

Document:-  
**A/CN.4/3224**

**Summary record of the 3224th meeting**

Topic:  
**<multiple topics>**

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of the Statute of the International Court of Justice, he would like to see some reference to the fact that a general principle of law that was applied with sufficient consistency became a rule of customary international law. His concern was not of a purely theoretical nature; the transformation of a principle into a customary rule could have an impact on establishing the evidence of that rule.

70. With regard to *opinio juris*, which the Special Rapporteur addressed in paragraphs 65 to 68 of the second report, he questioned whether it was still the case, as doctrine had at times affirmed, that a belief might be considered to be a psychological element, if the conduct in question corresponded not to *opinio juris stricto sensu*, but to an overriding need.

71. The practice and *opinio juris* of States that were part of federal States should perhaps be taken into account. Consideration could also be given to NGOs that had functions under international law, such as ICRC, to the extent that practice and *opinio juris* related to those functions.

*The meeting rose at 12.55 p.m.*

### 3224th MEETING

*Wednesday, 16 July 2014, at 10.05 a.m.*

*Chairperson: Mr. Kirill GEVORGIAN*

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

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

[Agenda item 14]

#### STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Lijnzaad, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Requena, Head of the Public International Law Division and Treaty Office, Council of Europe and Secretary to CAHDI.

2. Ms. LIJNZAAD (Council of Europe) said that she welcomed the opportunity that was afforded to CAHDI every year to present its work to the International Law Commission. CAHDI was an intergovernmental committee, which, twice a year, brought together the legal advisers on public international law of the ministries for foreign affairs of Council of Europe member States, as

well as a significant number of representatives of observer States and international organizations, in order to examine issues relating to public international law and to promote exchanges and the coordination of views among member States. CAHDI also provided opinions at the request of the Committee of Ministers. In March 2014, it had issued an opinion on Recommendation 2037 (2014) of the Parliamentary Assembly of the Council of Europe on the accountability of international organizations for any human rights violations that might occur as a consequence of their activities, in which it had underscored the fact that the privileges and immunities of international organizations were essential for the fulfilment of their mission and were governed by international law.<sup>224</sup> CAHDI invited international organizations to consider waiving such immunities where appropriate in individual cases and drew their attention to the recent case law of the European Court of Human Rights on the scope of such immunity and on the question of the availability of “reasonable alternative means”.

3. CAHDI had also examined certain practical aspects of immunity, particularly in relation to international organizations. At its meeting in March, it had held an exchange of views on the settlement of disputes of a private character to which an international organization was a party, during which emphasis had been placed on gaps in the application of the principle of accountability of international organizations in cases of human rights violations—an issue of special relevance to peacekeeping operations—and on the need to address that situation by supplementing section 29 of the Convention on the Privileges and Immunities of the United Nations.

4. Another topic on the programme of work of CAHDI, the immunity of State-owned cultural property on loan, had been an issue in several disputes in recent years, in particular in *Diag Human SE v. the Czech Republic*. It posed a number of problems, in particular in regard to the origin of the property in question and uncertainty as to whether the seizure of property forming part of a cultural heritage was acceptable as repayment of a commercial debt. It was therefore necessary to clarify the status of such property, especially since the United Nations Convention on Jurisdictional Immunities of States and Their Property, which covered that matter, had not yet been widely ratified. CAHDI had therefore considered how it could contribute to the ongoing reflection on improving the level of protection for cultural objects on loan and had discussed a draft non-binding declaration recognizing the customary nature of the pertinent provisions of the Convention. Other discussions had centred on the immunities of special missions, a topic of great practical importance since States increasingly employed such missions, and on problems of international law posed by recent events in Ukraine, namely violations of such fundamental principles as territorial integrity, the inviolability of frontiers and the prohibition of the threat or use of force. A questionnaire on each of those subjects had been sent to States and observers. Their answers would be considered at the Committee’s meeting in September. CAHDI had also reviewed several Council of Europe conventions,

