Summary record of the 3151st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:
2012, vol. I
et seq.), the European Court of Human Rights had given a slightly different interpretation of the customary law applicable to immunity in respect of labour contracts concluded with an embassy than had the Court of Justice of the European Union in its judgment dated 19 July 2012 in the case of Ahmed Mahamdia v. People’s Democratic Republic of Algeria (paras. 54 et seq.). The Commission might also do well to look into the specific effect of codification treaties on the finding of evidence of custom.

65. Lastly, the Guide to Practice on Reservations to Treaties had made a start on the study of the effects of reservations to treaties on customary law, particularly in guidelines 3.1.5.3 and 4.4.2, and those ideas merited elaboration.


[Agenda item 10]

66. Mr. MURASE, referring to the discussion with the Secretary-General of AALCO, said that he had been encouraged by the enthusiastic support shown by AALCO member States for the inclusion in the Commission’s programme of work of the topic of protection of the atmosphere, for which he had written the syllabus.327 As he understood it, however, a decision had been taken to pursue informal consultations, at the Commission’s next session, on whether to include the topic. He requested clarification of the basis for that decision.

67. Mr. HMoud, speaking as a member of the Bureau, said that the proposal to include the topic had been discussed extensively in informal consultations, but the idea had met with some resistance, primarily concerning the scope of the topic and the possible outcome of its consideration.

The meeting rose at 1 p.m.

3151st MEETING

Friday, 27 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Georgion, 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. Štúrna, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.


[Agenda item 7]

Note by the Special Rapporteur (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the Special Rapporteur’s note on formation and evidence of customary international law (A/CN.4/653).

2. Ms. ESCOBAR HERNÁNDEZ said that the topic under consideration was of great interest in numerous respects, including a practical one, which was of priority for the Commission. As pointed out by the Special Rapporteur, it sometimes happened that State bodies, and not only the courts, had to take decisions on questions relating to international custom although they did not have the requisite expertise in international law. Thus, a practical guide or conclusions would be of great use to them.

3. Moreover, such interest was not limited to the domestic sphere: the formation and evidence of customary international law had acquired growing importance in recent years and concerned the international community as a whole, including regional organizations. That was attested to by the work of the International Law Association and the London statement of principles applicable to the formation of general customary international law,328 to which the Special Rapporteur had referred, but also the February 2012 decision of the International Court of Justice in the case concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), which had given rise to an interesting debate on the invocation of custom and on ways of identifying evidence of its existence, as well as by the fact that CAHDI had planned to devote a meeting of its September 2012 session to the treatment of custom by national and international courts. Thus, it was particularly appropriate for the Commission to consider the topic.

4. For the moment, the Special Rapporteur’s objective was not to analyse the substance of the problems posed in connection with the formation and evidence of international customary law, but simply to identify them and to promote a debate on their subject. She therefore would confine herself to posing several questions.

5. In paragraph 16 of his note, the Special Rapporteur evoked customary international law as “law”, but it was difficult to see how it could be understood otherwise.

327 Yearbook ... 2011, vol. II (Part Two), annex II.
unless reference were made to other areas, such as “soft law” or relations with other international legal acts. In paragraph 18, he referred to codification efforts by non-governmental organizations; there again, one might ask what exactly he had in mind. Perhaps he was thinking of private codification, because he mentioned the writings of publicists, or of other exercises, such as the study of ICRC on international humanitarian law\textsuperscript{329} in its customary dimension, but in that case the reference to “non-governmental organization” was inappropriate, given the ICRC’s very specialized nature. In any event, the question arose as to whether such codification was sufficiently relevant and authoritative for the Commission to take it into account in its work. A consideration of private codification usually presupposed a substantive analysis, whereas the exercise that the Commission was planning to undertake was basically one of methodology: to study the formation of custom and evidence of its existence.

6. The Special Rapporteur’s approach, which involved a study that was essentially practical and not theoretical, was welcome, because the objective was to assist States and judicial authorities in addressing questions relating to the application of custom or the identification or evidence of its existence. That was why the part devoted to the conceptual and theoretical approach to the formation of customary international law, planned for the first report, should be rather restricted (although it was still useful), because the theoretical postulates were relatively well known and because above all an empirical assessment of practice was needed.

7. Needless to say, it was important to analyse case law, in particular that of the international tribunals, without neglecting domestic courts, although their contribution to custom was of course smaller. Other non-judicial manifestations of State practice might also be relevant. An analysis of practice must cover all States, judicial systems, cultures and languages. The Special Rapporteur also undertook to examine the relationship between custom and treaties, which might be useful, although the question was not controversial, and he might also add the relationship between custom and other international acts, such as the great diversity of resolutions of international organizations and the unilateral declarations of States, which, although they could not be termed sources of international law, nevertheless contributed to demonstrating the existence of a custom. The Special Rapporteur had rightly decided to leave out rules of \textit{jus cogens}, but should include regional customary practice to avoid creating a lacuna, regardless of how small. It would also be useful to analyse the question of custom in relation to international organizations, and in that framework to consider their contribution not only to the formation of a custom that bound them, but also to the identification of a custom, regardless of whether they were bound by it.

8. She had reservations about the schedule for the development of the topic. It would of course be desirable for the Commission to complete its work during the current quinquennium, but the topic was very complex and had been the subject of considerable debate in recent decades, and it would be a Herculean task to cover it in four years, even if the Commission confined itself to the formulation of conclusions. In any event, the proposed schedule must not have an impact on the methodology. The Special Rapporteur appeared to be contemplating a sole reading for the adoption of the final product. That would take the form of a practical guide or conclusions, and not draft articles, but a sole reading might deprive the Commission of an invaluable tool, namely the comments of States. It was true that States would formulate observations in the Sixth Committee every year on the successive reports, but it would also be useful to have their opinion on the final product, the formation and evidence of custom being a very sensitive subject and a source of controversy.

9. She also pointed out that the word “documentación” used in the Spanish version of the title did not correspond to the tenor of the topic. Instead, as noted by Mr. Fortea concerning the word “\textit{preuve}” in the French version, “\textit{prueba}” should be used in the Spanish version, in line with Article 38 of the Statute of the International Court of Justice.

