Provisional

**For participants only**

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# International Law Commission

**Sixty-sixth session (second part)**

**Provisional summary record of the 3226th meeting**

Held at the Palais des Nations, Geneva, on Thursday, 17 July 2014, at 3 p.m.

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Identification of customary international law (*continued*)

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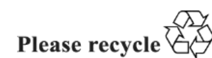


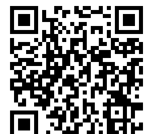

***Present***:

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| *Chairman*: | Mr. Gevorgian |
| *Members*: | Mr. Caflisch |
| | Mr. Candioti |
| | Mr. Comissário Afonso |
| | Mr. El-Murtadi |
| | 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. Petrič |
| | Mr. Saboia |
| | Mr. Singh |
| | Mr. Šturma |
| | Mr. Tladi |
| | Mr. Valencia-Ospina |
| | Mr. Wako |
| | Mr. Wisnumurti |
| | Sir Michael Wood |

***Secretariat***:

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| Mr. Korontzis | Secretary to the Commission |

*The meeting was called to order at 3 p.m.*

**Identification of customary international law** (agenda item 9) (*continued*) (A/CN.4/672)

**Mr. Šturma** said that the Special Rapporteur's well-documented report would be useful not only to the Commission and Member States but also to law students. "Methods" rather than "methodology" would be the best term to describe the process of determining the existence and content of rules of customary international law, since the expected outcome of the topic was methods or guidelines for practitioners.

The language of the definition contained in draft conclusion 2 justified the two-element approach outlined in chapter IV of the report and reflected in draft conclusion 3 *et seq.* General practice and *opinio juris* both had a role to play, although the emphasis placed on either component would vary in different areas of international law.

As he read draft conclusion 5, it did not exclude the practice of international organizations. He could agree to draft conclusion 6, on the understanding that it covered State organs and other entities within the meaning of articles 4 and 5 of the articles on responsibility of States for internationally wrongful acts, but not all cases of conduct attributable to a State for the purpose of responsibility. He concurred with the approach adopted in draft conclusion 9. The time element might, however, deserve a separate conclusion, because the statement that "no particular duration is required" might or might not be correct, depending on circumstances. The distinction drawn by R.J. Dupuy between "*la coutume sauvage*" and "*la coutume sage*" had merit, in that it clarified the interrelationship between practice and the expression of *opinio juris* in the light of different circumstances and the pronouncements of States at international conferences and in international organizations.

He was in favour of the wide range of forms of practice referred to in draft conclusion 7 and the lack of a predetermined hierarchy of those forms. It was noteworthy that, in the decision taken by the Supreme Court of the Czech Republic in 2004, to which reference was made in footnote 32, the Court had used as evidence for its findings the writings of international jurists and had discussed the distinction between international customary law and international comity. The current topic should also encompass the relationship between international customary law and general principles of law, usages and international comity. The Special Rapporteur should perhaps examine the role of writings of publicists in identifying elements of international custom. Lastly, the role of international organizations and international courts in the formation of customary international law seemed to be indisputable.

He recommended the referral of all the draft conclusions to the Drafting Committee.

**Mr. Huang** endorsed the many favourable comments made on the Special Rapporteur's second report and said that all 11 draft conclusions should be referred to the Drafting Committee. However, he was not in favour of extensive quotes from the judgments of the International Court of Justice in statements during plenary debates, as it gave the impression that the Commission relied too heavily on such judgments instead of on the opinions of its members.

He agreed with the aim of the topic as outlined in paragraph 12 of the report. The Commission should base its work on current international practices relevant to the practical needs of the international community. It should avoid purely academic debate and devise uniform criteria which could be used, by all audiences, to identify elements of practice in all fields of customary international law.

The constituent elements of customary international law formed the core of the topic. He agreed with the Special Rapporteur's two-element approach, which was

substantiated by State practice and national and international judicial practice. Customary international law could be compared to a human being, with general practice forming the body, and *opinio juris*, the soul: in other words, both elements were vital.

