Provisional

For participants only

9 June 2015

Original: English

International Law Commission

Sixty-seventh session (first part)

Provisional summary record of the 3251st meeting

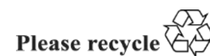
Held at the Palais des Nations, Geneva, on Friday, 15 May 2015, at 10 a.m.

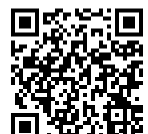
Contents

Identification of customary international law (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@unog.ch).

GE.15-07797 (E) 220515 090615





Present:

Chairman:	Mr. Singh
Members:	Mr. Al-Marri
	Mr. Candioti
	Mr. Comissário Afonso
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kittichaisaree
	Mr. Laraba
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Korontzis	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Identification of customary international law (agenda item 6) (*continued*) (A/CN.4/682)

Mr. Murphy said that the new draft conclusions proposed by the Special Rapporteur in his third report (A/CN.4/682) were largely acceptable. He supported the addition of a second paragraph to draft conclusion 3, but would suggest the replacement of the word "specific" with "separate". He was likewise in favour of adding a third paragraph to draft conclusion 11, to address the issue of inaction, but he proposed that it should be redrafted to read: "Failure to react over time to a practice that affects the interests or rights of a State, when the State has knowledge of the practice, may serve as evidence of acceptance as law (*opinio juris*)."

Draft conclusion 12 was well crafted, but the commentary should bring out the fact that, in every instance, it was necessary to ascertain whether the rule set forth in the treaty was supported by a general practice that was accepted as law (*opinio juris*). While he agreed with draft conclusion 13 on resolutions of international organizations and conferences, he thought that the commentary should cover the same point that he had just made for draft conclusion 12. The commentary would also benefit from some reference to the significance of consensus in the adoption of a resolution. As the Commission had noted during its sixty-sixth session, the adoption of a resolution by consensus did not suffice to constitute agreement within the meaning of article 31, paragraph 3 (b), of the 1969 Vienna Convention on the Law of Treaties. While he concurred with the general thrust of draft conclusion 14 on judicial decisions and writings, he thought that for the sake of consistency with the language of draft conclusions 1 and 2, it might be better to reword it to read: "Judicial decisions and writings may serve as subsidiary means for determining the existence of a rule of customary international law and its content."

Since the type of custom referred to in draft conclusion 15 was commonly known as "regional" or "special" custom, a key issue was whether it had to have a geographic nexus. The principal case law to date had been driven by geography. Some scholars had characterized the rules deriving from regional custom as being binding only upon States in a certain geographic area or region, constituting a regionalized exception permitted out of respect for regional legal traditions. Others, including the Special Rapporteur, had argued that a rule of customary international law could exist among any group of States, even if they were scattered across the globe. Since the Special Rapporteur did not provide any examples of such a rule, one might wonder if his argument was based more on theory than practice. In any event, the wording of draft conclusion 15, paragraph 2, was unclear. If the intention was to cover solely practice and beliefs confined to a group of States, paragraph 2 should read: "To determine the existence of a particular custom and its content, it is necessary to ascertain whether there is a practice accepted as law (*opinio juris*) that exists only among the States concerned."

Referring to section IV of the report, on the relevance of international organizations, he said that he agreed with the Special Rapporteur's emphasis on the centrality of States in the formation of customary international law and endorsed draft conclusion 4. He likewise concurred with the two propositions in paragraphs 74 and 75 on how international organizations might contribute to the formation or expression of rules of customary international law: the propositions were consistent with the case law of the International Court of Justice and the views of academics and had been supported by a number of States in the Sixth Committee.

On the other hand, the third proposition set forth in paragraph 76, namely that the practice of international organizations could be relevant to the identification of customary international law, had not been substantiated by any references to international case law, and it had been rejected by several States in the Sixth Committee. Only a handful of States

and some academics were in favour, and even they seemed to recognize that it owed more to theory than to reality. Even the European Union, which was widely regarded as supranational, had itself emphasized that its practice was pertinent to the formation of customary international law only in its areas of exclusive competence.