10. Mr. GEVORGIAN said that the Special Rapporteur’s note on formation and evidence of customary international law contained a sufficiently elaborated work schedule for the coming quinquennium and was an excellent basis for structuring the debates in the Commission. The topic was very important and of great current relevance, because, at national level, the work of the Commission would assist practitioners of law and jurists, who rarely were required to identify and apply rules of customary international law. He agreed with the Special Rapporteur about avoiding pitfalls and in particular that the Commission should not rely solely on academic sources. That said, the Special Rapporteur’s approach reflected a certain optimism. He personally agreed that the result of the Commission’s work should be clearly defined and should focus on practical conclusions, without dwelling too much on details or theory, because otherwise there was a risk that more questions would be posed than answers given, which would not be of great use. It should also be recalled that customary law was essentially unwritten and that the Commission’s work should not undermine its inherent flexibility.

11. With regard to the concerns expressed by Mr. Murase, who had cautioned that the Commission might end up stating the obvious, he personally thought that elements that might seem obvious to the members of the Commission might not necessarily be obvious to domestic judges, who might be required to apply rules of customary international law for the first time in a specific case. Mr. Murase had also said that if he were a legal adviser, he might well be alarmed that the Commission was developing guidelines to cover rules of customary law. On the contrary, he personally would welcome it if the Commission considered the subject, because practical guidelines presented as authoritative by the Commission would be of great assistance to those called upon to identify rules of customary law. As stressed by the Special Rapporteur, decisions by international jurisdictions were evidence of such rules, but there was also, and above all, doctrine. However, there was no unanimity in that regard: some believed that elements of doctrine established the existence of a customary rule, while others did not.

12. More specifically, he agreed with the proposed format for the Commission’s work, the conclusions of which would have to be formulated in a detailed and clear-cut manner. He also agreed that a large part of the work of the quinquennium would need to be devoted to the topic. As to method, he believed, like Mr. Murphy and Mr. Murase, that it was important to be cautious and not to base the study of the topic solely on the decisions of international courts and tribunals: indeed, in the case concerning Jurisdictional Immunities of the State, the International Court of Justice had relied in its judgment on the practice of only 10 States, and in the “Lotus” case, the judgment rendered by the Permanent Court of International Justice had been based on the practice of only 6. Thus, it could not be concluded, despite appearances, that generalized State practice existed. The customs established had subsequently been the subject of criticism, because they had been accused, and rightly so, of being illegitimate and undemocratic and of reinforcing the political and economic status quo. The Commission, which must produce authoritative guidance for national and international judges, would do well to take those comments into account in its future work.

13. With regard to paragraph 13, he agreed with those members who believed that the work of the International Law Association was very important and should be taken into account in order to avoid repeating its mistakes. The criticism voiced by Mr. Murase on the London statement of principles applicable to the formation of general customary international law was well taken. The work awaiting the Commission was complex, but that did not mean that the task could not be accomplished. The questions referred to in paragraphs 14 and 16 of the Special Rapporteur’s note might be of some interest, but the Commission should not dwell on them, because that might give rise to an overly theoretical debate, which would be contrary to the task with which the Commission had been assigned, namely to produce authoritative guidance. Concerning paragraph 15, he agreed that it would be useful to establish a lexicon in the languages of the United Nations; the Commission should use existing terms, while not neglecting to consider practice. He agreed with other members of the Commission who argued that there was no need to consider the emergence of new norms of jus cogens, apart from a few aspects. He subscribed to the idea set out in paragraph 27 of seeking information from States, but also endorsed the comment by Ms. Jacobsson that careful consideration should be given to the formulation of questions.

14. Concerning the title of the topic, the search for evidence of the existence of norms, and their identification, was inherent to the study of the process of the formation of customary international law. It was precisely that study that would make it possible to determine what relations existed between components of custom, such as State practice and opinio juris, and what role the latter played in the emergence of international rules. That would help ascertain where to look for evidence of the existence of a customary international rule.

15. He also pointed out that the Russian version should use the word “Идентификация” (“identification”) rather than “Свидетельство” (“proof”) for the English word “evidence”, the translation of which apparently also posed problems in the Spanish version and perhaps also in the French version.

16. Mr. HMOUD said that the topic of formation and evidence of customary international law was difficult and complex, and it was important to define its scope; otherwise the exercise would be overwhelming. He was certain that the Special Rapporteur would ensure that the scope was limited and focused so that the result would be a useful tool for States and other international and national actors. There was no need to dwell too much on theory, and it would be preferable to focus on the practical outcome, which, as the Special Rapporteur had indicated, should be a set of conclusions, with commentaries, that set out the grounds and basis for any particular conclusion. While theory would indicate the basis for any conclusion, it was the practice that laid the cornerstone of the topic and that should be the centre of attention. He agreed with the point made by the Special Rapporteur in paragraph 24 of his note that the outcome should not be a series of hard-and-fast rules but should elucidate the process of the formation and determination of rules of customary international law. The Special Rapporteur had rightly stressed that it was essential not to be overly prescriptive. It was important to achieve that balance or at least to strive to do so; otherwise, the Commission’s work might not gain the necessary acceptance of the relevant actors.

17. The Special Rapporteur had indicated that he intended to focus on the jurisprudence of international courts and tribunals, in particular that of the International Court of Justice and the Permanent Court of International Justice. They were of course a primary source for guidance on the topic, but he wondered to what extent their judgments could help in identifying a rule of customary international law. Several cases that had been brought before the Permanent Court of International Justice and the International Court of Justice, such as the S.S. “Wimbledon”, “Lotus”, Nottebohm, Fisheries, Fisheries Jurisdiction and North Sea Continental Shelf cases, could provide useful guidance on evidence of practice, but sometimes international courts did not indicate how they had reached the conclusion that a rule was customary and provided little or no reasoning on how they had arrived at their determination. They explained that they had come to their conclusions based on what they had “noticed” in State practice or what a particular jurist had said or because the articles of the International Law Commission on a particular subject indicated the existence of a rule. Recently, in the case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), the International Court of Justice had avoided the question of the existence of a customary basis of a certain rule altogether, and one judge had written a separate opinion on that point that had not provided any evidence on his conclusion regarding the customary basis.

