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Identification of customary international law

Statement of the Chairman of the Drafting Committee, Mr. Gilberto Saboia

7 August 2014

Mr. Chairman,

It gives me great pleasure to introduce the fifth report of the Drafting Committee for the sixty-sixth session of the Commission, which concerns the topic “Identification of customary international law”.

The Drafting Committee devoted nine meetings, from 21 to 31 July, to its consideration of the draft conclusions relating to this topic. It examined nine of the eleven draft conclusions initially proposed by the Special Rapporteur in his second report (A/CN.4/672), together with a number of suggested reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debate in Plenary with respect to certain draft conclusions. As a result of the deletion of draft conclusion 2, as proposed by the Special Rapporteur, the Drafting Committee provisionally adopted, at the present session, a total of eight draft conclusions on this topic.

Time was missing for the Drafting Committee to address the two last draft conclusions referred to it by the Plenary. These draft conclusions, which deal with the second element, namely acceptance as law (*opinio juris*), will be examined during our next session.

Before addressing the details of the report, let me pay tribute to the Special Rapporteur, Sir Michael Wood, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also thank the members of the Drafting Committee for their active participation and valuable contributions to the successful outcome. Furthermore, I also wish to thank the Secretariat for its valuable assistance.

Mr. Chairman,

The draft conclusions, as provisionally adopted by the Drafting Committee, are structured in three parts, which I shall introduce in turn.

Part One – Introduction

The title of Part One is “Introduction”, as originally proposed. It is constituted of a single draft conclusion.

Draft conclusion 1 – Scope

Draft conclusion 1 is entitled “Scope”, as originally proposed. The terminology and structure of this draft conclusion were revisited by the Drafting Committee in the light of comments made during the debate in Plenary.

This draft conclusion is composed of a single paragraph on the scope of the draft conclusions. For reasons I will explain shortly, the Drafting Committee decided to delete the original second paragraph of draft conclusion 1.

Draft conclusion 1 is a statement explaining what the overall purpose of the draft conclusions is. Extensive discussion took place in the Drafting Committee regarding the most appropriate expression to describe this purpose. You will recall that the proposed text for this draft conclusion gave rise to a number of comments during the debate in Plenary on the use of the word “methodology”. The Drafting Committee considered that this term should be avoided,

since some saw it as associated with science and as referring to a thought on the method, rather than to the method itself. Various alternative proposals were considered, such as “method”, “process” or “rules”. The Drafting Committee concluded that the chosen formulation would best convey that the main purpose of the draft conclusions was to identify the way in which rules of customary international law are to be determined, rather than to identify the content of customary international law itself. The formulation was also favoured as it captured the flexibility of the identification process and was thought to not be too prescriptive.

The Drafting Committee also considered that it was important to maintain an express reference to both the determination of the existence of rules of customary international law, and the content of those rules, since these were the two principal issues that practitioners are facing in the identification of customary rules. A discussion took place as to the necessity of mentioning explicitly the notion of formation as well. It is to be recalled that the change in the title of the topic, which was decided at the previous session, did not imply a change in the direction of the topic, but had been made essentially to resolve translation issues. The Drafting Committee, while generally reiterating its support for maintaining the formation aspect in the topic, preferred however not to use the term explicitly at this stage of the draft conclusions, considering that the present wording was sufficient to cover the question. In particular, it was felt that the verb “determined” implied inevitably an investigation into the formation of the customary rule, a point that would be clarified in the corresponding commentary.

The reference in the draft conclusions to ‘rules’ of customary international law is without prejudice to whether certain rules may also be referred to as ‘principles’, a point that would be addressed in the commentaries.

The originally proposed paragraph 2 of draft conclusion 1 was a “without prejudice” clause excluding from the scope of the draft conclusions the question of the methodology pertaining to the identification of other sources of international law or peremptory norms of general international law (*jus cogens*).

Further to the debate in Plenary, the Special Rapporteur suggested the deletion of this provision, preferring instead to leave such questions to the commentary. There was a general sense that draft conclusion 1 should be kept as simple as possible and that paragraph 2 could

indeed be deleted. Several members of the Drafting Committee emphasized the importance for the topic of dealing with the question of the interrelationship between customary international law and other sources of international law, in particular treaties and general principles of law.

