

Document:-
A/CN.4/3183

Summary record of the 3183rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2013, vol. I

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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 RAPPOREUR (*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 1949¹²⁴ 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 2011.¹²⁵ 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.

¹²⁴ 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).

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

international law and had become a peremptory norm (*jus cogens*), the International Court of Justice seemed to be confirming the existence of a reinforced obligation, or a “super”, as opposed to “normal”, rule of customary international law. The Commission should perhaps help to clarify that distinction. Nonetheless, the peculiar nature of *jus cogens* norms, which apparently took precedence over certain “minor” treaties but not “major”, multilateral ones, in principle, justified the exclusion of *jus cogens* from the scope of the present topic. As to whether the rules governing the formation and evidence of customary international law differed depending on the branch of international law in question, he agreed with Mr. Tladi’s observation that it should not be assumed *a priori* that the rules of international law operated uniformly. On the other hand, he recalled that the Commission’s Study Group on fragmentation of international law had concluded that the very concept of the fragmentation of international law presumed the existence of a single international legal system.¹²⁶ In view of that position, he was in favour of giving precedence to the unity of the rules governing customary international law. Lastly, he supported the idea that the outcome of the Commission’s work should be a set of conclusions.

5. Regarding paragraphs 28 to 45 of the report, he agreed that the Commission should, at least briefly, examine the relationship between customary international law and the other sources of international law, especially since, as pointed out by the Special Rapporteur, the distinction between customary international law and the general principles of law was not always very clear in the case law or literature. The advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* (1996) was a good illustration of that point, inasmuch as the Court had based its conclusions on an analysis of customary international law, international humanitarian law and general international law, without however clarifying the relationship between those different sources.

6. He preferred not to enter into a debate on paragraphs 46 to 101 of the report, which dealt with the issue of the traditional and modern approaches of customary international law. State practice and *opinio juris* had always constituted the two indispensable elements of customary international law and remained distinct from each other, despite the fact that, in some instances, it had become more difficult to infer the existence of *opinio juris* from State practice.

7. Lastly, in view of the difficulty of the topic, it was possible that the time required to complete the Commission’s work might exceed that provided for in the Special Rapporteur’s timetable. He considered it premature to refer the draft conclusions to the Drafting Committee.

8. Mr. PARK, noting that the Special Rapporteur’s first report and the memorandum by the Secretariat provided a

firm foundation for the Commission’s work on the topic, recalled that Hans Kelsen had considered the topic to be eminently complex, owing to the “unconscious” and “unintentional” elements that characterized customary international law.¹²⁷ The Special Rapporteur’s first report comprised two main components, the second of which presented an analysis of case law and doctrine, and revealed a current trend in customary international law.

9. With regard to the fragmentation of international law, he did not subscribe to the notion that the rules for the formation and evidence of customary international law differed depending on the branch of international law in question. Since that was a pivotal issue in terms of guiding the Commission’s work, it would be useful for the Special Rapporteur to clarify his position with regard to it. On the other hand, he agreed entirely with the Special Rapporteur’s recommendation to exclude *jus cogens* from the scope of the topic for the time being, even if, like the Special Rapporteur, he acknowledged the fact that customary international law and peremptory norms were closely related, as evidenced by paragraph 99 of the judgment handed down in the *Questions relating to the Obligation to Prosecute or Extradite* case cited previously.

10. As to the question of the effects of treaties on customary international law, particularly with respect to “widely accepted ‘codification’ conventions” (para. 35 of the report), it would be helpful if, when dealing with that issue in his next report, the Special Rapporteur addressed the following points in greater detail: the effects of multilateral treaties drafted by the Commission but which had not yet entered into force; the effects of multilateral treaties to which there were few States parties; and the value of those instruments as evidence of customary international law. Moreover, given the fine line that existed between customary international law and the general principles of law, it was important to include a definition of the latter in draft conclusion 2 (Use of terms). A further reason to do so was the practical objective established for the Commission’s work, which was to offer guidance to those called upon to apply rules of customary international law (especially national judges in monist systems).

11. Turning to the second component of the Special Rapporteur’s first report, and with regard to the approach taken by States and intergovernmental actors to the formation and evidence of customary international law, he emphasized that it would be useful to consider the work of United Nations special rapporteurs. He cited as an example the final report on systematic rape, sexual slavery and slavery-like practices during armed conflict presented in 1998 by the Special Rapporteur of the Commission on Human Rights,¹²⁸ in which the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict had demonstrated the customary nature of the prohibition against slavery. With regard to the case law of the International Court of Justice, in paragraph 64 of his report, the Special Rapporteur on the present topic had merely noted that, in the view of some

¹²⁶ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, report of the Study Group finalized by Martti Koskeniemi (A/CN.4/L.682 and Corr.1 [and Add.1]), paras. 407 *et seq.*; available from the Commission’s website, documents of the fifty-eighth session (the final text will be published as an addendum to *Yearbook ... 2006*, vol. II (Part One)).

