might be implied by its use and the difficulties raised by the definition of that term. In addition, "accepted as law" more closely described the beliefs that motivated States and took account of the forward-looking dimension. It was useful to read draft conclusion 11 (Evidence of acceptance as law) in conjunction with draft conclusion 7, as paragraphs 1, 2 and 3 of the former had parallels with those of the latter. Paragraph 4 reflected the idea that evidence of the acceptance of a practice as law could arise from the practice itself or could be deduced from it. Nonetheless, the element of acceptance was a separate requirement from practice itself, and should be established in each case. The Commission might prefer to reflect that idea, which necessitated further study, in a separate draft conclusion placed close to draft conclusion 3.

22. He proposed referring the draft conclusions to the Drafting Committee for provisional adoption during the current session. He would submit the related commentaries at the following session. The draft conclusions proposed in the second and third reports could be adopted at that session and thus be included in the report of the Commission to the General Assembly for 2015.

The meeting rose at 12.15 p.m.

3223rd MEETING

Tuesday, 15 July 2014, at 10 a.m.

Chairperson: Mr. Kirill GEVORGIAN

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. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)[*]

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Novak Talavera, Vice-Chairperson of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

2. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the Inter-American Juridical Committee was the advisory body of the Organization of American States (OAS) on international juridical matters; it undertook studies of that subject, either at the request of the OAS General Assembly or on its own initiative. In 2013, it had held two regular sessions, had completed five reports and had begun work on four issues of concern in the American hemisphere.[215]

3. The first report, on sexual orientation, gender identity and expression, surveyed progress in the protection afforded to the right to non-discrimination on grounds of sexual orientation and identity by the domestic legislation of American countries. It analysed the rulings of courts in some member States and identified inter-American instruments that might be of use in protecting the aforementioned right, as well as the latest precedents of the Inter-American Court of Human Rights that promoted non-discrimination on grounds of sexual identity.

4. The second report, on protection of cultural property in the event of armed conflict, contained model legislation to assist member States in implementing the standards and principles of international humanitarian law. The text comprised 12 chapters covering, *inter alia*, marking, identifying and cataloguing cultural property; planning of emergency measures; and monitoring and compliance mechanisms. The main objective was to persuade American States to adopt a nexus of preventive measures in peacetime in order to protect and preserve the region's cultural heritage in the event of armed conflict.

5. The third report, on inter-American judicial cooperation, had been prompted by threats to the region's security from trafficking in persons and drugs, terrorism, arms smuggling and organized crime. The report advocated a set of measures to harmonize procedures and legislation, enhance cooperation among the relevant authorities, promote capacity-building and remove obstacles to efficient intraregional judicial cooperation.

6. The fourth report concerned the drafting of guidelines on corporate social responsibility in the area of human rights and the environment in the Americas. It took account of the work done by several international organizations and of the particular features of the region. It reflected legislative progress and improvements in company practice in safeguarding human rights and the environment. It also pinpointed shortcomings and difficulties that had led the Inter-American Court of Human Rights to advocate for closer oversight by States of the activities of companies operating in their territory.

7. The fifth report, entitled "General guidelines for border integration", comprised more than 50 standards designed to facilitate agreements on cross-border cooperation and integration that drew on examples of best practice in the Americas and elsewhere and encompassed follow-up mechanisms.

8. In the second half of 2013, the IAJC had commenced work on a number of other matters of particular importance in the Americas. In devising guidelines for

[*] Resumed from the 3218th meeting.