General practice, shared by many countries, had to be widespread and consistent. While practice by a State or an organization could take a variety of forms, with no predetermined hierarchy, it had to satisfy certain conditions in order to serve as evidence of general practice. First, it had to be lawful, compatible with the relevant laws and legal procedures. It was to be hoped that that requirement would be taken into consideration in the wording of draft conclusion 6.

Secondly, any individual practice used as evidence of a general practice had to be of relevance to that general practice. Thirdly, a practice must be public; secret or undisclosed practices could not be considered evidence of valid practice. Fourthly, there had to be internal consistency: the practices of different State bodies had to be consistent. The Special Rapporteur's treatment of that point in paragraph 50 of the report and in draft conclusion 8, paragraph 2, left much to be desired. In order to serve as evidence of customary international law, State practice had to be the authoritative and effective practice of the State concerned. He hoped that all those facets would be addressed in the commentary.

Turning to *opinio juris* on whether a general practice constituted customary international law, he said that it had to be that of several States. Evidence of such *opinio juris* could take various forms, including inaction. The burden of proof of *opinio juris* was borne by the party which claimed that a certain practice was part of customary international law.

He disagreed with those members who had argued that a single practice could not be used as evidence of both general practice and *opinio juris*. Lastly, while the attempt by some scholars to devise alternatives to the two-element approach had some merit for the purposes of academic study, that method could not be recommended to the Commission, which should continue to base its deliberations on both general practice and *opinio juris*.

**Mr. Hmoud** thanked the Special Rapporteur for his well-researched and well-balanced report. The utility of the project was clear, since in many instances, the lack of clarity in the methodology of identification created doubts about the customary nature of a certain rule. Accordingly, the current project must devise a useful tool that would assist in identifying the elements of a rule of customary international law and the relevant evidence to be utilized in the identification process.

The definition of customary international law should be based on Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, which offered a simple, sufficiently flexible definition. The phrase "derive from and reflect", in draft conclusion 1, highlighted the fact that general practice and acceptance as law were both constitutive and declaratory of the rules of customary international law.

It was well settled that a rule of customary international law encompassed two separate elements: the objective element of practice and the subjective element of acceptance of the obligatory nature of the practice. To adopt a one-element approach would neither advance the process by which rules of customary international law were formed nor make evidence more usable for the purpose of identification. Moreover, there was no plausible argument in favour of using different approaches to identification depending on the field of law, although the emphasis placed on an element might depend on circumstances and on the context and nature of the evidence available.

Turning to the role of practice, he said it was solely the practice of States that created the rules of custom; the practice of international organizations should be consulted only in the contact of evidence, not creation, of a rule. The fact that a State might confer

some competences on an international organization did not mean the latter then acted on its behalf in creating customary law. For the purpose of identifying customary international law, attribution of an act to a State did not have to meet the high threshold established in the articles on State responsibility.

As far as draft conclusion 7 was concerned, he concurred with the non-exhaustive list of sources in paragraph 2 and with the notion that State practice comprised verbal as well as physical conduct, along with various forms of intergovernmental communication. It might be necessary to provide guidance as to the types of verbal conduct which represented practice. As to whether confidential internal memorandums by State officials could be regarded as a manifestation of practice, they seemed instead to fall into the category of the subjective element of “acceptance as law”.

Draft conclusion 7, paragraph 2, referred to “manifestations” of practice, although that word was more closely linked to evidence than formation. He therefore suggested that the paragraph should begin with the phrase “Practice and its manifestations include …”. The issue of inaction had to be treated with caution, and a distinction must be drawn between inaction as conduct, which was an objective element, and inaction representing acquiescence, a subjective element.

Draft conclusion 7, paragraph 4, should be recast to indicate that acts “in the context of international organizations” could serve as practice, in order to make it plain that it was only State practice through the organization, and not the practice of an international organization itself, that constituted the relevant practice.

Regarding draft conclusion 8, while there was no hierarchy of forms or of evidence of State practice, more emphasis should be given to practice by an organ of the State that was closely associated with the content of the customary rule. Concerning draft conclusion 9, it was well established that practice had to be general, but not necessarily universal, and consistent. Frequency or repetition of practice, in addition to generality and consistency, should be borne in mind. Hence the time element should receive greater emphasis.

