

Document:-  
**A/CN.4/3182**

**Summary record of the 3182nd meeting**

Topic:  
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whereas *opinio juris* was the statement of their beliefs, as manifested in treaties and declarations. The President of the International Court of Justice had expressed a similar position at the conference on “The judge and international custom” in September 2012.<sup>121</sup> However, it would be too extreme to follow the views of Judge R. Abraham in his separate opinion in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. There, he had concluded that certain States might have acted on the basis of “a purely unilateral choice and sovereign decision” reached without any belief that the action was “required ... by some international obligation, whether conventional or customary—but solely in the belief that international law entitled them to do so. Here again, the ‘*opinio juris*’ is lacking” (para. 38). Unfortunately, it was unrealistic to try to find the ulterior motive behind a State’s action in order to prove the existence of *opinio juris*.

25. In fact, it was often impossible to disentangle *opinio juris* and practice. The International Law Association rightly differentiated among the various stages in the life of a customary rule and concluded that it was not always necessary to separately establish the existence of the subjective element of customary international law. On the other hand, the International Court of Justice had stated on a number of occasions that there must be a “settled practice” together with *opinio juris* in order to identify a rule of customary international law. However, both bodies considered that *opinio juris* that was well established in treaty law, for example, could compensate for practice that was less clear-cut. In that connection, the Special Rapporteur would have to deal with the relationship between treaty law and customary international law, with particular reference to the *North Sea Continental Shelf* cases.

26. It would also be useful to analyse the relationship between the approach of other intergovernmental actors and the formation of customary international law, as proposed in paragraph 53 of the report. The resolutions of international organizations were of special importance in that regard.

27. Lastly, the Special Rapporteur might consider the need to follow what the President of the International Court of Justice, in the conclusion of his speech at the September 2012 conference, had called the four particular methods that had played an important role in the Court’s assessment of evidence of customary international law, depending on the circumstances. The methods were (1) referring to multilateral treaties and their *travaux préparatoires*; (2) referring to United Nations resolutions and other non-binding documents which were drafted in normative language; (3) considering whether an established rule applied to the circumstances as a matter of deduction; and (4) resorting to an analogy.<sup>122</sup>

*The meeting rose at 1 p.m.*

## 3182nd MEETING

*Thursday, 18 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Cooperation with other bodies (*continued*)<sup>\*</sup>

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE  
INTERNATIONAL COURT OF JUSTICE

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

2. Mr. TOMKA (President of the International Court of Justice) said that, in fulfilment of its role as the principal judicial organ of the United Nations, the International Court of Justice had rendered two major decisions in the past year on the merits of cases concerning boundary disputes.

3. The decision in the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* had settled a long-standing argument regarding maritime delimitation and sovereignty over certain maritime features in the western Caribbean. Although the case had been brought to the Court in 2001, the delivery of the final judgment had been delayed by the need to examine several objections to the Court’s jurisdiction and by the lodging, by Honduras and Costa Rica, of requests for intervention. In its judgment of 2007, on preliminary objections, the Court had concluded that it lacked jurisdiction over the claim by Nicaragua to three islands, since the matter had been resolved in favour of Colombia by the 1928 Treaty concerning Territorial Questions at issue between Colombia and Nicaragua.<sup>123</sup> Nevertheless, several maritime features had remained in dispute in the maritime area where delimitation by the Court was being sought by the parties.

4. The Court had first assessed whether the small maritime features could be subject to the exercise of sovereignty through appropriation. It had emphasized that, unlike low-tide elevations, islands, however small, were capable of appropriation. Upon review of the scientific evidence, the Court had concluded that the disputed features were above water at high tide and were therefore capable of appropriation.

<sup>121</sup> Tomka, “Custom and the International Court of Justice” (footnote 119 above).

<sup>122</sup> *Ibid.*, p. 215.

<sup>\*</sup> Resumed from the 3180th meeting.

<sup>123</sup> Signed at Managua on 24 March 1928, League of Nations, *Treaty Series*, vol. CV, No. 2426, p. 337.

5. Turning to the issue of sovereignty over the maritime features in dispute, the Court had first investigated the question of what constituted the San Andrés archipelago, which had been mentioned in the Treaty in lieu of any mention of specific maritime features. The historical records were silent on that point, and the Court had accordingly examined the arguments submitted by the parties. It had dismissed the arguments based on *uti possidetis juris*, but it had found that, through various administrative acts (*effectivités*), Colombia had consistently conducted itself *à titre de souverain* with regard to the disputed maritime features. That fact lent very strong support to its claim of sovereignty over them. The conduct of Nicaragua with respect to the islands, the practice of third States and the relevant maps were likewise supportive of the claims by Colombia.

