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Provisional summary record of the 3302nd meeting
Held at the Palais des Nations, Geneva, on Friday, 20 May 2016, at 10 a.m.

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Present:

Chairman:	Mr. Comissário Afonso
Members:	Mr. Caflisch
	Mr. Candioti
	Mr. El-Murtadi
	Ms. Escobar Hernández
	Mr. Forteau
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Ms. Jacobsson
	Mr. Kamto
	Mr. Kolodkin
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Identification of customary international law (agenda item 6) (*continued*) (A/CN.4/695)

Mr. Forteau said that he wished to thank the Special Rapporteur for his report, which had many commendable qualities, not least of which its concision. He also wished to thank the secretariat for its memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691), which was very useful and illuminating.

In sections II and III of the report, the Special Rapporteur had begun what could be referred to as a "first reading *bis*" of the draft conclusions provisionally adopted by the Drafting Committee and of which the Commission had taken note at the previous session without formally adopting them. The Special Rapporteur was to be commended on his efforts to take account, in real time, of the observations made by Member States. At the same time, it was important not to radically change the Commission's normal procedures. At the first reading stage, the Commission should adopt what it considered appropriate to propose; it was at the second reading stage that the draft conclusions should be amended, if necessary, in the light of comments and observations made by States. The Commission should continue to follow that order if it wished to maintain its independence as an expert body.

He agreed with the Special Rapporteur that, in response to the observations made by certain States, the commentaries to the draft conclusions should "provide the necessary additional depth and detail". In particular, it should be ensured that sufficient examples were provided in the commentaries so that readers understood how to go about identifying customary international law in practice. He also agreed with many of the observations made by the Special Rapporteur in section II of the report, particularly the fact that the draft conclusions aimed to assist in the determination of the state of customary international law at a particular time, and not to address the more general issue of how customary international law was formed. He also supported the Special Rapporteur's clarification in paragraph 26 of the report that the particular role played by the Commission in the identification of customary international law, which extended well beyond "scholarly work", would be highlighted in the commentaries to several of the draft conclusions. Indeed, international courts and tribunals — particularly the International Court of Justice and the European Court of Human Rights — attached particular weight and particular authority to the work of the Commission, as noted by the Special Rapporteur in paragraph 44, in which he recalled that the process of codification by the Commission furnished a convenient way of discovering the actual practice of States. The commentaries to the draft conclusions would have to be very explicit on that point. Lastly, he supported the sensible statement by the Special Rapporteur to the effect that the practice of international organizations could, in itself, contribute to the formation or expression of customary international law in certain cases.

With regard to the amendments proposed by the Special Rapporteur in section III of the report, since they involved only "minor" changes, he believed they could be dealt with by the Drafting Committee. The proposal in paragraph 35 was welcome, as it relaxed the definition of *opinio juris*. In addition, as Mr. Tladi had pointed out, it would be useful to retain the reference to "conduct in connection with resolutions adopted by an international organization" in draft conclusion 6 (2).

Turning to section IV of the report, which in his view dealt with a crucial issue, he said that, as he had repeatedly argued since the beginning of the consideration of the topic, the draft conclusions on the method of identifying customary international law had meaning only if, in parallel, international law practitioners had effective access to the elements that supported such identification and thus the establishment of customary international law in a way that was truly representative of the international community as a whole. Failing that, the method codified by the Commission would remain a dead letter, as custom would reflect only the position of States that had the means to disseminate their practice. He therefore welcomed the Special Rapporteur's intention to examine the means of making the evidence of customary international law more readily available.

