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Summary record of the 3225th meeting

Topic:
<multiple topics>

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much as a Supreme Court ruling. That would be all the more problematic if, as stated in paragraph 2 of the draft conclusion, "[w]here the organs of the State do not speak with one voice, less weight is to be given to their practice". Perhaps in order to address that problem it would be sufficient to indicate that the organs in question were "the highest competent organs".

30. Concerning draft conclusion 9, and given that the term "general practice" was used throughout the set of draft conclusions, he proposed that the beginning of paragraph 1 of draft conclusion 9 be reformulated to read "General practice means that the practice must be widespread" and, for the sake of consistency, that the title of the draft conclusion be amended to read "General practice must be widespread, representative and consistent". Perhaps reference should also be made to the fact that, in certain cases, practice was disregarded—for example, practice that was inconsistent with Article 2, paragraph 4, of the Charter of the United Nations and that was considered unlawful by States. As to draft conclusion 10, in paragraph 1, he proposed the replacement of the words "accompanied by" with "undertaken out of" and the insertion of the words "right or" before "obligation". He proposed the addition of a paragraph 3 that would read: "In some instances, a State may deviate from a general practice accepted as law due to a belief that a new practice will be followed and accepted as law by other States. In such circumstances, the law may change over time". In draft conclusion 11, he proposed that the clause "which indicate what are or are not rules of customary international law" be moved so that paragraph 2 would begin: "The forms of evidence which indicate what are or are not rules of customary international law include, but are not limited to". In addition, in order better to capture the analysis contained in paragraph 74 of the report, paragraph 4 could be reformulated to read: "Acceptance as law by a State generally is not evidenced by the underlying practice alone."

31. In conclusion, he was in favour of referring all of the draft conclusions to the Drafting Committee.

The meeting rose at 1 p.m.

3225th MEETING

Thursday, 17 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, 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. 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. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the remaining three weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt it.

2. Mr. KITTICHAISAREE said that little time seemed to have been allocated to the topic of the provisional application of treaties.

3. The CHAIRPERSON emphasized that the programme was provisional. If additional time was required to discuss a particular topic, it could be amended. He asked whether the Commission agreed to adopt the programme of work on that understanding.

It was so decided.

Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

4. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the identification of customary international law (A/CN.4/672).

5. Mr. VÁZQUEZ-BERMÚDEZ, referring to the Special Rapporteur's suggestion to use the phrase "accepted as law" in preference to "*opinio juris*", said that problems with the latter term had arisen more in academic circles than in practice. "*Opinio juris*" was used frequently by the International Court of Justice and other international and domestic tribunals, as well as by States and in the literature; it reflected the flexible and dynamic nature of customary international law and avoided literal or mistaken interpretations, to which the suggested alternative could give rise. The Special Rapporteur himself had referred to "*opinio juris*" several times in his second report. He therefore agreed with those who had suggested that it should be used in place of "accepted as law" wherever the latter phrase occurred in the draft conclusions. It must remain clear that the subjective element of custom, however it was referred to, was not the same as State consent or the will of States: rather, it was the belief that a particular practice was required under international law. Draft conclusion 10 went some way towards explaining the distinction, but should be modified slightly.

6. Some members of the Commission had suggested that, in draft conclusion 1, paragraph 1, the word "methodology" should be changed to "method". He could agree to that suggestion, but would prefer "methods", as there was more than one method for identifying the existence and scope of customary international law.

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* Resumed from the 3222nd meeting.

7. One method of identifying the existence and content of a rule of customary international law was to conduct an exhaustive analysis of a particular practice and its accompanying *opinio juris*; however, as the President of the International Court of Justice had pointed out, the Court did not undertake such an inquiry for every rule claimed to be customary in a particular case, making use instead of the best and most expedient evidence available to determine whether a customary rule existed. Sometimes the Court examined practice directly; more often, it considered evidence deriving from codification or subsidiary sources of international law, including draft articles produced by the Commission and resolutions of the United Nations General Assembly. It frequently recognized the existence of a rule of customary international law in the form in which it had been codified, including where a rule had acquired customary status after codification. Exhaustive examination of State practice was exceptional for the Court.

8. The Court and the Commission had a significant influence on each other's work. The Court also influenced other international courts, States and domestic courts, which did not replicate the work done by the Court to identify the existence and scope of a customary rule. It would be useful for the Special Rapporteur to refer to the Court's practice and its recognized authority, which the Commission shared, to identify rules of customary international law.

9. Draft conclusion 1 referred to "peremptory norms of international law (*jus cogens*)", but both in the text of the draft conclusions and in the commentary, the word "general" should be added, so that the phrase reads "peremptory norms of general international law (*jus cogens*)". That would bring it into line with the wording of the 1969 Vienna Convention and indicate that a rule of *jus cogens* was of universal application.

10. It did not seem necessary to include definitions of customary international law and international organizations in the draft conclusions; if they were retained, they should be discussed in detail by the Drafting Committee. He saw no reason why international organizations, which were subject to international law and enjoyed legal personality separate from that of their member States, could not contribute to the formation of customary international law. If that was the intention behind the inclusion of the word "primarily" in draft conclusion 5, it could be retained. The purpose of the draft conclusion was somewhat unclear, however, since its title was "Role of practice".