[215] See the Annual Report of the Inter-American Juridical Committee to the forty-fourth regular session of the General Assembly of the Organization of American States (OAS/Ser.G - CP/doc.4956/14), available from the OAS website: www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2013.ENG.pdf.

cross-border migratory management, its aim was to inform OAS member States about best practices in border checks, combining the protection of State security with scrupulous respect for non-residents' and migrants' human rights. The purpose of the work being undertaken on the jurisdictional immunities of States was to discover whether member States' current judicial practice was consistent with the standards and principles of international law, above all those embodied in the United Nations Convention on Jurisdictional Immunities of States and Their Property. The report resulting from the work on regulation of the use of narcotics and psychotropic substances sought to determine not only the compatibility of domestic legislation with international law, including the various drug control conventions of the United Nations, but also the position of individual member States on the consumption of "soft" drugs. The purpose of drawing up a report on electronic warehouse receipts for agricultural products was to formulate a set of principles and to draft a model law in order to establish a system enabling farmers to store some of their seeds between harvests and use the warehouse receipt as security for loans.

9. The IAJC had held meetings and exchanged information with the African Union Commission on International Law. In 2013, it had held its fortieth course on international law, which had been taught by some of the most distinguished experts in that field.

10. Mr. VÁZQUEZ-BERMÚDEZ wished to know in what way the IAJC guidelines concerning corporate social responsibility in the Americas had been of additional value with regard to other international instruments, such as the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011.[216] Perhaps the IAJC could make a useful contribution to the forthcoming deliberations of the Working Group on the issue of human rights and transnational corporations and other business enterprises.

11. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the main contribution made by the IAJC report on corporate responsibility in the area of human rights and the environment was that it filled a gap. Although some countries of the Americas had accepted the guiding principles laid down by the United Nations, no guidelines specifically addressed the situation in that part of the world. The report had focused on a preventive approach to some of the worst problems caused by the disconnect between corporate social responsibility and corporate culture, and on making companies aware of what corporate social responsibility really meant. It had also emphasized oversight, because there was little supervision in most countries of the region and, as a result, national and foreign companies alike had been able to engage in activities with scant respect for the environment or human rights. For that reason, the Guidelines might prove useful to the above-mentioned Working Group.

12. Mr. KITTICHAISAREE wished to know the position in inter-American practice with regard to the statute of limitations in cases of enforced disappearance. When the Inter-American Court of Human Rights deliberated, did it apply local or universal customary law?

13. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the Inter-American Court of Human Rights was mandated to safeguard the rights set forth in the American Convention on Human Rights: "Pact of San José, Costa Rica" and in some other inter-American instruments that protected human rights. In interpreting and defining the true scope of those rights, it did not confine itself to the contents of the Convention, but took account of general international law. In the Court's findings, it was common to find references to general legal principles. The Court deemed enforced disappearance to be a continuous crime that started as soon as a person disappeared and continued until his or her fate was known. That principle was embodied in inter-American case law.

14. Mr. PETER said that, in some parts of the world, corporate social responsibility appeared to be synonymous with plundering in tons and giving back in ounces, in other words, companies enjoyed substantial tax exemptions but did little in return for the communities where they operated. Was that also the experience of the American region? Had the IAJC been able to identify any best practices, including through its interaction with the African region?

15. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said the Committee's first, very interesting meeting with the African Union Commission on International Law the previous year had shown that, while the African and American regions shared some common problems, practices and realities varied widely.

16. Some businesses in the Americas confused corporate social responsibility with simply building a few public works, whereas it entailed a commitment to, or long-term relationship with, the host community. Some, but not all, companies in the region behaved responsibly, took care of the environment and respected workers' rights and human rights. The main problem lay not with big companies, but with small and medium-sized enterprises, because they had fewer financial resources and therefore claimed that they were less able to include social responsibility in their corporate strategy. The IAJC took the view, however, that all companies could assume corporate social responsibility in keeping with their own scale. Work on the subject was progressing well.

17. One of the main concerns of the IAJC when drawing up the relevant guidelines had been to strike a balance between those members who wanted to bind companies using strong provisions and those who favoured greater flexibility. While foreign investment was beneficial because it generated jobs and wealth, at the same time, companies had to respect human rights and the environment. He believed that this balance had been achieved.