Former draft conclusion 2 – Use of terms

In his second report, the Special Rapporteur proposed a draft conclusion 2 on the “Use of terms”, which contained definitions of the terms “customary international law” and “international organization” for the purposes of the draft conclusions.

In his introduction of the second report as well as his concluding remarks following the debate in Plenary, the Special Rapporteur raised the question of the advisability of this draft conclusion. A discussion took place in the Drafting Committee on whether the two proposed definitions would indeed be better dealt with in the commentary, rather than a separate conclusion.

Regarding the definition of “customary international law”, defining this term “for the purposes of the present draft conclusions” was considered somewhat odd since the draft conclusions were concerned with customary international law in general and not customary international law “for the purposes of the present draft conclusions”. The content of this definition was also considered redundant in light of draft conclusion 2 [3] on the two-element approach.

As regards the proposed definition of “international organization”, the variety of definitions adopted in the prior work of the Commission was pointed out. It was felt that it might be premature to choose between the possible definitions at this stage, since the questions relating to the role of international organizations would be dealt with in greater detail in the third report of the Special Rapporteur.

It was understood that the question of a draft conclusion on use of terms remained open and that the Drafting Committee could come back to it in light of the future reports on the topic.

Part Two – Basic approach

Mr. Chairman,

Let me turn to Part Two, which is now entitled “Basic Approach”. As provisionally adopted, Part Two consists of two draft conclusions: draft conclusion 2 entitled “Two constituent elements” and draft conclusion 3 entitled the “Assessment of evidence for the two elements”. For reasons I will elaborate upon, the Drafting Committee decided to switch the titles of Part Two and draft conclusion 2 [3].

Draft Conclusion 2 – *Two constituent elements*

The title of draft conclusion 2 is “Two constituent elements”. It reflects the purpose of this draft conclusion, which is to set out the two-element approach to the identification of rules of customary international law. This provision is at the core of the present draft conclusions, which generally reaffirm an approach that is followed in State practice and in the jurisprudence of international courts and tribunals, and is largely supported in writings. For this reason, the Drafting Committee considered it useful not to adopt the originally proposed title “Basic approach”, which covers both the two-element approach and the assessment of evidence for the two elements, and to use rather the expression “Two constituent elements”. ‘Basic approach’ is reserved for the title of the Part.

The text of draft conclusion 2, as initially suggested, relied on the language of article 38, paragraph 1 (b), of the Statute of the International Court of Justice. While support for the two-element approach was generally reiterated in the Drafting Committee, some members questioned the appropriateness of relying too much on the language of the Statute of the Court. Firstly, it was stressed that the language of the Statute does not make a very clear-cut distinction between the two elements. Several drafting proposals aimed at resolving this issue were discussed and the Drafting Committee concluded that the addition of the words “that is” in draft conclusion 2 would more clearly distinguish the two elements. Secondly, a discussion took place on the phrase “accepted as law”, as some members of the Drafting Committee preferred the expression “*opinio juris*”. While it was acknowledged that it would be useful to rely on the language of the Statute of the Court as a starting point, it was also stressed that the expression *opinio juris* was commonly used in the jurisprudence and doctrine. Ultimately, the Drafting Committee decided to

include both expressions by adding the words “*opinio juris*” in parentheses after “accepted as law”.

Some members were concerned that the formulation of draft conclusion 2 could imply that the assessment of general practice should precede that of *opinio juris*. The Special Rapporteur indicated that it would be clarified in the commentary that this was not necessarily the case. Another point of importance that will be addressed in the commentary was the possible difference in application of the two-element approach in different fields of international law or with respect to different types of rules. Moreover, draft conclusion 2 does not pertain to the relationship between the two elements, especially temporal, an important aspect of the topic that would be dealt with in the third report of the Special Rapporteur and perhaps captured in a separate draft conclusion.