11. Turning to draft conclusion 7, he expressed support for the inclusion of the acts and inaction of international organizations as examples of practice, but emphasized that resolutions of organs of international organizations and conferences should be considered in the context of the circumstances of their adoption. Explanations of vote tended to come from States that voted against a particular resolution or abstained from voting. Taking such statements as evidence of practice or *opinio juris*, but ignoring votes in favour, could skew an analysis to favour a minority position. Acts carried out in connection with such resolutions should not be considered in isolation from the resolutions themselves. States took particular care when negotiating and adopting resolutions in international forums because they were aware of the legal consequences that those resolutions could have. The broad participation of States in international organizations yielded an equally broad contribution to practice and *opinio juris*.

12. In view of the basic principle of the sovereign equality of States, draft conclusion 9, paragraph 4, should be deleted. All States, not just specially affected ones, had an interest in the content, scope, creation and development of general international law in all fields, and their practice should carry equal weight.

13. Lastly, he expressed support for referring all the draft conclusions to the Drafting Committee.

14. Mr. TLADI said that the second report and the draft conclusions it contained were largely faithful to the Commission's aims in working on the topic, striking a balance between the normative and the descriptive. He endorsed the "two-element" approach to the identification of customary international law, but said that it sometimes appeared that a crucial element of the topic had been lost. The original title of the topic had been the "formation" of customary international law, and it had been changed to avoid translation difficulties, not to alter the direction of work on the project.[232] The second report mentioned the formation of customary international law only incidentally, but he hoped that this aspect would be integrated into future reports more deliberately, as a critical component of the Commission's work. Draft conclusion 1 might need to be amended to that end. Draft conclusion 5, on the other hand, made it plain that the Commission was concerned with the formation as well as the identification of customary international law.

15. He echoed the Special Rapporteur's doubts concerning the need to define "customary international law", but for different reasons: while there might be confusion as to how it was formed and identified, there was little doubt about the meaning of the term. Neither was it necessary to define "international organization" if there were no peculiar circumstances to warrant anything other than a standard textbook definition.

16. With regard to whether there were different approaches to the identification of rules of customary international law in different fields of international law, he questioned the assertion in paragraph 28 of the second report that this was not the case. Variations in how international courts and tribunals tackled the identification of customary rules could indeed indicate that different approaches existed, and the Commission should consider how and why that might be the case, rather than simply stating, as did the Special Rapporteur, that both elements were required and that any other approach risked artificially dividing international law. The two-element approach must not be advocated too rigidly, as Mr. Park had pointed out.

17. The overlap between draft conclusions 2 and 3 should be eliminated, preferably by removing the definition of "customary international law" from draft conclusion 2.

[232] See *Yearbook … 2013*, vol. I, 3186th meeting, p. 109, para. 21, and *ibid*., vol. II (Part Two), p. 64, paras. 65 and 69.

Draft conclusion 3 should incorporate the idea that both the formation and the identification of customary international law followed the same basic approach. If draft conclusion 4 was considered necessary, it could be merged with draft conclusion 3 or draft conclusion 8, although draft conclusion 8 did not deal with the notion of acceptance as law.

18. While he agreed with the Special Rapporteur that resolutions of organs of international organizations could serve as evidence of State practice, he emphasized that such resolutions should not be viewed in isolation: the process of negotiating and adopting them should be analysed as a whole, with a particular focus on the positions taken by individual States. He also agreed that inaction could count as practice; however, there was an additional nuance that should be reflected in draft conclusion 7. The fact that a high-ranking State official had never been prosecuted might indicate that he or she enjoyed immunity *ratione personae* if, and only if, the relevant authorities had considered prosecuting but ultimately decided not to do so.

19. With reference to draft conclusions 5 and 7, he concurred with the proposition that the search for practice was primarily aimed at the practice of States.

20. Instances in which the practice of entities other than States was used were exceptional, although they could occur. The conduct of international organizations could reflect the practice of States and, in some circumstances, the practice of international organizations themselves could be relevant. He hoped that such exceptions would be covered in the Special Rapporteur's third report.

21. With reference to draft conclusion 8, he shared the concern expressed about lessening the weight to be given to the practice of a State if its various organs did not speak with one voice, as that approach failed to take account of the relative power of the organs. The decisions of a country's highest court should not be discounted on account of the contrary practice of a municipal manager. He also shared the view that the practice of "States whose interests are specially affected" should not be taken to mean the practice of "powerful States" or even of the five Permanent Members of the Security Council, as that could have implications for the principle of the sovereign equality of States. The Commission might therefore need to define the phrase "States whose interests are specially affected" for the purposes of draft conclusion 9, paragraph 4.

22. Finally, he rejected Mr. Murase's criticism that the enumeration of the same sources to serve as evidence of both practice and *opinio juris* amounted to double counting and was inconsistent with the two-element approach. A resolution adopted every year on a particular issue undoubtedly counted as practice; if it contained exhortatory provisions, it also counted as *opinio juris*. Lastly, he expressed support for the transmission of the draft conclusions to the Drafting Committee.

