Provisional

For participants only

18 June 2018
Original: English

International Law Commission

Seventieth session (first part)

Provisional summary record of the 3401st meeting
Held at Headquarters, New York, on Friday, 11 May 2018, at 3 p.m.

Contents

18-07694 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez Mr. Aurescu Mr. Cissé Ms. Escobar Hernández Ms. Galvão Teles Mr. Grossman Guiloff Mr. Hassouna Mr. Hmoud Mr. Huang Mr. Jalloh Ms. Lehto Mr. Murase Mr. Murphy Mr. Nguyen Mr. Nolte Ms. Oral Mr. Ouazzani Chahdi Mr. Park Mr. Peter Mr. Rajput Mr. Reinisch Mr. Ruda Santolaria Mr. Saboia Mr. Šturma Mr. Vázquez-Bermúdez Sir Michael Wood

Secretariat:

Mr. Pronto	Principal Assistant Secretary to the Commission

The meeting was called to order at 3 p.m.

Identification of customary international law (agenda item 6) (*continued*) (A/CN.4/710, A/CN.4/716 and A/CN.4/717)

The Chair invited the Commission to resume its consideration of the fifth report on identification of customary international law (A/CN.4/717).

Mr. Rajput, recalling that international lawyers invoked rules of customary international law every day but had great difficulty in agreeing on a definition of customary international law, said that the Special Rapporteur was to be commended for his hard work over the years in identifying, if not in defining, such law and for producing an analytically precise report that had sought to build upon the outcome of the first reading. The exercise, benefiting also from the excellent memorandum by the Secretariat on the ways and means for identification of customary international law (A/CN.4/710), had become essential at a time marked by greater participation of States from different regions of the world that had not previously been able to note their impact on the formation of customary international law. Additional efforts to give access to materials providing evidence of such law would make the international law-making process truly participatory.

The fact that the Commission had spent 70 years working on the topic, which was a fundamental component of international law, reflected its implicit objective of preserving the flexibility of the topic. While it was both important and necessary to codify the principles underpinning it, the outcome should not disturb the often-trodden path of identification of customary law or affect the future development of the law. It appeared to him that the Special Rapporteur was struggling to find an appropriate place for academic writings, which was an arduous task considering the abundant literature available on the topic. The Special Rapporteur had adopted the expedient approach of appending a bibliography rather than weaving academic references into the commentaries. While that approach might have been necessary for the current topic, there was a need for further discussion, because the role of the literature gave rise to similar difficulties in other areas of the Commission's work.

He agreed with the Special Rapporteur that the topic should be limited to identification of customary international law and that the relationship between customary international law and other sources of international law or a burden of proof should not be dwelt upon; otherwise, the Commission would be entering into the area of application with its the complex case law.

With regard to the two-element approach, he agreed that it was necessary to establish the two elements independently. The discussion about the inductive and deductive approaches in paragraph (5) of the commentary to draft conclusion 2 watered down the effect of the two-element approach. Excessive reliance on the deductive approach of the International Court of Justice in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* could disturb an otherwise well-established balance. The Court had in fact adopted both the deductive and the inductive approaches to identify the existence of a custom, but extreme care was in order since the outcome of the Commission's work would be used by domestic courts to identify customary law, particularly in view of the comments of some States, including China and Israel, on the need for rigour and objectivity.

Turning to draft conclusion 4 (Requirement of practice), he said that two issues were embedded in paragraph 2: whether the practice of international organizations could contribute to general practice, and the role and importance of that practice of that practice. In his own view, the practice of international organizations might contribute to general practice, if it was the outcome of direct or indirect participation of States as a direct expression of their actions or actions undertaken by the international organization as agents of States. If, as some members had argued, international organizations had a personality of their own and were not acting merely as agents of States, as might sometimes happen, it was difficult to see how those actions could contribute to State practice. If they did, that would open a Pandora's box. For instance, in several investment arbitration cases administered by the World Bank through the International Centre for Settlement of Investment Disputes, States had been directed to pay compensation to foreign investors when they adopted regulations in the public interest. Without any clarification of whose practice was involved, such case law might be treated as practice and States would have to pay compensation for regulations adopted in the public interest. The Commission could not simply say that the fact that such a situation might not have arisen in the past did not exclude the possibility of such an interpretation, if it was not carefully determined which parts of the activity of an international organization counted as State practice and which did not.