Draft conclusion 3 – Assessment of evidence for the two elements

Mr. Chairman,

Turning to draft conclusion 3, which is now entitled “Assessment of evidence for the two elements”; it should be noted that the title of this draft conclusion has been slightly modified from the original title proposed by the Special Rapporteur in his report. The phrase “for the two elements” has been added for the sake of clarity and compatibility in all language versions.

Draft conclusion 3 indicates that, in assessing evidence for the two elements, regard must be had to the overall context and the particular circumstances of the evidence in question. This is an overarching principle that applies to many of the draft conclusions that follow, such as that concerning the forms of practice.

A lengthy discussion took place in the Committee on the question of relevant evidence. Some members expressed reservations concerning a formulation that would imply that only facts and circumstances would need to be identified. In particular, it was suggested that practitioners intending to identify a rule of customary international law would need to include normative considerations in their analysis. In addition, it was agreed that the term evidence is to be taken in

its general meaning, i.e. the available information for the determination of the rule of customary international law. It should be noted here that a linguistic issue arose in the effort to convey this general meaning of “evidence” in French and Spanish. The term “evidence” had been originally translated in the proposed draft conclusions as “preuve”, yet it was considered that in French this term would have wrongly limited the assessment of evidence to the judicial context, rather than the desired general meaning (covering the identification of rules of customary international law within foreign ministries, for example). As a result, the Drafting Committee examined several proposals and concluded that the word “*moyens*” was the most appropriate French term in this context.

The Drafting Committee also decided to refine the first part of the sentence in light of the language adopted for draft conclusion 2. Regarding the second part of the sentence, proposals were made to clarify the language initially proposed, which several members of the Commission considered too vague. Draft conclusion 2 now indicates that relevant evidence shall not be assessed in isolation, but with regard to the overall context and the particular circumstances of the evidence in question.

Finally, the Drafting Committee has decided to leave in abeyance the question of the possible combination of draft conclusion 3 with other draft conclusions.

Part Three – A general practice

Mr. Chairman,

I shall now turn to Part Three, which is entitled “A general practice”, as originally proposed. It comprises four draft conclusions.

Draft Conclusion 4 – Requirement of practice

The title of draft conclusion 4 is now “Requirement of practice”. The content and structure of this draft conclusion were revisited in the Drafting Committee in light of the comments made during the debate in Plenary.

An extensive discussion took place in the Drafting Committee regarding the importance of *State* practice in the process of formation of rules of customary international law and on the

question of the relevance of the practice of other subjects of international law, especially international organizations. The question of the role, if any, of other non-state actors was also raised. Having considered several proposals, the Drafting Committee eventually opted for a formulation that first addresses the role of State practice (paragraph 1), and then the role of the practice of international organizations (paragraph 2).

There was general agreement among the members of the Drafting Committee that the Commission would not be able to reach any firm conclusion on the issues relating to the role of international organization practice before the submission of the third report of the Special Rapporteur next year. It was therefore agreed that the draft conclusion would be revisited in the future in light of the next report and of the debate in Plenary on that report. This understanding is expressly mentioned in a footnote.

I will now turn to paragraph 1 of draft conclusion 4.

This paragraph states that the requirement of a general practice, as an element of customary international law, means that it is primarily the practice of States which contributes to the formation, or expression, of rules of customary international law. You will recall that the use of the word “primarily” was discussed in the Plenary. Different views were expressed by members of the Drafting Committee in that regard. Some members considered that this draft conclusion should deal with State practice alone, without any reference to international organizations. The view was also expressed that the practice of international organizations could not be overlooked and that, for certain rules of customary international law, such as those on the responsibility of international organizations or on the internal practice of these organizations, it might actually be their practice that is of primary importance. It was also suggested that this draft conclusion be left in abeyance, pending the third report of the Special Rapporteur.

The Drafting Committee concluded that it would be appropriate to address State practice at this stage. It decided to retain the word “primarily” essentially to indicate that the practice of international organizations should not be overlooked. Nevertheless, the language of draft conclusion 4, paragraph 1, emphasizes the particular importance of State practice in the assessment of a general practice, since they remain the primary subjects of international law. This particular importance given to their conduct in the assessment of a general practice does

not, however, amount to a monopoly. The word “primarily” encapsulates this idea, which will be developed in the commentary.