18. Ms. ESCOBAR HERNÁNDEZ asked whether the IAJC intended to draft a regional legal instrument on the jurisdictional immunities of States. If it had no such intention, did it consider that the United Nations Convention on Jurisdictional Immunities of States and Their Property

[216] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31), annex. See also Human Rights Council resolution 17/4 of 16 June 2011, para. 1.

reflected the essence of the jurisdictional immunity of States in current international law? She wished to know if the IAJC had had any opportunity to study the practice of the civil and criminal courts of the American region with respect to the immunity of State officials from foreign criminal jurisdiction. It might be useful for the IAJC and the Commission to exchange information on the subject.

19. With reference to the theme of access to public information and protection of personal data, she asked how the Committee's consideration of access to public information by individuals was progressing. She was eager to learn what the general thrust of the work was and whether it was confined to specific aspects of the topic.

20. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the IAJC did not intend to draft a regional convention on the jurisdictional immunities of States, in view of the existence of the United Nations instrument just mentioned. The IAJC initiative had been prompted by the fact that practice at the inter-American level diverged widely and was even contradictory. As no regional study of the topic had ever been conducted, it appeared vital to compile information on the current practice of national courts with respect to the jurisdictional immunity of States, how that immunity was defined and what limits were placed on it. The IAJC was currently analysing the replies to a questionnaire which it had sent to ministries for foreign affairs. It had also drafted a guide on the protection of personal data.

21. Mr. PARK asked whether any divergences of opinion had surfaced within the IAJC during its discussion of the report on sexual orientation, gender identity and expression, or whether it had easily arrived at consensus. Did attitudes to the subject in the Americas differ from those held in Europe and Asia?

22. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that Europe was much more advanced than his region in discussing sexual orientation and gender identity. Still, various domestic and international forums in the Americas were tackling those issues. At first, the subject had proved difficult to discuss within the IAJC, mainly for technical reasons such as terminology, rather than principled objections. The subject was certainly a sensitive one within the region, but overall the clear objectives of the IAJC had been to ensure that everyone enjoyed the same legal protection and to prevent discrimination.

23. Mr. HASSOUNA, welcoming the cooperation begun between the Inter-American Juridical Committee and the African Union Commission on International Law, asked whether cooperation was planned with bodies from other regions, and whether closer political cooperation among regions would affect cooperation on legal matters.

24. The IAJC work on immigration touched on the issue of expulsion of aliens. He asked whether the Committee had made use of the principles formulated by the Commission in that regard,[217] to what extent it followed the Commission's work, and whether it coordinated its position with that of the Commission.

25. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the IAJC was open to the work of other, similar bodies, from which it could doubtless benefit; however, budgetary constraints inevitably hampered cooperation. Solutions were sought wherever possible, for instance by organizing exchange visits and joint activities. Both the IAJC and its individual members closely followed the work of the Commission, a body that had forged a path through a wide range of topics in international law and whose reports were highly appreciated. The IAJC tried to maintain a position consistent with that of the Commission.

26. Mr. SABOIA expressed concern that, despite some progress, many acts of discrimination, some of them extremely serious, were committed on grounds of sexual orientation and gender identity in the region of the Americas.

27. He asked to what extent inter-American judicial cooperation mirrored processes under the United Nations Convention against Transnational Organized Crime and whether the IAJC had considered issues such as corruption, money laundering, slavery and child labour.

28. The Commission's work on the expulsion of aliens had focused on the rights of refugees and internally displaced persons. It had emerged that the region of the Americas took a much more favourable stance than others, thanks to the Cartagena Declaration on Refugees, which had been adopted by the OAS,[218] and he asked whether the IAJC planned to draft a convention on the rights of refugees.

29. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that high rates of hate crime based on sexual orientation or gender identity, including violence and even murder, were a reality in much of the Americas. Most worryingly, rates appeared to be rising. Tackling the problem would be a complex task, as discrimination was not confined to any one field, and the lives and physical integrity of victims were at stake. Those factors had prompted the IAJC to begin work on the issue.