<sup>224</sup> CAHDI, Meeting report, 47th meeting, Strasbourg, 20–21 March 2014 (CAHDI (2014) 11), appendix III, para. 7.

including the European Convention for the peaceful settlement of disputes, whose ratification, it had concluded, should be encouraged, since the Convention was still not widely known, even though it had been used to bring a number of cases before the International Court of Justice. In the coming months, CAHDI would study the responsibility of international organizations, the division of responsibility between States and international organizations, mutual legal assistance, and the possible accession of the European Union to the European Convention on Human Rights. Lastly, it should be noted that CAHDI had developed databases on practice relating to immunities of States, on the organization and functions of the office of the legal adviser of the ministry for foreign affairs in various countries, and on national measures for the implementation of sanctions imposed by the United Nations and for respect for human rights.

5. Ms. REQUENA (Council of Europe) said that the work of the Committee of Ministers currently focused on stepping up cooperation in order to combat corruption and on strengthening the protection of vulnerable persons and young people. Protocols No. 15 and No. 16 to the European Convention on Human Rights had been opened for signature in June 2013 and October 2013, respectively. The first, which had, at the time of speaking, obtained 8 ratifications and 31 signatures, provided for the insertion into the preamble to the Convention of an explicit reference to the principle of subsidiarity and the doctrine of the “margin of appreciation” and reduced the time limit within which an application could be made to the Court from six to four months. The second provided that, in the context of a case pending before them, the highest national courts and tribunals could request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the Convention or the protocols thereto.

6. Two new protocols had entered into force in 2014, namely the Protocol to the European Convention for the Protection of the Audiovisual Heritage, on the Protection of Television Productions and the Fourth Additional Protocol to the European Convention on Extradition. The Council of Europe Convention on preventing and combating violence against women and domestic violence was expected to enter into force in the near future. It should also be noted that the Committee of Ministers had recently adopted the Council of Europe Convention against Trafficking in Human Organs and the Council of Europe Convention on the Manipulation of Sports Competitions.

7. The Court of Justice of the European Union was expected to give its opinion in the coming months on the revised draft agreement on the accession of the European Union to the European Convention on Human Rights and the accompanying explanatory report that had been submitted to it in 2013.<sup>225</sup> Generally speaking, the accession of the European Union to Council of Europe treaties raised many complex issues that must be addressed not only from the standpoint of European Union law but also—especially—from that of general international law, including the law of treaties.

<sup>225</sup> See Council of Europe, “Fifth negotiation meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final report to the CDDH” (document 47+1(2013)008rev2), appendices I and V.

8. With regard to the European Neighbourhood Policy of the Council of Europe, the Parliamentary Assembly had established a “partner for democracy” status in order to foster institutional cooperation with the parliaments of non-member States in neighbouring regions that wished to benefit from the Assembly’s experience in democracy-building and to participate in the political debate on common challenges that transcended European boundaries. In that context, there were plans to set up a Council of Europe office in Rabat. The Committee of Ministers had recently accepted application by Kosovo for membership of the European Commission for Democracy through Law (Venice Commission); it had done so, however, without prejudice to the individual positions of member States of the Council on the status of that entity.<sup>226</sup>

9. In conclusion, she stressed the importance of cooperation between the United Nations and the Council of Europe and recalled that the latter welcomed the accession to its legal instruments of States from other regions as a means of furthering the development of international law. In that connection, she noted the significance of the recent judgment handed down by the Grand Chamber in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, which concerned sanctions that had been adopted by the United Nations Security Council. Although the Court did not call into question the hierarchy of the Charter of the United Nations and the European Convention on Human Rights, it nevertheless found that it could be presumed that the Security Council did not mean to impose any obligation on Member States that would violate fundamental principles regarding the protection of human rights. The Court noted that a State could not invoke the binding nature of a Security Council resolution as justification for violating human rights and must take all possible measures to implement the sanctions regime. It concluded that, so long as the United Nations failed to provide any means of effective and independent judicial review of the legitimacy of placing individuals or entities on a sanctions committee’s list, it was essential that such individuals and entities be allowed to request a review by the national courts of any measure taken to implement the sanctions regime.