18. In his research of evidentiary standards, the Special Rapporteur should draw on a wide range of sources, including the writings of jurists, public sources and the work of independent sources.
19. On the other hand, in relation to the “formation” aspect of the topic, the extensive jurisprudence of international judicial bodies could be the primary source for determining the elements for the creation of customary rules. The views of States could be very useful, and the Special Rapporteur should perhaps draft a specific set of questions for States in that regard. Legal departments in foreign ministries could assist by providing the Commission with their views on how a customary rule was formed. Those inputs would enable the Commission to make rapid progress on the topic.

20. National judicial bodies, in particular those that were well versed in international law, could constitute a valuable source of information for either aspect of the topic. However, few national judicial systems had the necessary expertise, and he cautioned the Special Rapporteur against relying on certain sources. After all, customary international law was of a general nature, and the views of a limited number of judicial systems did not necessarily reflect the general view of States with regard to the formation of a particular rule or to the evidence of its existence.

21. Regional rules could be used in the consideration of the topic, but their value should be seen within the context and particularity of each region. That was important, since regional institutions and judicial bodies often made determinations on customary rules of a general character. Those sources could be more relevant within the framework of so-called special customary international law, which the Special Rapporteur should also address. He encouraged the Special Rapporteur to examine the relation between general and special customary international law, especially given the emergence of regional structures with their own self-contained legal regimes.

22. Concerning the scope of the topic, the Special Rapporteur stated in paragraph 22 of his note that the same basic approach to the formation and identification of customary international law applied regardless of the field of law under consideration. In the footnote to paragraph 27 referring to the second report scheduled for 2014, he referred to the question of whether the criteria for the identification of a rule of customary law could vary depending on the nature of the rule or the field to which it belonged. His own preference would be for the latter approach, which would be very beneficial for certain specialized judicial, quasi-judicial and treaty bodies.

23. The Special Rapporteur should reconsider his intention not to examine peremptory norms of international law. As pointed out by a number of other members, those were essentially customary rules, and the fact that they might exist in a treaty did not change their nature. He did not prescribe to the view that dealing with the formation and evidence of jus cogens would be seen as being “overly progressive” or politically improper, because the Commission would not be determining which rules were considered jus cogens or the legal value of such rules versus other obligations.

24. Two issues should be addressed. The first was the transformation of “soft law” into customary international law, which was of particular importance with regard to General Assembly resolutions. While there had been extensive debate on the status of such resolutions, the pronouncement of the Commission on “soft law” would have a direct impact on deciding what conditions must be met for General Assembly resolutions to become customary international law, including temporal and substantive aspects. The second issue concerned the impact of lack of universality of certain treaties on the determination of whether the treaty obligations contained therein reflected customary international law.

25. Mr. WISNUMURTI said that the topic was interesting, but not easy. The formation of customary international law was a dynamic process, while evidence of customary international law was static in nature. Yet the two aspects were closely related, and it was important for the work on the topic to address both. However, Mr. Forteau had been right to stress that efforts should focus more on the identification of evidence. Customary international law was difficult to identify, in particular for domestic courts, and that was where the topic was most important.

26. As indicated by the Special Rapporteur in his note, the topic had gained support in the Sixth Committee. Such support was essential for the Commission and the Special Rapporteur to be able to move ahead in the right direction with its work on the topic.

27. The Special Rapporteur had done well to raise the issue of customary international law as a source of public international law, and he approved the Special Rapporteur’s intention to address the relationship between customary international law and treaties in his first report. It was also important to clarify the relationship of “customary international law” and “general international law”, and of “general principles of law” and “general principles of international law”, as suggested in paragraph 14 of the note. A common understanding of the terminology used was also necessary from the outset of substantive work on the topic.

28. On methodology, he agreed with the Special Rapporteur that the first report should include a descriptive survey of how international judicial bodies dealt with customary international law as well as a survey of the case law of national courts, the codification efforts by non-governmental organizations and the writings of publicists. A study of State practice, from which customary international law was basically derived, should also be part of the first report.

29. The scope of the topic needed to be set at an early stage of work. That would prevent overlap with the Commission’s work on other topics. It would be reasonable for the scope of the topic to cover the whole of customary international law, which included different fields of law.

30. He agreed with the Special Rapporteur and other members that the emergence of new peremptory norms of general international law, or jus cogens, was a separate matter that should not be part of the work on the topic. It would be useful to explain why that was so.

31. It was clear that prescribing rules would not be the best option for an outcome of the work on the topic but that, as suggested in the Sixth Committee, the Commission
should aim to provide a practical guide to customary international law for judges, government lawyers and practitioners.