There was ample evidence from the pronouncements and decisions of courts that the practice of specially affected States had to be given due weight. That proposition did not conflict with the principles of generality of practice or the equality of States, provided that the practice was accepted by the community of States as a whole. The citation in footnote 167, to the effect that the “major Powers” would often be “specially affected by a practice”, seemed to suggest that the participation of the major Powers was essential for the formation of rules of customary international law, and that was worrisome. Fortunately, that idea had not been incorporated into the draft conclusions, and it was to be hoped that it would not find its way into the commentaries.

The phrase “acceptance as law” was the proper term and, unlike “*opinio juris*”, it had a precise connotation. Such acceptance was what distinguished custom from usage and the discretionary acts of States. If the draft conclusions were to serve as a useful guide for practitioners, they should better explain how to differentiate between practice that was accepted as binding and other forms of States’ usage. Evidence of acceptance, as described in draft conclusion 11, would of course form the factual basis for doing so. As that evidence was also proof of the practice itself, it would be necessary to find a method for determining whether evidence was relevant as proof of practice, or of acceptance, and for deducing the subjective element.

**Mr. Nolte** thanked the Special Rapporteur for his excellent report, which went in the right direction. The report and the debate on it had, however, raised such a quantity of fundamental questions of international law that it would normally take several years to address all of them, in all their complexity. It seemed impossible that the Commission

would be able to articulate a reasoned position on all the questions raised in the time that was available.

Concerning draft conclusion 1, he was uncomfortable with the terms “methodology” and “method”, since the topic was about much more that a method: it concerned the secondary rules regarding the formation and determination of customary international law. He therefore suggested that draft conclusion 1 should be reformulated to read:

> “The present draft conclusions concern the elements of customary international law and the factors which need to be taken into account for determining the existence and content of such rules.”

It was not sufficient to deal with other sources of international law by means of a “without prejudice” clause. That was true, in particular, of general principles of law, since they might be relevant for determining the content of particular rules of customary international law, and *vice versa*. For that reason, he suggested the addition of a draft conclusion, or paragraph, based on article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties, to read:

> “In identifying rules of customary international law, account is to be taken of general principles of international law.”

With regard to draft conclusion 2, he agreed that customary international law consisted of two elements, but thought it would be wise to add the expression “*opinio juris*” in brackets after the phrase “accepted as law”, to show that the latter term meant a common positive attitude on the part of the stakeholders of the international legal system. He did not think the Commission should attempt to define “international organization” during the current session.

The draft conclusions should be formulated in a way which did not suggest that general practice must come first and then be accepted as law. To make that clear, draft conclusion 3 could be worded to say that it was necessary to ascertain “whether there is a general practice and whether it is accepted as law”. He welcomed the Special Rapporteur’s openness to the idea that the two-element approach could be applied differently in different fields, since types of rules might vary according to dissimilar forms of evidence, the availability of which might differ greatly depending on the nature of the rule.

The reference to the “surrounding circumstances” hardly added anything to draft conclusion 4, which should emphasize that the assessment of the evidence must take account of the factual context and normative considerations.

As for draft conclusion 5, the practice of States contributed primarily, but not exclusively, to the formation of customary international law. The word “formation” captured the process by which customary law came into being better than “creation”.

He doubted whether the implicit reference to the articles on State responsibility in draft conclusion 6 was appropriate, because the primary purpose of those articles was to identify and attribute responsibility for internationally wrongful acts. It was also questionable whether it was necessary to add that the relevant conduct could be “in the exercise of executive, judicial or any other function”. If such an addition were considered useful, he suggested the insertion of the word “public” before “any other function”. In draft conclusion 7, paragraph 1, the word “verbal” should be replaced with “communicative”, because non-verbal communication also played a role in that context. In paragraph 2, a generic reference to internal forms of conduct should be inserted. The forms of practice listed in paragraph 3 had been insufficiently explored, and it would therefore be wise not to include them in the text until the underlying issues were addressed in the Special Rapporteur’s third report.