There were two aspects to the issue addressed in section IV. The first, a normative matter that had to date been insufficiently explored by the Commission, involved determining what was meant by the word "available". Draft conclusion 7 (1) provided that account was to be taken of all "available" practice of a particular State, but it was necessary to know what was understood, from a legal perspective, by that word, whose definition would, of course, have an impact on the means of identifying customary international law. If "available" was taken to mean any document that existed, the task of those charged with identifying customary international law would be an impossible one, as it was difficult to see how all the practice of all the bodies of all States and international organizations could be searched for and found in a reasonable time frame. The matter would thus have to be considered further and limits would have to be put on what was to be understood by "available" in the context of the draft conclusions and the identification of customary international law. Inspiration could be drawn, for example, from the regime applied by the International Court of Justice to "readily available" evidence, which could be used at all stages of the proceedings since it was supposed to be known to the parties. The Court's Practice Direction IX *bis*, which was available on its website, provided in that regard that a document was considered readily available if it was part of a publication, in other words was in the public domain, and specified that the publication could be in any format (printed or electronic), form (physical or online, such as posted on the Internet) or on any data medium (on paper, on digital or any other media). It also stated that the publication was considered readily available to the extent that it was accessible both to the Court and the other party, which meant in particular that it should be possible to consult the publication within a reasonably short period of time. There was no need to specify references for documents whose source was well known, which according to the Court covered, for example, United Nations documents, collections of international treaties, major monographs on international law and established reference works. On the basis of those elements, it seemed that a particular effort should be made in the commentaries to help the users of the draft conclusions to determine the areas to which they should direct their research and how in-depth that research should be when it came to establishing practice and *opinio juris*. From that point of view, he supported the citation in footnote 51 of the report, which aptly stated that "one can never prove a rule of customary law in an absolute manner but only in a relative manner — one can only prove that the majority of the evidence *available* supports the alleged rule". Such sensible limits should also be applied to the draft conclusions because, in their absence, the methodology codified by the Commission would make it impossible to recognize the existence of even the most minor rule of customary international law.

The second aspect to the issue addressed in section IV was determining what the Commission could do to help enhance the dissemination of existing practice. On that point, he supported the Special Rapporteur's recommendation that it would be useful for the Commission to consider once more the issue covered in article 24 of its statute and his proposal that the secretariat should be requested to provide an account of the evidence currently available by updating the 1949 memorandum, including its recommendations. That said, times had changed and the Commission would have to take a slightly different approach. Since 1950, there had been two developments that had changed the way in which the question of availability of evidence was addressed and that necessarily had an impact on the recommendations the Commission could make in that regard. First, as had rightly been noted by the Special Rapporteur, there was an extraordinarily high number of publications, documents and examples of case law in the various branches of international law. In that context, what mattered most was not so much exhaustively collecting everything that existed — which would be impossible — but rather helping practitioners to find their way through the maze of publications by guiding them towards the most relevant sources for each subject. In other words, what practitioners needed was not an encyclopaedic digest, but rather a navigation system to help them get directly to the relevant source. The secretariat's new memorandum should be prepared with that in mind, in the form of a general mapping of all available resources and the places — physical or electronic — where they could be found. Secondly, as the Special Rapporteur also noted, many States had major difficulties in disseminating their practice, for financial and practical reasons. The Commission should give some thought to the recommendations it could make in order to help those States, for example by recommending to the international institutions and

organizations that financed university research projects to allocate a portion of such funding to projects that would facilitate greater dissemination of the practice of States that had difficulty in doing so. Similarly, a call could be put out to universities to support thesis projects dealing with unexplored areas of international practice. International law journals should also more systematically include a review of national practices in international law. National societies of international law, some 50 of which had assembled in Strasbourg in 2015 at the initiative of the French Society for International Law, culminating in the establishment of a global network of national societies of international law, should also be called on to contribute. At the institutional level, although the resources of the United Nations were limited, other recommendations could be formulated with a view to enhancing the collection and dissemination of State practice. The United Nations Development Programme had played a role in that regard in some States, as had the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law; the Codification Division should also play a leading role in that regard.

With regard to section V of the report on the future programme of work, he wished to make a comment on the form the final outcome of the Commission's work should take. To the extent that the draft conclusions and commentaries thereto were intended to guide the work of practitioners, it would be useful to give some consideration to the best way of presenting the final text. In general, the Commission presented its projects in the form of a set of draft articles or conclusions, accompanied by commentaries. If the intention was to adopt a methodological guide, it might be useful to take a different approach, starting with a brief introduction to explain the purpose, objective and content of the project, before inserting the draft conclusions accompanied by their commentaries. A brief index of key terms would allow readers to consult specific elements of practice, pointing them to the conclusions in which they would find answers to their questions. The bibliography should be annexed to the project and, ideally, be presented thematically, again to make the reader's task easier.

Mr. Hmoud said that the secretariat's memorandum on the role of decisions of national courts and tribunals confirmed, as the Special Rapporteur had noted in his oral introduction to the fourth report, the draft conclusions on the subject, namely draft conclusions 6, on forms of practice, 10, on forms of evidence of acceptance as law (*opinio juris*), and 13, on decisions of courts and tribunals. The memorandum also showed that the jurisprudence of the international courts and tribunals recognized the dual nature — as forms of State practice and as evidence of *opinio juris* — of the decisions of national courts, and also cited them as subsidiary means to determine the existence and content of rules of law, including rules of customary international law.

