

Document:-
A/CN.4/3250

Summary record of the 3250th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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63. In sum, 12 members had expressed support for sending all five draft guidelines to the Drafting Committee, while 10 had been in favour of sending only some. Seven members had opposed referring draft guidelines 3 and 4 to the Drafting Committee, while two had opposed referring draft guideline 4. Three members had not been in favour of referring draft guideline 1 (a), and one member had not been in favour of referring draft guideline 2.

64. He therefore requested that draft guidelines 1, 2, 3 and 5 be referred to the Drafting Committee, on the understanding that guideline 3 was to be moved to the preamble. In the light of the need for further review and given the concerns of Commission members, he was not requesting the referral of draft guideline 4 at the current session. He hoped that the concerns expressed by some members with regard to the wording of draft guidelines 1, 2 and 5 could successfully be addressed in the Drafting Committee. He also requested that the parts of the preamble that he had read out earlier be considered by the Drafting Committee at the current session. Lastly, he did not consider it necessary at the current stage to set up a working group on the topic, as had been proposed by Mr. Forteau.

65. The CHAIRPERSON thanked the Special Rapporteur for his flexibility in incorporating the views expressed by members in a revised set of draft guidelines.

66. Sir Michael WOOD requested reassurance that, in moving draft guideline 3 to the preamble, the Commission was not necessarily endorsing the exact words “common concern of humankind”. In his second report, the Special Rapporteur had referred to a number of alternative ways in which the notion could be described, which he trusted that the Drafting Committee could consider. If that was agreed, he could accept the proposal that was before the Commission.

67. Mr. PETRIČ said that he supported the proposal for the Drafting Committee to clarify all of the questions raised in the proposed guidelines. However, if it reached an impasse on a particular issue, the Commission might wish to revisit Mr. Forteau’s proposal to set up a working group.

68. Mr. HMOUD said that he supported draft guideline 4 and considered there to be a basis for its reformulation by the Drafting Committee; however, he would go along with the Special Rapporteur’s proposal to postpone its finalization until the sixty-eighth session. With regard to draft guideline 3, he was concerned at the Special Rapporteur’s comment that a common concern of humankind imposed a general obligation on States, given that such an obligation produced a wide variety of legal effects. He had not heard any Commission member endorse that notion, and in his own view, it did not *per se* impose a general obligation on States. He could accept Sir Michael’s idea that the text of draft guideline 3 should be reformulated so as to portray it as an understanding by the international community on certain issues, but it should not carry legal obligations.

69. Mr. MURPHY requested confirmation of his understanding that it was the Drafting Committee that would determine the proper format for the introductory text to the draft guidelines, whether that turned out to be a preamble, an introduction or some other format.

70. The CHAIRPERSON confirmed that it was indeed the Drafting Committee that was entrusted with deciding that matter. If he saw no objection, he would take it that the Commission wished to refer draft guidelines 1, 2, 3 and 5 to the Drafting Committee, on the understanding that draft guideline 3 would be placed in the introductory text.

It was so decided.

Organization of the work of the session (continued)

[Agenda item 1]

71. Mr. McRAE (Chairperson of the Study Group on the most-favoured-nation clause) said that the members of the Study Group were Mr. Cafilisch, Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Murase, Mr. Murphy, Mr. Park, Mr. Singh, Mr. Šturma, Mr. Tladi, Sir Michael Wood and Mr. Vázquez-Bermúdez (*ex officio*).

The meeting rose at 1 p.m.

3250th MEETING

Wednesday, 13 May 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies

[Agenda item 13]

STATEMENT BY THE SECRETARY-GENERAL OF
THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The CHAIRPERSON welcomed Mr. Mohamad, Secretary-General of the Asian–African Legal Consultative Organization (AALCO), and invited him to take the floor.

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that, at the fifty-fourth session of AALCO, which had been held in Beijing in April 2015, many member States had acknowledged the Commission’s immense contribution to the codification and development of international law and had expressed the hope that cooperation between the Commission and AALCO would be strengthened. He wished to share with the Commission some comments made by AALCO member States during the half-day special

meeting that had been devoted to four topics on the Commission's programme of work: identification of customary international law; expulsion of aliens; protection of the atmosphere; and immunity of State officials from foreign criminal jurisdiction.