23. Mr. FORTEAU, while praising the intellectual rigour of the Special Rapporteur's second report, said that the quantity of issues raised in the numerous draft conclusions threatened to bring the work of the Drafting Committee to a halt. More complex issues were to be taken up the following year. It would therefore be useful to know more about what was planned, particularly with regard to the form and content of the commentaries.

24. Having drawn attention to a translation problem in the title of the draft conclusions in French, he said that the term "*opinio juris*", which the Special Rapporteur had chosen to avoid for theoretical and conceptual reasons, should be introduced because it was widely used by States, in the literature and in rulings of international courts and tribunals, and it offered a simple alternative to the complicated paraphrase suggested. It also reflected the fact that the creation of custom did not rest on individual acceptance by each member of the international community, but on a generally held view within that community.

25. He expressed support for the general orientation of the draft conclusions and fully endorsed the two-element approach to the identification of customary international law. In draft conclusion 1, reference should be made, not only to the existence and content of customary rules, but also to their scope, so as to leave the door open to consideration of persistent objectors and non-universal, regional custom. Draft conclusion 1 should also refer, not to "methodology", but to "rules", a more accurate term in the context of the topic, which dealt with the secondary rules of international law that helped to determine how and when a rule could be deemed to form part of custom.

26. With regard to draft conclusion 5, he disagreed that it was primarily the practice of States that contributed to the creation of rules of customary international law. While that might be true for rules concerning relations between States, international law was not limited to such relations. The practice of international organizations was directly relevant. Draft conclusion 5 should therefore be deleted or substantially redrafted.

27. In draft conclusion 7, paragraph 2 should refer to administrative as well as legislative acts; paragraph 3 seemed premature, given that the Special Rapporteur's third report would deal with inaction. Draft conclusion 11, paragraph 3, also seemed premature, for the same reason. Only certain types of inaction could constitute practice. Inaction could be direct, as in the case of compliance with a customary prohibition, or indirect, such as the failure to object to the practice of other States, as reflected in the recent judgment of the International Tribunal for the Law of the Sea in the *M/V "Virginia G" Case (Panama/Guinea-Bissau)* (para. 218). Draft conclusion 7, paragraph 4, would be the subject of further discussion in light of the Special Rapporteur's third report, but he emphasized that, as international organizations enjoyed legal personality, their practices were attributable to the organizations themselves, not to their individual members, something that was appropriately reflected in the use of the term "general practice" in preference to "State practice".

28. Rather than giving less weight to the practice of States whose organs did not "speak with one voice", as suggested in draft conclusion 8, the focus should be directed towards establishing the consistency of a particular practice. The need to take account of all available

State practice, set out in draft conclusion 8, paragraph 2, raised two difficulties: how could the Commission help to make State practice more available to practitioners, and what was meant by "available" in a legal sense? Was it realistic to expect judges, particularly in domestic courts, to seek out all available State practice regarding a particular rule, or should they rely on the evidence presented by the parties to a case? He questioned the very use of the term "evidence" in the context of determining customary international law, suggesting that draft conclusions 4, 8 and 11 should instead refer to "means" or "modes" of establishing practice and *opinio juris*. According to the principle *jura novit curia*, it was for the judge to determine the law, not for the parties.

29. In draft conclusion 9, paragraphs 2 and 3 should be more consistent in referring to how general a practice must be for the purpose of establishing a rule of customary international law. Paragraph 4 seemed to go too far in interpreting the rulings of the International Court of Justice concerning the practice of States whose interests were specially affected: it risked creating inequalities among States. He endorsed the principle contained in draft conclusion 11, paragraph 4, because a single document could easily serve as evidence both of practice and of *opinio juris*.

30. Lastly, he recommended that the draft conclusions be transmitted to the Drafting Committee.

31. Mr. CANDIOTI, referring to Mr. Forteau's comment that it would be preferable to speak of "rules" rather than "methodology" in draft conclusion 1, recalled that the original aim of work on the topic had been to produce a guide for practitioners[233] rather than to elaborate secondary rules for determining the existence of customary international law.

32. Mr. MURASE, referring to comments made by Mr. Forteau and Mr. Tladi, said that he himself had not understood the Special Rapporteur's intention as being to consider the content of *opinio juris*.

33. Mr. PETRIČ said that he found the overall structure and formulation of the draft conclusions acceptable and that all 11 of them should be referred to the Drafting Committee. As the draft conclusions were intended to be of assistance to practitioners, they should be as explicit as possible, even if certain of them might appear self-evident to experts in international law.

34. With regard to draft conclusion 1, he concurred with Mr. Park about the need to replace the word "methodology" with a more appropriate alternative.

35. As to draft conclusion 2, he agreed with the Special Rapporteur's proposal to adopt a definition of customary international law based on the language of the Statute of the International Court of Justice. As the Statute of the International Court of Justice was one of the most widely accepted international legal instruments, the Commission should not depart in any significant way from its language and spirit, in particular Article 38.

