Document:-
A/CN.4/3150

Summary record of the 3150th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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Juridical Committee in the area of the incorporation of international immunities in domestic law.

34. Mr. WAKO, noting that the work of the Inter-American Juridical Committee was very similar to that of the Commission inasmuch as it was also concerned with the progressive development of international law, requested information on the report mentioned in the 2011 annual report[321] on the role of cultural diversity in the development of international law. His impression was that the Inter-American Juridical Committee was concerned above all with monitoring cooperation between OAS member States and the International Criminal Court but he wondered whether the Committee might go a step further and identify areas in which the Rome Statute of the International Criminal Court possibly warranted a review. Lastly, given that the question of internal conflicts had been included on the agenda of the Inter-American Juridical Committee, he would like to know the Committee's opinion regarding limitations on the freedom of expression. On the African continent, in any case, internal armed conflicts often had an ethnic dimension and were frequently motivated by hate speech. It would be interesting to know what the Committee would recommend in terms of reconciling the freedom of expression with the need to prohibit incitement to hatred.

35. Ms. ESCOBAR HERNÁNDEZ said that, like Mr. Saboia, she wished to know to what extent international immunities had been incorporated into domestic legislations. She also wished to know whether, in the course of its report on strengthening the inter-American human rights system, the Committee had provided for a mechanism of cooperation and exchange of views with the organs of the inter-American system charged with the protection of human rights, in particular the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the permanent secretariats that served them.

36. Mr. STEWART (Inter-American Juridical Committee) said that he would try to provide a brief answer to Mr. Šturma's question on the Inter-American Democratic Charter. The Charter was not a treaty but rather a declaration with significant normative force. The mechanisms that oversaw its implementation were essentially political in nature. One State could not initiate proceedings against another State for violating the Charter. In his view, proper compliance with the most important obligations was possible even when efforts to monitor such compliance were not enforced by law.

37. In response to Mr. Saboia's question concerning the overlap between the work of the Committee and that of the Commission in certain areas, he cited the example of an applicant whose request for asylum and refugee status had been denied because the applicant had not followed established procedures. The Committee had declared that denial to be unjustified on the grounds that it was inconsistent with the obligations of States and that the procedures could not be invoked as grounds for denying an individual access to the process to which he or she was entitled under international law.

38. The issue of immunities under international law was a topic of obvious interest within the inter-American legal system, whether it addressed immunities of the State or those of individuals. However, the Committee had not yet decided to include the topic on its agenda, and he did not know what form the topic might take if it did.

39. With regard to the question posed by Mr. Wako concerning cultural diversity, he drew attention to the Committee's report on the subject, which emphasized the rights of indigenous peoples in order to ensure that attention was given to preserving the rights of all peoples that made up multicultural societies, indigenous and otherwise.

40. The Committee had not proposed any amendments to the Rome Statute of the International Criminal Court; rather, it had focused on the ratification of the Statute and the incorporation of its provisions into domestic law.

41. Lastly, the Committee had not yet taken up the issue of freedom of expression and internal armed conflicts. With regard to the question posed by Ms. Escobar Hernández about strengthening the human rights system, the Committee cooperated and exchanged views with the other bodies concerned, but on an informal basis, and such cooperation was sometimes difficult.

Organization of the work of the session (*concluded*)[*]

[Agenda item 1]

42. The CHAIRPERSON thanked the representative of the Inter-American Juridical Committee for his report and informed the members of the Commission that informal consultations had been held with a view to considering the advisability of including the topic "Protection of the atmosphere", which had been included in the Commission's long-term programme of work, in its current programme of work. Those consultations would no doubt continue at the next session. In addition, the Bureau was planning to hold informal consultations on another subject included in the long-term programme of work, "Protection of the environment in relation to armed conflicts", also with a view to its inclusion in the Commission's long-term programme of work. Lastly, the Chairperson informed the members that, owing to his new responsibilities, Mr. Vasciannie had resigned from the Commission with immediate effect.

The meeting rose at 11.40 a.m.

3150th MEETING

Thursday, 26 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba,

[321] See footnote 319 above.

[*] Resumed from the 3141st meeting.

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

Cooperation with other bodies (*concluded*)

[Agenda item 12]

Statement by the Secretary-General of the Asian–African Legal Consultative Organization

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

2. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that one of the Organization's statutory functions was to study the topics dealt with by the Commission and to forward to it the views of its member States. The fulfilment of that mandate over the years had helped to forge a close relationship between the two bodies, which were also customarily represented at each other's sessions.