3. Irrespective of whether States chose to become parties to treaties, they could still be bound by customary international law even without their express consent, hence the importance of identifying that law. In 2014, in response to the lively interest shown by its member States in that matter, AALCO had set up an informal expert group to identify customary international law and to comment on the Commission's work in that sphere. The group's report had been submitted for comment to AALCO member States in March 2015.⁵⁴ At the Organization's annual session that year, member States had requested more time to examine the report. At the same time, they had emphasized the need for a cautious approach and had instructed AALCO to follow developments related to that topic closely. The Chairperson of the informal group had expressed concern about States' low response rate to the Commission's questionnaires, which he had ascribed to the technical nature of the subject and to a lack of capacity and resources.

4. It had been suggested that the Commission could explore the question of "what does not constitute customary international law" in accordance with the general principles of international law and the purposes and principles of the Charter of the United Nations. It had also been said that the same importance should be attached to both constituent elements of customary international law, and that the practice of States from all regions, including developing States, should be taken into account. Some States had considered that the practice of international organizations might play a subsidiary role in identifying customary rules and that, subject to an examination of their content and the circumstances in which they had been adopted, General Assembly resolutions might sometimes supply evidence of the existence of a rule or the emergence of *opinio juris*, whereas the conduct of NGOs and individuals could not constitute practice for the purposes of identifying customary international law. They had also considered that the Commission should deal with the concepts of "specially affected States" and "persistent objector" and that efforts should be made to ensure that due account was taken of the views of many competent jurists from Asia and Africa through cooperation between AALCO and the Commission.

5. Many member States had expressed their appreciation of the Commission's work on expulsion of aliens and had welcomed the draft articles adopted by the Commission at its sixty-sixth session.⁵⁵ However, a few States had voiced concerns. One State had taken the view that the draft articles did not reflect universal practice and that some articles were inconsistent with the current practice of several Asian States. Another State had opined that some articles, such as draft article 12, did not secure a fair

balance between the rights of States and those of aliens, while other articles tended unduly to restrict State sovereignty. For example, draft article 19, paragraph 2 (*b*), took no account of the fact that the authorities competent to decide on any extension of the duration of detention differed from one State to another and that each State was free to decide which judicial or administrative means and procedures should be applied in order to protect aliens facing expulsion. Similarly, draft article 23, paragraph 2, which prohibited the expulsion of an alien to a State where he or she might be executed or sentenced to death, ignored the fact that there was no international consensus on the abolition of the death penalty or on its prohibition in international law. Another concern had been that some articles designed to strengthen the protection of aliens' rights went beyond States' treaty obligations and their general practice, and some States feared that they would hamper international judicial cooperation and encourage impunity. Despite the divergence of views expressed, he believed that a consensus would emerge when the subject was reconsidered at the seventy-second session of the General Assembly.

6. AALCO member States regarded protection of the atmosphere as a very serious global issue that required coordinated action by the international community. Climate change negotiations were of special importance in that context, and one State had emphasized that the Commission must display caution and rigour in the pursuit of its work, so as not to encroach on current political negotiations and existing treaty-based mechanisms, and in order to ensure that its guidelines were rooted in common international practice and existing laws. As far as the Special Rapporteur's second report (A/CN.4/681) was concerned, the AALCO secretariat welcomed the definition of air pollution, including the reference to energy and atmospheric degradation. As for the advisability of setting forth basic principles, one State had held that a reference to basic principles of international environmental law was inevitable, even though the Commission was not seeking to complement current international instruments that applied to States' activities in the atmosphere. Others had stressed the importance of taking into consideration and complying with the principle of common but differentiated responsibilities. None had disputed the fact that the concept of "common concern of humankind" was well established in treaty practice, since it was to be found in several instruments that had been ratified by more than 195 States, but some States had contended that, owing to the difficulty of determining its legal implications, it did not entail any substantive obligations to protect the atmosphere. Another State had commented that, since recognition of the "atmosphere" as a common concern of humankind was highly controversial and less well accepted in other areas of international law, the Special Rapporteur should adduce more legal reasoning in support of draft guideline 3.