36. It was unclear why the Special Rapporteur, when referring to customary international law, spoke only of "rules". It was well known that some principles established in international treaties, which were binding only *inter partes*, might subsequently be generally accepted by non-parties to a particular treaty and thus become part of customary international law. It would be helpful if the Special Rapporteur could clarify the reasoning behind his decision and also include a corresponding explanation in the commentary.

37. It should be made clear that, unless codified, customary international law was unwritten law, and the consequences of that fact in terms of its identification and interpretation should also be considered.

38. With regard to draft conclusion 3, it would be useful, either in the commentary or in the conclusion itself, to indicate who was responsible for determining the existence of a rule of customary international law. In the context of a dispute, it would probably be a court, an arbitrator or an organ of an international organization. The question, however, was whether States themselves were free to determine the existence and content of a rule of customary international law by claiming that there was a general practice accepted as law.

39. With respect to draft conclusion 5, he shared the concerns expressed by previous speakers regarding the term "primarily". If the word were to be retained, it should be clearly explained what type of practice, other than State practice, contributed to the creation of the rules of customary international law: otherwise, "primarily" might be understood as indicating that there was a hierarchy of practice among the various contributors to customary international law. Furthermore, the use of the word was at variance with draft conclusion 6, which referred only to State practice.

40. In paragraph 40 of the second report, the Special Rapporteur cited a non-exhaustive list of the main forms of practice, including "international and national judicial decisions". However, in draft conclusion 7, no mention was made of the judgments of international courts; bearing in mind the future users of the conclusions, it might be helpful if that omission were explained.

41. Furthermore, while the non-exhaustive list of types of State practice presented in paragraph 41 of the second report included the category of diplomatic acts and correspondence, it did not refer to the act of recognition, even though recognition of a custom, situation or claim was an important diplomatic act that produced legal effects. In addition, there was no mention of *démarches*. It would be useful if those omissions could be explained.

42. Draft conclusion 7, paragraph 3, which dealt with inaction, should be extensively elaborated upon in the commentary or even in a separate conclusion.

43. Draft conclusion 8, paragraph 1, which indicated that there was no predetermined hierarchy among the various forms of practice, was contradicted by paragraph 2, which suggested that the practice of one organ of a State might carry more weight than that of another.

[233] *Yearbook … 2012*, vol. II (Part Two), p. 69, para. 160.

44. With respect to draft conclusion 9, he agreed that practice had to be general, widespread and extensive. He also concurred with the Special Rapporteur's view, expressed in paragraph 53 of the second report, that practice followed by a relatively small number of States could create a rule in the absence of any conflicting practice. However, the question arose whether, absent any opposition by another State, the practice of just one State sufficed for the creation of a customary rule. It was a largely hypothetical question, but a famous case in point was the legal behaviour of the United States subsequent to its moon landing, which had led to the affirmation of the legal status of the moon and other celestial bodies as *res communis omnium*.

45. Although he basically agreed with draft conclusion 10, he was not sure whether the phrase "accompanied by a sense of legal obligation" was appropriate. In his view, there must be more than just a "sense" that the practice in question was perceived to be a legal obligation. The words "awareness" or "understanding" might be appropriate alternatives.

46. He generally agreed with draft conclusion 11, on evidence of acceptance of law, but suggested that the Special Rapporteur consider giving some attention in the commentary to the issue of so-called "professional public opinion", in other words the opinion of experts and bodies such as the International Law Association, as an element contributing to an awareness of what was accepted as law.

47. Mr. KITTICHAISAREE said that, since his view was that the identification process should be practical and realistic, he welcomed draft conclusion 4, which required that regard should be had to context, including the surrounding circumstances. In that connection, the Commission might consider the need to follow the four particular methods identified by the President of the International Court of Justice as having played an important role in the Court's assessment of evidence of customary international law, depending on the circumstances. Those methods were: referring to multilateral treaties and their *travaux préparatoires*; referring to United Nations resolutions and other non-binding documents that were drafted in normative language; considering whether an established rule applied to current circumstances as a matter of deduction; and resorting to an analogy.

48. In a world of nearly 200 States and various other international actors, draft conclusion 7, paragraph 2, and draft conclusion 11, paragraph 2, were right to encompass all forms of possible evidence of practice and acceptance as law, respectively. The main challenges, however, were how to establish that a "sense of legal obligation" was accompanied by a particular practice, as required under draft conclusion 10, paragraph 1, and how to identify situations where "double counting" was permissible under draft conclusion 11, paragraph 4.

49. With regard to the Special Rapporteur's assertion in paragraph 27 of the second report that the International Law Association's London Statement of Principles Applicable to the Formation of General Customary International Law[234] tended to downplay the role of subjective element in the identification of customary international law, he said that the Statement should be considered in its proper context. The International Law Association had rightly made a distinction among the different stages in the life of a customary rule, and had concluded that it was not always necessary to establish the existence of the subjective element of customary international law separately from the existence of the objective element.[235] Furthermore, the "paradox" or "vicious cycle argument" referred to in paragraph 66 of the second report had been resolved by the International Law Association, which had stated that, "[o]nce a customary rule has become established, States will naturally have a belief in its existence: but that does not *necessarily* prove that the subjective element needs to be present during the *formation* of the rule".[236]

50. With regard to the application of the two-element approach in different fields of international law, addressed in paragraph 28, he said that draft conclusion 4 correctly enunciated the fact that the identification of a particular rule of customary international law in any field must be considered in its proper context, including the surrounding circumstances.