The approach adopted by the Special Rapporteur and the Commission struck the right balance between the need to draft flexible and practical conclusions, on the one hand, and the need to substantiate such conclusions on a solid basis, such as the decisions of the International Court of Justice, the legal positions and practice of States and their organs or the opinions of legal scholars, on the other, all the while maintaining the dynamism by which the rules of customary international law were created and identified. Furthermore, the commentaries were a particularly important component of the project and should be read together with the draft conclusions they were intended to explain in order to give practitioners the specific guidance they needed in order to be able to identify the existence of a rule of customary international law at a particular point in time. Nonetheless, although the conclusions were intended to provide guidance to practitioners, they were and should be an expression of *lex lata*, and some of them might need to be revisited on second reading based on the reaction of States. That was particularly true with regard to the conclusions concerning the practice of international organizations inasmuch as it contributed to the expression and creation of customary rules, or the role of the conduct of other actors. It would also be helpful for States to give their views on the role of silence or inaction as both an objective and subjective element.

The Special Rapporteur and the Commission had rightly decided not to widen the scope of the topic unduly to issues related to the content of the rules of customary international law or the process of the formation of such rules and the element of time.

Nonetheless, more substantial conclusions on certain issues, such as the transformation of a particular rule of customary law into a general customary rule, including the conditions relating to the general practice and the required *opinio juris*, could be useful for practitioners.

As to whether the term "guidelines" should be used rather than "conclusions" to describe the output of the work on the topic, he was of the view that the latter term should be retained because, even though they purported to be a guide to practice, they were in fact conclusions on the state of the law concerning the identification of customary international law.

Regarding the difficulty of assessing when a critical mass of practice accompanied by acceptance of law occurred, the Special Rapporteur rightly noted that that was not the purpose of the draft conclusions, which aimed to provide practitioners with the means to determine the existence and content of a rule at a particular time. It would be counterproductive to focus on the element of time, even though customary rules were created over time rather than at a particular moment in time.

Concerning the practice of international organizations, draft conclusion 4 (2) fell into the ambit of *lex ferenda* in that it indicated that, in certain cases, such practice contributed to the expression or creation of rules of customary international law because, as Mr. Murphy had explained, there was no evidence to support that proposition. Indeed, the forms of practice provided for in draft conclusion 6 involved only State practice. Paragraph 2 of draft conclusion 4 should therefore be worded in a less definitive manner, or at least confine the role of practice of international organizations at the current stage to an evidentiary role or a subsidiary role to State practice.

With regard to inaction or silence as a form of practice or evidence of *opinio juris*, it was necessary to exercise caution. It was therefore to be welcomed that both the relevant draft conclusion and the commentary thereto explained that, in order for silence to be considered a subjective element and proof of acquiescence, the State in question must have been in a position to react and the circumstances must have called for such a reaction.

The same caution had to be applied to the resolutions of international organizations and their evidentiary value in relation to the existence of a customary rule, as they had to be corroborated by State practice and *opinio juris*. As to whether the Commission's output came under the category of the "teachings" of the most highly qualified publicists, the subject of draft conclusion 14, he was of the view that, in the light of the Commission's statute and its mandate for the codification and progressive development of international law, its work should be treated separately, even though it was of subsidiary value in determining customary rules.

With regard to the persistent objector rule and the concept of particular customary law, due attention had been paid to the reservations expressed by certain delegations in both the relevant draft conclusions and the commentaries. As stated in the report, the persistent objector rule was subject to stringent conditions, in accordance with *lex lata*. As for particular customary law, its existence was widely recognized by States and international courts and tribunals; not mentioning its rules would have no effect in terms of the fragmentation of international law, as they already existed under international law.

Turning to the proposed amendments to the draft conclusions, he did not have strong views on the amended wording of draft conclusion 3, since it did not change the content. It was understood that the evidence of the existence of each of the two elements must be assessed separately. He had no objection to replacing the word "formation" with "creation" in draft conclusion 4 to conform to the language used by the International Court of Justice. He welcomed the deletion of the words "contributes to" in paragraph 1, which made it clearer that the practice of international organizations did not have the same value as that of States.