7. With regard to the immunity of State officials from foreign criminal jurisdiction, in the light of State practice and recent judicial decisions, there was broad consensus among AALCO members as to the scope of the term "official" for the purposes of the topic. They had all been in favour of immunity *ratione personae* for members of the troika, but had disagreed as to whether that immunity

⁵⁴ This report is available from the AALCO website (www.aalco.int), under *Annual Session*, documents of the fifty-fourth session.

⁵⁵ For the draft articles and commentaries thereto adopted on second reading by the Commission, see *Yearbook ... 2014*, vol. II (Part Two) and corrigendum, pp. 22 *et seq.*, paras. 44–45.

could be extended to other high-ranking officials whose duties often required them to travel abroad on behalf of the State that they represented. The AALCO secretariat considered that the scope of immunity *ratione materiae*, as defined in the Special Rapporteur's third report,⁵⁶ might be construed to mean that a private company providing military or security services that had been hired by a State to guard detainees or a paramilitary group acting as a *de facto* organ of the State could enjoy immunity *ratione materiae*. It was therefore essential to define the scope of that category of immunity more narrowly and to keep within the confines of what was recognized by State practice and *opinio juris*. One State had considered that, even if it was difficult to compile an exhaustive list that all States would agree on of persons coming within the category of officials enjoying immunity *ratione materiae*, the Commission should endeavour to formulate a definition of the term "official", which did not exist in international law, by basing itself on State practice flowing from domestic law. In the opinion of that same State, immunity *ratione materiae* should not be extended to individuals or to legal persons acting under a contract on behalf of a State, since there was no legal basis for widening immunity to cover persons, such as private contractors, who were not public officials and who were not empowered to exercise "inherent State authority". Any exceptions that might be allowed should not undermine the immunity of Heads of State whose role was purely ceremonial and who had no *de facto* authority to direct or control acts or omissions constituting crimes proscribed by international law. Another State had held that the immunity of State officials from foreign criminal jurisdiction was procedural in nature and that it in no way exempted them from their criminal responsibility, with the result that they could be prosecuted and tried by national courts.

8. As for the other topics on the Commission's programme of work, some States had stated that, in the context of the protection of the environment in relation to armed conflict, the Commission should flesh out environmental obligations in armed conflicts in order to fill in the gaps in international humanitarian law in that respect. The Commission should also define the concept of "armed conflict" and examine the legal obligations of non-State actors, but at the same time it should take care not to stray too far from the purpose of its work. Lastly, AALCO member States had been pleased to note the adoption, on first reading, of the draft articles on the protection of persons in the event of disasters.⁵⁷ With respect to the terms used, it had been noted that great caution was required when defining "external assistance", and that "other assisting actors" should not include domestic actors who engaged in disaster relief assistance or disaster risk reduction.

9. In conclusion, he said that AALCO would continue to follow the Commission's work very closely and he hoped that joint intersessional meetings could be arranged in order to debate various topics currently under consideration. It would also be desirable to put in place other means of obtaining the views of AALCO member States

which, because they lacked capacity, found it difficult to participate meaningfully in the Commission's questionnaire system. As his term of office as Secretary-General of AALCO ended in 2016, it would be the last time that he addressed the Commission in that capacity. He therefore wished warmly to thank all the members of the Commission for their support and their invaluable contribution to the progressive development of international law. He would continue to make strenuous efforts to enhance cooperation between the Commission and associations of international lawyers.

10. Sir Michael WOOD said that, under the dynamic leadership of Mr. Mohamad, AALCO had become a model for cooperation with the Commission. He hoped that the good practices which Mr. Mohamad had helped to institute would continue after he had retired. As Special Rapporteur for the topic "Identification of customary international law", Sir Michael had been most interested to read the report of the informal expert group of AALCO on the identification of customary international law, which he encouraged other members of the Commission to consult on the Organization's website. He would be happy to participate in any meeting which AALCO might convene in the future on that subject.

11. Mr. KITTICHAISAREE asked whether the comments on the immunity of private contractors referred to by Mr. Mohamad reflected a general consensus within AALCO, or only the stance of certain members. In addition, he enquired as to the position of AALCO on exceptions to the immunity *ratione personae* of members of the troika and on immunity for *ultra vires* acts. Lastly, he urged the Organization to take the necessary steps to improve access to its work through its website.