3. A half-day special meeting on selected items on the Commission's agenda had been convened at the fifty-first annual session of AALCO, held in Abuja, Nigeria, from 18 to 22 June 2012. The topics discussed at the meeting had been "Protection of persons in the event of disasters" and "Immunity of State officials from foreign criminal jurisdiction". The panellist for both topics had been Mr. A. Rohan Perera, a former member of the Commission; Mr. Djamchid Momtaz, also a former member of the Commission, had shared his thoughts on the topics.

4. In his paper on the topic "Protection of persons in the event of disasters", Mr. Perera had observed that the protection of victims of natural disasters and the fundamental principle of respect for sovereignty and territorial integrity fell under customary international law and were covered by Article 2, paragraph 7, of the Charter of the United Nations. He had summarized the main points of contention and consensus that had emerged from the Commission's consideration of draft articles 10 to 12 of its text on the topic. The middle ground that seemed to surface from the range of views expressed was that the right of an affected State to request international assistance was associated with the duty of third States and organizations to consider such requests, but not necessarily to accede to them. The Commission had also emphasized the fact that the right of the international community to offer assistance could be combined with encouragement to make such offers of assistance on the basis of the principle of international cooperation and solidarity.

5. In his paper on the topic "Immunity of State officials from foreign criminal jurisdiction", Mr. Perera had indicated that the Commission's debate had centred on three principal issues: the general orientation of the topic, the scope of immunity and the question of whether there were exceptions to immunity with regard to grave crimes under international law. Highlighting the views of States during the debates in the Sixth Committee, he had said that, in principle, they had endorsed the Special Rapporteur's intention to approach the topic from the standpoint of *lex lata*, but that once the gaps had been identified, the Commission should proceed to the next stage, the *lex ferenda* perspective.

6. With regard to the scope of the immunity of State officials from foreign criminal jurisdiction, Mr. Perera had noted that there was a broad degree of consensus within the Commission that the troika enjoyed immunity *ratione personae*. It was with regard to other categories of State officials that the Commission was required to move into uncharted territory. The challenge was to strike a delicate balance between the need to expand, albeit cautiously, the categories of State officials to be granted jurisdictional immunity *ratione personae*, on the one hand, and the need to avoid a liberal expansion of such categories that could be conducive to an environment of impunity under the cover of immunity, on the other.

7. Regarding exceptions to the immunity of a State official, Mr. Perera had recalled the Special Rapporteur's opinion that it was pertinent only with regard to immunity *ratione materiae*, concerning acts performed in an official capacity in the context of crimes under international law, but not to immunity *ratione personae*, which covered acts performed both in an official or personal capacity. Lastly, he had suggested that the recent judgment by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, in which it had held that there could be no conflict between rules substantive in nature and rules on immunity, which were procedural, had clear implications for the Commission's ongoing work.

8. Mr. Momtaz had reiterated the need for AALCO member States to become active in responding to questions raised by the Commission. For example, the Special Rapporteur on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)" had asked whether the basis of State practice was to be found in treaty obligations or obligations arising from customary international law. Other questions, relating to protection in disaster situations, included whether States had the duty to offer assistance and whether the obligation of an affected State to accept assistance was limited to assistance from subjects of international law, thus excluding assistance from non-governmental organizations.

9. Lastly, on the topic of immunity of State officials from foreign criminal jurisdiction, Mr. Momtaz had noted that article 27 of the Rome Statute of the International Criminal Court did not accord immunity to any Head of State, minister for foreign affairs or other high-ranking State official and that, in its recent ruling in the *Jurisdictional Immunities of the State* case, the International Court of Justice had insisted on the jurisdictional immunity of States before national tribunals.

10. In the deliberations at the special meeting, delegations from China, Indonesia, Japan, the Islamic Republic of Iran, Malaysia, the Republic of Korea,

Saudi Arabia, Kuwait and India had made a number of important points. Given that a large number of Commission members were from Asian and African States, several delegations had expressed the hope that their active participation in the Commission's work would help to reflect more prominently the views and aspirations of those States in the progressive development and codification of international law.

11. One delegation had mentioned that it planned to express in the Sixth Committee, during the sixty-sixth session of the General Assembly, its views on the United Nations Convention on Jurisdictional Immunities of States and Their Property and on the articles on the law of transboundary aquifers. The delegation had suggested that, given the coexistence of differing rules in the field of environmental law and in order to avert the fragmentation of international law, the Commission should include the topic of protection of the atmosphere in its agenda for the current session.

