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Identification of customary international law

Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau

29 July 2015[*]

Mr. Chairman,

It gives me great pleasure to introduce the fourth report of the Drafting Committee for the sixty-seventh session of the Commission, which concerns the topic "Identification of customary international law". This report should be read together with the interim report of the Chairman of the Drafting Committee dated 7 August 2014, which described the work of the Drafting Committee on the topic in 2014.

It will be recalled that the Drafting Committee last year provisionally adopted eight draft conclusions. This year the Committee provisionally adopted a further eight draft conclusions, as well as additional paragraphs for two of the draft conclusions provisionally adopted last year.

I draw your attention to document A/CN.4/L 869, which for convenience reproduces the text of the all the draft conclusions provisionally adopted by the Drafting Committee, both last year, with the necessary adjustments as appropriate, as well as at the present session.

At the present session, the Drafting Committee devoted 12 meetings, on 5, 6, 21, 22, 26, 27 May, 3 June, and on 7, 8, 9 and 13 July, to its consideration of the draft conclusions on this topic. It examined the draft conclusions left pending from last year, as contained in the second report by the Special Rapporteur (A/CN.4/672), as well as those presented in his third report

[*] Corrected on 17 August 2015.

(A/CN.4/682) this year, taking into account the draft conclusions provisionally adopted last year, together with reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the plenary with respect to the draft conclusions presented.

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.

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Mr. Chairman,

Document A/CN.4/L869 contains all the draft conclusions provisionally adopted this year and last year. These draft conclusions, 16 in all, appear in seven Parts. The Introductory Part One contains one draft conclusion on scope. Part Two, with two draft conclusions, sets out the basic approach to the identification of customary international law, consisting of an inquiry into the two constituent elements, and the assessment of evidence in that respect. Parts Three, with five draft conclusions, and Four, containing two draft conclusions, address the basic approach by explaining further the two constituent elements, namely a general practice and accepted as law *(opinio juris*). Part Five then addresses, in four draft conclusions, the significance of certain materials for the identification of customary international law. Finally, Parts Six and Seven, each containing one draft conclusion, address, respectively, the persistent objector and particular customary international law.

In the present statement, I will focus on those elements that are new or bear on the draft conclusions adopted last year. As noted earlier, the present report is to be read together with the report of the Chairman of the Drafting Committee last year.

I will first turn to draft conclusion 3, which appears in Part Two entitled “Basic approach”.

Draft conclusion 3 [4], paragraph 2 - *Assessment of evidence for the two elements*

You will remember that, last year, the Drafting Committee provisionally adopted draft conclusion 3, entitled “Assessment of evidence for the two elements”, which then comprised a single paragraph. This central provision, as modified this year, sets out an overarching principle applying to many of the following draft conclusions by stating that “[i]n assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law, regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.” The need to consider further the relationship between the two constituent elements was raised within the Commission and the Sixth Committee in 2014 and was re-examined by the Special Rapporteur in his third report.

The structure originally proposed by the Special Rapporteur has been refined in light of the third report and the debate in plenary. In particular, it was deemed appropriate to deal with the issue sometimes referred to as “double-counting”, originally addressed in draft conclusion 11, paragraph 4, in the Part on acceptance as law under draft conclusion 3 [4] on the assessment of evidence for the two elements.

Draft conclusion 3 [4], paragraph 2, comprises two sentences. The first sentence states that “[e]ach element is to be separately ascertained”, while the second sentence adds that “[t]his requires an assessment of evidence for each element”.

The purpose of the first sentence is to make clear that, in the assessment of evidence for the two elements, each element must be found to be present. Even though as the building blocks of customary international law the two constituent elements are inseparable, the identification of a rule of customary international law requires that each element be ascertained separately: the existence of one element cannot be deduced from the existence of the other, and an independent

inquiry has necessarily to be carried out. As illustrated by the Special Rapporteur in his third report, this approach reflects the way in which the matter is commonly dealt with in State practice and by international courts and tribunals.

The second sentence covers the issue sometimes referred to as "double-counting", which gave rise to much debate within the Commission. This sentence expresses a logical consequence of the statement in the first sentence. In order to ascertain separately the existence of each element there must be an assessment of evidence for each element – most often different evidence. There was general agreement within the Drafting Committee, however, that, in assessing the existence of a general practice or acceptance as law, it should not be excluded that, in some cases, the same material might be used to ascertain practice and *opinio juris*; but the important point remains that, even in such cases, the material will be examined for different purposes.