6. In the context of maritime delimitation, the Court had had to address the admissibility of the submission by Nicaragua that the Court should define a continental shelf boundary by dividing the overlapping entitlements into equal parts. All the judges but one had concluded that the claim by Nicaragua to an extended continental shelf was admissible, but could not be upheld owing to a dearth of the information required by article 76 of the United Nations Convention on the Law of the Sea. In effecting a delimitation of the parties' overlapping entitlements in the maritime area in question, the Court had recalled the overarching objective, in maritime delimitation, of devising an equitable solution, as opposed to equal apportionment of maritime areas. It had also recalled the basic delimitation methodology described in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*.

7. The Court had then investigated whether there were any circumstances that might call for an adjustment of the provisional equidistance line in order to achieve an equitable result. In view of the substantial disparity between the respective lengths of the parties' coasts, the Court had found that a significant shift was justified. The delimitation it had ultimately effected took account both of the disparity in coastal lengths and of the need to avoid cutting off either State from the maritime space into which its coasts projected.

8. The judgment in the case had been adopted unanimously, save for one point related to the admissibility of claim by Nicaragua to an extended continental shelf.

9. In the second boundary delimitation case, *Frontier Dispute (Burkina Faso/Niger)*, the Court's work had lasted for three years, culminating in the judgment of 16 April 2013. It had analysed the historical records in resolving certain preliminary questions, including whether it should recognize a boundary recorded in surveys carried out in 2009. It had then turned its attention to the disputed section of the frontier and had opted, after a review of the scientific evidence, for a direct line to connect two points at which boundary markers were located. The judgment had been adopted unanimously. In early July 2013, the Court had performed its last act in connection with that case, by appointing three cartographers to assist the parties in implementing the judgment.

10. The Court had been involved in drafting and deliberations in a few other cases. In December 2012, it had held public hearings in the case concerning the *Maritime Dispute (Peru v. Chile)*. The deliberations had reached an advanced stage and it was to be hoped that the judgment would settle a long-standing dispute over the maritime frontier between those two States. In April 2013, the Court had held public hearings in the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* and would be handing down its judgment in late 2013. In July 2013, it had completed three weeks of public hearings in the case concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, and it was preparing to hold three weeks of public hearings in another case which was likely to have scientific and environmental implications, the *Aerial Herbicide Spraying (Ecuador v. Colombia)* case.

11. The Court had been kept busy with the cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. In April 2013, the Court had decided to join those proceedings and to dismiss four counterclaims entered by Nicaragua in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*.

12. The Court's activities showed that States increasingly turned to the principal judicial organ of the United Nations as a propitious forum for the peaceful settlement of disputes, including those which had potential consequences for the conservation of the natural environment. The sharp increase over the previous 22 years in the number of judgments delivered could be ascribed to the fact that the Court strove to attain well-reasoned and just outcomes. Like the majority of international adjudicative bodies, the Court's jurisdiction over disputes between States was contingent upon parties agreeing to appear before it. States Members of the United Nations could accept the Court's compulsory jurisdiction by making an optional clause declaration under Article 36, paragraph 3, of the Statute of the International Court of Justice. The Secretary-General had launched a campaign in an attempt to boost the number of Member States which had done so from its current level of just over one third. Compared with the situation in 1948, when 59 per cent of Member States, including four of the five permanent members of the Security Council, had made Article 36 declarations, acceptance of the Court's jurisdiction had obviously declined in relative terms. It was encouraging, however, that in the past three years, three new Article 36 declarations had been made.

13. For the rule of law to be imbued with any meaningful force at the international level, it was vital to have independent and impartial courts where disputes could be adjudicated and rights asserted. It was therefore time to consider ways of enhancing the Court's role so as to bolster the rule of law and provide broader access to the peaceful settlement of international disputes. Ways of attaining the objectives and ideals enshrined in the Charter of the United Nations should be sought, with a view to strengthening both the role and the rule of international law. That, in turn, would facilitate the transition to more just and equitable societies.