32. He approved the schedule for the development of the topic suggested by the Special Rapporteur in his note.  
33. Mr. McRAE said that the topic under consideration was a real challenge, because it gave rise to differences of opinion with regard to approach, perspective and emphasis.  
34. A common language had to be developed, but above and beyond the lexicon idea, a common understanding was needed on whether the aim of the exercise was the formation of rules of substance or rules of procedure and, indeed, whether the aim was the formation of rules at all. The Special Rapporteur avoided that difficulty to a certain extent by talking about reaching conclusions, but the difficulty might re-emerge in subsequent work on the topic.  
35. The Special Rapporteur had emphasized that the aim was to assist national judges, arbitrators and other practitioners who were frequently called on to find and apply customary international law, although they were not sufficiently trained to do so. That aim was laudable, but in order to attain it, the Commission would have to produce an outcome that had the authority of the articles on responsibility of States for internationally wrongful acts.  
36. Mr. Forteau had argued that the Commission should focus on the evidence of customary international law and not on its formation. If by that he meant that the Commission should limit itself to directing judges and decision makers to where they could find customary international law, then that was too narrow. The Commission should not simply state that customary international law was found in State practice and opinio juris, but should also explain how to evaluate that practice and the difficult question of what constituted opinio juris and its relationship to practice. Those were questions that were at the core of customary international law and on which the Commission must provide guidance, as the Special Rapporteur himself had recognized in his introduction of the topic.  
37. However, if the result of the Commission’s work on the topic were to have the same authority as the articles on responsibility of States for internationally wrongful acts, two important aspects must be taken into consideration. First, its work would be judged only in part as a function of whether it was understandable for judges and arbitrators. The crucial criterion was whether it would be seen by the broader international law community as fully reflecting and perhaps resolving conflicting views on customary international law. To attain that goal, it was important to be mindful of the points made by Mr. Murase concerning the expectations of many scholars, for example the need to broaden research beyond judicial decisions, the different subjective and objective perspectives from which the issues could be viewed, the paucity of State practice on which rules of customary international law were often identified, the intrinsic value of ambiguity in the whole of the customary international law process and the difficulty of moving from the specificity of finding a rule of customary international law to the elaboration of a consensus on the methodology for finding that rule. Second, although the Commission might seek to avoid theoretical debates on the topic, the test of its success would be whether it would be seen as having dealt adequately with those debates. As already pointed out by a number of members, changes in the structure of the international community meant that new aspects must be taken into consideration in identifying the State practice that was at the basis of customary international law and in understanding the consensual basis of customary international law. The age-old debate about the relative balance between State practice and opinio juris had to be confronted, and the views of the naysayers about the binding nature of customary international law had to be taken into consideration.  
38. The Special Rapporteur’s pragmatism was a valuable starting point, but the Commission should keep open the possibility of going much further into theory and practice in order to achieve a set of propositions, conclusions or guidelines that would gain wide acceptance. There was no point in repeating what could be found in any standard work on public international law.  
39. It would be premature to put questions to States before the Special Rapporteur had defined the scope of the topic more precisely and indicated where there might still be gaps.  
40. Mr. GÓMEZ ROBLEDO recalled that, in countries of Latin law, the transposition of international law in domestic law only concerned treaties. For example, the Constitution of Mexico did not make any reference to customary rules or general principles of law. However, today international law covered virtually all aspects of life, and domestic judges were thus constantly called upon to apply it. That was why, in the context of the recent constitutional reform, the Supreme Court of Mexico had introduced a verification of compliance with treaties at all levels: judges must ensure that their decisions were in conformity not only with domestic law but also with international law. In that connection, the Supreme Court had ruled that the decisions of the Inter-American Court of Human Rights were binding in the national territory, but a domestic judge would simply not know what to do when faced with a decision by the Inter-American Court that evoked the existence of a rule of customary law. The work envisaged by the Special Rapporteur would thus be very useful in helping domestic judges identify customary rules. Consequently, greater emphasis should be placed on evidence than on formation, although the two were closely related. In that connection, he agreed with Ms. Escobar Hernández that the word “documentación” in the Spanish version of the title of the topic should not be used to designate the issue concerned, namely evidence or identification of a customary rule.  
41. He was pleased that the Commission was addressing the topic, and although it would have to wait until States in the Sixth Committee considered the utility of the work, he had no doubt that the Special Rapporteur would succeed in convincing them.
42. Mr. PARK recalled that “formation” was the process by which rules of customary international law developed and that “evidence” consisted in identifying them. A balance needed to be found between the two aspects of the topic, but given that the Commission’s aim was to provide guidance for practitioners, it would be preferable to focus on evidence. The Commission’s work, which would result in a practical guide, with commentaries, for judges, government lawyers and practitioners, would help dispel a number of ambiguities. The questions most often posed by national practitioners included these: how to identify a customary international law, especially when a Government had not yet ratified an international convention and was called upon by another State to respect one of its provisions on grounds that it reflected international custom; the effect of acquiescence in the international order, in particular in the process of the formation of customary international law, and the importance of the duration of silence and omission; with regard to the burden of proof, the question whether a national judge must rely solely on practice to determine the existence of an international customary rule or whether he must also examine opinio juris and, if so, how; the relationship between customary international law and treaties; the legal status of resolutions adopted by international organizations, in particular the United Nations General Assembly; and the distinction between lex lata and lex ferenda and the link with codification work.

43. The Special Rapporteur had rightly pointed out that the theoretical underpinnings of the topic were important, but it would not be appropriate to dwell too much on the details. As to methodology, in the Special Rapporteur’s view the most reliable guidance on the topic was likely to be found in the case law of international courts and tribunals, particularly the International Court of Justice and the Permanent Court of International Justice, but it should be borne in mind that the consideration of international and national case law was not an easy task, given the differences of opinion that existed even in international case law. For example, in the “Lotus” case, the Permanent Court of International Justice had considered, in 1927, that custom was the product of the consent of States, whereas in the cases concerning the North Sea Continental Shelf, the International Court of Justice had been of the view that custom was the expression of an objective rule.

44. Apart from the practice of States and international organizations, the practice of States that were not recognized by the international community as a whole should also be taken into account. As to the scope of the work, the Special Rapporteur had ruled out jus cogens from the outset, a position that was already shared by most members, but as the work should result in guidelines for national practitioners, it should provide a minimum of explanations, by indicating, for example, that jus cogens not only was defined in article 53 of the 1969 Vienna Convention, but also existed to a certain extent in international custom. The Special Rapporteur should also contemplate the inclusion of the subject of regional customary law in the scope of the topic.

45. Mr. KAMTO said that, given the Special Rapporteur’s remarkable qualities as an international jurist and, indeed, as a legal expert, it was certain that he would succeed in ensuring that the Commission made the most of the topic under consideration. Although it was not obvious that the customary process in the domestic legal system was the same as in the international legal system, it was not irrelevant that the Special Rapporteur came from a culture that placed emphasis on custom, namely the common law tradition. In his note, the Special Rapporteur had sought to map out the itinerary that he intended to follow. In his oral introduction, he had evoked the ICRC study on customary humanitarian law, which it would have been preferable to refer to specifically in his note. Thus, it might have been better for section B of the chapter on preliminary points to have been entitled “Work of other organizations on the formation of customary international law”, which would have made it possible to mention not only the work of the International Law Association and ICRC, but all other work of a similar nature, notably that of the Princeton Project, but also that of academic institutions. He entirely agreed with the point made by Mr. Murase at the 3148th meeting on the title of the topic, and he was not convinced that the Commission had an interest in considering both the formation and evidence of customary international law. Mr. Murase had presented a cogent argument to which a number of members had subscribed and which reflected his own point of view. However, he believed that it was necessary to speak of “identification” or, to be more precise, the “method of identification” of customary international law rather than “evidence” of custom or of customary international law, because the concept of evidence was more restrictive and would not permit the Commission to cover all the basic aspects of the topic as outlined by the Special Rapporteur in his note.