The commentary to draft conclusion 4 should spell out the following limitations on using the practice of international organizations for the formation of customary international law: only the external practice of the international organization was relevant; the practice of a body was relevant if it was composed of representatives of States, not of independent experts; and the more member States an international organization had, the greater the weight to be attributed to its practice. Lastly, only the acts of international organizations on which States had conferred authority, including law-making functions, could contribute to the formation of rules of customary international law. Since no non-State actors other than international organizations were empowered by States with law-making functions, their conduct could not constitute practice that contributed to the formation of custom.

There were other important aspects of the third proposition that needed to be analysed. Could the practice of an international organization include inaction or silence? Could such practice contribute only to practice but not to *opinio juris*? Must the practice of the international organization be accepted as law by that organization? Once an international organization had contributed to the formation of a rule of custom, was that rule binding upon both States and the international organization? An explanation of how States could change an existing rule of customary law over time would also be welcome.

In conclusion, he said that he viewed the report as a remarkable achievement and was in favour of sending the draft conclusions and the other proposals to the Drafting Committee.

Mr. Tladi said that he agreed with the substance of most of the draft conclusions proposed by the Special Rapporteur in his third report. He fully concurred with the point made in paragraph 13 that practice and *opinio juris* ought not be artificially separated, as if one had nothing to do with the other. However, while the existence of each element had to be verified separately, that did not mean that the same material could not be used as evidence of both. That stance, taken by the Special Rapporteur in paragraph 15, ignored the interrelationship between the two elements that had been recognized in the judgments of the International Court Justice cited in footnote 17. Quoting paragraph 70 of the Special Rapporteur's second report (A/CN.4/672) and the judgment of the International Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, he said that they suggested that evidence of acceptance of law was found in the practice itself, but that did not mean that practice was acceptance as law. It simply meant that the two elements of customary international law, practice and *opinio juris*, served different functions.

Whether or not it was permissible or desirable to use the same materials would depend on their content. The adoption of a resolution urging States to conduct themselves in a particular manner might constitute practice, and if that resolution proclaimed a belief that the conduct was required by law, it would be evidence of *opinio juris* – but it would not necessarily constitute *opinio juris*. Regard must be had to the overall context and particular circumstances, as stated in draft conclusion 3 provisionally adopted by the Drafting Committee in 2014.

He fully agreed with the Special Rapporteur's analysis of inaction as evidence of acceptance as law and he endorsed draft conclusion 11. With regard to inaction as practice and/or evidence of acceptance as law, the phrase "under certain circumstances" was not clear, and the report did not offer much help. It was noteworthy that the main judgment on which the conclusion that "inaction is a form of practice" was based, *Military and*

Paramilitary Activities in and against Nicaragua, did not provide authority for the view that inaction was a form of practice. The assessment therein of customary international law focused squarely on the "acceptance as law" element and, in that regard, referred to a number of authorities. Nowhere in it did the Court consider the role of inaction. The quote stating that inaction was a form of practice was not about inaction or, for that matter, practice. It was in fact a prelude to the Court's assessment of *opinio juris*. A careful reading of the relevant passages of the judgment made it clear that the Court was not concerned with inaction. Thus, the abstention that the Court referred to appeared to be quoted out of context. "Such abstention" in that context appeared to refer to what was normally called "prohibition", namely, it referred to the rule rather than to an element in the formation of the rule. Elsewhere in the judgment, however, where the Court was considering exceptions to the prohibition, it referred to the action of "other States in a position to react". Similar language might be included in draft conclusion 6, paragraph 1, indicating that the type of inaction that might amount to action was inaction under circumstances when States were in a position to act. In the same paragraph, a more specific qualifier than "in certain circumstances" was required.

Turning to section IV, on the role of treaties, he said he endorsed draft conclusion 12, even though it was rather general: more detail would be desirable.

With regard to draft conclusion 13, on resolutions, he said that he did not agree with the statement in paragraph 47 of the report that the General Assembly was a political organ, in which it was far from clear that the acts of States carried juridical significance. On the contrary, it was clear that they did – the only question was the extent of the significance.

Paragraph 60 of the report raised a number of uncomfortable questions with regard to judicial decisions and writings. Who would decide whether the quality of the legal reasoning in such decisions was good, and how was the court's composition to be taken into account?