Concerning draft conclusion 6, the proposed deletion of forms of practice involving "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" was not strictly necessary, since it was clarified in the commentary that such conduct should be considered more as evidence of acceptance as law

than as practice. He had no objections to the proposed amendments to draft conclusions 9 and 12, although he believed it should be made clear in the commentary on the contribution of the resolutions adopted by international organizations to the development of customary rules that such resolutions did not themselves create customary rules but could corroborate State practice or *opinio juris*.

Making documentation on customary international law more readily available was the aspect of the Commission's mandate, set out in article 24 of its statute, which had received the least attention. The secretariat's 1949 memorandum and the Commission's report of the following year, based on Hudson's working paper, were the only two documents to address the issue. Many changes had taken place in the more than six decades since then: the quality of evidence reflecting State practice had improved, as had its volume; information technology had made such evidence more accessible; and there had been a proliferation of treaties codifying customary international law or creating new rules that were now part of general international law. Furthermore, much of the material available related to the practice of developed countries and States that wished to make their views on international law known. It would therefore be very useful if the secretariat were to revisit the issue, as proposed by the Special Rapporteur; it should explain in its future study the weight to be given to the various examples of State practice and *opinio juris*, including the resolutions of bodies of international organizations, provide a categorization of diplomatic and political correspondence, and give examples of other acts of State that could be pertinent in establishing the existence of a practice, *opinio juris* or both. The study should also include examples of the practice and *opinio juris* of States that were less actively involved in international relations and whose international law practice was less developed. Examples should be provided concerning the treatment of silence in the context of practice and *opinio juris*, as well as the practice of international organizations that had contributed or could contribute to the creation of rules of customary international law. From a practical perspective, it might be very helpful for the secretariat in performing the task if the Commission were to ask the General Assembly, in its resolution on the Commission's report, to call on States, to provide it with the necessary information for the study and respond to its enquiries.

Mr. Hassouna said that the review of the informal draft commentaries undertaken by the working group established for that purpose would certainly assist the Special Rapporteur in preparing the formal draft of his commentaries. The new method of work could be used for other topics under consideration; it had already been proposed in the past to circulate an informal draft of the commentaries among all Commission members so as to allow the Special Rapporteur to prepare his or her formal commentaries in the light of their views. Such a collective process of preparing draft commentaries or other legal texts could be considered in the years ahead as the Commission updated its methods of work.

He thanked the Special Rapporteur for widely consulting on the draft conclusions provisionally adopted by the Drafting Committee and participating in meetings at which they had been discussed, including a meeting of the informal expert group of the Asian-African Legal Consultative Organization (AALCO) on customary international law. He was gratified to learn that the Special Rapporteur seemed to consider the work of that group as generally perceptive and constructive based on the group's comments on the need for a rigorous and systematic approach to the identification of customary rules, the relevance of the practice of international organizations, the concept of "specially affected States" and the persistent objector rule.

Other comments made by the AALCO group of experts were also worthy of mention, particularly given that the Organization's Secretary-General had been unable to present them, as he had had to cancel his visit to the Commission. For example, the group of experts had noted that the outcome of the work should serve to protect State sovereignty; that only the exercise of State functions in the field of international relations was relevant to the formation of customary international law; that the evidence to be relied upon should be primary materials — secondary materials such as the decisions of the international courts and tribunals could be given weight only if they were well supported by primary materials; that the two-element approach was the proper one, but that the uneven rigour with which international courts and tribunals applied it in their decisions to identify the rules of

customary international law was a matter of concern. With regard to the relations between treaties and custom, the identification of a rule of customary international law should be conducted in the normal way, on the basis of the two-element approach, with treaties as part of the materials to be considered either as practice or acceptance as law.

The comments and suggestions made by States in the Sixth Committee in 2015 demonstrated that they were overwhelmingly supportive of the approach adopted by the Commission. As a result, the proposed amendments to the draft conclusions, set out in section III of the report, improved the clarity and consistency of the provisions and were not controversial. Delegations had, however, expressed concern with regard to draft conclusion 4 (2), according to which "in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law." Some delegations had argued that the paragraph should be deleted, but the Special Rapporteur appropriately took the view that the contribution of international organizations to the formation of customary norms was recognized under international law and should not be controversial. At the same time, he had also rightly proposed explaining in the commentary that the practice of international organizations must be appraised with caution, as they varied greatly in their membership and functions. It seemed helpful, both to alleviate the aforementioned concerns and to provide practical guidance to those called upon to identify rules of customary international law, which was the central aim of the Commission's work on the topic, to give examples of cases in which the practice of international organizations had been found relevant to the identification of customary norms.