46. With regard to the possible outcomes of the Commission’s work, he agreed with the aim proposed by the Special Rapporteur in paragraph 24 of his note, namely to provide guidance and practical advice rather than hard-and-fast rules. He had reservations about Mr. McRae’s proposal that the Commission should elaborate a text that was as authoritative as its articles on responsibility of States for internationally wrongful acts, because the current exercise was of a different nature. As to the approach, he was pleased that, as shown in paragraph 17, the Special Rapporteur did not entirely rule out a consideration of theoretical aspects, although his introduction of the note might have given the opposite impression. While not contesting the importance of the practical use of the Commission’s work, he personally believed that it could not allow itself to consider a topic by relying solely on the case law of international, regional and national jurisdictions. After all, the teachings of the most qualified publicists of the various nations were referred to in Article 38 of the Statute of the International Court of Justice, if only as a subsidiary means for the determination of rules of law. In sum, it was the outcome that must be practical, not the study itself. The schedule of work proposed in paragraph 27 of the note did not call for any particular comment: it was purely indicative, and thus open to adjustments as a function of the development of the topic and the circumstances.

331 See footnote 329 above.
332 See footnote 328 above.
47. Turning to the substance, he pointed out that a customary rule was difficult to establish because its formation often gave rise to disputes and its determination was a source of conflict; hence the importance of the question of the evidence of custom. As one writer had put it, in international law, jurists knew how to make treaties, but they did not really know how to make customs. Sometimes judges identified rules by mysterious means, as the International Court of Justice had done in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), before correcting itself through its judgment of 3 February 2012 in the case concerning Jurisdictional Immunities of the State, in particular paragraph 55. In other cases, they had preferred to avoid becoming involved in the identification of custom, as reflected in the position set out by the WTO Appellate Body in its report on EC Measures concerning Meat and Meat Products (Hormones). However, their role remained determinant in the identification of customary rules. After all, once a judge had found that a rule was a rule of customary law, even if he or she had not shown by what method he or she had arrived at that conclusion, his or her decision must be taken note of: that clearly showed, as he had already pointed out, that the human will sometimes played a role in the determination of a customary rule.

48. With regard to the criteria of quantity, i.e. the number of States participating in the formation of custom, and quality, i.e. the participation or non-participation of “States whose interests are specially affected”, to quote the phrase used by the International Court of Justice in the cases concerning the North Sea Continental Shelf (para. 74), the question arose whether one of those two criteria could take precedence over the other, in which circumstances and in which conditions. In addition to those two criteria, a spatial or geographical criterion should be added which could serve as the basis for the determination of a regional or local custom.

49. The boundary between a customary rule and a rule that came under the heading of progressive development was an important and even fundamental point for the Commission itself. It happened that, in many cases, a rule proposed as coming under the heading of progressive development was also based, like a customary rule, on considerable State practice, which was often convergent but not unanimous. The question then arose as to whether the distinction between rules of customary law and rules that came under the heading of progressive development was based on the existence of an opinio juris in the case of custom and its absence in the case of lex ferenda. With regard to the passage of a rule from unwritten to written form, i.e. the transformation of customary law through codification into treaty law, Judge Herczegh had recalled in his declaration on the advisory opinion rendered by the International Court of Justice in 1996 in the case concerning the Legality of the Threat or Use of Nuclear Weapons that such an operation made it possible to remove some of the weaknesses inherent in customary law by conferring upon it the precision of treaty law, but at the same time—and that was the risk of an imperfect transcription—codification could subtract from or add to customary rules or even result in their transformation. There would then be two customary norms having the same objective, with one remaining at the stage of customary law and the other crystallized by codification. The Commission’s work should lead it to examine the status of each of those rules, both of which claimed to be customary. In other words, the Special Rapporteur should perhaps consider whether the identification of a customary norm through the codification process left intact the possibility of a non-treaty identification, for example by means of case law. To be sure, the International Court of Justice had affirmed in its 1986 judgment on the merits in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) that it “will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content” (para. 179). However, the Commission was not concerned with the content of a rule, but with its identification. Thus, the question was whether the reference to a codified treaty rule could serve as evidence or as a means of identifying the custom of a State that was not party to a convention and had not even participated in its negotiation.

50. With regard to the question of the respective importance of practice and opinio juris in the formation of custom, whereas practice was in general relatively easy to identify, that was not true for opinio juris. As noted by Mr. Park, the role played by acquiescence in the determination of opinio juris needed to be examined. The question also arose whether intent played a role in that regard and, if so, in what way; at the 3148th meeting, Ms. Jacobsson had raised a similar point concerning the consequences of silence. Those questions were not purely rhetorical, and positive international law was not particularly clear or consistent on whether, for example, consent expressed during the negotiation of an international treaty and which emerged as early as the phase of the travaux préparatoires, i.e. before the signing of the final text, constituted opinio juris. In that connection, Sir Robert Jennings had posed the question of whether the protesting State (or States) could exclude itself (themselves) from the generality of that law and had pointed out that the question was largely answered by the observation that opinio juris sive necessitatis was indeed the product of consensus, not of consent. The Commission should examine whether case law was clear in that regard and, if not, what proposals should be made.

51. In paragraph 23 of his note, the Special Rapporteur had referred to jus cogens solely in order to rule it out, because he believed that it should not be dealt with. Although that argument had been supported by many members of the Commission, he personally feared that it was premature to take such a decision, because it was not certain that the Commission could really avoid a consideration of formation and identification of jus cogens as an element of customary international law. In the case concerning the Prosecutor v. Anto Furundžija, 335. P.-M. Dupuy, “L’unité de l’ordre juridique international: cours général de droit international public (2000)”, Collected Courses of The Hague Academy of International Law 2002, vol. 297, p. 160.

