politique publique*” should be replaced with “*exceptions d’ordre public*”, and the quotation marks should be deleted.

Paragraph 19, as amended in the French version, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Paragraph 22

16. Mr. NOLTE said that the word “case” at the end of the first sentence should be replaced with “treaty”.

Paragraph 22, as amended, was adopted.

Paragraph 23

17. Mr. NOLTE said that in the fourth line, the reference should be to articles 31, 32 and 33 of the 1969 Vienna Convention, since article 33 also contained an important principle of treaty interpretation.

18. Mr. FORTEAU said that, as in paragraph 19, the words “*exceptions de politique publique*” in the penultimate line of the French version should be replaced with “*exceptions d’ordre public*”, and the quotation marks should be deleted.

Paragraph 23, as amended, was adopted.

Paragraphs 24 and 25

Paragraphs 24 and 25 were adopted.

Section B, as amended, was adopted.

Chapter XI of the draft report of the Commission, as amended, was adopted.

Chapter VII. Provisional application of treaties (A/CN.4/L.805)

19. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.805.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Paragraph 4

Paragraph 4 was adopted subject to drafting changes.

REPORT OF THE SPECIAL RAPPORTEUR OF THE INFORMAL CONSULTATIONS HELD ON THE TOPIC

Paragraph 5

20. The CHAIRPERSON said that, in the French version, the word “*informelles*” should be replaced with “*officieuses*” in the title and in the body of the paragraph.

Paragraph 5, as amended in the French version, was adopted.

Paragraphs 6 to 9

Paragraphs 6 to 9 were adopted.

Paragraph 10

21. Sir Michael WOOD said that in actual fact, paragraph 10 dealt with two separate matters, because the first sentence was a statement about the internal practice of States, namely their constitutional and legal provisions concerning provisional application of treaties, whereas the second sentence suggested that it would be useful to compile State practice in the sense of examples of provisional application clauses in treaties. He therefore proposed to insert, in the first sentence, the word “internal” before “position of States” and to make a new paragraph with the second sentence, which would read as follows: “It was also suggested that having examples of provisional application clauses in treaties would be useful for the work of the Commission.”

22. Mr. NOLTE suggested the deletion of the word “simply”.

Paragraph 10, as amended, was adopted, on the understanding that it would be followed by a paragraph 10 bis, as agreed.

Paragraphs 11 to 15

Paragraphs 11 to 15 were adopted.

Section B, as amended, was adopted.

Chapter VII of the draft report of the Commission, as amended, was adopted.

Chapter XII. Other decisions and conclusions of the Commission (A/CN.4/L.811)

23. The CHAIRPERSON invited the Commission to begin its consideration, paragraph by paragraph, of document A/CN.4/L.811.

J. International Law Seminar (A/CN.4/L.811)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

Paragraph 11 was adopted with a minor drafting change.

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

Section J, as amended, was adopted.

The meeting rose at 4.15 p.m.

3158th MEETING

Friday, 3 August 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fourth session (concluded)

Chapter VIII. Formation and evidence of customary international law (A/CN.4/L.806)

1. The Chairperson invited the Commission to consider chapter VIII of its draft report as contained in document A/CN.4/L.806.

A. Introduction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS NOTE

Paragraphs 5 to 13

Paragraphs 5 to 13 were adopted.

2. SUMMARY OF THE DEBATE

(a) *General comments*

Paragraphs 14 to 17

Paragraphs 14 to 17 were adopted.

(b) *Scope of the topic and use of terms*

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

2. Mr. NOLTE proposed to delete the word “essential” from the last sentence, as the sentence was more coherent without it.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 22

Paragraphs 20 to 22 were adopted.

(c) *Methodology*

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

3. The CHAIRPERSON said that the word “the” should be inserted before “need” in the first sentence.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

(d) *Points to be covered*

Paragraphs 29 to 33

Paragraphs 29 to 33 were adopted.

Paragraph 34

4. Mr. FORTEAU proposed to delete the phrase “in which custom was purportedly formed” at the end of the last sentence, given that it added nothing and was potentially confusing.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

(e) *Final outcome of the Commission’s work on the topic*

Paragraph 36

Paragraph 36 was adopted.

