

Document:-  
**A/CN.4/3148**

**Summary record of the 3148th meeting**

Topic:  
**<multiple topics>**

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case, the next report would be chiefly devoted to the issues enumerated in paragraph 72, subparagraphs 1 and 2, of the preliminary report. Lastly, in response to several members who had pointed out that it was the first time in the history of the Commission that a woman had been appointed Special Rapporteur, Ms. Escobar Hernández, while welcoming that development, expressed the hope that the composition of the Commission in future might more closely reflect the proportion of women in the community of lawyers of international law, which was significantly higher.

*The meeting rose at 11.55 a.m.*

## 3148th MEETING

*Tuesday, 24 July 2012, at 10.05 a.m.*

*Chairperson:* Mr. Lucius CAFLISCH

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

### Formation and evidence of customary international law<sup>292</sup> (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited Sir Michael Wood (Special Rapporteur) to present his note on formation and evidence of customary international law (A/CN.4/653).

2. Sir Michael WOOD (Special Rapporteur) said that uncertainty about the process of formation of rules of customary international law was sometimes seen as a weakness in international law generally. It was an easy target for those who sought to play down the importance and effectiveness of international law, or even to deny its nature as law. Perhaps the Commission's study of the topic would contribute to the acceptance of the rule of law in international affairs.

3. A more prosaic reason for engaging in the topic was to offer guidance (not prescription) to those who, although they were not necessarily specialists in international law, were called upon to apply it, in other

<sup>292</sup> At its sixty-third session, the Commission included the topic in its long-term programme of work and recommended the preparation of a draft on the topic (*Yearbook ... 2011*, vol. II (Part Two), paras. 365–366, and annex I). At the current session, it decided to include the topic in its programme of work and appointed Sir Michael Wood, Special Rapporteur (see above, 3132nd meeting).

words judges in both the highest and the lower domestic courts. Some arbitrators in investment cases might likewise have little instinctive understanding of how to identify rules of customary international law. Explaining to a domestic judge why something was, or was not, a rule of customary international law could be quite challenging when there was no firm reference point, apart from some rather brief pronouncements by the International Court of Justice. Guidance might also be helpful for lawyers operating primarily within national systems, but who might occasionally encounter public international law in their day-to-day work. He therefore hoped that the Commission's work on the topic would assist judges and lawyers practising in a wide range of fields.

4. His preliminary note should be read together with annex I to the Commission's report on its work at its sixty-third session,<sup>293</sup> which contained the syllabus and an extensive, but by no means comprehensive, list of materials and writings.

5. As the proposal to include the topic in the Commission's programme of work had been discussed in 2010 and 2011 in the Working Group on the long-term programme of work for the quinquennium, current and former members of the Commission had already supplied some very useful input. He looked forward to receiving more input during the current debate, since work on the topic was a collective endeavour.

6. The aim of the note was to stimulate an initial debate. After the introduction, the Special Rapporteur listed seven preliminary points that might be covered by a report in 2013. Those points were of varying degrees of importance, but each should be covered. Section A referred to the Commission's ground-breaking work on the topic in 1949<sup>294</sup> and 1950.<sup>295</sup> It had been almost the Commission's first task and one prescribed by its statute. That very practical work was still relevant and formed the basis for many United Nations publications in the field of international law, including some of the admirable publications prepared by the Codification Division.

7. In addition, there might be much to learn from the Commission's work on other topics, especially when it was largely engaged in codification. Over the years, the Commission had presumably gained considerable experience in identifying rules of customary international law. As the Commission had a dual mandate, namely

<sup>293</sup> *Yearbook ... 2011*, vol. II (Part Two), p. 183.

<sup>294</sup> Memorandum submitted by the Secretary-General, "Ways and means of making the evidence of customary international law more readily available: preparatory work within the purview of article 24 of the statute of the International Law Commission" (A/CN.4/6 and Corr.1; available from the Commission's website). For the Commission's consideration of the subject at its first session, see *Yearbook ... 1949*, 31st meeting, paras. 89 *et seq.* (the working paper prepared by the Secretariat on the basis of the memorandum submitted by the Secretary-General (A/CN.4/W.9) is reproduced in footnote 10 to para. 89). See also the Commission's report to the General Assembly, *ibid.*, paras. 35–36.

<sup>295</sup> *Yearbook ... 1950*, vol. II, document A/3116, Report of the International Law Commission covering its second session, Part II, "Ways and means for making the evidence of customary international law more readily available", paras. 24–94. See also document A/CN.4/16 and Add.1 (article 24 of the statute of the International Law Commission: working paper by Manley O. Hudson), *ibid.*, pp. 24 *et seq.*

progressive development and codification, he was unsure how easy it would be to identify the Commission's practice in that regard, but the effort should be made.

8. Section B drew attention to the London statement of principles applicable to the formation of general customary international law,<sup>296</sup> which might be of interest when considering what form the Commission's output on the topic should take. It might also help in identifying the range of issues that should or should not be covered. It was, however, necessary to bear in mind the fact that the London statement had been drafted some years earlier and no doubt reflected the views of the rapporteurs and members of the International Law Association. It remained to be seen whether the Commission's conclusions would be similar to those reached in the year 2000, some of which had proved to be controversial. The Commission would also need to examine such other efforts as had been made in order to deal with the subject comprehensively.

9. Sections C to F of the chapter concerned Article 38 of the Statute of the International Court of Justice; questions of terminology; the importance of customary international law; and the various theories regarding the formation of customary international law, such as the supposed distinction between "traditional" and "modern" approaches. He hoped that the Commission would not dwell too much on theory, but would focus mainly on practical aspects of the topic.

10. Under section G on methodology, he had emphasized the approach of the International Court of Justice and its predecessor, the Permanent Court of International Justice. In addition to looking at what the International Court of Justice had said about methodology, it would be necessary to scrutinize what it had done in particular cases and what it had, or had not, taken into account when considering whether a rule of international law existed. The Commission would also have to study the approach of other international courts and tribunals and of domestic courts.

11. Although State practice in regard to the formation of customary international law was undoubtedly extensive, it might not be easy to identify, since States rarely articulated their views on the subject, unless they were involved in litigation, and the extent to which their arguments in the course of litigation represented their practice was an interesting question. The Commission should nevertheless try to determine when it was that States regarded themselves as legally bound by international custom.

12. The experience of those who had tried to identify customary international law in specific fields could make a significant contribution to the Commission's work on the topic. In that context, he was thinking, for example,

<sup>296</sup> "London statement of principles applicable to the formation of general customary international law", and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: [www.ila-hq.org/en/committees/index.cfm/cid/30](http://www.ila-hq.org/en/committees/index.cfm/cid/30)). See also the debate in plenary, pp. 922–926 (*ibid.*). The "London statement" also appears on pp. 712–777 (*ibid.*); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid.*).

of the study on customary international humanitarian law published by ICRC in 2005.<sup>297</sup> The legal literature on the formation of customary international law might also shed light on the subject. All basic textbooks addressed the matter, as did some important monographs, and there was a vast array of articles covering the identification of rules in particular fields. There were probably as many different theories about the relationship of practice to *opinio juris* as there were writers on the subject. One major issue dividing writers was whether to regard statements as State practice combined with *opinio juris*, or only as indicative of *opinio juris*. Some had concluded that State practice and *opinio juris* were not really two things that had to be proved separately, but were two separate requirements that might be combined. Such different approaches sometimes led to similar results, but not always.

13. The following chapter of the note examined the scope and possible outcomes of the topic. Those were related but distinct issues. He would be grateful for confirmation that the opinion that he had expressed in paragraphs 20 to 22 of his note was generally shared. As he had indicated in paragraph 23, his initial thinking was that the formation and identification of *jus cogens* did not really belong to the topic.

14. His tentative view of how to proceed was set out in paragraphs 24 to 27 of his note. Although he had suggested that the outcome of the Commission's work might take the form of a set of conclusions with commentaries, guidelines might be an equally appropriate term. Whatever they were called, the conclusions or guidelines should not be unduly prescriptive. The Commission would have to find the right balance between helpful guidance and overly restrictive rule-making, which would accord with the views of the Sixth Committee as summarized in paragraph 3 of his note. The Commission would not be drafting a "Vienna convention on customary international law", because a convention in that field would be inappropriate and inconsistent with the need to retain the necessary degree of flexibility. It should not try to produce a comprehensive text requiring many years of work, but should aim to complete the topic within the current quinquennium, if possible.