As to the other proposals made by States in the Sixth Committee, they related to issues that had already been discussed in the Commission and on which the members' views had been fully expressed and, as such, there was no need to revisit them.

Section IV of the report dealt with the need to make the evidence of international customary law more readily available. It referred to various ways of achieving that objective, including the wide distribution of publications on customary international law, the publication of information provided by States in response to requests made by the Commission and the publication of State practice. In his view, there were a number of challenges in that regard: first, the financial implications for the secretariat of preparing and disseminating such publications on a wide scale; second, the rather limited number of States, particularly developing States, that responded to the Commission's questionnaires; and third, the fact that only a small number of States published their practice. Despite those challenges, the Special Rapporteur's outline of the history of the Commission's previous work on the topic and the changes that had occurred in the meantime, including, in particular, the new forms of evidence and the new technologies available to access them, convincingly demonstrated that a renewed consideration of the issue by the Commission, which would take such changes into account, would be of significant benefit to practitioners. In that respect, he supported the proposal to request the secretariat to provide an account of the evidence currently available by updating the general survey of compilations and digests of evidence of customary international law. He also believed that an investigation into the Committee of Legal Advisers on Public International Law's model for the classification of documents pertaining to State practice could be a helpful starting point. He considered most of the Special Rapporteur's proposed amendments to the draft conclusions in the light of the suggestions and comments made since the Commission's sixty-seventh session acceptable. However, he was of the view that they should be referred to the Drafting Committee for a final "clean-up", as the Special Rapporteur would say.

As to the future programme of work, it was his hope that the first reading of the draft conclusions and the commentaries thereto could be completed at the current session so that a second reading could take place in 2018, although amendments to the draft conclusions and their commentaries were still possible on both first and second reading. It would be useful to annex a bibliography to the report; in order to be truly comprehensive and representative, the bibliography should cite sources from all regions, legal systems and languages.

Mr. Candioti, noting that the draft conclusions covered only one part of the topic under consideration, namely the identification of customary international law, when

"locating" customary international law was just as important, said that all those who had taken the floor had highlighted the importance of preparing a memorandum on available evidence to update the 1949 study. That practical part − where to look for and find customary international law in the available sources − could take the form of an annex to the draft conclusions. He also supported Mr. Forteau's proposal to add an introductory note to precede the draft conclusions.

Mr. Park thanked the Special Rapporteur for his introduction to his fourth report and for the addendum containing a selected bibliography, and welcomed the secretariat's memorandum on the role of decisions of national courts. He said that the 25 observations set out in the memorandum would help clarify the content of draft conclusions 6 and 13 with regard to the role of decisions of national courts in determining customary international law. He drew attention to the fact that, in the English version, the words "identification" and "determination" were used interchangeably, whereas in the French version both had been translated as "*détermination*".

The fourth report was concise but provided a good summary of the comments and suggestions made by States concerning the 16 draft conclusions provisionally adopted by the Drafting Committee in 2014 and 2015, on the basis of which the Special Rapporteur had proposed amendments to some of the draft conclusions. In paragraph 27 of the report, the Special Rapporteur stated that "the inclusion of a draft conclusion on the persistent objector rule was supported by almost all delegations who addressed the matter in the Sixth Committee, indicating widespread agreement that the rule does form part of the corpus of international law". However, as the persistent objector rule was still controversial among scholars and there was insufficient State practice in that area, the aforementioned passage might be misunderstood by legal practitioners who were not so familiar with the theory of international law.

Concerning section III of the report, the Special Rapporteur's proposed amendments to draft conclusions 3 and 9 were essentially editorial changes, while those to draft conclusions 4, 6 and 12 were substantive. With regard to the latter and, in particular, the proposed amendment to draft conclusion 4, he noted that, in paragraph 32, the Special Rapporteur justified replacing the words "formation, or expression" with "expressive, or creative" on the grounds that that formulation drew inspiration from the language of the 1982 International Court of Justice judgment in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. He was not convinced by the reasoning behind that proposed amendment, as the word "creative" in the English version seemed less commonly used than the words "formation, or expression".