Mr. Chairman,

Let me now turn to draft conclusion 4 [5], in Part Three, entitled "A general practice".

Draft conclusion 4 [5], paragraph 3 - *Requirement of practice*

You will recall that during the last session, the Drafting Committee provisionally adopted draft conclusion 4 [5], entitled "Requirement of practice". It was decided to structure this provision in two separate paragraphs addressing in turn the role of State practice in paragraph 1 and the role of the practice of international organizations in paragraph 2.

At the time, there was general agreement among the members of the Drafting Committee that the Commission would not be able to reach a firm conclusion on the issues relating to the role of practice of international organizations before the submission of the Special Rapporteur's third report this year.

These outstanding issues were addressed more extensively in the third report and discussed by the Plenary. The Drafting Committee decided to maintain the substance of the two first paragraphs of draft conclusion 4 [5]. In particular, it was deemed appropriate to

maintain, in paragraph 1, that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law. As indicated by my predecessor Mr. Saboia in his report to the Plenary last year, the word primarily was used to emphasize the central role of States and to indicate, at the same time, that the practice of international organizations should not be overlooked. This provision is complemented accordingly by the wording of paragraph 2, which indicates that the practice of international organizations can have the same effect, but "in certain cases" only. In light of the third report and of the debate in Plenary, the Drafting Committee was satisfied with the suggestion of the Special Rapporteur to maintain unchanged the language of paragraph 2 of draft conclusion 4 [5]; the term 'in certain cases' will be addressed in the commentary.

The last issue to be dealt with in this draft conclusion was the role of other actors, referred to as 'non-State actors' in the Special Rapporteur's third report. Paragraph 3 indicates that "[c]onduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2."

In his third report, recalling the debate in 2014, the Special Rapporteur made a proposal indicating that "Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law". Two issues arose in connection with the consideration of this proposal. First, it was suggested that the expression "other non-State actors" could be misleading depending on how one viewed international organizations. Some members of the Drafting Committee stressed that, strictly speaking, intergovernmental organizations could not be described as non-State actors in view of their composition. That being said, the Drafting Committee agreed that the role of international organizations was addressed exclusively in paragraph 2 and that the purpose of paragraph 3 was to address the role of actors other than States and international organizations. Thus, it decided to use the expression "other actors", following a suggestion by the Special Rapporteur.

Secondly, a number of members suggested in the Plenary as well as in the Drafting Committee, that the role of some of these other actors, such as the International Committee

of the Red Cross, could nevertheless be significant. The purpose of the first part of the sentence is indeed to distinguish the conduct of such actors from the practice of States or international organizations, by making clear that it cannot, as such, contribute to the formation or attest to the existence of customary international law. However, such conduct might play an important role in the process of identification of customary international law, since it might instigate or record practice. This dimension is encapsulated in the second part of the sentence which recognizes the relevance of the conduct of other actors in the assessment of practice referred to in paragraphs 1 and 2.

Let me now turn to Part Four, "Accepted as law (*opinio juris*)"

Part Four – Accepted as law (*opinio juris*)

Mr. Chairman,

The title of Part Four is "Accepted as law (*opinio juris*)". You will recall that, in the plenary debate last year, a discussion took place on the phrase "accepted as law", as some members of the Commission preferred the expression "*opinio juris*", because of its common use in practice. The Drafting Committee ultimately decided to include both expressions by adding the words "*opinio juris*" in parentheses after "accepted as law".

Part Four consists of two draft conclusions that I will address in turn. Draft conclusion 9 [10] deals with the requirement of acceptance as law, while draft conclusion 10 [11] is devoted to forms of evidence of acceptance as law. These were proposed in the Special Rapporteur's second report, but were not considered by the Drafting Committee in 2014 because of lack of time.

Draft conclusion 9 [10] – Requirement of acceptance as law (*opinio juris*)

Draft conclusion 9 [10] is entitled "Requirement of acceptance as law (*opinio juris*)". The reference to "requirement" mirrors the title of draft conclusion 4 [5], which is the corresponding provision relating to the other constituent element, "a general practice". Draft conclusion 9 [10] comprises two paragraphs.

Paragraph 1

The purpose of the first paragraph is to define the second constituent element of customary international law, "acceptance as law (*opinio juris*)", often referred to as the "subjective element". Paragraph 2 underlines that it is acceptance as law (*opinio juris*) that distinguishes a general practice, as an element of customary international law, and other conduct that, even if general, is not creative, or expressive, of customary international law.