Turning to draft conclusion 8, he agreed that practice must be unequivocal and consistent, even if that meant that it was sometimes hard to identify the position of democratic States which might speak with many voices. Taken in isolation, draft conclusion 9 might be misread to mean that practice alone could establish a rule of customary international law. Paragraph 1 should therefore begin by saying "The relevant practice, as an element of a rule of customary international law, must be general." The expression "*opinio juris*" should be added at the end of draft conclusion 10, paragraph 1, to highlight the need for the subjective element of customary international law. It would also be wise to reflect in the draft conclusion the Special Rapporteur's explanations of the need to cover the subjective element of customary international law.

He generally agreed with draft conclusion 11, although he doubted whether internal memoranda and other internal communications should be recognized as evidence of *opinio juris*. The relevance of inaction should not be addressed without the benefit of the Special Rapporteur's third report.

In closing, he said that the Drafting Committee should take the necessary time to digest and evaluate the proposed draft conclusions.

**Ms. Escobar Hernández** thanked the Special Rapporteur for having submitted a report of such great interest. She would confine herself to comments about the draft conclusions contained in the report. First, she said that the contents of draft conclusion 1, paragraph 1, were adequate for the purpose outlined in paragraph 12 of the report. While she agreed with the general tenor of paragraph 2, it would be difficult to avoid entering into general principles of law, and how to discern them, when discussing the method for identifying the existence and content of international custom.

As for draft conclusion 2, she did not believe that the Commission should define either customary international law or an international organization, since they were sufficiently well-known and clear-cut categories. With regard to the definition of "international organization", she considered that to define it as "an intergovernmental organization" was a reductionist approximation that was not appropriate. Moreover, [t]he Special Rapporteur had not explained sufficiently why he had departed from the Commission's definition of an international organization as contained in the articles on responsibility of international organizations. Furthermore, if the Special Rapporteur wished to define the concept of "international organization", she wondered why "State" had not been defined, given the importance which the Special Rapporteur attached to State practice in the context of the topic. In short, the definitions contained in the draft conclusion were unnecessary and potentially dangerous.

She supported the Special Rapporteur's "two-element" approach as reflected in draft conclusion 3. A balance between the two should be maintained throughout the draft conclusions. However, the phrase "accepted as law" might give rise to uncertainty about whether one or both elements had to exist, and it should therefore be replaced with "and *opinio juris* thereon", since the latter was the term normally used by States, national and international courts and learned writers. The focus on the two elements of practice and *opinio juris*, which were, indeed, sometimes difficult to separate, was not uniform throughout the report. The relationship between the two could have major practical implications and therefore deserved closer attention.

In draft conclusion 5, she had no problem with the word "primarily", since State practice was the main, but not the sole source of "general practice". The action or inaction of international organizations was also of relevance to the establishment and identification of custom. Given that the Special Rapporteur had announced that he would deal with the practice of international organizations in his third report, [t]he Commission should examine

that issue the following year, at which point the Drafting Committee might have to revise some of the draft conclusions proposed in the second report.

She agreed that the bald reference to “inaction” in draft conclusion 7 was inadequate. Inaction in itself could not be automatically deemed a relevant practice. Inaction must be assessed in the light of the surrounding circumstances and with special regard to whether the State could reasonably have been expected to act. Moreover, [i]n that regard, the Commission’s parallel debate on subsequent agreements and subsequent practice in relation to the interpretation of treaties might well provide some guidance.

The use of the term “hierarchy” in draft conclusion 8 raised major problems. First, the acts and omissions under consideration were highly diverse and were not amenable to ranking. Secondly, it was important to take due account of the nature and rank of the State body taking or failing to take a given action: an act of the Ministry of Foreign Affairs was not comparable with the action of a local mayor, nor was an act of a trial court comparable with a Supreme Court ruling. In addition, the specific circumstances giving rise to a practice or custom needed to be taken into account in evaluating the status of a given form of practice or a given act. Contrary to the implication conveyed by paragraph 50 of the report, the relationship of sub-State organs to State organs — for example in a federal State — was based on competencies, and was not comparable with the relationship between higher and lower courts, which was strictly hierarchical.

She was not fully convinced that, where the organs of the State did not speak with one voice, less weight should be given to their practice. Though it was true that such practice could not have the same significance as uniform practice, the complexity of a State’s structure, for example, and the impact of the separation of powers, must be taken into account. A lack of unanimity might equally be evidence of the non-existence of custom, something which was also part of the process of identifying rules of customary law.