As to draft conclusion 6, in which the Special Rapporteur proposed deleting the phrase "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" on the grounds that such conduct was more often useful as evidence of acceptance as law (*opinio juris*), in his view, what was more important was whether States complied with or ignored the resolution adopted rather than how they had reacted when adopting the resolution. Their conduct in that context could become important evidence not only of acceptance as law (*opinio juris*), but also of the existence of practice; he would therefore prefer the text adopted by the Drafting Committee not to be amended.

Turning to draft conclusion 12, which dealt with the effect of resolutions of international organizations and intergovernmental conferences on customary international law, he noted that, in paragraph 37 of the report, the Special Rapporteur stated that his proposal to delete the words "or contribute to its development" in paragraph 2 was intended to better focus the draft on the identification of customary international law and that the potential contribution of resolutions of international organizations and intergovernmental conferences to the development of the law could be covered in the relevant commentary. However, it was well established that such resolutions could contribute to the development of customary international law. Furthermore, the Special Rapporteur had himself acknowledged the pertinence of the issue of the formation of customary international law in paragraph 16 of the report. Consequently, he would prefer to keep the text adopted by the Drafting Committee as it stood.

At the end of section IV of the report, on ways of making the evidence of customary international law more readily available, the Special Rapporteur said that he would welcome the views of members of the Commission on whether, and if so how, the matter should be revisited. Given that the term "evidence" in the English version had been translated as "*documentation*" in the French version, the question might be interpreted as having to do with how to proceed effectively and appropriately with the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, as provided for in article 24 of the Commission's statute. However, in his view, that was not necessarily the most pressing question: in the information era, the question was rather how to collect and publish the relevant documents, on the one hand, and how to classify and evaluate such information, on the other. Moreover, the changing nature of customary international law should not be ignored. Indeed, State practice could be contradictory, inconsistent or evenly divided when it came to the implementation of certain international instruments. With respect to the United Nations Convention on the Law of the Sea, for example, the question of whether the "rocks" referred to in article 121 (3) could be considered to be islands when they had been modified and enlarged by a State had not yet been decided. Similarly, there were differing interpretations of articles 58 and 59 concerning whether a State could carry out military manoeuvres in the economic zone of another State without the latter's consent. Concerning the delimitation of the exclusive economic zone and of the continental shelf, provided for in articles 74 and 83, respectively, some States preferred the equidistance method, while others preferred the principle of equity, in view of the circumstances. The creation of an air defence identification zone could also be contrary to the rules of international law, particularly the freedom of the high seas. At the plenary meeting of the Conference on Disarmament in Geneva in 2016, many States had insisted on the need for the complete removal and destruction of nuclear weapons from nuclear arsenals, relying on the advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*. Was that the sign of the emergence of new *opinio juris*? Or were nuclear-weapon States trying to test draft conclusion 15 on the persistent objector rule *vis-à-vis* emerging rules of *jus cogens*?

He did not have any clear answers on those issues but, through those examples, he wished to emphasize that it was not sufficient to compile the evidence of customary international law, but also important to accurately analyse State practice and select the most reliable evidence for collection or publication. The question of whether, and if so how, the matter should be revisited should be put to States and be included in the annex to the draft conclusions, as had been done for the conclusions on the reservations dialogue adopted by the Commission in 2011, which had been annexed to the Guide to Practice on Reservations to Treaties. States and international organizations should periodically review and publish their practice concerning customary international law because the cooperation of States would be crucial to the availability of documentation.

Ms. Escobar Hernández thanked the Special Rapporteur for his fourth report on the identification of customary international law and commended him on the work he had carried out during the quinquennium, thanks to which the Commission would be able to adopt all of the draft conclusions and commentaries thereto at the current session. She said that the Special Rapporteur had faithfully followed the workplan he had announced in 2012; the result he had achieved largely corresponded to the objective he had set, namely the preparation of a document to help legal practitioners, particularly at the national level, to identify the existence of customary rules and their content. She had no doubt that, under the capable chairmanship of Mr. Vázquez-Bermúdez, the working group tasked with examining the informal draft commentaries proposed by the Special Rapporteur would be able to present a new version of the draft for consideration and adoption in the plenary.

