Document:-
A/CN.4/3253

Summary record of the 3253rd meeting

Topic:
Identification of customary international law

Extract from the Yearbook of the International Law Commission:-
2015, **vol. I**

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.

4. The wording of the new paragraph 3 of draft conclusion 4 [5] was too categorical, given that the interaction of States and non-State entities in the context of treaty-making activities involved an intermingling of practice. Including some elements of non-State entity activity in the practice that was relevant for determining the existence of customary international law did not prejudice the position of States, since States were the ones that must demonstrate the existence of *opinio juris*. The Special Rapporteur should therefore reformulate paragraph 3 to show that, in some circumstances, the mixed activity of States and non-State actors could constitute relevant practice, although the actions and views of non-State actors were not relevant to the determination of *opinio juris*.

5. The wording of draft conclusion 11 did not give the right impression of the role played by inaction in identifying customary international law. The formulation "provided that the circumstances call for some reaction" might be appropriate if there was a general rule that States had an obligation to object if they disagreed with the development of a customary rule of international law. However, no such principle existed, and draft conclusion 11 seemed to be introducing it through the back door. There was no need for a special rule on inaction that imported the notion of acquiescence, either: inaction was the same as any other practice. In the *Military and Paramilitary Activities in and against Nicaragua* case, the issue had been, not whether the circumstances called for some reaction, but whether abstention from reacting was supported by *opinio juris*—whether it was accepted as law.

6. Some kinds of inaction thus called for an analysis, not of whether there was a general practice of inaction, but rather, of whether the inaction in question had been accepted as law. Moreover, in a world of 192 States, the identification of customary international law often depended, not on the general practice of all of those States, but on the practice of some States, which provided evidence of *opinio juris*, and on inaction by the remaining States. In fact, such inaction could be critical to the formation of a particular rule of customary international law. He saw no reason to distinguish between inaction in cases when the circumstances called for some reaction and those in which they did not, since both merely demonstrated a lack of opposition to the development of *opinio juris*. That said, perhaps some mention should be made of inaction as practice.

7. Draft conclusion 12 clearly set out the basic doctrine on the relationship between treaties and the development of customary international law. Nevertheless, guidance in the commentary was needed on when entering into a treaty could be used as evidence of *opinio juris*. Was becoming a party to a multilateral treaty more likely to constitute evidence of *opinio juris* than entering into successive bilateral treaties with the same content? At what point might practice under a treaty also become evidence of customary international law?

8. With regard to draft conclusion 13, some further clarification was needed. The statement that resolutions adopted by international organizations or at international conferences could be evidence of customary international law left open the question of whether they were evidence of practice or *opinio juris*, or both.

9. Turning to draft conclusion 14, he said that to characterize judicial decisions and the writings of scholars as being equally capable of serving as subsidiary means for the identification of international law afforded them an equivalence that they, in fact, did not possess. Of course, Article 38 of the Statute of the International Court of Justice also equated judicial decisions and scholarly writings, and the formulation of draft article 14 had the advantage of being clearer. But to what were those decisions and writings subsidiary? They clearly did not constitute practice, nor did they of themselves constitute *opinio juris*, but they could serve as evidence of State practice and of what had been accepted as law. However, it was misleading to describe judicial decisions as "subsidiary means". The decisions of the International Court of Justice, for example, now played a central role in the identification of rules of customary international law, whereas the views of learned writers were currently seen as less authoritative than in the past, when the leading scholars had been less numerous and easier to identify. Thus, at least in the reference to judicial decisions, the term "subsidiary" should be deleted.

10. A distinction should be made between the decisions of international tribunals and those of national courts in terms of their authority in identifying rules of customary international law. Some guidance should also be provided on how to approach the judicial decisions of the different types of international tribunals when attempting to identify rules of customary international law. The writings of scholars in general should be treated separately from the work of the Commission and of scholars and practitioners in the International Law Association and the Institute of International Law. The activities and writings of certain non-State actors, including those involved in treaty-making exercises and mixed bodies such as ICRC and NGOs, provided a further source of evidence of the existence of rules of customary international law.

