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Summary record of the 3252nd meeting

Topic:
Identification of customary international law

Extract from the Yearbook of the International Law Commission:-
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after its creation, and that it had consistently objected, albeit tacitly at times. The key was whether the objection was sufficiently well communicated to other States.

55. In response to the Special Rapporteur's invitation to propose issues that should be taken up in the fourth report, he suggested the process whereby, over time, general customary rules changed in nature or became special custom. Greater clarity was needed on aspects such as how to determine a change in a rule and its legal consequences, and where to draw the line between the violation of a previous rule and adherence to a new rule.

56. In conclusion, he recommended the referral of all the draft conclusions to the Drafting Committee.

57. Mr. TLADI said that Mr. Hmoud had referred to rules that by their nature required inaction, such as those on the prohibition of the use of force. However, the forms of practice covered in draft conclusion 6 [7] included diplomatic acts, through which a State could express its views on the use of force. That was a positive act, which implied that even rules prohibiting certain acts did not by definition rely solely on inaction.

58. Mr. AL-MARRI said that the topic was important because customary law was a primary source of international law. The Special Rapporteur was well placed to guide the Commission in its work. He had crafted a high-quality report and draft conclusions for review by the Drafting Committee.

59. On the substance of the third report, he said that the two-element approach should be retained. A fundamental aspect of the law was the practice, not only of States, but also of international organizations in areas where they had competence. It was essential to study the role that might be played by United Nations resolutions and rules that might be derived therefrom as well as proposals under treaty negotiations. It was also essential to study local and regional agreements relating to the codification of international law.

The meeting rose at 1 p.m.

3252nd MEETING

Tuesday, 19 May 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, 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. Kolodkin, 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.

Identification of customary international law (*continued*) (A/CN.4/678, Part II, sect. E, A/CN.4/682, A/CN.4/L.869)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the members of the Commission to pursue their consideration of the third report on the identification of customary international law (A/CN.4/682).

2. Mr. MURASE said that he approved of the proposed paragraph 2 of draft conclusion 3 [4], which clearly indicated that "double counting" the two constituent elements of customary international law had to be avoided. He proposed that the word "generally" be deleted from the beginning of the second sentence, because it presupposed the existence of "exceptions" to the rule set forth therein. He also welcomed the proposed paragraph 3 of draft conclusion 4 [5], on non-State actors, although he was dubious about the merits of using the term "other". As to draft conclusion 11, he had some reservations about paragraph 3. While in some cases inaction could be regarded as a form of practice or a form of expression of acceptance as law, in others it could imply denial of acceptance—as it did in Asia and in Japan, in particular, where silence often signified disagreement. That negative aspect should therefore be mentioned in that paragraph. He shared Mr. Kittichaisaree's views on "specially affected States" and, for the reasons that he had already stated, he approved of the decision taken by the Commission at its previous session not to deal with that issue.

3. As far as the constituent elements of customary international law were concerned, he noted that the Special Rapporteur assumed that the members of the Commission subscribed to the "two-element" approach. While that assumption did not pose any particular problems, the extent of agreement should not be overestimated, because the members of the Commission held diverging views on the relationship between those two elements, which varied depending on the rules of international law. Although there was a discernible group of customary rules where both elements were sufficiently present, other groups of rules which were supported by abundant State practice lacked *opinio juris* and, conversely, many rules that were clearly supported by worldwide *opinio juris* did not evince enough State support to be considered established rules of customary international law. What the Special Rapporteur said in the penultimate footnote to paragraph 16 of his third report might not be entirely appropriate. In some exceptional circumstances, *opinio juris* (and not just *opinio*) preceded State practice and, when the latter was not yet sufficient, the former was regarded as a supplementary means of identifying a rule of customary international law, in accordance with section 19 of the London Statement.[75] In any event, an excessively rigid approach to the relationship between the two constituent elements

[75] Statement of Principles Applicable to the Formation of General Customary International Law, with commentary (resolution 16/2000: Formation of general international customary law, adopted on 29 July 2000 by the International Law Association, *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, London, 2000, p. 39).

of customary international law would hamper the latter's proper development, which was why he again stressed the need for flexibility.

4. With regard to draft conclusion 13, on resolutions of international organizations and conferences, he approved of the distinction drawn by the Special Rapporteur in paragraph 72 of the third report. He agreed that it was the external practice of the organization that was relevant to the formation and identification of customary international law. However, a draft conclusion should record the fact that subsequent practice within an organization could have a bearing on the external effects of the customary law formed by it. Moreover, while the Commission had been right, at its previous session, to decide not to define the term "international organization", it could ill afford not to qualify international conferences, given their wide diversity. Perhaps it would be possible to use language drawn from section 33 of the above-mentioned London Statement and to speak of "international conferences of a universal character".

5. The relationship between treaties and custom could not be discussed without a reference to article 38 of the 1969 Vienna Convention. It was regrettable that this article was only briefly mentioned in the second footnote to paragraph 39 of the third report, since several authors, including Judge Gaja, had drawn attention to some important issues raised by that provision. Those questions should be carefully examined in the Commission's work on the topic, especially the meaning of the phrase "recognized as such". In the *chapeau* of draft conclusion 12, it might be wise to replace or supplement the verb "reflect", which was purely descriptive and devoid of any normative content. Since the crux of the matter was whether a treaty provision bound States as a customary rule, the *chapeau* could be changed to read, "A treaty provision may reflect or come to reflect a rule of customary international law binding on third parties to the treaty …". While he was pleased that the Special Rapporteur had spoken of an "emerging rule of customary international law" in paragraph (*b*), he was unsure what was meant by the term "a new rule of customary international law" in paragraph (*c*), which seemed all the more redundant given that those "new rules" were already subsumed within the expression "emerging rules". That draft conclusion should likewise indicate that only those provisions "of a fundamentally normative character"—and not all treaty provisions—could generate new rules of customary international law, as the International Court of Justice had rightly held in the cases concerning the *North Sea Continental Shelf*.

