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Contents

Formation and evidence of customary international law (*continued*)

Present:

Chairman:	Mr. Niehaus
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. Comissário Afonso
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gevorgian
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Ms. Jacobsson
	Mr. Kittichaisaree
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Nolte
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Korontzis	Secretary to the Commission

Formation and evidence of customary international law (agenda item 8) (*continued*) (A/CN.4/663)

The Chairman invited the Commission to continue its consideration of the first report of the Special Rapporteur on the topic of the formation and evidence of customary international law (A/CN.4/663).

Mr. Gómez-Robledo said that the study of the topic should focus on the different lines of legal reasoning used to determine that a rule was part of customary international law. The context in which that finding was made — whether it was a court or a State that sought to establish the existence of the rule — should also be taken into account.

He considered the approach based on Article 38, paragraph 1 (b), of the Statute of the International Court of Justice to be appropriate, but as that provision was not exhaustive, account should also be taken of other sources of international law and the practice of the various actors that contributed to the formation of rules of customary international law. By way of example, he cited the 1969 judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, particularly the arguments contained in paragraph 73 thereof. It should be made clear to national courts that when there was an applicable rule of customary international law, they were obliged to apply it. It might also be worthwhile to include a brief introduction to the draft conclusions, explaining what was to be understood by "sources of international law".

He commended the Special Rapporteur on his analysis of the two opposing theories, "traditional" and "modern", about the formation of customary international law. He agreed that it made sense to work on the basis of the traditional, namely two-element, model of custom formation, but thought the Special Rapporteur could perhaps develop further the arguments for disregarding the modern theory. Given that the two-element model had been chosen, did that mean that in order for a rule of customary law to be identified, both of the constitutive elements of custom formation, State practice and *opinio juris*, needed to be given equal weight?

With regard to the role of the International Court of Justice in the identification of rules of customary law, he said the Court did not have to prove the existence of the rules of customary law that it invoked: that was the responsibility of the States involved in the dispute. The Special Rapporteur should therefore review not only the Court's judgments but also the arguments presented by the Parties in order to draw conclusions about how States identified and proved the existence of rules of customary international law.

He stressed the difficulty of finding evidence for elements of customary law in the rulings of national courts, particularly in countries with a neo-Roman legal system, because of their reluctance to base their decisions on customary law as opposed to written law. Nevertheless, the Mexican Supreme Court, for example, had developed innovative mechanisms to incorporate into the Mexican *corpus juris* the jurisprudence of the Inter-American Court of Human Rights, which occasionally confirmed the existence and validity of rules of customary law.

If the decisions of national courts on the existence of rules of customary law were to be taken into account as subsidiary means for the determination of rules of law, in accordance with Article 38 of the Statute of the International Court of Justice, then to what extent were such decisions binding on third parties, and to what restrictions were national courts subject when identifying such rules? Another question to consider was what happened if a decision of a national court diverged from what the State revealed through its conduct.

If the final conclusions to be presented by the Special Rapporteur were used by national courts, then the courts would be converted into another principal actor in the

formation of such rules. National courts certainly contributed to the identification of rules, but it was more controversial to argue that they were actors in their formation. That subject could be given more thorough consideration in future reports.

The legal effects of the identification of customary international law by specialized institutions such as the International Committee of the Red Cross or the International Law Association could be studied in detail. The Special Rapporteur might include in his next report a section dealing with the work done by Jorge Castañeda on the legal effects of United Nations resolutions. With regard to terminology, it might be more appropriate to refer to formation and identification rather than to formation and evidence of customary international law.

Referring to paragraphs 34 and 35 on the relationship between customary international law and treaties, he said that what happened when a treaty contradicted customary law and whether there was a hierarchy among those sources needed to be considered. He asked why paragraph 37 on acts of comity and courtesy had been included in the chapter on sources. In one case that he knew of, an act of comity had been invoked as the basis of an executive decision in the United States to comply with a judgment of the International Court of Justice.

Mr. Candioti commended the Special Rapporteur on his pragmatic and descriptive rather than prescriptive approach. He would support a new request to States to provide documentation to facilitate an analysis of how customary international law was identified in State practice.