11. Draft conclusion 15 set out the standard principles relating to the determination of "particular" custom, namely applying the requirements of general practice and acceptance as law in a local context. However, particular custom might be of less practical importance today, given the trend towards the pursuit of regionalism through treaties and economic integration.

12. Turning to draft conclusion 16, he noted that the examples on which the persistent objector principle was based were often equivocal. The validity of that principle was unrelated to whether a State had successfully declared itself to be a persistent objector. The central point was that a rule of customary international law could not develop in the face of opposition by a number of States, but it could do so in the event of opposition by a single State—the persistent objector—when all other States had declared their support for it. Rather than focusing on the extreme and somewhat irrelevant case of the persistent objector, the draft conclusions should further explore the role of objection in preventing a rule of customary international law from coming into existence; whether a rule could develop when there were multiple persistent objectors;

and at what point the objections of States could no longer prevent a rule from developing.

13. He was in favour of referring the draft conclusions to the Drafting Committee, along with the changes and additions he had proposed.

14. Mr. TLADI said that, although he agreed with the logic of Mr. McRae's proposal to delete the word "subsidiary" in draft conclusion 14, he was concerned that the resulting wording might be seen as endorsement of the view that judicial decisions made law, particularly since arguments to that effect could be found in the literature.

15. Mr. McRAE said that the word "subsidiary" in draft conclusion 14 might confuse practitioners not familiar with the full breadth of international law. It would make more sense to draft an unambiguous conclusion and to provide any further elaboration deemed necessary in the commentary.

16. Mr. HMOUD said that he supported Mr. McRae's view that draft conclusion 14 dealt with the identification of customary international law, not with the sources of international law. As such, it was related to evidence, which should be dealt with in its totality, regardless of its source. He asked Mr. McRae to clarify the distinction he had drawn between objection and acquiescence; to what extent States' objections could prevent the formation of a particular rule of customary international law; and at what point the generality of acceptance of practice might constitute sufficient evidence of *opinio juris*.

17. Mr. FORTEAU pointed out that chapter IV of the third report covered two distinct ideas: forms of practice and forms of evidence of customary international law. Draft conclusion 14 dealt with forms of evidence, and he considered the Special Rapporteur's inclusion of the concept "subsidiary means" to be a useful one. In developing draft conclusion 6 [7], which had been provisionally adopted by the Drafting Committee, the Commission had taken the view that the decisions of national courts constituted a form of practice, and it was in that light that draft conclusion 14 should be read.

18. Mr. KAMTO said that the distinction between forms of practice and forms of evidence was perhaps an artificial one. It was sometimes unclear whether judicial decisions constituted evidence of State practice or of the practice of the court itself. He was in favour of maintaining a distinction between the judicial decisions of national courts and those of international courts and tribunals, since the decisions of the former could be considered as evidence only of State practice, and not of international practice, unless they were corroborated by other States. He agreed that the Commission needed to analyse in greater depth and take a stance on a number of issues relating to States' objections to the development of an emerging rule of customary international law. Those included: the rules relating to the persistent objector; the role of courts and codification bodies in identifying the existence of a rule of customary international law; and the relationship between the two.

19. Deleting the words "subsidiary means" in draft conclusion 14 would imply that the Commission considered that judicial decisions served as evidence for the identification of customary international law. Would the deletion also apply to scholarly writings? Although attempting to establish a strict hierarchy among all the sources for the identification of rules of customary international law would be complicated, he was in favour of differentiating the role of judicial decisions and the work of the Commission from the rest of the writings of legal experts.