51. Paragraph 62 of the second report posited that when a State acted in compliance with its treaty obligation, the act did not generally demonstrate the existence of *opinio juris*. In that context, a dilemma that needed to be tackled was that, as the number of parties to a treaty increased, it became more difficult to assess what the state of customary law was outside treaty law: in the case of widely ratified treaties, only a few States would be creating customary law. Indeed, in some instances, such as with the four 1949 Geneva Conventions for the protection of war victims, it would be virtually impossible to assess the status of customary law outside the Conventions, since there were virtually no States outside that treaty regime. In order to clarify the relationship between customary law and treaty law, the Commission should consider the classification made in 1978 by the President of the International Court of Justice, Judge Jiménez de Aréchaga, of the ways in which a treaty could interact with customary law. According to the Judge, a treaty could: have a declaratory effect of codifying existing law; have a crystallizing effect of codifying an emerging rule; and have a generating effect and represent constitutive evidence of acceptance as law, which would contribute to the formation of customary law.[237]

52. In paragraph 66 of his second report, the Special Rapporteur contended that the subjective element of customary international law had created more difficulties in theory than in practice. As the most recent of the international court judgments cited in support of that contention

[234] London Statement of Principles Applicable to the Formation of General Customary International Law, adopted by the International Law Association in its resolution 16/2000 (Formation of general customary international law) of 29 July 2000. See *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, London, 2000, p. 39. The London Statement is reproduced in *ibid.*, pp. 712–777.

[235] See para. (*b*) (4) of the commentary to Part I of the London Statement.

[236] Para. 10 (*b*) of the introduction to the London Statement.

[237] E. Jiménez de Aréchaga, "International law in the past third of a century", in *Collected Courses of the Hague Academy of International Law, 1978-I*, vol. 159, pp. 9 *et seq.*, at p. 14.

dated as far back as 1970, he wondered whether there were any more recent rules of customary international law which had come into existence based on the criteria established by the International Court of Justice in the *North Sea Continental Shelf* cases in 1969. If there were, the Special Rapporteur should elaborate on how those rules had been identified and the factors that had contributed to their being identified as such.

53. In paragraph 70 of the second report, the Special Rapporteur stated that some practice might in itself be evidence of *opinio juris* or be relevant both in the establishment of the necessary practice and in its acceptance as law. However, in paragraph 74, he stated that the same conduct should not serve in a particular case as evidence of both practice and acceptance of that practice as law. As those two paragraphs were mutually contradictory, further elaboration was required to clarify the rule proposed in draft conclusion 11, paragraph 4. In order to resolve the contradiction, Mr. Kittichaisaree proposed that it be indicated that consistent State practice could prove acceptance as law and vice versa.

54. The term "international organization" in draft conclusion 2 (*b*) should be understood to cover such international entities as the General Agreement on Tariffs and Trade (GATT), the predecessor of the WTO. Second, draft conclusion 4 should specify the circumstances that were important in assessing evidence of a general practice. Third, the Special Rapporteur might address the evaluation of consensus in the context of resolutions of deliberative organs of international organizations or conferences. Although that issue was touched on in paragraph 76 (*g*) of the second report, no conclusion was offered regarding resolutions adopted by consensus.

55. Fourth, although inaction might be considered as evidence of State practice, in particular when it qualified as acquiescence, that was not always so. Silence in the absence of an obligation to speak should not necessarily imply consent. Since the manner in which international affairs were conducted differed from region to region, inaction could not be interpreted in a uniform manner. Further guidance on when inaction could be interpreted as acquiescence should be provided in the commentary. The Commission needed to elaborate criteria to answer fundamental questions about, for example, the level of inaction required, the relationship between action and inaction, and the role of the persistent objector in that context.

56. Lastly, on the weight to be given to the practice of the State when its organs did not speak with one voice, it was necessary to consider which organs had legal and/or constitutional authority to speak on a particular issue and whether the position of the organ should be taken as representing State practice for that State.

57. In conclusion, he recommended that the draft conclusions be sent to the Drafting Committee.

58. Mr. HASSOUNA said that he endorsed the "two-element" approach and approved of the careful formulation of draft conclusions 2 and 3. He concurred with the Special Rapporteur's rejection of the view that the identification of customary international law could vary according to the specific field of international law; acceptance of that view could create artificial divisions within international law as a whole. The commentary should nevertheless indicate that the respective weight to be accorded to each of the two elements could vary according to the field of international law in question.

59. Regarding draft conclusion 4, it would be helpful if the Special Rapporteur could clarify the meaning of the phrase "including the surrounding circumstances", which seemed to be subsumed by the expression "regard must be had to the context". The formulation "must be had" was too prescriptive and he proposed replacing it with "due consideration should be given".