30. With regard to inter-American judicial cooperation, one of the aims of the IAJC was to prepare recommendations to facilitate cooperation in the various areas that Mr. Saboia had mentioned, and others, such as illicit drug trafficking and trafficking in persons, which were a serious problem in the Americas and elsewhere. Cooperation among police and security forces already seemed to function effectively, but more could be done at judicial level.

31. With regard to a possible regional convention on the rights of refugees and internally displaced persons, he said that the IAJC had not taken up the matter and had no plans to do so at present.

[217] See the draft articles on the expulsion of aliens adopted by the Commission on first reading, *Yearbook ... 2012*, vol. II (Part Two), p. 15 *et seq.*, paras. 45–46.

[218] Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 to 22 November 1984; available from: www.acnur.org/cartagena30/en, *Documents*.

32. Mr. VALENCIA-OSPINA said that, despite rising rates of discrimination based on sexual orientation and gender identity throughout the Americas, the work of the IAJC on the topic enjoyed significant political support, as reflected in judicial and legislative developments in a number of countries, including his own.

33. Various countries and groups in the Americas had expressed dissatisfaction both with regional judicial and arbitration bodies and with international courts and tribunals, leading to the idea of establishing an inter-American court to perform some of the functions currently ascribed to the International Court of Justice. He asked whether the IAJC had discussed the matter and whether the Americas had seen a change in attitude to universal jurisdiction in judicial and arbitral matters.

34. Mr. NOVAK TALAVERA (Inter-American Juridical Committee) said that the IAJC had considered the possibility of creating a regional court of justice some years previously, but for various reasons had reached a majority view not to pursue the matter. The budgetary and resource constraints involved would have been difficult to overcome, as the experience of the Inter-American Court of Human Rights had shown. Overall, despite their drawbacks, the International Court of Justice and other existing international tribunals were considered sufficient to enable countries to settle their disputes without recourse to force, even if rulings that went against a country's interests sometimes generated domestic discontent.

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

[Agenda item 9]

Second report of the Special Rapporteur (*continued*)

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

36. Mr. PARK suggested that Parts One and Two of the proposed draft conclusions be merged, as draft conclusions 1 to 3 could all be considered introductory material; draft conclusion 4 could be incorporated later in the text. He expressed support in principle for the "two-element" approach to determining the existence and content of rules of customary international law, particularly in view of the well-reasoned analysis presented in the second report.

37. Although the definition of "international organization" proposed in draft conclusion 2 was clear, he doubted its necessity. The term "intergovernmental organization" could be used instead. If a more specific definition was needed, he suggested adopting the one used in the articles on the responsibility of international organizations.[219] He also suggested moving the definitions of "general practice", currently in draft conclusion 5, and "accepted as law (*opinio juris*)", now in draft conclusion 10, to draft conclusion 2, to form new subparagraphs (*c*) and (*d*), respectively, so as to define the basic substance of the two-element approach at the outset. Given that the terms "State practice", "practice of international organizations" and "*opinio juris*" were used more frequently than "general practice" and "accepted as law", it would be helpful to present both sets of terms in parallel. "General practice" was understood to include both State practice and the practice of international organizations.

38. Although he supported the two-element approach, he pointed out that no reference was made to the relationship between the two elements. In particular, the temporal relationship between them was not covered. In some cases, it was possible for rules of customary international law to be supported only by *opinio juris* until practice became fully established, as had occurred in the formation of the general principles of the law on outer space. Although general practice generally preceded *opinio juris*, a different tendency could be seen in some areas of international law, especially where technological developments or the emerging needs of developing countries were concerned. He therefore proposed a new draft conclusion, to read:

> "General practice (State practice) generally precedes acceptance as law (*opinio juris*). However, acceptance as law (*opinio juris*) may, in some instances, exceptionally precede general practice (State practice)."

39. He urged caution in drawing generalizations from judgments of the International Court of Justice and similar bodies, as they dealt only with concrete cases brought by particular parties to a dispute. There had been no international cases under the law on outer space to date, for example, and it would therefore be inappropriate to rely on judgments of international courts in that sphere.