15. He was fully aware of the inherent difficulty of the topic and of the need to approach it with a degree of caution. Nevertheless, the outcome should be relatively straightforward, clear and understandable by all those who were confronted with rules of customary international law in their daily work, but who were not necessarily experts in public international law. The topic, like the law of treaties, formed part of the secondary rules of international law, although the distinction between primary and secondary rules was not always clear. However, saying that the Commission was addressing secondary rules emphasized that its task was not to determine substantive rules of law.

16. It would be appropriate to seek certain information from Governments, as that would help them to participate

<sup>297</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Rules) and vol. II (Practice) (Cambridge, United Kingdom, Cambridge University Press, 2005).

in the Commission's work at an early stage. That information could include, first, any official statements concerning the formation of customary international law in, for example, proceedings before international courts and tribunals or at the United Nations, within other international organizations or in national parliaments; second, any significant cases in national, regional or subregional courts that shed light on the formation of customary international law; and third, any writings or work done at universities and institutions other than those listed in annex I of the report of the Commission on the work of its sixty-third session (2011).<sup>298</sup>

17. He encouraged any member of the Commission who had any information or thoughts on any of the aforementioned matters to convey them to him at any time. In view of the fact that Secretariat studies had proved to be invaluable in the context of other topics, he proposed that the Secretariat should be asked to prepare a memorandum describing any earlier work done by the Commission that would be of relevance to the topic under consideration and would shed light on the Commission's understanding of the notion of customary law. The schedule contained in the last chapter of his note was very tentative and subject to review during the next session in 2013.

18. Mr. MURASE thanked the Special Rapporteur for his note, but said that he had already expressed some serious doubts about the topic of the formation and evidence of customary international law in the Working Group on the long-term programme of work. It was regrettable that at the current session it had proved impossible to discuss matters beyond those already on the syllabus, since numerous additional aspects of what was an important topic of international law would have benefited from in-depth analysis and discussion. Part of the Commission's work had always been to consider whether a particular rule had become established as customary international law in a specific field. For example, it was currently examining whether the principle *aut dedere aut judicare* had become part of customary law; it could do the same with the territorial tort exception to State immunity, the issue before the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. Its deliberations could bear fruit because, in each case, the Commission would be focusing on a specific rule. It would be impractical, if not impossible, to consider the whole of customary international law, even at a very abstract level.

19. His critical attitude to the issue stemmed from his participation in the Committee on Formation of Customary (General) International Law of the International Law Association, which had studied the subject for 15 years (from 1984 to 2000). If the Special Rapporteur were to use the London statement of principles applicable to the formation of general customary international law, which was a broad normative statement, as a model for his project, the project would be doomed to fail, because it would end up by stating the obvious or being ambiguous. Almost every guideline in the London statement contained a saving or contingent clause, either because there had been little agreement among Committee members on general

propositions or because they had had serious concerns about them in the light of cases involving issues of customary international law where the ruling had contradicted or been inconsistent with the general proposition in question. All the guidelines required further elucidation owing to their lack of clarity and conditional nature. States were likely to become confused if those guidelines were presented as authoritative, normative statements.

20. Legal advisers to States might well be alarmed by the idea of having to follow a set of guidelines developed by the Commission that were supposed to cover the whole spectrum of customary international law. The Commission had great authority and responsibility, but it was not an academic institution like the International Law Association. That was why, in 1998, the British Institute of International and Comparative Law had advised the Commission not to include the topic on its agenda.

21. Determining the existence of customary international law was predominantly a question of method. That was why he objected to the proposed title of the topic; the word "formation" was a dynamic concept that implied that the law was seen as a process, whereas the word "evidence" was static and premised on the idea that the law was made up of a body of rules. The term "formation" suggested a sociological process whereby a customary rule was created over a period of time. The word "evidence" meant stopping the clock and trying to ascertain the applicable law at that given moment. It was impossible to talk simultaneously of formation and evidence without causing some methodological confusion. In the Working Group, he had suggested that the Commission should confine the scope of the topic to the evidence of customary international law.

22. It would also be necessary to decide for whom the Commission's work on the topic was intended. There were four conceivable target audiences, the first being the Commission itself. The working paper of 1950 prepared under article 24 of the statute of the International Law Commission, "Ways and means for making the evidence of customary international law more readily available",<sup>299</sup> had plainly been designed for use by the Commission itself, as at that initial stage it had been essential to identify appropriate material to be used as a common basis for the codification of customary international law. The 1950 document contained lists of treaty series, collections of judicial decisions and the like, but not much normative content, and had resembled the handout material that a tutor might give to a first-year law student.

23. The three other possible target audiences were States, especially those that were parties to a dispute requiring the interpretation and application of customary international law, whose position was subjective; third-party decision makers, in other words, judges who had to deliver a judgment on a dispute, whose position was intersubjective; and the detached observer, who wished to consider matters from an objective perspective. It was necessary to distinguish between the subjective, intersubjective and objective perspectives in order to avoid confusion.

<sup>298</sup> See footnote 292 above.

<sup>299</sup> See footnote 295 above.

24. The Commission should be careful about the relatively easy approach proposed by the Special Rapporteur, which consisted in examining the case law of international courts and tribunals, because when an international court dealt with a question of customary international law, its primary goal was to settle a dispute between the parties. To that end, it might examine the practice of a limited number of States. A student who wrote a dissertation citing evidence from only a small fraction of the countries of the world would not receive even a passing grade from his professor, because his paper would not have been based on the general practice of States, that being the criterion that had to be met before it was possible to say that a customary norm had been established. In the case concerning *Jurisdictional Immunities of the State*, to which the Special Rapporteur had referred in paragraph 18 of his note, the 10 instances of State practice had been the ones cited by the parties, Germany and Italy. The Court had not examined the practice of all the other States in the world. Although several judges, in separate or dissenting opinions, had remarked upon the lack of assessment of the “silence” of other States, the majority opinion was permissible because of the generally accepted presumption that the members of the Court knew the law (*jura novit curia*) and because their prime responsibility had been not to write an objective dissertation but to settle a dispute brought before it in the intersubjective context of judicial proceedings. In other words, the Court was primarily concerned with the customary law status of the relevant rule as asserted by the parties, on which it rendered its judgment. Hence the Court’s role in the debate surrounding customary international law was limited by its judicial function and was therefore significantly different from that of the Commission, whose work was aimed at the world at large.

25. While it was true that it was easy to collect the relevant passages of the case law of the International Court of Justice or the Permanent Court of International Justice, that approach could be misleading because judicial precedent covered only a limited area of international law. For that reason, the Special Rapporteur should vigorously research the 95 per cent of international law not covered by the case law of international courts.

26. Although it could generally be assumed that customary international law was universally recognized by all States, it was essential to bear in mind the subjective element entering into individual States’ recognition. Article 38 of the 1969 Vienna Convention on the law of treaties stipulated as follows:

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

There had been a major debate at the United Nations Conference on the Law of Treaties as to whether the phrase “recognized as such” was necessary and, if it was necessary, by whom the customary law character of the rule had to be recognized: the third State, some other States or the international community as a whole.

27. Extreme forms of individual recognition or non-recognition of customary norms, such as those reflected in persistent objections or unilateral measures, prompted

major questions about customary international law, including that of how much importance should be attached to recognition or non-recognition by specially affected States. Those questions should be set in the proper context. The concept of opposability functioned as a medium for the creation of new customary rules.

28. He was somewhat troubled by the expression “empirical research” used by the Special Rapporteur in paragraph 19 of his note. In the context of the topic under consideration, the Commission should not be conducting empirical research in the sense of sociology-of-law studies, but rather inductive research in the sense of Georg Schwarzenberger’s *The Inductive Approach to International Law*.<sup>300</sup>

29. The formation of customary international law was an informal process. As Roberto Ago<sup>301</sup> had pointed out, it was a spontaneous process. By definition, customary international law was unwritten law. Ambiguity was of the essence and, probably, the *raison d’être* of customary international law, which was useful because it was ambiguous. It might therefore be better to leave it as something ambiguous that could be clarified, if necessary, by a court when a specific rule was at issue between States.