On terminology, he would favour using the phrase “customary international law”, as featured in the report, over “international custom”, as in Article 38 of the Statute of the International Court of Justice. He agreed with the Special Rapporteur that the most appropriate title for the topic was “identification,” not “formation,” of customary international law. Given the confusion surrounding the subject, it was of paramount importance that the Commission help to ensure greater terminological and conceptual clarity. He agreed that it was not advisable to address *jus cogens*.

As to the definition of customary international law, he stressed the importance of distinguishing it from other sources of international law. It was necessary to take into account not only the sources of law listed in Article 38 of the Statute of the International Court of Justice but also other new sources. He supported the programme of work proposed by the Special Rapporteur for the coming years.

Mr. Gevorgian said that, although the difficulty of assessing State practice often made it hard to identify rules of customary international law, those rules had to be predicated on a careful analysis of practice, rather than on abstract reasoning. In principle he shared the basic premises underpinning the report. He agreed with the Special Rapporteur that the guidance to emerge from the Commission’s work should be of theoretical and practical use to specialists and non-specialists alike; its main value would lie in preventing the incorrect use of a rule of international customary law.

He could not agree with the idea of not using the word “formation” with reference to the topic. In order to establish the existence — or non-existence — of a rule of customary international law, the whole process of its formation had to be analysed. He did agree with the Special Rapporteur and others, however, that the topic’s title must accurately convey, in all six languages, the intended scope. That meant, in his opinion, conveying the idea that in order to determine that a rule of customary international law existed, the whole course of events whereby the international community came to see a certain historical development as reflecting a customary rule had to be studied.

As the Special Rapporteur noted in paragraph 19 of the report, customary international law constituted a single, unified system of law and the process of its formation should not be addressed in a fragmented manner, from the standpoint of the various branches of the law. The first draft conclusion, contained in paragraph 23 of the report, was a good basis for future work. Rules of *jus cogens* should not be studied as part of the topic, since how they were formed remained a mystery, as Sir Ian Sinclair had rightly pointed out. Still, they had not simply come down from the heavens, either: they had been produced by human activity, and they were mentioned in articles 53, 64 and 71 of the Vienna Convention on the Law of Treaties. He agreed with other members of the Commission that they could be rooted both in custom and in treaties.

In paragraph 31 of the report, the Special Rapporteur referred to the sharp criticism to which the wording of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice had been subjected. Nevertheless, he himself agreed with other members that the Commission should not turn its work on the topic into yet another commentary to that provision, the significance of which was hard to overestimate, even though it contained a logical contradiction. It characterized international custom as evidence of general practice, when in fact the opposite was true: general practice was evidence of the existence of international custom. In that context it would be more accurate to say that recognition, not of practice, but of the conduct constituting such practice, was what created a legal rule.

Another difficulty inherent in the wording of the Statute was the use of the term "general practice", which served as the basis for either denying that particular local rules might exist in international law, or for confirming that the definition of international custom in Article 38 referred solely to universal or generally recognized customary rules. For that reason, he endorsed the statement in paragraph 33 of the report that it was necessary to consider the relationship between customary international law and the other sources of law listed in Article 38, paragraph 1.

He likewise endorsed the view expressed in paragraph 34 that the relationship between customary international law and treaties was an important aspect of the topic. That relationship was nothing if not complex, especially with the trend towards closer links between the two sources. Treaties could embody existing rules of customary international law, create new customary rules or serve as evidence, or lack thereof, of their existence. Treaty-based rules could turn into rules of customary international law, and if that transition occurred, as article 38 of the Vienna Convention on the Law of Treaties stipulated, then all States without exception could demand compliance with the treaty's provisions, regardless of whether or not they were parties thereto.

It was inaccurate, to say the least, to suggest that customary international law was less important than treaties as a source of international law. Rules of customary international law could fill lacunae in treaty law. The Vienna Convention even stipulated that the rules of customary international law would continue to govern questions that had not been regulated by the Convention.

He agreed with the Special Rapporteur that a distinction had to be drawn between customary international law and general principles of law, for which purpose a definition of the latter might need to be developed. Drawing a distinction was no easy matter: for example, was *pacta sunt servanda* a general principle, a rule of customary international law or a treaty rule? The criterion might be the presence or the absence of actual State practice. He also endorsed what was said in paragraph 38 of the report about looking at how States and courts went about identifying the sources of the law.