12. Concerning the topic "Protection of persons in the event of disasters", many delegations had observed that humanitarian assistance should be undertaken solely with the consent of the affected State and with the utmost respect for the core principles of international law, such as sovereignty, territorial integrity, national unity and non-intervention in the domestic affairs of the State. One delegation had suggested that AALCO should initiate contact with ASEAN regarding mechanisms of disaster management and emergency response under the ASEAN Agreement on Disaster Management and Emergency Response.

13. With regard to the topic "Immunity of State officials from foreign criminal jurisdiction", a number of delegations had expressed the view that the Commission should focus exclusively on the codification of existing rules of international law, rather than on an exercise of progressive development.

14. In conclusion, he informed the Commission that his Organization would continue to cooperate with it actively with a view to bringing the voice of Asia and Africa to bear on its work and contributing to that work in a substantial manner.

15. Mr. EL-MURTADI SULEIMAN GOUIDER said that AALCO was among the leading legal organizations and one that most diligently took into account the Commission's work. The relationship between the two bodies was a significant one, and he looked forward to even closer cooperation with AALCO in the future.

16. Mr. HASSOUNA said that if the Commission had been informed, prior to its sixty-fourth session, about the outcome of AALCO's special meeting, it would have been able to take into account in its debates the views expressed by AALCO member States. He suggested that AALCO should consider holding its annual sessions prior to those of the Commission. Since the Secretary-General had just completed his first term at the head of AALCO, he asked what had been the Organization's main achievements during that period and what were his future objectives and aspirations for AALCO.

17. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said he agreed that it was unfortunate that the fifty-first annual session of AALCO had been held too late for the outcome to be taken into account at the Commission's current session. He would redouble his efforts to ensure that future annual sessions of AALCO were held in April.

18. In his first four years as Secretary-General of AALCO, he had endeavoured to learn how the Organization functioned, to maintain good housekeeping and to ensure that AALCO remained a relevant organization. In his second term, he would focus on substantive matters, particularly those relating to the work of the Commission. AALCO would be involved in some of the research to be undertaken by the Commission, in particular with regard to new topics, which would be included in the Organization's programme of work.

19. Mr. SINGH said that the agenda for the fifty-first annual session of AALCO had contained an item on the environment and sustainable development, and AALCO had held a special meeting on the law of the sea and the international legal challenges entailed by responses to piracy. One of the recommendations to emerge from that meeting had been that technical assistance should be provided by the AALCO secretariat to member States in enacting anti-piracy legislation. He asked how the secretariat planned to undertake that task.

20. Mr. WISNUMURTI said that the re-election of the current Secretary-General of AALCO augured well for continued constructive cooperation between that body and the Commission. He welcomed the news that AALCO intended to work even more closely with the Commission in future and said that it would be useful if AALCO could provide a report summarizing the main trends in the views expressed by member States at its annual sessions.

21. Mr. VALENCIA-OSPINA, after congratulating Mr. Mohamad on his re-election, said that over the years, AALCO had provided useful input on many of the topics considered by the Commission. The Organization's discussions on the Commission's draft articles had been instrumental in shaping the views of a fairly large group of Member States of the United Nations. As Special Rapporteur on the topic of protection of persons in the event of disasters, he had attended, and greatly appreciated, the AALCO meetings held in New York in parallel with those of the Sixth Committee. He asked what type of relationship AALCO envisaged with AUCIL.

22. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization), responding to Mr. Singh's question, said that AALCO was going to look into organizing a conference to commemorate the thirtieth anniversary of the United Nations Convention on the Law of the Sea, a conference which, it was hoped, would coincide with the fifty-sixth anniversary of the foundation of AALCO in November 2012.

23. Concerning Mr. Wisnumurti's request for a report summarizing the main trends in the views of member States, he pointed out that AALCO had a very small secretariat but said that it would do its best to accede to the request.

24. In reply to Mr. Valencia-Ospina's question about the relationship that AALCO envisaged with AUCIL, he said that AALCO had signed a memorandum of understanding with the African Union and would continue to cooperate with it in areas of common interest.