He endorsed draft conclusion 4 and the inclusion of a new paragraph 3, on conduct by non-State actors. The term "particular custom" in draft conclusion 15 might need to be fleshed out by specific references to what was meant, perhaps in a commentary.

Finally, he suggested that in future, the Special Rapporteur might wish to consider the effects of rules of local custom on the formation and identification of general rules of customary international law.

Mr. Forteau said, first, that the purpose of the topic was to identify whether, at a moment in time, there existed a rule of customary international law, which was without prejudice to any possible future evolution of the said rule. The practical nature of the present project must be kept in mind. Then, he said that he fully endorsed the reference in paragraph 17 of the report to the fact that the two-element approach applied to any rule of customary international law and that its application in a concrete case could vary depending on the specificities of the field of international law at stake. That was coherent with the inherently flexible nature of customary international law. Indeed, custom was a spontaneous, not a deliberate, means of creating international law, and it was important not to constrain it within over-strict limits that in reality pertained to the law of treaties. In that regard he strongly disagreed with many of Mr. Murphy's comments, which seemed to conflate the law of treaties with customary law.

With regard to draft conclusion 3, paragraph 2, he disagreed with the argument in paragraph 15 of the report that the same evidence could not be used as both relevant practice and *opinio juris* in identifying a rule of customary international law. Such so-called double counting, it seemed to him, had been accepted by the Special Rapporteur after the discussion at the previous session, in which he himself had offered an example based on maritime law. There was no such thing as "specific evidence for each element" – what

mattered was the operation whereby the existence of each element was separately ascertained, as stated in the first sentence of paragraph 2. The second sentence was thus superfluous and should be deleted.

In draft conclusion 4, he did not feel there was any justification for omitting the word "primarily" in paragraph 1, since the practice of international organizations was also relevant, according to paragraph 2. He agreed, indeed, with the Special Rapporteur that the practice of international organizations could be relevant for assessing the existence of customary international law. He considered paragraph 3 to be too restrictive, as it would preclude taking account of the practice of the International Committee of the Red Cross or the International Olympic Committee, for example. He suggested inserting "in principle" in that paragraph.

While he was in general agreement with draft conclusion 11, paragraph 3, he found the second clause ("provided that the circumstances call for some reaction") too restrictive. Would one expect every State to react to every action by another State that was not in line with a given customary rule? Moreover, the reaction criterion implied that every State needed to be aware of the practice of every other State, which was hardly realistic. He would therefore prefer a more flexible wording — an approach that would also be more in line with positive law — to the effect, for example, that inaction might serve as evidence of *opinio juris* "when the particular circumstances of that inaction lead to that conclusion" (*lorsque les circonstances propres à cette inaction conduisent à cette conclusion*).

The title of section V, "Particular forms of practice and evidence", was somewhat confusing. It would be better to refer to the various manifestations of practice, on the one hand, and the various means of acquiring evidence of practice or of *opinio juris*, on the other.

It was essential to include a separate conclusion on the role, not only of treaties, but also of the texts produced by the Commission, as evidence of customary law. Given the Commission's status as a subsidiary body of the United Nations General Assembly, its work was more than just a subsidiary means for the determination of rules of international law. The Special Rapporteur's classification of the Commission's texts as "writings" was a debatable over-simplification: its status set its works apart, and both domestic and international courts made use of them in a way that was in no way comparable with their use of other writings.

It might be better to limit the scope of draft conclusion 12 to multilateral treaties. Bilateral treaties rarely gave rise to customary law, if only for statistical reasons: to reflect consensus among the nearly 200 States in the international community would require the existence of nearly 20,000 similar bilateral treaties. In those circumstances, even 3,000 treaties was a low number, and it could explain the decision taken by the International Court of Justice in 2007 in the *Ahmadou Sadio Diallo* case regarding bilateral investment treaties.

It was not enough to state, as in draft conclusion 12, that a customary rule codified by a treaty must have existed at the time when the treaty was concluded. The rule might well have changed or lapsed between the moment of codification and the time of the attempt to identify customary law. Instead, it should be stated that a customary rule codified by a treaty must still apply at the time of the attempt to identify the rule. According to draft conclusion 12 (b), a treaty "led to the crystallization" of a rule, but crystallization was a process. It would be more appropriate to say that a treaty participated in the process of creating a new rule of customary international law. The wording of draft conclusion 12 (c) should likewise be corrected to read "has generated a general practice accepted as law", since the juxtaposition of "generated" and "giving rise" was tautological.