As terminology was extremely important, a list of terms and their definitions would be of great assistance, especially to practitioners who were not specialists in public international law. The proposed wording of draft conclusion 2 (a) was excellent, although it

might be wise to think about subsuming the phrase “rules of customary international law” in the definition of “customary international law”. In paragraph 2 (b), it might be advisable to consider the relationship of national legislation and decisions of national courts to the formation of international custom. Extreme caution was required, however, when referring to the practice of national courts. Such practice could be used only as confirmation of the existence of rules of customary international law that were binding on a given State, not as pointing to the emergence of rules of customary international law. What constituted the State practice that created international custom must also be analysed. Did it include official statements at international conferences, or “passive” practice, such as refraining from expressing opposition to the acts of other States? When defining “State practice”, characteristics such as uniformity, generality and consistency, referred to in the memorandum by the Secretariat (A/CN.4/659), had to be borne in mind.

The attitude of States towards the decisions adopted by international organizations, for example General Assembly resolutions, might be used — with all due precaution — to identify *opinio juris*. States could recognize an emerging customary rule either expressly or tacitly, the advantage of the former being clarity about whether a State was bound by a given customary rule. In the absence of such express recognition, how could *opinio juris* be established? That was a question that merited careful study.

He endorsed the future programme of work set out in paragraph 102 of the report.

Ms. Escobar Hernández said that the Special Rapporteur’s first report accurately reflected the three main questions that arose in connection with customary international law: what elements defined the emergence of a rule of customary international law, and by what process was such a rule formed? How could the existence of those elements and the completion of the formation process be ascertained? What was the role of custom in contemporary international law? In addressing those questions, the Commission was revisiting a classic issue of international law that had already been abundantly addressed by scholars and research institutes, in particular the International Law Association. The challenge was to find a way to deal with the issue in such a way as to offer added value to what had already been achieved by others.

In introducing his first report, the Special Rapporteur had proposed an alternative title for the topic that offered a good starting point. The decision on the title was not just a matter of wording: it would define the scope of the Commission’s work. The title should make explicit reference to the evidence, or determination, or identification, of customary international law. The use of the word “*documentación*” to mean “evidence” in the current Spanish version of the title was inappropriate. The word referred to the documentary substantiation of certain elements in order to prove or identify the existence of customary international law, and not to the act of proving or identifying. She did not see Mr. Murphy’s proposal to change the title simply to “Customary international law” as the wisest option. Even though it had the advantage of being simple, it left the scope of the Commission’s work too broad and ill-defined.

As other speakers had noted, the formation and the evidence of customary international law were two distinct concepts; however, in addressing the task of identifying or proving whether the requirements for the emergence of a rule of customary international law had been met, the Commission would inevitably make pronouncements on the basic characteristics of those requirements and how they related to and interacted with each other. While she did not have any problem with taking on that task, she felt that it should be done with extreme caution, without entering into a purely theoretical debate. In that connection, she found some of the Special Rapporteur’s doctrinal analyses in paragraphs 96 to 101 of the report to be somewhat worrying, as they seemed to enter into an ideological debate only marginally related to the system of sources of international law with which the topic should rightfully be concerned.

Divergent views had been expressed as to what was meant by finding evidence of or identifying a rule of customary international law, and what materials were to be used to substantiate such findings. In her own view, the general nature of customary international law implied that the range of materials to be used should be broad and sufficiently representative of the sources of information to be found worldwide. It should also be recalled that customary international law, as a formal source of international law, was characterized by its procedural flexibility, that being its main virtue and something to be preserved. Accordingly, the Commission should take care to ensure that its treatment of the topic did not lead to the formalization or straitjacketing of customary international law.

On the question of whether to include *jus cogens* in the Commission's work on the topic, she thought it should be excluded, not because it would complicate the Commission's work, but because it was a separate issue, although it did share some common ground with customary international law. The Commission would be doing a disservice to international law if it reduced *jus cogens*, which was an essential and autonomous component of the international legal system, to the identification of a customary rule. If the Special Rapporteur found it necessary to refer to *jus cogens*, he should do so briefly, and primarily to differentiate it from customary international law as a formal source of the law. Any other approach would be technically unsound. However, the Commission might wish to take up *jus cogens* independently, as had been proposed.

