Document:-
**A/CN.4/3280**

# Summary record of the 3280th meeting

Topic:
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-
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36. In his next report, he would deal with the broader issue of the termination of provisional application and the related legal regime, while continuing consideration of the relationship between provisional application and other relevant provisions of the 1969 Vienna Convention—in particular, articles 46 and 60, as suggested—while taking care, of course, not to reinvent the Convention. It would also be useful to study in greater depth the question of entry into force, and to determine whether article 25 of the 1969 and 1986 Vienna Conventions was customary in nature.

37. As far as the draft guidelines were concerned, it did not seem necessary at the present juncture to go back over the many pertinent comments and proposals that had been made, as the Drafting Committee would take them into account in its redrafting and they would also be reflected in future commentaries to the guidelines. Nonetheless, three points were worthy of note. First, almost all members of the Commission wished to draw a distinction between the question of the provisional application of treaties with respect to States and the question of the relations between international organizations or with States. Perhaps, as Mr. Park had proposed, a final draft guideline should be added recalling that all the guidelines relating to States applied *mutatis mutandis* to international organizations. Furthermore, as several members had said, it seemed appropriate to add a guideline defining the scope of application as well as a guideline covering situations where a unilateral declaration had been made. Lastly, as to the question of whether the Commission should draft a set of guidelines or conclusions, he recalled that the purpose of the topic had always been to provide States with something of very practical use. He would continue his work based on the current approach, although he did not exclude the possibility of proposing draft model clauses, as recommended by Mr. Hassouna and Mr. Petrič. Furthermore, he did not consider that the topic should be understood simply as an interpretation of article 25.

38. The CHAIRPERSON said he would take it that the members of the Commission wished to refer draft guidelines 1 to 6 on the provisional application of treaties to the Drafting Committee.

*It was so decided.*

*The meeting rose at 11.20 a.m.*

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## 3280th MEETING

*Wednesday, 29 July 2015, at 10.05 a.m.*

*Chairperson*: Mr. Narinder SINGH

*Present*: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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**Identification of customary international law (*concluded*)[*] (A/CN.4/678, Part II, sect. E, A/CN.4/682, A/CN.4/L.869)**

[Agenda item 7]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. FORTEAU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft conclusions on identification of customary international law, as provisionally adopted by the Drafting Committee during the sixty-sixth and sixty-seventh sessions of the Commission, and as contained in document A/CN.4/L.869, which read:

IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

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]. 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 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.

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[*] Resumed from the 3254th meeting.

*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*).

2. He reminded the members of the Commission that the numbers of the draft conclusions as originally proposed by the Special Rapporteur in his second and third reports[315] were indicated in square brackets where the numbering was different.

[315] *Yearbook … 2014*, vol. II (Part One), document A/CN.4/672, and *Yearbook … 2015*, vol. II (Part One), document A/CN.4/682.

3. He said that during the current session, the Drafting Committee had devoted 12 meetings to the consideration of the draft conclusions on identification of customary international law. It had examined the two draft conclusions left pending from the previous session, as well as those proposed by the Special Rapporteur in his third report, also taking into account the eight draft conclusions that it had provisionally adopted at the sixty-sixth session, together with the reformulations proposed by the Special Rapporteur to the Drafting Committee in response to suggestions made or concerns raised in plenary session. It had provisionally adopted a further eight draft conclusions at the current session, as well as additional paragraphs for two of the draft conclusions provisionally adopted the previous year. He commended the Special Rapporteur, whose mastery of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee.

4. The report of the Drafting Committee would be made available on the Commission's website in both French and English. Its focus was on those elements that were new or had a bearing on the draft conclusions adopted at the sixty-sixth session, and it should be read together with the interim report of the Chairperson of the Drafting Committee given at that session.

5. The draft conclusions, 16 in all, appeared in seven parts. Part One dealt with scope. Part Two set 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 and Four delved further into those constituent elements, namely, general practice and *opinio juris*. Part Five addressed the significance of certain materials for the identification of customary international law. Parts Six and Seven addressed the persistent objector and particular customary international law, respectively.