Drawing upon the jurisprudence of the International Court of Justice, draft conclusion 4, as originally proposed, indicated that State practice contributed to “the creation, or expression, of rules of customary international law”. Draft conclusion 4, paragraph 1, retains this dual dimension of practice, which, at the same time, contributes to the formation of rules as a constitutive element of customary international law, as well as to the expression of such rules. The Drafting Committee deemed it preferable to replace the word “creation” by “formation”, for the sake of consistency within the draft conclusions.

Paragraph 2 of draft conclusion 4 states that, in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law. This paragraph is the direct counterpart of paragraph 1, and would allow for the consideration of practice of international organizations in the determination of a general practice. Again, it should be emphasized that this paragraph will be revisited in light of the third report of the Special Rapporteur.

It is also important to stress that paragraph 2 deals with the practice of international organizations only, and does not address the question of the relevance of the practice of other actors at the international level. Some members considered that the practice of actors such as the International Committee of the Red Cross could play a role in the determination of a general practice, while several other members stressed that the practice of non-State actors other than international organizations was not relevant in this context. The Drafting Committee considered it preferable not to address this question in the conclusion itself, as there was widespread agreement that the practice of non-State actors generally was not directly relevant to the formation of customary international law.

A discussion took place regarding the relevance of various forms of practice of international organizations. While some members of the Drafting Committee indicated that attention should be paid to the specific competences of each international organization in the evaluation of the relevance of their respective practice, others stressed the practical difficulties of such an undertaking. For example, the difficulties associated with the consideration of *ultra vires*

practice of international organizations were underlined. The Drafting Committee concluded that the practice of international organizations might well be relevant in some instances. Therefore, it decided to express the idea, in paragraph 2, that the practice of international organizations might be relevant for the determination of a general practice only when certain conditions were fulfilled. For this reason, draft conclusion 4, paragraph 2, limits the contribution of the practice of international organizations to “certain cases”, words that echo the general principle expressed in draft conclusion 3. These particular cases will be described in the corresponding commentary. The formulation of paragraph 2 was also aligned to the wording of paragraph 1 for the reasons I just mentioned on the dual nature of practice.

Draft Conclusion 5 – Conduct of the State as State practice

Mr. Chairman,

Let me now turn to draft conclusion 5. Its new title is “Conduct of the State as State practice”. Further to a discussion in the Drafting Committee on the desirability of referring explicitly to the concept of “attribution”, as set out in the 2001 *Articles on Responsibility of States for internationally wrongful acts*, the title and text of draft conclusion 5 have been refined.

Draft conclusion 5 consists of a single paragraph, which aims at indicating the range of conduct which might count as State practice. The conclusion states that State practice consists of conduct of the State, whether in the exercise of executive, legislative, judicial or any other functions of the State.

You will remember that the text of this draft conclusion as originally proposed in the second report of the Special Rapporteur related to the concept of “attribution”, and relied to some extent on the 2001 articles on State Responsibility. In both the Plenary and the Drafting Committee, several members of the Commission pointed to some issues pertaining to the application of all the provisions on attribution of the 2001 articles in the context of the determination of State practice. In particular, some members stressed that, while it was certainly important for practitioners to know which State conduct might constitute State practice in this context, a draft conclusion on attribution might introduce unnecessary complexity into the draft conclusions. In the context of a discussion of whether some acts attributable to a State may count

as State practice, it was recalled that the identification process usually does not include consideration of whether State conduct was specifically authorized, or other questions related to attribution. A general reference to the concept of attribution might have the effect of including in State practice some conduct that might not be relevant for the purpose of the identification of customary rules. For instance, the 2001 Articles on State Responsibility not only cover conduct of the State itself, but also encompass several cases of conduct by non-State actors that might be attributable to a State for the purpose of the determining whether its responsibility is engaged or not. The Drafting Committee concluded that some of the cases covered in the context of State Responsibility may not necessarily be relevant in the context of the present topic. Given the overarching goal of developing a practical, user-friendly set of draft conclusions, it was agreed that it would be better to explain nuances relating to attribution in the commentary.

