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**A/CN.4/3254**

**Summary record of the 3254th meeting**

Topic:  
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permitting the determination of general practice and *opinio juris*.

51. He was in favour of referring the draft conclusions to the Drafting Committee, which should take account of the comments of the members of the Commission.

52. Mr. HUANG said that, with reference to the two-element approach referred to in paragraph 17 of the third report, uniform standards must be applied to the identification of customary international law regardless of the field of law or the intended end user of the draft conclusions. The application of different standards would exacerbate the fragmentation of customary international law and even call its validity into question.

53. With regard to draft conclusion 3 [4], he disagreed with the Special Rapporteur's view that the evidence of practice must be different and separate from the evidence of *opinio juris*. In many cases, practice and *opinio juris* went hand in hand. When a State took action, it made it clear whether it was implementing a legal obligation or exercising its rights. An artificial separation of evidence of practice and evidence of *opinio juris* was therefore undesirable.

54. While he agreed with the proposed new paragraph 3 of draft conclusion 4 [5], there was no denying that the conduct of non-State actors could play a role as a reference in identifying customary international law.

55. He concurred with the three conditions set forth in paragraphs 23 to 25 of the third report for recognizing inaction as evidence of acceptance as law. He wondered, however, what was meant by "some reaction" in draft conclusion 11, paragraph 3. With regard to draft conclusion 12, the Special Rapporteur had not provided any criteria for deciding which provisions of a treaty belonged to customary international law. According to international case law, the following elements needed to be investigated: the extent to which the treaty had been ratified, acceded to and accepted by States; whether any of the States parties had withdrawn from or denounced the treaty; the length of time the treaty had been in effect; the nature of the treaty provisions; and, lastly, the number of reservations.

56. With reference to draft conclusion 13, he was of the opinion that only resolutions adopted by international organizations with universal membership could become a source of international law or serve as subsidiary means of its identification. General Assembly resolutions deserved particular mention, as they reflected the will of Governments and crystallized world public opinion. They expressed a universal belief and, as such, constituted strong evidence of the formation of a rule of customary international law. The contributions made by some NGOs in special fields of international law should also be duly taken into account.

57. He had no difficulty with draft conclusion 14, but he was curious to know what would be the effect of contradictory rulings from an international and a domestic court. At the same time, it seemed to be going too far to include the reference to writings, without any qualification, since

there was a considerable difference between authoritative and ordinary writings.

58. With regard to draft conclusion 15, the International Court of Justice had held that, when determining the rights and obligations of States, long-standing practice accepted by States as governing their mutual relations must prevail over general rules of international law. He endorsed the title chosen for the draft conclusion—"Particular custom"—because it covered the many types of customary international law. Special customary international law applied only to particular types of States or States with particular interests. Regional customary international law applied only to specific regions. Local or bilateral customary international law was applicable to only two States. Special customary international laws were exceptions to general customary international laws that were binding only upon States which had accepted them. Since they clarified the relationships among those States, their binding effect should be greater than that of general customary international law.

59. The persistent objector rule was gradually being accepted as a subsidiary rule and a useful compromise. The rule deserved to be recognized, for a number of reasons. It protected a country from being bound by a rule formed by the majority of members of the international community that was inconsistent with its wishes. It meant that an emerging rule could become established without being taken hostage by a single objector. Even though it had been infrequently invoked in the past, it might now come to play an increasingly important role. It promoted the development of new rules of customary international law by creating a back door that enabled a State to avoid being bound by rules of international law that had not been established by the traditional process. Some flexibility was necessary, however, in characterizing the persistent objector rule.

60. He agreed with the referral of the draft conclusions to the Drafting Committee.

*The meeting rose at 1 p.m.*

## 3254th MEETING

*Thursday, 21 May 2015, at 10.05 a.m.*

*Chairperson: Mr. Narinder SINGH*

*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. Kitichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

**Identification of customary international law (*continued*) (A/CN.4/678, Part II, sect. E, A/CN.4/682, A/CN.4/L.869)**

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the members of the Commission to resume their consideration of the third report of the Special Rapporteur on the identification of customary international law (A/CN.4/682).

2. Ms. JACOBSSON thanked the Special Rapporteur for his excellent report, which contained well-substantiated, careful analysis. She had no objection to the assertion made in draft conclusion 3 [4], paragraph 2, that each element of customary law was to be separately ascertained, provided that this requirement was explained in the manner proposed by Mr. McRae and Mr. Tladi. As had been noted by many Commission members, the fact that the two elements served as evidence of each other should be reflected in the commentaries as well. It had, furthermore, quite rightly been pointed out that legislation concerning the exclusive economic zone that was in force prior to the United Nations Convention on the Law of the Sea provided a number of good examples of how a single legal instrument could yield evidence of the two elements. Also in paragraph 2, although the word “specific” before “evidence for each element” should be retained, insofar as it reflected discussions at the sixty-sixth session and represented an improvement over the earlier wording, she wondered whether the new formulation would be sufficiently clear to the general reader.

3. It was unfortunate that the wording of draft conclusion 4 [5], paragraph 3, excluded all conduct by non-State actors, given the growing influence of such actors on the formation and identification of customary international law. The practice of ICRC had been cited as an example in that regard. Admittedly, however, it was difficult to establish what kind of conduct by that body—which occupied a special position in international law—would count as practice. Was it how ICRC acted during its field missions, the publications in which it evaluated the customary law status of a particular rule of international law, or its official views on topical issues such as the classification of an armed conflict? That question warranted further consideration. The same applied to the conduct of other categories of non-State actors, particularly in the context of non-international armed conflict, but also in the increasingly frequent situations in which States and non-State actors cooperated to achieve a common objective. This occurred when non-legally binding documents, best practices or statements of law had an influence on the conduct of private companies or civil society organizations, examples of which included the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict<sup>81</sup> or the work currently in progress on the use of cyberspace. Although such cooperation or intermingling between States and

private actors did not automatically constitute “practice” within the meaning of draft conclusion 4 [5], it was nevertheless difficult to dismiss those actions as irrelevant to the topic. Furthermore, in the context of non-international armed conflict, it was becoming increasingly frequent for non-State actors to pronounce their views on the status of the rules of international humanitarian law and whether or not they considered themselves to be bound by them. They sometimes also committed themselves to applying the provisions of certain treaties to which, by definition, they could not accede. When States or international organizations recognized those commitments and invoked them so as to hold those actors accountable for alleged breaches of the provisions in question, their practice could justifiably be taken into consideration for the purposes of the identification of rules of customary international law. Such “responsibility” was often referred to in peace negotiations, fact-finding reports and official reports by United Nations special rapporteurs. In such cases, the practice of non-State actors, and the recognition of their practice by States, served as evidence of the acceptance of the rule in question. Although in her second report on the protection of the environment in relation to armed conflicts (A/CN.4/685<sup>82</sup>), which she would introduce during the second part of the session, she had not claimed that non-State actors formally contributed to the formation of customary international law, she in fact supported the position of Mr. Caflisch, Mr. Forteau, Mr. Šturma and Mr. McRae on that matter.