30. Given the inherent difficulty and sensitivity of the topic, he hoped that the Commission would not be overambitious. For that reason, he proposed that the Special Rapporteur should take a step-by-step approach and start by considering the questions posed by article 38 of the 1969 Vienna Convention. The Commission might have to be content with a modest study that identified the inherent problems in an abstract manner. Many theoretical studies had been produced on the subject not only by Western academics, but also by scholars from other regions. The Commission’s consideration of the topic should therefore be broad-based and reflect the diversity of legal cultures throughout the world.

31. Mr. MURPHY said that it would indeed be useful to review the *travaux préparatoires* to Article 38, paragraph 1, of the Statute of the International Court of Justice, as the Special Rapporteur had suggested, though, of course, that would actually entail a review of the *travaux* associated with the corresponding article of the Statute of the Permanent Court of International Justice. The Special Rapporteur was also right to emphasize that an important element of the topic was the distinction between customary international law and other sources of international law—what could be termed general principles of law. As for the issue of terminology and the possible development of a lexicon of relevant terms, he encouraged the Special Rapporteur to consider the term “law of nations”, which appeared frequently in laws, judgments, publications and even constitutions, and to endeavour to clarify the relation of that term to customary international law.

<sup>300</sup> G. Schwarzenberger, *The Inductive Approach to International Law* (London, Stevens and Sons, 1965).

<sup>301</sup> See, among others, R. Ago, “Science juridique et droit international”, *Collected Courses of The Hague Academy of International Law, 1956-II*, vol. 90, pp. 857–954, and “Positive law and international law”, *American Journal of International Law*, vol. 51 (1957), pp. 691–733.

32. While he supported the Special Rapporteur's proposal to give some attention to theory, he would caution against getting bogged down in theoretical distinctions of no practical value. There were two specific arenas to which he hoped the Special Rapporteur would pay special attention, and which were important because many analyses of customary international law, instead of establishing the actual practice of all or a majority of States worldwide, used certain surrogates. First, the existence of a customary rule was often inferred from the adoption by States of a resolution, usually in the framework of an international organization. Most such resolutions were not legally binding, so the key question was whether they were evidence of a rule of customary international law. The answer doubtless turned largely on the content of the resolution (including whether it truly embodied a legal view as opposed to a political preference); its acceptance at the time of adoption and thereafter; and its consistency with State practice. The decision of the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided useful guidance in that regard. Second, the existence of a customary rule was frequently inferred from the existence of a rule in a widely ratified treaty, which purportedly generated a customary obligation binding on States that had not adhered to the treaty. While widespread ratification of a treaty might indicate the existence of a settled rule of customary international law, presumably one must assess the degree of adherence to the treaty, the reasons for non-adherence and the practice of States not parties to the treaty. The Court's decisions in the *North Sea Continental Shelf* cases and in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* provided guidance on the issue. If the Commission's work on the topic resulted in an outcome that provided clarification with respect to the aforementioned two arenas in which custom was purportedly formed, it would constitute a remarkable legacy.

33. Difficulties might arise in assessing when the conduct of a particular State or group of States called for special attention with respect to customary law formation. One side of the coin was the concept of "specially affected States", whose positive participation was necessary for the formation of a particular norm; the other was the concept of the "persistent objector", which applied in situations where, even if a norm could be said to have developed, it did not apply to certain States because they consistently rejected it. Those concepts were important because they attempted to mediate between the values of community and sovereignty in international law. The Commission should avoid upsetting the apparently prevailing balance between those values.

34. He agreed that it would be best not to include a study of the concept of *jus cogens*. Though the concept might be relevant in some areas, it was not a creature of any one source of international law but rather a limitation on those sources, and furthermore it presented its own difficulties in terms of evidence, formation and classification, which were outside the scope of the topic.

35. He supported the proposed scope of the topic as set forth by the Special Rapporteur in paragraphs 21 and 22

of his note. He himself viewed the project as largely one of *lex lata*, with the Commission's goal being to clarify existing rules governing the formation and evidence of customary international law, not to propose new rules. As to the form of the project, he supported the crafting of a series of conclusions with accompanying commentaries. Lastly, he agreed that it would be useful to seek the kinds of information from States outlined in the footnote at the end of the first subparagraph of paragraph 27.

36. Since the Special Rapporteur had invited Commission members to assist him in identifying useful sources of State practice, he had provided him with a recent edition of a book he had authored, *Principles of International Law*,<sup>302</sup> containing information about sources on the practice of the United States relating to international law. As more and more information about State practice was becoming available online, it might be helpful for the Special Rapporteur or the Secretariat to catalogue the main relevant electronic databases and Internet sites.

37. Mr. TLADI said that he had supported the topic from the start because he had often wondered how domestic legal experts could be expected to make sense of customary international law when international lawyers, including judges of the International Court of Justice, often adopted conflicting approaches to the formation and evidence of customary international law. In many domestic systems, customary international law was automatically considered law, in contrast to treaties, which often had to be incorporated. Judge M'Kean in *Respublica v. De Longchamps* had stated that law "collected from the practice of different nations" was "in its full extent" part of the law of the United States, and Blackstone had made a similar comment about English law.<sup>303</sup> In some legal systems, such as that of South Africa, the constitution provided that customary international law was part of the law of the land. He had therefore believed that by considering the topic the Commission could make a practical contribution.

38. In thinking more concretely about the topic, he had asked himself why, when the Commission had, during its first session in 1949, decided to take up the codification of treaty law,<sup>304</sup> it had not also taken up the topic of customary international law. Treaty law and customary international law were perhaps the two most important topics in the study of international law, and it was worth asking why the body responsible for the progressive development and codification of international law had not, during its 63-year history, save for incidental references, addressed the formation of customary international law. He wondered if the topic was in fact inappropriate for treatment by the Commission. It was one thing to try to codify the body of

<sup>302</sup> S. Murphy, *Principles of International Law*, 2nd edition (Saint Paul, Minnesota, West Academic Press, 2012).

<sup>303</sup> According to Sir William Blackstone, "the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land" (W. Blackstone, *Commentaries on the Laws of England in Four Books, Notes Selected from the Editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and Others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood in Two Volumes*, Book IV, chap. V (Philadelphia, J. B. Lippincott Co., 1893)). Available from [http://oll.libertyfund.org/titles/2142#Blackstone\\_1387-02\\_801](http://oll.libertyfund.org/titles/2142#Blackstone_1387-02_801).

<sup>304</sup> *Yearbook ... 1949*, report to the General Assembly (A/CN.4/13 and Corr.1-3), paras. 16 and 19.

law on which written law was based; trying to codify the body of law on which unwritten law was based was entirely different, even if the Commission was not embarking on codification in the classical sense. When the Commission began its work on treaties, it had expressed reservations about the wisdom of codifying treaty law, and only in 1961 had it moved towards true codification.<sup>305</sup> While the change made sense for treaty law, it would be wise to maintain the course suggested by the Special Rapporteur for customary international law. At no point should the Commission consider codification proper.

39. He strongly agreed with the Special Rapporteur that the outcome of the Commission's work should be a set of conclusions or propositions, with commentaries. In keeping with the aim identified by the Commission during its previous session, he did not favour an approach that was at all prescriptive. The Commission should not attempt to evaluate the relative correctness of any of the several theoretical approaches to customary international law, which predated the existence of the Commission. Not only would such an effort be outside the scope of a project to establish practical guidelines for practitioners, he feared that it would fail given the divergent approaches to the formation of customary international law that he had detected during his first eight weeks of participation in the Commission's work.

40. During the Commission's consideration of the topic of treaties over time, he had said that the interpretation of treaties was an art, not a science—a view that had admittedly not been shared by all, but perhaps that was more a matter of degree than principle. While the fluidity of customary international law presented dangers, particularly for the uninitiated, its flexibility was a great strength and an essential feature that should be jealously guarded and not tampered with. It allowed international law, even treaty law under the influence of article 31, paragraph 3 (c), of the 1969 Vienna Convention, to evolve with State practice. With that in mind, he urged the Commission to approach its task with caution and realistic ambition.

41. The Special Rapporteur had raised an important point concerning the unity of international law and the consequent uniformity of the customary international law-making process. While not disagreeing with the Special Rapporteur, he would caution that that was yet another theoretical issue that the Commission should perhaps not try to resolve. The point should not be overstated. While the same theoretical process of practice and *opinio juris* was relied on to advance arguments about the existence of customary international law norms, "soft law", for example, played a bigger role in the formation of customary norms on environmental protection than, say, in the law relating to nuclear disarmament. If indeed the Commission's purpose was to elucidate States' tendencies and practice, then the question of whether different approaches existed should be answered on the basis of a study of practice; their existence should not be excluded *a priori*.