25. Mr. HMOUD, highlighting the importance of cooperation between AALCO member States and the Commission on all aspects of international law, said that the organization of AALCO meetings and seminars in parallel with those of the Sixth Committee helped to raise awareness of legal issues. Better links should be established among AALCO member States during the intersessional period. AALCO should facilitate the holding of legal workshops by member States. Lastly, participants from other African and Asian States that were not AALCO members should be invited to participate in its activities.

26. Mr. KITTICHAISAREE recalled that, during an AALCO intersessional meeting of experts held in New Delhi, he had suggested that the Organization should work towards consolidating the positions on legal issues of Asian and African States. Such States now numbered more than 100, and their patterns of State practice might crystallize into regional and eventually international customary law. He suggested that the AALCO observer in New York should organize brainstorming sessions on issues of concern to both the Commission and AALCO. The outcome of such sessions could be submitted to the Sixth Committee for its discussions of topics studied by the Commission. Lastly, the AALCO website should contain information on the positions of member States on different aspects of international law relevant to the work of the Commission.

27. Ms. ESCOBAR HERNÁNDEZ said that the discussion at the fifty-first annual session of AALCO of her topic, "Immunity of State officials from foreign criminal jurisdiction", had been based mainly on the approach the Commission had taken at its sixty-third session but had also touched upon many of the issues she had highlighted in her preliminary report presented at the current session (A/CN.4/654). As consideration of the topic had now entered a decisive phase, AALCO member States should be apprised of her intention to submit substantive reports containing draft articles, with the aim of adopting the draft articles on first reading by the end of the current quinquennium. She reiterated her thanks to AALCO for its interest in her topic and looked forward to the results of its work on that and other topics studied by the Commission.

28. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) said that he had taken note of all the points raised by Mr. Hmoud. He would ensure that, under his leadership, the important relationship between the Commission and AALCO flourished and the work of the latter remained relevant.

29. Due account would also be taken of Mr. Kittichaisaree's comments on the need to consolidate the positions of AALCO member States on legal issues and of his suggestions for the AALCO website. AALCO currently had difficulty in obtaining access to some sources, particularly national laws and declarations made by member States, but it was working on the problem. The AALCO observer in New York certainly made an invaluable contribution; it was to be hoped that more activities could be organized in New York in future.

30. He thanked Ms. Escobar Hernández for the information provided on the immunity of State officials from foreign criminal jurisdiction and looked forward to her participation in a future AALCO meeting.

31. Mr. SABOIA asked whether the interest expressed by one delegation in discussing the United Nations Convention on Jurisdictional Immunities of States and Their Property at a future session of the General Assembly was part of an effort to promote the entry into force of that Convention.

32. Mr. KAMTO said that the unanimous re-election of Mr. Mohamad as Secretary-General of AALCO was ample proof of how much AALCO member States appreciated his leadership skills. AALCO made an important contribution to the work of the Commission, and the meetings it organized in New York in parallel with those of the Sixth Committee were very useful and should be continued.

33. As he had been unable to attend the fifty-first annual session of AALCO in Abuja, he welcomed the very detailed and clear account of its proceedings. Very little had been said about his topic, "Expulsion of aliens", however. Was that cause for pessimism, because the topic had not aroused much interest, or optimism, indicating that AALCO was satisfied with the work he had done thus far?

34. Sir Michael WOOD said that AALCO had a long, distinguished history in the field of international law. One reason for its importance was that it represented a very wide range of States from a vast geographical area; another was its openness to observers at its annual sessions and at its meetings in New York. Given the importance of those meetings, he wished to know what was being planned for the next one, in late 2012. He asked if any efforts were being made to extend the Organization's membership to additional African and Asian States and to increase the number of observers. Lastly, he enquired about the procedures for obtaining observer status.

35. Mr. WAKO said that the activities of AALCO were of greater direct relevance to the Commission's work than those of any other regional organization, none of which had a mandate for both the codification and the progressive development of international law and for contributing to the topics under discussion in the Commission, as did AALCO. For that reason, it would be advisable for the relationship between AALCO and the Commission to be made more dynamic. AALCO should invite Commission members from the African and Asian regions to its meetings. It would also be useful for the Commission's special rapporteurs to be invited to the AALCO meetings at which their topics were discussed, as that would give them a clearer understanding of the thinking of the Organization's members. AALCO's input to the Commission's work was sufficiently important to warrant holding its annual session in April of each year. A representative of AALCO should attend a Commission meeting in the first part of the session, rather than at the end of the second part of the session.