4. As had previously been noted, the wording of draft conclusion 11, paragraph 3, was too general to be of assistance to judges in evaluating a particular situation. Furthermore, for the sake of consistency with the parallel project on subsequent practice and subsequent agreements, the Commission should exercise caution with regard to the subject of inaction. Nonetheless, in view of the difficulties involved in evaluating inaction, the criteria identified by the Special Rapporteur in paragraphs 22 to 25 of the third report should perhaps be included in the draft conclusion.

5. She supported the premise underlying draft conclusion 12, but was of the view that the latter needed to be more clearly formulated. It was doubtful whether subparagraph (a) was necessary, since it was obvious that a treaty provision that codified a rule of customary international law could reflect that rule. In contrast, subparagraph (c) dealt with what was now probably the main means by which customary law was formed, given the number of treaties that existed. Meanwhile, subparagraph (b) should be reworded or even deleted, as it sought to cover the transition of a treaty-based rule into a customary one and thus dealt with an emerging rule that did not yet form part of customary international law.

6. She welcomed draft conclusion 13 on the resolutions of international organizations and conferences; however, it was overly restrictive to say that, although such resolutions could be evidence of customary international law, they could not “in and of themselves, constitute it”. The example of Security Council resolution 1838 (2008) of 7 October 2008 on the situation in Somalia, which was

<sup>81</sup> ICRC and Federal Department of Foreign Affairs of Switzerland, August 2009.

<sup>82</sup> Reproduced in *Yearbook ... 2015*, vol. II (Part One).

followed by other resolutions on the same subject and which provided that “this resolution shall not be considered as establishing customary international law”, could in fact be used to argue the contrary. Indeed, if it was accepted that the Security Council could prevent the formation of a rule of customary international law, why would it not be in a position to contribute to its creation? Along those same lines, reference could also be made to General Assembly resolution 377 (V) of 3 November 1950, entitled “Uniting for peace”, or the practice of the European Union in its capacity as an international legal entity.

7. With regard to draft conclusion 14, while it was true that some judicial decisions and writings could serve as subsidiary means for the identification of rules of customary international law, it was certainly not the case for all of them, and the formulation in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice remained entirely relevant. In addition, the wording of draft conclusion 14 seemed to treat judicial decisions and writings equally, which was probably not the Special Rapporteur’s intention, and it would therefore be preferable to deal with the two separately. The judicial decisions of national courts and of international courts and tribunals should also be dealt with separately.

8. With regard to draft conclusion 15 on particular custom, the question arose as to why it was an exception to the general application of the rules of customary international law. Particular custom was undoubtedly an important aspect of customary international law, which differed from “ordinary” customary international law in that it concerned a region or group of States and often had a security dimension that made it a stabilizing factor that contributed to peace and international security. Nevertheless, it could take decades for the criterion of *opinio juris* to be met. The choice of the expression “particular custom” rather than “regional custom” was apt, since the concept of “region” in that context raised many questions. For example, if it was considered that certain rules of customary international law had originated in the Antarctic Treaty, should it follow that the Treaty was applicable only to the States that were active in the region, failing any requirement for them to be situated there? There should perhaps also be mention of the fact that a regional treaty could give rise to regional custom and even to general custom.

9. Lastly, with respect to draft conclusion 16, which required further elaboration, she agreed with most of what had been said by Mr. Vázquez-Bermúdez. In conclusion, she was in favour of referring all of the draft conclusions to the Drafting Committee.

10. Mr. KOLODKIN said that he welcomed the report, which was excellent, well balanced and took a pragmatic approach to a complex topic. Despite the many conceptual and philosophical differences of opinion concerning the formation and application of customary international law, his view was that the rules of customary law, like those of treaty law, were based on the will of States in that they were the result of a process that depended on the deliberate conduct in which stakeholders engaged, sometimes tacitly, and which they similarly expected from the

other parties in the process. However, that did not mean that customary international law was a form of treaty law.

11. While the importance of international jurisprudence in identifying customary law could not be denied, the role of national practice in that area was every bit as essential. The draft conclusions should stress the importance of combining all of the established criteria for identification, without omitting any—subject, of course, to the availability of the elements necessary to identify them.

12. With regard to the scope of the project, he noted with satisfaction that the question of the link between *jus cogens* and customary law, on the one hand, and between customary law and general legal principles, on the other, had been excluded from the scope of the topic. It was regrettable, however, that the Commission was venturing into the territory of the application of customary international law. Furthermore, although it was an interesting subject, the extinction of the effects of a rule of customary international law should not be included in the scope, as it was an issue that related to the formation of customary international law rather than to its identification.

13. Although the criticisms expressed in relation to paragraph 15 of the third report were justified, “double counting” was a reality that could not be ignored. Besides, the wording of draft conclusion 3 [4], paragraph 2, did not rule out such an approach.

14. With regard to the generality of practice, he agreed with the Special Rapporteur that it was appropriate to interpret the requirement of the two elements flexibly and that the criterion of generality could be taken to be more or less stringent depending on the fields of international law concerned. For example, when international space law was beginning to emerge, certain States had not been in a position, materially speaking, to develop a practice because they lacked the necessary technical know-how. Conversely, the question arose—and had still not been resolved—as to whether a practice that did not at first glance seem to be related to an existing rule of international law was capable of giving rise to a rule of customary international law. Situations in which *opinio juris* preceded practice should also be taken into consideration, particularly in cases in which States expressed the view that a given practice was not acceptable under international law before that practice had even started to develop.

15. Although he agreed in principle with the idea that inaction could be considered to be a form of practice, as well as evidence of acceptance as law, he recommended proceeding with the utmost caution in that regard. It was regrettable that the draft conclusions did not reflect the various criteria set out in paragraphs 22 to 25 of the third report. Paragraph 3 of draft conclusion 11 should therefore be redrafted, as it currently mentioned only a single criterion. It should also take into consideration the work of AALCO.

16. It was doubtful whether the title of Part Five of the draft conclusions was relevant insofar as there was no indication in draft conclusions 12, 13 or 14 as to how treaties, resolutions of international organizations and conferences or judicial decisions and writings were particular forms

of practice and evidence. Furthermore, it was a pity that the forms of practice listed in draft conclusion 6 [7], paragraph 2, did not include treaty provisions. With regard to draft conclusion 12, subparagraph (c), it seemed that, without a specific context, the expression “crystallization of an emerging rule of customary international law” could have two different meanings. It could either mean that a treaty provision could serve as evidence of the completion of the process of the formation of a rule of customary international law or that it could clarify the content of an emerging rule of customary international law. It would be advisable to reconsider the wording of the subparagraph or at least to clarify its meaning in the commentary. While one could not argue with the validity of the assertion contained in subparagraph (c), it was regrettable that it did not mention either the form of practice or the evidence of *opinio juris*. Reference should also be made in draft conclusion 12, or in the commentary, to the particular role of “normative” treaties. Again, if the processes for the formation of customary international law and treaties were by nature fundamentally different, it would be difficult to imagine how the two sources of international law could interact with each other.