Furthermore, the paragraph in question opened the possibility that the practice of international organizations could be treated as State practice and the resolutions of international organizations and

intergovernmental conferences as no more than evidence of customary law. In the cases concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda/Burundi/ Uganda)* the International Court of Justice had not declared the practice of an international organization to constitute custom, but had treated the resolution of a body functioning through States to be customary law, referring in particular to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation between States. Such examples did not support paragraph 2 but, rather, gave a larger role to a resolution adopted by States; however, that role was reduced by draft conclusion 12, paragraph 2, which declared such resolutions to be only evidence of customary law. Moreover, while a resolution of the General Assembly might contribute to State practice, the same could hardly be said about a statement of the President of the General Assembly.

The role and importance of international organizations in general international law and international relations should not be imported into State practice; their role, powers and functions depended on their constituent instruments. He noted that the International Court of Justice had not acceded to the request of the World Health Organization for an advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, even though that request had been made pursuant to a resolution of the member States; the advisory opinion had, however, been given subsequently upon the request of the General Assembly. Any assignment of such general competence to a specialized agency would have run counter to the provisions of its constituent instrument and to the powers and functions of international organizations. There was a need, however, to attach greater weight to resolutions adopted by States members of international organizations and intergovernmental conferences. In the 1960s and 1970s, developing States had insisted that nearly all resolutions of the General Assembly had an undeniable value as customary law, while legal writers had sought to downgrade their value as being merely hortatory, with no effect. In draft conclusion 12 adopted on first reading, some value had been assigned to those resolutions, but their role had been diminished by the Special Rapporteur's proposed changes, which he consequently did not support. He proposed the following wording for its paragraph 2: "In certain cases, the practice of international organizations, with the participation of States directly or indirectly, may contribute to the expression of rules on customary international law".

With regard to draft conclusion 6, paragraph 1, he supported the Special Rapporteur's position and looked forward to expressing himself further on the subject. He did not, however, support the Special Rapporteur's proposal to include the words "virtually uniform" in draft conclusion 8, paragraph 1, to which he still preferred the formulation adopted on first reading. "Virtually uniform" introduced a standard of universality where the standard was, rather, one of generality. Article 38 (1) (b) of the Statute of the International Court of Justice referred to "general practice", as did the title of draft conclusion 8. Introducing the standard of universality would raise the threshold for custom higher than under the said provisions of the Statute of the International Court of Justice and would place it at the same level as jus cogens. The process of identification of customary international law should not be made so difficult that it would be virtually impossible to prove its existence. Following the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, where the International Court of Justice had restricted itself to the words "a uniform and widespread State practice", the development of its case law did not reveal any constant requirement that practice should be "virtually uniform".

As for the previous wording of paragraph 1, which had referred to the practice of "States whose interests [are] specially affected", he saw no need to give a special role to the practice of such States. The Commission's work should not compromise the equality of States and the equal potential of all of them to shape international law. He agreed with Mr. Tladi and others that the practice of specially affected States was not a question of strong versus weak States; it rested on the issue of practice *in abstracto* versus practice *in concreto*. The narrow view taken by some scholars that there could be no State practice except in concrete situations and in response to something was contradicted by judicial and State practice. In the law of the sea negotiations, for example, support for the length of the territorial sea by certain neighbouring or opposite coastal States or by landlocked States was a practice *in abstracto*, yet such practice was as equally valid as the practice of other States. In the case of the *S.S. "Lotus"*, the *North Sea Continental Shelf* cases and the *Fisheries Jurisdiction* cases, the Court had adopted the *in abstracto* rather than the *in concreto* approach to locate relevant State practice. Moreover, attaching too much importance to the practice of States said to be specially affected defeated the very purpose of the "sufficiently widespread" element in the paragraph in question. The International Court of Justice had referred to the practice of specially affected States in the *North Sea*

Continental Shelf cases only because of an absence of practice by other States; the practice would still have to meet the requirements of generality prescribed in the draft conclusion. The Commission should not make any reference to specially affected States, either in the text or in the commentary.

He supported the persistent objector provisions, which were essential to the process of identification of customary law and should not be excluded from the topic. It was not just a question of application. A "without prejudice" clause needed to be added to clarify that local custom did not affect globally applicable customary law. He supported the referral of the draft conclusions to the Drafting Committee.

Mr. Grossman Guiloff, commending the Special Rapporteur for his dedication and skill and for his thoughtful responses to the concerns and suggestions of States, said that the draft conclusions and commentaries, together with the memorandums prepared by the Secretariat, provided extensive coverage of identification of customary international law and would serve as valuable guidance for the international community. He was concerned, however, about the limited number and geographical representation of States that had submitted written comments, since customary international law was generally intended to apply to all States. The presence of the Commission in New York could offer an opportunity to seek to identify more fully the reasons for that situation, with a view to suggesting solutions beyond merely bringing the situation to the attention of States. More systematic consultation of international organizations would also have been useful and would have served to enrich the Commission's decision-making process; it would have provided more examples of practice and opinions that could have been reflected in the commentaries. He recalled that the General Assembly had taken such a step under its resolution 69/126 with regard to the articles on the responsibility of international organizations.