12. Mr. MURPHY thanked Mr. Mohamad for the exceptional work he had done at the head of AALCO. In view of the controversy that the concept of "specially affected States" had stirred within the Commission, since some members had taken the view that it favoured powerful States to the detriment of others, he wished to know whether AALCO agreed with him that this concept applied to all States without distinction as soon as they had a special interest in a given rule and that it should therefore remain part and parcel of the Commission's work.

13. Mr. HASSOUNA said that AALCO played an important role in that it enabled African and Asian States not only to exchange views, but also to contribute to the development of international law. He hoped that, in the future, the organization would be able to hold its annual session before that of the Commission, as it had done in 2015. In view of the interest displayed by AALCO in the Commission's work on the identification of customary international law, it would be advisable to arrange joint meetings between the two institutions' respective sessions in order to facilitate exchanges on that important topic. As AALCO was also interested in the Commission's work on the protection of the atmosphere, it would be gratified to learn that, after a week of intensive debate, the Commission had achieved a compromise on the thrust of the draft guidelines and had referred them to the Drafting Committee. On the subject of the expulsion of aliens, the Commission hoped that the General Assembly, which

⁵⁶ *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/673.

⁵⁷ For the draft articles and commentaries thereto adopted on first reading by the Commission, see *ibid.*, vol. II (Part Two) and corrigendum, pp. 61 *et seq.*, paras. 55–56.

had been unable to agree at its previous session, would arrive at a consensus at its seventy-second session. Lastly, in order to enhance cooperation between both institutions, AALCO could propose new topics for study by the Commission. For example, at its previous session it had considered some aspects of international law in cyberspace and general principles of international law, two subjects which the Commission might consider for inclusion in its programme of work.

14. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) thanked the members for their kind words and questions. He said that the topic “Identification of customary international law” had sparked great interest among AALCO member States and the members of the informal expert group. Although he hoped that the latter’s report would be adopted as quickly as possible by the member States, they all seemed to agree that, in view of the complexity of the subject, it would be better not to rush. It was difficult to reply in detail to the question regarding “specially affected States”, because the member States had not yet decided whether to deal with that matter in the context of work on customary international law; however, he invited Mr. Murphy to consult the above-mentioned report where he would find some answers.

15. Discussions on the immunity of State officials from foreign criminal jurisdiction were continuing. Since there were still some differences of opinion on whether the troika should be expanded, AALCO member States had not reached consensus on the subject. He wished to thank Mr. Hassouna for the major contribution that he had made to several annual sessions of AALCO, especially for his statements regarding the expulsion of aliens. International law in cyberspace and electronic commerce were among the new topics that were of particular interest to AALCO member States.

16. Mr. KAMTO paid tribute to Mr. Mohamad’s outstanding contribution to the development of AALCO and its stronger presence on the international scene, as well as to his vigorous efforts to forge a closer relationship between AALCO and the Commission. He emphasized that, throughout its work on the draft articles on the expulsion of aliens, the Commission had endeavoured to preserve the balance between State sovereignty, which presupposed the right to expel, and respect for the rights of the alien subject to expulsion. Noting that the AALCO member States were also Member States of the United Nations and that the draft articles on the expulsion of aliens were in the hands of the General Assembly, he said that the topic might possibly have been somewhat neglected by AALCO member States during debates in the Sixth Committee. Perhaps they should study the matter in greater depth; if they were to understand the Commission’s intentions, it was essential that they read not only the proposed draft articles, but also the commentaries thereto.

17. For example, the commentary to draft article 12, which explicitly stated that “the expelling State retains the right to expel an alien when the conditions for doing so have been met”,⁵⁸ showed that the purpose of

that draft article was merely to prevent two procedures related to completely different situations being rolled into one. Draft article 19, to which Mr. Mohamad had also referred, in no way hampered the right of a State to expel, since it only provided for judicial review, which was the least that could be done to avoid arbitrary action by the administrative authorities or the police. The Commission had clearly indicated that draft article 23 constituted progressive development of the law on the basis of the jurisprudence of the Human Rights Committee of the United Nations. Lastly, draft article 24, which echoed article 3 of the Convention against torture and other cruel, inhuman or degrading treatment or punishment, was supported by plentiful jurisprudence of the Committee against Torture.