10. Mr. KITTICHAISAREE asked whether the initiative aimed at improving the international framework for mutual legal assistance and extradition on investigating and prosecuting the most serious crimes was likely to succeed, given that it was bound to fail in certain respects. He also asked whether, during the exchange of views on the situation in Ukraine, reference had been made to the advisory opinion of the International Court of Justice on *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo*.

11. Mr. PETRIČ asked whether, during that same exchange of views, the right of peoples to self-determination, which flowed from the Charter of the United Nations and was one of the fundamental principles of international law, along with that of the sovereign equality of States, had been mentioned as an element to be taken into account in order to reach a solution that was consistent with international law. He welcomed the fact that Kosovo

<sup>226</sup> Council of Europe, Committee of Ministers, 1202th meeting, document CM/Del/Dec(2014)1202/10.3.

was now a member of the Venice Commission and found it regrettable that the Constitutional Court of Kosovo, which played a leading role in protecting the rights of minorities in Kosovo, was still excluded from the Conference of European Constitutional Courts.

12. Mr. SABOIA, referring to the immunity of State-owned cultural property on loan, requested additional information on the method used by CAHDI to identify the customary nature of the relevant provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property. He wondered whether, in the case of the removal of cultural property from its rightful owners by illegitimate means, other principles took precedence over the principle of immunity. In addition, although some Council of Europe treaties—whose universal relevance had been underscored—were of considerable usefulness, it was regrettable that the procedure for accession to them by non-member States was complicated. That procedure should be simplified so as to strengthen cooperation with States in other regions.

13. Ms. LIJZAAD (Council of Europe) said that it was important for CAHDI to discuss the status of the initiative on mutual legal assistance on investigating and prosecuting the most serious crimes without prejudging the outcome of the debate. CAHDI had examined the situation in Ukraine at its meeting in March 2014 from the standpoint of the Council of Europe, in other words it had considered the inter-State application lodged by Ukraine against the Russian Federation before the European Court of Human Rights,<sup>227</sup> resolution 1974 (2014) on the functioning of democratic institutions in Ukraine adopted by the Parliamentary Assembly in January 2014, the two opinions of the Venice Commission on various issues of constitutional law, including the referendum in Crimea,<sup>228</sup> the visit to Ukraine planned by the Advisory Committee on the Framework Convention for the Protection of National Minorities, and discussions in the Committee of Ministers. The delegations of Ukraine and the Russian Federation had been given the opportunity to state their positions, and issues concerning the relevance of the advisory opinion of the International Court of Justice on *Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo* and the right to self-determination had been raised. Although viewpoints still differed, CAHDI had played its role, which was to provide the Committee of Ministers with the elements of public international law that would allow it to express the position of the Council of Europe. CAHDI had not agreed on the adoption of the proposed draft declaration on the immunity of State-owned cultural property on loan<sup>229</sup> because, despite the fact that the declaration might have been seen as clarification of *opinio juris*, a number of members did not consider that the provisions of the United Nations Convention on Jurisdictional Immunities expressed customary rules.

<sup>227</sup> *Ukraine v. Russia*, Application no. 20958/14, lodged on 13 March 2014, European Court of Human Rights.

<sup>228</sup> Venice Commission, Council of Europe, Opinion no. 762/2014 of 21 March 2014 (CDL-AD(2014)002), and Opinion no. 763/2014 of 21 March 2014 (CDL-AD(2014)004).

<sup>229</sup> CAHDI, “Immunity of State owned cultural property on loan”, 46th meeting, Strasbourg, 16–17 September 2013 (CAHDI (2013) 10), chap. III.