20. Mr. McRAE said that the current discussion highlighted many questions that had not yet been examined fully by the Commission but that required answers. He did not know when the generality of practice reached the point of constituting sufficient evidence of *opinio juris*; he had merely raised the question because it had not been addressed clearly in the third report. He was certain, however, that the Commission needed to give more thought to the kind of guidance it wished to provide to practitioners, and it should avoid implying that some answers were straightforward when they were actually quite complicated.

21. Mr. NOLTE said that he agreed in substance with the general approach taken by the Special Rapporteur in his third report, but thought that the latter had perhaps attempted to cover too much ground too quickly. He concurred with the quotation in paragraph 13 of the report to the effect that general practice and acceptance as law were not two juxtaposed entities, but two aspects of the same phenomenon. A concern about "double counting" should therefore not lead to the conclusion that a particular practice could never also simultaneously express the subjective element of acceptance of the practice as law. What was needed was for that subjective element to be identified separately, not for it to be manifested in a different act. He was consequently opposed to deleting the word "generally" in draft conclusion 3 [4], paragraph 2. Instead, he proposed repositioning the word "specific" in that paragraph so that the sentence would read: "This generally requires a specific assessment of evidence for each element." Doing so would give the two-element approach a sharper focus and facilitate the proper identification of differences in the application of the two-element approach with respect to different types of rules, as mentioned in paragraph 17 of the third report.

22. On the question of inaction, he supported the wording of draft conclusion 11, paragraph 3. While he acknowledged Mr. Murase's point that some States might be more reluctant than others to speak out against a practice with which they did not agree, surely there were subtle forms of disapproval that could be used to express disagreement in such cases. However, it was inaccurate to say that a sharp distinction should be drawn between acquiescence and *opinio juris*, as they were both forms of acceptance of a proposition.

23. Although he endorsed the Special Rapporteur's analysis of the role of treaties in the formation of customary international law, he failed to see the difference between subparagraphs (*b*) and (*c*) of draft conclusion 12, since both referred to instances in which a treaty had led to the creation of a rule of customary international law. He hoped that the Drafting Committee could improve the formulation of the draft conclusion.

24. In general, he agreed with the Special Rapporteur's analysis in his third report of resolutions adopted by international organizations and conferences, including the proposition contained in paragraph 53. However, since inaction could, under certain circumstances, constitute practice, and since some propositions contained in resolutions could be complied with simply by refraining from action, it was not always necessary for States to modify their national policies, or even legislation, for a rule of customary international law to come into existence. He shared the view that the Commission's work was not merely a collective academic endeavour: the political process of its creation, and the relationship of the work to that of the General Assembly, in particular the Sixth Committee, gave it enhanced authority.

25. Concerning the treatment in the third report of the relevance of actors other than States in the formation of customary international law, he said that within the framework of international organizations, States did not always act in their capacity as States: they might act simply as members of the organization, in which case, under international law, their conduct was attributed to the organization. The statement in paragraph 71 of the third report that, "where appropriate", the practice of States within international organizations was to be attributed to States themselves suggested that the Special Rapporteur viewed such practice as State conduct. Much depended on what the Special Rapporteur meant by the words "where appropriate". The reference in paragraph 72 to " 'the established practice of the organization' " as relating to the "internal operation of the organization" might be too narrow an interpretation. In his view, the relationship between the organization and its members, in particular the competences of the organization *vis-à-vis* its members, was not a matter of general customary international law.

26. The relevance of actors other than States was bluntly denied in the proposed new paragraph 3 of draft conclusion 4 [5], which read: "Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law." It should be amended along the lines of draft conclusion 5, paragraph 2, of the draft conclusions on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, which read: "Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty."[80] That would allow for the practice of ICRC and certain other non-State actors to be taken into account in identifying customary international law, without, however, putting them on the same level as States.

27. He had some doubts about the wording of draft conclusion 15, which precluded the possibility that regional custom might exist by requiring that each State must specifically agree with a particular practice. In reality, however, there could be a general expectation among members of a particular region that those who disagreed with a particular development accepted by the majority would have to clearly articulate their disagreement. He therefore proposed the deletion of the words "each of" in paragraph 2 of the draft conclusion.