The draft conclusions and the commentaries were properly expected to be read together, making it necessary for there to be a balance between them: he supported the Special Rapporteur's efforts to that end, in the interest of clarity and completeness, and stressed the importance of precision, rigour and brevity. The commentaries provided valuable clarification and examples to serve as more extensive guidance in the identification of customary international law; the Special Rapporteur was to be commended for his flexibility in introducing therein such additions as were necessary. He agreed with the Special Rapporteur that greater precision was needed as to the relevant practice of international organizations; the agreements identified by the Special Rapporteur provided a solid basis on which to build.

Noting the unanimous agreement that the practice of States had a paramount role in the creation and expression of rules of customary international law, that the practice of international organizations among themselves and in their relations with States could give rise or attest to rules of customary international law binding in such relations, and that a wide array of acts by international organizations was relevant to the process of identification of such rules, he concurred with some members that the examples of such acts provided by the Special Rapporteur could be expanded to include examples from the Security Council should and such specialized bodies as the World Health Organization, the International Labour Organization, the World Intellectual Property Organization and the Universal Postal Union.

He himself could suggest other examples of a wide array of acts of the Organization of American States that were also worth considering. For instance, it was engaged in numerous projects aimed at combating the problem of illicit drugs and the drug trade in the Americas; those projects came under the responsibility of the organization as such and not of its member States. Similarly, and while no one could dispute that States could develop their own practice within an organization, the Organization of American States, in addition to serving by its nature as a place where States could dialogue peacefully without resorting to weapons or force, was also, through its action to promote disarmament, helping to build peace and cooperation in the world. It was at the same time striving to combat the proliferation of weapons of mass destruction and taking measures to eliminate illegal trafficking in arms. He referred also to the many electoral observation missions that had been deployed by the Organization in 27 countries throughout the Americas since 1962, based on law and a concern to promote fair and free elections, thereby establishing valuable customary norms as to the criteria to be used to assess elections, as well as in matters of gender equity in political campaigns, political financing systems, access to media and the participation of indigenous and Afrodescendent peoples.

In all those activities, the Organization of American States was acting as an entity separate from its member States. While it was true that not everything could be measured and that issues still remained, such as what could be considered binding on an organization, as on a State, it was possible to assess the responsibility of such an organization as a result of its having international legal personality. The idea that there were subjects of law that were more than the sum of their

parts was well grounded and certainly older than the common law tradition; there was nothing to prevent States from creating such entities. Moreover, due to the nature of present-day international challenges, reflected in the existence of permanent organizations, each having the benefits and responsibilities of international personality and operating by virtue of that personality in one or more areas of international cooperation, a reality had been created that could not be addressed on a purely ad hoc basis, with sporadic interactions among members of the international community. The view that, considering how numerous such organizations were, no process could be found to identify customary international law was not persuasive: in matters of health, the World Health Organization would be consulted; in matters of peace and security, customary norms would be found in the relevant organizations. In the computer age, searching through all existing organizations was not a problem.

Going on to address the draft conclusions, he said that he agreed with the Special Rapporteur that the mandate to determine the existence and content of rules of customary international law, set out in draft conclusion 1, encompassed the right to investigate the formation of such rules. On the matter of proof, it was too easy to claim that the report was not about facts. Facts required a legal framework that included assessment in terms, for example, of burden of proof. Nonetheless, that issue could perhaps be discussed in the commentary, or a different ground for their exclusion might be invoked. As for the two-element approach for determining the existence and content of a rule of customary international law, it was well grounded in international law. The expression "general practice that is accepted as law (*opinio juris*)" used in draft conclusion 2 suggested that some form of deduction might be utilized and, indeed, that was not troubling since deduction was not excluded in legal theory. The sole objection to the use of deduction for the identification of a norm of customary international law was that it had become paradigmatic that anything not explicitly accepted by States was not a law. Deduction, however, did not imply an "everything goes" approach; its parameters needed simply to be established more accurately.

With regard to the requirement of a general practice as a constituent element of customary international law, there was no disagreement that State practice was the primary evidence for identifying such law. While looking forward to expressing his opinion thereon in the Drafting Committee, he noted that most of the draft conclusions mentioned States or only addressed States. While the practice of international organizations was mentioned in draft conclusion 4, the type of evidence required to indicate such practice could be better covered. The changes proposed in the text of that draft conclusion in respect of the role of international organizations as actors in their own right in certain cases were not in line with the commentary, which had precisely established such cases. In the past, the practice of international organizations had been considered in attempts to identify customary international law, as, for instance, during the drafting of the articles on the responsibility of international organizations, when the practice and *opinio juris* of international organizations had been considered by the Commission and States to determine whether rules of customary international law had crystallized. While every argument could be countered with an *a contrario* analysis, that was part of the nature of progressive development and further examples to enrich the practice of international organizations would contribute to that end.