335 See R. Jennings, “What is international law and how do we tell it when we see it?”, Annaire suisse de droit international vol. 37 (1981), pp. 59–88; see also his dissenting opinion in Military and Paramilitary Activities in and against Nicaragua.
the International Tribunal for the Former Yugoslavia had written, in its judgment of 10 December 1998, that

the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force (para. 153).

By writing that “this principle has evolved into”, the Tribunal was implying the existence of a process or formation, without indicating how that process or formation operated. Moreover, it enunciated various categories of customs—local, special and general—concerning which the Commission should examine whether they were all formed in the same manner. But if, according to the Tribunal, States could not derogate from jus cogens even through the intermediary of a general custom, did that mean that a customary norm of jus cogens was formed differently from a general custom? Clearly, that aspect of the question was not so simple.

52. Mr. NOLTE congratulated Sir Michael on his appointment as Special Rapporteur for the topic of formation and evidence of customary international law, the most daunting and ambitious topic on the Commission’s agenda. In his note, the Special Rapporteur had provided an outline for future work, and although much could be said about possible alternatives on how to approach the topic, it was the Special Rapporteur’s prerogative to go forward as he had proposed. Members who had already spoken had made many valuable comments on a number of specific points, which he did not want to repeat or comment upon further at the current stage of the preliminary debate, since his remarks essentially concerned the title of the topic. Mr. Forteau had proposed that the Special Rapporteur should focus on the evidence of customary international law rather than on its formation, and he had argued that the main interest of practitioners would lie in having a better understanding of how to identify customary international law and that the Commission would engage in an academic exercise if it tried to explain the “formation” of customary international law. Thus, Mr. Forteau had addressed a distinction that Mr. Murase had introduced into the debate when he had distinguished between a “snapshot” perspective, which sought to identify the state of customary international law at a given point in time, and a broader perspective that aimed to explain the process by which customary international law came about. Personally, he fully understood that it was most important for States and practitioners to be able to identify customary international law at any given point in time. Thus, he did not disagree with Mr. Forteau insofar as that must be a main element of the Commission’s work on the topic. He did not, however, subscribe to the idea that a clarification of the “formation” of customary international law would be less important and would be merely an academic exercise. States and practitioners did not only want to know by which means customary international law could be identified, they also wanted to know how to explain to their national courts and other bodies why and under which circumstances those means led to the conclusion that a particular rule was or was not a rule of customary international law. Of course, in trying to explain the formation of customary international law, the Commission ran the risk of becoming involved in a discussion of certain general questions of principle, but that was inevitable in the current exercise. If the Commission did not deal with such issues, it would not meet the expectations of States and the international community at large, and the result of its work might be called into question too easily.

53. To cite one example, during the current session the Commission had again taken up, under the guidance of a new Special Rapporteur, the topic of immunity of State officials from foreign criminal jurisdiction. One important aspect of that topic was whether a sufficiently strong trend could be discerned to identify a development in customary international law. Much depended on which factors were taken into account to identify such a trend. Were those factors only, or mainly, specific decisions by courts, Governments and legislatures, or also general values and policy statements, and parallel developments in related areas, such as that of international criminal jurisdiction? In his view, it would be futile to try to tackle the issue by merely seeking to define which of those factors were relevant for the identification of a rule of customary international law at a given point in time. Instead, it was necessary to explain how a possible new rule of customary international law was formed in order to make sense of the diverse factors at work. That required some thinking at a more general level. Otherwise, the Commission would miss the essential characteristic of customary international law, namely the fact that, in contrast to other sources of international law and different forms of national law, customary international law was both the result and the element of a process—a characteristic that must also be taken into account when States and other actors sought to identify a rule of customary international law at a particular moment in time.

54. Another important aspect was that, as indicated by the Special Rapporteur, one of the main goals, and perhaps the main goal, was to give national courts guidance on how to proceed when they were called upon to apply customary international law. Mr. Petrič and other members had underscored the importance of that aspect. Mr. Petrič had drawn the Commission’s attention to the fact that many national constitutions accorded customary international law a special place in their national legal orders, often higher than treaty law. That suggested that the willingness of national courts to identify and apply a rule of customary international law in accordance with those constitutional rules might depend on how well an authoritative body, such as the International Law Commission, could explain the specific and binding nature of customary international law. If the Commission merely adopted a “snapshot” approach or established a technical list of sources of evidence, it would miss that important dimension of customary international law.

55. The objective of the Commission’s work on the formation and evidence of customary international law must not only be to provide practical guidance for judges and other actors who were not familiar with customary international law, but also to provide a considered opinion for those who were. Debates at academic level in a number
of countries reflected a deep concern of a practical nature: today, national jurists and judges asked themselves what the particularities of customary international law were and whether it was legitimate to accord it a special status in the domestic legal system. For example, the ease or, on the contrary, the difficulty with which customary rules evolved had a considerable impact on their legitimacy and authoritative value at both international and national level. The Commission must bear in mind that its work would have implications for the legitimacy and authoritative value of customary international law, both in domestic legal systems and beyond, and it must therefore justify each of its conclusions.

56. He agreed with Mr. Petrić that it would be useful for the Special Rapporteur to explore sources of law in languages other than English and French, for example the decisions of the German Constitutional Court.