28. He agreed with the Special Rapporteur that the concept of the persistent objector had a place in the rules on the formation of customary international law, but contrary to what was stated in paragraph 90 of the third report, he did not consider that it was " 'the sole preserve of the mighty' ". On the contrary, the classic cases concerned less powerful States that stubbornly refused to agree to a certain development. Nor did he consider the recognition of the persistent objector to be in any way contrary to the law; it was an important factor in legitimizing the rules of customary international law and in ensuring transparency in the process of its formation.

29. Mr. PETRIČ said that while he recommended the referral of all the draft conclusions to the Drafting Committee, there was still room for improvement. Since they were intended mainly for practitioners, they should provide clear guidance on the identification of customary international law and its rules. However, they included several phrases that were quite unclear: "come to reflect" and "the crystallization of an emerging rule of customary international law" in draft conclusion 12; "contribute to its development" in draft conclusion 13; and "the process of formation" in draft conclusion 16. He suggested that those phrases either be deleted or clarified in the commentaries. The commentaries should also elaborate on the formation of customary law, which had been given limited treatment in the project.

30. On the relationship between the two constituent elements, he expressed concern about the rather categorical statement, in paragraph 14, that "in seeking to ascertain whether a rule of customary international law has emerged, it is necessary to consider and verify the existence of each element separately[, which] generally requires an assessment of different evidence for each element". Such an approach could be problematic when there was no physical evidence of State practice, which was often the case in contemporary international relations. With the proliferation of international organizations and conferences, States were more likely to express their will through verbal acts, in which practice and *opinio juris* were interconnected and thus difficult to separate. He suggested that the issue be discussed in the Drafting Committee.

31. Concerning the temporal aspect of the "two-element" approach, he questioned the statement, in paragraph 16 of the third report, that acceptance that something ought to be the law (nascent *opinio juris*) might develop first, and then give rise to something that embodied it, so as to produce a rule of customary international law. The concept of "nascent *opinio juris*" required clarification. He agreed that a State might act in the belief that it was acting in accordance with customary international law, and that *opinio juris* might then temporarily coincide with verbal or physical practice, but he did not agree that *opinio juris* could precede practice.

32. He endorsed the Special Rapporteur's reasoning with regard to inaction, and the basic thrust of draft conclusion 11. However, the circumstances surrounding the

[80] *Yearbook … 2013*, vol. II (Part Two), p. 34.

grey area that constituted inaction needed to be more clearly explained, either in the text of the draft conclusion or in a commentary, preferably in the former. In his view, a State should be required to act only when it had been duly informed and when its interests were involved. Otherwise, its inaction should not be taken as an indication of consent.

33. Generally speaking, he concurred with the Special Rapporteur's position on the role of treaties. However, since treaties established a legal relationship solely among the parties, a cautious approach should be taken when assessing their role in the establishment of customary international law, which was general law applicable to all. He expressed concern about the discussion, in paragraph 38 of the third report, of the "crystallization"—a term with no meaning in law—of rules of customary international law, a process that might start from a "customary rule *in statu nascendi*". What did that mean? Was the rule still just pure custom, or already an emerging rule of customary international law? Although he endorsed draft conclusion 12, he thought that subparagraph (*c*) should be redrafted in a more affirmative manner.

34. It was important to draw a distinction between international organizations and international conferences for the purpose of identifying customary international law. The resolutions of international organizations expressed the will of the organizations, but they did not reflect the practice of member States, some of which might well have voted against the resolutions. On the other hand, international conferences usually adopted resolutions by consensus, and consequently they represented the sum of the will of participating States. When seeking to identify relevant State practice, the Commission should therefore give more weight to the resolutions of international conferences. Even though such resolutions could reflect existing customary international law and contribute to its formation, customary international law could not be identified without first identifying the general practice and *opinio juris* of States.