14. Mr. FORTEAU said that there appeared to be some discrepancies between, on the one hand, the Court's 2007 judgment in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* and its 2012 judgment in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* and, on the other hand, the 2012 judgment of the International Tribunal for the Law of the Sea in the Bangladesh/Myanmar case (*Delimitation of the maritime boundary in the Bay of Bengal*) with regard to the limits of the continental shelf beyond 200 nautical miles and the respective roles of the courts and tribunals under the United Nations Convention on the Law of the Sea and the Commission on the Limits of the Continental Shelf. He wondered whether the fact that the United Nations Convention on the Law of the Sea was intended to establish "a legal order for the seas and oceans" had an institutional impact on that relationship. Noting that it was stipulated in the Court's 2012 judgment that the parties to the dispute had agreed to consider article 121 of the Convention, on the legal regime of islands, as forming part of customary international law, he asked to what extent that agreement had been taken into account in the Court's ruling regarding the applicable customary international law.
15. Mr. KITTICHAISAREE asked whether the Court took into account the possibility that its decisions could lead to an escalation in tensions in the bilateral relations between parties. Referring to variations in the time taken to render judgments in different cases, he asked whether the delay was sometimes due to dissenting opinions among the judges. The Court should aim to ensure some consistency in the time it took to hand down judgments. Lastly, he noted that in the case concerning *Jurisdictional Immunities of the State*, the Court had only analysed the rulings of national courts in 11 European and 2 non-European States, but that was not a representative cross section of State practice.
16. Mr. VALENCIA-OSPINA, noting that Mr. Tomka had emphasized the need for the increased acceptance by States of the compulsory jurisdiction of the Court through optional clause declarations, enquired about the Court's views as to whether the Commission should consider including compromissory clauses concerning the jurisdiction of the Court in the final texts it adopted on its topics.
17. Mr. TOMKA (President of the International Court of Justice) said that he did not perceive any major discrepancy as far as the views of the Court and of the International Tribunal for the Law of the Sea were concerned: in its 2012 judgment, the Court had opined that even if a State was a party to the United Nations Convention on the Law of the Sea, it still had to go through the procedure for justifying its claim for an extended continental shelf. The fact that the other State was not a party to the Convention did not relieve the State party of that obligation. With regard to article 121 of the Convention, the Court had taken the view that that article reflected customary international law as far as the legal regime of islands was concerned. If the parties, too, accepted that a rule reflected customary law, then the issue was not open to challenge.
18. The Court adjudicated disputes in such a way as to effectively resolve them, but it was not appropriate for it to speculate on what form bilateral relations might take following its decisions. Some judgments took longer to produce than did others, not because judges sometimes lodged dissenting opinions, but rather because the Court now took up several cases simultaneously, in an effort to progress on its caseload, and some cases were simply more complex or involved a greater volume of evidence than others.
19. Lacking the time or resources to carry out inductive studies on State practice in all cases, the Court welcomed the Commission's commentaries, which it found to be an extremely important resource when it was establishing the existence of customary international law.
20. He had highlighted the role of the optional clause because it would ensure broader recognition of the Court's jurisdiction. There were now some 300 multilateral conventions that contained compromissory clauses, and further efforts should be made to increase that number. In some cases, however, the jurisdiction of the Court could be established through unilateral declarations. By way of example, he cited the *Whaling in the Antarctic* case, in which article VIII of the International Convention for the Regulation of Whaling was disputed. As the Convention did not contain a compromissory clause, Australia had brought the case on the basis of declarations by it and by Japan recognizing the Court's jurisdiction as compulsory. Even if a State had not made a declaration recognizing the Court's jurisdiction, however, it could conclude a special agreement or, more exceptionally, become a respondent in order to establish *ad hoc* jurisdiction.
21. Mr. HMOUD asked whether the Court had the capacity to deal with the increase in its caseload. What type of assistance did it require from States and the General Assembly? Was it faced with any financial or technical difficulties?
22. Mr. MURPHY, referring to the maritime dispute between Nicaragua and Colombia, asked whether the Court's judgment might have been different if the applicant seeking delimitation of the continental shelf had been Colombia, which was not a party to the United Nations Convention on the Law of the Sea, instead of Nicaragua, which was a party thereto.
23. Mr. VÁZQUEZ-BERMÚDEZ said that the fact that in some cases the Court had simply declared that a rule reflected customary international law instead of conducting an inductive study did not mean that the rule did not meet the requirements of generalized practice and *opinio juris*. He would be interested to hear whether the Court considered some rules of international customary law to be self-evident and therefore not requiring a detailed analysis.
24. Mr. TOMKA (President of the International Court of Justice) said that under its new working methods, the Court now worked in parallel on two to three cases at a time. In the past there had sometimes been more than 20 cases on the Court's docket, but the backlog had now been reduced to only 10. That number was expected to go down to 5 by the following year, and any new cases brought before the Court could then be adjudicated

in an efficient manner once the written procedure had been completed. In some cases, the parties themselves requested additional time to prepare their arguments.