36. Mr. MOHAMAD (Secretary-General of the Asian–African Legal Consultative Organization) thanked all the members of the Commission for their input and feedback. He explained that the statement to which Mr. Saboia had referred had been made by a delegate at the annual session and did not reflect the position of AALCO.

37. In response to Sir Michael's questions, he said that AALCO was trying to widen its membership. It had established an Eminent Persons Group to help to recruit more members. It often received enquiries from African and Asian States about how to become members and was trying to do better in facilitating their entry. International organizations and non-member States could attend the annual sessions of AALCO as observers.

38. He had taken note of the three points made by Mr. Wako. The dates for the organization's annual sessions were set by the State hosting the event and AALCO itself had little say in the matter. It would, however, try to persuade States hosting future annual sessions to hold them in April and to invite the members and special rapporteurs from the Commission, in order that they could interact with member States of AALCO.

Formation and evidence of customary international law (*continued*)[*] (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPPORTEUR (*continued*)

39. Mr. HASSOUNA commended the Special Rapporteur on the clear, well-structured note (A/CN.4/653) in which he had introduced the Commission to the very important topic of the formation and evidence of customary international law. Entire areas of international law were still governed by custom, notwithstanding the considerable growth in the number and scope of treaties. In the absence of a centralized international legislature, the corpus of written norms was often plagued by lacunae, something which heightened the need for unwritten rules to fill the gaps. While treaties themselves sometimes referred to customary law, customary norms were sometimes relied upon in order to interpret or supplement the provisions of treaties. Since the formation and evidence of customary norms raised some very complex issues, the Commission's guidance would be extremely useful for practitioners. Drafting a set of conclusions accompanied by commentaries, as suggested by the Special Rapporteur, would be the most appropriate outcome for the Commission's work. Those conclusions should focus on the formative process of customary international law and take account of its flexibility and constant evolution.

40. It would be wise to explore some background material in preparation for work on the topic. The Commission's own report, dating back to 1950, on "Ways and means for making the evidence of customary international law more readily available"[322] could be reappraised in the light of the current features of the international legal system. The findings of the International Law Association[323] and the study on customary international humanitarian law published by ICRC in 2005[324] could also be reviewed. The contentious issues, including that of methodology, warranted further analysis.

41. The note by the Special Rapporteur drew attention to the need to clarify certain notions such as the term "general international law", which had a different connotation from "customary international law". Concerns regarding terminology should be addressed at the outset, in order to ensure consistency in the Commission's work. The establishment of a short lexicon of the relevant terms in the six official languages of the United Nations would probably be very useful.

42. The Special Rapporteur's suggestion that the Commission should examine theories of custom was welcome. It had sometimes been said that custom raised the issue of how law was created because, unlike conventional law-making through the conclusion of treaties, customary norms were not laid down by a deliberate effort of will, but grew through a process consisting of practice and belief.

43. The identification of rules of customary international law had been greatly advanced not only by the case law of the International Court of Justice and the Permanent Court of International Justice, the two sources of guidance suggested by the Special Rapporteur, but also by the findings of other international courts and tribunals. For example, on 16 February 2011, in the case concerning *Ayyash and others*, the Appeals Chamber of the Special Tribunal for Lebanon had issued an interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, which had ruled that

> a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community … to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged (para. 85).

The decisions of international courts should be subjected to critical appraisal, however, and whenever there were doubts about their consistency, the factors underlying the variations should be analysed.

[*] Resumed from the 3148th meeting.

[322] *Yearbook ... 1950*, vol. II, document A/3116, Report of the International Law Commission covering its second session, Part II, "Ways and means for making the evidence of customary international law more readily available", paras. 24–94. See also document A/CN.4/16 and Add.1 (article 24 of the statute of the International Law Commission: working paper by Manley O. Hudson), *ibid*., pp. 24 *et seq*.

[323] "London statement of principles applicable to the formation of general customary international law", and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: www.ila-hq.org/en/committees/index.cfm/cid/30). See also the debate in plenary, pp. 922–926 (*ibid*.). The "London statement" also appears on pp. 712–777 (*ibid*.); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid*.). The six interim reports by the Committee contain more detailed information.

[324] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Rules) and vol. II (Practice) (Cambridge, United Kingdom, Cambridge University Press, 2005).

44. With regard to scope, the Special Rapporteur argued in paragraph 21 of his note that the role of customary international law in the interpretation of treaties was not part of the topic. Although it was true that the issue had been dealt with in other contexts, it might well be relevant to the topic under consideration, since it was an intrinsic element of the relationship between customary international law and treaties.