18. Mr. HUANG said that, since the creation of AALCO, and in keeping with the spirit of Bandung, the Organization had striven to develop international law and promote a fair and just international order. It was in that spirit that, at the fifty-fourth session of AALCO, which had been held in Beijing, the Prime Minister of China had undertaken to finance an exchange and research programme on international law which was designed to strengthen international legal cooperation. He wished to know what steps AALCO intended to take to derive maximum benefit from that programme and to contribute to the training of lawyers in Asia and Africa.

19. The comments and proposals made by AALCO on some aspects of the Commission’s work had often enriched its debates. The contributions from AALCO were vital for the development of international law. He therefore trusted that the Organization would continue energetically to promote the principle of the rule of law in international relations. He hoped that the Commission would endeavour to increase its cooperation with international and regional legal organizations, especially AALCO, with a view to codifying and developing international law.

20. Mr. HMOUD paid tribute to Mr. Mohamad’s action as Secretary-General of AALCO and thanked him for his active cooperation with the Commission. He wished to know more about the resources at the Organization’s disposal for providing training in international law at the regional and international levels. Was AALCO planning to organize any other activities in addition to the meetings that it held while the Sixth Committee was in session?

21. Mr. TLADI expressed his gratitude to Mr. Mohamad for his visit and his comments, which he had always found highly instructive. One perennial problem, namely the lack of replies from some Governments to Commission questionnaires, often meant that it was difficult for the Commission to rely on the statements and comments of AALCO, because they reflected the views of the secretariat rather than those of member States. He noted that, although the report of the informal expert group on the identification of customary international law should have been adopted by the member States, that had not been the case. He also had serious doubts whether the Commission could endorse some of the informal expert group’s controversial conclusions, for example regarding specially affected States.

⁵⁸ *Ibid.*, p. 36, paragraph (2) of the commentary to draft article 12.

22. Ms. JACOBSSON thanked Mr. Mohamad for his major contribution to the successful cooperation between AALCO and the Commission. She also thanked him for his comments on the topic of the protection of the environment in relation to armed conflicts, which had been especially useful, since no Asian or African State had replied to the Commission's questions on that subject. However, she drew attention to the disparity that sometimes existed between what Mr. Mohamad said with regard to the position of AALCO member States on a given issue of international law of relevance to the Commission's work and the statements of those States in the Sixth Committee on the same points. This disparity raised the question of how to deal with information conveyed by the Secretary-General of AALCO.

23. Ms. ESCOBAR HERNÁNDEZ thanked Mr. Mohamad for his clear and effective presentation of AALCO activities of relevance to the Commission's work and said that she was in the same position as Ms. Jacobsson, in that she had received no replies from AALCO member States to the Commission's questions regarding various aspects of the topic of the immunity of State officials from foreign criminal jurisdiction. Her only clues as to their viewpoints had been gleaned from the statements which some of them had made in the Sixth Committee. Such information as she had been able to gather by consulting the AALCO website suggested that, on the one hand, the majority of member States considered that no exceptions should be made to the immunity of the Head of State from foreign criminal jurisdiction and, on the other, that they were unable to agree on whether to widen the membership of the troika when it came to immunity *ratione materiae*. As it would be helpful to know more, she welcomed the adoption by AALCO, at its previous session, of a resolution inviting the member States to contribute to the Commission's work by communicating their comments on selected items on the agenda.

24. Mr. PETER said that he had listened to Mr. Mohamad with great interest and he noted that, on the whole, his comments on the Commission's work were often more detailed than the resolutions adopted by AALCO on subjects of common interest. It was therefore difficult for the Commission to use those resolutions, which were always very general, as a basis for ascertaining the views of AALCO member States.

25. Mr. PETRIČ thanked Mr. Mohamad for his most useful statement and paid tribute to the tremendous contribution that he had made to establishing closer links between AALCO and the Commission. He invited him to make his successor aware of the need to encourage AALCO member States to speak up when the Commission's report was considered in the Sixth Committee.