The use of the term "general international law" was not consistent with the aim of the current topic and was potentially misleading. The term was not synonymous with "customary international law". On the contrary, general international law encompassed customary international law, but also included other no less important categories, such as general principles of law. A reductionist approach to general international law would have serious and far-reaching consequences for the system of sources of contemporary international law and should be avoided.

In chapter XI on writings, the Special Rapporteur referred to the fact that the various approaches used had sometimes been labelled as "traditional" and "modern". The use of those terms was inappropriate for two reasons: first, they were not sufficiently descriptive of the rationale behind certain approaches to customary international law; secondly, they might bring in ideological aspects that it would be best to avoid. For example, the "traditional" approach was decried as having a "democratic deficit" and as being incompatible with basic human rights. Such arguments were difficult to sustain, especially if one looked closely at actual practice in contemporary international law. Nevertheless, the arguments were a good illustration of the problem facing the Commission, which was how to properly delimit the scope of the topic. If the topic included proving or identifying the existence of customary international law, then the arguments were irrelevant. If, on the other hand, it involved analysing the process and constitutive elements of the formation of customary international law, then the arguments took on greater relevance. However, she did not believe the Commission should take the second approach.

In chapter X of his report, which concerned the work of other bodies, the Special Rapporteur had included institutions and aspects of practice that, in her view, were not comparable. The International Committee of the Red Cross (ICRC) did not have the same status as the Institute of International Law, and the International Law Association's work could not be compared to the ICRC project on customary international humanitarian law or to the American Law Institute's restatement of the foreign relations law of the United States.

Although the Special Rapporteur did not intend the draft conclusions to be sent to the Drafting Committee yet, the Commission should never lose sight of the aim of its work under the topic, which was to offer guidance to those called upon to apply rules of customary international law on how to identify such rules. With that in mind, the

Commission should formulate substantive conclusions, not generic ones. In view of the number and complexity of the subjects to be addressed, the proposed future programme of work appeared to be too ambitious for the Commission to complete in the next three years.

Mr. Saboia said that the first report was precise and well substantiated. With regard to the title and the scope of the topic, while he understood the need to be consistent with the goal of establishing clear and pragmatic conclusions to provide guidance to practitioners, he agreed with others that leaving aside the aspect of formation would deprive the topic of an important element. He could accept the title "identification of customary international law" on the understanding that formation would also be dealt with.

In order to remain relevant, customary international law should stay faithful to its two traditional pillars — State practice and *opinio juris* — but be flexible enough to incorporate aspects derived from the dynamics of international relations since 1945, and in particular in the past 20 years.

The relevance of the practice of the United Nations and its organs as well as international and regional organizations had become of paramount importance in shaping rules governing the behaviour of States and other actors worldwide. While resolutions and other decisions of international organizations were means of expressing the practice and *opinio juris* of States in a non-binding manner, in many cases non-universal bodies, in particular the United Nations Security Council, adopted decisions that were binding on all States, even those that had expressed their opposition to the decisions. The increased recourse by the Security Council to decisions under Chapter VII of the Charter of the United Nations could not be ignored, and the competence of the Security Council had been extended to fields previously reserved to negotiations among States.

Specialized organizations and their governing bodies took decisions that regulated the operations and practices of State organs in the technical, scientific and cultural fields. Although States had agreed to the conventions establishing the specialized agencies, the executive or governing bodies thereof, frequently limited in their composition, had undeniably acquired broader powers over time. Those developments had rightly been recognized in the report, in the proposed draft conclusion 2 (b) and in chapter VII.

As to whether there were different approaches to the formation of customary international law and its evidence in different fields of law, it was likely that more weight was given in certain areas of law to the use of certain materials compared with other sources. That did not entail a risk of fragmentation of international law or a threat to its existence as a unified system, however; it merely corresponded to the need to adequately address the specific nature and requirements of particular branches of international law.

He joined the emerging consensus with respect to the Special Rapporteur's proposal that *jus cogens* should not specifically be addressed under the topic, but neither should it be ignored when a reference to it might be useful.

The case law of the International Court of Justice was undoubtedly of major importance, notwithstanding the limited guidance given by the Court itself on how a rule of customary international law was formed and was to be ascertained. Advisory opinions might also deserve special consideration as a source of *opinio juris*. In that regard, the Court's advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons*, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* could be relevant for the Commission's consideration of the topic.