Draft conclusion 13 should state that resolutions of international organizations and conferences "reflect" (*reflètent*) rather than were "evidence of" (*peuvent constater*) customary law, so as not to give the impression that they had legislative force. The expression "in some circumstances" had no legal meaning: some indication was needed of just what type of circumstances might apply.

He found draft conclusion 14 generally acceptable, except for the word "writings", which was somewhat unclear and vague. Draft conclusion 15, paragraph 1, was rather unclear. A rule of particular custom could be invoked against a State, not by just any other State, but only by one that was itself bound by that rule. It would therefore be clearer to say that particular custom was a rule of customary international law "that applied only between certain States" (*qui ne s'applique qu'entre certains Etats seulement*). Moreover, reference must be made to the liberal view adopted by the International Court of Justice in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* in 2009 (para. 141), in which the Court had adopted a less consensualistic definition of special custom than in its previous judgments.

As to draft conclusion 16, he said that, in order to show that the persistent objector rule was not purely theoretical (which it seemed to be), the commentary should give specific examples of cases when States had persistently made valid objections to a customary rule. In addition, the wording should be qualified to show that persistent objection was when a State objected persistently to the application of a new rule to itself; the objection had no effect on the existence of the customary rule.

Mr. Kittichaisaree, referring to the relationship between the two constituent elements of customary international law, said that the Special Rapporteur acknowledged in paragraph 14 of his report that they were "indeed really inseparable" and that the same practice could express both the attitude of States towards the content of the rule and the recognition of the rule as legally binding. His subsequent assertion that evidence of State practice should not also serve as evidence of *opinio juris* was therefore puzzling. Several cases of International Court of Justice demonstrated that widespread State practice could support *opinio juris*, while well-established *opinio juris* could compensate for State practice that was less clear-cut. The International Law Association had concluded that it was not always necessary to separately establish the existence of the subjective element. He therefore requested clarification as to whether, by going forward with a strict separation between evidence of practice and *opinio juris*, the Special Rapporteur was rejecting Kirgis's "sliding scale" approach, in other words, the notion that the weight accorded to each element could vary according to circumstances.

He would appreciate clarification of the use in paragraph 25 of the word "sufficient" in the context of inaction over "a sufficient period of time".

The concept of "specially affected States", referred to in paragraph 39, was highly contentious and indeed had been dropped the previous year from the draft conclusions. He requested clarification of whether the reference in the current report was inadvertent or whether the concept was being reintroduced in the specific context of custom created by treaty.

With regard to paragraph 41 of the report, he did not agree that the Baxter paradox was not a genuine paradox. On the contrary, it was a real problem that merited further discussion. According to the *North Sea Continental Shelf* cases, ratification of a treaty by a large number of States might transform the treaty's provisions into customary law by influencing the practice of non-States parties. Yet learned authors had argued that the more widespread the ratification of a treaty, the fewer non-States parties there were whose practice was vital to the transformation from treaty obligations to customary law. As treaties became more and more widespread, the paradox only became more real. It would

be remiss of the Commission to gloss over the matter as it did in draft conclusion 12 on the relevance of treaties. His own preferred solution was to apply Provost's suggestion of using the sliding scale theory, placing greater reliance on the *opinio juris* element, as reflected by the number of parties to the treaty, in order to compensate for the lack of relevant practice outside the treaty. That provided a convincing justification for treaty provisions taking on a stronger customary character as more States became parties to them.

He emphasized the importance of paragraph 60 of the third report, relating to the authority of judicial decisions. The paragraph was useful to those States which considered as bad law operative paragraph 2 E, especially the second sentence, of the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*. He also concurred with Mr. Murphy's statement on the relevance of the practice of international organizations to the identification of customary international law.

In connection with the persistent objector rule, he wondered whether the Special Rapporteur's point that it helped to prevent the formation of customary international law from becoming "the sole preserve of the mighty" still held true in today's world. States with greater geopolitical clout could hold on to their objections in the face of external pressure more easily than less influential States that were more susceptible to economic and diplomatic pressure.