26. Mr. CANDIOTI commended the quality of Mr. Mohamad's comments and thanked him for having striven tirelessly to forge closer links between AALCO and the Commission, which, he hoped, would continue their cooperation, especially on the topic of the identification of customary international law. As Mr. Hassouna had proposed, it would be useful if, as part of its work on that subject, AALCO were to investigate the extent to which

general principles of international law constituted a source of customary international law.

27. Mr. AL-MARRI recalled that, when AALCO had been founded, one of the main tasks with which it had been entrusted had been to promote legal culture in Asian and African countries and the principle of the rule of law in international relations. He wished to know if the adoption of an action plan to further the actual achievement of those goals in the future had been contemplated.

28. Mr. WAKO also invited Mr. Mohamad and his successor to encourage AALCO member States to express their opinions in the Sixth Committee during meetings devoted to the consideration of the report of the Commission in order that the latter might be able to obtain a precise idea of their views on its current work.

29. Mr. MOHAMAD (Secretary-General of the Asian-African Legal Consultative Organization) said that it would be difficult, in the short amount of time available, to reply to all the questions that had been asked. Although, in his capacity of Secretary-General of AALCO, he could provide the Commission with an annual round-up of member States' views on various topics on which it was engaged, he could not say what their "common position" was on those subjects, quite simply because very often no such position existed. AALCO was nonetheless a key go-between for the Commission. It was therefore essential that the Commission's members continue to attend the meetings held by AALCO member States while the Sixth Committee was in session. More generally speaking, it was vital that cooperation with the Commission continue—he would endeavour to alert his successor to the need to maintain it—and, despite all the inherent difficulties, further informal expert groups should be set up to examine questions of international law that were also of interest to the Commission. Lastly, he suggested that the exchange and research programme on international law that was being financed by the Government of China focus on topics that were being considered by the Commission.

Identification of customary international law⁵⁹ (A/CN.4/678, Part II, sect. E,⁶⁰ A/CN.4/682,⁶¹ A/CN.4/L.869⁶²)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

30. The CHAIRPERSON invited the Special Rapporteur on the identification of customary international law to present his third report (A/CN.4/682).

⁵⁹ At its sixty-sixth session (2014), the Commission had before it the second report of the Special Rapporteur (*Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672), containing his proposals for, *inter alia*, 11 draft conclusions. At its 3242nd meeting, on 7 August 2014, the Chairperson of the Drafting Committee presented the interim report of the Drafting Committee on "Identification of customary international law", containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session.

⁶⁰ Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

⁶¹ Reproduced in *Yearbook ... 2015*, vol. II (Part One).

⁶² Mimeographed; available from the Commission's website, documents of the sixty-seventh session.

31. Sir Michael WOOD (Special Rapporteur) said that he disagreed with most of the stylistic changes that had been made to his text by the editorial services, since they had sometimes affected the tone and emphasis of what he had written. His third report had to be read together with his earlier ones⁶³ and with the report written by Mr. Saboia in 2014 in his capacity as Chairperson of the Drafting Committee.⁶⁴ His aim had been to deal with all the issues that had not yet been covered and that fell within the scope of the subject. He therefore asked Commission members to inform him of any possible omissions, although it had to be remembered that the outcome was intended to take the form of a practical guide. As work progressed, its interconnections with various current and previous topics on the Commission's programme of work were becoming increasingly evident, starting with the topic mandated by article 24 of the statute of the Commission, which instructed it to consider "ways and means of making the evidence of customary international law more readily available", a matter with which he would deal in his next report. However, that was also true of the topics relating to subsequent agreements and subsequent practice; *jus cogens*, which was a separate subject but closely connected with the present topic; and the law of treaties, including reservations to treaties and to the fragmentation of international law. The statements made by delegations in the Sixth Committee, the replies received from some States to the questions contained in chapter III of the Commission's report on the work of its previous session⁶⁵ and the contributions of academic institutions had provided valuable input to the report. It would be helpful if Commission members were to continue to encourage their own States and States from their region to supply relevant information.