6. At the sixty-sixth session, the Drafting Committee had provisionally adopted draft conclusion 3 [4] (Assessment of evidence for the two elements), which had then comprised a single paragraph. That central provision, as modified at the current session, appeared in paragraph 1 and set out an overarching principle applying to many of the draft conclusions that followed. The need to consider further the relationship between the two constituent elements had been raised within the Commission and the Sixth Committee in 2014 and had been re-examined by the Special Rapporteur in his third report. In the light of that report and the debate in the plenary Commission, the structure originally proposed by the Special Rapporteur had been refined. In particular, it had been deemed appropriate to deal with the issue sometimes referred to as "double counting" in a second paragraph of draft conclusion 3 [4], rather than under draft conclusion 10 [11], where it had originally been addressed.

7. The purpose of the first sentence of draft conclusion 3 [4], paragraph 2, was to make clear that, in the assessment of evidence for the two elements, the existence of each element must be established. Even though the two constituent elements were inseparable, the identification of a rule of customary international law required each element to be ascertained separately; the existence of one element could not be deduced from the existence of the other. As shown in the Special Rapporteur's third report, that approach reflected the way in which the matter was commonly addressed in State practice and by international courts and tribunals. The second sentence, expressing a logical consequence of the statement in the first sentence, covered the issue of "double counting", which had given rise to much debate within the Commission. In order to ascertain each element separately, there must be an assessment of evidence, most often different evidence, for each element. There was general agreement within the Drafting Committee, however, that the possibility of using the same material to ascertain practice and *opinio juris* should not be ruled out; what was important was that, even in such cases, the material would be examined for different purposes.

8. At the previous session, the Drafting Committee had provisionally adopted draft conclusion 4 [5] (Requirement of practice), having decided to structure it in two separate paragraphs addressing the role of State practice and the role of the practice of international organizations, respectively. A number of outstanding issues relating to the role of the practice of international organizations had been addressed more extensively in the Special Rapporteur's third report and discussed in the plenary debate at the current session. The Drafting Committee had consequently decided to maintain the substance of the first two paragraphs of draft conclusion 4 [5]. In particular, it had deemed it appropriate to retain the wording of paragraph 1 stating that it was primarily the practice of States that contributed to the formation, or expression, of rules of customary international law; the word "primarily" had been used to emphasize the central role of States, while indicating that the practice of international organizations should not be overlooked. That provision was complemented by the wording of paragraph 2, which indicated that the practice of international organizations could have the same effect, but "[i]n certain cases" only. In the light of the Special Rapporteur's third report and the plenary debate, the Drafting Committee had been satisfied with the Special Rapporteur's suggestion to maintain the language of paragraph 2 unchanged; the phrase "in certain cases" would be discussed in the commentary.

9. Draft conclusion 4 [5], paragraph 3, dealt with the role of other actors, referred to in the Special Rapporteur's third report as "non-State actors". Two issues had been raised in connection with the language of paragraph 3 as proposed by the Special Rapporteur ("Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law"). First, it had been suggested that the expression "other non-State actors" could be misleading, depending on how international organizations were perceived. Some members of the Drafting Committee had stressed that, strictly speaking, such organizations could not be described as non-State actors in view of their composition. That said, the Drafting Committee had agreed that the role of international organizations was addressed exclusively under paragraph 2 and the purpose of paragraph 3 was to address the role of actors other than States and international organizations. It had thus decided to use the expression "other actors" in paragraph 3, following a suggestion by the Special Rapporteur. Second, a number

of members had suggested during the plenary debate and in the Drafting Committee that the role of certain "other actors", such as ICRC, could nevertheless be significant. While the purpose of the first part of the sentence was thus to distinguish the conduct of other actors from the practice of States or international organizations, by making clear that it could not, as such, contribute to the formation, or attest to the existence, of customary international law, the second part of the sentence, by recognizing the relevance of the conduct of other actors in the assessment of practice, encapsulated the fact that such conduct might, by instigating or recording practice, play an important role in the process of identification of customary international law.

10. With regard to the title of Part Four of the draft conclusions, the Drafting Committee had ultimately decided to include both the phrase "accepted as law", initially proposed by the Special Rapporteur, and the expression "*opinio juris*", which had been preferred by some members of the Commission because of its common use in practice. The words "*opinio juris*" had therefore been added in parentheses after "accepted as law". The two draft conclusions included in Part Four, draft conclusions 9 [10] and 10 [11], had been proposed in the Special Rapporteur's second report, but had not been considered by the Drafting Committee at the sixty-sixth session owing to a lack of time.