45. The Special Rapporteur was right in thinking that the topic should cover the whole of customary international law, because it could give rise to legal norms in all fields of international law. He agreed with the Special Rapporteur that the emergence of new peremptory norms of general international law, *jus cogens*, lay outside the scope of the topic, but thought it would be desirable to explain why that was so.

46. The participation of States in the formation of customary international law required further investigation—it was related to the interpretation of States' silence. The grounds on which customary norms would become binding on States that had not participated in their formation needed to be identified.

47. Lastly, he agreed with the tentative schedule proposed by the Special Rapporteur for the Commission's further consideration of the topic.

48. Mr. PETRIČ said that he supported the work being done on the topic, work that should focus on promoting a better understanding of the formation of customary international law and helping practitioners of the law to find evidence of custom. The Commission would thereby be performing a useful service: since the rules of customary international law were not written rules, disputes often arose over them. He agreed with the statement in paragraph 3 of the Special Rapporteur's note that the outcome of the work should be a practical guide with commentaries, meant for judges, government lawyers and practitioners. Judges and lawyers used the law in different ways, however, the former attempting to find solutions to legal problems, and the latter acting as advocates, seeking to prove points.

49. He agreed with the Special Rapporteur that the case law of international courts, in particular the International Court of Justice, should be the focus of the Commission's research. In trying to uncover evidence of existing customary international law, the Commission should pay attention, in addition, to contemporary State practice. In the past several decades, the number of new States had doubled, and State practice was currently being created by nearly 200 States, not a mere 40 or so as in the past. In dealing with unilateral acts of States, special attention should be paid to those that had legal effects *per se*, such as protest and recognition, and were accordingly particularly influential in the development of customary international law.

50. The desire expressed by the Special Rapporteur in paragraph 10 of his note to hear the initial views of members of the Commission on the topic was a good approach. Referring to paragraph 12, he said that to date, the Commission had endeavoured to establish rules of customary international law solely in relation to specific topics on its codification agenda. It had not, and should not, seek to produce a "Vienna convention on customary international law", as had been pointed out earlier.

51. He agreed with the comment in paragraph 13 that the work of the International Law Association was relevant, but, as Mr. Murase had said, the Association's conclusions were extremely cautious. That, in his own view, should alert the Commission to the need for it to be cautious, too. The terminology used in relation to customary international law needed to be clarified. Several formulations appeared in paragraph 14; in his own country, the "generally accepted principles of international law" were cited in the Constitution as being directly applicable by the courts. Developing a lexicon of relevant terms, as suggested in paragraph 15, would thus indeed be useful.

52. Paragraph 14 also referred to the distinction between customary law and "soft law". Customary law had a different formal origin than that of treaties, yet it had the same quality and power. "Soft law", however, was not law at all. "Soft law" instruments such as declarations and resolutions could eventually develop into treaties through codification, or become part of customary international law through State practice and the growth of *opinio juris*. They sometimes repeated or reconfirmed rules and principles that were already customary law, for example, those set out in the Charter of the United Nations. However, the role of "soft law" instruments in the formation and establishment of evidence of customary international law should not be an avenue for the Commission's research.

53. He endorsed the description, in paragraph 17, of the ultimate aim of the Commission's work: to provide practical aid to those called upon to investigate rules of customary international law. He likewise agreed with the comment in paragraph 18 that the case law of international courts and tribunals was the most reliable guidance on the topic. However, the case law of the highest national courts the world over—not just in Europe and North America, but also in Africa and Latin America, not just in English and French, but in other languages as well—should not be neglected. A great deal of useful doctrine was available in the German and Russian languages, for example. He was aware of the difficulties involved in using such sources, but perhaps the Secretariat could provide some assistance.

54. With reference to paragraph 19, he said that while empirical research into State practice was important, certain diplomatic notes and statements like those relating to a *fait accompli* were obviously biased: they were aimed at proving that the State's case was based on customary international law. He therefore thought that deductive reasoning should also be brought to bear on the topic.

55. Concerning the description of the scope of the topic in paragraph 20, he said that the guiding rules must be general rather than prescriptive, flexible rather than strict. With regard to the idea, mentioned in paragraph 22, of breaking customary international law into separate specialist fields, he said it seemed to him *prima facie* that such a differentiation in approach might lead to confusion and inconsistencies. Some small degree of differentiation might be useful to practitioners, however, depending on the techniques to be proposed as practical guidance.