32. Several points of particular interest for work at the current session had been highlighted in the introduction to the third report, namely the need to strike the right balance between the draft conclusions and the commentaries, on the one hand, and between offering clear guidance and maintaining the flexibility inherent in custom as a source of international law, on the other. It also underscored the idea, which had been acknowledged by several delegations to the Sixth Committee, that, although "it was primarily the practice of States that had to be taken into account when identifying a rule of customary international law", the practice of international organizations should not be ignored, provided that particular caution was exercised.

33. As requested by the Commission and the Sixth Committee, he had devoted chapter I of his third report to a detailed analysis of the relationship between the two constituent elements of customary international law. In his analysis, the Special Rapporteur concluded, first, that the existence of practice and *opinio juris* had to be considered and verified separately by assessing different evidence, because the practice allegedly prescribed by customary international law could usually not attest in itself to its acceptance as law and, second, that the temporal order in

which they appeared was of little importance for the formation of a customary rule. Moreover, on the basis of the statement contained in the second report that "[t]here may ... be a difference in the application of the two-element approach in different fields [of international law] (or, perhaps more precisely, with respect to different types of rules)"⁶⁶ he considered that, in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, might be more relevant than in others and that, when assessing constituent elements of custom, it was necessary to take account of the context in which the alleged rule had arisen and was to operate. He therefore suggested that a second paragraph be added to draft conclusion 3 [4] which would state that each of the two elements had to be ascertained separately and that this required an assessment of specific evidence for each one.

34. Chapter II of the third report, which concerned inaction as practice and/or evidence of acceptance of the practice as law, also responded to a request made at the previous session. It pointed out that inaction, even more than other forms of practice, was sometimes difficult to identify and qualify. It could serve as evidence of acceptance of a practice as law only when it represented concurrence in that practice, which presupposed that the practice in question called for a reaction, that the State concerned had knowledge of that practice or that the circumstances were such that it could be deemed to have had such knowledge and, lastly, that inaction had been sufficiently long. While those considerations did not call for any change in draft conclusion 6 [7], they did warrant the modification of draft conclusion 11, paragraph 3, to read: "Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction."

35. Chapter III of the third report was devoted to the role of treaties and resolutions—that term being understood in the broad sense of decisions of international organizations—in determining the existence of customary international law, because, to quote Judge Tomka, "the increasing prevalence of the expression of legal views in precise written form ... has had significant effects for the way in which"⁶⁷ customary international law might be ascertained. Even so, while recourse to such written texts might appear to be a convenient shortcut, caution was needed and all the circumstances surrounding their adoption had to be considered, for they might embody pre-existing customary rules (*lex lata*), or they might equally well seek to clarify or develop the law, or formulate new rules. The discussion of the role of treaties in the formation and identification of custom (section A) drew on the abundant case law of the International Court of Justice and covered various areas of international law. The practice of parties to multilateral conventions, including the so-called "Baxter paradox",⁶⁸ and the possible relevance of bilateral treaties were also addressed, and it would be wise for the commentary to the proposed draft conclusion 12 briefly to cover those points. The resolutions adopted by

⁶³ *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/663 (first report); and *Yearbook ... 2014*, vol. II (Part One), document A/CN.4/672 (second report).

⁶⁴ Available from the Commission's website: https://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/dc_chairman_statement_identification_of_custom.pdf&lang=E.

⁶⁵ *Yearbook ... 2014*, vol. II (Part Two) and corrigendum.

⁶⁶ *Ibid.*, vol. II (Part One), document A/CN.4/672, pp. 173–174, para. 28.

⁶⁷ P. Tomka, "Custom and the International Court of Justice", in *The Law and Practice of International Courts and Tribunals*, vol. 12 (2013), pp. 195–216, at p. 196.