25. With regard to technical and financial assistance from countries, he noted that the Court had a very modest budget, US\$23.5 million, accounting for only 0.8 per cent of the regular budget of the United Nations. However, the Court's resolution of a dispute was very cost effective for the international community, since the alternative was the escalation of the dispute into action that, in addition to costing human lives, could cost a great deal of money, given the extended length of many peacekeeping missions.

26. When acceding to the United Nations Convention on the Law of the Sea, States could choose either the International Court of Justice or the International Tribunal for the Law of the Sea as their dispute settlement machinery by making a written declaration to that effect. Failing such a declaration by the parties to a dispute, proceedings would be instituted before an arbitral tribunal constituted in accordance with annex VII to the Convention or a special arbitral tribunal constituted in accordance with annex VIII. That was the explanation for the growing number of *ad hoc* maritime arbitrations in recent years.

27. Lastly, he said that once the Court had declared that a rule reflected customary international law, it could rely on that declaration in future without having to conduct additional studies of State practice.

**Formation and evidence of customary international law (continued) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)**

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

28. Mr. TLADI, referring to the comment by some members of the Commission that the reference in the title of the topic to the "formation" of customary international law risked making it too broad, said he agreed with the Special Rapporteur's response, in paragraph 15 of his report (A/CN.4/663), that both the requirements for the formation of a rule of customary international law and the types of evidence that established the fulfilment of those requirements needed to be taken into account in order to determine whether a rule of customary international law existed. While he had no objection to replacing the word "formation" with "identification", it was not clear how customary international law could be "identified" without gaining at least a general conception of its formation. In any event, any change in the title of the topic should reflect what the Special Rapporteur had set as the main objective of the project, which was to shed light on the general processes of the formation and evidence of customary international law.

29. On the question of whether the scope of the topic should include *jus cogens*, he was of the view that *jus cogens* presented its own peculiarities and could not be dealt with adequately as part of the project. He also thought that the Commission should strive to achieve consistency in the wording used to refer to key concepts. For example,

the concept of generality of State practice had been expressed in a variety of ways, some of which had significantly divergent meanings. As to the use of terms, the Special Rapporteur should reformulate the definition of customary international law contained in paragraph 45 of the report. The mere reference to Article 38, paragraph 1 (b), of the Statute of the International Court of Justice was not particularly helpful, given that this provision, itself, required a definition. In view of the wealth of material available, a simpler and clearer definition ought to be possible.

30. In paragraph 19 of his report, the Special Rapporteur raised the question of whether different approaches to the formation and evidence of customary international law were used in different fields of international law. He himself cautioned against excluding *a priori* the possibility that such differences existed and advocated answering the question on the basis of a study of State practice. The fact that some international tribunals were less than rigorous in their search for and assessment of the constituent elements of customary international law might reflect differences, not in their approaches to finding evidence of customary international law, but simply in styles used to draft judgments. He hoped that the Special Rapporteur would explore that issue in subsequent reports.

31. Care must be taken not to overstate the role of State practice and *opinio juris* in advancing arguments about the existence of customary international law norms. Soft law, for example, also played an important role in the formation, and hence evidence, of customary norms in the field of environmental protection. As illustration, he cited the case of the International Tribunal for the Law of the Sea discussed in paragraph 67 of the report and the judgment of the International Court of Justice in the *Pulp Mills on the River Uruguay* case.

32. In paragraph 37 of his report, the Special Rapporteur drew attention to the distinction between customary international law and conduct by international actors that did not generate a legal right or obligation, the missing factor being *opinio juris*. When studying the relationship between State practice and *opinio juris*, the Special Rapporteur should consider the process according to which practice without legal significance evolved into practice that was accepted as law, a process that was central to the formation of customary international law.