60. With regard to draft conclusion 7, paragraph 1, it was open to question whether verbal actions constituted practice. Written or oral statements or declarations that were attributable to States undeniably played an essential role in the customary process, since they were evidence of the existence of a practice as well as of its acceptance as law. However, such assertions did not, of themselves, constitute practice. Customary norms were based on what States did, not on what they declared, even if their declarations were indispensable for knowing and understanding their behaviour.

61. The Special Rapporteur's argument, in paragraph 37, that excluding written and oral declarations from practice "could be seen as encouraging confrontation and, in some cases, even the use of force" seemed far-fetched. The scholarly contribution cited in the antepenultimate footnote to paragraph 37 in support of that argument was inaccurate. It overlooked the fact that inaction was also a form of practice, and that customary international law did not emerge from practice alone but required evidence of the acceptance of the practice as law, which was obviously not the case for the examples given in the cited article.

62. In order to avoid differences in the wording used in draft conclusion 11, which concerned *opinio juris*, and in draft conclusion 7, which concerned practice, he proposed to model draft conclusion 7 on draft conclusion 11. Accordingly, paragraphs 1 and 2, respectively, of draft conclusion 7 should begin: "Evidence of practice may take a wide range of forms" and "The forms of evidence include, but are not limited to". Such an approach would reflect the view that statements and declarations as "verbal actions" were not, in themselves, constitutive of customary norms, even if they were necessary to make sense of State practice and to provide evidence thereof.

63. With regard to draft conclusion 7, paragraph 4, he agreed that the resolutions of organs of international organizations, such as the United Nations General Assembly, could demonstrate that States engaged in a given practice and accepted it as law. However, a demonstration to that effect required a detailed elaboration of the voting procedure and the context in which the resolutions were adopted. A number of complex questions had to be addressed when the Special Rapporteur covered the practice of international organizations in greater detail in his third report: to what extent was the assumption that the practice of international organizations could be equated with that of States compatible with the legal status of

international organizations as distinct subjects of international law? How should the significance of the practice of international organizations be assessed in light of their great diversity? If the acts of international organizations served as practice, to what extent could the conduct of other non-State actors fulfil a similar role?

64. While draft conclusion 8 aptly indicated that no predetermined hierarchy existed among the various forms of practice, the Special Rapporteur's conclusion that verbal actions were a form of practice contradicted that provision. He pointed out in his second report that words could not always be taken at face value and that abstract statements alone could not create customary international law, thus implying that concrete actions took priority over statements conflicting with such actions. Other points made by the Special Rapporteur in his second report revealed a need to review and redefine the concept of hierarchy, such as his recommendation to give greater weight to the practice of intergovernmental organs of international organizations than to their secretariats, or his proposal that, where the organs of a State did not speak with one voice, the voice with the power to act in external affairs should be treated as representing the State in its practice.

65. Although draft conclusion 9 was in line with international and national judicial decisions regarding the generality of practice, evaluating whether a practice was "sufficiently general and consistent" or whether a State was "specially affected" would pose a challenge to those called on to identify customary rules. Consequently, it would be helpful if practitioners had access to as many examples of judicial decision-making as possible. The many examples cited in the footnotes of the second report would benefit from a more expansive discussion in the commentary to the draft conclusion. In view of the rule set out in paragraph 3, and as confirmed by the International Court of Justice in the *North Sea Continental Shelf* cases, he proposed that assertions of the spontaneous creation of customary rules, or what had frequently been referred to as "instant custom" in the literature, be mentioned in the commentary to the draft conclusion, along with some examples.

66. As to draft conclusion 10, paragraph 1, he proposed that the formulation "accompanied by a sense of legal obligation" be replaced by "derived from a sense of legal obligation".

67. The current formulation of draft conclusion 11, paragraph 4, needed further clarification since, by analogy with the view reflected in draft conclusion 7, paragraph 1, that practice included verbal actions, paragraph 4 could be read as implying that abstract statements might be sufficient to provide evidence of the two elements necessary for the formation of customary international law. Yet, as acknowledged in the second report, such statements could not, of themselves, create law.

68. With regard to the Commission's future programme of work, he welcomed the Special Rapporteur's suggestion, in paragraph 83 of his second report, that the draft conclusions should be accompanied by indications as to where and how to find practice and *opinio juris*. The Commission could supplement its 2013 request to States for information[238] by asking about digests and other national publications that might contain evidence of practice and *opinio juris*. It could also renew its initial request for information on State practice relevant to the formation of customary international law,[239] given the limited number of written replies it had received on that major topic: only nine at the time of the writing of the second report. Such a dearth of replies posed a major challenge to the Commission's work, since the formation of customary international law was primarily the province of States, and their practice should be determinative.