The most-favoured-nation clause (A/CN.4/650 and Add.1, sect. F)

[Agenda item 9]

Oral report of the Study Group

57. Mr. McRAE (Chairperson of the Study Group) recalled that the Commission had decided to reconstitute the Study Group on the most-favoured-nation clause at the current session and that the Study Group had held six meetings. The overall objective of the Study Group was to seek to safeguard against fragmentation of international law and to stress the importance of greater coherence in the approaches taken in arbitral decisions in the area of investment law particularly in relation to provisions concerning the most-favoured-nation clause. It was considered that the Study Group could make a contribution towards assuring greater certainty and stability in the field of investment law. The Study Group sought to elaborate an outcome that would be of practical utility to those involved in the investment field and to policymakers. It was not its intention to prepare any draft articles or to revise the 1978 draft articles adopted by the Commission on the most-favoured-nation clause.336

58. To date, the Study Group, in order to illuminate further the contemporary challenges posed by the most-favoured-nation clause, had considered several background documents. It had had before it a working paper on “Interpretation of MFN clauses by investment tribunals”, which he had prepared. That document was a restructured version of the 2011 working paper on “Interpretation and application of MFN clauses in investment agreements”, taking into account recent developments and the discussions of the Study Group in 2011.337 In the course of the discussion of that paper, there had been an exchange of views on whether the nature of the tribunal had a bearing on how it went about treaty interpretation, in particular whether the mixed nature of arbitration constituted a relevant factor in the interpretative process. The Study Group had also had before it a working paper on “Effect of the mixed nature of investment tribunals on the application of MFN clauses to procedural provisions”, prepared by Mr. Forteau.

59. The Study Group had also had before it an informal working paper on model most-favoured-nation clauses post-Maffezini, examining the various ways in which States had reacted to the Maffezini decision, including by specifically stating that the most-favoured-nation clause did not apply, or did apply, to dispute resolution provisions, or by specifically enumerating the fields to which the most-favoured-nation clause applied. It had also had before it an informal working paper providing an overview of most-favoured-nation-type language in headquarters agreements conferring on representatives of States to the Organization the same privileges and immunities granted to diplomats in the host State. Those informal papers, together with an informal working paper on bilateral taxation treaties and the most-favoured-nation clause that had not been discussed by the Study Group, were still a work in progress and would continue to be updated to ensure completeness.

60. The working paper on the effect of the mixed nature of investment tribunals on the application of most-favoured-nation clauses to procedural provisions had offered an explanation of the mixed nature of arbitration in relation to investment, an assessment of the particular modalities of the application of the most-favoured-nation clause in mixed arbitration and a study of the impact of such arbitration on the application of the most-favoured-nation clause to procedural provisions. It had been considered that the mixed nature of investment arbitration operated on two levels, because the parties to the proceedings, being a private claimant and a respondent State, were not of the same nature. Moreover, it had been argued that the tribunal in such an instance was a functional substitute for an otherwise competent court of the host State. Mixed arbitration was thus situated between the domestic plane and the international plane, with affinities in relation to investment to both international commercial arbitration and public international arbitration. It had a private and a public element to it.

61. It had been recognized in the working paper on the interpretation of most-favoured-nation clauses by investment tribunals that, notwithstanding a reliance on treaty interpretation or the invocation of the interpretative tools under the 1969 Vienna Convention, there was little consistency in the way in which investment tribunals actually went about the interpretative process, or necessarily in the conclusions that they reached. Accordingly, the working paper had reviewed further the approaches taken by investment tribunals to try to identify factors that appeared to influence such tribunals in interpreting most-favoured-nation clauses and to identify certain trends.

62. Those factors and trends included the following: (a) drawing a distinction between substance and procedure, by enquiring into the basic question whether in principle a most-favoured-nation provision could relate to both the procedural and the substantive provisions of the treaty; (b) interpreting the most-favoured-nation provision in relation to the dispute settlement provisions of the treaty as a jurisdictional matter, where there was an implication in some cases of an alleged

336 Yearbook ... 1978, vol. II (Part Two), pp. 19 et seq.
337 See Yearbook ... 2011, vol. II (Part Two), paras. 351–360.
higher standard for interpreting whether the scope of a most-favoured-nation clause was one of agreement to arbitrate, while in some other cases a differentiation was made between jurisdiction and admissibility, in which case a provision affecting a right to bring a claim, which was a jurisdictional matter, was distinguished from a provision affecting the way in which a claim had to be brought, which had been construed as going to admissibility; (c) adopting a conflict of treaty provisions approach, whereby tribunals took into account the fact that the matter sought to be incorporated into the treaty had already been covered, in a different way, in the basic treaty itself; (d) considering the treaty-making practice of either party to the bilateral investment treaties, in respect of which a most-favoured-nation claim had been made, as a means of ascertaining the intention of the parties regarding the scope of the most-favoured-nation clause; (e) considering the relevant time at which the treaty had been concluded (principle of contemporaneity) as well as the subsequent practice to ascertain the intention of the parties; (f) assessing the influence on the tribunal of the content of the provision sought to be ousted or added by means of a most-favoured-nation clause; (g) acknowledging an implicit doctrine of precedent, a tendency influenced by a desire for consistency rather than any hierarchical structure; (h) assessing the content of the provision invoked in order to determine whether, in fact, it accorded more/less favourable treatment; and (i) considering the existence of policy exceptions.

63. On the basis of his working paper, which had also offered a tentative analysis of the direction that the Study Group might wish to take, the Study Group had begun an exchange of views addressing three main questions, namely (a) whether in principle most-favoured-nation provisions were capable of applying to the dispute settlement provisions of bilateral investment treaties; (b) whether the conditions set out in bilateral investment treaties under which dispute settlement provisions could be invoked by investors were matters that affected the jurisdiction of a tribunal; and (c) what factors were relevant in the interpretative process in determining whether a most-favoured-nation provision in a bilateral investment treaty applied to the conditions for invoking dispute settlement.

64. The Study Group had recognized that whether a most-favoured-nation provision was capable of applying to the dispute settlement provisions was a matter of treaty interpretation to be answered depending on the circumstances of each particular case. Each treaty provision had its own specificities that had to be taken into account. It had been appreciated that there was no particular problem where the parties explicitly included or excluded the conditions for access to dispute settlement within the framework of their most-favoured-nation provision. The question of interpretation had arisen, as in the majority of cases, when the most-favoured-nation provisions in existing bilateral investment treaties were not explicit as to the inclusion or exclusion of dispute settlement clauses. It had been suggested that at a minimum, there was no need for tribunals when interpreting most-favoured-nation provisions in bilateral investment treaties to enquire into whether such provisions in principle would not be capable of applying to dispute settlement provisions. Post-Maffezini, it would be prudent for States to give an indication of their preference.