Several proposals to solve this issue were discussed. The Drafting Committee decided to refine the language of draft conclusion 5 in order not to refer explicitly to “attribution”. For this reason, the first part of the sentence is a very simple statement indicating that State practice consists of conduct of the State.

The second part of the sentence is aimed at shedding light on what range this conduct might cover. The Drafting Committee considered it appropriate to refer to the notion of State functions to encapsulate the various kinds of conduct that might constitute State conduct. In addition, the concept of State functions has been used in other texts developed by the Commission. Draft conclusion 5 refers first to the executive, legislative and judicial functions of the State, but it does not limit State conduct to the exercise of these three classic functions of the State. It has been stressed that the State might exercise other functions, including in the economic realm, that might be relevant. Therefore, in order to cover all functions of the State, the words “or any other functions” (which also appear in other texts adopted by the Commission) were included in draft conclusion 5.

Draft conclusion 6 – *Forms of practice*

Mr. Chairman,

I shall now turn to draft conclusion 6, which is entitled “Forms of practice”. The purpose of this draft conclusion is to indicate the various forms that State practice might take, and therefore to assist practitioners in identifying relevant practice for the determination whether a specific rule of customary international law exists.

Draft conclusion 6 is composed of three paragraphs. The structure originally proposed by the Special Rapporteur in his second report has been refined, for reasons I will explain shortly. The first paragraph contains general statements concerning the forms of State practice. Paragraph 2 is a non-exhaustive list of some of the main categories of forms of State practice, and paragraph 3 addresses the question of hierarchy among forms of practice.

I will now turn to the three paragraphs of draft conclusion 6.

Paragraph 1 contains general statements about practice. The first sentence indicates that practice may take a wide range of forms. This is an acknowledgement of the diversity of forms that practice may take, and of the wide range of conduct that might qualify as such for the purpose of the formation and identification of customary international law. The two next sentences specify the broad sense to be given to “practice” in this context, to cover any act or behaviour of States. The recognition of the diversity of forms of State practice is an important element for the flexibility of this source of international law. The second sentence indicates that State practice includes both physical and verbal acts, a point that was made in the second report and generally agreed in the Plenary debate. This view is indeed widely supported in the practice of States, in case-law and in writings. It implies that arbitrary distinctions should be avoided in researching the so-called “material element” of a rule of customary international law.

The third sentence of paragraph 1 states that practice may, under certain circumstances, include inaction. You will recall that, in the text of the draft conclusion initially proposed by the Special Rapporteur, the question of inaction was dealt with in a separate paragraph. The Drafting Committee has decided to include it in the first paragraph. Like other forms of practice, and perhaps even more so, inaction by States must be examined in context. To be relevant, inaction may need to constitute a conscious decision not to act. All inaction by States does not necessarily count as State practice. For that reason, paragraph 1 indicates that practice “may” include inaction. Moreover, the situations in which practice includes inaction vary. In certain

cases, inaction can be a practice relevant as such. In other cases, inaction is relevant only to the extent that the circumstances called for some reaction. In order to cover all different situations, the Drafting Committee has indicated that it is only “under certain circumstances” that practice may include inaction. This indication also reflects, in the case of inaction, the basic approach on the assessment of evidence set out in draft conclusion 3. I would recall that, according to that draft conclusion, in assessing evidence for the purpose of ascertaining whether there is a general practice [...], “regard must be had to the overall context and the particular circumstances of the evidence in question”.

Paragraph 2 of draft conclusion 6 is a non-exhaustive list of common forms of State practice. The question of the forms of practice of international organizations has been left in abeyance pending the third report of the Special Rapporteur. This paragraph indicates that “Forms of State practice include, but are not limited to: diplomatic acts and correspondence; acts in connection with resolutions of international organizations or international conferences; acts in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts.” The non-exhaustive nature of the list is emphasized by the words “but are not limited to”.