56. He agreed with the Special Rapporteur that the topic should not extend to the emergence of *jus cogens* and that at the start of its work, the Commission should seek to develop a series of propositions with commentaries. At a later stage, if the results of its research were promising, it could easily turn to drawing up conclusions. While neither propositions nor conclusions would have legal force, they would be backed by the authority of the Commission.

57. He endorsed the proposed four stages of work as a good approach and said that he looked forward to work on the topic, which had exciting theoretical dimensions and went to the roots of international law. The Special Rapporteur's note showed that he was aware of the possible difficulties involved and was therefore proposing a safe initial approach based on modest objectives.

58. Mr. FORTEAU, offering his first thoughts in response to the Special Rapporteur's query about the possible outcomes to the work on the topic, said that he agreed that the Commission should not be overly prescriptive and that it should aim at producing a practical guide in the form of conclusions with commentaries. The workplan proposed in paragraph 27 of the note seemed suited to bringing about that result, although the scheduling seemed a bit ambitious. Specifically, he thought it would be difficult, in a single year (2014), to discuss State practice and *opinio juris*, two major components of custom that raised a whole series of very complex problems. Similarly, the third report to be submitted in 2015 was to cover a number of matters that were widely divergent and might well merit separate consideration.

59. The first step the Commission should take was to decide what might be the value added of its consideration of the topic. The International Law Association had already adopted principles applicable to the formation of customary international law:[325] Could the Commission add or subtract significantly from those? He had initially had his doubts on that score, but after having heard Mr. Murase's critique of the principles, he now thought it would be useful to clarify the lacunae that had been pinpointed.

60. He agreed with the Special Rapporteur's suggestion in his introductory statement that the Commission should not linger too long on theoretical or conceptual matters. Indeed, he saw no need to delve into the definitions listed in paragraph 14 of his note, the terminological issues raised in paragraph 15 or the role of customary international law within the international legal system, as suggested in paragraph 16. All those questions were better suited to academic debates than to codification work. In fact, he did not see how the formation of custom fell within the Commission's mandate and thought the focus should be on the much more practical matter of identifying customary international law, meaning the specific evidence of custom. He endorsed Mr. Murase's remarks on that point. In addition, he thought that the distinction drawn in paragraph 20 between "formation" and "evidence" of customary international law was by no means clear.

61. The initial objective of the project should be to provide a practical guide that described, for international lawyers and particularly for domestic authorities, the legal techniques to be employed in determining whether a given rule was or was not a rule of customary international law. To that end, it might be useful to update the report on "Ways and means for making the evidence of customary international law more readily available" adopted by the Commission at its second session in 1950.[326] It would be particularly useful if international lawyers who ran into a problem to which a rule of customary international law was alleged to apply could know where to look to elucidate the matter. Domestic lawyers sometimes had to confront such challenges, especially in countries where resources for legal services were limited. They, too, would greatly benefit from guidance on where to look for the relevant materials among the proliferation of existing sources, not only repertories of national practice but also electronic resources. He endorsed Mr. Petrič's remark about the need to take into account the practice of countries throughout the world written in various languages.

62. He agreed with Mr. Tladi that the emergence of *jus cogens* should not be covered under the topic. He did not agree, however, with the reasoning advanced by the Special Rapporteur in paragraph 23 in support of the same conclusion. *Jus cogens* rules were by definition part of customary law. However, determining whether a rule was part of customary law was not the same as determining whether a rule of customary law was, in addition, not subject to derogation by way of a treaty. That was a valid distinction, even though, regrettably, the International Court of Justice had not made it very clearly when it had stated, in paragraph 99 of its judgment of 20 July 2012 in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, that the prohibition of torture was part of customary international law and had become a peremptory norm (*jus cogens*).

63. At the end of paragraph 22 of his note, the Special Rapporteur suggested that special techniques might be appropriate for the identification of particular rules of customary international law. The impact of special or particular rules was not just a question of techniques, however. For example, the approach to determining that a customary rule existed in international criminal law might be affected by the principle whereby there could be no crime without some basis in law. Similarly, the regime applicable to the identification of customary rules might or might not be identical to the regime applicable to the modification through custom of a customary rule. One might expect the latter regime to be more stringent than the former, insofar as the modification of an existing rule was involved.