6. New or emerging rules of customary international law were generated not only by treaties but also by unilateral measures of States—for example the continental shelf regime had originated in the unilateral policy adopted by the United States in the Truman Proclamation of 1945.[76] It was to be hoped that the Commission would deal with that question separately from the issue of the crystallization of customary international law based on treaties. Consideration of that aspect of emerging customary international law did not, however, mean returning to the Special Rapporteur's original proposal to study the formation of customary international law, which had been subsequently abandoned.

7. He was sceptical about the advisability of dealing with particular custom in draft conclusion 15. Although he agreed that this concept did exist, the identification of a particular custom, be it bilateral, local or regional, was essentially a matter for a given group of States. The Commission should confine its study to "general customary law", as the International Law Association had done in its London Statement.

8. As to draft conclusion 16, he did not think that the persistent objector doctrine had anything to do with the identification of customary international law, but was primarily a question of the application of certain of its rules. Save in a few exceptional instances, that doctrine had never been sufficiently supported by general State practice, or by the case law of international courts and tribunals, except in relation to the application of rules on acquiescence, estoppel and opposability (and, perhaps, admissibility). The persistent objector doctrine jeopardized the general applicability of customary international law and its increasing use might lead to the erosion of that branch of the law. If, however, the Special Rapporteur decided to base a draft conclusion on that doctrine, its application would have to be made subject to several requirements, namely that the objection must be persistent, consistent, publicly expressed and effectively maintained and accompanied by physical actions. It would also be necessary to specify the sorts of rules of international law to which objections could be entered. The Special Rapporteur held that "subsequent objection", in other words an objection made after a customary rule had crystallized, was impermissible. Had any thought been given to the situation of a newly independent State, which had a "clean slate" as far as treaties ratified by its predecessor were concerned? Would it not be permitted to object to customary rules that had crystallized before its independence?

9. In conclusion, in view of the complexity of the issues at stake, the Commission should take care not to adopt hasty conclusions and it should not attempt to complete its work on the topic in 2016. While the subject matter was certainly examined in depth in the third report, the questions related to emerging rules of customary international law still required further discussion. That was the reason why, although he agreed with sending the draft conclusions to the Drafting Committee—notwithstanding his reservations with regard to draft conclusions 15 and 16—he urged the Special Rapporteur to be cautious and patient.

10. Mr. HASSOUNA said that the Special Rapporteur's third report was a well-written, well-argued and well-researched document, although the abundant, lengthy footnotes tended to dominate the concisely formulated text. He commended the Special Rapporteur on his clear exposition of the complex issues raised by the topic and on the impressive number of references supplied in

[76] "Policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf: a proclamation by the President of the United States", *United States Statutes at Large*, vol. 59, Part 2: *Private Laws, Concurrent Resolutions, Proclamations, Treaties, and International Agreements other than Treaties*, Washington, D.C., United States Government Printing Office, 1946, p. 884.

support of the proposed draft conclusions, although the latter sometimes failed to provide clear guidance, despite the fact that the purpose of the Commission's work was to draw up a guide to practice to help practitioners to identify rules of customary international law. That was true, for example, of draft conclusion 12, which seemed to be of limited use. It could refer, for instance, to the guidance offered in the *travaux préparatoires* in order to determine whether the parties to a treaty had considered that a given provision reflected existing international law; to the need for the treaty provision to be normative; or to the relevance of the parties' ability to make reservations to the treaty's provisions.

11. Draft conclusion 13 also lacked clarity, since it failed to say in what circumstances resolutions adopted by international organizations or at international conferences could be evidence of customary international law or contribute to its development. It would be helpful if it were to contain a non-exhaustive list of the elements which the report listed as having to be taken into consideration in order to ascertain whether a resolution was normative—such as its wording, the method used to adopt it and, where applicable, the outcome of the vote—as well as a reminder that the resolution in question must also be observed in State practice.

12. The same lack of clarity was found in draft conclusion 14, which merely reiterated the provisions of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, whereas it could distinguish between the decisions of national courts and those of international courts and make it clear, as the third report did, that the former could play a dual role not only as State practice, but also as a means of determining rules of customary international law. Even if the need to "maintain the flexibility inherent in custom as a source of law" warranted the broad formulation of the conclusions, which had to be read in conjunction with the commentaries thereto, the proposed draft conclusions would significantly benefit from further specification. AALCO had made the same point and had asked the Commission for "greater precision and more concrete criteria, either in the text of the conclusions, or in the commentaries".

13. Regarding the constituent elements of customary international law, the Special Rapporteur stated in his third report that the two-element approach applied to the formation and identification of all rules of customary international law, but that the approach might be applied differently depending on the field of international law concerned. It was regrettable that the draft conclusion did not address that important point, which was dealt with in a somewhat cursory fashion in the report. The view that the two-element approach might apply differently depending upon the field of international law concerned was controversial in the literature and raised numerous questions, in particular which fields of international law were concerned and who made that determination. Leaving the resolution of those questions to international judges, who were supposed to apply—not to create—the rules of customary international law was problematic, since they might substitute their own judgment for that of States, which remained the primary sources of international law; moreover, international law still lacked a court of general and compulsory jurisdiction. Those questions needed to be addressed by the Commission; the mere mention of a differentiated application of the two-element approach to customary international law was unlikely to be enlightening for practitioners called upon to identify customary norms. Moreover, the views expressed by States in the Sixth Committee in 2014 confirmed the need for further discussion of the matter because, while several delegations had found that the approach according to which, in some fields, one constituent element alone would be sufficient to establish a rule of customary international law was not supported by practice, others had suggested exploring variations in the respective weights of the two elements in specific fields of international law. However, the Special Rapporteur did not discuss how to weigh the two elements. In paragraph 15 of his third report, he stressed the importance of the distinction between the two elements of customary international law, but, although he admitted the possibility of overlaps between the two, he gave no guidance as to the distinctive criteria or method that might help to assess the specific evidence for each element. Likewise, in paragraph 17 of the third report, it would be desirable to shed light in the commentaries on the objective circumstances that might have a differentiated effect.