According to draft conclusion 9 [10], the requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*), means that the practice in question must be undertaken with a sense of legal right or obligation. According to the two-element approach, it is not sufficient to identify a general practice; it is also necessary to verify that this practice is accompanied or motivated by a belief that it is mandated (or permitted) under customary international law. A large range of different expressions have been used in international practice and in the literature to refer to the subjective element and to its relationship with general practice. Several drafting suggestions were made by members of the Drafting Committee in that respect as well. The Committee concluded that the phrase "undertaken with" allowed for a better understanding of the close link between the two elements than the previous proposal "accompanied by". This formulation should also be understood to indicate that the practice in question does not have to be motivated solely by legal considerations to be relevant for the identification of rules of customary international law.

The Drafting Committee also concluded that the term "a sense of legal right or obligation" was the most appropriate to capture the subjective element underlying the relevant conduct, having considered a large number of definitions found in jurisprudence and in the literature. Following the debate in Plenary, the Special Rapporteur amended his original proposal to clarify that not only to a sense of legal obligation, but also to a sense of a legal right, could underlie the relevant practice. The Drafting Committee adopted this proposal.

Paragraph 2

The second paragraph of draft conclusion 9 [10] indicates that a general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit. The purpose of this paragraph is to indicate that it is the association with (or motivation of) acceptance as law which makes practice relevant for the formation, or expression, of customary rules. Therefore, it

is the subjective element which allows us to distinguish between relevant practice and irrelevant practice for that purpose. The important point is that without acceptance as law (*opinio juris*), a practice, even if widely observed and repeated, cannot create, or attest to, a rule of customary international law. The adjective "mere" seeks to highlight that.

Draft Conclusion 10 [11] - Forms of evidence of acceptance as law (*opinio juris*)

Mr. Chairman,

I shall now turn to draft conclusion 10 [11], which is entitled "Forms of evidence of acceptance as law (*opinio juris*)". The purpose of this draft conclusion is to indicate various forms that evidence of acceptance as law might take, and therefore to assist those tasked with determining whether a specific rule of customary international law exists to locate such evidence.

Draft conclusion 10 [11] is composed of three paragraphs. As indicated earlier, the structure originally proposed by the Special Rapporteur has been refined and the issue originally addressed in paragraph 4 of that draft conclusion is now dealt with under draft conclusion 3 [4] on the assessment of evidence for the two elements.

I will now turn to the three paragraphs of draft conclusion 10 [11].

Paragraph 1

Paragraph 1 is a general statement indicating that evidence of acceptance as law (*opinio juris*) may take a wide range of forms. This is an acknowledgement of the diversity of forms in which acceptance as law may be manifested, and of the wide range of materials that might serve as evidence for the purpose of establishing its existence. Paragraph 1 has to be appreciated against the background of the general provision regarding the assessment of evidence for the two elements under draft conclusion 3 [4]. I would recall that, in that conclusion, it is highlighted that, in assessing evidence for the purpose of identifying *opinio juris* as well as a general practice, "regard must be had to the overall context, the nature of the rule and the particular circumstances in which of the evidence in question is to be found."

Paragraph 2

Mirroring the structure of draft conclusion 6, paragraph 2, relating to practice, paragraph 2 consists of a non-exhaustive list of common "forms of evidence" of acceptance as law (*opinio juris*). This paragraph states that "Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference."

The order in which the examples are enumerated is not intended to be of particular significance, although the first example, "public statements made on behalf of States", may indeed constitute the clearest evidence of *opinio juris*. It comprises all kind of declarations made publicly by States or State officials in domestic or international *fora*, such as official statements by a Government official, official statements before legislatures or courts, or public protests. Next, the list refers to official publications. This comprises different kinds of publications by State organs, such as, for instance, military manuals. Government legal opinions are the next form of evidence listed; they comprise, for example, the opinions of legal advisers entrusted with the responsibility to advise the government on international law matters, which might contain relevant information on the existence or not of a customary rule. It was clear to members of the Committee that such opinions may not be considered as relevant where a Government has declined to agree with them. The list next mentions diplomatic correspondence, such as notes exchanged between Governments, which might express or imply an opinion as to the existence or otherwise of a legal rule. Paragraph 2 then refers to the decisions of national courts, which might apply a certain rule in a way that demonstrates that it is accepted as required under customary international law. The list turns to treaty provisions, which may sometimes indicate a view with respect to the existence or otherwise of a rule of customary international law. The most clear example would be a provision stating explicitly that a specific provision is declaratory of (or codifies) customary international law. Finally, the last category listed among the forms of evidence of *opinio juris* is conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference. This encompasses the conduct of States in

connection with resolutions, which might reveal the position of States regarding the existence and content of a specific customary rule.