69. He recommended referring the 11 draft conclusions to the Drafting Committee.

70. Mr. KAMTO said that the development of a rule of customary international law was a complex process that was not always easy to understand, and had even been described as "mysterious". In paragraph 12 of his second report, the Special Rapporteur stated that "the customary process [was] inherently flexible", which raised the question whether there was any merit in making it more rigid, and if so, within what parameters such an objective should be met. The identification of customary international law was at once a process and a result, and he agreed with the Special Rapporteur on the adoption of the "two-element" approach. The key question was how to determine the critical moment at which a practice became an enforceable rule of customary international law. The participants in the process could not answer that question, since, as practice showed, they were rarely in agreement as to the precise moment at which a rule of customary law that applied to them had been created. On the contrary, the invocation by State A of a rule of customary international law with respect to State B tended to elicit controversy and doubt as to State B's acceptance of State A's normative finding.

71. What the literature appeared to have lost sight of, when it came to the identification of a rule of customary international law, was the intervention of a third party: the judge or the codifier. The judge's power of discovery or even creation of a customary rule was very real; he or she could not only formulate a rule but could also refuse to transform a practice into a rule of customary international law.

72. The wording of rulings by the International Court of Justice raised questions about whether the judges always espoused the "two-element" approach, especially in cases relating to international humanitarian law. For example, in paragraph 79 of its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that the fundamental rules of international humanitarian law "are to be observed by all States … because they constitute intransgressible principles of international customary law". That was clearly a case of judicial identification of a rule of customary law, but one could not say for certain that the identification had come about through the application of the "two-element" approach. Hence the need, as the Special Rapporteur pointed out in paragraph 30 of his second report, for caution and balance—including in the wording of the draft conclusions.

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[238] See *Yearbook … 2013*, vol. II (Part Two), p. 15, para. 26.

[239] See *Yearbook … 2012*, vol. II (Part Two), p. 13, para. 29.

73. With regard to the substance of the second report, he wished to point out, first, that the Special Rapporteur's explanations and justifications were somewhat laconic and did not sufficiently substantiate his conclusions. In paragraph 14, for instance, he indicated merely that the work on the topic was without prejudice to questions relating to *jus cogens*, which could be the subject of a separate topic, without specifying who would address that topic or in what context it would be considered.

74. Second, in paragraph 18 of his second report, the Special Rapporteur indicated that a broad definition of "international organization" would seem desirable. However, that contradicted draft conclusion 2 (*b*), where "international organization" was defined as an "intergovernmental organization", a definition that was relatively restrictive when compared with the one contained in the articles on the responsibility of international organizations.[240]

75. Third, in paragraphs 37 and 38 of his second report, the Special Rapporteur stated that verbal acts could be considered a manifestation of practice—an idea that was substantiated considerably better by the literature than by case law. That point gave rise to three questions: was it necessary for a verbal act to be transferred to a physical medium in order to be taken into account as practice? Did a verbal act have to be repeated in order to be considered a form of practice? Could one actually identify a general practice if it was solely verbal?

76. Fourth, the Special Rapporteur indicated in paragraph 41 (*b*) of his second report that acts of the executive branch could include "positions expressed by States before … international courts and tribunals". Those positions should be treated with caution, however. The arguments put forward in the written and oral pleadings of States were governed by the dictates of the international litigation in question, and each party's aim was to advance winning arguments. Moreover, a Government might not even be aware of the arguments formulated by its own counsel. The latter had been known to advance arguments that were not consistent from one case to another or that contradicted their own previously published writings.

77. Fifth, in paragraph 55 of his second report, the Special Rapporteur stated that, for a rule of customary international law to become established, the relevant practice must be consistent. He failed to mention, however, that it should also be uniform. In fact, in paragraph 57 of his second report, he contended that complete uniformity of practice was not necessary, citing paragraph 186 of the 1986 judgment by the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case. However, the cited passage did not seem pertinent to the contention that uniformity of practice was not required in the formation of customary international law. The Court merely indicated, *inter alia*, that in the practice of States, the application of the rules in question was not expected to be perfect—but that did not at all invalidate the requirement for the practice to be uniform. Rather, the cited passage assumed that the custom-formation process had reached a stage where a rule had already been established. In keeping with the settled case law of the Court, as cited by the Special Rapporteur himself, one of the requirements for the existence of a rule of customary international law was precisely a constant and uniform practice. There was consequently no clear precedent in case law for not using the term "uniform".

78. With regard to draft conclusion 1, paragraph 1, he concurred with Mr. Candioti's warning against replacing the word "methodology" with "rules". Doing so would change the entire nature of the Commission's work on the topic; its aim was not to lay down strict secondary rules for determining the existence of rules of customary law but rather to guide practitioners and scholars in understanding the formation of custom. A more radical solution would be to delete the paragraph altogether, or to include it as part of the commentary to the draft conclusion.

79. In keeping with his observation that the "tw[o-element" approach did not always seem to be applied when an international court or tribunal declared that a rule of customary international law existed, he proposed that draft conclusion 1, paragraph 2, be reformulated to read: "The present draft conclusions are without prejudice to other ways of identifying a rule of customary international law as well as to methods relating to other sources of international law and questions relating to peremptory norms of international law (*jus cogens*)" ["*Les présents projets de conclusion sont sans préjudice d'autres modes de détermination d'une règle de droit international coutumier ainsi que des méthodes concernant d'autres sources du droit international et les questions relatives aux normes impératives de droit international (jus cogens)*"].