14. Concerning draft conclusion 11, the Special Rapporteur had sought to respond to questions raised by members of the Commission at the previous session and, by altering paragraph 3, to clarify when inaction could serve as evidence of acceptance as law, namely by restricting the use of inaction to instances in which circumstances called for some reaction. In his view, that paragraph should be reformulated so as to reflect relevant elements relating to inaction contained in the body of the report and, in particular, to highlight three basic elements, namely that a persistent and long-term inaction might also serve as evidence of acceptance as law; that the State had known or should have known of the specific circumstances in question; and that the situation would normally call for some reaction.

15. He supported the proposal to include the work of the Commission, as a subsidiary organ of the United Nations General Assembly, in Part Five of the draft conclusions, entitled "Particular forms of practice and evidence". Regarding draft conclusion 13, the Special Rapporteur stated that special attention would be paid to resolutions of the General Assembly, since it was a forum with near universal participation, whose resolutions might be particularly relevant as evidence of or impetus for customary international law. However, he made no mention of the weight to be given to resolutions of other international organizations, with a similar wide representation of States, in evidencing general customary international law. It was well established that resolutions adopted by States within international organizations or at international conferences might in certain circumstances contribute to the formation and identification of customary international law. In that context, the term "circumstances" in draft conclusion 13 should be explained either in the draft conclusion or the commentary thereto.

16. With regard to draft conclusion 14, it was stated in paragraph 60 of the third report that the weight of the

decisions of international courts and tribunals varied depending on the quality of the reasoning, the composition of the court or tribunal and the size of the majority by which they had been adopted. Not only were some of those conditions too subjective, but they also raised the question of which party might be entitled to evaluate them and on what basis. In paragraph 62 of the report, it was further stated that the role of writings depended on their quality; however, that was a criterion that was also difficult to evaluate objectively.

17. Although the arguments advanced by the Special Rapporteur in support of the relevance of the practice of international organizations in the identification of customary international law were convincing, there still seemed to be disagreement as to the independent role of those organizations in that regard, a situation that should be mentioned in the commentaries. Regarding draft conclusion 15, the Drafting Committee should decide which term—"particular custom", "special custom" or "regional custom"—was the most appropriate. The Drafting Committee might also replace, in paragraph 1, the words "by and against certain States" with "among States". The Special Rapporteur should clarify how a particular customary rule might evolve into a rule of general customary international law over time or, indeed, might contradict such a rule. Draft conclusion 16 was, in his view, incomplete because it did not mention whether the persistent objector might always evade the binding force of the customary norm to which it objected. The question of how the persistent objector rule might be applied in the context of peremptory norms of international law (*jus cogens*), or even in the field of international human rights law, should also be addressed. He was pleased to note that the Special Rapporteur aimed to conclude work on the topic in 2016 but that he would not press forward with undue haste if more time was needed. He also welcomed the Special Rapporteur's intention to consider, in addition to the draft conclusions and commentaries, practical ways of enhancing the availability of materials on the basis of which a general practice and acceptance as law might be determined. In conclusion, he recommended the referral of the eight proposed draft conclusions to the Drafting Committee.

18. Mr. WISNUMURTI thanked the Special Rapporteur for his third report on the identification of customary international law and his introductory statement at the previous session. It was heartening to note that the report contained a comprehensive set of very helpful draft conclusions. It was also important to note that the two-element approach had received support from the Sixth Committee. Before commenting on the draft conclusions themselves, he wished first to stress the need to bear in mind that the draft texts should be written in clear language in order to make sure that practitioners, especially those who were not very familiar with customary international law, would understand them.

19. With regard to draft conclusion 3 [4], he noted that the Special Rapporteur had managed to clarify further the relationship between the two constituent elements of customary international law. He agreed that, while the two elements were indeed inseparable, each element had to be separately ascertained, as indicated in paragraph 2. While he shared Mr. Tladi's doubts about the distinction, too rigid in his view, made in paragraph 15 of the third report between evidence of practice and evidence of *opinio juris*, he could nonetheless agree to the formulation of paragraph 2. However, in that paragraph, the word "generally"—which was not sufficiently precise and might create uncertainty for those interpreting the facts at hand—could be deleted. Furthermore, draft conclusion 11 was not sufficiently precise either and should be redrafted to reflect fully the conditions set out in paragraphs 23, 24 and 25 of the report. While he had no difficulty with draft conclusion 12, subparagraphs (*a*) and (*b*), he doubted whether the formulation of paragraph (*c*) was sufficiently clear for those who would be called upon to interpret it. With regard to draft conclusion 13, he welcomed the caution shown by the Special Rapporteur when stating that resolutions adopted by international organizations or at international conferences "cannot, in and of themselves, constitute" customary international law.

20. Regarding draft conclusion 14, he was pleased to note that the Special Rapporteur had taken due account of the need to bear in mind that the real effect of judicial decisions depended on the weight given to each decision. The same applied to the writings of individual authors.

21. As to the role of international organizations in the formation and identification of customary law, to which chapter V of the third report was devoted, it was important to note the distinction made by the Special Rapporteur between the conduct of the organization in its internal operation and its conduct in its relations with States, international organizations and others, only the latter being relevant to the identification of custom. Similarly, the report rightly stated that acts of international organizations might reflect the practice and convictions of their member States and that they might thus constitute State practice or evidence of *opinio juris*. Even though the proposed paragraph 3 of draft conclusion 4 [5] did not appear to be sufficiently substantiated, it did nonetheless serve as an important exclusionary clause that completed the provisions of the draft conclusion. He agreed with the proposal of the Special Rapporteur to delete the word "primarily" in paragraph 1 of draft conclusion 4 [5].