Paragraph 3

Paragraph 3 deals with the circumstances under which inaction might constitute evidence of acceptance as law. According to this paragraph, "[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction".

While the members speaking in the plenary debate agreed that inaction may serve as evidence of acceptance as law (*opinio juris*), it was suggested that the relevant paragraph, as originally proposed in the third report, needed to reflect the essence of the conditions set out in that report. Paragraph 3, as provisionally adopted by the Drafting Committee, is intended to capture these conditions, without being too restrictive.

The first condition is temporal. To be considered as expressing *opinio juris*, the failure to react needs to be maintained over a sufficient period of time, assessed in light of the particular circumstances. This condition is referred to by the expression "over time". Second, paragraph 3 indicates that, in order for inaction to qualify as acceptance as law, the State must be in a "position to react". This formulation is broad enough to cover the need for knowledge of the practice in question, but also other situations that might prevent a State from reacting, such as political pressures. Thirdly, it is also necessary that the circumstances called for some reaction. The Drafting Committee shared the view that States could not be expected to react to each instance of practice by other States. Attention is drawn to the circumstances surrounding the failure to react in order to establish that these circumstances indicate that the State choosing not to act considers such practice to be consistent with customary international law.

PART FIVE- Significance of certain materials for the identification of customary international law

Mr. Chairman,

Let me turn to Part Five, which is entitled "**Significance of certain materials for the identification of customary international law**", the initial title "**Particular forms of practice and evidence"** having been viewed as potentially confusing to the user. The draft conclusions in this Part are aimed at singling out certain materials for their important practical role. As provisionally adopted, Part Five consists of four draft conclusions, concerning treaties, resolutions of international organizations and intergovernmental conferences, decisions of courts and tribunals, and teachings.

Draft conclusion 11 [12] – *Treaties*

Draft conclusion 11 [12] is entitled "Treaties". It encapsulates the relationship between the two main sources of international law, treaties and customary international law, in as much as it is relevant for the identification of rules of customary international law. The draft conclusion comprises two paragraphs that I will describe in turn.

Paragraph 1

Paragraph 1 sets out the various ways in which possible evidence for establishing the existence or not of a rule of customary international law may be found in a treaty. The chapeau of this paragraph indicates that "[a] rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule…". The term "may reflect" is essential to make clear that treaties can neither, in and of themselves, create customary international law nor conclusively attest to it – the rule must find support in external instances of practice coupled with acceptance as law. As indicated in the third report, they may however offer valuable evidence of the existence and content of such rules, and do so in a number of different ways.

The original proposal by the Special Rapporteur in his third report has been refined by the Drafting Committee further to the plenary debate. First, the term "or come to reflect" has been omitted in order to focus this specific draft conclusion on the evidentiary value of treaties in the determination of the existence, and content, of customary rules (rather than their possible development). Second, the Drafting Committee considered that a rule may not necessarily be contained in a single treaty provision, but could be reflected by several provisions together. Therefore, it was deemed more appropriate to refer to "a rule set forth in a treaty", rather than to a "treaty provision".

Following the chapeau, sub-paragraphs (a), (b) and (c) describe the different ways in which evidence of a rule of customary international law may be found in a treaty. This distinction, which can be found, inter alia, in the jurisprudence of the International Court of Justice, mostly reflects the time when the rule of customary international law which may correspond to the treaty provision, was formed.

Sub-paragraph (a) concerns the situation when a treaty codifies a pre-existing rule of customary international law. The alleged customary rule predates the conclusion of the treaty and the treaty is thus merely declaratory of existing customary international law at that time. Sub-paragraph (b) addresses the case when a customary rule has begun to emerge prior to the conclusion of the treaty, without having yet attained the force of law as a general practice accepted as law. It is only upon the negotiation and conclusion of the treaty, or after that date, that the process is completed. This phenomenon is commonly referred to as "crystallization", an expression also used in sub-paragraph (b). Finally, sub-paragraph (c) concerns the situation where no customary rule existed, or had even started to emerge, at the time the treaty was concluded. This sub-paragraph emphasizes that the treaty did not create the customary rule in and of itself, but gave "rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law."

Paragraph 2

While paragraph 1 describes in positive terms the possible evidentiary value of treaties in general in identifying rules of customary international law, paragraph 2 addresses a particular question that quite often arises in practice, stressing that "[t]he fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law".