35. He endorsed the rationale behind draft conclusion 14. In paragraph 60 of the third report, the Special Rapporteur touched upon the changing nature of customary international law. That raised several important issues that the draft conclusions must address, including whether a new customary rule could replace an old one, and under what conditions, and how to distinguish the violation of a rule of existing customary international law from the establishment of a new one.

36. He concurred with the Special Rapporteur that the practice of States within international organizations needed to be distinguished from the practice of international organizations as such. However, the Commission should exercise caution with regard to the situation of special-interest States. It could not be argued, for example, that the practice of landlocked States was as relevant in matters pertaining to the United Nations Convention on the Law of the Sea as that of States like Indonesia, which consisted of thousands of islands. Similarly, was the practice of Slovenia as relevant to space law as that of countries that actually had a space programme?

37. The study of particular custom raised various issues, including to what extent particular custom could differ from general custom. When could a group of States claim to have established a particular customary law that might be at variance with general customary law? Using the example of "socialist international law"—a particular law according to which the basic principle of non-intervention was replaced by the principle of proletarian solidarity—he pointed out the danger that a particular custom could open the way for any like-minded group of States to declare the existence of a customary rule, thus leading to the fragmentation of international law.

38. He had some reservations about including a draft conclusion on the persistent objector, particularly from the standpoint of legal security. Could one refer to existing general practice and *opinio juris* when there were very few persistent objectors? The generality of practice seemed to depend less on the number of States and more on the absence of objections to practice, but it was important to know where to draw the line. Those matters should be discussed further in the Drafting Committee.

39. Lastly, he drew attention to the fact that the legal literature in languages other than English and French was not given due consideration in the Commission's work in general and in relation to the formation of customary international law in particular.

40. Mr. VÁZQUEZ-BERMÚDEZ said that although the third report was well structured and supported by case law, it did not resolve all the issues at stake. He agreed that the draft conclusions should not be overly prescriptive, in view of the inherently flexible nature of the formation of customary international law, and that the scope of the topic should be such as to facilitate the identification of customary international law by practitioners.

41. Referring to the first sentence of the new paragraph 2 in draft conclusion 3 [4], he concurred with the view that in order to identify a rule of customary international law, each element must be separately ascertained. However, that did not mean that an assessment of specific evidence for each element was required, as suggested in the second sentence of the paragraph. In some cases, different forms of evidence could be used—certain forms to establish general practice and others to establish *opinio juris*; however, in other cases, the same evidence could be used to establish both practice and *opinio juris*. Although the Special Rapporteur had endeavoured to allow for a certain flexibility in the second sentence of paragraph 2 by using the word "generally", that could be understood as meaning that an assessment of evidence for each element was not always required. In addition, the word "specific" could be construed as meaning that generally there was specific evidence for each element, which was not always the case. He therefore suggested that either the word "specific" be deleted or Mr. Nolte's proposal for the paragraph be followed.

42. He agreed with the Special Rapporteur that inaction was a form of practice that, when general and when coupled with acceptance as law, might give rise to a rule of customary international law. There were many rules of customary international law prohibiting the commission

of certain acts, such as the threat or use of force. The inaction of States in those cases constituted a form of practice, for the States were convinced of their legal obligation not to take action. Inaction could also be classified as an expression of *opinio juris* when it was a reaction to the practice of another State or States.

43. The Special Rapporteur also asserted that the inaction or silence of a State could be tantamount to acquiescence in relation to the conduct of other States. In such cases, silence might signify agreement with, or at least tolerance of, another State's conduct because it was complying with a legal obligation or exercising a right. In order to draw that conclusion, it was necessary to ascertain whether the practice was such, or had been carried out in such a manner, that general knowledge of it could be assumed. It was also necessary to analyse the general context in which a State could be expected to respond.