17. Nor was there any mention in draft conclusion 13, which concerned the resolutions of international organizations and conferences, of resolutions as a form of practice and evidence of *opinio juris*. It was also regrettable that it referred only to the example of the role of the General Assembly; greater importance should have been attached, in general, to the existence, or to the recognition by States, of the specific competence of an organization within its own field. In that regard, reference could be made to the considerable influence exerted by the International Maritime Organization on the development of maritime customary law, particularly through the rules that it was mandated to formulate under the United Nations Convention on the Law of the Sea in its capacity as the “competent organization”, even though those rules did not, in themselves, constitute rules of international law. Particularly in the light of paragraph 74 of the report, draft conclusion 13 could be considered an attempt at summarizing the question of whether resolutions were a form of practice and/or evidence of *opinio juris*. With that in mind, it might be helpful to amend the title of Part Five of the draft conclusions to read: “Evidence of customary international law”.

18. In his view, draft conclusion 14 wrongly conflated judicial decisions and writings, the latter of which should be dealt with separately and should not include the work of the International Law Commission. The Commission’s work should be mentioned elsewhere, for example together with the work of the United Nations Conference on Trade and Development, which was also involved in the codification of international law, albeit in a more limited field. Similarly, it was unfortunate that no distinction had been made between the decisions of international courts and tribunals and those of national courts, as the latter clearly did not have the same competence with regard to matters of international law. National jurisprudence should perhaps be mentioned in the draft conclusions on forms of practice and evidence of *opinio juris*, while draft conclusion 14 should deal only with international jurisprudence.

19. With regard to the importance of the practice of international organizations in identifying customary international law, the Special Rapporteur rightly considered that it was their “external” practice that was most relevant, as it had played an essential role in the formation of rules of customary international law concerning the conclusion of treaties by international organizations and concerning the responsibility and privileges and immunities of such organizations.

20. The wording of the proposed new paragraph 3 of draft conclusion 4 [5], which did not rule out the possibility that non-State actors might have some influence on the formation of customary international law, seemed appropriate.

21. Particular custom and persistent objectors were a reality and must therefore be included in the draft conclusions. However, he wondered why the title of Part Six of the draft conclusions referred to the application of rules of customary international law when the topic was the identification of customary international law. Draft conclusion 15, paragraph 1, and draft conclusion 16 should be rephrased in such a way as to tie them in with the topic of the identification of customary international law. Even though draft conclusion 15, paragraph 2, was in line with that approach, it should specify whether the criteria for determining general custom applied to particular custom. While it seemed that the question of whether the rules of customary international law were binding on objecting States should be excluded from the scope of the topic, it was nevertheless worth asking whether it was possible to establish the existence of a rule of customary international law when the States concerned had a particular interest in the field in question.

22. In conclusion, he supported sending all of the draft conclusions to the Drafting Committee.

23. Mr. SABOIA, referring to Mr. Kolodkin’s example of practice in relation to space activities, said that, even though only the few States that had had the necessary technological know-how in that field had actually been capable of developing any kind of practice in that area, the international community as a whole had followed those activities closely and had tried, through the Committee on the Peaceful Uses of Outer Space and the First Committee of the General Assembly, to prevent those activities from developing into an arms race.

24. Mr. GÓMEZ ROBLEDÓ congratulated the Special Rapporteur on his very comprehensive third report, which duly reflected the comments made by Commission members at the sixty-sixth session. In general, he supported the proposed lines of reasoning and approach, as he was of the view that one could not study the identification of customary international law without being concerned about its formation, and that customary law was characterized by the flexible way in which its two constituent elements originated. Nonetheless, he wished to make some comments that might help the Special Rapporteur to consolidate his conclusions or develop certain aspects of his thinking in his next report. He himself, as Special Rapporteur on the topic “Provisional application of treaties”, had found the arguments concerning inaction particularly interesting, especially as

they related to “qualified silence”. That concept was very useful for determining whether the provisional application of a treaty, as provided for under the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (“1986 Vienna Convention”), reflected compliance with a rule of customary law in cases in which such application was not provided for in the treaty but was otherwise agreed by two or more States and in which some of the other States invited to become parties to the treaty had tacitly agreed to that practice.

25. In addition to the three processes by means of which a treaty could assist in determining the existence and content of a rule of customary international law, which were mentioned in paragraph 35 of the third report, consideration should be given to the possibility of a fourth process. The latter would correspond to cases in which a treaty altered the meaning of an existing rule of customary law by establishing a new rule of international law that invalidated a previous practice that had been recognized as law. Similarly, the question arose as to whether the geographical distribution of States parties to a treaty could serve to determine the representative or general nature of the practice. When analysing the importance of the role of treaties in the identification of customary international law, the Special Rapporteur seemed to refer only to general rules of customary international law, even though there was no indication to that effect in draft conclusion 12, which simply stated that a treaty provision could reflect or come to reflect a “rule of customary international law”. It should perhaps be specified, in the draft conclusion itself or, failing that, in the accompanying commentary, that the rule in question could be general or particular. Another possibility would be to indicate in draft conclusion 15 on particular custom that regional and bilateral treaties could serve to determine the existence of a particular custom. It would be interesting to know what the Special Rapporteur thought about those various proposals.

26. With regard to the importance of international organizations, he thanked the Special Rapporteur for having accepted the recommendation he himself had made at the previous session and for having incorporated the “Castañeda doctrine”, mentioned in the first footnote to paragraph 46, into his analysis of the value of the resolutions of international organizations. Noting an inconsistency between paragraph 74, in which the Special Rapporteur concluded that “resolutions of organs composed of States reflect the views expressed and the votes cast by States within them, and may thus constitute State practice or evidence of *opinio juris*”, and draft conclusion 13, in which he merely stated that “[r]esolutions adopted by international organizations or at international conferences may, in some circumstances, be evidence of customary international law”, he proposed reformulating the draft conclusion based on the wording of paragraph 74 so that it would read: “Resolutions adopted by international organizations or at international conferences may, in some circumstances, be considered State practice or evidence of *opinio juris*.”

27. Furthermore, if, as was indicated in paragraph 70, “States remain the primary subjects of international

law and ... it is primarily their practice that contributes to the formation, and expression, of rules of customary international law”, the question arose as to what value should be ascribed, for the purpose of identifying rules of customary international law, to the opinions expressed by senior officials of international organizations, which the Special Rapporteur referred to in paragraph 75 as “statements” on behalf of international organizations, or to those of their legal advisers. If they could not be considered *opinio juris*, would such opinions be reduced to the status of subsidiary sources of doctrine, or would they be given a special status, similar to the status that several Commission members considered should be given to the work of the International Law Commission?