This new paragraph was proposed by the Special Rapporteur following the debate in Plenary and on the basis of the analysis provided in the second and third reports. There was a general sense in the Drafting Committee that it would be useful to include such guidance in the text of the draft conclusion, and not only to discuss the issue in the commentaries.

A similar rule may be present in several treaties, either multilateral or bilateral. This is actually a common feature in some fields, such as foreign investment, where a significant number of mainly bilateral instruments may be drafted based on a similar model. Draft conclusion 11 [12], paragraph 2, is intended to caution those seeking to ascertain whether a rule of customary international law exists against the conclusion that the mere existence of a number of similar provisions necessarily reflects customary international law, without assessing whether a general practice that is accepted as law does indeed exist. As the Special Rapporteur has explained, indeed it could equally show the contrary.

Let me now turn to draft conclusion 12 [13].

Draft conclusion 12 [13] – *Resolutions of international organizations and intergovernmental conferences*

Mr. Chairman,

The title of draft conclusion 12 [13] is "Resolutions of international organizations and intergovernmental conferences". Originally, the proposed title referred to 'international conferences'. The Drafting Committee preferred to use the adjective "intergovernmental", since the purpose of this draft conclusion is to address the potential role, in the identification of customary rules, of resolutions adopted within international organizations or at conferences in which States participate. The structure of this draft conclusion has been refined to address the suggestions made during the plenary debate. It comprises three paragraphs that I will now address in turn.

Paragraph 1

Paragraph 1 stresses that "[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law." This statement was originally made, in a slightly different form, in the second sentence of the proposal made by the Special Rapporteur in his third report. In view of its importance for the present topic, the Drafting Committee considered that it should be the object of a specific paragraph and be placed at the beginning of the draft conclusion. The verb "create", which also

appeared in the third report, was considered clearer than the term "constitute" in the Special Rapporteur's original proposal.

Paragraph 2

Although resolutions, as such, cannot create customary international law, they may play an important role in the formation and identification of customary international law. The purpose of paragraph 2 is to describe such possible effects of resolutions. According to this paragraph "[a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law or contribute to its development".

Paragraph 2 highlights that these resolutions may have evidentiary value. Indeed, resolutions are commonly referred to in jurisprudence, including in the case-law of the International Court of Justice, in the context of determining the existence and content of a rule of customary international law. They may, for example, purport to codify a rule or declare that it exists, in a manner similar to treaties. But resolutions adopted by international organizations or at an intergovernmental conference may not only be evidence of existing or emerging law, they might also catalyse State practice and *opinio juris*, thereby contributing to the development of customary international law. These two dimensions are encapsulated in paragraph 2.

Paragraph 3

Paragraph 3 indicates that "[a] provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)." The term "may" is essential, since the basic approach to the identification of customary international law applies to resolutions of international organizations or intergovernmental conferences, as it does for treaties and much other written evidence. Resolutions may purport to and indeed be found to reflect a customary rule and provide its content in written form, but the existence of the two constituent elements of customary international law needs to be ascertained. This is the purpose of paragraph 3, whose language mirrors the language of draft conclusion 11 [12] on treaties.

I shall now turn to draft conclusion 13.

Draft conclusion 13 [14] - *Decisions of courts and tribunals*

Draft conclusion 13 is entitled "Decisions of courts and tribunals". The structure and content of this draft conclusion were revisited in the Drafting Committee, in light of comments made during the debate in the Plenary. In particular, it was decided that judicial decisions and writings, which were originally addressed together in one draft conclusion, should be dealt with separately in the draft conclusions.

Draft conclusion 13 now only covers the role of decisions of courts and tribunals as a subsidiary means for the determination of rules of customary international law. In order to ensure a broad understanding of the kind of decisions contemplated by this draft conclusion, the Drafting Committee employed, in the title, the phrase "decisions of courts and tribunals" instead of "judicial decisions", which could be narrowly construed to cover only decisions of bodies composed of judges.

Furthermore, during the debate in the Plenary, several members cautioned against elevating decisions of national courts, in terms of their value for identifying rules of customary international law, to the same level of those of international courts and tribunals, which in practice play a greater role in this context. Accordingly, the Drafting Committee decided to deal with decisions of international and national courts in two separate paragraphs.