3. CONCLUDING REMARKS OF THE SPECIAL RAPPORTEUR

Paragraphs 37 to 40

Paragraphs 37 to 40 were adopted.

Paragraph 41

5. Mr. NOLTE said that the second sentence seemed to suggest that the Special Rapporteur was drawing a distinction between formation and evidence, whereas it should be made clear that that was not the case. He found the expression “information that could be used as the raw material for that purpose” to be somewhat obscure and proposed that it should be replaced with “information that could explain the formation of customary international law”.

6. Sir Michael WOOD (Special Rapporteur) proposed instead to delete the phrase “as the raw material”, since that would make it clear that the topic covered both the method for identifying a rule of customary law and the types of information that were used to do so.

Paragraph 41, as amended by the Special Rapporteur, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

7. The CHAIRPERSON proposed that in the sixth sentence, the phrase “the Commission’s eventual practical outcome” should be replaced with “the practical outcome of the Commission’s work”.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 47

Paragraphs 45 to 47 were adopted.

Section B, as amended, was adopted.

Chapter VIII, as amended, was adopted.

Chapter X. Treaties over time (A/CN.4/L.808)

8. The CHAIRPERSON invited the Commission to consider chapter X of its draft report as contained in document A/CN.4/L.808.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

1. DISCUSSIONS OF THE STUDY GROUP

Paragraph 8

Paragraph 8 was adopted.

(a) Completion of the consideration of the second report by the Chairperson of the Study Group

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

(b) Consideration of the third report by the Chairperson of the Study Group

Paragraph 11

9. Mr. FORTEAU, referring to the first sentence, said that, in the French text, the words “*en marge*” should be replaced with “*en dehors*”. In the second sentence, the

word “*traité*”, before “*au sens du paragraphe 3 a*”, should be replaced with “*accord*”.

10. Mr. NOLTE (Special Rapporteur) said that he endorsed both corrections to the French text, which did not affect the English text.

Paragraph 11 was adopted with those amendments to the French text.

Paragraph 12

11. Mr. FORTEAU said that, in the French text, the terms “*irrecevabilité*” in the third sentence and “*irrévocables*” in the fourth sentence were incorrect translations of the English (“*determinacy*” and “*determinate*”, respectively): better translations should be found.

12. Mr. NOLTE (Special Rapporteur) said that he endorsed Mr. Forteau’s comments regarding both terms.

Paragraph 12 was adopted, subject to linguistic improvements in the French text.

Paragraph 13

Paragraph 13 was adopted.

(c) Modalities of the Commission’s work on the topic

Paragraphs 14 to 18

Paragraphs 14 to 18 were adopted.

2. PRELIMINARY CONCLUSIONS BY THE CHAIRPERSON OF THE STUDY GROUP, REFORMULATED IN THE LIGHT OF THE DISCUSSIONS IN THE STUDY GROUP

Paragraph 19

Paragraph 19 was adopted.

Section B, as amended, was adopted.

Chapter X, as amended, was adopted.

Chapter XII. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.810)

13. The CHAIRPERSON invited the Commission to consider chapter XII of its draft report as contained in document A/CN.4/L.810.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Provisional application of treaties

Paragraph 2

Paragraph 2 was adopted.

Section B was adopted.

C. Formation and evidence of customary international law

Paragraph 3

*Paragraph 3 was adopted.**Section C was adopted.***D. Treaties over time**

Paragraph 4

*Paragraph 4 was adopted.**Section D was adopted.***E. Programme, procedures and working methods of the Commission and its documentation**

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

1. WORKING GROUP ON THE LONG-TERM PROGRAMME OF WORK

Paragraph 7

Paragraph 7 was adopted.