With those remarks, he said that he was in favour of referring the well-crafted set of draft conclusions to the Drafting Committee, but looked forward to hearing the Special Rapporteur's responses to the concerns he had raised.

Mr. Park said that although he understood the rationale, described in paragraph 15 of the report, behind the Special Rapporteur's proposal to add a new paragraph 2 to draft conclusion 3, he found the text to be too restrictive: the International Court of Justice had taken a more flexible approach in identifying the *opinio juris* element in several of its cases. The Special Rapporteur's concern about "double counting" was covered by the statement in draft conclusion 3 that "regard must be had to the overall context and the particular circumstances of the evidence in question". Therefore, instead of adding a new paragraph 2 to the draft conclusion, he proposed that the word "each" should be inserted before the word "evidence" in the original text, which would then read: "In assessing each 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."

Regarding the relationship between the two constituent elements, he recalled that during the sixty-sixth session he had proposed dealing with the temporal relationship between general practice and *opinio juris*, in which *opinio juris* usually preceded general practice. His proposal, which had been discussed briefly by the Drafting Committee, had been to include the following text: "General practice (State practice) generally precedes acceptance as law (*opinio juris*). However, acceptance as law (*opinio juris*) may, in some instances, exceptionally precede general practice (State practice)." His proposal still warranted consideration, as it would be useful for practitioners in identifying the existence of a customary rule.

Concerning draft conclusion 4, he recalled that, during the sixty-sixth session, the Drafting Committee had agreed to exclude the practice of non-State actors, since it was not directly relevant to the formation of customary international law. He therefore questioned the need for the new paragraph 3 and pointed out that the use of the word "other" before "non-State actors" could be misleading. On the other hand, he endorsed the Special Rapporteur's proposal to omit the word "primarily" in paragraph 1, in order to clarify the position in regard to non-State actors.

He supported the idea of adding a new paragraph, on inaction, to draft conclusion 11. However, some additional explanation of the conditions under which evidence could be construed as acceptance, discussed in paragraphs 23, 24 and 25 of the report, was necessary and should appear not in the commentary but in the text itself. In order to ensure consistency in the terminology used throughout the draft conclusions, the title of section V should be amended to read "Particular forms of practice and evidence of acceptance as law".

In paragraphs 35 to 39 of the report, the Special Rapporteur analysed the three ways in which a treaty provision might reflect a rule of customary international law or assist in determining the existence and content of the rule. In paragraph 31, the Special Rapporteur acknowledged that the interaction between treaties and customary international law raised a number of important issues – and he himself questioned whether one draft conclusion would be sufficient to cover them all. One such issue, mentioned in footnote 110, was reservations to provisions reflecting a rule of customary international law – the subject of guideline 3.1.5.3 of the Commission's *Guide to Practice on Reservations to Treaties*. Another issue was the legal effects of codified treaties that had not yet entered into force.

Concerning draft conclusion 13, he said that, based on the technique whereby a principle should be stated first, followed by any exception thereto, he would prefer the clauses to be reordered to read: "Resolutions adopted by international organizations or at international conferences cannot in and of themselves create or constitute a rule of customary international law. They may, in some circumstances, be evidence of customary international law or contribute to its development". The expression "in some circumstances" was somewhat vague; it should be replaced with more detailed wording such as "the size of the organizations and conferences, the results of voting, the contents of resolutions and reactions of States to the resolution, etc." Since the Commission's output was invariably transmitted to the United Nations General Assembly and annexed to that body's resolutions, it must be construed as falling within the ambit of draft conclusion 13, on resolutions of international organizations, and not of draft conclusion 14, on "judicial decisions". The latter term covered the decisions of both national and international courts. That meant that, under draft conclusion 14, the decisions of national courts could serve as subsidiary means for the identification of rules of customary international law, but they could also be a form of practice, in line with in draft conclusion 6. That point should be taken up in the relevant commentaries. Lastly, the general comments, recommendations and reports of the treaty bodies should also be considered as possible subsidiary means for the identification of rules of customary international law.