14. Ms. REQUENA (Council of Europe) added that, with regard to Ukraine, the Committee of Ministers decision did not mention the right to self-determination but concentrated on the question of territorial integrity. That said, the role played by the Council of Europe as a forum for discussion, and that of the Secretary-General, were very important, since both of the States concerned were members of the Council of Europe. The admission of Kosovo to the Venice Commission had no legal bearing on its recognition as a State. She agreed that, despite the universal relevance of Council of Europe treaties, the accession procedure to which non-member States were subject was fairly complex but that, aside from the requisite consent of the Committee of Ministers—which could admittedly pose problems—that complexity had less to do with the Council than with the accession regime provided for by the treaties themselves. Despite that, there were a growing number of applications, and the procedure for processing them had been simplified substantially.

15. Mr. NOLTE wished to know whether efforts to strengthen the activities of the Council of Europe in the area of the protection of personal data, namely updating the Convention for the protection of individuals with regard to automatic processing of personal data, had served to intensify the debate on those issues at the global level. He asked whether the admission of Kosovo to the Venice Commission, without prejudice to the issue of its status, might set a precedent for Palestine and whether the case of Palestine had played a part in discussions on how to handle Kosovo. With regard to Ukraine, he wished to know whether the Council of Europe had taken up the issue of the non-recognition of the acquisition of a territory through the illegal use of force and whether the Venice Commission, which had already given its opinion on several occasions on questions of general international law, had been asked to examine that matter.

16. Mr. ŠTURMA said that the draft declaration on jurisdictional immunities of State-owned cultural property had been prompted by a joint initiative presented by Austria and the Czech Republic following the *Diag Human SE v. the Czech Republic* case, the objective having been to avoid the refusal to loan cultural property for fear of its seizure. As to the question of the accession of the European Union to Council of Europe treaties, and more particularly the impact of changes in the respective competences of the European Union and its member States on the signature of or accession to those instruments, the solution whereby member States withdrew in favour of the European Union was regrettable and was as prejudicial to the law of treaties as it was to general international law. A set of rules on succession, for example, would no doubt be more appropriate, and it would be interesting to hear the opinion of CAHDI in that regard.

17. Ms. ESCOBAR HERNÁNDEZ said that she wished to thank the Chairperson of CAHDI for having organized the international seminar on the immunity *ratione materiae* of State officials from foreign criminal jurisdiction, which had examined the notion of an “official act”. With regard to Kosovo, the “without prejudice” clause, on which the Committee of Ministers had made membership of Kosovo of the Venice Commission conditional, confirmed the position that the recognition

of a State remained a sovereign and bilateral competence that did not affect membership in a particular organization. It would be interesting to know whether, during the debate, a distinction had been drawn between recognition by member States and recognition by the organization—in other words, recognition as a State as a prerequisite for admission to an organization, an institution or body—given that those points were related to the implications of the admission of Kosovo for the situation of Palestine.

18. Mr. WAKO asked whether other regional international organizations might be permitted to use the CAHDI website.

19. Ms. LIJNZAAD (Council of Europe) said that there had been no explicit reference to Palestine during the debates on the admission of Kosovo to the Venice Commission, but that it was clear that the States participating in it had had in mind the situation of those entities—especially that of Palestine. Generally speaking, the question of recognition had not been addressed, but it was possible that the viewpoint of international organizations differed from that of States and that the former believed they had a role to play in that regard. To date, CAHDI had not considered the question of the accession to treaties of entities not recognized as States—notably Palestine—nor that of the acquisition of territory by force.

20. The relationship between the European Union and its member States was indeed becoming increasingly complex. The position of the Council of Europe was that it was essential to maintain a balance between States that belonged to the European Union and those that did not. The reason was that, although they shared certain traditions and a common appreciation of the importance of the rule of law and human rights, it was necessary to avoid the development of two factions. The Council's role was to seek a coherent approach that heeded their divergent interests. Her personal viewpoint was that the European Union should take an in-depth look at its activities in the sphere of public international law.