11. With regard to draft conclusion 9 [10] (Requirement of acceptance as law (*opinio juris*)), the reference to "requirement" mirrored the title of draft conclusion 4 [5] (Requirement of practice), which was the corresponding provision relating to the other constituent element, "a general practice". The purpose of paragraph 1 was to define "acceptance as law (*opinio juris*)", often referred to as the "subjective element" of customary international law. According to the two-element approach, it was not sufficient to identify a general practice, it was also necessary to verify that the practice was accompanied or motivated by a belief that it was mandated, or permitted, under customary international law. A wide range of expressions had been used in international practice and in the literature to refer to the subjective element and its relationship with general practice. The Drafting Committee, after considering several drafting suggestions, had concluded that to say in paragraph 1 that the practice must be "undertaken with" a sense of legal right or obligation allowed for a better understanding of the close link between the two elements than the previous proposal "accompanied by". The new formulation should, furthermore, be understood to indicate that the practice in question did not have to be motivated solely by legal considerations to be relevant for the identification of rules of customary international law. Having considered a large number of definitions found in case law and in the literature, the Drafting Committee had 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. Following the debate in plenary session, the Special Rapporteur had amended his original proposal to clarify that not only a sense of legal obligation, but also a sense of a legal right, could underlie the relevant practice. That proposal had been adopted by the Drafting Committee.

12. The purpose of paragraph 2 of draft conclusion 9 [10] was to indicate that it was the association with, or motivation of, acceptance as law (*opinio juris*) that made practice relevant for the formation, or expression, of customary rules. The use of the adjective "mere" to qualify "usage or habit" sought to highlight the point that, without acceptance as law (*opinio juris*), a practice, even if widely observed and repeated, could not create, or attest to, a rule of customary international law.

13. The purpose of draft conclusion 10 [11] (Forms of evidence of acceptance as law (*opinio juris*)) was to assist those tasked with determining whether a specific rule of customary international law existed by indicating various forms that evidence of acceptance as law might take. The structure originally proposed by the Special Rapporteur had been refined and, as already mentioned, the issue originally addressed in draft conclusion 10 [11], paragraph 4, was now dealt with under draft conclusion 3 [4].

14. Draft conclusion 10 [11], paragraph 1, acknowledged the diversity of forms in which acceptance as law might be manifested and the wide range of materials that might serve as evidence for the purpose of establishing its existence. It should be appreciated against the background of the general provision regarding the assessment of evidence for the two elements under draft conclusion 3 [4], and, in particular, the phrase indicating that regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question was to be found.

15. Draft conclusion 10 [11], paragraph 2, consisted of a non-exhaustive list of common "forms of evidence" of acceptance as law (*opinio juris*), mirroring the structure of draft conclusion 6 [7], paragraph 2, relating to practice. The order in which the various forms of evidence were enumerated was not intended to be of particular significance, although the first example, "public statements made on behalf of States", might indeed constitute the clearest evidence of *opinio juris*. Such statements included all kinds of declarations made publicly by States or State officials in domestic or international forums, such as official statements by a government official, official statements before legislatures or courts, or official protests made public. The official publications referred to in the list comprised different kinds of publications by State organs, such as military manuals. Government legal opinions included, for example, the opinions of legal advisers responsible for advising the Government on international law matters, which might contain relevant information on whether a customary rule existed; it had, however, been clear to members of the Drafting Committee that such opinions could not be considered as relevant where a Government had declined to agree with them. Diplomatic correspondence, such as notes exchanged between Governments, might express or imply an opinion as to the existence or otherwise of a legal rule, while national courts might apply a certain rule in a way that demonstrated that it was accepted as being required under customary international law. Treaty provisions might also sometimes indicate a view with respect to the existence or otherwise of a rule of customary international law, the clearest example of which would be a provision stating explicitly that a specific provision was declaratory of customary

international law. Lastly, conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference might reveal the position of States regarding the existence and content of a specific customary rule.

16. Members who had spoken in the plenary debate had agreed that inaction might constitute evidence of acceptance as law (*opinio juris*) and had suggested that draft conclusion 10 [11], paragraph 3, needed to reflect the essence of the conditions where that was the case, as set out in the report. Paragraph 3, as provisionally adopted by the Drafting Committee, was intended to capture those conditions, without being too restrictive.