Paragraph 1

Paragraph 1 concerns decisions of international courts and tribunals. The paragraph affirms that such decisions are a subsidiary means for the determination of the existence and content of rules of customary international law. After a lengthy debate, the Committee decided to retain the words "subsidiary means" to indicate that the reference to these decisions, in this context, follows that of Article 38(1)(d) of the Statute of the International Court of Justice. The intention is not to downplay the practical importance of such decisions as the word "subsidiary" might be thought to imply, but rather to situate them in relation to the sources of law as referred

to in Article 38 (1) (a), (b) and (c) of the Statute. The term "subsidiary" is thus to be understood in opposition to the primary sources. The commentaries would serve to further clarify the meaning of the term "subsidiary" in this draft conclusion.

In order to provide further guidance to the intended user in determining rules of customary international law, a specific reference is made in the draft conclusion to the International Court of Justice, without seeking to prescribe any institutional hierarchy among the various international courts and tribunals. This would be further clarified in the commentaries, together with explanations concerning the different kinds of international courts and tribunals whose decisions may be of relevance in this context. The commentaries would also provide further guidance as to the kinds of decisions covered by the draft conclusion. Indeed, the term should be interpreted broadly to encompass, among others, interlocutory decisions, arbitral awards and advisory opinions.

To harmonize the terminology used in the various draft conclusions, the Committee decided to replace the word "identification" with "determination" (which is also the word used in Article 38 of the ICJ Statute).

Paragraph 2

Paragraph 2 concerns decisions of national courts. The paragraph is drafted differently from paragraph 1 in order to indicate the different role such decisions play in the determination of rules of customary international law as compared to those of international courts and tribunals. Whereas paragraph 1 affirms that the latter decisions *are* a subsidiary means, paragraph 2 stresses that "*regard may be had, as appropriate,* to decisions of national courts". The use of the phrase "as appropriate" isintended to caution the user that the value of a particular decision in this context will depend on various factors, including the quality of the legal reasoning and whether or not the decision was based on international law. This would be further explained in the commentary.

The term "subsidiary" was retained also in this paragraph for the reasons already explained under paragraph 1. However, it is important to recognize the dual function played by decisions of national courts with regard to customary international law, that is, both as a form of State practice and/or evidence of *opinio juris* as detailed in paragraphs 2 of draft conclusions 6

[7] and 10[11], and as a subsidiary means for the determination of customary rules. This dual function would be explained in the commentary.

I now turn to draft conclusion 14.

Draft conclusion 14 – *Teachings*

Following the decision to address judicial decisions and writings separately, the present draft conclusion 14 concerns writings as a subsidiary means for the identification of such rules. It is entitled "Teachings" to correspond to the language used in Article 38 (1)(d) of the Statute of the International Court of Justice. The draft conclusion likewise follows closely the language of Article 38 (1)(d) of the Statute, providing that the "[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law".

The word "teachings" was understood by the Drafting Committee to be broad in scope, to include possibly teachings in "non-written form" such as audio-visual. Moreover, it alludes to a certain value of the content that is not necessarily captured by the term "writings". As to the authors of such writings, following a discussion on the appropriate word to use during which terms like "jurists", "writers", "publicists" were offered, the Drafting Committee considered that, despite the somewhat dated nature of the term "publicists", it was well understood and seemed to be more appropriate in this context, given also the fact that the Drafting Committee elected to track the language of Article 38(1)(d). The commentaries would indicate the breadth of the term as understood today. The terms "most highly qualified" in the English text, also found in Article 38 (1)(d), makes it clear that only "teachings" of a certain quality may serve as a subsidiary means for the identification of international customary rules. The reference to publicists "of the various nations", also in Article 38 (1)(d), emphasizes the importance of having recourse, where relevant, to materials representative of various countries. The commentaries would clarify that this should generally be understood broadly to include not only teachings from different countries, but also from different regions, as well as materials representative of the different legal systems.

To harmonize the terminology used in the different draft conclusions, the Committee replaced the word "identification" with "determination" in this draft conclusion as well. To conclude on this draft conclusion, it may be mentioned briefly, since the issue was raised in plenary, that for the Drafting Committee the Special Rapporteur prepared a suggestion for a separate draft conclusion on the relevance of work of expert bodies, such as the International Law Commission, engaged in the codification of international law. However, while the Drafting Committee recognised the special importance that may attach to the work of the Commission and other collective works, it considered that the Special Rapporteur should address this matter further and the Special Rapporteur undertook to do so in his next report, bearing in mind the commentaries to be prepared.

I shall now turn to Part Six entitled "Persistent objector", containing draft conclusion 15 [16], with a corresponding title.