40. The approach taken in draft conclusion 4, while unquestionably reasonable, was also very general and somewhat vague as practical guidance. It seemed unnecessary to devote an entire draft conclusion to such a general statement, especially when draft conclusions 8 and 11 dealt with similar matters. He therefore suggested that draft conclusion 4 be incorporated into draft conclusions 8 and 11. He further suggested that draft conclusion 5 make explicit reference to the fact that the practice of international organizations could in some cases constitute general practice, even though that was stated later, in draft conclusion 7.

41. Draft conclusion 6 dealt with attribution of conduct, but a question arose concerning attribution of a non-State actor's conduct to a State. In paragraph 34 of his second report, the Special Rapporteur suggested, apparently on the basis of the articles on responsibility of States for internationally wrongful acts,[220] that the conduct of *de facto* organs of a State might count as State practice. According to article 9 on responsibility of States for internationally wrongful acts, which governed cases when the

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

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

State had not exerted any influence on the conduct of a non-State actor, such conduct did not have to be acknowledged by the State in order to be considered an act of the State under international law. It was doubtful, however, whether rules like that, which had been adopted for purposes of State responsibility, could be applied to determining that a non-State actor's conduct was State practice for the purposes of identifying customary international law. He therefore recommended that the issue of conduct attributable to a State in the context of State practice be examined carefully and discussed in the commentary to draft conclusion 6.

42. Draft conclusion 7, paragraph 2, simply listed various manifestations of State practice. He proposed that a more systematic approach be adopted, with the different examples classified under two headings, namely internal practice and external practice. He further proposed that the same approach be adopted with regard to draft conclusion 11, paragraph 2. He agreed with the Special Rapporteur's view, set out in paragraph 45 of his second report, that even though individuals and NGOs could play important roles in the observance of international law, their actions could not be considered to constitute practice for the purposes of the present topic.

43. Turning to draft conclusion 7, paragraphs 3 and 4, he said that while it was correct that inaction might serve as practice when absence of protest or of response to another State's unilateral action constituted acquiescence, the relationship between action and inaction in the context of the identification of practice needed further study. In particular, three questions needed to be addressed. First, what was the minimum level of inaction required for it to play a meaningful role in the formation of customary international law? Second, were a small number of actions sufficient to constitute customary international law when they were accompanied by numerous instances of inaction? Third, what happened in the event of inaction by some States while others acted as persistent objectors to unilateral actions by third States? His comment also applied to draft conclusion 11, paragraphs 3 and 4.

44. With regard to draft conclusion 7, paragraph 4, some concerns arose about the inclusion, in the list of possible forms of practice, of acts of international organizations, including resolutions. States often voted for or against a particular resolution as a result of political bargaining rather than out of legal conviction, and it was not always easy to discern a State's underlying intentions or motives, an element that was crucial in determining *opinio juris*. Furthermore, the legal value of United Nations resolutions varied greatly, depending on the type of resolution involved and the circumstances in which it was put to the vote. Care should be taken not to accord undue weight to the acts of international organizations. Accordingly, he proposed that references to resolutions and acts of international organizations be deleted in draft conclusion 7 and that the issue be dealt with separately from State practice.

45. With regard to draft conclusion 9 on the need for practice to be general and consistent, he said that it was unclear what the impact of persistent objectors was on the fulfilment of the generality requirement.

46. Lastly, he observed that one important issue seemed to be missing from the second report, namely the question of the burden of proof concerning the existence of customary international law, a topic that was of great practical significance. His initial thought was that a party that invoked a certain rule of customary international law bore the burden of proving the existence of that rule. However, it was a topic that should be explored in greater detail.

47. He was in favour of referring the entire set of draft conclusions to the Drafting Committee.

48. Mr. MURASE said that, although the definition of customary international law contained in draft conclusion 2 (*a*) was an improvement on the one contained in the previous report,[221] it was still unacceptable for several reasons. First, it was hard to understand why the ambiguous phrase "a general practice accepted as law" had been included, since it was an expression that had been severely criticized by many writers. To say that customary international law was something "accepted as law" was simply tautological, and the variety of meanings attaching to the verb "accept" made it unsuitable for inclusion in the definition.