22. While draft conclusion 15 on particular custom was welcome, it was regrettable that the scope of application of particular custom was not mentioned. That could be amended by reformulating paragraph 1 to read: "A particular custom manifesting regional or local custom is a rule of customary international law that can only be invoked by and against certain States."

23. Lastly, recalling that the rule of persistent objector was important for preserving the consensual nature of customary international law, he said that he endorsed draft conclusion 16, provided that the persistent objector sufficiently communicated its position. In conclusion, he recommended the referral of all the draft conclusions to the Drafting Committee.

24. Mr. CAFLISCH said that the Special Rapporteur's third report was very informative, clear, interesting and appropriately moderate and cautious.

25. With regard to draft conclusion 14, on judicial decisions and writings, the Special Rapporteur had wisely chosen to employ a neutral phrase without referring, as Article 38 of the Statute of the International Court of Justice did, to the "teachings of the most highly qualified publicists", who were difficult to identify. The Special Rapporteur was also right to include in judicial decisions the decisions of both international and national courts, even though the latter were certainly less authoritative—although it could be argued that, at the same time, they formed part of State "practice". Furthermore, while it was true that decisions of the International Court of Justice enjoyed particular prestige because they were made by the principal judicial organ of the United Nations, it was important to recall that there was no formal hierarchy among international judicial bodies and not to underestimate decisions of other permanent international courts or arbitral awards.

26. As to the proposed paragraph 3 of draft conclusion 4 [5], it was worth considering whether there were entities other than States and international organizations to which certain functions could be attributed and which, within the framework of those functions, might develop practices that contributed to the formation and evidence of customary law. ICRC, for example, might constitute one such entity.

27. The nature of regional or local custom and bilateral custom, referred to in draft conclusion 15, was uncertain. The former, which appeared to be based on the practice of the States of a geographical region or subregion, applied only to the States of the area concerned that recognized it and therefore did not necessarily apply to the region or subregion as a whole. Conversely, States situated outside the geographical area might accept it. In other words, it was the acceptance of the rule in question that determined its scope; consequently, it was based on the consent of States and, as a result, was more a treaty rule than a customary one. The same applied to bilateral custom, which derived from concordant instances of customary conduct, thus from bilateral agreements—tacit or otherwise—that were in fact of a quasi-treaty nature. The Special Rapporteur was therefore quite right to refer to rules of particular custom. It was open to question, however, whether such rules were genuine customary rules or latent treaty rules—even though that question did not appear to concern the international community, which had for a long time lived with the idea that it was a matter of customary law.

28. It did not appear appropriate for the Commission to endorse the persistent objector theory, which found little support internationally, apart from in the 1951 judgment of the International Court of Justice in the *Fisheries* case. Moreover, that theory had the potential to totally undermine the international legal order, since it made the consent of each State the basis of all international law, both treaty and customary. It was difficult to accept, however, that a State could indefinitely evade the application of a validly formed universal rule of customary law, since the international community would revert to a situation believed to be long gone where the idea of a purely voluntarist legal order prevailed. However, if the Commission decided to retain draft conclusion 16, it should make clear how it related to *jus cogens* rules, as Mr. Hassouna had noted. Furthermore, it would be feasible and helpful to amend the current text of draft conclusion 8 [9], by requiring that to establish a customary rule, the practice and *opinio juris* of the international community should be overwhelming, not merely widespread.

29. Ms. ESCOBAR HERNÁNDEZ congratulated the Special Rapporteur on the clarity of his third report and the added value brought to it thanks to his efforts to propose solutions to the problems identified by members of the Commission at the previous session.

30. As a preliminary observation, it was important to recall that the scope of the topic under consideration had been the subject of an extensive debate in 2013 that had led to its title being changed,[77] with the result that the latter referred only to the "identification" of customary international law, thereby excluding the question of its formation. In keeping with the agreed aim of the draft conclusions—namely to provide practitioners with a useful guide that would enable them to determine the existence and content of an international custom—it had been decided that the focus of the topic should be on evidence of custom, not its formation. However, the Special Rapporteur had not adhered to that approach; several paragraphs of the third report, in particular in chapters V, VI and VII, referred to the formation of custom (its birth) and dealt with questions that were of a theoretical nature or that related to the binding nature of custom or its opposability. In order to avoid any ambiguity, work on the topic should remain focused on the notion of "identification", and the term "formation" should not appear in the draft conclusions. Similarly, the word "*identificación*", which had been chosen for the Spanish version, should be used in a uniform and consistent manner, to the exclusion of the terms "*determinación*" and "*determinar*", which appeared in draft conclusion 3 [4], paragraph 2, and draft conclusions 14 and 15, paragraph 2.

31. The programme of work proposed by the Special Rapporteur seemed overly ambitious. As had already been pointed out, given the importance of the topic, the Commission should allow time for reflection and not risk leaving some questions inadequately explored by seeking to complete its work before the end of the quinquennium. Furthermore, the Special Rapporteur's stated intention of considering in his fourth report practical means of enhancing the availability of materials on the basis of which a general practice and acceptance as law might be determined seemed somewhat vague. Did he intend to compile a list of existing means of accessing evidence of custom or, on the contrary, propose new mechanisms with a view to enhancing access in the future? What about the essential requirement of universal access to the relevant information? There was a real risk that those mechanisms would not be supplied with data by all States, that they would not take account of the practice and *opinio juris* of all States and that they would lead to the "most powerful" States being overrepresented. Perhaps the Special Rapporteur could provide some answers to those questions when summarizing the debate, in anticipation of his next report.

[77] At its sixty-fifth session (2013), the Commission decided to change the title of the topic from "Formation and evidence of customary international law" to "Identification of customary international law" (*Yearbook … 2013*, vol. II (Part Two), p. 64, para. 69).