17. The first condition was temporal and was conveyed by the expression "over time", which signified that, in order to be regarded as *opinio juris*, the failure to react must last for a sufficient period of time, assessed in the light of the particular circumstances. Second, the State must be in a "position to react". That formulation implied the need for knowledge of the practice in question, but was broad enough to cover other situations that might prevent a State from reacting, such as political pressure. Third, the circumstances had to call for some reaction; States could not be expected to react to each instance of practice by other States. Under the circumstances indicated in draft conclusion 10 [11], paragraph 3, however, failure to react indicated that a State considered the practice in question to be consistent with customary international law.

18. The title of Part Five (Significance of certain materials for the identification of customary international law) had been changed because it had been thought that the initial title, "Particular forms of practice and evidence", might confuse the user. The draft conclusions in Part Five singled out certain materials for their important practical role.

19. Draft conclusion 11 [12] (Treaties) demonstrated the relevance of treaties for the identification of rules of customary international law. Paragraph 1 set out the various ways in which possible evidence for establishing the existence of a rule of customary law might be found in a treaty. In the *chapeau*, the term "may reflect" made it clear that treaties could not in or of themselves create a rule of customary international law or conclusively attest to its existence, although they might offer valuable evidence of its existence and content. The phrase "come to reflect" in the text proposed by the Special Rapporteur in his third report had been deleted in order to focus the draft conclusion on the evidentiary value of treaties when determining the existence and content of customary rules, rather than on their possible development. The Drafting Committee had taken the view that a rule might not necessarily be contained in a single treaty provision but could be inferred from several provisions read together, and it therefore deemed it more appropriate to refer to a "rule set forth in a treaty" than to a "treaty provision".

20. Subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 listed the ways in which evidence of a rule of customary international law might be found in a treaty. Subparagraph (*a*) concerned the situation where a treaty codified a pre-existing rule of customary international law. Subparagraph (*b*) addressed the case where the conclusion of the treaty "crystallized" a customary rule that had begun to emerge. Subparagraph (*c*) concerned the situation where no customary rule had begun to emerge when the treaty was concluded but where the treaty gave rise to a general practice accepted as law.

21. The new version of paragraph 2 of draft conclusion 11 [12] had been proposed by the Special Rapporteur after the plenary debate, since the Drafting Committee had felt that it would be useful to include the guidance it contained in the text of the draft conclusions, rather than merely in the commentary. Paragraph 2 should be understood as a warning that the mere presence of a similar rule in several treaties, of either a multilateral or bilateral nature, was not necessarily indicative of customary international law; it was also vital to ascertain that a general practice accepted as law did indeed exist. As the Special Rapporteur had explained, that treaty practice could also demonstrate the absence of a customary rule.

22. In the title of draft conclusion 12 [13] (Resolutions of international organizations and intergovernmental conferences) the Drafting Committee had inserted the adjective "intergovernmental", since the purpose of the draft conclusion was to address the potential role, in the identification of customary rules, of resolutions adopted by international organizations or at conferences in which States participated. The structure of the draft conclusion had been revised to take account of suggestions made during the plenary debate. The point that a resolution adopted by an international organization or at an intergovernmental conference, could not, of itself, create a rule of customary international law had been expressed, in a somewhat different form, in the draft conclusion originally proposed by the Special Rapporteur. The Drafting Committee had been of the opinion that, in view of its importance for the topic under consideration, a whole paragraph should be devoted to that notion at the beginning of the draft conclusion. The verb "create" had been deemed clearer than "constitute".

23. Although such resolutions could not create customary international law, they might play an important role in its formation and identification. The purpose of paragraph 2 was to outline the possible effects of those resolutions and to highlight their evidentiary value. Indeed, the International Court of Justice often referred to them when determining the existence and content of a rule of customary international law, since they might codify a rule or declare that it existed. They might also catalyse State practice and *opinio juris* and thereby contribute to the development of customary international law.

24. In paragraph 3, the expression "may reflect" was essential, since the basic approach to the identification of customary international law applied to the resolutions of international organizations or intergovernmental conferences just as it did to treaties and much other written evidence. The purpose of such resolutions might be to reflect a customary rule and to capture its content in writing, but the existence of the two constituent elements of customary international law still needed to be ascertained. The purpose of paragraph 3, the language of which mirrored that of draft conclusion 11 [12], was to make that point clear.