49. Second, the phrase "derive from and reflect" was highly ambiguous; in order to ensure that State practice and *opinio juris* were given equal status, draft conclusion 2 (*a*) should be reformulated to read: "Customary international law means the rules of international law that are constituted by general practice and *opinio juris*."

50. Third, the definition of customary international law appeared to rest, at least partially, on the faulty premise that general practice must always precede *opinio juris* in the formation of custom. That was not always the case, however. While it was true that, traditionally, the formation of customary international law began with the accumulation of State practice, to which *opinio juris* subsequently attached, the order had often been reversed in recent years. *Opinio juris*, as expressed in General Assembly resolutions or the declarations of international conferences, frequently preceded general State practice. If the Commission intended to adhere to a two-element model of custom formation, the definition of customary international law should treat both elements equally.

51. Fourth, the definition failed to refer to the fact that customary international law was "unwritten" law (*lex non scripta*). Even if a rule of customary international law was formed on the basis of treaties or written instruments, the customary rule itself was not *lex scripta*; it was an unwritten law.

52. Lastly, he did not agree with the suggestion by the Special Rapporteur that draft conclusion 2 (*a*) be moved to the general commentary.[222] A definition of customary international law was required as a stand-alone conclusion, separate from the use of other terms.

53. Turning to the issue of double counting or repeat referencing of the same evidence for both State practice

[221] See *Yearbook ... 2013*, vol. II (Part One), document A/CN.4/663, p. 126, para. 45.

[222] See the 3222nd meeting above, p. 109, para. 16.

and *opinio juris*, he said that, if the Commission were to maintain the two-element model of custom formation, it was important to distinguish between those two elements as much as possible. However, the Special Rapporteur undermined that model by counting the same evidence for both elements. The manifestations of State practice listed in draft conclusion 7, paragraph 2, were virtually identical to the forms of evidence of *opinio juris* set out in draft conclusion 11, paragraph 2. Rather than enumerating the sources of evidence for *opinio juris*, the Special Rapporteur should elaborate on the methods practitioners might use to locate evidence of *opinio juris*.

54. He proposed that the Commission maintain the two-element model at a theoretical level, but take a more flexible approach to the actual identification of the subjective element, along the lines of section 19 of the International Law Association's London Statement of Principles Applicable to the Formation of General Customary International Law.[223] Under that approach, *opinio juris* could compensate for a relative lack of State practice, thus assuming a complementary function. In any event, it was clear that further reflection on the complex issue of *opinio juris* was needed. Accordingly, the Commission should wait until 2015 before sending draft conclusions 10 and 11 to the Drafting Committee.

55. Turning to draft conclusion 1, he said that, in paragraph 1, the word "methodology" should be replaced by "methods" and that, in paragraph 2, the phrase "the methodology concerning" should be deleted.

56. Draft conclusion 3 began with the phrase "To determine the existence of a rule of customary international law", raising the question of who made such a determination. The allocation of the burden of proof with respect to customary international law was a serious matter in some domestic courts. In Japan, for example, under the rules of civil procedure, if a rule was asserted as customary law, the court had to make a determination in that regard *proprio motu*. On the other hand, if the rule was asserted merely as *de facto* custom, which nonetheless had certain normative effects, the burden of demonstrating its existence fell on the party making the assertion. Unlike in domestic legal systems, there was no supreme court at the international level to make ultimate determinations on customary rules. Furthermore, most disputes did not end up before the International Court of Justice or other international juridical bodies. As a result, the attitudes and arguments of the parties were of much greater importance in international law than in domestic law.

57. He shared Mr. Park's doubts about the usefulness of draft conclusion 4, on assessment of evidence. First of all, it was not clear what kind of evidence the Special Rapporteur actually had in mind. Assessment of evidence required much clearer and more solid criteria than what was contemplated by the ambiguous phrase "regard must be had to". When it came to assessing evidence, reliance could not be placed on such unsettled and contingent factors as "context" and "surrounding circumstances".