¹²⁷ H. Kelsen, *Principles of International Law* (New York, Rinehart, 1952), p. 308.

¹²⁸ E/CN.4/Sub.2/1998/13.

authors, the Court, through its jurisprudence, had enhanced the role of customary international law, whereas according to others, it had not always demonstrated sufficient rigour in proving the existence of the customary rules it invoked. He would like to know the Special Rapporteur's opinion as to which of the two perceptions of the Court was the predominant one. The weight to be accorded to the individual and dissenting opinions of judges of the Court with regard to the constituent elements of customary international law should also be addressed in greater detail.

12. As to the draft conclusions formulated by the Special Rapporteur, he proposed that draft conclusion 1 (Scope) should mention the objective of the topic. In draft conclusion 2 (Use of terms), it would be preferable not to refer to Article 38 of the Statute of the International Court of Justice, given the lack of consensus regarding its relevance. It would, however, be useful for it to include a definition of the general principles of law. The title of the topic should reflect the objective of the study. An expression along the lines of "verification of the existence of customary international law" would resolve the problems posed by the use of the term "evidence".

13. Mr. NOLTE said that, while he acknowledged the arguments of Commission members who wished to restrict the scope of the topic to the evidence of customary international law, some attempt should be made to explain basic aspects of the process of formation. That was all the more true since the argument that there was a trend in a particular area of the law played an important role in court proceedings and in case law, as shown by another topic being dealt with by the Commission. Nevertheless, he could agree to the deletion of the term "formation" from the title. Greater attention must also be paid to the interaction between the rules and the principles of varying degrees of generality that constituted customary international law.

14. Another important interaction was the one that took place between customary international law and the general principles of law, the latter often being used in conjunction with or in place of the traditional criteria of customary law. It was thus conceivable for a customary rule to be interpreted in the light of a recognized general principle. The role of such principles was closely linked to the formation and evidence of customary international law, but given the need to consider the scope of the topic, a distinction had to be drawn between the two. The Commission must be careful, however, not to exclude the possibility of identifying a general principle as a source of international law, whether as a stand-alone rule or as a complement to other rules from other sources. In any event, it was important, as stated by the Special Rapporteur in paragraph 36 of his report, to at least identify those rules which, by their nature, needed to be grounded in the actual practice of States. But those rules could not be identified exclusively by way of "secondary" rules; they must also be identified on the basis of their substance.

15. To conclude, he welcomed the fact that the Special Rapporteur had not labelled the two main schools of thought as "positivist" and "critical". He also welcomed, in paragraph 65 of the report, the inclusion of a reference by the President of the International Court of

Justice to the criterion of the "evidence available".¹²⁹ That point deserved to be analysed further. The recognition of the relevance of availability in that context was not incompatible with the effort to make the identification of customary law more equal among States. Finally, one might wonder whether the comment in the last footnote to paragraph 84 of the report, which recalled that it was not for a national court to develop international law,¹³⁰ might not also apply to international courts, especially if one held to the notion that the accepted approach for identifying the law should be the same for all.

16. Mr. ŠTURMA said that the topic should cover both the formation and evidence of customary international law, even if the title mentioned only the second of those processes or was shortened to "customary international law". The Commission was concerned with the formal sources of international law, and it was not possible to consider the evidence of customary law without addressing its formation, especially in terms of determining whether the criteria of formation had been met. In order to settle the debate on secondary rules that appeared to divide the Commission, recourse might be had to the broader definition provided by H. Hart, who had described them as "rules about rules", which established the procedures through which primary rules could be introduced or modified.¹³¹ In his own view, it was preferable not to deal with the issue of *jus cogens* as part of the topic; however, the relationship of *jus cogens* to customary international law should not be omitted entirely. Nor should the Commission adopt the somewhat outdated interpretation of *opinio juris* according to which the latter was regarded as an implicit form of consent. Mr. Tladi had suggested during the Commission's sixty-fourth session that both customary international law and treaty law were based on a theory of State consent, while *jus cogens* was based on something different. That was the interpretation of the old positivist school (the theory of the will), but nowadays customary international law differed from treaty law. It must be borne in mind that *opinio juris* was something other than the consent of all States and must be combined with practice in order to establish a peremptory norm.