28. In his view, the proposed paragraph 3 on non-State actors to be added to draft conclusion 4 [5] was very relevant and very clear. He shared the doubts expressed by Mr. Caffisch and Mr. Forteau concerning the persistent objector theory. He wished to know to what extent customary obligations *erga omnes*, such as those established by the International Court of Justice in relation to the fundamental principles of international humanitarian law in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, could limit that theory. In other words, was it sufficient for a State to persistently and unambiguously register its objection to customary obligations *erga omnes* in order to be exempted from them indefinitely? The Special Rapporteur could perhaps clarify that point in his next report.

29. The CHAIRPERSON, speaking as a member of the Commission, thanked the Special Rapporteur for his third report, which was supported by extensive references to national and international case law, as well as to the academic literature. In general, he endorsed the substance of most of the proposed draft conclusions. With regard to the assessment of the evidence for the two elements, he agreed with the Special Rapporteur that the two elements were inseparable and that, in order to ascertain whether a rule of customary international law existed, it was necessary to consider and verify each element separately. However, he was of the view that the assertions to the effect that “this ... requires an assessment of different evidence for each element” and “the very practice alleged to be prescribed by customary international law could usually not attest in itself to its acceptance as law” should be slightly rephrased.

30. Like several other members of the Commission, he believed that draft conclusion 11, paragraph 3, should expressly mention the three criteria that must be met in order for inaction to serve as evidence of acceptance as law, namely that the practice in question affected the interests or rights of the State failing or refusing to act, that the State must have had knowledge of the practice in question, and that the inaction had been maintained over a sufficient period of time. He had no objection to draft conclusion 12, subparagraphs (a) and (b), but considered that the formulation in subparagraph (c) required further clarification and, as suggested by Mr. Murase, should reflect the language of article 38 of the 1969 Vienna Convention.

31. With regard to draft conclusion 13 on the resolutions of international organizations and conferences, he

generally endorsed the Special Rapporteur's explanations, particularly his statement in paragraph 53 to the effect that General Assembly resolutions could play a significant part in the formation and identification of rules of customary international law and that overwhelming (or even unanimous) approval of those resolutions was an indication of *opinio juris* but did not create law without any concomitant practice. As to the requirement of practice, the Special Rapporteur put forward convincing arguments in support of the role of the practice of international organizations in the formation and identification of customary international law. It should be pointed out in the commentaries, however, that the issue remained controversial, as had been reflected, for example, in the debates in the Sixth Committee and in the judgment of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, in which the Court had concluded that the acts of an international organization could not constitute "practice". In any case, the wording of draft conclusion 4 [5], paragraph 2, was sufficiently cautious as to accommodate the recognition that States were the primary actors in the formation of customary international law. He welcomed the addition of paragraph 3, whose aim was to exclude the practice of non-State actors.

32. With respect to draft conclusion 14, he was of the view that judicial decisions and writings should be dealt with separately, as had been done in chapter IV of the report. Furthermore, judicial decisions should not be characterized as "subsidiary means" for the identification of customary international law, even though those words were used to refer to judicial decisions in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, since, under the circumstances, judicial writings served to determine or to identify rules of "international custom, as evidence of a general practice accepted as law", as set out in paragraph 1 (b) of that Article.

33. Although he supported the inclusion of draft conclusion 15 on particular custom, he had some doubts about the use of the word "particular", which should be replaced by "regional", "local" or "special". It would also be useful to specify that this type of custom applied only to States that had participated in its formation and had accepted it as law. As to draft conclusion 16 on the persistent objector, he was of the view, for the reasons mentioned by the Special Rapporteur, that this concept had its rightful place in the rules on the formation of customary international law. In conclusion, he was in favour of referring all of the draft conclusions to the Drafting Committee.

34. Sir Michael WOOD (Special Rapporteur) thanked all of the members of the Commission who had participated in the debate for their kind words and constructive comments. He had taken note of the many points raised, which he would take into account in his future work on the topic, and was pleased that a broad consensus seemed to have been reached in the Commission on the main aspects of the topic. In his summing up of the debate, he would not respond to all of the comments that had been made, as these deserved further reflection and he would rather not rush to any conclusions. He wished to reassure those members who had cautioned against moving too fast on the topic that this was certainly not

his intention, although his proposed ambitious workplan might have given the opposite impression. It was essential for the Commission members and other interested parties to have sufficient time to reflect and comment on the project, and they could rest assured that they would have that time. Referring to the mini-debate on the scope of the topic that had been prompted by Ms. Escobar Hernández's comments at the 3252nd meeting, he recalled that the decision taken in 2013 to change the title of the topic had in part been due to translation difficulties, but it was also intended to emphasize that the aim of the topic was to assist in the determination of the existence of rules of customary international law and their content. That was the task that faced judges or arbitrators and lawyers advising on the law as it was (or as it had been at a particular time), as opposed to lawyers advising on how the law might develop or be developed. Of course, an understanding of how rules emerged, changed or were overtaken was also important in many contexts, and indeed formed part of the background to the topic. The deliberate contravention by States of existing rules in order to develop new rules, and the transformation of a particular custom into general custom, were matters that could be explained in the commentaries. Nonetheless, it must be borne in mind that the aim of the topic was not to explain the myriad influences and processes involved in the development of rules of customary international law, especially if such processes were to maintain their inherent flexibility. Within limits and subject to finding the appropriate language, he was willing to accept the proposals made by Mr. Hassouna and a number of other members for adding more detail to the conclusions based on the contents of the commentaries.

35. With regard to chapter I of his third report, several members had made comments concerning the temporal aspect of the relationship between the two constituent elements of customary international law, including Mr. Park, who wished to see reflected the idea that general practice generally preceded *opinio juris*, but that the opposite was true in some exceptional instances. Although that was an important point, it had more to do with the formation of customary international law than with its identification, where it was necessary to establish the existence of a general practice together with its acceptance as law. That position did not depart fundamentally from what was stated in paragraph 16 of the third report and the penultimate footnote to this paragraph, and could be addressed with all due caution in the commentary. He would try to clarify the sentence "[t]here may ... be a difference in application of the two-element approach ... with respect to different types of rules" in paragraph 17, which some had described as "ambiguous", and to provide further details on the differences in question. He recalled, however, that all of the members had stressed the need to be clear but not too prescriptive. That principle should guide the Commission throughout the course of its work on the topic, particularly when it came to considering the draft conclusions.