Coming from Latin America, a region with a long history of work in international law, he could only support the proposal that the study of regional customary law should be

included in the topic. Attention could also be given to cases where practice had started as regional custom and had later acquired more universal recognition. The case law of the Inter-American Court of Human Rights had undoubtedly acquired very broad authority worldwide.

Mr. Peter said that as part of the work on the topic, the Special Rapporteur should set clear criteria to be used in identifying specific rules of customary international law and indicate what type of evidence was appropriate for that purpose. The criteria should be aimed at answering specific questions such as: How many States had to practise a particular rule, and for how long, before it was recognized as customary international law?

The Special Rapporteur should also indicate which rules of customary international law had become obsolete or lacked legitimacy. The question of what did or did not constitute customary international law was highly controversial. Some jurists, himself included, regarded the current body of customary international law as comprising rules developed by only a segment of society and imposed on the rest. They had been carved out at a time when a large portion of the world's population had no voice in establishing the laws that governed them. In 1945, when the United Nations was founded, only a very few of the current 54 member States of the African Union enjoyed the status of independent States. Nearly all the rest had been colonies in various guises, such as mandated territories, trust territories and protectorates. They were objects, not subjects, of international law, which was applied to them in the form dictated by their colonial masters. As a result, they had not participated in the creation of any type of international law, including customary international law.

The very language used in certain instruments from that period of history excluded African countries. The often-cited Article 38, paragraph 1 (c), of the Statute of the International Court of Justice referred to the general principles of law recognized by "civilized nations". At the time, colonies did not qualify as either civilized or as nations. Customary international law had thus been created by a few States that had declared their customs to be international and universally applicable, with no regard for the opinion of all the other States.

The current topic presented an opportunity to correct that historical mistake. He urged the Special Rapporteur to challenge some of the so-called established rules of customary international law through the rigorous application of the identification criteria to which he had alluded previously. To embrace the current system and recommend only cosmetic changes would amount to a serious failure and be a disservice to the international community. What he was requesting fell within the mandate of the Special Rapporteur and required boldness and courage on his part.

As to the question of whether there were different approaches to the formation and evidence of customary international law, he disagreed with Judge Greenwood's declaration in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* that international law was a "single, unified system of law". In his own opinion, the approaches to the formation and evidence of customary international law would never be uniform: it was only the application of customary international law that could be uniform. The rules of customary international law pertaining to a particular branch of law tended to emerge, develop and consolidate according to a variety of factors, including the frequency of their use and application and the number of people or groups involved in that particular branch. He cited as an example the valuable contribution made by the International Committee of the Red Cross to the development of international humanitarian law. In any area where there were dynamic interest groups, the law would be much more advanced than in others, and in different branches, the law would be found to have developed in very dissimilar ways. He knew that the Special Rapporteur was not in

favour of breaking the law up into different specialist fields. However, he himself believed that the question of international law developing as one system of law did not even arise.

The Special Rapporteur, when hunting for possible sources of customary international law, should take into account the case law of subregional courts in Africa. In the section of his report on the contribution of domestic courts to the creation of customary international law, he had selected examples from a cross-section of jurisdictions; however, the variety of those examples should be expanded even more in future reports.

In the section on scholarly writings, the Special Rapporteur seemed not to have ventured beyond the most well-known literature and ideas. Asia and Latin America had doubtless produced their fair share of the world's finest legal minds, and there were legal luminaries from Africa who had made tremendous contributions to the development of international law. Few of them, however, had been referred to in chapter XI of the report. In his next report, the Special Rapporteur should include a more balanced selection of the literature on customary international law from the developing countries.

The topic of customary international law had attracted much attention in legal circles and had elicited genuine interest in the international community. The quality of the Commission's reports and its debate on the topic, as well as the courage with which it handled its work, could help to sustain that excitement and ensure that it made a genuine difference in that important branch of international law.

Ms. Jacobsson said she agreed with the definition of the scope of the topic proposed by the Special Rapporteur and with the wording of draft conclusion 1. She preferred the original title of the topic to the proposed alternative formulation. References in her statement to the "rules of customary international law" should be understood to include norms and principles as well.