32. As to the draft conclusions, she generally agreed with the content of the proposed paragraph 2 of draft conclusion 3 [4], even though the adjective "specific" before the words "evidence for each element" seemed redundant. With respect to draft conclusion 4 [5], she considered that chapter V of the third report did not adequately address the concerns voiced by members of the Commission at the previous session regarding the role of the practice of international organizations. In that draft conclusion, the Special Rapporteur emphasized the State component of such practice but did not analyse sufficiently clearly which practice of the organization, understood narrowly, might be useful for identifying international custom. The chapter focused more on the contribution of the practice of international organizations to the formation of custom than to its evidence; it did not seem likely to provide practitioners with useful guidelines to determine which practice, of which organs and in what circumstances, might be helpful in identifying the custom in question. Moreover, even when considered from the perspective of the formation of custom, the arguments put forward by the Special Rapporteur appeared, at the very least, unconvincing and sometimes even contradictory. For example, paragraph 72 of the third report stated that the internal practice of an organization might give rise to " 'a kind of customary law of the organization, formed by the organization and applying only to the organization' " and stated in the first footnote to the paragraph, without further explanation, that "[s]uch 'custom' lies beyond the scope of the present topic". However, in paragraph 76, reference was made to the fact that the practice of administrative or operational organs might serve as relevant practice for purposes of formation and identification of customary international law. Similarly, the external practice of international organizations was described, also in paragraph 72, as relevant to the formation and identification of customary international law, without any explanation being offered as to how it might be relevant. Despite those arguments, the Special Rapporteur had not considered it necessary to amend paragraph 2 of draft conclusion 4 [5], whose wording was ambiguous and offered little guidance to practitioners. It would, however, be advisable to make it less vague and imprecise by deleting the introductory words "in certain cases" and to include in the commentary more specific information on the circumstances in which the practice of international organizations might be taken into account when identifying customary rules. However, she was not in favour of the proposal to delete the adverb "primarily" in draft conclusion 4 [5], paragraph 1, because that would amount to making State practice the only form of practice relevant for purposes of identifying customary law. It would be preferable to delete the reference to the formation of customary international law in the proposed paragraph 3, in line with the other paragraphs of draft conclusion 4 [5].

33. While the approach underpinning draft conclusion 11, paragraph 3, seemed appropriate, it would be useful if the Drafting Committee could decide on the exact terms to be used to refer to the circumstances in which inaction was relevant. She endorsed the content of draft conclusion 12, which reflected the traditional approach to the relationship between treaties and custom; however, she would like the phrase "or come to reflect" in the *chapeau* to be deleted because it referred not so much to the identification of custom as to its formation, since in the identification process the treaty was considered to exist already and therefore already reflected the customary rule for whose identification it served as evidence.

34. The wording of draft conclusion 13, in which the Special Rapporteur had rightly chosen to address in parallel treaties and resolutions of international organizations and conferences, called for a few observations. First, it contained elements that were related to the formation of custom and unrelated to its identification, namely the phrases "or contribute to its development" and "they cannot, in and of themselves, constitute it", which should be deleted. Moreover, its wording was overly general; the expression "in some circumstances" did not provide the reader with concrete guidance. Draft conclusion 12 should be taken as a model, in particular because the Special Rapporteur also based that draft conclusion on the threefold interplay between custom and the resolutions of international organizations. In any event, the commentary to draft conclusion 13 should provide guidance regarding, in particular, the probative value of declarations made by the General Assembly, and give examples of resolutions other than those of the General Assembly.

35. While the text of draft conclusion 14 seemed acceptable, she supported other members who had expressed the view that the work of the Commission should not, under any circumstances, be characterized as merely "writings". The nature and mandate of the Commission required, on the contrary, that it should be the subject of a separate provision, which would be better placed in the draft conclusions relating to the practice of international organizations or to the role of treaties.

36. The title of Part Six of the draft conclusions was somewhat vague and again seemed to bear little relationship to the criteria for the identification of custom. Of course, it was necessary to consider the issues of persistent objector and particular custom, but they should be dealt with from the perspective of clarifying whether there were specific criteria that had to be applied to the identification of rules of particular custom or to the identification of a given State as a persistent objector. However, both draft conclusion 15, paragraph 1, and draft conclusion 16 dealt with the nature, binding character and opposability of the custom, rather than focusing on any specific characteristics of the means for identifying the particular custom or emphasizing the need to clearly identify the general practice and *opinio juris* relevant for each of the States purportedly bound by the particular custom. It was regrettable that the latter point was not addressed expressly in the third report and appeared only in paragraph 2 of draft conclusion 15. The draft conclusion should therefore be reworked; paragraph 1 should be deleted—because the definition of "particular custom" would be better placed in the commentary—and paragraph 2 clarified. Furthermore, the issue of persistent objector, as presented in the report, wrongly combined genuine—or supposedly genuine—cases of persistent objection and other cases in which the issue at hand was in fact that of the opposability of a particular custom. Although it was possible to understand the idea behind such an approach, it might nonetheless make the draft conclusions difficult for users to understand and interpret. Current draft conclusion 16 merely described the effect of the theory of the persistent objector and set

out no criterion for ascertaining whether a State should be considered to be a persistent objector with respect to a given custom. The Special Rapporteur should therefore reformulate the draft conclusion with a view to aligning it with the aim pursued by the Commission.

37. In conclusion, she was in favour of referring all the draft conclusions to the Drafting Committee, on the understanding that it should take into account all the observations made in plenary.

38. Mr. TLADI, referring to the 2013 change in the title of the topic under discussion, said that the Commission had not intended thereby to substantively reorient its work but rather simply to solve a problem that had arisen regarding the French translation of the term "formation".