2. WORK PROGRAMME OF THE COMMISSION FOR THE REMAINDER OF THE QUINQUENNIAL

Paragraph 8

14. Ms. ESCOBARHERNÁNDEZ (Special Rapporteur) said that she had submitted to the Secretariat a number of amendments to the Spanish text of the Commission's work programme, subparagraph (c) of which related to the topic of immunity of State officials from foreign criminal jurisdiction. The amendments had not been incorporated, however. Under the heading "2013", the words "*del proyecto de artículos*", after "*Examen y aprobación*", should be replaced with "*de los proyectos de artículos*". The same change should be made in all subsequent uses of the identical formulation. The only exception related to the text that appeared under the heading "2016", where the current text should be retained, as it referred to the complete set of draft articles. She further proposed that all instances of the expression "possible" should be deleted.

Paragraph 8 was adopted, subject to those editorial amendments.

3. CONSIDERATION OF GENERAL ASSEMBLY RESOLUTION 66/102 OF 9 DECEMBER 2011 ON THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

15. Mr. NOLTE proposed that the reference in paragraph 12 to "the high-level meeting" should specify which high-level meeting was meant.

Paragraph 12 was adopted, subject to its completion by the Secretariat.

Paragraph 13

16. Following an exchange of views about an aspect of English usage in which the CHAIRPERSON, Sir Michael WOOD and Mr. McRAE took part, Mr. NOLTE suggested that the words "be informed ... by" should be replaced with the phrase "take into account".

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

4. HONORARIA

Paragraph 15

Paragraph 15 was adopted.

5. DOCUMENTATION AND PUBLICATIONS

Paragraphs 16 to 21

Paragraphs 16 to 21 were adopted.

6. TRUST FUND ON THE BACKLOG RELATING TO THE YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

Paragraph 22

Paragraph 22 was adopted.

7. ASSISTANCE OF THE CODIFICATION DIVISION

Paragraph 23

Paragraph 23 was adopted.

8. WEBSITES

Paragraph 24

*Paragraph 24 was adopted.**Section E, as amended, was adopted.***F. Date and place of the sixty-fifth session of the Commission**

Paragraph 25

Paragraph 25 was adopted.

17. Mr. CANDIOTI proposed to insert a new paragraph between sections F and G that would be entitled "Tribute to the Secretary of the Commission". The paragraph would read as follows:

"At its 3158th meeting, on 3 August 2012, the Commission paid tribute to Mr. Václav Mikulka, who has acted with high distinction as Secretary of the Commission since 1999, and who will retire after the present session; expressed its gratitude for the outstanding contribution made by him to the work of the Commission and to the codification and progressive development of international law; acknowledged with appreciation his professionalism, dedication to public service and commitment to international law; and extended its very best wishes to him in his future endeavours."

*It was so decided.**Section F, as amended, was adopted.*

G. Cooperation with other bodies

Paragraphs 26 to 31

18. The CHAIRPERSON, replying to a question from Mr. PETER on what criteria had been used to determine the order in which the organizations mentioned in section G were listed, said that United Nations organizations had been listed first, regional bodies second, and the International Committee of the Red Cross, which was neither a United Nations body nor a regional body, last.

Paragraphs 26 to 31 were adopted.

Section G was adopted.

19. The CHAIRPERSON suggested that a new section should be added after section G. It would read as follows:

“H. Representation at the sixty-seventh session of the General Assembly

“The Commission decided that it should be represented at the sixty-seventh session of the General Assembly by its Chairperson, Mr. Lucius Caffisch.

“At its 3158th meeting, on 3 August 2012, the Commission requested Mr. Maurice Kamto, Special Rapporteur on the topic ‘Expulsion of aliens’, to attend the sixty-seventh session of the General Assembly under the terms of paragraph 5 of General Assembly resolution 44/35 of 4 December 1989.

“The Commission wishes that the former Special Rapporteur on the topic ‘Reservations to treaties’, Mr. Alain Pellet, be invited by the Sixth Committee of the General Assembly in order to attend the debate in the Sixth Committee on the chapter of the 2011 report³⁷⁷ of the Commission that relates to this topic.”

It was so decided.

Section H was adopted.

Chapter XII, as amended, was adopted.

Chapter II. Summary of the work of the Commission at its sixty-fourth session (A/CN.4/L.800)

20. The CHAIRPERSON invited the Commission to consider chapter II of its draft report as contained in document A/CN.4/L.800.