In draft conclusion 9, paragraph 1, she considered the term “sufficiently” to be both superfluous and problematic. It introduced a subjective element by necessitating the evaluation of whether a practice was widespread and representative enough to be considered general. It would therefore be preferable to delete the term “sufficiently”. Paragraph 1 should instead refer to the need for practice to be continuous and uniform.

With regard to draft conclusion 9, paragraph 4, she did not dispute the fact that the practice of specially affected States must be taken into account and even had special significance. However, it could not constitute the decisive — and certainly not the sole — criterion in establishing the existence of general practice, and still less, of *opinion juris*. Giving critical weight to the practice of affected States could enable them to impose their interests, as a group, on others. While that might not be a problem within regions or in bilateral relations, it could conflict with the principle of sovereign equality when the establishment of general practice was involved.

In conclusion, she pointed out that, in Spanish at least, the use of certain expressions, such as “physical and verbal actions” [*actos físicos ... verbales*] and “conduct … ‘on the ground’”, [*conducta ... ‘sobre el terreno’*], might be questionable. However, it would be better to discuss those matters in the Drafting Committee.

**Mr. Wisnumurti**, referring to draft conclusion 2, subparagraph (a), said that a working definition of customary international law was needed in order to clarify the overall context of the draft conclusions. He agreed with Mr. Park that “*opinio juris*”, which was the term most commonly used, should be added in brackets after the words “accepted as law”.

In draft conclusion 4, the words "context" and "surrounding circumstances" were unclear and could give rise to varying interpretations, lessening their usefulness to those responsible for assessing evidence that a general practice could be accepted as law.

In draft conclusion 6, the words "or any other function" unnecessarily broadened the scope of the draft conclusions and could create confusion. It was not clear, for example, whether they referred to the conduct of *de facto* organs of a State, mentioned in paragraph 34 of the report.

In draft conclusion 7, paragraph 3, the notion of inaction needed clarification. He was not convinced that applying draft conclusion 9, paragraph 2, of the Commission's work on subsequent agreements and subsequent practice, *mutatis mutandis*, as proposed by Mr. Murphy, would solve the problem. That paragraph dealt with silence on the applicability of a subsequent agreement or a subsequent practice, while draft conclusion 7, paragraph 3, of the topic under consideration dealt with the interpretation of inaction or silence in the context of conduct that would form State practice.

The arguments in the report underpinning draft conclusion 7, paragraph 4, on the role of international organizations, lacked clarity. A case in point was paragraph 44. To equate an act of an international organization such as the European Union with that of a State was to over-simplify. If the acts of international organizations were to be included as a form of practice, the Commission would need to look into the complex structures and mandates of various international organizations. That could present difficulties.

Draft conclusion 8, paragraph 2, could be viewed as contradicting paragraph 1 and was too prescriptive in nature. The element of flexibility and the weighing of evidence of practice on a case-by-case basis, should be reflected in paragraph 2. He supported the proposal to merge draft conclusion 8 with draft conclusion 4.

Draft conclusion 9 could be drafted more efficiently, notably in respect of the words "general", "widespread", "representative", "universal" and "consistent", which were used variously to set out the conditions required for establishing a rule of customary international law. Like other colleagues, he had reservations with regard to paragraph 4, on the need to pay due regard to the practice of States whose interests were specially affected, especially in relation to the principle of sovereign equality of States.

In draft conclusion 10, paragraph 1, the words "the practice in question must be accompanied by a sense of legal obligation" did not seem to sufficiently clarify the meaning of "accepted as law" or *opinio juris*. He suggested replacing those words with "the practice in question must be accepted as a legal obligation".

His comments on draft conclusion 7 were applicable to draft conclusion 11, which closely paralleled it. The wording of the two texts should be harmonized, however.

With those comments, he was in favour of sending all 11 draft conclusions to the Drafting Committee.