36. The proposal to add a paragraph 2 to draft conclusion 3 [4] had been the focus of particular attention by Commission members. Although there seemed to be general agreement on the first sentence, the second had

been more controversial, as some speakers had pointed out that the International Court of Justice did not completely support the conclusion that “double counting” should be excluded. He tended to agree with Mr. McRae that it was a false issue. He was not referring to the impossibility of using the same evidence for both elements; the word “generally” had been carefully chosen precisely to indicate that it was possible in exceptional circumstances. The example given of legislation establishing a 200-mile exclusive economic zone was not relevant since, even though the enactment of the legislation was clearly State practice, evidence of *opinio juris* was more likely to be found not in the legislation itself but in what State officials said about the legislation in explanatory memorandums, in parliament, to the media or to other States. The implementation of the legislation could also constitute relevant practice or evidence of *opinio juris*.

37. Mr. Tladi’s detailed arguments, which were supported by a rigorous analysis of the case law, were somewhat convincing, and he tended to agree with Mr. Tladi’s recommendation not to include in the draft conclusions some of the less cautious statements contained in the report, such as H. Thirlway’s comment regarding the return to the single-element theory. Nonetheless, he invited the members of the Commission to closely reread the case law that was referred to in the last footnote to paragraph 14, which recalled the difference between a practice that might be general, but that was not accepted as law, and customary international law. He could not fully support the “sliding scale” approach to the two constituent elements of customary international law that had been mentioned by Mr. Kittichaisaree. Both elements must be present, as each had its own role to play; a lot of one could not compensate for a lack of the other, as otherwise, it was simply not customary international law.

38. Consideration should be given to whether the second sentence of the proposed paragraph 2 of draft conclusion 3 [4] was essential or whether the matter might not be addressed in a more nuanced way in the commentary. If Commission members agreed with him that it was useful to keep it in the draft conclusion, the wording could be improved by the Drafting Committee. For example, the word “specific” could be replaced with “separate”, and the commentary could be redrafted so as to highlight why that word had been chosen and to clarify the meaning of the word “generally”.

39. Despite his efforts to take account of the comments made at the Commission’s sixty-sixth session on how to deal with the practice of international organizations, some members continued to have serious doubts about the matter. While that issue was, admittedly, not wholly straightforward, he hoped that a consensus could be reached. With regard to draft conclusion 4 [5], Mr. Forteau had questioned the deletion of the word “primarily” from paragraph 1, arguing that it would be misleading to suggest that only the practice of States was relevant, whereas paragraph 2 stated that the practice of international organizations could also be relevant in some instances. The problem could easily be remedied by making the necessary drafting changes in order to clarify the relationship between the two paragraphs. As to Mr. Forteau’s proposal to add the words “in principle”

to paragraph 3 to qualify what he considered to be an overly strict exclusion, particularly as it meant that the practice of ICRC could not be taken into consideration, he himself would be reluctant to introduce such vague words unless they were essential for obtaining consensus, and in any event he would question the premise that the practice of ICRC might be considered relevant for the purposes of customary international law. Such organizations, or even ones like the International Olympic Committee, which had also been mentioned, could certainly play a role in the formation and identification of rules of customary international law, but only through prompting or recording State practice, not by their own conduct as such.

40. There had been considerable concern among Commission members about the wording of paragraph 3 of draft conclusion 4 [5], which was admittedly somewhat stark, although not all would go as far as Mr. Park, who had proposed its deletion. He continued to believe that, with the exception of the drafting problem, the members were close to his own position on the substance. The proposed paragraph 3 was not essential, and its content could easily be reflected in the commentary, but in the spirit of providing as much guidance as possible in the draft conclusions themselves, it would be preferable to retain it. Its retention would also make paragraph 1 easier to draft.

41. Several members had expressed doubts concerning paragraph 76 of the report, in which it was stated that the practice of international organizations relating to the international conduct of the organization or international organizations generally could serve as relevant practice for purposes of formation and identification of customary international law. That statement would not be at all controversial if it was accepted that the practice of international organizations, in their relations among themselves at least, could give rise to rules of customary international law that were binding in such relations. That notion appeared to be accepted in the preamble to the 1986 Vienna Convention, according to which “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”. The relevance of the practice of international organizations as such was also difficult to deny in the case of the European Union or in any case where the member States of an international organization could direct it to execute on their behalf actions falling within their own competence. That said, the practice of international organizations must, of course, be appraised with considerable caution, as was stressed in the third report.

42. The Commission itself had recognized in the 1950s that the practice of international organizations could be regarded as evidence of customary international law with reference to States’ relations to the organizations. Observation 13 in the Secretariat’s memorandum<sup>83</sup> was also very clear. It was clear from their statements in the Sixth Committee that States generally seemed to accept that the practice of international organizations as such could serve as relevant practice for the purposes of the

<sup>83</sup> *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/659, p. 156.



formation and identification of rules of customary international law. The European Bank for Reconstruction and Development was one such example. It could therefore not be contended that the opposite was true. In his view, which he understood to be widely shared within the Commission, there was a need for a text on the practice of international organizations, at least as a marker along the lines of draft conclusion 4 [5], paragraph 2. It should not be concluded that all international organizations played an important role nor that their role was generally comparable to that of States. The issue of the practice of international organizations was complex, as the debate had shown, and that would have to be reflected in the commentary. Reference could also be made to the two judicial bodies mentioned by Mr. Saboia—the International Court of Justice and the WTO Appellate Body—although it would be preferable to do so in the draft conclusion on judicial decisions.

43. He was grateful to the members for their contributions on the issue of inaction, or silence, which he would study with great attention, giving careful thought, for example, to the similarities and possible differences found in relation to the topic on subsequent agreements and subsequent practice.

44. Turning to chapter III of the third report, he recalled that one member had proposed that draft conclusion 12 deal only with multilateral treaties. Of course, the role of bilateral treaties needed to be approached with caution, but it would not be right to exclude them from the scope of the draft conclusion. Rather than artificially limiting the scope to a category of treaties, it was necessary to maintain its generality but explain in the commentary the importance of examining the actual wording of the treaty and all the circumstances surrounding its adoption and subsequent implementation.

45. Mr. Murase had noted the importance of analysing article 38 of the 1969 Vienna Convention, and in particular the significance of the words “recognized as such”. He had taken careful note of that comment and would study the matter, although it was doubtful that he would be able to add much to Judge Gaja’s commentary. In any case, he would read Mr. Murase’s article on the subject, and he agreed with him entirely that it was necessary to capture the notion of the “fundamentally norm-creating character” of a provision, which was referred to in the report as well.

46. Several members had proposed that details contained in the report might be added to the text of draft conclusion 12. He had no objection to that proposal, which was in line with the general tendency to flesh out the draft conclusions themselves rather than keeping the details for the commentaries, which was not always an easy balance to strike.