The list enumerates, first, common forms of practice at the international level and then forms of practice at the domestic level. The order in which the forms are listed is not significant. Diplomatic acts and correspondence constitute a common form or practice in international relations and are mentioned first. The list then refers to acts in connection with resolutions of international organizations or international conferences, and acts in connection with treaties. These two distinct categories have to be understood broadly as covering all kinds of acts that a State might perform in these two contexts. Next, the paragraph refers to the executive conduct of States, including operational conduct “on the ground”. This formulation was discussed at length in the Drafting Committee. It refers generally to the conduct of the executive authorities and includes the physical conduct of governments, such as passage of warships and battlefield military conduct. The list continues with legislative and administrative acts, as well as decisions of national courts, all of particular relevance in the context of identifying rules of customary international law. The words ‘decisions of national courts’ are to be understood broadly, as covering not only final judgments of courts, but also relevant interlocutory decisions. I should

recall that the list in paragraph 2 is only a general description of common forms of State practice, and that the commentary will aim to describe in more depth and illustrate each specific form enumerated, and also discuss other forms not expressly included in this list.

Paragraph 3 of draft conclusion 6 addresses the question of hierarchy among forms of State practice. It indicates that there is no predetermined hierarchy among the various forms of practice. You will recall that, in the second report, this statement was initially included in the next draft conclusion proposed by the Special Rapporteur. The Drafting Committee has deemed it preferable to insert it in the draft conclusion enumerating the various forms of State practice, in order to address the general question of the hierarchy among those forms. The order in the list of forms in paragraph 2 was chosen only as a matter of drafting and does not imply that a specific form of practice is *a priori* more important than the other. This point is made clear in paragraph 3. It does not imply, however, that all forms of State practice necessarily carry the same weight. The word “predetermined” indicates that if such a hierarchy exists, it needs to be assessed on a case-by-case basis.

Draft Conclusion 7 – Assessing a State’s practice

Mr. Chairman,

I turn now to draft conclusion 7, entitled “Assessing a State’s practice”. This draft conclusion indicates some fundamental principles in the assessment of the practice of a particular State.

It is composed of two paragraphs that I will examine in turn.

Paragraph 1 is a general statement concerning the assessment of the practice of a particular State. The starting point in the assessment of a State’s practice is that account is to be taken of all (relevant) available practice of a particular State. The assessment of State practice needs first to be exhaustive, within the limits of availability of the practice in question. Then, State practice shall be taken as a whole. This requirement, which has been recalled recently by the International Court of Justice in the case concerning *Jurisdictional Immunities of the State*, means that the practice of all of the State’s organs, or the different practice of the same organs,

shall be considered altogether in assessing what the practice of a particular State actually is and how it is to be weighed.

Paragraph 2 addresses one possible situation of conflict resulting from the principle set out in paragraph 1, namely contradictory practice within a single State. Paragraph 2 indicates that “where the practice of a particular State varies, the weight to be given to that practice may be reduced”. The variations in question are of different natures. On one hand, different branches of a single State might adopt different conduct, such as, for instance, judgments of domestic courts with which the executive branch disagrees and/or does not enforce. Another example is different domestic courts at the same level adopting different decisions on a given legal issue. On the other hand, the practice of the same organ might vary over time. Draft conclusion 7, paragraph 2, indicates that, in such cases, the weight to be given to that practice may be reduced. The use of the word “may” means that this issue as well needs to be approached with caution, since such a consequence is not necessarily to be drawn in all cases. For instance, the difference of practice of lower and higher organs of the same State would not necessarily lead to giving any less weight to the practice of the higher organ.

Draft conclusion 8 – *The practice must be general*

Mr. Chairman

Let me now turn to draft conclusion 8. Its title is “The practice must be general”. This title emphasizes the key aspect of the assessment of the so-called “material element” of custom, which is “a general practice”. While the previous draft conclusion dealt with the practice of and within a particular State, this draft conclusion addresses the necessary characteristics of practice at the international level in order to establish the existence of a rule of customary international law.

The draft conclusion is composed of two paragraphs that I will refer to successively. Paragraph 1 indicates the main requirement that practice must meet as an element of a customary international rule. Paragraph 2 deals specifically with the temporal element.

Paragraph 1 indicates that “[t]o establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent”.