42. Another important question raised by the Special Rapporteur related to the topic of *jus cogens*, or peremptory norms of international law. He agreed with

the Special Rapporteur that *jus cogens* should be excluded from the topic, but his reasons were different. The Special Rapporteur wished to exclude *jus cogens* because such norms could be found in treaties as well as in customary international law, but that was equally true of norms of customary international law, which could also be found in treaties. Even when found in a treaty, a *jus cogens* norm derived its binding force from a source independent of and higher than the treaty. Both customary international law and treaty law were based on a theory of State consent, while *jus cogens* was, he suspected, based on something different. *Jus cogens* should be excluded from consideration of the topic because it introduced complexities that were entirely different from those found in customary international law. In particular, the identification of *jus cogens* could not be explained simply in terms of practice and *opinio juris*. Furthermore, he had heard some rather conservative notions of international law aired in the Commission and doubted that it would be able to reach agreement on various aspects of *jus cogens*. He hoped nonetheless that the Commission would in the future decide to tackle that classical yet modern concept.

43. He wished to conclude by mentioning what he believed would be at the heart of the Commission's work on the topic: the relevant weight, identification, expression and illustration of practice and *opinio juris* in the search for customary international law. He wondered whether the flexibility inherent in customary international law, which, as he had earlier said, should be jealously guarded, was actually embedded in the two elements of practice and *opinio juris*. In his view the study of the topic should consider the extent to which tribunals, especially the International Court of Justice, and States, when presenting arguments before courts or in diplomatic forums, actually relied on those two elements.

44. The notorious inconsistency of the International Court of Justice regarding how much weight to give each of those two elements was sometimes evident even within a single case and judgment. For example, in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, the Court, faced with the questions of whether a minister for foreign affairs enjoyed immunity under customary international law and, if so, whether there were exceptions to such immunity, had adopted two different standards of rigour for the two questions. For the first, it had taken a nonchalant and flexible approach, not even referring to State practice or *opinio juris*. Yet in considering whether there were exceptions for international crimes, it had addressed the issue of which of the two elements it had found not to have been met. Indeed, it had been observed that there was an inverse relationship between the Court's finding that there was a rule of customary international law and its diligence in applying the elements. He hoped that the Commission would not be shy in addressing any legal implications of that inconsistency.

45. Ms. JACOBSSON said that she agreed with the Special Rapporteur's analysis of why the proposed topic was important. The outcome could be especially useful for practitioners in ministries of foreign affairs and litigators of State cases. She also agreed that the Commission should aim to produce, as the outcome, a set of conclusions with commentaries.

<sup>305</sup> *Yearbook ... 1961*, vol. II, document A/4843, paras. 38–39.

46. However, the topic raised a number of challenging questions. The first was whether the process whereby customary international law was formed had changed with the great increase in the number of sovereign States. States in general had more difficulty in responding or objecting to the development of new norms; it was simply increasingly difficult to keep track of legal developments around the world, particularly in different regions. Another challenging problem was the relation of regional practice to the unity of international law as a system, and that, too, might have changed over the past 50 years. In the light of those changes, the Commission might have to think carefully about the consequences for the formation of international law of a State's silence on a particular development.

47. The distinction between the mere practice of States and State practice in the legal sense needed to be analysed more deeply. States might apply international law as a matter of policy, but reject a given norm because of conflict with a treaty or for other reasons, in effect treating international law as a sort of smorgasbord. The practice of applying international law for policy reasons but not as *opinio juris* presented challenges for interpretation.

48. She supported the proposal for a study by the Secretariat. She also thought that States could be approached with questions, but they would need to be carefully framed. She feared, for example, that the Special Rapporteur's proposal in the footnote at the end of the first subparagraph of paragraph 27 of the note to ask for official statements concerning the formation of international customary law might be misinterpreted as asking for their views on customary law itself rather than on its formation. She would also be reluctant to ask States about relevant work being done at national institutes, as in her experience Governments were simply too busy to respond to such requests.

49. She was confident that the Commission could learn from the mistakes made by the International Law Association<sup>306</sup> and ICRC<sup>307</sup> in their studies. Her last point was that any conclusions drawn up by the Commission should not prejudice future developments regarding the formation of international law.

### Cooperation with other bodies (*continued*)\*

[Agenda item 12]

#### STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

50. The CHAIRPERSON welcomed Mr. Peter Tomka, President of the International Court of Justice, and invited him to address the Commission.

51. Mr. TOMKA (President of the International Court of Justice) said that he was delighted to return to the Commission after 10 years and grateful for the opportunity to continue the long-standing tradition of cooperation and exchange of ideas. In fact, cooperation

and mutual assistance between the two institutions would be a theme of his presentation. In particular, he wished to highlight some recent Court decisions that were based on, or particularly relevant for, the Commission's work.

52. The Court's recent case law confirmed the existence of a well-established trend towards interaction between the two institutions and demonstrated the influence of the Commission's work on the Court's reasoning. That interaction was evident in the judgment of 20 July 2012 delivered by the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. In that case, Belgium had complained of Senegal's conduct and its failure to comply with its obligations under the Convention against torture and other cruel, inhuman or degrading treatment or punishment. Belgium had maintained that Senegal, the country in which Mr. Hissène Habré, the former President of the Republic of Chad, had been living in exile since 1990, had not given effect to Belgium's repeated demands aimed at ensuring that Mr. Habré should be prosecuted in Senegal or extradited to Belgium for acts characterized as crimes of torture. Belgium had considered that Senegal, by failing to prosecute Mr. Habré or to extradite him to Belgium to stand trial, had breached its obligations under article 5, paragraph 2, article 6, paragraph 2, and article 7, paragraph 1, of the Convention.

53. It was not surprising that the law governing the international responsibility of States had played an important role in that case. It had also added to Belgium's submissions in that the latter had considered itself entitled to request a finding of wrongfulness owing to the breaches of the Convention against torture perpetrated by Senegal by virtue of article 42, subparagraph (b) (i), of the Commission's articles on responsibility of States for internationally wrongful acts,<sup>308</sup> or at any rate under article 48 of that text.

54. In its judgment, the Court had touched on that aspect when it had addressed issues relating to the admissibility of Belgium's claims. Senegal had objected to the admissibility of those claims and had maintained that Belgium was not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation to prosecute Mr. Habré or to extradite him, because none of the alleged victims of the acts attributed to Mr. Habré had been of Belgian nationality at the time when the acts had been committed, a contention that Belgium had not disputed.

55. Belgium, in its application, had requested the Court to adjudge and declare that its claim was admissible and had noted that "[a]s the present jurisdiction of the Belgian courts is based on the complaint filed by a Belgian national of Chadian origin, the Belgian courts intend to exercise passive personal jurisdiction" (see paragraph 65 of the judgment). In the oral proceedings, Belgium had claimed to be in a "particular position" since it had availed itself of its right under article 5 of the Convention against torture to exercise its jurisdiction and to request Mr. Habré's extradition (*ibid.*). Belgium's arguments on

<sup>306</sup> See footnote 296 above.

<sup>307</sup> See footnote 297 above.

\* Resumed from the 3146th meeting.

<sup>308</sup> General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and commentaries thereto appear in *Yearbook ... 2001*, vol. II (Part Two), paras. 76–77.

that score had become even broader when its counsel, at the oral proceedings stage, had declared that “[u]nder the Convention, every State party, irrespective of the nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform” (*ibid.*).

56. The Court had noted that the divergence of views between the parties on that point raised the issue of Belgium’s standing. In addition, Belgium had based its claims not only on its status as a party to the Convention but also on “the existence of a special interest that would distinguish Belgium from the other parties to the Convention and give it a specific entitlement in the case of Mr. Habré” (para. 66). In considering whether being a party to the Convention was sufficient to entitle a State to bring a claim to the Court concerning the cessation of alleged violations by another State party of the latter’s obligations under that instrument, the Court had recalled that the object and purpose of the Convention against torture, as stated in its preamble, was “to make more effective the struggle against torture ... throughout the world”. Consequently, the Court had noted that, by virtue of their shared values, the States parties to the Convention “have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity” (para. 68). In the eyes of the Court, it therefore followed that the State in whose territory an alleged violator of a Convention was present was required to meet its obligations under that Convention. The Court observed as follows:

The obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred (para. 68).