21. Ms. REQUENA (Council of Europe) said that, when it was adopted, the Convention for the protection of individuals with regard to automatic processing of personal data had been one of the most progressive in its field, but it had quickly been overtaken by developments in the field of information technology. The Council of Europe was working on revising it and accompanying it with follow-up mechanisms, which required settling many legal and political issues.

22. Palestine did not have observer status with the Parliamentary Assembly of the Council of Europe, but rather that of guest. In the same way that it was a party to several United Nations conventions, it planned to accede to various Council of Europe treaties; for the time being, however, there were no negotiations under way concerning its accession. With regard to Ukraine, the Venice Commission had issued two opinions on two specific issues: the compatibility with constitutional principles of the decision of the Supreme Council of the Autonomous Republic of Crimea in Ukraine to hold a referendum on the question of whether to become a constituent territory

of the Russian Federation, and the compatibility with international law of the procedure for the admission of the Autonomous Republic of Crimea to the Russian Federation. However, the situation had evolved so rapidly that, by the time the Committee of Ministers had adopted its resolutions, those questions were no longer pertinent.

23. As far as Kosovo was concerned, the Committee of Ministers had issued a statement in which it recognized Kosovo as a member—not a member State—of the Venice Commission. That statement had therefore had no impact on the positions of the member States of the Council of Europe on the recognition of Kosovo as a State. Some States had issued a statement indicating that, in their view, only a State could be a member of Council bodies, but the question had not been settled. Nor had the Council settled the question of the accession of Palestine to certain international instruments, since it was not within its authority to do so, but rather it was a matter to be decided by consensus among member States.

#### **Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)**

[Agenda item 9]

#### **SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)**

24. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on identification of customary international law (A/CN.4/672).

25. Mr. MURPHY said that, while he appreciated the succinctness of many of the draft conclusions, it was questionable whether the Commission should leave it up to the commentary to supply the necessary nuances and to set out important restrictions or clarifications, as many users would limit themselves to consulting only the text of the conclusions. The question of whose practice and whose *opinio juris* was to be considered relevant for determining the existence of customary international law remained ambiguous. Draft conclusion 3 did not indicate whose practice was relevant or who accepted it as law. By stating that it was “primarily” the practice of States that was of interest, draft conclusion 5 left open many other possibilities, such as the practice or *opinio juris* of transnational corporations, NGOs and think tanks. Draft conclusion 7 stated in paragraph 1 that practice might take a wide range of forms, which suggested a rather broad ambit, while paragraph 3 failed to indicate whose inaction was relevant. Similarly, the reader learned in paragraph 2 that manifestations of that practice “included” the conduct of States and, in paragraph 4, that the acts of international organizations could also serve as practice, but without being able to infer from the text whether those actors were the only ones whose practice was relevant.

26. That ambiguity could be the result of the Special Rapporteur's view that perhaps most of the practice was State practice, but that there was a sliver of practice by international organizations that might also count. Yet, if this latter practice were to be taken into account, there was a risk that it would create uncertainty and confusion.

Sometimes the State alone was mentioned in the draft conclusions, while at other times it was not mentioned at all, a situation which opened the door to any number of other actors. If the Commission decided to mention international organizations as primary actors in the formation of customary law, it would be preferable for it keep the main focus on States throughout the draft conclusions and to find some other appropriate way to take into account the role of international organizations.