58. The first sentence of draft conclusion 7, paragraph 1, "Practice may take a wide range of forms", was merely a factual description and was perhaps not appropriate in a conclusion.

59. Draft conclusion 8 seemed unnecessary. He had reservations about both paragraph 1, which seemed to state the obvious, and paragraph 2, which appeared to disregard the fact that it was quite normal within democratic countries for State organs to express conflicting views.

60. With regard to draft conclusion 9, he had doubts about the rather vague wording in the first paragraph to describe the requirement that practice must be general. It would be preferable to use the phrase "extensive and virtually uniform", the terminology employed by the International Court of Justice in the *North Sea Continental Shelf* cases. He also questioned the reference to the controversial concept of "specially affected" States in paragraph 4.

61. In draft conclusion 10, paragraph 2, the use of the adjective "mere" to describe "usage" suggested that the latter had no normative force. However, that was not necessarily the case, since *de facto* custom or usage to which *opinio juris* had not yet attached might have a certain limited normative effect in both domestic law and international law.

62. On a final point, he said he hoped that the Special Rapporteur would address the question of unilateral measures and their opposability as part of his future work on the identification of customary international law.

63. Mr. CAFLISCH said that he had only a few comments to make on the draft conclusions, which, in his opinion, should all be sent to the Drafting Committee.

64. With regard to draft conclusion 1, he agreed with Mr. Murase that "methodology" should be replaced by "methods".

65. Draft conclusion 2 (*a*) constituted a useful clarification of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice.

66. In draft conclusion 4, perhaps it would suffice to refer to the "surrounding circumstances", which presumably encompassed the "context".

67. In draft conclusion 5, the word "primarily" was used, not in relation to the acceptance of a practice as law, but rather to the contribution to that practice that might be made by non-State actors. Perhaps that might be clarified.

68. Under draft conclusion 9, State practice had to be "sufficiently widespread" for it to be established as a rule of customary international law. It might be preferable to delete the adverb "sufficiently".

69. While he understood the Special Rapporteur's desire not to address the "general principles of law recognized by civilized nations", referred to in Article 38, paragraph 1 (*c*),

[223] London Statement of Principles Applicable to the Formation of General Customary International Law, adopted by the International Law Association in its resolution 16/2000 (Formation of general customary international law), of 29 July 2000. See *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, London, 2000, p. 39. The London Statement is reproduced in *ibid*., pp. 712–777.

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

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

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

The meeting rose at 12.55 p.m.

3224th MEETING

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

Chairperson: Mr. Kirill GEVORGIAN

Present: Mr. 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. Laraba, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)

[Agenda item 14]

STATEMENT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

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

2. Ms. LIJNZAAD (Council of Europe) said that she welcomed the opportunity that was afforded to CAHDI every year to present its work to the International Law Commission. CAHDI was an intergovernmental committee, which, twice a year, brought together the legal advisers on public international law of the ministries for foreign affairs of Council of Europe member States, as well as a significant number of representatives of observer States and international organizations, in order to examine issues relating to public international law and to promote exchanges and the coordination of views among member States. CAHDI also provided opinions at the request of the Committee of Ministers. In March 2014, it had issued an opinion on Recommendation 2037 (2014) of the Parliamentary Assembly of the Council of Europe on the accountability of international organizations for any human rights violations that might occur as a consequence of their activities, in which it had underscored the fact that the privileges and immunities of international organizations were essential for the fulfilment of their mission and were governed by international law.[224] CAHDI invited international organizations to consider waiving such immunities where appropriate in individual cases and drew their attention to the recent case law of the European Court of Human Rights on the scope of such immunity and on the question of the availability of "reasonable alternative means".

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

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

[224] CAHDI, Meeting report, 47th meeting, Strasbourg, 20–21 March 2014 (CAHDI (2014) 11), appendix III, para. 7.