57. Drawing on the well-known case concerning *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, the Court had taken the question of common interest one step further:

That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties “have a legal interest” in the protection of the rights involved ... These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case (para. 68).

58. In support of its reasoning, the Court had drawn a parallel between the Convention against torture and the Convention on the Prevention and Punishment of the Crime of Genocide, considering that the relevant provisions of the former were similar to those contained in the latter. In that regard, the Court had recalled its advisory opinion of 28 May 1951 on *Reservations to the Convention on Genocide*, in which it had observed that

[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention (p. 12 of the advisory opinion).

59. The Court had clarified that, in practical terms, the existence of that common interest implied that each State party to the Convention against torture was entitled to make a claim concerning the cessation of an alleged

breach by another State party. It had noted that if a special interest was required for that purpose, in many cases no State would be in the position to make such a claim. The Court’s judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* clearly stated that

any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end (para. 69).

The Court had therefore concluded that Belgium, as a State party to the Convention against torture, had standing to invoke the responsibility of Senegal for the alleged breaches of the obligations of Senegal under the Convention and that, in consequence, the claims of Belgium based on article 6, paragraph 2, and article 7, paragraph 1, were admissible. Given that conclusion, there had been no need for the Court to pronounce on whether Belgium also had a special interest that could support its claims.

60. After considering the merits, the Court had emphasized that “in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility” (para. 121). Adopting a perspective that was compatible with the Commission’s work, the Court had also emphasized the continuing nature of Senegal’s breaches of its obligations under the Convention, stating that Senegal was “required to cease this continuing wrongful act in accordance with general international law on the responsibility of States for internationally wrongful acts” (*ibid.*) and was to “take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it [did] not extradite Mr. Habré” (*ibid.*).

61. Another recent judgment, delivered by the Court on 19 June 2012 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, illustrated the importance of the Commission’s work in the area of State responsibility. The judgment on the question of compensation flowed from the judgment of 30 November 2010 on the merits in the same case. In its judgment on the merits of 2012, the Court had held that the Democratic Republic of the Congo had breached certain international obligations by virtue of the fact that Mr. Diallo, a Guinean national, had been detained on two separate occasions for a total of 72 days (para. 12 of the judgment). The Court had concluded that Guinea had failed to demonstrate that Mr. Diallo had been subjected to inhuman or degrading treatment during his detentions (*ibid.*). Additionally, the Court had found that Mr. Diallo had been expelled from the Democratic Republic of the Congo on 31 January 1996 and had received notice of his expulsion on the same day (*ibid.*).

62. In its judgment of 30 November 2010, the Court had said that the Democratic Republic of the Congo was required to pay compensation to Guinea for the injury suffered by Mr. Diallo as a result of the violation by the Congolese State of its obligations under a number of human rights conventions (para. 161). According to the judgment on the merits, the amount of compensation was to be based on the

injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995–1996, including the resulting loss of his personal belongings. Since the parties had failed to reach an agreement on the amount of compensation before the prescribed date, the Court had settled that issue in its judgment of 19 June 2012.

63. In its judgment of 19 June 2012, the Court had reiterated the formulation used in the case concerning the *Factory at Chorzów*, which was also reproduced in the commentary to the draft articles on responsibility of States for internationally wrongful acts,<sup>309</sup> asserting that “[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law” (para. 13 of the judgment).

64. In order to assess the general principles governing compensation, particularly as they related to injury resulting from unlawful detention or expulsion, the Court had considered the practice of other international courts, tribunals and commissions, such as the European Court of Human Rights, the Inter-American Court of Human Rights, the Iran–United States Claims Tribunal, the Eritrea–Ethiopia Claims Commission and the United Nations Compensation Commission.

65. At that stage of the proceedings, Guinea had sought compensation under four heads of damage including one head of non-material injury and three heads of material damage: alleged loss of personal property, alleged loss of professional remuneration during detention and after expulsion, and alleged deprivation of potential earnings. In assessing the compensation claimed under the head of non-material damage, the Court had relied on analyses and examples of case law that were consistent with the work of the Commission on the subject of compensation and international responsibility, recognizing that “[n]on-material injury to a person which is cognizable under international law may take various forms” (para. 18).

66. In considering the pertinent and/or aggravating factors that had informed its decision on compensation, the Court had taken an approach consonant with positions held by the Commission and reflected in the commentary to the draft articles on responsibility of States for internationally wrongful acts. Relying on abundant case law from various international courts, the Court had concluded that “[q]uantification of compensation for non-material injury necessarily rests on equitable considerations” (para. 24). Ultimately, the Court had considered that the amount of US\$85,000 would provide appropriate compensation with regard to the non-material injury suffered by Mr. Diallo (para. 25).

67. As to the assessment of compensation to be paid by the Democratic Republic of the Congo for the alleged loss of Mr. Diallo’s personal property, the Court had again relied on the notion of equitable considerations and had looked at the case law of the European Court of Human

Rights and the Inter-American Court of Human Rights. On the basis of the foregoing reasoning, it had awarded the sum of US\$10,000 to Guinea under that head of damage (para. 36).

68. The Court had once again relied on the case law of various international courts to support its conclusion that a claim for income lost as a result of unlawful detention was cognizable as a component of compensation, even if estimation was necessary because the amount of the lost income could not be calculated precisely. Ultimately, however, the Court had held that “Guinea had not proven to the satisfaction of the Court that Mr. Diallo suffered a loss of professional remuneration as a result of his unlawful detentions” (para. 46).

69. With regard to the loss of professional remuneration allegedly suffered by Mr. Diallo in the period following his unlawful expulsion, the Court had been guided by its previous analysis, according to which the Congolese State could not be required to make compensation to Guinea for that head of damage. Invoking, *inter alia*, the Commission’s work and its commentary to draft article 36 of the draft articles on responsibility of States for internationally wrongful acts, the Court had explained as follows:

Guinea’s claim with respect to Mr. Diallo’s post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US\$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative ... Thus, the Court concludes that no compensation can be awarded for Guinea’s claim relating to unpaid remuneration following Mr. Diallo’s expulsion (para. 49).

70. The Court had recently delivered another judgment that illustrated particularly well the interaction between the Court and the Commission. The judgment of 3 February 2012 in the case concerning *Jurisdictional Immunities of the State* had raised two sets of interesting issues: one relating to State responsibility and the other to the Commission’s work in elaborating the draft articles<sup>310</sup> that provided the basis for the United Nations Convention on Jurisdictional Immunities of States and Their Property.

71. In that case, Germany had claimed that Italy had failed to respect the jurisdictional immunity to which Germany was entitled under international law by allowing civil claims to be brought against Germany in Italian courts seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War. Germany had further requested the Court to find that Italy had violated its jurisdictional immunity by taking measures of constraint against the Villa Vigoni, which was German State property situated in Italian territory and used as a German cultural centre, and by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those that had given rise to the claims brought before Italian courts.

72. In its judgment, the Court had drawn extensively on the Commission’s draft articles on responsibility of States for internationally wrongful acts and the commentary thereto, as well as its work on jurisdictional immunities

<sup>309</sup> See the commentary to draft article 36 (Compensation), in particular paragraph (2) and footnote 511, *Yearbook ... 2001*, vol. II (Part Two), p. 99.

<sup>310</sup> *Yearbook ... 1991*, vol. II (Part Two), para. 28.

of States and their property, in order to determine whether Italy had breached its international obligations regarding jurisdictional immunities of States when its national courts had denied Germany the immunity to which it otherwise would have been entitled. The Court had begun by considering the relevance of the principles governing jurisdictional immunity within the broader framework of the rules of international law.