25. The structure and content of draft conclusion 13 [14] (Decisions of courts and tribunals) had been revisited by the Drafting Committee in the light of the comments made during the plenary debate. In particular, it had decided that judicial decisions and writings should be dealt with in separate draft conclusions. Draft conclusion 13 [14] covered only the role of decisions of courts and tribunals as a subsidiary means of determining rules of customary international law. In order to ensure a broad understanding of the kind of decisions to which the draft conclusion referred, the Drafting Committee had employed the phrase "decisions of courts and tribunals" instead of "judicial decisions", since the latter term might be narrowly construed to cover only decisions of entities composed of judges. During the plenary debate, several members had cautioned against giving the decisions of national courts the same value as those of international courts and tribunals when identifying rules of customary international law. For that reason, the Drafting Committee had decided to deal with the decisions of international and national courts in two separate paragraphs.

26. After lengthy debate, the Drafting Committee had decided to retain the expression "subsidiary means" in paragraph 1 in order to indicate that, in that context, the reference to the decisions of international courts and tribunals had been taken from Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. The intention had been, not to downplay the practical importance of those decisions, but to situate them in relation to the other sources of law referred to in that Article. The term "subsidiary" was therefore to be understood in opposition to the primary sources. The commentaries would further clarify the meaning of that term.

27. In order to provide users with further guidance, the commentary to paragraph 1 would make it clear that the reference to the International Court of Justice did not seek to prescribe an institutional hierarchy, and it would clarify which kinds of international courts and tribunals were of relevance in the context. The commentary would also explain that the decisions in question encompassed interlocutory decisions, arbitral awards and advisory opinions. The Drafting Committee had replaced "identification" with "determination" for the sake of terminological consistency.

28. Paragraphs 1 and 2 were worded differently in order to underline the fact that the decisions of national courts did not play the same role in the determination of rules of customary international law as those of international courts and tribunals. The commentary would explain that the phrase "[r]egard may be had, as appropriate, to decisions of national courts" was intended to caution users that the value of a particular decision in that connection would depend on various factors, including the quality of the legal reasoning and whether the decision was based on international law. The term "subsidiary" had been retained in that paragraph for the same reasons as those applying to paragraph 1. It was, however, important to recognize the dual function performed by the decisions of national courts with regard to customary international law; such decisions could be a form of State practice and/or evidence of *opinio juris*, as well as a subsidiary means for the determination of customary rules. Those points would be further explained in the commentary.

29. As it had been decided to address judicial decisions and writings separately, draft conclusion 14 was devoted to the latter. It was entitled "Teachings" in order to match Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, the language of which it closely followed.

30. The Drafting Committee had understood the word "teachings" to be broad in scope and possibly to include teachings in non-written form, such as audiovisual material. The Committee had decided that, although the term "publicists" was somewhat dated, it was well understood and seemed apt in that context, since it tracked the language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. The commentary would indicate the breadth of the term in its current connotation. The expression "most highly qualified" indicated that only teachings of a certain quality might serve as a subsidiary means of identifying customary international law. The commentary would make it clear that the phrase "of the various nations" should be understood to cover teachings not only from different countries, but also from different regions and legal systems. The Committee had replaced "identification" with "determination", again for reasons of terminological harmony. The Drafting Committee had considered the suggestion made during the plenary debate that the Special Rapporteur draw up a separate draft conclusion on the relevance of the work of expert bodies, such as the International Law Commission, which engaged in the codification of international law. The Special Rapporteur had undertaken to address that matter in his forthcoming report with a view to including an explanation in the commentary.

31. Turning to Part Six (Persistent objector), the Chairperson of the Drafting Committee said that the Drafting Committee had been of the opinion that it would be somewhat artificial to combine the draft conclusions on persistent objectors and particular customary international law in a single part dealing with exceptions to the general application of rules of customary international law, as the Special Rapporteur had originally proposed. It had therefore decided to place the two draft conclusions in separate parts, to reverse the order in which they appeared and to place the draft conclusion concerning the persistent objector first, since the persistent objector rule might be relevant to particular customary international law. Most Commission members had been in favour of a draft conclusion on the persistent objector rule because, in practice, reliance was often placed on that rule in cases where a determination of the existence of a customary rule was sought. However, given the exceptional nature of that rule, the Drafting Committee had recognized the need to reflect the stringent requirements for a State to qualify as a persistent objector and to provide examples in the commentary.