⁶⁸ R. R. Baxter, "Treaties and custom", *Collected Courses of The Hague Academy of International Law, 1970-I*, vol. 129, pp. 25–105, at p. 64.

international organizations and at international conferences (section B) were not examined from the viewpoint of the practice of international organizations as such, but as State practice, or, as was more often the case, as evidence of States' *opinio juris*. Although it was generally agreed that resolutions did play a role in the determination of customary international law, that issue had proved somewhat controversial in the past, in particular with regard to the extent of the legal effects of General Assembly resolutions. The efforts of the International Law Association had almost foundered on that matter at its sixty-ninth Conference, held in London from 25 to 29 July 2000. It seemed, however, that those controversies had been more the result of misunderstandings than of real substantive disagreements. In his view, that issue would not raise any questions of principle or particular difficulty provided that it was borne in mind that the resolutions adopted by States within international organizations and at international conferences could, in certain circumstances, play a role in the formation and identification of customary international law; that while those resolutions could not in and of themselves create customary international law, they might provide evidence of an existing or emerging rule; that establishing whether a given resolution provided such evidence was, in the opinion of the International Court of Justice, something to be done "with all due caution"⁶⁹ by looking at the content and conditions of the adoption of the resolution concerned and by checking whether an *opinio juris* existed as to its normative character; and that, in such a process of assessment, the particular wording of a resolution and the circumstances surrounding its adoption were crucial. Draft conclusion 13 on resolutions was framed in more general terms than the corresponding draft conclusion 12 on treaties in order to reflect the quite nuanced ways in which resolutions operated in that field.

36. Chapter IV of the third report, which culminated in draft conclusion 14, was devoted to judicial decisions and writings, which Article 38 of the Statute of the International Court of Justice regarded as subsidiary means for determining rules of customary international law. The term "judicial decisions" covered both decisions of national courts, which had to be approached with caution and taking account of the position of national courts within their own legal system, and decisions of international courts, which were of particular significance, especially those of the International Court of Justice as the principal judicial organ of the United Nations. Writings remained a useful source of information and analysis; that might possibly be the place to mention the Commission's own work, provided that a distinction was drawn between *lex lata* and *lex ferenda*.

37. Chapter V, probably the most sensitive section of the third report, responded to a wish expressed at the previous session by members of the Drafting Committee who wanted to reconsider draft conclusion 4 [5] on the basis of an analysis of the importance of the practice of international organizations for purposes of identifying rules of customary international law. After that analysis, he had not thought it necessary to modify draft conclusion 4 [5], paragraph 2, on international organizations, but he suggested

that the word "primarily" be deleted from the first paragraph and that a third paragraph be inserted, which would read: "Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law." In that connection, it was necessary to bear in mind the fact that a distinction had to be made between the practice of States within international organizations and the practice of international organizations themselves and between the conduct of the organization in relation to its internal operation and its conduct in its relations with States and other entities (external practice), since only the latter might be of relevance to the formation and identification of customary international law.

38. Chapters VI and VII of the third report both concerned, albeit in different ways, the application *ratione personae* of rules of customary international law. Although the International Court of Justice had found in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* that the rules of customary international law were "of general application, valid for all States" (para. 90 of the judgment), there was also what he had chosen to call "particular custom", deriving from "special", "regional", "local" or "bilateral" customary rules. As far as the International Court of Justice was concerned, the two constituent elements rule applied to their determination. However, as those rules bound only a limited number of States, it was essential to identify which ones had participated in the practice and accepted it as law by strictly applying those criteria to all the States concerned, as had been said. Draft conclusion 15, paragraph 2, which concerned that particular custom, made that point. The practical importance of the persistent objector rule, which formed the subject of chapter VII, was not as limited as had sometimes been argued. It was well established in international law and its existence was recognized by national and international courts and in legal writings. It was therefore important that the Commission address that rule, *inter alia* in order to confirm the stringent requirements for it and to make it clear that there could be no such thing as a "subsequent objector". That was the purpose of draft conclusion 16.

39. In conclusion, he said with regard to chapter VIII of his third report, dealing with the Commission's future programme of work, that, although he hoped that the Commission would be able to complete its work on the topic at the following session, he did not intend to jeopardize its quality by rushing.

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

[Agenda item 1]

40. Mr. FORTEAU (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of the protection of the atmosphere was composed of Mr. Hmoud, Mr. Huang, Mr. Kittichaisaree, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Tladi, Sir Michael Wood and Mr. Vázquez-Bermúdez (*ex officio*).

The meeting rose at 1 p.m.

⁶⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14, at pp. 99–100, para. 188.*