73. The Court had noted that the parties were “in broad agreement regarding the validity and importance of State immunity as a part of customary international law” (para. 58), but disagreed over the law to be applied. Germany had contended that the law to be applied was that which had determined the scope and extent of State immunity in the period between 1943 and 1945, at the time that the events giving rise to the proceedings in the Italian courts had taken place, while Italy had maintained that the law that had applied at the time the proceedings themselves had occurred should prevail. In addressing those issues, the Court had indicated that, in accordance with the principle stated in article 13 of the Commission’s articles on responsibility of States for internationally wrongful acts, “the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred” (*ibid.*). Since the claim before the Court concerned the actions of the Italian courts, it was the international law in force at the time of those proceedings that the Court had to apply. The Court had also emphasized that the law governing State immunity was essentially procedural in nature (*ibid.*). For those reasons, it had considered that it must examine and apply the law on State immunity as it had existed at the time of the Italian proceedings, rather than that which had existed in the period between 1943 and 1945 (*ibid.*).

74. Subsequently, the Court had had to address the question of whether there was a conflict between a rule, or rules, of *jus cogens* and the rule of customary law that required one State to accord immunity to another. In that instance, the Court had answered the question in the negative. Reiterating the procedural nature of the rules governing State immunity, the Court had concluded that those rules had no bearing on the legality of the acts committed by the German army during the Second World War, which were the acts underlying the proceedings in the Italian courts. It had further stated the following:

That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943–1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility ... For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission’s Articles on State Responsibility (*ibid.*, para. 93).

75. In addressing Germany’s final submissions and the remedies sought, the Court had again expressly relied on the Commission’s work in the area of State responsibility. In its fifth submission, Germany had essentially asked the Court to order Italy to take the steps necessary to ensure that all the decisions of its courts and other judicial authorities infringing Germany’s sovereign immunity

should become unenforceable and cease to have effect (para. 137). The Court had upheld Germany’s fifth submission and, in examining the consequences arising from it, had expressly referred to two provisions of the Commission’s articles on responsibility of States for internationally wrongful acts, namely subparagraph (a) of article 30 (Cessation and non-repetition) and article 35 (Restitution) (*ibid.*).

76. The United Nations Convention on Jurisdictional Immunities of States and Their Property, the draft articles of which had been elaborated by the Commission, had informed the Court’s reasoning in its judgment in the *Jurisdictional Immunities of the State* case. The Court had also referred to the significant State practice to be found in the judgments of national courts in the field of jurisdictional immunity. According to the Court, that practice was reflected in the domestic legislation of States, in the claims to immunity asserted by States before foreign courts and in “statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention [on Jurisdictional Immunities of States and Their Property]” (para. 55).

77. In the opinion of the Court, it was clear from that context that *opinio juris* relating to the rules governing the jurisdictional immunity of the State was reflected, in particular, in the assertion by States claiming immunity that international law accorded them a right to such immunity, in the acknowledgement by States granting immunity that international law imposed upon them an obligation to do so and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States (*ibid.*).

78. The Court had relied on conclusions drawn by the Commission more than 30 years previously in order to point to the prevalence of the relevant rule of customary international law. In its judgment, the Court referred to the conclusion reached by the Commission in 1980 that the rule of State immunity had been adopted as a general rule of customary international law solidly rooted in the current practice of States.<sup>311</sup> Moreover, according to the Court:

That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity (para. 56).

79. Later in its judgment, the Court had turned to the question of whether national legislation that provided for a “territorial tort exception” expressly distinguished between *acta jure gestionis* and *acta jure imperii*, a question to which it had subsequently given a negative response. The Court had observed that the notion that State immunity did not extend to civil proceedings in respect of acts committed on the territory of the forum State that caused death, personal injury or damage to property had originated in cases concerning road traffic accidents and other insurable risks. The Court had further

<sup>311</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 142, paragraph (26) of the commentary to draft article 6 of the draft articles on jurisdictional immunities of States and their property.

noted that, among others, article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property also did not distinguish between *acta jure gestionis* and *acta jure imperii* in that context. It should be recalled that article 12 rendered the jurisdictional immunity of the State inapplicable

in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission (quoted in para. 69 of the judgment).

80. With that in mind, the Court had stated, “The International Law Commission’s commentary on the text of what became Article 12 of the United Nations Convention<sup>312</sup> makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis*” (para. 64). After taking note of the views expressed by some States during the drafting of the Convention, the Court had considered that it was not called upon to resolve the question of whether there was in customary international law a tort exception to State immunity applicable to *acta jure imperii* in general, since the issue before it was “confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict” (para. 65).

81. As part of that analysis, the Court had considered that, although article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property—and the Convention as a whole—did not expressly exclude the acts of armed forces from its scope, the Commission’s commentary to the text of draft article 12 stated that the provision did not apply to situations involving armed conflicts.<sup>313</sup> That understanding had also been reiterated by the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property when reporting<sup>314</sup> to the Sixth Committee.<sup>315</sup> In addition, that understanding had not been the subject of any protest by States and had been reflected in the declarations made on ratification of the Convention by some States. The Court had thus endorsed that understanding of the rules governing jurisdictional immunity.

82. The Court had also noted that the maintenance of immunity was established in national jurisprudence in such circumstances, meaning that the State was entitled to invoke immunity “for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State” (para. 77 of the judgment). Referring to *opinio juris* that supported such an interpretation, the Court had noted that

<sup>312</sup> *Yearbook ... 1991*, vol. II (Part Two), p. 45, paragraph (8) of the commentary to draft article 12.

<sup>313</sup> *Ibid.*, p. 46, paragraph (10) of the commentary.

<sup>314</sup> A/59/22.

<sup>315</sup> *Official Records of the General Assembly, Fifty-ninth Session, Sixth Committee*, 13th meeting (A/C.6/59/SR.13), para. 36.

[t]he almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases (*ibid.*).

83. While considering the scope of jurisdictional immunity, the Court had also had to consider Italy’s claim that a limitation of that rule might follow from the gravity of the breach or the preemptory character of the rule breached, a possibility not provided for in the above-mentioned Convention or other relevant instruments, according to the Court. In that regard, the Court had noted that the absence of any such provision from the Convention was particularly significant.

84. The Court had further pointed out that the Working Group established by the Commission in 1999 in order to consider various developments in practice highlighted by the Sixth Committee had stated in its report that the issue of claims in the event of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens* should not be ignored.<sup>316</sup> However, it had not recommended any amendment to the text of the articles elaborated by the Commission. The matter had subsequently been considered by the Working Group of the Sixth Committee, which had decided that it was not yet ready for a codification exercise. During subsequent debates in the Sixth Committee, no State had raised any objection to that decision. In fact, the Court had concluded that such a history indicated that, at the time of adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property in 2004, States had not considered that customary international law limited immunity in the manner suggested by Italy.

85. In 2011, the Court had rendered two substantive decisions. The first of those, the judgment of 5 December 2011 in the case concerning *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* raised some pertinent questions with respect to the work of the Commission. In that case, the former Yugoslav Republic of Macedonia (the “Applicant”) had claimed that Greece (the “Respondent”) had breached article 11, paragraph 1, of the 1995 Interim Accord<sup>317</sup> by objecting to the admission of the Applicant to the North Atlantic Treaty Organization (NATO). That provision reserved the right of Greece to object to any membership referred to in the provision if and to the extent that the former Yugoslav Republic of Macedonia was to be referred to in such organization or institution differently than in paragraph 2 of Security Council resolution 817 (1993).

86. The justifications advanced by the Respondent in response to the allegation that it had breached the 1995 Interim Accord contained references to aspects of the law of State responsibility. The Respondent had argued that any failure on its part to comply with its obligations under the Interim Accord could be justified as a countermeasure

<sup>316</sup> *Yearbook ... 1999*, vol. II (Part Two), annex, p. 172, para. 3.

<sup>317</sup> Interim Accord (New York, 13 September 1995), United Nations, *Treaty Series*, vol. 1891, No. 32193, p. 3.

pursuant to the law of State responsibility. The Respondent had asserted that the violations of the Applicant were serious and that its own responses were consistent with the conditions reflected in the articles on responsibility of States for internationally wrongful acts, which it described as requiring that countermeasures should be proportionate, should be taken for the purpose of achieving cessation of the wrongful act and should be confined to the temporary non-performance of the Respondent's obligation not to object. The Respondent had stated that it had repeatedly informed the Applicant of its positions.

87. For its part, the Applicant had called attention to the requirements set forth in the articles on State responsibility that countermeasures must be taken in response to a breach by the other State, must be proportionate to those breaches and must be taken only after notice to the other State. In the view of the Applicant, none of those requirements had been met. The Applicant was further of the view that the requirements for the imposition of countermeasures contained in the articles on State responsibility reflected general international law.