**Mr. Niehaus** said that as the work progressed, the Commission might well decide that draft conclusion 2 was unnecessary. Nevertheless, he himself was inclined to retain it, and in particular, to adhere as far as possible to the definition of customary international law set out in the Statute of the International Court of Justice. Moreover, further terminological definitions would probably be required. As to draft conclusion 4, he suggested that the Drafting Committee find a fuller and clearer wording that would do justice to the contents of paragraphs 29 to 30 of the report.

The title of draft conclusion 5, "Role of practice", was not very clear, at least in Spanish (*Función de la práctica*). In order not to minimize the importance of the practice of international organizations in the formation of customary international law, he suggested

that, rather than saying "it is primarily the practice of States" that contributed to that process, it might be better to say simply that it was the practice of subjects of international law that contributed to the creation of customary international law.

In draft conclusion 6, the expression "any other function" was too general and thus did not properly reflect the contents of paragraph 34 of the report. To some extent he shared Mr. Murphy's view that draft conclusion 6 was too broad and should be more restrictive. That could be achieved by using the expression "conduct authorized" by a State, for example. In addition, he suggested that "Relevant practice" would be a more appropriate title than "Attribution of conduct".

In draft conclusion 7, paragraph 2, it would be much clearer to say "forms of practice" instead of "manifestations of practice". As to paragraph 3, he shared the view that greater clarity was needed over the meaning of "inaction". What would be the minimum level of inaction? Did silence constitute inaction in and of itself or only when the circumstances required action?

In draft conclusion 10, paragraph 1, he agreed that, in addition to "a sense of legal obligation", a reference to lawfulness should be included.

**Ms. Jacobsson** said that, like others, she believed that the Commission's future work on customary international law should address the questions of who was involved in assessing evidence of a rule of customary law and who bore the burden of proof. They were not difficult questions to answer where a court or tribunal was doing the assessment, but when it was a State, things became more complex. In attempting to identify a rule of customary law, the State might either be trying to evaluate whether such a rule definitely existed, or else it might want to contribute to the firm establishment of an emerging rule.

The status of a rule of customary law was not black and white. Nor did all States need to agree on its existence or on the exact parameters of its content. There was also a temporal element to be taken into account: in some situations, uncertainty might disappear overnight. That had happened with the ban on the use of chemical weapons in response to an attack using chemical weapons – the so-called reciprocity option. Up to the time of the chemical weapons attack in Syria, in August 2013, a tiny element of uncertainty had remained; however, after the attack, States had revealed their clear legal assessment that there were no situations when chemical weapons might be used, even in response to a chemical-weapon attack.

Referring to draft conclusion 2, she said that she was not convinced that a definition of the term "customary international law" was needed. The text stated that the proposed definition was for the purposes of the draft conclusions, which clearly indicated that there might exist another, differently defined "customary international law". That was confusing, however, since the Commission's aim was to address the identification of customary international law in all situations, not to define it at a given time and for a given purpose. Any decision on whether to retain the definition would need to address whether or not to diverge from the wording of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice. The most important argument in favour of that definition was that it was a well-established and well-recognized formulation. She could also see the merit in inserting a reference to *opinio juris*.

She doubted the need for a broader definition of "international organization" than the one given in the articles on responsibility of international organizations. The perception of what constituted an international organization might change in the future, even if the proposed definition might seem acceptable today.

Draft conclusion 4 would not give practitioners clear guidance as it stood. Examples of "surrounding circumstances" would be best spelled out in the draft conclusion rather than the commentary.

Turning to draft conclusion 5, she said that customary international law could be created simultaneously by international organizations and States: on occasion, it might even be difficult to separate them in terms of their involvement. A legally binding decision on sanctions and enforcement measures taken by the European Union, for example, was most often preceded by lengthy consultations on what the individual States were or were not entitled to do under international law. As the competence — often the exclusive competence — of the European Union had expanded, it had become difficult to distinguish the expression of a customary international law of the European Union from that of its individual member States. The practice of an international organization like the European Union could thus not be described solely as the view of that organization on customary international law; it might also be equivalent to State practice.

Draft conclusion 6 should be read in the light of draft conclusion 8, especially since no distinction was made between the various institutions of the State and their place in the national hierarchy.