39. Mr. NOLTE, referring to the report of the Commission on the work of its sixty-fifth session, recalled that there had been a general view that, even if the title were to be changed, both the formation and evidence of customary international law should be included within the scope of the topic.[78]

40. Mr. FORTEAU said that the change of title did not address only a linguistic issue and that the Commission had agreed, in the light of the objective of its work, that, although the topic under discussion did not concern the description of the formation of customary rules themselves, it nonetheless related to the evidence of such rules and the definition of the regime applicable to the formative elements of custom.

41. Sir Michael WOOD (Special Rapporteur), acknowledging that he had never fully understood the change, said that he nonetheless tended to share Mr. Forteau's view. The focus of the topic should be on the identification of custom with a view to guiding practitioners who were seeking to ascertain whether customary rules existed; to do that, however, they might have to consider whether the customary rules in question had formed. Consequently, identification could not be totally disassociated from formation. The Commission should, however, refrain from entering into the sociological question of how customary rules came about. It might be best to adopt a pragmatic approach and, while continuing with the consideration of the third report, decide on a case-by-case basis whether to refer to formation.

42. Ms. ESCOBAR HERNÁNDEZ said that, by emphasizing the need to distinguish between formation and identification, she did not wish to imply that the question of whether custom had formed should not be taken into consideration as evidence of the existence of that custom. However, that question should not be the focus of the work of the Special Rapporteur or the draft conclusions; rather, it should be seen as instrumental in nature. That was all the truer given that it would be hazardous to undertake to identify the general conditions required for the formation of custom, since that might suggest that the Commission intended to introduce new elements into the already well-established mechanism whereby an international norm was formed.

43. Mr. SABOIA said that he wished to congratulate the Special Rapporteur on the excellent quality of his third report on identification of customary international law. He agreed with the view, set out in chapter I, that the two constituent elements of customary international law were inseparable but should be considered and verified separately and supported the recognition, in paragraphs 16 and 17, that both the temporal order of the appearance of State practice and *opinio juris* and their possible influence on each other might vary depending on the context and the field of international law concerned. He was of the view that, even though the word "formation" had been excluded from the title of the topic, the question of the formation of customary international law deserved appropriate treatment in future work. He had no problem with the proposal to add the new paragraph 2 to draft conclusion 3 [4].

44. He was satisfied with the way in which the Special Rapporteur had dealt with the effect of inaction on the identification of customary international law. Although he considered that the circumstances in which inaction might serve as evidence of acceptance were adequately addressed in paragraphs 23 and 24 of the third report and illustrated by examples provided in the footnotes thereto, he proposed, in response to Mr. Tladi's request for clarification in that regard, that those circumstances should be spelled out in the proposed new paragraph 3 of draft conclusion 11. With regard to chapter III, the Special Rapporteur had achieved the necessary balance between the increasing role that certain categories of treaties played in the formation of customary international law and the need to take due account of other relevant circumstances and factors, in particular State practice. He agreed with the proposal for draft conclusion 12. In that part of the chapter devoted to resolutions adopted by international organizations and at international conferences, the Special Rapporteur conducted a careful survey of the conditions and factors that might enable those documents, which were not in themselves legally binding, to contribute significantly to the formation, crystallization and identification of customary international law, without neglecting the other determining factors, in particular State practice but also the circumstances in which those resolutions were adopted. However, draft conclusion 13 might reflect in language that was more positive the actual influence of those resolutions, which seemed to be acknowledged in the explanatory paragraphs.

45. Contrary to what he had announced in his second report,[79] the Special Rapporteur did not deal in detail with the question of the role of international organizations in the formation and identification of customary international law. The Special Rapporteur devoted a great deal of attention to highlighting the differences, in terms of nature and scope, between the practice of international organizations and that of States and, although he quoted academic sources that ascribed increasing significance to those organizations in the formation of customary international law, it was the opposite view that he favoured in the report. He himself did not contest that State practice continued to have a predominant role and that the influence of international organizations on customary international law depended on factors resulting from their mandates and

[78] *Ibid.*, para. 76.

[79] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672.

composition. However, contemporary history suggested that international organizations contributed increasingly to customary international law. For example, the United Nations Security Council, which was mandated by States under Chapter VII of the Charter of the United Nations to act with respect to threats to the peace, breaches of the peace and acts of aggression, had broadened its practice and agenda, in particular after the end of the cold war and had, in particular, established international criminal courts, whose judgments had in certain cases been recognized as having an impact on customary international law. Another interesting example was that of General Assembly resolution 377 (V) of 3 November 1950, entitled "Uniting for peace", which had had significant legal and political consequences, since it had made it possible for the General Assembly to play an increasingly important role in the fields of peace and security. Of course, it could be argued that those were just examples of State practice within an international organization. But what then of the powers of the Secretary-General? Furthermore, not all of the organs of international organizations were composed of States; sometimes they were formed by experts serving in a personal capacity or envoys or special representatives of the Secretary-General who acted on mandates that were supervised by States but which evolved and were not always clearly defined. The International Court of Justice, which was composed of judges elected in their personal capacity, had a great impact on the formation of customary international law. As to the WTO Appellate Body, which was made up of members elected by the Dispute Settlement Body, States accepted its rulings as final settlement of trade disputes that had been submitted to it. Did its decisions have any impact on customary international law? In the light of such considerations, draft conclusion 4 [5] should be reviewed in order better to reflect the contemporary role of international organizations in the formation and identification of customary international law. He would also favour the retention of the adverb "primarily" in paragraph 1. Lastly, he shared Mr. Caflisch's concern that, in its current wording, draft conclusion 4 [5] took no account of any possible role for ICRC in the identification or formation of customary international law, a position that was not supported by the history of international humanitarian law.