64. Paragraph 18 of the Special Rapporteur's note, concerning methodology, seemed to exclude the practice of regional courts, although the Special Rapporteur had slightly corrected that impression in his introductory statement. Still, such practice deserved to be considered, for two reasons: to find out how judges in regional courts went about identifying customary rules and to look into possible discrepancies in judicial practice. It was noteworthy, for example, that in its judgment of 23 March 2010 in the case of *Cudak v. Lithuania* [GC] (paras. 60

[325] See footnote 323 above.

[326] See footnote 322 above.

et seq.), the European Court of Human Rights had given a slightly different interpretation of the customary law applicable to immunity in respect of labour contracts concluded with an embassy than had the Court of Justice of the European Union in its judgment dated 19 July 2012 in the case of *Ahmed Mahamdia v. People's Democratic Republic of Algeria* (paras. 54 *et seq.*). The Commission might also do well to look into the specific effect of codification treaties on the finding of evidence of custom.

65. Lastly, the Guide to Practice on Reservations to Treaties had made a start on the study of the effects of reservations to treaties on customary law, particularly in guidelines 3.1.5.3 and 4.4.2, and those ideas merited elaboration.

Programme, procedures and working methods of the Commission and its documentation (*continued*)[*] (A/CN.4/650 and Add.1, sect. G)

[Agenda item 10]

66. Mr. MURASE, referring to the discussion with the Secretary-General of AALCO, said that he had been encouraged by the enthusiastic support shown by AALCO member States for the inclusion in the Commission's programme of work of the topic of protection of the atmosphere, for which he had written the syllabus.[327] As he understood it, however, a decision had been taken to pursue informal consultations, at the Commission's next session, on whether to include the topic. He requested clarification of the basis for that decision.

67. Mr. HMOUD, speaking as a member of the Bureau, said that the proposal to include the topic had been discussed extensively in informal consultations, but the idea had met with some resistance, primarily concerning the scope of the topic and the possible outcome of its consideration.

The meeting rose at 1 p.m.

3151st MEETING

Friday, 27 July 2012, at 10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Formation and evidence of customary international law (*continued*) (A/CN.4/650 and Add.1, sect. G, A/CN.4/653)

[Agenda item 7]

NOTE BY THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the Special Rapporteur's note on formation and evidence of customary international law (A/CN.4/653).

2. Ms. ESCOBAR HERNÁNDEZ said that the topic under consideration was of great interest in numerous respects, including a practical one, which was of priority for the Commission. As pointed out by the Special Rapporteur, it sometimes happened that State bodies, and not only the courts, had to take decisions on questions relating to international custom although they did not have the requisite expertise in international law. Thus, a practical guide or conclusions would be of great use to them.

3. Moreover, such interest was not limited to the domestic sphere: the formation and evidence of customary international law had acquired growing importance in recent years and concerned the international community as a whole, including regional organizations. That was attested to by the work of the International Law Association and the London statement of principles applicable to the formation of general customary international law,[328] to which the Special Rapporteur had referred, but also the February 2012 decision of the International Court of Justice in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, which had given rise to an interesting debate on the invocation of custom and on ways of identifying evidence of its existence, as well as by the fact that CAHDI had planned to devote a meeting of its September 2012 session to the treatment of custom by national and international courts. Thus, it was particularly appropriate for the Commission to consider the topic.

4. For the moment, the Special Rapporteur's objective was not to analyse the substance of the problems posed in connection with the formation and evidence of international customary law, but simply to identify them and to promote a debate on their subject. She therefore would confine herself to posing several questions.

5. In paragraph 16 of his note, the Special Rapporteur evoked customary international law as "law", but it was difficult to see how it could be understood otherwise,

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[*] Resumed from the 3132nd meeting.

[327] *Yearbook … 2011*, vol. II (Part Two), annex II.

[328] "London statement of principles applicable to the formation of general customary international law", and accompanying commentary, adopted by resolution 16/2000 of 29 July 2000 on formation of general customary international law by the International Law Association: see *Report of the Sixty-ninth Conference held in London, 25–29th July 2000*, p. 39 (available from the website of the International Law Association: www.ila-hq.org/en/committees/index.cfm/cid/30). See also the debate in plenary, pp. 922–926 (*ibid.*). The "London statement" also appears on pp. 712–777 (*ibid.*); the final report of the working session of the Committee on Formation of Customary (General) International Law appears on pp. 778–790 (*ibid.*). The six interim reports by the Committee contain more detailed information.