27. Turning to the consideration of individual draft conclusions, he would prefer to retain draft conclusion 1 as it was currently worded, but he would have no objection to moving paragraph 2 to the commentary. With regard to draft conclusion 2, he found it, at best, redundant and, at worst, confusing to attempt to define in a single draft conclusion terms that would be used throughout the entire set of draft conclusions. Such a task would better be left to the commentary. He agreed with the wording of draft conclusion 3, as he did not believe that there were different approaches in that regard. He offered to provide the Special Rapporteur with citations of recent cases in the United States that supported the “two constitutive elements” approach. With regard to draft conclusion 4, he agreed with Mr. Cafilisch that the expression “the surrounding circumstances” was unhelpful, and he proposed that the end of the sentence be replaced with “including the nature of the evidence, the situation in which the evidence arises, and its relationship to other available evidence”. As to draft conclusion 5, he proposed that the word “primarily” either be deleted or placed in square brackets until the Commission had considered the Special Rapporteur’s third report. Contrary to what the Special Rapporteur had said, that word did not appear in the text of the judgment in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, but rather in that of the judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, which nowhere suggested that the practice of other actors was also relevant. He proposed that draft conclusion 6 be entitled “Relevant practice” and that it specify that the conduct of the State was that which was “authorized by and attributable to a State”, since the current wording gave the impression that even the conduct of a State organ that had overstepped its authority or acted in contravention of its instructions was attributable to the State.

28. As for draft conclusion 7, he endorsed paragraph 1 and, in paragraph 2, which he considered to be excellent, he proposed the replacement of the word “manifestation” with “forms”. His preference would be to place paragraph 3 in square brackets—especially since the Special Rapporteur had indicated in paragraph 42 of his second report that he would revisit the issue of inaction—or to move it to draft conclusion 2 and reformulate it to say that “inaction by a State may also serve as practice when the circumstances call for some reaction”. He would like to raise five points with respect to paragraph 4, which might also be placed in square brackets pending the Special Rapporteur’s third report. First, the paragraph made no mention of the practice of States within international organizations, which was alluded to at the end of paragraph 2 in the phrase “acts in connection with resolutions of organs of international organizations and conferences”, but spoke only of the practice of international

organizations, without any explicit or implicit connection with the practice of States. Second, since it did not establish any limitations, it gave the impression that any practice by an international organization might be relevant, whereas a reading of the second report showed that this was not the Special Rapporteur’s intention. Once again, it would be better not to leave it to the commentary to provide the necessary explanations. Third, there was nothing in the second report that supported the proposition set forth in paragraph 3 of draft conclusion 7. The cases cited by the Special Rapporteur did not sufficiently substantiate his reasoning, and the scholarly literature was deeply divided on whether the practice of an international organization, strictly speaking, was relevant to an analysis of customary international law. Fourth, apart from the fact that the European Union was an atypical international organization, paragraph 44 of the second report indicated that European Union member States had transferred exclusive competences to it, which was an important caveat that did not appear in paragraph 4 of draft conclusion 7. Finally, the Special Rapporteur had not dealt with the question of whether there must also be *opinio juris* of the international organization operating in tandem with its practice. Draft conclusion 7, paragraph 4, referred to the practice of international organizations, but draft conclusion 11 did not. He asked whether the Special Rapporteur could provide examples in which international organizations adopted behavior based on a belief that they were compelled to do so by the same customary international law that bound States. Many of them would probably be resistant to such a notion: the fact that the Commission had developed entirely separate sets of draft articles concerning the responsibility of States for internationally wrongful acts<sup>230</sup> and the responsibility of international organizations,<sup>231</sup> and that the same dichotomy existed in other areas, such as immunities, raised some doubt that international organizations were actors in the realm of customary international law in the same way as States. Perhaps it would be wiser to consider that they were different types of actors who operated in different realms of customary law. It appeared, however, that it was widely believed that the practice of an international organization was not an independent source of practice relevant to identifying the customary international law that was binding upon States. If the Commission said otherwise, it should base its view on a very thorough and careful analysis of practice, case law and scholarship that was accompanied by appropriate examples.