44. However, States were under no obligation to protest against, or agree with, every act performed by other States. There could be various reasons why States did not always protest against acts of other States which they considered to breach international law, even when they could be presumed to have generally expressed their condemnation of such acts. In those cases, silence could not be construed as *opinio juris* accepting the conduct of another State as law.

45. Turning to chapter IV of the third report, he noted that progress with the codification of international law and the growing number of multilateral treaties and international resolutions or instruments in various areas of the law was making for a richer, more complex fabric of international law. The International Court of Justice turned to those sources when seeking to identify the existence of rules of customary international law. The general principles and rules of the international community's legal heritage therefore informed the whole international legal system. It was, however, clear that some evidence, such as a codification treaty that enjoyed wide support from States, was of greater probative value than others when determining the existence of a customary rule.

46. The Special Rapporteur had clearly described three forms of interaction between treaties and custom. In the second case, when a treaty crystallized a rule of customary international law, some practice and *opinio juris* already existed and the rule of customary international law was *in statu nascendi*. During treaty negotiations, the rule would crystallize and, when it had received wide support, it would be included in a multilateral treaty. The circumstances surrounding practice and *opinio juris* prior to the adoption of the treaty and during its negotiation, the statements made by the negotiating States and the form in which the rule was adopted all had to be borne in mind. For that reason, draft conclusion 12 (*b*) should be reformulated, because the treaty provision had not led to the crystallization of an emerging rule of customary international law: instead, the rule of customary international law *in statu nascendi* had crystallized with the adoption of the treaty provision. It should therefore read "has crystallized" or "crystallizes an emerging rule of customary international law". The third form of interaction, the generating effect, was captured well in draft conclusion 12 (*c*). However, the words "*opinio juris*" should be added in brackets at the end.

47. As far as draft conclusion 13 was concerned, the International Court of Justice had frequently resorted to General Assembly resolutions in order to identify customary rules. Resolutions, especially those adopted by international organizations with universal membership such as the United Nations, could serve as evidence of State practice or *opinio juris* when they reaffirmed principles or obligations that were regarded as fundamental or generally applicable. Resolutions adopted by organs with universal membership provided weightier evidence of the existence of customary rules than resolutions approved by organs with restricted membership. The provisions of certain resolutions adopted at international conferences could also reflect or codify a customary rule, or could help to generate customary rules giving rise to general practice accompanied by *opinio juris*. For that reason, draft conclusion 13 should more amply reflect the fact that resolutions adopted by international organizations or international conferences could codify, crystallize or generate customary rules.

48. With reference to draft conclusion 14, he pointed out that the work of the Commission consisted not in producing academic writings, but in the codification and progressive development of international law. Great care was needed when writings were used as a subsidiary means of determining rules of customary international law, since they reflected the authors' opinions, experience and legal background. As another speaker had pointed out, the writings of different regions had to be taken into consideration. An additional draft conclusion should refer to the authoritative nature of the Commission's work. He agreed with Mr. McRae that judicial decisions and legal writings should be addressed separately. He likewise agreed with what Mr. Hmoud had said about the authoritative nature of the decisions of the International Court of Justice when it came to identifying customary international law.

49. Judicial decisions regarding persistent objectors, the subject of draft conclusion 16, were far from clear, and learned writers' opinions were divided. However, there did not appear to be any general resistance from States to the persistent objector rule. More examples of cases where the existence of a rule of customary international law covering persistent objectors had been determined on the basis of practice and *opinio juris* should be sought and included in the commentary. In any event, the persistent objector had to maintain its objection to the application of a rule of customary international law at all times, and not just when that rule was emerging. Failure to do so would signify that it had abandoned its objection. The draft conclusion must make it plain that a State could not object to fundamental rules of customary international law such as peremptory norms or rules that contained obligations *erga omnes*. For that reason, an additional paragraph should be added to draft conclusion 16 to clarify the restrictions applying to the case of the persistent objector, including those to be found in any regional or local customary law that might give rise to general practice or *opinio juris*.