33. He agreed with the Special Rapporteur's suggestion in paragraph 53 of his report that the approach of international actors, in particular the United Nations, might prove valuable when surveying practice. However, the two reports mentioned by the Special Rapporteur, while providing useful material on State practice, did not appear to be examples of the work of international organizations. It would be useful, when referring to the output of international organizations, to distinguish clearly between that of their secretariats and that of their intergovernmental organs in order to ensure that greater relative weight was given to the latter, whose authors were also the primary authors of State practice.

34. To his recollection, there had been general agreement during the sixty-fourth session that the Commission

should not be drawn into the academic debate on the various and sometimes conflicting theories to be applied to the formation and evidence of customary international law. To the extent, however, that the writings of experts helped to advance the Commission's work on the topic, then ample use should be made of them.

35. Mr. CAFLISCH said that it was important that the outcome of the Commission's work on the topic not be an abstract exposé, theoretically sound but devoid of any practical value. Given that States and certain writers held divergent views on the respective roles of *opinio juris* and general practice as components for identifying customary international law, the Special Rapporteur had wisely opted for a straightforward solution. He proposed to use a more elegantly drafted version of the definition of customary international law set out in Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, along with a reference to the two constitutive elements, practice and *opinio juris*. The additional element of *opinio juris sive necessitatis* could be included, in his own view, and paragraph 70 of the report would be relevant when defining that concept.

36. The Special Rapporteur appeared to be leaning towards excluding *jus cogens* from the scope of the topic, both for pragmatic reasons and because the Commission was contemplating a separate study of the subject. Nevertheless, the undeniable links between customary international law and *jus cogens* needed to be clarified. In his view, *jus cogens* was expressed in customary rules whose subjective elements included, in addition to *opinio juris*, a conviction that they were norms from which no derogation was permitted and which could be modified only by a subsequent norm of international law having the same character.

37. As to whether to include regional or subregional customary law in the scope of the topic, it seemed impossible not to do so. The only exception might be the controversial category of bilateral custom introduced by the International Court of Justice in the case concerning *Right of Passage over Indian Territory*. In his own view, such so-called "custom" related more to the law of treaties than to customary international law.

38. With regard to the relationship between customary international law and treaties, discussed in paragraph 34 of the report, it was true that "customary international law has an 'existence of its own', even where an identical rule is to be found in a treaty". That gave rise to the question of whether, and in what form, a customary rule would survive, if a conflict arose between it and a treaty provision, once the treaty provision had gained prominence and the customary rule was no longer supported by anything but reduced elements of practice and *opinio juris*.

39. With regard to the complex relationship between customary international law and general principles of law, he noted that, when general principles of law applicable under national law were transposed frequently enough into international law, they became customary rules of international law. The process by which that occurred was a mode of formation that the Commission could not afford to overlook.

40. A large portion of the report dealt with the process of formation of customary international law. Among the materials to be consulted to understand that process was the case law of the International Court of Justice and that of other courts and tribunals. While in principle there was no hierarchy among the various permanent or *ad hoc* courts and tribunals that engaged in the identification of customary international law, it was obvious that the judgments of the International Court of Justice enjoyed particular prestige as texts issued by the main judicial organ of the United Nations. The number of permanent courts that settled questions of international law had increased considerably, making it necessary to consider all the materials that they produced. However, all international tribunals did not always exercise care in examining whether a customary rule existed in a specific domain.

41. The "practice" referred to in Article 38, paragraph 1 (b), of the Statute of the International Court of Justice was another source to be consulted, although a certain degree of caution was to be advised. In order to identify it, the various collections of State practice compiled by certain countries would need to be consulted. In his view, such practice was every bit as important as that of the courts, and countries that had not begun collecting and publishing their practice should do so.

42. The two remaining types of materials were scholarly writings—he found the wording "the most highly qualified publicists of the various nations" in Article 38 of the Statute to be quite puzzling—and the decisions of domestic courts. Such decisions, at times, failed to reveal any specific trend; they were downgraded, by Article 38, to "subsidiary means for the determination of rules of law".

43. Clearly, the Commission's future work should be adapted to the contemporary environment of international relations and take into account new actors, such as international organizations and even NGOs. Lastly, he could accept the title of the topic but had a slight preference for replacing the term "*identification*" with that of "*détermination*" in the French text.