29. He pointed out with reference to draft conclusion 8 that, although it was true that there was no predetermined hierarchy among the various forms of practice, there was nevertheless a certain hierarchy in specific cases. Without it, the conduct of a sheriff in a small town in the United States would have as much weight as that of the Department of Justice, and the decision of a municipal court as

<sup>230</sup> General Assembly resolution 56/83 of 12 December 2001, annex. See the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session and the commentaries thereto in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

<sup>231</sup> See the draft articles on the responsibility of international organizations adopted by the Commission at its sixty-third session and the commentaries thereto in *Yearbook ... 2011*, vol. II (Part Two), pp. 40 *et seq.*, paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

much as a Supreme Court ruling. That would be all the more problematic if, as stated in paragraph 2 of the draft conclusion, “[w]here the organs of the State do not speak with one voice, less weight is to be given to their practice”. Perhaps in order to address that problem it would be sufficient to indicate that the organs in question were “the highest competent organs”.

30. Concerning draft conclusion 9, and given that the term “general practice” was used throughout the set of draft conclusions, he proposed that the beginning of paragraph 1 of draft conclusion 9 be reformulated to read “General practice means that the practice must be widespread” and, for the sake of consistency, that the title of the draft conclusion be amended to read “General practice must be widespread, representative and consistent”. Perhaps reference should also be made to the fact that, in certain cases, practice was disregarded—for example, practice that was inconsistent with Article 2, paragraph 4, of the Charter of the United Nations and that was considered unlawful by States. As to draft conclusion 10, in paragraph 1, he proposed the replacement of the words “accompanied by” with “undertaken out of” and the insertion of the words “right or” before “obligation”. He proposed the addition of a paragraph 3 that would read: “In some instances, a State may deviate from a general practice accepted as law due to a belief that a new practice will be followed and accepted as law by other States. In such circumstances, the law may change over time”. In draft conclusion 11, he proposed that the clause “which indicate what are or are not rules of customary international law” be moved so that paragraph 2 would begin: “The forms of evidence which indicate what are or are not rules of customary international law include, but are not limited to”. In addition, in order better to capture the analysis contained in paragraph 74 of the report, paragraph 4 could be reformulated to read: “Acceptance as law by a State generally is not evidenced by the underlying practice alone.”

31. In conclusion, he was in favour of referring all of the draft conclusions to the Drafting Committee.

*The meeting rose at 1 p.m.*

## 3225th MEETING

*Thursday, 17 July 2014, at 10 a.m.*

*Chairperson:* Mr. Kirill GEVORGIAN

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

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

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the remaining three weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt it.

2. Mr. KITTICHAISAREE said that little time seemed to have been allocated to the topic of the provisional application of treaties.

3. The CHAIRPERSON emphasized that the programme was provisional. If additional time was required to discuss a particular topic, it could be amended. He asked whether the Commission agreed to adopt the programme of work on that understanding.

*It was so decided.*

## Identification of customary international law (*continued*) (A/CN.4/666, Part II, sect. D, A/CN.4/672)

[Agenda item 9]

### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

4. The CHAIRPERSON invited the Commission to resume its consideration of the second report of the Special Rapporteur on the identification of customary international law (A/CN.4/672).

5. Mr. VÁZQUEZ-BERMÚDEZ, referring to the Special Rapporteur’s suggestion to use the phrase “accepted as law” in preference to “*opinio juris*”, said that problems with the latter term had arisen more in academic circles than in practice. “*Opinio juris*” was used frequently by the International Court of Justice and other international and domestic tribunals, as well as by States and in the literature; it reflected the flexible and dynamic nature of customary international law and avoided literal or mistaken interpretations, to which the suggested alternative could give rise. The Special Rapporteur himself had referred to “*opinio juris*” several times in his second report. He therefore agreed with those who had suggested that it should be used in place of “accepted as law” wherever the latter phrase occurred in the draft conclusions. It must remain clear that the subjective element of custom, however it was referred to, was not the same as State consent or the will of States: rather, it was the belief that a particular practice was required under international law. Draft conclusion 10 went some way towards explaining the distinction, but should be modified slightly.

6. Some members of the Commission had suggested that, in draft conclusion 1, paragraph 1, the word “methodology” should be changed to “method”. He could agree to that suggestion, but would prefer “methods”, as there was more than one method for identifying the existence and scope of customary international law.

\* Resumed from the 3222nd meeting.