32. Draft conclusion 15 [16] (Persistent objector) consisted of two paragraphs. The formulation of paragraph 1 had generated a wide-ranging debate, whose aim had been to reflect the aspects of temporality, emergence and continuity that were intrinsic to the persistent objector rule. The discussion had focused on how the phrase "persistently objected", as it appeared in the Special Rapporteur's initial formulation, was to be understood and on whether the adjective "new" before "rule of customary

international law" in that paragraph was better than "emerging" and "still emerging". The adverb "persistently" had been deleted from paragraph 1, since the requirement it implied was covered in paragraph 2.

33. The Special Rapporteur's initial proposal had also provided that the objecting State was "not bound" by the rule to which it objected so long as it maintained that objection. After a long exchange of views on how to reflect the relationship between a customary rule and a persistent objector, the Drafting Committee had agreed to use the term "opposable", which was understood in both its procedural and substantive dimensions.

34. As currently formulated, paragraph 1 sought to capture a process whereby an objection to a rule or its application was registered while the rule was in the process of formation—and thus before it had crystallized into a rule of law—and was thereafter maintained. It was thus a two-stage process characterized by a temporal element: the State must have objected to the rule "while that rule was in the process of formation", and once the rule had been formed, the State would not be bound by the rule "for so long as it maintains its objection". The burden of proof was on the objecting State when asserting its right to benefit from the persistent objector rule; once it had provided such proof, the rule was not opposable to it.

35. Paragraph 2, which was new, set out three stringent requirements for a persistent objection to be effective, as described in the Special Rapporteur's third report. The commentary would elaborate on what each of the three requirements entailed. The first, which was that the objection must be "clearly expressed", meant that the legal position of the objecting State must be made clear, either orally or in writing. The second, which was that the objection must be "made known to other States", was intended to provide for some flexibility in how the objector State's position was communicated to the other States concerned. The third, which was that the objection must be "maintained persistently", meant that the State must maintain its objection both persistently and consistently, in order not to be considered to have acquiesced to the rule. The adverb "persistently" related to all temporal phases of the rule's formation and existence. It had been noted, however, that it might be unrealistic to demand total consistency.

36. The Drafting Committee had also briefly discussed whether to include an additional paragraph to reflect the non-applicability of persistent objector status to a rule of *jus cogens*. That question had also been raised in the plenary Commission. It would be recalled that the Commission had decided not to deal with *jus cogens* in the context of the present topic and that the aforementioned question would best be addressed in the context of the separate topic "*Jus cogens*", which had been included in the Commission's long-term programme of work.

37. Part Seven (Particular customary international law) contained only draft conclusion 16 [15], which had the same title. There had been general agreement by members during the plenary debate to include a draft conclusion on that subject, although some members had expressed concern that it risked encouraging a fragmentation of international law. Its initial title, "Particular custom", had been changed in order to clarify that the draft conclusion related to particular customary international law and not to mere custom or usage among certain States. The formation of particular customary international law, much like that of general customary international law, required the existence of a general practice coupled with the acceptance of that practice as law (*opinio juris*).

38. That there were rules of customary international law that were binding only on certain States had been long recognized; such rules had variously been described in the case law and literature as "particular", "local" or "special", and had generally emerged in the form of regional or bilateral custom. With regard to the English text, a preference had been expressed for the word "particular", as opposed to "special", as it served as a better contrast to the term "general".

39. Paragraph 1 of draft conclusion 16 [15] had two components. The first indicated that a rule of particular customary international law could be regional, local or other. The commentary would describe instances in which such custom manifested itself regionally, locally or in other situations that might be based on a community of interest. The second component related to the applicability of rules of particular customary international law, the key consideration being that the rules in question applied only to a limited number of States. The reference to a "limited number of States" had to be appreciated in the context of paragraph 2, which referred to "the States concerned". In paragraph 1, the Drafting Committee had elected to use the term "applies" rather than to state that a rule of particular customary international law could be invoked by or against a State, or was binding on a State. The latter two terms were perceived as inviting questions about possible effects, and it was thought that they raised more questions than they answered. In contrast, the word "applies" had the virtue of simplicity: its *prima facie* meaning was factual and it was easily understood by the intended user.