46. Mr. ŠTURMA said that he wished to commend the Special Rapporteur on the quality of his third report, which was well structured, clear and well documented. He was pleased to note that the report reflected the position that he had taken at the previous session, namely that recognition that the weight put on practice and *opinio juris* might vary according to the different fields of law considered did not imply replacing the unitary approach to international custom with sectoral approaches in different areas of international law (such as human rights law, international humanitarian law and international criminal law). He also agreed that a particular form of practice or particular evidence of acceptance of a practice as law might be more relevant in some cases than others. He therefore supported the proposed new paragraph 2 of draft conclusion 3 [4]. Similarly, he had no problems with draft conclusion 4 [5], paragraphs 2 and 3; he would, however, add a qualification such as the adverb "generally" to illustrate the fact that in some exceptional cases the practice of non-State actors, for example ICRC, might also contribute to the formation or expression of customary rules. While he approved the substance of draft conclusion 11, paragraph 3, he agreed with other speakers about the need to clarify the circumstances in which inaction might serve as evidence of acceptance as law, namely when inaction resulted from abstention by the State concerned, when it continued over a sufficient period of time and when the circumstances called for some reaction.

47. As to the draft conclusions on particular forms of practice and evidence, draft conclusion 12 correctly reflected the different types of relationship between treaty rules and customary rules. He likewise endorsed draft conclusion 13, which concerned the role of resolutions of international organizations and conferences, although, in his view, that role was far from marginal. Perhaps a distinction should be made between international organizations, their organs and their acts in order to give more precise guidance as to the circumstances in which those acts might be relevant and have different weight as evidence of customary international law. Regarding the role of judicial decisions and writings, while he supported in principle draft conclusion 14, he shared Mr. Tladi's view that the separate and dissenting opinions of judges of the International Court of Justice should also be taken into account. He also agreed with Mr. Forteau that the word "writings" would benefit from further clarification.

48. Regarding the draft conclusions on exceptions to the general application of rules of customary international law, he could accept the expression "particular custom" provided that it served as shorthand for regional and local customary rules, which could be taken into consideration only if they were not contrary to general custom having the character of *jus cogens*. It would be useful to make clear in paragraph 2 of draft conclusion 15 that the particular custom bound only those States that had taken part in a general (or common) practice accepted among them as law—in other words, that it could not be invoked against other States. He agreed to a certain extent with the concerns voiced by Mr. Forteau and Mr. Caflisch regarding the voluntarist approach adopted by the Special Rapporteur, since, in his view, customary international law should keep its spontaneous nature as a source of law clearly distinct from treaty law. Nevertheless, the concepts of particular custom and persistent objector might be recognized as exceptions, provided that draft conclusion 16 was reworded more carefully or, failing that, deleted.

49. In view of the current large number of documents adopted by international bodies that were not classic resolutions adopted by international organizations or judicial decisions *stricto sensu*, the question arose as to, for example, the importance to be accorded to the views, decisions or observations of international human rights treaty bodies. Although those bodies had neither the status nor the powers of international courts and tribunals, they did, however, as international institutions created by States, often perform functions that were similar to those of such judicial bodies. Their role in the formation of the customary international human rights law had, however, been largely neglected, even though they might contribute to it in various ways. Given that they were quasi-judicial bodies, their decisions should be taken into account, *mutatis mutandis*, in the same way as those of international tribunals; they

should not be considered as writings but should have the status of collective works, comparable to that of the texts that emerged from the work of the Commission; and they should be regarded as acts of the international organizations (such as the United Nations and Council of Europe) to which they belonged. Those issues should be addressed in the Special Rapporteur's next report.

50. Another point that should be examined more closely was the evolution over time of existing customary international law and, in particular, the circumstances in which a new customary rule might replace an existing rule and a given customary rule might fall into obsolescence. That analysis might also shed light on the way in which the particular custom might become a general custom, since he was firmly convinced that this question concerned not only the formation of customary international law but also the identification of existing customary rules. However, those were all questions that mainly concerned the Commission's future work. In conclusion, he recommended that all the draft conclusions be referred to the Drafting Committee.

51. Mr. KAMTO congratulated the Special Rapporteur on his excellent report, which, however—and it was not alone in that regard—did not respect the 50-page word limit set for reports by the Commission. By way of a general observation, he said that he had reservations about the unusual way in which the Special Rapporteur had dealt with the views expressed by members of the Commission in plenary, since he had expressly mentioned those that supported his position while omitting to mention others, an approach that was likely to prompt those members whose views had not been taken into consideration to raise the points again. As to the content of the third report, it was hard to follow the reasoning of paragraph 16, which, in his view, was contrary to the letter and spirit of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice and the latter's settled case law. How could the Special Rapporteur argue that "it is possible that an acceptance that something ought to be the law … may develop first, and then give rise to practice that embodies it", while Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice referred to "international custom, as evidence of a general practice accepted as law" and the Court, in its judgment rendered in the *North Sea Continental Shelf* cases, which, moreover, he cited in paragraph 13 of his third report, stated that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it" (para. 77 of the judgment)? *Opinio juris* was a belief that a practice was rendered obligatory, not that a future practice would be or might be rendered obligatory. He could not therefore endorse the Special Rapporteur's position and he did not find convincing the view that was cited in the third footnote to paragraph 16 of the third report, according to which the expression of a need for law gave rise to a practice that completed the formation of the customary rule, since there could be a need for law, though not necessarily a need for customary law: very often, it was a need for treaty law. For example, to feel and express a need for rules with respect to protection of the atmosphere did not mean that States considered that the document whereby they expressed such a need would constitute an *opinio juris* of a practice that did not exist, still less that they accepted in advance the rule of law that might emerge from a future practice. The Commission would undermine its work if it adopted that approach, which was purely theoretical and did not correspond to the way in which customary rules actually emerged in the international legal order. Of course, international custom was not voluntary law in the sense that treaty law was—although elements of will played a part in the formation of certain customary rules—but it was certainly not spontaneous law because no rule of law emerged suddenly without any objective assessment or intellectual or psychological process. As to evidence of the two constituent elements of customary international law, he proposed the addition of the following sentence in the new paragraph 2 in draft conclusion 3 [4]: "In some cases, however, evidence of one element may also serve as evidence of the other element."