Judges and adjudicators as well as government lawyers had to identity customary law and its genesis by investigating the formation of a rule and the evidence of its existence. That legal analysis had to address both process and content, although understanding the process by which States formed and identified customary international law was complicated by a lack of official documents and States' potential unwillingness to disclose how they went about the process. Unofficial State practice accordingly played an important role in the formation and evidence of customary international law and needed to be dealt with by the Commission.

For several years, the *Nordic Journal of International Law* had contained a section on Nordic State practice, but it was always difficult to elicit contributions from Nordic legal advisers. For that reason, it would probably prove hard to gather the relevant information. Governments and domestic courts did not necessarily take the same position on matters of international law. Hence caution was needed in any attempt to use domestic court cases to elucidate the formation process of customary international law.

The expansion of the exclusive competence of the European Union had made it difficult to distinguish between an expression of a customary rule of the Union and a customary rule of the individual member States. While the organization might speak as a subject of international law and announce what it considered to be a rule of customary international law, the formation of that view was often preceded by lengthy discussions among member States which frequently advanced *opinio juris* arguments. Hence the process leading up to the decision could be part of the formation of customary law and evidence of a rule thereof. Similarly, if an international court found that the European Union's interpretation of a rule of customary international law in an area where it had exclusive competence accurately reflected customary international law, it would be difficult to maintain that that practice did not amount to State practice.

General Assembly resolutions and the decisions of the Security Council had a role to play not only in the formation and evidence of customary international law but also as estoppel of its formation, as had been the case with Security Council resolution 1838 (2008) on acts of piracy. Hence the practice of international organizations could not be disregarded.

A treaty could also signal intent to prevent the development of a rule of customary international law. While the provisions of such a treaty clearly applied to the parties thereto, would they apply in relations between a State which was a party and a State which was not? The formation of a rule in bilateral relations would necessarily be different than the formation of a rule of customary international law applicable to all States.

A distinction should also be drawn between evidence of the formation of geographically restricted regional State practice and of functional regional practice. While it was important to uphold a uniform system of international law, it was impossible to conclude that all customary law must have been developed, or must be developed, in an identical manner. Another question was whether the elements of the formation of a rule of customary international law should be given different weight in disparate situations.

The customary law process did not stop when a rule emerged, as Professor Mendelson of the International Law Association had pointed out. The process evolved over time in a changing world. Some rules stood for decades, while others developed more quickly, and not all States could take an active part or play an equal role in their formation. Hence the procedure for identifying the existence of those rules was different. It was likewise important to study the process of how a rule of customary international law might vanish.

The formation of a modified rule of customary international law might also be addressed. For example, freedom of the high seas was one of the classic principles of customary international law. The content of the principle had been modified through the centuries by both treaty provisions and State practice. The process by which the modified content was formed was probably not identical to the process used when the principle was first identified, however.

The increasingly frequently assertion by States that they were applying a rule of international law as a matter of policy rather than of law signalled a lack of *opinio juris sive necessitatis*, although it was clearly an example of State conduct. Did such an assertion by a State mean that it could prevent a rule from being recognized as a rule of customary international law?

While *jus cogens* could not be totally excluded from the consideration of the topic, it should not be studied in depth, since any discussion of the formation and evidence of *jus cogens* automatically entailed a risk of having to address the substance of the *jus cogens* rule itself. Moreover, *jus cogens* deserved separate study as a topic in its own right.

The Special Rapporteur had outlined the right course for consideration of the topic. However, undue emphasis should not be placed on court cases or the wording of Article 38 of the Statute of the International Court of Justice. Whether that article actually contained a complete list of sources of international law was a matter that needed to be discussed. Some attention should also be paid to the relationship between the formation of customary international law and general principles of law. In future work on the topic, it was vital to preserve the flexibility of the customary process.

Mr. El-Murtadi said that in the light of the discussions both in the Commission and in the Sixth Committee, it was clear that the scope of the topic and its title in particular needed to be revisited. The report stated that the central issue was the “identification” of customary international law – in other words, the determination of whether a rule of

customary international law existed. Accordingly, a title like: "The determination (ascertainment) of the existence of rules of customary international law" would be a better match for the scope of the topic, and would have the advantage of avoiding any mention of "formation" and "evidence", thus circumventing all the reservations raised in that regard. There was no need to address the issue of peremptory norms (*jus cogens*), since the majority of members both of the Commission and of the Sixth Committee had agreed to exclude them, owing to the ambiguities and difficulties involved.