40. Paragraph 2 addressed the substantive aspects of how the existence and content of particular customary international law were 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 the two-element approach described in draft conclusion 2 applied in that context as well. There had to be a general practice among the States concerned that was accepted by them as law. The only difference was that the general practice in question was that existing among the limited number of States concerned, the word "general" thus relating to the consistency of such practice.

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

42. For convenience, the text of the 16 draft conclusions provisionally adopted by the Drafting Committee had been set out in document A/CN.4/L.869. At the current stage, the Commission was not being requested to adopt the draft conclusions, which had been presented for information purposes only. The Special Rapporteur would begin preparing commentaries to the draft conclusions as well as his fourth report, which would address all other outstanding issues on the topic. The Drafting Committee recommended that the Commission provisionally adopt the draft conclusions early in its sixty-eighth session. The Special Rapporteur would then submit the accompanying draft commentaries to the Commission for consideration later in that session. That would enable the full set of draft conclusions and commentaries to be adopted on first reading by the Commission prior to the conclusion of its sixty-eighth session.

43. Sir Michael WOOD (Special Rapporteur) said that, in keeping with his proposed future programme of work, he intended to prepare an informal preliminary draft of the commentaries and make it available to Commission members for their comments and suggestions before the start of the sixty-eighth session. If time allowed, the draft commentaries could be considered by the Drafting Committee early in the session, which would greatly assist him in preparing them for formal submission to the Commission in good time for its consideration.

44. Mr. HASSOUNA, referring to draft conclusion 15 [16], asked whether the issue of persistent objection to a *jus cogens* rule, which was both important and controversial, would be referred to in the commentary to that draft conclusion.

45. Mr. KITTICHAISAREE asked whether, following the provisional adoption of the draft conclusions on first reading at the end of its sixty-eighth session, the Commission would leave a gap year in order to allow States time for reflection on the draft conclusions before the Commission adopted them on second reading.

46. Mr. McRAE said he sought confirmation of his recollection that, in draft conclusion 15 [16], paragraph 1, the Drafting Committee had decided to replace the words "so long as" with "as long as".

47. Mr. CAFLISCH asked at what point Commission members would be given the opportunity to comment on the set of draft conclusions.

48. Mr. FORTEAU (Chairperson of the Drafting Committee), responding to Mr. McRae's question, said that the latest version of draft conclusion 15 [16], paragraph 1, which had been provisionally adopted by the Drafting Committee, contained the expression "so long as". That said, the wording of that expression could be left to the discretion of the English-speakers of the Commission, as it was purely an editorial matter.

49. In response to Mr. Kittichaisaree's question, he noted that allowing one year for States to reflect on the draft conclusions would afford them the opportunity not only to comment on them orally in the Sixth Committee but also to submit written comments to the Commission.

50. Sir Michael WOOD (Special Rapporteur), responding to the point raised by Mr. Hassouna, said that the issue of persistent objection to a rule of *jus cogens* was indeed important; the commentary would mention that the issue had been raised and would be considered under the future topic of *jus cogens*. In response to Mr. Kittichaisaree's question, he would suggest that the Commission adopt the draft conclusions on first reading at its sixty-eighth session, leave a gap of one year in order to allow time for States to consider them and submit written comments, if they so desired, and subsequently adopt the draft conclusions on second reading at its seventieth session. The topic would benefit greatly from such an approach. Responding to Mr. Caflisch's question, he supposed that one appropriate time for Commission members to comment on the draft conclusions would be at the start of the sixty-eighth session, when the Commission would revisit them with a view to their provisional adoption, so that the commentaries thereto could be formally submitted and considered thereafter.

51. The CHAIRPERSON confirmed that the adoption of the draft conclusions on the identification of customary international law would be deferred to the Commission's sixty-eighth session, at which time members would have an opportunity to comment on them.

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

[Agenda item 1]

52. Mr. FORTEAU (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of provisional application of treaties was composed of Ms. Escobar Hernández, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Petrič, Mr. Tladi and Sir Michael Wood, together with Mr. Gómez Robledo (Special Rapporteur) and Mr. Vázquez-Bermúdez (Rapporteur, *ex officio*).

*The meeting rose at 11.30 a.m.*

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## 3281st MEETING

*Thursday, 30 July 2015, at 10.05 a.m.*

*Chairperson*: Mr. Narinder SINGH

*Present*: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gómez Robledo, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Kolodkin, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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