52. Noting that draft conclusion 11, paragraph 3, made no mention of the three conditions set out in paragraphs 23, 24 and 25 of the third report, under which inaction might be considered as practice and evidence of *opinio juris*, he proposed that the paragraph read: "Inaction may also serve as evidence of acceptance as law, provided that the circumstances call for some reaction, that the State whose inaction is sought to be relied upon in identifying a rule of customary international law had knowledge thereof and that its inaction has been maintained over a sufficient period of time." As to draft conclusion 12, he proposed splitting it into two paragraphs, the first of which would contain the *chapeau* and current subparagraphs (*a*) and (*b*), deleting the phrase "or come to reflect", which added nothing and might cause unnecessary confusion, and amending subparagraph (*b*) to read: "has led, at the date of the conclusion of the treaty, to the crystallization of an emerging customary rule". The second paragraph of draft conclusion 12 would reproduce the substance of current subparagraph (*c*) and read: "A treaty provision may also create a new rule of customary international law, by giving birth to a general practice accepted as law."

53. He endorsed the careful wording of draft conclusion 13, but considered it preferable to say that resolutions might contribute, not to the "development" of customary international law, but to its formation, or if that word was problematic, its identification, in accordance with the terminology used in other draft conclusions. In chapter IV of the third report, entitled "Judicial decisions and writings", it should be made clear that the decisions in question were international judicial decisions. The separate or dissenting opinions of judges, which had no authority with respect to the parties to the dispute, should be seen not as part of judicial decisions but rather as part of writings. He was concerned about the subjective nature of the selection of the texts considered as writings for the purposes of codification in general and the identification of customary international law in particular, which favoured writings from European or Western nations to the detriment of those from other regions of the world, contrary to the provisions of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which referred to the "teachings of the most highly qualified publicists of the various nations". He noted in that regard that the term "jurists" was more apposite than "publicists" because it encompassed jurists who were specialists in private law, some of whom

were members of the Commission and the International Court of Justice. He therefore proposed amending draft conclusion 14 to read: "International judicial decisions and the writings of the most highly qualified jurists of the various nations may serve as subsidiary means for the identification of rules of customary international law."

54. Regarding the role of non-State actors in the identification of customary international law, he was of the view that the traditional approach adopted in chapter V of the third report did not always take account of the development of customary international law. Even though transnational—not inter-State nor semi-State—law, which was produced by such actors, for example the International Olympic Committee, could not yet be taken into account, there was an increasing trend in international humanitarian law towards considering that non-State actors in armed conflicts could contribute to the formation of rules of customary international law in that field. The proposed new paragraph 3 of draft conclusion 4 [5] should be reworded, taking into account that trend or, at least, reference should be made to it in the commentary.

55. Turning to chapters VI and VII of the third report, he supported draft conclusions 15 and 16. However, regarding draft conclusion 16, which concerned the doctrine of the persistent objector, the Special Rapporteur should flesh out the commentaries so as to highlight the fact that the effects of objection were different according to whether the rule in question was developing or well established. In his opinion, persistent objection applied only if the existence of the rule had not been established. Once it had been established, and if it was a universal custom, all States, including those who had objected at a given time, must be bound by the customary rule. It remained to be seen whether, in that case, the persistent objection could continue to produce effects, in particular whether it could render the customary rule inapplicable as against the objecting State. Judging by the comments that had been made in that regard, the members of the Commission appeared to be of the view that this was not the case.

56. In conclusion, he was in favour of sending all the draft conclusions to the Drafting Committee. However, he would like to know whether the Special Rapporteur, who aimed to conclude work on the topic at the 2016 session, intended there to be no consideration of the draft conclusions on second reading. Given that it was one of the most controversial topics in international law, he called on the Special Rapporteur not to rush the conclusion of the work.

The meeting rose at 1 p.m.

3253rd MEETING

Wednesday, 20 May 2015, at 10 a.m.

Chairperson: Mr. Narinder SINGH

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Identification of customary international law (*continued*) (A/CN.4/678, Part II, sect. E, A/CN.4/682, A/CN.4/L.869)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic "Identification of customary international law" (A/CN.4/682).

2. Mr. McRAE said that, although the broad outlines of the two-element approach were well known and frequently cited, the relationship between the two elements and the way the approach was to be applied in practice were less clear. Empirical evidence was lacking as to how States and international courts actually applied the criteria that they said should be used in identifying customary international law. What emerged from the judgments of the International Court of Justice in the *North Sea Continental Shelf* cases and the *Military and Paramilitary Activities in and against Nicaragua* case was that the two constituent elements of customary international law were not applied consistently. Sometimes the identification of customary international law seemed to be based on an intuitive response, rather than on an analysis of practice and *opinio juris*, and sometimes the existence of one of the elements was merely assumed. It was that dissonance between the principles enunciated and what was actually done by courts and States that made the process of identifying customary international law confusing and difficult. Among the questions that should be addressed were: what, in fact, constituted general practice in an international community of 192 States; who should gather the necessary evidence for the existence of general practice; and how exactly should that be done?

3. Turning to the proposed new paragraph 2 of draft conclusion 3 [4], he noted that its wording did not adequately capture what was at stake in terms of the separate assessment of evidence for the two elements. The "double counting" issue was a false one, because there was no question but that practice that constituted general practice could be used to ascertain *opinio juris*. The real point was that one could not assume from the existence of general practice that a practice had been accepted as law. From that standpoint, the second sentence of paragraph 2 could be misleading if the phrase "specific evidence for each element" was understood as implying that the general practice was irrelevant for determining whether that practice had been accepted as law. If it was explained in the commentary that the first sentence meant that acceptance as law could not be implied from the mere existence of practice, then that sentence might be helpful, but the second sentence obscured that clarity and should be deleted.