The term "regional" should be placed in brackets after the word "particular" in the title of draft conclusion 15, since the former term was more common than the latter. Furthermore, as particular custom was an exception to general customary international law, the practice element, like the *opinio juris* element, should be strictly applied. The term "general practice" in paragraph 2 of the draft conclusion needed to be referenced in relation to draft conclusion 8.

As to draft conclusion 16, he said that although the persistent objector rule played a number of important roles in customary international law, it was not without its critics. He himself was worried that it might cause fragmentation of international law. Moreover, a controversial theory should not be included in draft conclusions whose purpose was to provide guidance. He therefore proposed that the draft conclusion should either be deleted or expanded to indicate that the rule applied only when a customary international law was in the process of emerging, and that a State must express its objection as early as possible.

Lastly, since the purpose of the draft conclusions was to provide practical guidance to practitioners and others less expert in international law, they should be sufficiently comprehensive to deal with all the relevant issues. He therefore suggested that the Commission might wish to consider the following issues: the relationship between general

principles of law and customary international law; the burden of proof in identifying customary international law; and the question of *opinio juris* over time, namely, identifying the point at which it could be said to exist regarding a certain practice.

Mr. Hmoud said that dealing with a source of international law that was inherently flexible was not an easy task; he endorsed the Special Rapporteur's approach of proposing practical and simplified conclusions that corresponded to the flexible nature of the identification process. The commentaries to the draft conclusions should include the necessary detailed analysis and methodology to assist States, practitioners and other parties with the identification of customary international law; the text itself should highlight the key elements of identification, without being too restrictive.

With regard to the two-elements approach, he said that they should each be determined separately, and each assessed on its own merit. While that could prove difficult in certain situations, it was crucial that the same evidence should not be used to verify both general practice and acceptance as law: that might blur the line between the two elements, with the risk that usage might be mischaracterized as a customary rule.

On inaction, he maintained the view that refraining from action could form practice for the purposes of the identification of customary international law. That was borne out by the numerous rules based on negative practice, including some customary rules of international humanitarian law that called on a party to a conflict to refrain from certain conduct, rules on the use of force and rules in other fields of customary law. However, the proposition that inaction could serve as evidence of *opinio juris* should be treated with caution, as it might not always denote acquiescence on the part of the State concerned. As mentioned in the report, there might be reasons other than tacit consent for the inaction of the State, such as lack of capacity, of interest or of awareness of the consequences of inaction. There might also be political motives, or the State might not be aware of the existence of the practice or of the need for a reaction, especially when its interests were not at stake or when it was under pressure not to react.

Silence or inaction therefore had to be corroborated by a positive general reaction by other States in order to be considered as evidence of acquiescence. All the circumstances should be taken into account, starting with whether the situation warranted a reaction by the State or States concerned. Next, it should be determined whether the silence on the part of the State or States was due to a sense of legal obligation, other reasons or lack of knowledge. He agreed with the Special Rapporteur that inaction had to be maintained for a sufficient period of time, whose length depended on the circumstances.

On the role of written texts, he agreed that a distinction must be drawn between treaties and the resolutions of international organizations and conferences. Treaties were by nature legally binding on States, while resolutions were not necessarily so. Treaties contained rules which could reflect customary international law or lead to the formulation of customary rules under certain circumstances, while resolutions could be of a political, economic or other nature, but not necessarily legal. Treaties could involve the two elements and contribute to the formation of the customary rule or attest to its existence, whereas resolutions had more of an evidentiary nature, especially in relation to the subjective element.

He also agreed that there were three ways in which treaties contributed to the identification of customary international law: they could codify existing customary rules, lead to the crystallization of emerging rules or be the first steps towards the formation of new customary rules. Regarding rule codification and rule formation, he said that the written text specified the formulation of the rule and its various substantive elements, while the crystallization of an emerging rule was more closely related to the process, which could itself shed light on how an emerging rule developed. The content of such an emerging rule

needed to be asserted in three stages: before the treaty, throughout the treaty process and after the treaty, although, in reality, there was some overlap between the identification of an emerging rule that crystallized through the treaty and the identification of a new customary rule created by the treaty.