50. In the next report, it would be useful to discuss practical means of improving the availability of material

permitting the determination of general practice and *opinio juris*.

51. He was in favour of referring the draft conclusions to the Drafting Committee, which should take account of the comments of the members of the Commission.

52. Mr. HUANG said that, with reference to the two-element approach referred to in paragraph 17 of the third report, uniform standards must be applied to the identification of customary international law regardless of the field of law or the intended end user of the draft conclusions. The application of different standards would exacerbate the fragmentation of customary international law and even call its validity into question.

53. With regard to draft conclusion 3 [4], he disagreed with the Special Rapporteur's view that the evidence of practice must be different and separate from the evidence of *opinio juris*. In many cases, practice and *opinio juris* went hand in hand. When a State took action, it made it clear whether it was implementing a legal obligation or exercising its rights. An artificial separation of evidence of practice and evidence of *opinio juris* was therefore undesirable.

54. While he agreed with the proposed new paragraph 3 of draft conclusion 4 [5], there was no denying that the conduct of non-State actors could play a role as a reference in identifying customary international law.

55. He concurred with the three conditions set forth in paragraphs 23 to 25 of the third report for recognizing inaction as evidence of acceptance as law. He wondered, however, what was meant by "some reaction" in draft conclusion 11, paragraph 3. With regard to draft conclusion 12, the Special Rapporteur had not provided any criteria for deciding which provisions of a treaty belonged to customary international law. According to international case law, the following elements needed to be investigated: the extent to which the treaty had been ratified, acceded to and accepted by States; whether any of the States parties had withdrawn from or denounced the treaty; the length of time the treaty had been in effect; the nature of the treaty provisions; and, lastly, the number of reservations.

56. With reference to draft conclusion 13, he was of the opinion that only resolutions adopted by international organizations with universal membership could become a source of international law or serve as subsidiary means of its identification. General Assembly resolutions deserved particular mention, as they reflected the will of Governments and crystallized world public opinion. They expressed a universal belief and, as such, constituted strong evidence of the formation of a rule of customary international law. The contributions made by some NGOs in special fields of international law should also be duly taken into account.

57. He had no difficulty with draft conclusion 14, but he was curious to know what would be the effect of contradictory rulings from an international and a domestic court. At the same time, it seemed to be going too far to include the reference to writings, without any qualification, since there was a considerable difference between authoritative and ordinary writings.

58. With regard to draft conclusion 15, the International Court of Justice had held that, when determining the rights and obligations of States, long-standing practice accepted by States as governing their mutual relations must prevail over general rules of international law. He endorsed the title chosen for the draft conclusion—"Particular custom"—because it covered the many types of customary international law. Special customary international law applied only to particular types of States or States with particular interests. Regional customary international law applied only to specific regions. Local or bilateral customary international law was applicable to only two States. Special customary international laws were exceptions to general customary international laws that were binding only upon States which had accepted them. Since they clarified the relationships among those States, their binding effect should be greater than that of general customary international law.

59. The persistent objector rule was gradually being accepted as a subsidiary rule and a useful compromise. The rule deserved to be recognized, for a number of reasons. It protected a country from being bound by a rule formed by the majority of members of the international community that was inconsistent with its wishes. It meant that an emerging rule could become established without being taken hostage by a single objector. Even though it had been infrequently invoked in the past, it might now come to play an increasingly important role. It promoted the development of new rules of customary international law by creating a back door that enabled a State to avoid being bound by rules of international law that had not been established by the traditional process. Some flexibility was necessary, however, in characterizing the persistent objector rule.

60. He agreed with the referral of the draft conclusions to the Drafting Committee.

The meeting rose at 1 p.m.

3254th MEETING

Thursday, 21 May 2015, at 10.05 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. 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.