Part Six- *The persistent objector*

It will be recalled that in the third report the Special Rapporteur proposed that the last two draft conclusions, one on particular custom in what was then draft conclusion 15 and another on the persistent objector in draft conclusion 16, should appear together in a final part entitled "Exceptions to the general application of rules of customary international law". On reflection, this was considered somewhat artificial and the Drafting Committee decided to place the two draft conclusions in two separate parts. In addition, the order in which the two draft conclusions originally appeared has been reversed with 'Persistent objector' now appearing first, in a Part Six, and then 'Particular customary international law' in Part Seven. It was considered that the persistent objector rule may also be relevant with respect to particular customary international law, and that such structural change would better accommodate that.

Even though in plenary some members expressed doubt as to the relevance of the persistent objector rule to the identification of customary international law, noting that it was seemed to be more related to application of such law, there was a preponderance in favour of a draft conclusion on the matter given the fact that, in practice, there was often reliance on persistent objector rule in cases where a determination of the existence of a customary rule is

sought. At the same time, considering the exceptional nature of the rule, the Drafting Committee recognised the need to capture in the text the stringent requirements for a State to become a persistent objector. It was also considered necessary that the commentary give examples.

Accordingly, draft conclusion 15 consists of two paragraphs.

Paragraph 1

The formulation of paragraph 1 generated a wide ranging debate intended to reflect fully the elements of temporality, emergence and continuity inherent in the persistent objector rule. The discussion centred around the understanding of the phrase "persistently objected" as used in the Special Rapporteur's formulation, as well as whether the reference in the same proposal to a "new" rule reflected in the best manner the existence of a new rule as opposed to "emerging" or "still emerging" rule. It should be noted further that the reference to "persistently" objected in the paragraph has been deleted as this requirement is now covered in paragraph 2.

The initial proposal by the Special Rapporteur also provided that the objecting State would "not [be] bound" by the rule for so long as it maintains its objection. After a long exchange of views on the various formulations on how to reflect the relationship of a customary rule with the persistent objector, the Drafting Committee agreed on the term "opposable". Opposability is understood in its procedural and substantive dimensions.

As now formulated, paragraph 1 seeks to capture a process whereby the objection to the rule or its application is registered while the rule is forming, before it has crystallised into a rule of law, and then maintained thereafter. Accordingly, it provides that where a State objected to a rule of customary international law while the rule was in the process of formation the rule is not opposable to the State concerned for so long as it maintains its objection. In other words, there is a two-stage process whereby in the first instance, reflecting a temporal element, a State must have objected to the rule "while [it] was in the process of formation"; once the rule is formed, the State would not be bound by the rule "so long as it maintains its objection", thus denoting emergence of the rule and continuity of the objection. The objecting State would have the burden

of proving the right to benefit from the persistent objector rule. Once it is proven, the rule is inapplicable to it – it is not opposable to the objecting State.

Paragraph 2

Paragraph 2, which is new, then seeks to set out the stringent requirements for a persistent objection to be effective, as described on the Special Rapporteur's third report. It provides for three essential elements, (a) the objection must be clearly expressed, (b) the objection made known to other States, and (c) the objection must be maintained persistently. The commentary will describe what each of the three elements entails. The objection must be unambiguously expressed and the legal position of the objecting State made clear. It may be verbal or written. The phrase "made known to other States" is intended to bring a certain flexibility as to the manner in which the statement of position of the objector is communicated to the States concerned. It is understood that the reference to "maintained persistently" denotes, as noted by the Special Rapporteur in his third report", that State must maintain its objection both persistently and consistently, lest it be taken as having acquiesced. The "persistence" relates to all the temporal phases of the rule's formation and existence. It was noted, nevertheless, that it may be unrealistic to demand total consistency.

The Drafting Committee also had a brief discussion on whether there should be an additional paragraph to reflect the impossibility of having a persistent objector status with respect to a rule of *jus cogens*. This was a matter that was also raised in Plenary. It would be recalled that the Commission decided not to deal with *jus cogens* in the context of the present topic; indeed, the separate topic *"Jus cogens"* is now on the Commission's programme of work. It was therefore considered that the matter would be best dealt with in the framework of that other topic.

I shall now turn to Part Seven entitled "Particular customary international law" containing draft conclusion 16, also with a corresponding title.

Part Seven- ***Particular customary international law***

Part Seven consists of one draft conclusion, devoted to particular customary international law. The Plenary debate revealed a majority inclination to have a conclusion on this subject even though views were expressed cautioning against a possible encouragement of fragmentation of international law. The title was changed from "particular custom" to clarify that the draft conclusion relates to particular customary international law and not to mere custom or usage among certain States; in the case of particular customary international law, much like in that of general customary international law, there has to be a general practice coupled with acceptance as law *(opinio juris).*

Draft conclusion 16 is also entitled "Particular customary international law". The focus here is on the "particular" as opposed to "general". That there are rules of customary international law that are binding on certain States only has been long recognised; these have variously been described in the case-law and doctrine as "particular", "local", or "special", and have generally emerged in the form of regional or bilateral custom. There was a preference for the use of "particular" rather than "special" in English as it serves as a better contrast to the term "general".