In draft conclusion 7, she particularly appreciated the inclusion of verbal actions. If they were not included, only the practice of those States with the economic and political power to act physically would count as State practice. Given that inaction could be misinterpreted as consent — and that was one of the reasons that "inaction" would need careful handling — verbal actions could make a crucial contribution to the establishment or estoppel of a rule of customary law.

Caution was required before admitting all "correspondence" between States — which would include, for example, non-papers — as a form of practice of a State. The same applied to "official publications". It was important to be aware of the domestic status of such documents.

Draft conclusion 9 seemed to assume the existence of an entity capable of establishing a rule of customary international law and assessing State practice. While a court might be in a position to do so, that did not mean the court's assessment was a correct assessment. The Government might take a different position on a matter of international law. Courts were bound by their own jurisdiction and regulations, and caution was therefore needed in relying on domestic court cases when attempting to define the process of formation of customary international law.

She agreed with Mr. Caflisch that the word "widespread", in paragraph 1, should be deleted, partly because it had no normative function, but also because it seemed to dismiss regional practice as less relevant. Concerning paragraph 4, clearly the doctrine of specially affected States was important, but the Commission's conclusions should reflect the fact that it was not easy to identify such States.

In draft conclusion 11, paragraph 2, she had no problem with the non-exhaustive list of forms of evidence, but she was concerned that the wording might be unclear to readers who did not have the Special Rapporteur's background analysis in mind. For example, what did "action in connection with resolutions of organs of international organizations and of international conferences" or "official publications in the field of international law" mean? Not every such publication could be interpreted as a pronouncement by the Government. The report of a government committee, for example, was published by the Government but did not necessarily reflect the Government's views. Similarly, a parliament's view on what it considered to be a binding rule of international law could not necessarily be attributed to the State, and indeed the Government might take a different position.

Lastly, she said that she supported the future programme of work as outlined in section VII of the report.

**Mr. Saboia** said that in removing the reference to "formation" from the title of the topic, the Commission had agreed to aim at a practical outcome for a non-expert practitioner. There had nevertheless been an understanding that the Special Rapporteur would make some reference to elements relating to the formation of customary international law. He saw few such references in the report, and suggested that the Special Rapporteur should address the question in his future reports.

Although State practice was the major source of evidence of general practice, he did not consider non-State actors to be of negligible importance in the establishment of customary international law. In that regard he favoured retaining the words "surrounding circumstances" in draft conclusion 4, as well as retaining draft conclusion 7, paragraph 4. While it was true that resolutions and decisions taken by international organizations were the acts of States, they were taken in accordance with the constitutive instruments of those organizations, and in a concerted and interactive manner that was by no means the same as the decision-making process in individual States. He nevertheless agreed with Mr. Forteau on the independent nature of international organizations as subjects of international law, and with Ms. Jacobsson on the need to retain the definition of "international organization" given in the draft articles on responsibility of international organizations.

The role of non-State actors in the formation of customary international law deserved more emphasis than it had been given. Indeed, some of the radical changes to customary international law since the Second World War had been brought about by non-State actors in response to necessity and in spite of — or even in opposition to — State practice. Notable examples were decolonization, the recognition of national liberation movements, the incorporation of self-determination as a right of peoples under customary international law, the recognition of the legality of the use of armed force in fighting colonialism and apartheid, and indeed the evolution of the position of the International Court of Justice; in that last regard, he shared the view that the Commission should be careful not to show undue reliance on the judgments of the Court.

Another example of the way in which customary international law had developed was international humanitarian law, in which bodies such as the International Committee of the Red Cross, and even prominent individuals, had played a pivotal role in creating and developing institutions and rules relating to the protection of individuals in armed conflict. Similarly, in the law of the sea, unilateral acts by States, which initially ran counter to the prevailing rule, had formed the basis of a new regime governing the seas and the continental shelf.

He agreed with Mr. Huang that, if practices were contrary to peremptory rules or treaties or the Charter of the United Nations, they should not be considered as lawful practice for the purpose of forming customary international law. On the other hand, customary international law was evolutionary by nature: if practice came to supersede a customary rule, then that was part of that evolutionary process. Whereas in the past, practice, repetition and *opinio juris* might combine in a process that could take centuries, in an age of advanced communications technologies, the formation of custom through the medium of international organizations might take less than one generation. That was an example of the transformation of law as a result of change in the social substratum.