47. Mr. Park had proposed the inclusion of reservations and unratified treaties, two issues that were certainly important in practice, but whether they might better be dealt with in the commentary was an open question. Some members had asked about the distinction between subparagraphs (b) and (c): in his view, the distinction was a temporal one. Subparagraph (b) covered

the case in which a rule was emerging at the time of the negotiation or conclusion of a treaty, whereas subparagraph (c) covered that in which a new rule was created after the conclusion of a treaty. In any event, the drafting of the subparagraphs could certainly be improved, and consideration could be given to the proposal to merge subparagraphs (a) and (b).

48. Regarding draft conclusion 13 on resolutions of international organizations and conferences, all Commission members were aware of the need to proceed with caution when dealing with that potentially difficult subject and of the factors that had to be taken into account, as explained in the Special Rapporteur’s third report. The necessary caution should not, however, prevent the conclusion from being expressed more positively, as had been proposed by Mr. Saboia. While he agreed with the need to further qualify international conferences, he was not sure that they needed to be universal: for example, in its case law, the International Court of Justice had referred to the Conference on Security and Cooperation in Europe: Final Act (Helsinki Final Act). Non-universal conferences could thus also be relevant for the purpose of identifying particular custom.

49. With regard to draft conclusion 14 on judicial decisions and writings, he shared the general view that the text should be expanded. He could see the merit in dealing with the two items in separate draft conclusions and of describing in more detail, at least in the commentary, the different kinds of judicial decisions that were covered. The description of the role of national courts would require careful drafting, and most members appeared to agree that it belonged in draft conclusion 14, as well as in the draft conclusions on forms of practice and evidence of *opinio juris*.

50. One member had wondered whether it was appropriate to describe judicial decisions as “subsidiary” means, thereby relegating their value, as if resort to them would be had only after exhaustion of the primary means of identification of the rules of customary international law or in order to complement other means. However, that was not what was meant by “subsidiary”. Judicial decisions and writings were different in nature from treaties, customary international law and general principles of law in that they were not primary sources, as were those mentioned in subparagraphs (a), (b) and (c) of Article 38, paragraph 1, of the Statute of the International Court of Justice. They came into play as part of a single process of determining whether a certain customary rule existed. He had no objection to the point that had been raised concerning the benefit of considering the writings of jurists representing the various legal systems of the world, which should be reflected in the commentary.

51. Two members had asked why he had not addressed the issues of separate and dissenting opinions, particularly those of the judges of the International Court of Justice. Although that was a vast subject, the short answer was that Article 38, paragraph 1 (d), of the Statute of the International Court of Justice referred to “judicial decisions”, and although separate and dissenting opinions were not without importance, inasmuch as they could shed light

on the Court's decisions, they were not judicial decisions within the meaning of that provision.

52. Some members had noted that he had not taken into consideration the general comments, recommendations and reports of the treaty bodies. Those sources were, of course, of great interest, but it must be recalled that such bodies had specific and limited powers under the specific treaties that provided for their establishment, as the Commission had emphasized in its Guide to Practice on Reservations to Treaties.<sup>84</sup>

53. There had been a good deal of interest in and support for draft conclusion 15 on particular custom. He acknowledged that the heading of Part Six of the draft conclusions was somewhat artificial, given that it had been formulated, not without some difficulty, to cover both draft conclusions 15 and 16, but perhaps the two should be separated.

54. With regard to conclusion 16 on the persistent objector, he supported the idea of including practical examples in the commentary. The proposal to amend the draft conclusion so that it referred to the State persistently objecting "to the opposability to itself" of a new rule of customary international law was valuable and warranted consideration by the Drafting Committee. However, paragraph 92 of the third report already indicated that "a State may deny that an emerging rule has become a rule of customary international law, or object to the applicability of the rule to itself, or do both". As to whether it was necessary to address the persistent objector rule in a draft conclusion, he believed that the answer was yes, since the issue might well arise before judges who were asked to identify rules of customary international law. It would thus be useful to provide practitioners with guidelines on how the matter was to be evaluated, stressing the stringency of the requirements for a State to become a persistent objector. He had taken note of comments by Commission members concerning the importance of addressing the relationship between the persistent objector rule and *jus cogens*.

55. Turning to the proposals that had been made for new elements to be covered under the topic, several members had proposed that a separate draft conclusion be devoted to the work of the International Law Commission. They had questioned the classification of its work as being part of "writings", and Mr. Forteau had described the Special Rapporteur's position as "reductive". Although that was perhaps the case, he was not sure that this position was incorrect, especially since his third report indicated that special importance could be attached to collective works, in particular the texts and commentaries emerging from the work of the International Law Commission. In any case, even if he himself was not convinced of the need for a separate draft conclusion on the matter, he accepted that the members were strongly in favour of one, and he hoped that the Drafting Committee would find the best way forward and exercise the necessary caution to avoid

giving the impression that the Commission was inflating its own importance.

56. With regard to collective works, he was of the view that, despite their importance, it would be preferable to refer to them in the commentary rather than in a separate draft conclusion.

57. Mr. Park had proposed that the Commission address the relationship between general principles of law and customary international law. He recalled that the Secretary-General of AALCO had said that general principles of law might be a suitable topic to study in its own right at some point in the future. That might be true, although he tended to think that, rather like the topic of *jus cogens* in the 1990s, there might not yet be enough guidance in practice and judicial decisions to justify studying the topic. In any event, he believed that the relationship, as well as the distinction, between general principles and customary law should at least be mentioned in the project. He would consult with Mr. Park on how best to cover the issues of the burden of proof and *opinio juris* over time, and with Mr. Murase, who had proposed that subsequent practice within international organizations be examined. He would also consider Mr. Murase's proposal to formulate a draft conclusion on the role of what he had referred to as "unilateral measures of States". He was not sure, however, that it was necessary to devote a separate draft conclusion to that heterogeneous body of acts.

58. In his next report, he would also seek to deal with specific issues, such as access to State practice, evidence of acceptance as law and a bibliography, as had been proposed by a number of speakers.

59. As to the future programme of work, he was of the view that, in the light of the debate, a realistic aim would be to complete a first reading of the draft conclusions and commentaries by the end of the Commission's sixty-eighth session in 2016. If that proposal was accepted, it would be necessary to proceed in two stages, given the importance of the commentaries. First, if the Drafting Committee was able to complete its work at the current session and provisionally adopt a set of draft conclusions, he could then prepare the draft commentaries to all the conclusions in time for the beginning of the next session in 2016. The members would then be able to consider them carefully and the Commission could adopt the full set of draft conclusions adopted on first reading and their commentaries before the end of the Commission's sixty-eighth session in 2016.

60. In conclusion, he thanked the members for having approved of referring all of the proposed draft conclusions to the Drafting Committee, including those that had already been provisionally adopted at the current session and at the Commission's sixty-sixth session in 2014.

61. The CHAIRPERSON said that he took it that the Commission wished to refer draft conclusions 3 [4], 4 [5] and 11 to 16 to the Drafting Committee.