The term “general”, borrowed from Article 38, paragraph 1 (b), of the Statute of the International Court of Justice, is the fundamental adjective qualifying practice in the context of the determination of the existence and content of a rule of customary international law. This adjective means that a practice needs not to be universally followed for a customary international rule to emerge, but that it needs to be extensive, or “sufficiently widespread and representative”. This important aspect will be made clear in the commentary. The language adopted, inspired by the jurisprudence of the International Court of Justice, reflects the flexibility of customary international law and the situations in which it arises. The number of States whose practice is required may vary from case to case, a reality that is encapsulated by the word “sufficiently”. Practice also needs to be followed by a sufficiently representative group of States, usually in different regions. The precise representativeness required also depends on the rule in question and this condition is also to be examined with some flexibility. On that matter, you will recall that, in the Plenary debate, concern has been raised regarding the Special Rapporteur’s proposal stating that “[d]ue regard should be given to the practice of States whose interests are specially affected”. In light of the debate, the Special Rapporteur suggested not to address this question at this stage and not to include any reference thereto in this draft conclusion yet. This question will be further addressed in the next report. The Drafting Committee considered it preferable to follow the suggestion made by the Special Rapporteur, with the understanding that this question would need to be examined during the next session in light of his third report and of the Plenary debate.

Draft conclusion 8, paragraph 1, also indicates that practice must be consistent to establish a rule of customary international law. This requirement, which is generally accepted in practice and in the case law of international courts and tribunals, was understood as inherent in the concept of generality. It means that a regularity of conduct needs to be observed for the establishment of a customary rule. As stressed in the Special Rapporteur’s second report, some inconsistency of practice is not fatal and consistency of practice does not require complete uniformity. This will be made clear in the commentary.

Paragraph 2 addresses the question of duration of the practice. It indicates that “[p]rovided that the practice is general, no particular duration is required”. This conclusion means that the conditions set out in paragraph 1 are sufficient for the practice to be conclusive in the context of the identification of rules of customary international law. There is no additional condition for practice, requiring the passage of a certain period of time for practice to be relevant. This conclusion has been reached by the International Court of Justice in the *North Sea Continental Shelf Case*. The fact that customary international law can develop rapidly has been illustrated in certain areas, such as the law of outer space. Nevertheless, draft conclusion 8, paragraph 2, is not to be understood as a recognition of so-called “instant custom”, a point that the commentary will make clear.

Mr. Chairman,

For convenience, the eight draft conclusions provisionally adopted at the present session will be annexed to the written version of this report, which will as usual appear on the Commission website

This concludes my introduction of the fifth report of the Drafting Committee for the sixty-sixth session. I shall recall that the Commission is not requested to act at this stage on the draft conclusions that have been presented at this stage for information only. The Drafting Committee hopes formally to submit a set of draft conclusions, including those covered in this report, for adoption at the sixty-seventh session.

Thank you very much.

Identification of customary international law

Text of draft conclusions 1, 2 [3], 3 [4], 4 [5], 5 [6], 6 [7], 7 [8] and 8 [9] provisionally adopted by the Drafting Committee at the Sixty-sixth session (2014)

PART ONE

Introduction

Draft Conclusion 1¹

Scope

The present draft conclusions concern the way in which the existence and content of rules of customary international law are determined.

PART TWO

Basic approach

Draft Conclusion 2 [3]

Two constituent elements

To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

Draft Conclusion 3 [4]

Assessment of evidence for the two elements

In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context and the particular circumstances of the evidence in question.

PART THREE

A general practice

Draft Conclusion 4 [5]

***Requirement of practice*²**

1. The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.
2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

Draft Conclusion 5 [6]

Conduct of the State as State practice

¹ The numbers of the draft conclusions, as originally proposed by the Special Rapporteur in his second report, are indicated in square brackets.

² The Drafting Committee provisionally adopted Draft Conclusion 4 with the understanding that this draft conclusion would be considered again at the next session in light of the analysis of the question of the practice of international organizations that will be part of the third report of the Special Rapporteur.

State practice consists of conduct of the State, whether in the exercise of executive, legislative, judicial or any other functions of the State.