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

21. Mr. FORTEAU said that, in the French version, at the end of the penultimate sentence, the words “*en marge*” should be replaced with “*en dehors*”. The English version would remain unchanged.

With that amendment to the French text, paragraph 9 was adopted.

Paragraphs 10 to 15

Paragraphs 10 to 15 were adopted.

Chapter II, as amended, was adopted.

Chapter III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.801)

22. The CHAIRPERSON invited the Commission to consider chapter III of its draft report as contained in document A/CN.4/L.801.

B. Formation and evidence of customary international law

Paragraph 1

23. Mr. McRAE drew attention to the phrase “such practice might include” and said that in order to elicit a more focused response from States, it would be better to be more specific. The phrase should therefore be replaced with the words “in respect of”.

24. Sir Michael WOOD (Special Rapporteur) supported that proposal.

Paragraph 1, as amended, was adopted.

A. Immunity of State officials from foreign criminal jurisdiction

Paragraph 2

25. Mr. FORTEAU said that, in the French version of the final sentence of subparagraph (b), the phrase “*tout acte de pratique étatique*” should be replaced with “*tout élément de pratique étatique*”. The English version would remain unchanged.

It was so decided.

26. Mr. MURPHY expressed concern over the fact that, as currently worded, paragraph 2 gave the impression that the Commission was asking States for information for the purpose of creating a legal regime. The Special Rapporteur had agreed, however, that in the first instance, the intention was simply to look at the laws that currently existed. The Commission should thus ask States about their own national practice and request information on how their national courts addressed the issue of immunity when exercising criminal jurisdiction over State officials. To that end, he proposed the following new wording for paragraph 2: “The Commission requests States to provide information on their national law or practice on immunity of foreign State officials from criminal jurisdiction, in particular on: (a) whether there is a distinction between immunity *ratione personae* and immunity *ratione materiae*; and (b) if immunity *ratione personae* exists, which persons are covered by such immunity?”

27. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that, while she understood the concern expressed by Mr. Murphy, she in turn was concerned that his proposal questioned the very existence of a distinction between immunity *ratione personae* and immunity *ratione materiae*, a distinction that had been widely accepted, both in the Commission and in the Sixth Committee. Posing the question in the terms suggested by Mr. Murphy would

³⁷⁷ Yearbook ... 2011, vol. II (Part Three).

amount to making the Commission start its work all over again. In her view, it was not the right time to question whether there was a distinction between immunity *ratione personae* and immunity *ratione materiae*.

28. A related issue—on which information had been included in her preliminary report—was that, given that there was a distinction between immunity *ratione personae* and immunity *ratione materiae*, it should have consequences for the regime applicable to the type of immunity. The primary aim of the questions in paragraph 2 was to obtain information, from the discussion within the Sixth Committee, that could be used when drafting the next report on the topic. In order to solve the problem raised by Mr. Murphy, she would accept the deletion in subparagraph (a) of the word “legal” before both occurrences of the word “regime”. The final sentence in subparagraph (b) could be replaced with the following new sentence: “Furthermore, the Commission requests States to provide information on their national legislation or practice as regards immunity of State officials from foreign criminal jurisdiction.”

29. Mr. MURPHY said that he remained concerned: the wording suggested by the Special Rapporteur still seemed to invite States to indicate whether they thought a regime for immunity should be established. He understood the Special Rapporteur’s concern about his own proposal, but its purpose was not to question the distinction between immunity *ratione personae* and immunity *ratione materiae*; rather, it was simply meant to ask States whether such a distinction existed in their national practice and, if so, what were the consequences.

30. Sir Michael WOOD said that he shared the concerns of both Mr. Murphy and the Special Rapporteur. In order to address them, he proposed that the chapeau of the paragraph should read as follows: “With respect to the topic ‘Immunity of State officials from foreign criminal jurisdiction’, the Commission requests States to provide information on their national legislation or practice as regards the following questions.” The two particular questions on which the Commission wanted information would be set out in subparagraphs (a) and (b). It was important to ask States for information, rather than ask them for their views as to what the law should be, which was really the task of the Commission.