17. The part of the report that dealt with the materials to be consulted made sense, but it should be recalled that not all States published a survey of State practice, and consideration should be given to the case law of other courts and tribunals besides the International Court of Justice, such as regional courts, international criminal tribunals, and the organs of the International Labour Organization, among others. The case law of national courts was also a valuable source of evidence, but was limited in terms of international law insofar as such courts primarily applied treaty law and did not always have competence to directly apply customary international law.

18. Mr. HMOUD said that the interaction between theory and practice was an inherent component of the

¹²⁹ P. Tomka, "Custom and the International Court of Justice", *The Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 197–198.

¹³⁰ Lord Hoffmann, in his arguments before the Chamber of Lords in the *Jones and Mitchell* cases, para. 63.

¹³¹ H. Hart, *The Concept of Law*, 2nd ed. (Oxford University Press, 1994), p. 94.

present topic, even if some saw that interaction as an expression of the flexibility of customary international law, while others saw it as a limitation. Developments in international relations had led to the emergence of various concepts whose legal value depended on whether they could be regarded as customary law. Disputes often arose when there was no clear or common understanding of what constituted customary international law or of the interaction between that law and other sources, such as treaties and general principles of law. The Commission should therefore clarify the process according to which customary international law was formed, its constituent elements and the kind of evidence required to establish its existence, all of which would serve to promote legal certainty.

19. The requirements for the formation of a customary rule and the means of establishing its existence were thus two separate but closely interrelated aspects of customary international law, and it would be futile to attempt to study one without the other. However, the Commission could, as had been noted previously, consider the term “identification” as adequate to cover both in the title. As to the scope of the topic, the question arose as to whether the approach to identification necessarily differed according to the branch of law concerned, in terms of both the constituent elements of the customary rule in question and the means that served to establish its existence. Further reflection was needed on that point. Along the same lines, it was necessary to study the potential role of customary regional law. He was of the view that *jus cogens* should be included in the scope of the topic. In its commentary to the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session, the Commission had recalled that peremptory norms of international law were, in almost all cases, customary in nature.¹³² There was no convincing argument to suggest that such norms should be excluded from the topic, even if important questions still needed to be answered, such as those relating to their formation and their value, the extent of their acceptance and their relationship to multilateral treaty regimes. As to whether customary law should be considered a source of international law, it should be borne in mind that the notion of the binding nature of customary international law had long preceded the adoption of the Statute of the International Court of Justice, which merely reflected the state of the law. In his view, the definition contained in Article 38 of the Statute of the International Court of Justice was an appropriate reference, in addition to the fact that it was widely cited. However, rather than refer to the actual wording of the article, reference ought to be made to the binding nature of the customary international law that was implicit in it.

20. The definition of practice should specify that it should be general and consistent, while also clarifying precisely what was meant by those terms. A definition should also be given of the term *opinio juris sive necessitatis*, which should indicate whether there was a difference between the general recognition of the binding nature of a rule and its necessity. Another aspect that needed to be studied was whether *opinio juris* was

subsequent to practice or could precede it, given that some declarations and political acts appeared to be binding even prior to the existence of practice and could give rise to so-called “soft law”.

21. It was clear that there was a wide range of material that needed to be consulted in order to identify customary international law, although the relative weight of each element was dependent on its source and on the primary or secondary nature of that source. Thus a distinction had to be drawn between the different types of materials and their weight in the formation and/or proof of the existence of customary international law. In particular, clarification was needed of the circumstances in which an act or declaration by a State body or a decision by a national court reflected the practice of the State and those in which they reflected its interpretation of a particular rule of customary international law. The case law of the International Court of Justice could be considered the primary source of materials to be used for that purpose. The Court had, on several occasions, reiterated the elements required to establish the existence of a customary rule, specifying the need to take into account both the objective element of practice and the subjective element of *opinio juris*. Those statements served as guidance to the Commission on the approach to be followed, namely the traditional positivist approach, although the Commission should not exclude other approaches that were followed in situations in respect of which the Court had never ruled. That said, the Court had sometimes determined that a rule existed by virtue of the Court’s own pronouncement, which raised the question of whether such pronouncements were declaratory or determinative of the rule. Other international courts and tribunals followed the case law of the Court in order to identify the elements of a customary rule and its existence but sometimes failed to take into account one or the other of the two elements (practice and *opinio juris*) or both, thus departing to varying degrees from the conventional approach. That issue needed to be analysed in the light of the nature of both the law and the court concerned, and such analysis was important in determining the emergence of certain norms and the precise point in time at which emerging norms in a particular field achieved the status of customary international law. Material from international organizations also needed to be taken into account, while paying careful attention to the role of the bodies of various organizations, particularly the United Nations, in the formation of customary law. Among the questions to be answered were the following: At what point did a General Assembly resolution or Security Council decision become part of customary international law, or give rise to or reflect a rule of customary international law? Could customary international law be formed through the acts of an organization? The latter was a highly debatable question.