88. The Respondent had relied, in addition, on the *exceptio non adimpleti contractus*—which it had described as a general principle of international law—in support of its assertion that a State suffering breaches of treaty obligations had the right to suspend the execution of corresponding obligations in respect of the State at fault. In particular, the Respondent had argued that there was a synallagmatic relationship between its own obligation not to object under article 11, paragraph 1, of the Interim Accord and the obligations of the Applicant under articles 5, 6, 7 and 11 of the Accord. In short, the Respondent had considered that the breach on the part of the Applicant of its treaty commitments precluded the wrongfulness of any suspension by the Respondent of the execution of its obligations in response to that breach. Furthermore, the Respondent had contended that the conditions governing the *exceptio* were much less rigid than those relating to the suspension of a treaty or precluding wrongfulness by way of countermeasures, because exercise of the *exceptio* was not subject to any procedural requirements.

89. For its part, the Applicant had asserted that the allegedly customary status of the *exceptio* had not been demonstrated by the Respondent. It had further observed that the law governing State responsibility did not accept the *exceptio* as justification for suspending the execution of international obligations. It had argued instead that article 60 of the 1969 Vienna Convention should be applied in response to material breaches of treaty commitments. Furthermore, the Applicant had challenged the Respondent's argument aimed at drawing attention to a purported synallagmatic relationship between the obligations set forth in the relevant provisions of the Interim Accord.

90. In the end, the Court had found that the Respondent had failed to demonstrate that the Applicant had breached the Interim Accord, except in relation to the use of the symbol prohibited by article 7, paragraph 2. The Court had further observed that the Respondent had failed to show a connection between the use of the symbol in 2004 by the Applicant and the Respondent's objection to the Applicant's admission to NATO in 2008. Consequently,

the Court had stated that the arguments put forward by the Respondent did not indicate that the Respondent objected to the Applicant's admission to NATO "on the basis of any belief that the *exceptio* precluded the wrongfulness of its objection" (para. 161). In short, the Court had considered that the Respondent had failed to observe the conditions of application of the *exceptio*, as it had set them out in its own pleadings. Accordingly, the Court did not consider that it was called upon to determine whether the *exceptio* formed part of contemporary international law.

91. The last substantive decision worthy of note, although it did not touch upon the issues currently under consideration by the Commission, was the advisory opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*. In the advisory opinion, the Court had felt it necessary to highlight a certain inequality in the process for reviewing judgments rendered by the ILO Administrative Tribunal, in the sense that only the Organization could seek the remedy and not the individual concerned. Although the United Nations had reformed its justice system, ILO had not. However, the time was ripe to do so, particularly since the Administrative Tribunal served as the tribunal not only for ILO, but also for many other organizations, including the Permanent Court of Arbitration.

92. That completed his review of the outcome of the Court's main judicial activities over the last 10 months. In their long history, the Court and the Commission, as the principal judicial and legal organs of the United Nations, respectively, had been mutually influential. While the Commission had studied carefully the judgments of the Permanent Court of International Justice and the International Court of Justice, with special rapporteurs taking them into account when drafting various proposals, the Court had not overlooked the work of the Commission, not only the conventions based on its codification efforts, but also its texts that had not become conventions, such as the articles on responsibility of States for internationally wrongful acts.

93. There was also the personal aspect of the relationship between the Court and the Commission, since of the Court's 103 judges to date, 34 had been members of the Commission, and 9 of those had become President of the Court. He expressed the hope that such fruitful cooperation, exchange of views and mutual influence would continue and flourish in the future.

94. The CHAIRPERSON thanked Mr. Tomka for his statement and invited questions and comments from members of the Commission.

95. Mr. KITTICHAISAREE, speaking as Chairperson of the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), said that the Group had been anxiously awaiting the judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. However, it appeared to be quite narrow in scope. He wished to ask Mr. Tomka, as a former member of the Commission, whether he considered that the Commission could make a meaningful contribution

in the area of the obligation to extradite or prosecute through the codification and progressive development of customary international law or treaty practice.

96. In his separate opinion on the case, Judge Abraham seemed to have set an unrealistically high threshold for evidence of *opinio juris*. In its recent discussion of the topic “Formation and evidence of customary international law”, the Commission had observed that there were now nearly 200 States, which made it more difficult to determine *opinio juris*. In his separate opinion, Judge Abraham seemed to assert that some States claimed universal jurisdiction over certain crimes of their own volition and on the basis of a sovereign decision, without considering themselves bound to do so. With all due respect, that was not a very realistic assertion.

97. Sir Michael WOOD said that he had two queries relating to procedural matters. First, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, as Judge Abraham had noted in his separate opinion, an exceptional number of questions had been put to the parties. He asked whether there was an increasing trend for the Court to ask questions; that would not be an unwelcome development, since questions could be very helpful both for the Court and the parties concerned in framing the case.

98. Second, he observed that quite often correspondence of a substantive nature was not posted on the Court’s website, making it somewhat difficult to follow the Court’s decisions. One example included the letters sent in the case concerning *Questions relating to the Obligation to Prosecute or Extradite* as written responses to questions put at the provisional measures and merits stages. It might be useful if such information could be posted on the website in future.

99. Mr. PETRIČ said that his question concerned the legal validity of the Court’s advisory opinions on important issues, such as its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Although such opinions were based on the same rules of law, and were adopted following similar procedures by the same persons, he wondered what their real impact was compared with judgments. As a judge of a national constitutional court, he would find it difficult to deal one day with an advisory opinion that might not be taken seriously and the following day with a judgment that was binding.

100. Mr. TOMKA (President of the International Court of Justice), in response to Mr. Kittichaisaree, said that it was for the Commission to decide whether it could draw inspiration for its future work from the judgment in *Questions relating to the Obligation to Prosecute or Extradite*. The Court was not in such a comfortable position as was the Commission: it could not select topics, but had to consider the cases submitted to it. Moreover, it could not engage in theoretical debates; it had to decide specific cases and consider only those issues relevant to its decision. In its judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the Court had interpreted the Convention against torture, and in particular the obligations under article 6, paragraph 2,

and article 7, paragraph 1. The Court had found that the principal obligation under article 7 was to submit the case for prosecution and that extradition was not strictly speaking an obligation but an option available to the State that, if chosen, relieved it of its obligation to prosecute.

101. It was not appropriate for him to comment on the views of his colleagues: some were prolific writers, while others expressed their views only when necessary. He would therefore prefer to refrain from commenting on the separate opinion of Judge Abraham. Opinions and judgments should speak for themselves. His role as President of the Court was simply to remind colleagues that in their opinions they should not disclose the confidential nature of deliberations, and that the purpose of a separate opinion was not to criticize the judgment, but to explain why the judge concerned could not endorse the interpretation or the conclusions of the Court. It was for the reader to draw his or her own conclusions as to whether the Court’s conclusion or the separate opinion provided a more convincing analysis of the situation and the rules in question.

102. Replying to Sir Michael, he confirmed that there was an increasing trend for members of the Court to ask questions of the parties. The Court’s policy regarding questions from individual members was that the judge in question informed colleagues of his or her intention to put a question, and they could offer advice on the content of the question. However, for questions put on behalf of the Court, the majority of members had to agree on the content beforehand.

103. When the Court’s website had originally been set up, only its judgments had been posted; subsequently the pleadings of the parties had been added, but without their annexes, namely the presentation of the facts and legal arguments. Currently, a debate was under way on whether to post the written pleadings of the parties. As to Sir Michael’s specific suggestion, he recalled that selected correspondence was, in fact, published in bound volumes containing the written pleadings and transcripts of all the arguments, although not until some time after the Court handed down its decisions.