The Special Rapporteur noted in paragraph 43 of his report that the practice of international organizations among themselves and in their relations with States could give rise or attest to rules of customary international law binding in such relations. It followed that such rules would apply to all States, having regard to their interdependence. The issue was whether the actions of one actor could in some cases be considered in isolation from the others. He did not support the proposed amendments to paragraphs 1 and 2 of draft conclusion 4, as he found that the double qualification proposed downgraded the role of international organizations and did not reflect the current status of such organizations in international law. In addition, he agreed with the suggestion of Austria that draft conclusions 6, 7 and 8 should also cover the practice of international organizations. The wording of draft conclusion 6 seemed sufficiently careful, but he would appreciate clarification as to how the word "deliberate", as applied to inaction, addressed the concerns of States. The last paragraph of that draft conclusion should be retained: he agreed with the Special Rapporteur that it might be relevant to establish a hierarchy among the various forms of practice on a case-by-case basis. In draft conclusion 7, which was currently limited to assessing a State's practice, the default should not be to reduce the weight to be given to the practice: variation of practice could indicate different positions for different States depending on the circumstances. As for draft conclusion 8, while the text did not call for any further amendment, further clarification might be provided in the commentary concerning general practice, especially in reference to particular customary international law. No changes were needed for draft

conclusion 9, but the addition alluded to by the Special Rapporteur to address the interests of specially affected States would be useful or even necessary. Some consultation might be required to shed further light on the issue.

Regarding draft conclusion 11, he agreed with the Special Rapporteur's suggestion to review the commentary and provide more guidance on factors to be considered, in particular that treaties were only binding on the parties thereto. He appreciated the Special Rapporteur's comment on draft conclusion 12 as to why it did not deal, at least not directly, with the direct role of international organizations in the creation or expression of rules of customary international law, while agreeing with many other members that the role of resolutions, particularly General Assembly resolutions, should be further clarified in all relevant aspects, including their text and purpose and whether they reflected, crystallized or gave rise to customary norms.

Moving on to draft conclusion 13, he said that there was a difference between the decisions of domestic courts and those of international courts. While one component of the persuasive character and legitimacy of such decisions was of course quality of reasoning, the authority of the entity adopting the decision could not be simply ignored. On the question of the nature of the term "subsidiary means", which the Special Rapporteur said was to be understood in opposition to the primary sources, further clarification might be necessary in relation the role of evidence in identifying customary international law, and likewise in draft conclusion 14, as noted by the Special Rapporteur, in relation to teachings.

After carefully considering the Special Rapporteur's amendment to draft conclusion 15 and the argument of Belarus that the persistent objector rule should not apply to the detriment of the international community or the integrity of the international legal system as a whole, he continued to have concerns. One issue raised in scholarly writings was that persistent objectors undermined the significance of the practice of Third World States. It might be useful to address that concern in the commentary, it being understood of course that the context was not that of an academic exercise. He supported the inclusion of a reference to jus cogens in paragraph 3, in view of the valid scope of its applicability, while noting that some members had taken the view that, if that reference was maintained, there should also be other mentions of jus cogens elsewhere in the draft conclusions. While indeed other such references might well be made, that was not an argument for eliminating it from draft conclusion 15. With regard to draft conclusion 16, he agreed with the Special Rapporteur's suggestion that it should be clarified in the commentary how the two-element approach would be applied in cases of particular customary international law and supported the inclusion of "among themselves" in paragraph 2, which served to clarify the subjective element.

He again expressed appreciation for the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available, while stressing the serious need for capacity-building and training; it was not enough to have libraries and access to computers. He agreed with the Special Rapporteur that the Commission should endorse the Secretariat's suggestions and forward them to the General Assembly for consideration. He also supported the referral of the draft conclusions to the Drafting Committee.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Jalloh (Chair of the Drafting Committee) said that the Drafting Committee on Identification of customary international law would be composed of Mr. Argüello Gomez, Mr. Aurescu, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hmoud, Mr. Huang, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi and Mr. Vázquez-Bermúdez, together with Sir Michael Wood (Special Rapporteur) and Ms. Galvão Teles (Rapporteur), ex officio.

The meeting rose at 4 p.m. to enable the Working Group on the Long-term Programme of Work to meet.