65. In the context of its further work, the Study Group would continue to examine the various factors that had been taken into account by the tribunals in interpretation, with a view to considering whether recommendations could be made in relation to (a) the ambit of context; (b) the relevance of the content of the provision sought to be replaced; (c) the interpretation of the provision sought to be included; (d) the relevance of preparatory work; (e) the treaty practice of the parties; and (f) the principle of contemporaneity. It had been considered that it would be necessary to give further attention to aspects concerning interpretation of the most-favoured-nation clause beyond Maffezini, and to question whether additional light could be thrown on the distinction made in the case law between jurisdiction and admissibility, who was entitled to invoke the most-favoured-nation clause, whether a particular understanding could be given to “less favourable treatment” when such provision was invoked in the context of bilateral investment treaties, and whether there was any role for policy exceptions as a limitation on the application of the most-favoured-nation clause.

66. The Study Group was aware that it had previously identified the need to study further the question of most-favoured-nation clauses in relation to trade in services under the General Agreement on Trade in Services (GATS) and investment agreements, as well as the relationship between most-favoured-nation, fair and equitable treatment, and national treatment standards. Those would be kept in view as the Study Group progressed in its work. It had also been recalled that the relationship between the most-favoured-nation clause and regional trade agreements was an area that was anticipated for further study. It had also been suggested that there were other areas of contemporary interest, such as investment agreements and human rights considerations. However, the Study Group had been mindful of the need not to broaden the scope of its work and had therefore been cautious about exploring aspects that might divert attention from its work on areas that posed problems relating to the application of the provisions of the 1978 draft articles.

67. The Study Group had shared views on the broad outlines of its future work. It was envisaged that for the next session of the Commission, a report would be prepared for the Study Group, providing the general background, analysing and contextualizing the case law, drawing attention to the issues that had arisen and trends in the practice and, where appropriate, making recommendations, including possible guidelines and model clauses. The two working papers constituted preparatory documents to form part of that report. The Study Group remained optimistic that its work could be completed within the next two or three sessions of the Commission.

68. The CHAIRPERSON said he took it that the Commission wished to take note of the oral report of the Study Group.

It was so decided.
Provisional application of treaties

[Agenda item 6]

Oral report of the Study Group

69. Mr. GÓMEZ ROBLEDO (Chairperson of the Study Group on provisional application of treaties) said that the Study Group had met on 19 and 25 July 2012 to initiate a dialogue on a number of issues that could be relevant for the consideration of the topic during the current quinquennium. It had had before it his informal document outlining some preliminary elements. Those elements were to be read together with the syllabus, prepared by Mr. Giorgio Gaja, which had been reproduced in annex III to the Commission’s report on the work of its sixty-third session (2011).

70. In opening the discussions, he had indicated that he intended to submit his first substantive report at the Commission’s sixty-fifth session and that, in his view, the basis for consideration of the topic should be the work undertaken by the Commission on the topic concerning the law of treaties, as well as the travaux préparatoires of the relevant provisions of the 1969 Vienna Convention. The Study Group had addressed the following questions: (a) the procedural steps that would need to be considered as preconditions for provisional application and for its termination; (b) the extent to which article 18 of the 1969 Vienna Convention, which established the obligation not to defeat the object and purpose of a treaty prior to its entry into force, was relevant to the regime of provisional application under article 25 of the Vienna Convention; (c) the extent to which the legal situation created by the provisional application of treaties was relevant for the purpose of identifying rules of customary international law; and (d) whether it would be useful to request from States information regarding their practice and, if so, what should be the focus of the questions to be asked.

71. Concerning the relationship between articles 18 and 25 of the 1969 Vienna Convention, the majority of members who had taken the floor on that point had been of the view that provisional application under article 25 went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. Although related insofar as they both had to do with the period preceding the entry into force of the treaty, those two provisions gave rise to different legal regimes and should be treated as such.

72. As to the question concerning the relevance of the situation created by the provisional application of treaties for the purpose of identifying rules of customary international law, the general feeling had been that aspects relating to the formation and identification of customary international law should be excluded from the scope of the topic. An analysis of the customary status of article 25 of the 1969 Vienna Convention could, however, be envisaged.

73. The Study Group had considered that it would be premature to seek information from States; when the time came, questions on their legislative, diplomatic, judicial and parliamentary practice could be posed in the form of a questionnaire. According to one view, it would be preferable to limit any request for information to relevant domestic laws on the matter. However, it had been stressed that the Commission could not ignore the position of States regarding provisional application. In that regard, a view had been expressed that it would suffice to have a sample of relevant State practice.

74. Other points addressed during the discussions had included, for instance, the exact meaning of “provisional application of a treaty”; the various forms and manifestations covered by that legal institution; the legal basis for the provisional application of a treaty, namely article 25 of the 1969 Vienna Convention itself or a parallel agreement to the treaty; the question of which organs were competent to decide on provisional application and the connection of that issue with article 46 of the Vienna Convention on provisions of internal law regarding competence to conclude treaties; whether the legal regime of provisional application was the same for different types of treaties; whether the provisional application of a treaty generated legally binding obligations, the breach of which would entail the international responsibility of the State(s) concerned; and the modalities and effects of the termination of the provisional application of a treaty with an emphasis on its retrospective perspective. The general feeling had been that it was premature for the Commission to take a decision on what the final outcome of work should be. The possibility of elaborating draft articles had been mentioned by some members, but other possible forms, such as guidelines and model clauses, had also been alluded to and should not be excluded at the current stage.

75. Some members had mentioned the possibility of requesting the Secretariat to prepare a memorandum on the topic. He believed that it would be very useful to have a memorandum of the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties and on the travaux préparatoires of the relevant provisions of the 1969 Vienna Convention. He therefore proposed that a mandate should be given by the Commission to the Secretariat for the preparation of such a memorandum.

76. The CHAIRPERSON said he took it that the Commission wished to take note of the oral report of the Study Group on provisional application of treaties and to approve the recommendation contained therein.

It was so decided.

The meeting rose at 12.55 p.m.