Draft conclusion 16 consists of two paragraphs.

Paragraph 1

Paragraph 1 has a definitional character. It has two components. The first notes that the rule of particular customary international law may be regional, local or other. The commentary would describe instances in which such custom manifests itself regionally, locally or in other situations which may indeed be based on a community of interest. The second aspect relates to its applicability, and the key consideration here is that "particular customary international law" applies only among a limited number of States. The reference to a "limited number of States" has to be appreciated in the context of paragraph 2, which talks about "States concerned". The Drafting Committee elected to use the term "apply" rather than employ the notion of

"invocability" by or against a State or to introduce an element of "bindingness". To the extent that latter considerations seem to invite questions of possible "effects", it was considered that they raised more questions than answers, while "applies" has the simplicity of being *prima facie* factual and easily understood by the intended user.

Paragraph 2

Paragraph 2 addresses the substantive aspects concerning how the existence and content of particular customary international law are to be determined. Even though some members wondered whether the qualifier "general" (with respect to the constituent element of practice) was necessary in the context of particular custom, it was considered that, here too, the two-elements approach applies; there has to be a "general practice" among the States concerned and "acceptance [by them] as law". In other words, the same considerations as in draft conclusion 2 must be present with respect to particular customary international law. The only difference is that this is a "general practice" among the States concerned, who as noted in paragraph 1 are limited in number; "general" would thus mostly relate here to the consistency of the practice among the States concerned. Moreover, there has to be "acceptance by them" as law.

The commentary will seek to capture the various nuances associated with the phrase "accepted by them as law (*opinio juris*)" in paragraph 2, whether in a regional, local or other context. The Drafting Committee also decided not to include a third paragraph, proposed by the Special Rapporteur, which would have stated that the preceding draft conclusions apply *mutatis mutandis* to the identification of particular customary international law. Instead, the way in which the other draft conclusions apply to particular customary international law will be explained in the commentary.

Mr. Chairman,

This concludes my introduction of the fourth report of the Drafting Committee for the sixty-seventh session. For convenience, the 16 draft conclusions provisionally adopted by the Drafting Committee appear in document A/CN.4/L 869. The Commission is not, at this stage, being requested to act on the draft conclusions, which they have been presented for information purposes only. It is the wish of the Drafting Committee that the Commission will provisionally approve the draft conclusions early in its session next year. The Special Rapporteur will then submit draft commentaries to accompany the draft conclusions, which could be considered later during that session. That would mean that a full set of draft conclusions and commentaries could be adopted on first reading by the Commission by the end of the session next year.

Thank you very much.

Identification of customary international law

Text of the draft conclusions provisionally adopted by the Drafting Committee*

Part One
Introduction

Draft conclusion 1
Scope

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

Part Two
Basic approach

Draft conclusion 2 [3][1]
Two constituent elements

To determine the existence and content of a rule of customary international law, 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

1. 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, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each element is to be separately ascertained. This requires an assessment of evidence for each element.

Part Three
A general practice

Draft conclusion 4 [5]
Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that

* The present text contains draft conclusions provisionally adopted by the Drafting Committee during the sixty-sixth (2014) and sixty-seventh (2015) sessions of the Commission.

[1] The numbers of the draft conclusions, as originally proposed by the Special Rapporteur in his second and third reports, are indicated in square brackets where the numbering is different.

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.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

Draft conclusion 5 [6]
Conduct of the State as State practice

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

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; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

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. 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.

Part Four
Accepted as law (*opinio juris*)

Draft conclusion 9 [10]
Requirement of acceptance as law (opinio juris)

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

Draft conclusion 10 [11]
***Forms of evidence of acceptance as law* (opinio juris)**

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

Part Five
Significance of certain materials for the identification of customary international law

Draft conclusion 11 [12]
Treaties

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Draft conclusion 12 [13]
Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the

existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

Draft conclusion 13 [14]
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

Draft conclusion 14
Teachings

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

Part Six
Persistent objector

Draft conclusion 15 [16]
Persistent objector

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

Part Seven
Particular customary international law

Draft conclusion 16 [15]
Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*).