*It was so decided.*

<sup>84</sup> General Assembly resolution 68/111 of 16 December 2013, annex. The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and corrigenda 1–2, pp. 23 *et seq.*

**Crimes against humanity<sup>85</sup> (A/CN.4/678, Part II, sect. I,<sup>86</sup> A/CN.4/680,<sup>87</sup> A/CN.4/L.853<sup>88</sup>)**

[Agenda item 10]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

62. The CHAIRPERSON invited Mr. Murphy, Special Rapporteur on the topic “Crimes against humanity”, to introduce his first report (A/CN.4/680).

63. Mr. MURPHY (Special Rapporteur) said that the first report on crimes against humanity consisted of six chapters and an annex, which included two proposed draft articles. The introduction provided information on the basis for the inclusion of the topic in the Commission’s programme of work and set out the purpose and structure of the report. Chapter I explained why a new convention on the prevention of crimes against humanity was needed. It was interesting to note that the footnote to paragraph 12 referred, *inter alia*, to a new study published in 2014 on the possibility of drafting a new treaty on the topic, entitled *On the Proposed Crimes Against Humanity Convention*.<sup>89</sup> The organizers of the conference on crimes against humanity that had been held in Geneva the previous summer, in which several Commission members had participated, had produced a useful report that captured the views expressed at that conference, entitled *Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity*.<sup>90</sup> Amnesty International, which had expressed its support for the Commission’s project in July 2014, had published a memorandum that made some initial recommendations for the Commission’s work. The topic was also attracting some media attention; for example, the magazine *The Economist* had published a brief editorial that mentioned the Commission’s project. It was now for the Commission to work through the issues that the topic presented and to carefully develop a series of draft articles that would serve as the best means for crafting a treaty in that area.

64. Chapter I recounted the reactions of States to the inclusion of the topic of crimes against humanity in the Commission’s programme of work. As indicated in paragraph 18, most of the 23 States that had addressed the topic in the Sixth Committee at the sixty-ninth session of the General Assembly had welcomed its inclusion.

<sup>85</sup> At its sixty-fifth session (2013), the Commission decided to include the topic in its long-term programme of work (*Yearbook ... 2013*, vol. II (Part Two), pp. 78–79, para. 170, and pp. 93 *et seq.*, annex II). At its sixty-sixth session (2014), the Commission decided to include the topic in its programme of work and to appoint Mr. Sean D. Murphy as Special Rapporteur on the topic (*Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 164, para. 266).

<sup>86</sup> Mimeographed; available from the Commission’s website, documents of the sixty-seventh session.

<sup>87</sup> Reproduced in *Yearbook ... 2015*, vol. II (Part One).

<sup>88</sup> Mimeographed; available from the Commission’s website, documents of the sixty-seventh session.

<sup>89</sup> M. Bergsmo and T. Song (eds.), *On the Proposed Crimes Against Humanity Convention*, Brussels, Torkel Opsahl, 2014.

<sup>90</sup> L. N. Sadat and D. J. Pivnichny, *Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes against Humanity*, Crimes against Humanity Initiative, Whitney R. Harris World Law Institute, Washington University School of Law, July 2014 (available from: <http://sites.law.wustl.edu/docs/harris/Final-CAHGenevaReport-071714.pdf>).

Although a few had expressed the view that there was no gap in international law in relation to crimes against humanity, others had spoken in favour of drafting a new convention but in an alternative forum and covering a wider range of crimes. On balance, Governments seemed to be of the view that there was value in developing a new convention, but that the latter must be pursued carefully, paying particular attention to its relationship with the Rome Statute of the International Criminal Court. That relationship was also addressed in section C, as was the relationship between a convention on crimes against humanity and other treaties.

65. Chapter II provided background on the subject of crimes against humanity; section A dealt with the meaning of the concept of “crimes against humanity” and referred to the most important articles on the subject; section B recounted the historical emergence of the prohibition of crimes against humanity; section C dealt with the jurisdiction of international and special courts and tribunals over crimes against humanity; and section D addressed the adoption and application of national legislation on crimes against humanity. It contained details on the national laws of a few States, such as Finland and Switzerland, as well as aggregated data on some 70 States, from a study by the International Human Rights Clinic of the George Washington University Law School, which had been published in July 2013.<sup>91</sup>

66. In its report on the work of its sixty-sixth session, the Commission had asked States to provide it with information on their legislation,<sup>92</sup> and, to date, it had received responses from Austria, Belgium, Cuba, the Czech Republic, Finland, France, Germany, the Republic of Korea, Spain, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. He was grateful to those States and hoped that other States would do the same.

67. To assist in understanding existing treaties that could be useful for the topic, chapter III reviewed multilateral conventions that promoted crime prevention, criminalization and inter-State cooperation in that area. It was encouraging to note that there were many models, which had been largely accepted by States, on which the Commission could rely in making choices about the kinds of provisions to include in the draft articles. Sections A to C dealt with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions for the protection of war victims and various other treaties concerning the prevention and punishment of torture, enforced disappearances, trafficking in persons and transnational organized crime.

68. Chapter IV addressed the broad issue of preventing and punishing crimes against humanity. As was indicated

<sup>91</sup> International Human Rights Clinic of the George Washington University Law School, *Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction* (2013), updated and partially reprinted in A. J. Carrillo and A. K. Nelson, “Comparative law study and analysis of national legislation relating to crimes against humanity and extraterritorial jurisdiction”, *The George Washington International Law Review*, vol. 46, No. 3 (2014), pp. 481–530.

<sup>92</sup> *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, p. 20, para. 34.

in paragraph 78, treaties that addressed efforts to criminalize acts were largely focused on the punishment of individuals for the crime once it had been committed, but many also imposed an obligation of some type on States parties to prevent the crime as well. Section A thus provided detailed information on the nature and scope of an “obligation to prevent”, covering a series of categories: first, treaties containing such an obligation; second, comments by treaty bodies on such an obligation; third, United Nations resolutions; fourth, relevant international case law; and fifth, the views of publicists.

69. When considering Sir Michael Wood’s third report on identification of customary international law the previous week, Mr. Forteau had noted that he, in his first report on the topic of crimes against humanity, had relied on the practice of international organizations. He had referred to those sources, not because he believed that they established rules of customary international law, but rather because they provided guidance for drafting a convention on crimes against humanity. In the light of such sources, Section B explained the advantages of including in the convention a general obligation to prevent and punish, an obligation to pursue specific prevention measures and a non-derogation provision. Section C, which comprised paragraph 120, contained a proposed draft article 1 on the prevention and punishment of crimes against humanity.