31. Mr. NOLTE said that he agreed with Sir Michael and shared Mr. Murphy’s concerns. It was not for the Commission to ask States a legal policy question about its future work on the topic. It should instead elaborate draft articles or proposals and elicit reactions from States. He supported the proposals made in order to orient the questions to actual State practice and national legislation. He suggested that, in subparagraph (a), the first word “Should” should be changed to “Does”. The second sentence of subparagraph (a) should read as follows: “In such a case, which aspects are treated differently?”

32. The CHAIRPERSON said that he was in favour of the proposal by Sir Michael.

33. Ms. ESCOBAR HERNÁNDEZ (Special Rapporteur) said that if the majority of Commission

members were not in favour of her proposals, she would not press for their adoption. She wished to note, however, that the role of Special Rapporteur was to drive the work of the Commission forward. With regard to the point made by Mr. Nolte, she had no intention of saying to the Sixth Committee that they should tell the Commission what to do; the Commission was, or should be, a body of independent experts and would decide on its legislative policy objectives. However, the Commission was a subsidiary body of the General Assembly and should respond to the needs of States, as expressed by States themselves.

34. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to adopt the following text for paragraph 2, incorporating the amendments proposed by Mr. Murphy, Sir Michael and Mr. Nolte:

“With respect to the topic ‘Immunity of State officials from foreign criminal jurisdiction’, the Commission requests States to provide information on their national law and practice on the following questions:

“(a) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?

“(b) What criteria are used in identifying the persons covered by immunity *ratione personae*?”

It was so decided.

Chapter III, as amended, was adopted.

Chapter I. Organization of the session (A/CN.4/L.799 and Corr.1)

35. The CHAIRPERSON invited the Commission to consider chapter I of its draft report as contained in document A/CN.4/L.799 and Corr.1.

Paragraph 1

Paragraph 1 was adopted.

A. Membership

Paragraph 2

36. Mr. VALENCIA-OSPINA drew attention to the fact that Mr. Vasciannie had resigned as a member of the Commission during the course of the current session. He wondered how that fact would be recorded.

37. The CHAIRPERSON explained that his resignation would be recorded in a footnote.

Paragraph 2 was adopted, subject to that editorial adjustment.

B. Officers and the Enlarged Bureau

Paragraphs 3 to 5

Paragraphs 3 to 5 were adopted.

C. Drafting Committee

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

D. Working groups and study groups

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

E. Secretariat

Paragraph 11

Paragraph 11 was adopted.

F. Agenda

Paragraph 12

38. The CHAIRPERSON drew attention to a corrected version of paragraph 12 contained in document A/CN.4/L.799/Corr.1.

Paragraph 12 was adopted.

Chapter I, as amended, was adopted.

The report of the International Law Commission, as a whole, as amended, was adopted.

Chairperson's concluding remarks

39. The CHAIRPERSON thanked all the members of the Commission for their contribution to the work of the sixty-fourth session and for the very fruitful debates on the various topics on the agenda. He was grateful

for the efficient assistance of the Secretariat. On behalf of the Commission, he also thanked the members of conference services, interpreters and précis-writers for their cooperation and assistance.

40. As it was the last session that Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, would attend as Secretary of the Commission, he wished to thank him for all that he had done for the Commission. The Commission had been very lucky to be able to call on the services of such an eminent researcher and practitioner of international law. Between 1992 and 1998, Mr. Mikulka had been a member of the Commission and Special Rapporteur on nationality of natural persons in relation to the succession of States.³⁷⁸ From 1999 to 2006 and from 2009 to 2012, he had been the Secretary of the Commission. His familiarity with its traditions and deep knowledge of its topics had made him an invaluable guide of its members and chairpersons.

Closure of the session

41. After the customary exchange of courtesies, the CHAIRPERSON declared the sixty-fourth session of the International Law Commission closed.

The meeting rose at 12.05 p.m.

³⁷⁸ The text of the draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 1999*, vol. II (Part Two), paras. 47–48. The General Assembly took note of the articles on nationality of natural persons in relation to the succession of States, presented by the Commission in the form of a declaration, the text of which was annexed to its resolution 55/153 of 12 December 2000.