The role of resolutions in the identification of customary international law stemmed from the fact that they expressed the will of the relevant actors. They did not create customary rules, but could contribute to their development. However, the value of the resolutions depended on the other corroborating evidence of general practice and *opinio juris*. The circumstances surrounding the adoption of the resolution, its content, whether it purported to set legal standards, whether the State representative was authorized to act on behalf of the State concerned and whether the forum was one with broad or limited representation of States all had to be taken into account. Moreover, if the practice did not conform to the content of the resolution, or if States acted in a manner that raised doubts about their belief in the binding nature of the rule, the value of the resolution must be discounted. Resolutions adopted unanimously or by consensus could be a strong indication of the existence of *opinio juris*, but they could not constitute instant *opinio juris*, as their acceptance as law needed to reflect consistent and general practice – a process that went beyond the instance of adoption of the resolution.

He had no doubt that judicial decisions and certain scholarly writings could be evidence of the existence of a certain rule. However, he wondered whether it was appropriate to describe them as subsidiary means for the determination of rules, implying that they would be resorted to only after exhaustion of the primary means of identification or to complement other means. While judicial decisions and writings could not be a source of law or create rules, they were viewed as authoritative pronouncements of the rules of international law. The fact that their evidentiary value could not be conclusive did not mean that they were subsidiary, as all forms of evidence relating to the existence of customary international law needed to be corroborated. The decisions of national courts should not be accorded the same status as pronouncements by international courts, however.

Intergovernmental organizations were subjects of international law and had a separate legal personality from their member States. Their practice contributed to the formation of customary rules to the extent that it reflected general or collective State practice. Even when international organizations were delegated by their members to act on their behalf, their practice could not shape the general practice on its own merits: it was a subsidiary form of practice. That was particularly important when the resolutions of certain representative bodies contradicted the conduct of other bodies purporting to act on behalf of the organization. In that regard, he wondered whether the draft conclusions should contain wording similar to that in draft conclusion 7, paragraph 2, to deal with the weight of practice that varied among international organizations. Lastly, the silence of States regarding a certain conduct by an organization should not be considered in the context of acquiescence for the purpose of *opinio juris*, unless the international organization’s practice reflected emerging State practice.

On particular or special custom, he said the fact that it was binding only on certain States was recognized. However, a State that was not bound by a rule of particular custom might find itself so bound if the rule became part of general custom, although it might be difficult to pinpoint the transition from a particular rule to a general customary rule. Special attention should be paid to the value of acquiescence, and a higher threshold of awareness of generalized practice needed to be established.

He endorsed the wording and content of draft conclusion 16 on the persistent objector rule. However, it was not always clear how a State needed to express its objection and whether tacit objection would suffice. In his opinion, there had to be evidence that the State had objected throughout the crystallization of the rule and after its creation, and that it

had consistently objected, albeit tacitly at times. The key was whether the objection was sufficiently well communicated to other States.

In response to the Special Rapporteur's invitation to propose issues that should be taken up in the fourth report, he suggested the process whereby, over time, general customary rules changed in nature or became special custom. Greater clarity was needed on aspects such as how to determine a change in a rule and its legal consequences, and where to draw the line between the violation of a previous rule and adherence to a new rule.

In conclusion, he recommended the referral of all the draft conclusions to the Drafting Committee.

Mr. Tladi said that Mr. Hmoud had referred to rules that by their nature required inaction, such as those on the prohibition of the use of force. However, the forms of practice covered in draft conclusion 6 included diplomatic acts, through which a State could express its views on the use of force. That was a positive act, which implied that even rules prohibiting certain acts did not by definition rely solely on inaction.

Mr. Al-Marri said that the topic was important because customary law was a primary source of international law. The Special Rapporteur was well placed to guide the Commission in its work. He had crafted a high-quality report and draft conclusions for review by the Drafting Committee.

On the substance of the report, he said that the two-element approach should be retained. A fundamental aspect of the law was the practice, not only of States, but also of international organizations in areas where they had competence. It was essential to study the role that might be played by United Nations resolutions and rules that might be derived therefrom as well as proposals under treaty negotiations. It was also essential to study local and regional agreements relating to the codification of international law.

The meeting rose at 1 p.m.