70. If draft article 1 were to be written completely *de novo*, there might be questions as to its meaning, but fortunately there was considerable treaty practice to serve as guidance. Thus, paragraph 1 of the proposed draft article contained essentially the same language as that of article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide. In its 2007 judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice had interpreted that article extensively, stating that its language imposed two obligations on States parties: first, the obligation not “to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law” (para. 166 of the judgment) and, second, the obligation “to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing” such acts (*ibid.*). For the latter of those obligations, the State party was merely expected to use its best efforts—a due diligence standard—when it had a “capacity to influence effectively the action of persons likely to commit, or already committing, genocide” (*ibid.*, para. 430), which depended on its geographic, political and other links to the persons or groups at issue. Furthermore, the State party was obligated to do only what it was legally capable of doing under international law.

71. A breach of that general obligation engaged the responsibility of the State if the conduct at issue was attributable to it pursuant to the rules of State responsibility. Indeed, the Court had stressed that a breach of the obligation to prevent was not a criminal offence but rather a violation of international law that engaged traditional State responsibility.

72. In addition, in March 2015, the Human Rights Council had adopted a resolution on prevention of genocide<sup>93</sup> that provided some insights into the kinds of steps to be taken to give effect to article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide. Among other things, the resolution “[r]eiterates the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means”, “[e]ncourages Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention” and “[e]ncourages States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and subregional mechanisms”.<sup>94</sup>

73. More recent conventions had also included a prevention provision that sought to be more specific about the measures to be taken in that area. His proposed draft article 1, paragraph 2, specified those measures by using essentially the same language as article 2, paragraph 1, of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, which provided that: “Each State shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”

74. Practice under the Convention against torture and other cruel, inhuman or degrading treatment or punishment and similar treaties indicated that, depending on the particular crime in question and the context in which the State party was operating, such measures might be pursued in various ways. The State party might be expected to take measures to educate government officials on the State’s obligations under the relevant treaty regime. Training programmes for police, military, militia and other personnel might be necessary to prevent the proscribed act. National laws and policies would likely be necessary to raise awareness of the criminal nature of the act in question and allow for early detection of any risk of its commission. Furthermore, once the crime had been committed, such an obligation reinforced other obligations imposed on the State party under the treaty to investigate and prosecute or extradite the perpetrators, since doing so had a deterrent effect. Again, the responsibility of the State party was engaged if it failed to use its best efforts to organize the governmental apparatus as necessary and appropriate in order to minimize the risk of the proscribed act being committed.

75. For egregious crimes, such obligations were accompanied by a provision indicating that no exceptional circumstances, such as an armed conflict or state of emergency, could be invoked as justification for the crime. Such general statements, sometimes placed at the beginning of the treaty, stressed that the obligation not to commit the offence was non-derogable in nature. For that reason, draft article 1, paragraph 3, which used language

<sup>93</sup> Human Rights Council resolution 28/34 of 27 March 2015.

<sup>94</sup> *Ibid.*, paras. 2–4.

that was essentially the same as that of article 2, paragraph 2, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, provided that no exceptional circumstances could be invoked as a justification of crimes against humanity.

76. Chapter V of the first report concerned the definition of crimes against humanity. As was indicated in paragraph 121, the most widely accepted formulation was that of article 7 of the Rome Statute of the International Criminal Court, which reflected an agreement reached among more than 120 States. Various subsections addressed the key elements of article 7, drawing upon the jurisprudence of the International Criminal Court, the International Tribunal for the Former Yugoslavia, the International Tribunal for Rwanda and other tribunals.

77. Section A addressed the meaning of “widespread or systematic attack” and section B the phrase “directed against any civilian population”. Section C noted that the definition covered conduct by non-State actors in certain circumstances, and section D considered what was meant by “with knowledge of the attack”. Section E analysed the various types of prohibited acts, ranging from “murder” to “other inhumane acts”. Section F contained a proposal for a draft article 2, entitled “Definition of crimes against humanity”, which reproduced almost verbatim article 7 of the Rome Statute of the International Criminal Court. As was indicated in paragraph 176, three non-substantive changes, which were necessary given the different context in which the definition was being used, had been made: first, the beginning of paragraph 1 had been changed to read “For the purpose of the present draft articles” rather than “For the purpose of this Statute”; second, the same change had been made in the opening phrase of paragraph 3; and third, the phrase “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”, which appeared in article 7, paragraph 1 (*h*), of the Rome Statute of the International Criminal Court, had been replaced with “in connection with any act referred to in this paragraph or in connection with acts of genocide or war crimes”.

78. Finally, chapter VI set out a tentative road map for the completion of work on the topic. A second report, to be submitted in 2016, would likely address the obligations set forth in paragraph 179, such as the obligation for each State party to ensure that crimes against humanity constituted an offence under its national law. Although subsequent work on the topic would fall to the members of the Commission elected for the 2017–2021 quinquennium, he had nevertheless outlined in paragraphs 180 and 181 a possible timetable for the third and fourth reports, which would allow for a first reading of the draft articles on the topic by 2018 and a second reading by 2020. He would welcome the members’ views concerning issues that should be addressed in the next report and on the proposed timetable.

79. In conclusion, he hoped that the Commission would decide to refer the two draft articles to the Drafting Committee.

*The meeting rose at 1 p.m.*

## 3255th MEETING

*Friday, 22 May 2015, at 10 a.m.*

*Chairperson:* Mr. Narinder SINGH

*Present:* 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. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Crimes against humanity (*continued*) (A/CN.4/678, Part II, sect. I, A/CN.4/680, A/CN.4/L.853)

[Agenda item 10]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Ms. ESCOBAR HERNÁNDEZ commended the Special Rapporteur on his first report (A/CN.4/680), which comprehensively described not only the background to the topic, but also international and national legal responses to crimes against humanity. She fully agreed with the Special Rapporteur on the need for an international legal instrument to curb such heinous crimes to the fullest extent possible. The Commission’s earlier work on related issues, such as the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,<sup>95</sup> the draft code of crimes against the peace and security of mankind<sup>96</sup> and the Rome Statute of the International Criminal Court had made an important contribution to efforts to suppress the most serious international crimes and to safeguard the legal values and principles central to “humanity’s conscience”.

2. In the past few decades, the following had become clear: the defence of the key principles and values of the international community was directly linked to the fight against impunity; certain types of conduct had to be characterized as contrary to those principles and values; crimes against humanity were among those prohibited types of conduct; and States had a general legal obligation to adopt all the requisite measures at the domestic and international levels to prevent and punish such crimes. The Commission should therefore set out to define mechanisms to give effect to those international principles and obligations at the domestic level and to strengthen international cooperation and mutual legal assistance. It was essential to ensure that devious procedural tactics did not render the wealth of international legal instruments inoperative, with the result that perpetrators of crimes against humanity went unpunished.

<sup>95</sup> *Yearbook ... 1950*, vol. II, document A/1316, pp. 374–378, paras. 97–127.

<sup>96</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 17 *et seq.*, para. 50.