104. Turning to the question by Mr. Petrič, he said that some advisory opinions were followed by the organs that had specifically requested them, which was indeed their intended purpose. Generally speaking, the Court acceded to requests from the General Assembly for advisory opinions. Most judges considered that by issuing advisory opinions the Court was making its contribution to the work of the United Nations. However, personally speaking, he was not always convinced that there was a real need on the part of the requesting organ for such opinions: it was often simply a question of a majority of Member States prevailing in the voting process that resulted in the adoption of the relevant General Assembly resolution. For example, in 2010, when the Court had issued an advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, five judges had taken the view that the Court should have exercised its discretion and declined the request for an advisory opinion. They had considered that the question was not of relevance to the ongoing work of the General Assembly, as had been demonstrated

by resolution 64/298 of 9 September 2010: although the draft resolution had provided for an item on the follow-up to the advisory opinion to be placed on the agenda of the General Assembly, following heated negotiations and a change in the sponsorship of the resolution, the paragraph containing the decision to include the item had been deleted.<sup>318</sup>

105. Mr. FORTEAU said that he had two questions concerning how the Court had dealt in its jurisprudence with the articles on responsibility of States for internationally wrongful acts. First, in its recent judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the Court had referred only to its jurisprudence of 1951 and 1970 on the question of Belgium's standing, without reference to articles 42 and 48 of the articles on responsibility of States for internationally wrongful acts. He wondered whether the Court had not considered it necessary to include such a reference or whether it had doubts as to the customary status of those two provisions.

106. Second, concerning the obligation to cease wrongful acts, he noted a certain inconsistency in the jurisprudence of the Court. In its 2009 judgment in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court had based the obligation to cease wrongful acts not on the law of responsibility, but on the need to comply with the judgments of the Court, and had indicated that it would not mention that obligation in the operative part of its judgment, unless it was appropriate and special circumstances so required. However, in its judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the Court had based the obligation to cease wrongful acts on State responsibility and had mentioned that obligation in the operative part of the judgment, without explaining under what circumstances it was required. He therefore wondered whether the precedent established in 2009 was no longer valid and the obligation to cease wrongful acts would systematically be mentioned in judgments on the basis of State responsibility.

107. Mr. HMOUD asked, first, how the Court coped with its workload from the logistical, legal and financial standpoint and whether the General Assembly provided for all its needs. Second, he observed that while the Commission was currently considering the immunity of State officials from foreign criminal jurisdiction, the Court's judgment in *Jurisdictional Immunities of the State* had considered the issue of the immunity of States from the standpoint of civil but not criminal jurisdiction. He would appreciate clarification regarding the Court's reasoning in that case and whether it considered that those two issues were related.

108. Mr. McRAE said that, at one time, concerns had been expressed about the proliferation of international tribunals and the potential problems of overlapping jurisdiction they might pose for the International Court of Justice. Although the former President of the Court, Dame Rosalyn Higgins, had said during her last visit to the Commission that it was no longer an issue, he wondered whether the situation might have changed in the light of

the substantive decision handed down recently by the International Tribunal for the Law of the Sea (ITLOS).

109. Mr. TOMKA (President of the International Court of Justice) said, in response to Mr. Forteau's questions, that it was not always necessary to refer specifically to the number of the article but rather to its substance. A careful reading of the judgment in *Questions relating to the Obligation to Prosecute or Extradite* showed that the Court's views closely reflected the content of article 48 of the articles on responsibility of States for internationally wrongful acts. It was generally helpful to have former members of the Commission as members of the Court, since they tended to draw more on the work of the Commission, although that was not always the case. The one judge who had argued vehemently that article 48 of the articles on responsibility of States for internationally wrongful acts did not reflect customary international law was a former member of the Commission. The Court did not always consider all possible legal issues, but only what was strictly necessary for deciding the case, as when the issue of the standing of Belgium had been raised.

110. Concerning the obligation to cease wrongful acts, the Court did tend to rely on the Commission's articles on responsibility of States for internationally wrongful acts. If the 2009 judgment in the *Dispute regarding Navigational and Related Rights* was not specific enough on that point, one explanation might be the composition of the drafting committee. In any event, that was the only case in which he had not fully participated owing to health problems.

111. In reply to Mr. Hmoud, he said that the Court was kept busy: there were currently 11 cases on the docket, and it had taken five substantive decisions in less than one year. Hearings for two cases had already taken place in 2012, and more were scheduled for later in the year and in 2013. The workload of the Court was increasing, and it simply had to work harder to prevent States from waiting too long to have their cases heard.

112. The case concerning *Jurisdictional Immunities of the State* was not about State or individual criminal responsibility but about providing compensation to victims. It was in that context that the Court had examined the jurisdictional immunity of the State and not by distinguishing criminal jurisdiction from civil jurisdiction. On the other hand, the Court had made a point of mentioning that if there were any outstanding issues in terms of compensation to the victims, they should be resolved through bilateral negotiations.

113. In response to Mr. McRae, he said that, personally, he saw no reason to fear the proliferation of international tribunals. As was borne out by recent developments, ITLOS had not departed from the established jurisprudence of the Court in matters of maritime delimitation in its judgment in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*. In fact, it had followed very closely the jurisprudence of the Court, including by referring to its judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. Meanwhile, in the Court's pending

<sup>318</sup> Document A/64/L.65, limited distribution.

case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the parties had referred to the recent judgment handed down by ITLOS and the Court was studying that decision.

114. The CHAIRPERSON thanked Mr. Tomka, on behalf of the Commission, for his interesting statement and the wealth of information provided, including in response to the questions raised.

*The meeting rose at 1.10 p.m.*

## 3149th MEETING

*Wednesday, 25 July 2012, at 10 a.m.*

*Chairperson:* Mr. Lucius CAFLISCH

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

### Cooperation with other bodies (*continued*)

[Agenda item 12]

#### STATEMENT BY THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Stewart, of the Inter-American Juridical Committee, and invited him to address the Commission.

2. Mr. STEWART (Inter-American Juridical Committee) said that he was pleased to report on the recent activities of the Inter-American Juridical Committee. Given that Commission members had been provided with a very detailed annual report of the Committee's activities for 2011,<sup>319</sup> he would limit his remarks to a few of the most important issues addressed by the Committee that year.

3. As set forth in the 1948 Charter of the Organization of American States (OAS), the Inter-American Juridical Committee was the principal advisory body of OAS. Composed of 11 members who were elected by the OAS General Assembly as independent experts, it provided advice or opinions on specific issues of regional or global concern, worked on the harmonization of laws among the OAS member States, prepared draft conventions or other instruments, conducted studies of legal problems related to regional integration, proposed conferences and meetings on international legal matters and cooperated with other

entities engaged in the development or codification of international law.

4. The Committee had prepared many notable instruments, including the 1969 American Convention on Human Rights: "Pact of San José, Costa Rica", the Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance (1971) and the Inter-American Convention on extradition (1981). More recently, it had helped to prepare the Inter-American Convention on the Law Applicable to International Contracts (1994), the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999), the Inter-American Convention against Corruption (1996) and the Inter-American Democratic Charter (2001), all of which reflected a shared commitment to democracy, which was of great importance in the region. Since 1974, the Committee had been organizing a highly regarded annual course for young lawyers from OAS member States that made a substantial contribution to the promotion and development of international law throughout the region. The theme of the 2011 course had been "International law and democracy".

5. In contrast with the Commission, the Committee had always emphasized issues of private international law in its work, as had its predecessor, the Permanent Commission of Jurisconsults. In keeping with that aspect of its work, the Committee organized Inter-American Specialized Conferences on Private Law, known as "CIDIP conferences", which dealt with such varied topics as the choice of law in contractual matters, the enforcement of arbitral awards, proof of foreign law, international recovery of child support, extracontractual civil liability, electronic registries for the implementation of the Model Inter-American Law on Secured Transactions and international consumer protection. Through the years, the CIDIP conferences had resulted in the adoption of 26 instruments, which had helped to create an effective legal framework for judicial cooperation and added legal certainty to regional cross-border transactions in civil, family, commercial and procedural matters.

6. The recent work undertaken by the Committee covered a wide range of topics, six of which were particularly important and might be of interest to the Commission. First, the Committee had prepared a study of ways to strengthen the regional human rights system, which was a critical area in which it had long played an active role by providing advice for the preparation of a regional instrument on new forms of discrimination. The Committee's report contained a number of recommendations regarding the powers and responsibilities of the system's principal organs, namely the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In it, the Committee had also formulated a number of comments and suggestions relating to the friendly settlement of cases and the issuance of precautionary measures. It had also identified new measures that the Court and Commission might usefully take in promoting human rights and had proposed mechanisms for the effective follow-up and enforcement of judgments. Lastly, the Committee concluded in that study that it was vital for more States to

<sup>319</sup> Document OEA/Ser.G-CP/doc.4695/12; available from [www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2011.ENG.pdf](http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2011.ENG.pdf).