44. Mr. PETRIČ said that he had been sceptical from the very beginning about the inclusion in the scope of the topic of not only the evidence but also the "formation" of customary international law. By choosing that route, the Commission was sailing into the waters of the social sciences, including the sociology, theory and philosophy of law. It would need to look into what was shaping the will of States—the impact of ideology, political realities and social development, among other things. That was not its task, nor did he believe that the Commission could succeed at it. It should refrain from addressing the material sources of international law and should limit itself to the formal sources listed in Article 38 of the Statute of the International Court of Justice.

45. A decision to address *jus cogens* separately would facilitate the Commission's work, since it could then concentrate on whatever was necessary for the purposes of the current topic. *Jus cogens* was a kind of *corpus separatum* within customary international law that had a special quality and special effects.

46. He fully agreed with other speakers that the Commission's task was not to write a new commentary to Article 38 of the Statute of the International Court of Justice, since such commentaries had already been written and the Commission should not challenge them. Rather, it should devote its attention to the relationship between customary international law and treaties, and to that between customary international law and the general principles of law. The second relationship was perhaps the more complicated, thus warranting greater attention than the first.

47. While agreeing that the practice of States and other intergovernmental actors represented the crux of the topic, he thought that the Commission should also analyse soft law, such as statements by State representatives and confidential exchanges of views. In so doing, it should take into account the office held by the authors of such practice: he had in mind the members of the troika, whose statements were legally binding and carried more weight than those of other officials. The Commission should also consider the actual behaviour of States. Research should be devoted to the practice of constitutional courts, which issued important rulings, and to the provisions of States' constitutions, which stipulated the way in which international law would be applied.

48. It was important to bear in mind that, before the Second World War, international law had consisted primarily of customary international law. With the recent codification of the main areas of international law, customary international law had now become a somewhat subsidiary source. That change in its status over the past 60 years should be borne in mind when the Commission considered classical and modern scholarly writings and State practice.

49. Lastly, he thought it would be a reasonable ambition if the Commission restricted itself to the formulation of conclusions, not rules or criteria, for the formation of customary international law.

*The meeting rose at 1.05 p.m.*

### 3183rd MEETING

*Friday, 19 July 2013, at 10.05 a.m.*

*Chairperson:* Mr. Bernd H. NIEHAUS

*Present:* Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

### Organization of the work of the session (*concluded*)\*

[Agenda item 1]

1. The CHAIRPERSON read aloud the proposed programme of work for the last three weeks of the session.

*The programme of work for the last three weeks of the session was adopted.*

### Formation and evidence of customary international law (*continued*) (A/CN.4/657, sect. E, A/CN.4/659, A/CN.4/663)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. MURPHY commended the Special Rapporteur for the wealth of information contained in his first report (A/CN.4/663) and noted that the memorandum by the Secretariat (A/CN.4/659) provided useful clarification of the Commission's previous work on the topic.

3. In the introduction of his report, the Special Rapporteur referred to the debates that had been held in the Sixth Committee in 2012; however, he failed to mention that some States had discussed the idea of identifying regional customary norms, which confirmed the wisdom of addressing such norms in his third report on the topic. The Special Rapporteur had suggested that the Commission should renew its request to States to provide information on their practice. As he himself was not very optimistic about the success of such an approach, he joined with the Special Rapporteur in encouraging Commission members to provide any relevant information that they might have available to them.

4. With regard to the part of the report on the scope and outcome, and in particular the title of the topic, he recalled that the term "evidence" was firmly embedded in the work on customary international law undertaken by the Commission in 1949<sup>124</sup> pursuant to article 24 of its statute, which itself contained that very term. That said, he had no objection to replacing the term "evidence" with "identification", as the two were treated as synonyms in the syllabus for the topic that had been prepared in 2011.<sup>125</sup> Nor did he have strong feelings about retaining the word "formation" in the title, even if the question of the formation of customary international law would no doubt resurface in one way or another at some point in the study. He proposed that consideration should be given to a title consisting of just three words, "customary international law", which clearly indicated that what was being dealt with was how the law was formed. As to the issue of *jus cogens*, in stating in its judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* that the prohibition of torture was part of customary

\* Resumed from the 3180th meeting.

<sup>124</sup> The Commission discussed the topic "Ways and means for making the evidence of customary international law more readily available" at its first and second sessions, held in 1949 and 1950 (see *Yearbook ... 1949*, pp. 283–284, paras. 35–37, and *Yearbook ... 1950*, vol. II, pp. 367–374, paras. 24–94).

<sup>125</sup> *Yearbook ... 2011*, vol. II (Part Two), annex I, paras. 6–10.