Draft Conclusion 6 [7]

Forms of practice

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.
2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; acts in connection with resolutions of international organizations or international conferences; acts in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts.³
3. There is no predetermined hierarchy among the various forms of practice.

Draft Conclusion 7 [8]

Assessing a State’s practice

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.
2. Where the practice of a particular State varies, the weight to be given to that practice may be reduced.

Draft Conclusion 8 [9]

The practice must be general

1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.
2. Provided that the practice is general, no particular duration is required.

³ Forms of practice of international organizations will be examined in the future.

Détermination du droit international coutumier

Texte des projets de conclusion 1, 2 [3], 3 [4], 4 [5], 5 [6], 6 [7], 7 [8] et 8 [9] adoptés provisoirement par le Comité de rédaction

Partie I Introduction

Projet de conclusion 1⁴ *Portée*

Les présents projets de conclusion concernent la façon de déterminer l'existence et le contenu des règles de droit international coutumier.

Partie II Approche fondamentale

Projet de conclusion 2 [3] *Deux éléments constitutifs*

Pour déterminer l'existence d'une règle de droit international coutumier et son contenu, il est nécessaire de rechercher s'il existe une pratique générale qui est acceptée comme étant le droit (*opinio juris*).

Projet de conclusion 3 [4] *Appréciation des moyens permettant d'établir les deux éléments*

⁴ La numérotation des projets de conclusion, ainsi que proposée initialement par le Rapporteur spécial dans son deuxième rapport, est indiquée entre crochets.

Dans l'appréciation des moyens permettant d'établir l'existence d'une pratique générale et son acceptation comme étant le droit (*opinio juris*), il faut tenir compte du contexte général et des circonstances particulières à chacun de ces moyens.

Partie III

Pratique générale

Projet de conclusion 4 [5]

Exigence d'une pratique⁵

1. L'exigence d'une pratique générale en tant qu'élément du droit international coutumier signifie que c'est principalement la pratique des États qui contribue à la formation ou à l'expression de règles de droit international coutumier.
2. Dans certains cas, la pratique des organisations internationales contribue également à la formation, ou à l'expression, de règles de droit international coutumier.

Projet de conclusion 5 [6]

Comportement de l'État en tant que pratique de l'État

La pratique de l'État consiste dans le comportement de celui-ci, dans l'exercice d'une fonction exécutive, législative ou judiciaire ou de toute autre fonction de l'État.

Projet de conclusion 6 [7]

Formes de pratique

1. La pratique peut revêtir une large variété de formes. Elle comprend des actes matériels et verbaux. Elle peut, dans certaines circonstances, comprendre l'inaction.

⁵ Le Comité de rédaction a adopté provisoirement le projet de conclusion 4, étant entendu que ce projet de conclusion sera examiné à nouveau lors de la prochaine session à la lumière de l'analyse de la question de la pratique des organisations internationales qui sera traitée dans le troisième rapport du Rapporteur spécial.

2. Les formes de pratiques étatiques comprennent, sans y être limitées : les actes et la correspondance diplomatiques; les actes touchant les résolutions d'organisations internationales ou de conférences internationales; les actes touchant aux traités; la conduite exécutive, y compris la conduite opérationnelle « sur le terrain »; les actes législatifs et administratifs; et les décisions des juridictions internes.⁶

3. Il n'y a aucune hiérarchie prédéterminée entre les différentes formes de pratique.

Projet de conclusion 7 [8]

Appréciation de la pratique d'un État

1. Il convient de prendre en compte toute la pratique accessible de l'État, laquelle doit être appréciée dans son ensemble.
2. Lorsque la pratique d'un État varie, le poids à accorder à cette pratique peut être réduit.

Projet de conclusion 8 [9]

La pratique doit être générale

1. Pour qu'une règle de droit international coutumier soit établie, la pratique pertinente doit être générale, c'est-à-dire suffisamment répandue et représentative, ainsi que constante.
2. Il n'est prescrit aucune durée particulière de la pratique, pour autant que celle-ci soit générale.

⁶ Les formes de pratiques des organisations internationales seront examinées à l'avenir.