She also wished to express her sincere congratulations to the secretariat for its memorandum on the role of decisions of national courts. The highly interesting and well-structured memorandum added considerably to an understanding of the reasoning followed by international courts and tribunals in their consideration of the decisions of national courts. The memorandum, particularly general observations 23, 24 and 25, which were especially important, should be reflected in the final outcome of the Commission's work,

for example in the commentaries, and more specifically in the general commentary mentioned in paragraph 13 of the report.

Before addressing the amendments proposed by the Special Rapporteur, she wished to comment briefly on two issues touched on in paragraphs 12 and 14 of the report: the final outcome of the Commission's work — conclusions or guidelines — and the statement that the conclusions and commentaries thereto should be read together as an indissoluble whole. Those two issues were closely linked, since the outcome of the work would largely depend on the content of the draft conclusions and commentaries thereto. It should be noted in that regard that their current form did not seem fully consistent with the stated objective of adopting a "guide to practice". The Special Rapporteur's proposal to wait until the second reading to decide on the final outcome of the work thus seemed a sensible one. With respect to Mr. Murase's proposal to include the bibliographical references in the final outcome of the project, she was of the view that the contribution of teachings to the identification of customary international law could not be ignored in the commentaries, particularly as, according to the draft conclusions, teachings constituted a "subsidiary means" of identification. It thus did not seem justified to delete all bibliographic references from the commentaries, although an effort should be made to ensure that they were concise. The Special Rapporteur had made an effort to draw up a bibliography that helpfully provided the relevant references systematically and in groups. In addition to individual references to particular teachings, the commentaries could include a generic reference to the bibliography, and mention could be made of the role of teachings in a general commentary. She supported the approach outlined by the Special Rapporteur in paragraph 16 of the report, which was more balanced in respect of the debate in the Commission on the pairing of identification/formation of custom.

Turning to the Special Rapporteur's proposed amendments to draft conclusions 6 and 12 and the question of the weight to be given to the practice of international organizations, she said that such practice undeniably contributed to the formation of customary international law, both directly and through the will expressed by States during the process of adopting resolutions and through their subsequent conduct in that regard. That contribution was not in any way extraordinary or exceptional; quite the opposite, in fact. She could therefore not support the amendments proposed by the Special Rapporteur concerning those two draft conclusions. The phrase "conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference" referred to a relevant form of practice that must be taken into account in the identification of customary international law. The Special Rapporteur's proposal to delete the word "cannot" in draft conclusion 12 (1) was also inappropriate, as the paragraph would be overly categorical if thus amended. It would call into question the relationship between the resolutions of international organizations and customary international law and would not accurately reflect reality. Furthermore, deleting the words "or contribute to its development" in draft conclusion 12 (2) would be to disregard the debate in the Commission on that point. Given that the reference to international organizations was the result of a compromise between the various proposals made by members, it would be ill-advised to amend the version adopted on first reading.

The concerns expressed by certain States, which the Special Rapporteur described in paragraph 25 of the report, could be better addressed through the commentaries, including by referring to several objective indicators of the contribution of the resolutions of international organizations. It was also important to clearly highlight the difference between the role of States, international organizations and other non-State actors in the process of forming customary law and, consequently, the differing relevance of their respective practice for the purpose of identifying the material element of custom. Since that distinction was adequately reflected in the current draft conclusion 4, that provision should be left as it was. Any amendment would only upset a delicate balance and could give the impression that the Commission wished to minimize the contribution of the practice of international organizations.

She had no objection to the proposal to replace the word "formation" with "creation", as it was not a substantive amendment. However, it seemed that it referred, at least in the Spanish version, to an intentional element, which was not really in line with the informal

nature of the customary process. If that proposal were accepted, the necessary clarification would have to be provided on that point in the commentary.

She agreed with the Special Rapporteur's comments concerning the special rules on the persistent objector and particular custom, which adequately reflected the Commission's previous work. A set of draft conclusions on the identification of customary international law would not be complete without an express reference to particular custom, particularly regional custom. She also supported the Special Rapporteur's observations on the issues to be addressed in the commentary. His comments on the persistent objector were also relevant, although it should be borne in mind that States sometimes made objections on a purely provisional and strategic basis before expressing a definitive position, which often led to the rule in question being ultimately accepted. Perhaps that point could be reflected in the commentary.