22. The Commission’s work on the topic could bridge the gap between the traditional and modern approaches, as well as foster greater understanding of the two elements of the law and the necessary emphasis to be placed on each depending on the situation, the time frame, the interests at stake and the area of law concerned. Finally, regarding so-called “emerging norms” and their link to customary international law, a study of the relationship

¹³² *Yearbook ... 2011*, vol. II (Part Three), paragraph (14) of the commentary to guideline 3.1.5.3.

between the general principles of law and customary international law could assist in determining their legal value. In conclusion, he supported the programme of work proposed by the Special Rapporteur in his report.

23. Mr. HASSOUNA noted that the report raised many questions for which there were no clear answers, especially since even the basic terminology was unclear. The formation of customary international law was surrounded by ambiguity, largely created by States that wanted to have clear rules when they needed them, while the rest of the time they preferred the rules to be ill defined, unenforceable and “weak”. That duality created a certain fluidity of the law, making it difficult to define the rules that existed in that realm with clarity and certainty. Throughout his first report, the Special Rapporteur had combined direct and concise arguments with extensive references. In paragraphs 13 to 23 of his report, he had highlighted four main aspects relating to the scope of the topic and the form that the outcome would take, which were in line with the discussions held in the Commission in 2012.¹³³ The Special Rapporteur had considered it preferable not to deal with *jus cogens* as part of the present topic, which seemed well justified, even if it might sometimes be necessary to refer to some *jus cogens* rules in particular contexts. The Commission would nonetheless have to address the issue, which arose in the last two chapters of the report, of determining whether there were different approaches to the formation and evidence of customary norms in different fields of international law.

24. Regarding the title of the topic and its various language versions, perhaps the Commission could opt for “the identification of customary international law”, so long as both the formation and evidence of customary international law were duly addressed. As to paragraphs 28 to 45 of the report, the relationship between customary international law and the other sources listed under Article 38 of the Statute of the International Court of Justice should be considered at a later stage of the Commission’s work, since it was first necessary to have a clear understanding of the two elements of customary international law. With regard to the distinction between customary international law and general principles of law, it was important to differentiate general principles as a type of norm of a more general and fundamental nature from the source referred to in Article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

25. As noted by the Special Rapporteur in his report, the lack of response from States to the Commission’s request was certainly regrettable, and one might question whether it was a matter of mere negligence or a certain reluctance to engage in a complex and controversial topic. Not only was information on State practice required for the Commission’s process of codification but it was also of great value for the work of international courts and tribunals. The President of the International Court of Justice had recently highlighted the fact that the Commission’s work facilitated the Court’s task in identifying evidence of State practice and had further explained that the Court accepted the Commission’s codification work as

customary, with little or no further comment.¹³⁴ With regard to intergovernmental actors, the Commission should address the role of United Nations resolutions in the formation of customary international law, which the International Court of Justice had also addressed, namely in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* and in its judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.

26. Lastly, with regard to the future programme of work referred to in the last chapter of the report, which some had considered to be far too ambitious, it was his understanding that the Special Rapporteur intended to remain focused on the main issues of practical value to the current topic, and he was confident that the latter could successfully conclude the topic by the end of the current quinquennium.

27. Mr. WISNUMURTI said that the topic should cover both the formation of customary international law, which reflected a dynamic process, and its evidence, which had a static character. Some members had proposed to simplify the title so as to avoid translation problems by deleting the word “formation”, but he had reservations about that proposal given that he considered the two concepts to be equally important and closely interrelated. He had no problem with draft conclusion 1, provided that the set of conclusions covered the essence of both the formation and evidence of customary international law. He agreed that *jus cogens* should not be included as part of the present topic, even if the Commission might need to take into account rules of *jus cogens* at a later point in its work, and he agreed with the views expressed by the Special Rapporteur in paragraphs 34 to 37 of his report. He also agreed with the Special Rapporteur’s observations concerning the use of the terms “customary international law” and “rules of customary international law”. Draft conclusion 2 deserved the Commission’s attention.