In addressing customary international law as a source of international law, the report mentioned, among other major sources, Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, with its reference to "international custom, as evidence of a general practice accepted as law". That text, addressed to the International Court of Justice alone, had been, and still was, subject to much criticism. The phrase "evidence of a general practice accepted as law" had triggered questions about whether the subjective element was voluntary or not. Some argued that the paragraph would have been more precise if it had referred to "established custom consistent with a general practice accepted as law", thereby making the relationship between the rule and its constitutive elements more logical.

Yet there was no choice but to deal with the article and with the dual requirements on which it had conditioned the formation of customary international law: practice and *opinio juris*. The mention in some treaties of international custom had no bearing on the evolution of customary rules from those two sources. It only pointed to the idea that the courts had to apply treaties, as special rules, before applying customary norms, as general rules.

Treaties, in particular treaties intended for the codification or progressive development of international law, were part of State practice relevant to the identification of rules of customary international law. In its judgments in *Military and Paramilitary Activities in and against Nicaragua* and the *North Sea Continental Shelf* cases, the International Court of Justice concluded that a rule set out in a particular treaty could become a new rule of customary international law. Customary law had lately been marked by a close relationship with written texts that was the starting point for the formation of customary rules, and in some instances the basis for the identification of certain rules.

He agreed with the Special Rapporteur's proposals regarding terminology. It would unquestionably be useful to prepare a short lexicon of relevant terms in the six official languages of the United Nations. However, every language had its own spirit transcending the words, and in his experience, no sooner was a debate on terms closed than a new one started up.

Concerning the range of materials to be consulted, there was no doubt about the distinct status of the approaches or practice of States, described as "extensive and virtually uniform" by the International Court of Justice in the *North Sea Continental Shelf* cases. Such practice was not limited to the unilateral behaviour of individual States. It went further, to the rich and important practice of groups of States: joint action, statements, declarations and the resolutions of United Nations organs and treaty bodies. The elements of customary international law were thus strongly tied to the will of States. The exercise of identifying those elements was largely about gathering facts that made it possible to determine the existence of a customary rule and the process leading thereto. It was no easy task, especially in view of the large numbers of States and international organizations holding diverse positions and coming from different backgrounds.

That might explain why only a limited number of States had so far responded to the Commission's request for information on State practice. Apart from practice at the group level, there was some limited unilateral State practice on the part of the so-called newly

independent States which had objected, soon after their creation, to a number of rules of customary international law, arguing that they had not participated in their formation.

The approach of international organizations and other intergovernmental actors could also prove valuable when surveying practice. For example, in its 1980 advisory opinion on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice appeared to have inferred from the agreements between States and international organizations some customary rules relating to the rights and obligations of the organizations and of host countries. The International Court had relied on three resolutions passed by the United Nations General Assembly to conclude that the principle of permanent sovereignty over natural resources was one of the principles of customary international law, although it had found that that principle did not apply to the case under consideration. Some argued that the study of the practice of international organizations should take account of the limited spheres of competence of such organizations, while others tended to consider many aspects of practice such as that of the General Assembly to pertain more to State practice than to that of organizations.

Among the materials to be consulted, the report included the case law of the International Court of Justice, which was entrusted with the central task of verifying customary law, as well as interpreting treaties. The Court ascertained customary rules and their contents based on the important resource materials available to it and thanks to the high technical expertise of its judges. While the Court's rulings pertaining to the formation of customary rules were sometimes described — including in the dissenting opinions of its own judges — as vague, inconsistent and failing to analyse extensive and convincing practice, their important contribution to the elucidation of customary law was well recognized. In several cases, notably those involving maritime delimitation, the Court's role had extended beyond merely stating customary rules to inferring general principles from them.

He welcomed the fact that the activities of several international courts and tribunals were to be addressed in future reports, as was the work of other bodies. All of those activities dealt with, and had an impact on, customary international law. With regard to the future programme of work, he was confident in the Special Rapporteur's ability to overcome the "serious difficulties", as the International Law Association had put it, that were inherent in setting out the rules of customary international law.

The meeting rose at 1.10 p.m.