The Special Rapporteur's proposal to indirectly reflect in the commentaries to the relevant draft conclusions the role of the Commission in the identification of customary international law was not the most appropriate solution, as it did not take into account one particularly important element: the Commission was not a "university" body or similar structure, but a subsidiary body of the General Assembly tasked with the codification and progressive development of international law. Accordingly, it had contributed and was called on to contribute significantly to the process of identifying customary international law — as illustrated by the repeated references to its work by international courts and tribunals, for example. The best way of resolving the issue would therefore be to draft a separate draft conclusion. Once again, referring to the work of the Commission in the commentary to the draft conclusion on teachings was not the most appropriate solution. She supported the Special Rapporteur's proposals concerning the future programme of work and agreed that it would be very useful for the secretariat to prepare a report on the means of making evidence of customary international law more readily available. It had been many years since the publication of the first study on the subject; the changes that had taken place following the appearance of the Internet and new technologies must be taken into account to ensure better representation of the various legal cultures and different regional and interest groups. In conclusion, she supported referring the proposed draft conclusions to the Drafting Committee.

Mr. Kolodkin thanked the Special Rapporteur for his introduction to his fourth report and for his informal draft commentaries, which the working group had already had the chance to consider. He also thanked the secretariat for its memorandum on the role of decisions of national courts.

He supported most of the specific amendments proposed by the Special Rapporteur. However, he did not consider the proposed amendments to draft conclusion 4 (1), particularly as regards the Russian version, to be appropriate, even though they had been inspired by the judgment of the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. As originally worded, paragraph 1 stated that the practice of States, while important, only contributed to the formation or expression of rules of customary international law. If amended as proposed by the Special Rapporteur, it might be interpreted to mean that practice could, in itself, create a rule of customary international law. In his view, paragraph 1, as currently worded, was not incompatible with the Court's judgment and there was no reason to amend it.

Concerning the Special Rapporteur's proposal to replace the word "establishing" with "determining" in draft conclusion 12 (2), he would prefer the verb "determine" not to be used systematically throughout the draft articles. That word was generally associated with authoritative decisions by courts, tribunals and other competent bodies, such as the International Court of Justice, with respect to the existence of rules of customary international law and their content, while the English word "identification" generally referred to the establishment of the existence of customary rules and their content, not only by the aforementioned bodies, but also by practitioners of international law. Accordingly, it would be preferable to use "identification" in the English version or to use "identification" and "determination" interchangeably. He would like his comments to be taken into consideration by the Drafting Committee.

Although the Special Rapporteur's proposal to request the secretariat to prepare a report on the evidence of customary international law seemed at first glance interesting, he was of the view that the Commission should not rush to take a decision on that matter. The United Kingdom of Great Britain and Northern Ireland had recently submitted to the Council of Europe's Committee of Legal Advisers on Public International Law a proposal to update the amended model plan for the classification of documents concerning State practice in the field of public international law, which was along the same lines as the Special Rapporteur's proposal. The proposal by the United Kingdom had not garnered much enthusiasm in the Committee, perhaps because its implementation would require the mobilization of resources not available to all States. Consequently, he proposed that the Commission should limit itself for the time being to requesting the secretariat to prepare the document in question, without specifying, as the Special Rapporteur had done in paragraph 49 of the report, that that would constitute an initial step. Once members had received the document, they could resume consideration of the matter. It would be worth consulting States in order to ascertain whether they considered it appropriate for the Commission to deal with that subject.

Mr. Petrič said that he had doubts about the appropriateness of the Special Rapporteur's proposed amendments to draft conclusions 6 and 12. However, as the proposals were editorial in nature and did not give rise to any objections concerning their substance, he was sure that the Drafting Committee would be able to resolve the problems raised. With regard to the future programme of work, he unreservedly supported the Special Rapporteur's proposal that the ways and means of making the evidence of customary international law more readily available should continue to be considered, since it was a crucial problem which required long-term solutions.

Organization of the work of the session (agenda item 1) (*continued*)

The Chairman invited the Chairman of the Drafting Committee to announce the composition of the Drafting Committee on crimes against humanity.

Mr. Šturma (Chairman of the Drafting Committee) said that the Drafting Committee on the topic crimes against humanity was composed of Ms. Escobar Hernández, Mr. Forteau, Mr. Hmoud, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood, together with Mr. Murphy (Special Rapporteur) and Mr. Park (Rapporteur), *ex officio*.

The meeting rose at 11.55 a.m.