80. With regard to draft conclusion 2 (*a*), the use of the expression "that derive from and reflect a general practice accepted as law" was neither explained nor substantiated in the analysis that preceded the draft conclusion. The use of the two expressions "derive from" and "reflect" created confusion; he was therefore in favour of keeping only the former. A more radical solution would be the deletion of the paragraph.

81. In draft conclusion 5, the expressions "means that it is primarily the practice" and "the creation, or expression, of rules" were ambiguous; the second gave the impression that, while in some cases a customary rule was created, in others it was expressed, thereby implying its prior existence. As an alternative, he proposed a simpler formulation, to read: "The requirement, as an element of customary international law, of a general practice means that such a practice contributes to the creation of rules of customary international law" ["*L'exigence d'une pratique générale en tant qu'élément du droit coutumier signifie qu'une telle pratique contribue à la formation de règles de droit international coutumier*"].

82. In draft conclusion 8, paragraph 2, the second sentence implied that, although less weight was to be given to contradictory practice within a given State, some weight would nevertheless be given to it. That raised the question of which of the various trends in such practice would

[240] See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

be selected as evidence. In the hypothetical situation in which the Head of State and the Parliament held opposing views, yet both had authority in a given area, it would be difficult to decide whether to favour the practice of one or the other in determining the existence of a customary rule. For that reason, he proposed the reformulation of the second sentence to read: "No account is to be taken of the contradictory practice of the organs of the State" ["*Il ne sera pas tenu compte de la pratique contradictoire des organes de l'État*"].

83. He proposed to replace the existing title of draft conclusion 9 with "General practice must be consistent and uniform" ["*La pratique générale doit être constante et uniforme*"], which was in line with the settled case law of the International Court of Justice in that area. In paragraph 1, it would be better, in the French version, to replace the word *forcément* with *nécessairement*. Paragraph 2 was unnecessary since it reproduced, with less appropriate wording, the title of the draft conclusion. It should be deleted altogether or else replaced with wording that explained what was meant by practice that was consistent and uniform.

84. Lastly, with respect to draft conclusion 9, paragraph 4, he shared the concerns expressed regarding the phrase "the practice of States whose interests are specially affected". From paragraph 54 of the second report, it emerged that, apart from the judgments in the *North Sea Continental Shelf* cases, references to the concept of the specially affected State appeared only in separate or dissenting opinions or in the work of certain authors. In his own view, acceptance of the concept of specially affected States would compromise the principle of the sovereign equality of States. If the Commission decided to retain a reference to the concept, it was essential for the Special Rapporteur to explain it in a detailed and thorough fashion in the commentary to paragraph 4.

85. He was in favour of referring the draft conclusions to the Drafting Committee.

The meeting rose at 1 p.m.

3226th MEETING

Thursday, 17 July 2014, at 3 p.m.

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, 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. 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.

Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ŠTURMA said that the Special Rapporteur's well-documented second report (A/CN.4/672) would be useful not only to the Commission and Member States but also to law students. "Methods" rather than "methodology" would be the best term to describe the process of determining the existence and content of rules of customary international law, since the expected outcome of the topic was methods or guidelines for practitioners.

2. The language of the definition contained in draft conclusion 2 justified the two-element approach outlined in chapter III of the report and reflected in draft conclusion 3 and the following conclusions. General practice and *opinio juris* both had a role to play, although the emphasis placed on either component would vary in different areas of international law.

3. As he read draft conclusion 5, it did not exclude the practice of international organizations. He could agree to draft conclusion 6, on the understanding that it covered State organs and other entities within the meaning of articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts,[241] but not all cases of conduct attributable to a State for the purpose of responsibility. He concurred with the approach adopted in draft conclusion 9. The time element might, however, deserve a separate conclusion, because the statement that "no particular duration is required" might or might not be correct, depending on circumstances. The distinction drawn by René-Jean Dupuy between *la coutume sauvage* and *la coutume sage* had merit, in that it clarified the interrelationship between practice and the expression of *opinio juris* in light of different circumstances and the pronouncements of States at international conferences and in international organizations.[242]

4. He was in favour of the wide range of forms of practice referred to in draft conclusion 7 and the lack of a predetermined hierarchy of those forms. It was noteworthy that, in the decision taken by the Supreme Court of the Czech Republic in 2004, to which reference was made in paragraph 24 of the second report, the Court had used as evidence for its findings the writings of international jurists and had discussed the distinction between customary international law and international comity.[243] The current topic should also encompass the relationship between customary international law and general principles of law, usages and international comity. The Special

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[241] General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

[242] R.-J. Dupuy, "Coutume sage et coutume sauvage", in *Mélanges offerts à Charles Rousseau*, Paris, Pedone, 1974, pp. 75–87.

[243] *Diplomatic Privileges and Immunities of a Visiting Prince Case*, Czech Republic Supreme Court, No. 11 Tcu 167/2004, *International Law Reports*, vol. 142 (2011), p. 186.