28. With regard to the two conditions that had to be met for the formation and evidence of customary international law, namely practice that was extensive and virtually uniform, and a belief that such practice was rendered obligatory by the existence of a rule of law requiring it, as had been stated by the International Court of Justice in the *North Sea Continental Shelf* cases (paras. 74 and 77 of the judgment), it was worth noting that those two conditions had not been clearly explained or analysed. It was necessary to establish a common understanding as to what was meant by the phrases “settled practice” and “extensive and virtually uniform” practice by establishing criteria relevant to their meaning. The same applied to what was meant by the concepts “evidence of a belief that [a] practice [was] rendered obligatory by the existence of a rule of law requiring it” and “the subjective element ... in the very notion of *opinio juris sive necessitatis*”.

¹³³ See *Yearbook ... 2012*, vol. II (Part Two), paras. 169–191.

¹³⁴ Tomka, “Custom and the International Court of Justice” (footnote 129 above), pp. 202–203.

29. It was interesting to note, as indicated in paragraphs 94 to 101 of the report, that the traditional approach to the formation and evidence of customary international law had been criticized and that the proponents of a modern approach were in favour of reducing the role of *opinio juris*, or conversely, relaxing the practice requirement and focusing instead on *opinio juris*. He was of the view that the Commission should retain the two-element mode, it being understood that flexibility was needed to determine which of the two should take precedence. Finally, while it might be true that the Special Rapporteur's programme of work was too ambitious, the fact that he planned to prepare the final report on the topic in 2016 showed that he had set a target that he intended to achieve.

The meeting rose at 12.45 p.m.

3184th MEETING

Tuesday, 23 July 2013, at 10 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

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

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*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the first report of the Special Rapporteur on the topic of the formation and evidence of customary international law (A/CN.4/663).

2. Mr. GÓMEZ ROBLEDÓ said that the study of the topic should focus on the different lines of legal reasoning used to determine that a rule was part of customary international law. The context in which that finding was made—whether it was a court or a State that sought to establish the existence of the rule—should also be taken into account.

3. He considered the approach based on Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice to be appropriate, but as that provision was not exhaustive, account should also be taken of other sources of international law and the practice of the various actors that contributed to the formation of rules of customary international law. By way of example, he cited the 1969

judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, particularly the arguments contained in paragraph 73 thereof. It should be made clear to national courts that when there was an applicable rule of customary international law, they were obliged to apply it. It might also be worthwhile to include a brief introduction to the draft conclusions, explaining what was to be understood by “sources of international law”.

4. He commended the Special Rapporteur on his analysis of the two opposing theories, “traditional” and “modern”, about the formation of customary international law. He agreed that it made sense to work on the basis of the traditional, namely two-element, model of custom formation, but thought the Special Rapporteur could perhaps develop further the arguments for disregarding the modern theory. Given that the two-element model had been chosen, did that mean that in order for a rule of customary law to be identified both of the constitutive elements of custom formation, State practice and *opinio juris*, needed to be given equal weight?

5. With regard to the role of the International Court of Justice in the identification of rules of customary law, he said the Court did not have to prove the existence of the rules of customary law that it invoked: that was the responsibility of the States involved in the dispute. The Special Rapporteur should therefore review not only the Court's judgments but also the arguments presented by the parties in order to draw conclusions about how States identified and proved the existence of rules of customary international law.

6. He stressed the difficulty of finding evidence for elements of customary law in the rulings of national courts, particularly in countries with a neo-Roman legal system, because of their reluctance to base their decisions on customary law as opposed to written law. Nevertheless, the Mexican Supreme Court, for example, had developed innovative mechanisms to incorporate into the Mexican *corpus juris* the jurisprudence of the Inter-American Court of Human Rights, which occasionally confirmed the existence and validity of rules of customary law.

7. If the decisions of national courts on the existence of rules of customary law were to be taken into account as subsidiary means for the determination of rules of law, in accordance with Article 38 of the Statute of the International Court of Justice, then to what extent were such decisions binding on third parties, and to what restrictions were national courts subject when identifying such rules? Another question to consider was what happened if a decision of a national court diverged from what the State revealed through its conduct.

8. If the final conclusions to be presented by the Special Rapporteur were used by national courts, then the courts would be converted into another principal actor in the formation of such rules. National courts certainly contributed to the identification of rules, but it was more controversial to argue that they were actors in their formation. That subject could be given more thorough consideration in future reports.

9. The legal effects of the identification of customary international law by specialized institutions such as the