**Mr. Singh** said that he was in favour of deleting draft conclusion 1, paragraph 2.

It was not clear why the list in draft conclusion 7, paragraph 2, mentioned "statements on behalf of States concerning codification efforts" but left out the numerous other examples of State actions identified in paragraphs 40 and 41 of the report.

With respect to draft conclusion 7, paragraph 3, the relationship between action and inaction in identifying practice required further investigation.

Given the wide range of international organizations, with a great variety of mandates, it was not possible to draw a general conclusion such as was expressed in draft conclusion 7, paragraph 4. The conclusion should be revisited in the Commission's consideration of the third report on the topic.

Referring to draft conclusion 8, paragraph 2, he said that, in considering a State's practice "as a whole", it would be useful to identify which organs were competent, and had the authority, to act on behalf of the State. The practice of States whose organs did not speak with one voice could not be completely disregarded.

Lastly, he shared the concerns of members who had expressed doubts on draft conclusion 9, paragraph 4.

**Mr. Gevorgian**, speaking as a member of the Commission, said that he supported the combined "two-element approach", as reflected in draft conclusion 3. Attempts to separate State practice from *opinio juris* might result in overemphasizing one element, or in futile arguments like the one as to which came first, the chicken or the egg. Both elements — State practice and *opinio juris* — had to exist simultaneously in order to give rise to rules of customary international law. However, he endorsed Mr. Nolte's suggestion that the term "*opinio juris*" should be used in tandem with "accepted as law", since the two terms combined overcame the inadequacies of each when used in isolation.

He supported the scope of the topic as set forth in draft conclusion 1. The Commission should concern itself only with the methods of determining the existence and content of rules of customary international law, and not with their formation, and it should not deal with peremptory norms of international law. He was not troubled by the use of the term "methodology", and he would object to replacing it with a reference to "rules", as it might alarm some States. Moreover, a provision should be included to the effect that the existence or formation of rules of customary law must not conflict with *jus cogens*, in accordance with the principle embodied in the Vienna Convention on the Law of Treaties that a breach of the law could not create law.

Like the Special Rapporteur, he doubted whether the definitions in draft conclusion 2 were necessary. On the whole, he supported draft conclusion 3, the wording of which could be improved in the Drafting Committee. Indeed, several of the draft conclusions should be fleshed out and made less vague. Like other members, he had some doubts about the phrase "regard must be had to the context" in draft conclusion 4. If it was supposed to mean that different types of evidence of the existence of practice could have dissimilar weight depending on the context, then that idea should be better conveyed.

The Commission should make it plain, either in the draft conclusions or in the commentary, that it was State practice coupled with *opinio juris* that was of relevance for the formation of rules of customary law. The practice of individuals and non-governmental organizations was not pertinent for that purpose; the practice of international organizations was simply an additional means of shedding light on State practice. The Commission should also pay serious attention to the attribution of conduct to a State and to the weight of various acts of a State in the formation of customary rules. State practice directed at the outside world, especially when it was that of organs competent to bind the State at the international level, should be accorded the greatest significance. For that reason, draft conclusion 8, paragraph 1, should be deleted. Similarly, he was unconvinced of the need for a provision establishing that if the organs of a State were not unanimous, a practice was less important. In general, State practice could take the form of physical and verbal actions, inaction and silence. What was important was the interaction between them. It would be

necessary to look more closely at the role of inaction and the circumstances in which it could be regarded as State practice for the purpose of forming customary international law.

On the whole, he could support draft conclusion 10, which covered two highly important elements: practice as a legal obligation and acceptance as law as a criterion for distinguishing between a customary rule and usage.

With regard to draft conclusion 11, while the evidence of *opinio juris* could sometimes be contained in the same acts as those which established State practice, it might be wise to restrict the list of such sources to State acts chiefly directed at the outside world. That section should reflect the idea, implicit in the reference in paragraph 64 of the report to the "general consensus of States", that universal *opinio juris* was vital if State practice itself, albeit widespread, was not universal.

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

*The meeting rose at 5.50 p.m.*