International Law Commission
Sixty-eighth session (first part)

Provisional summary record of the 3303rd meeting
Held at the Palais des Nations, Geneva, on Tuesday, 24 May 2016, at 10 a.m.

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Chairman: Mr. Comissário Afonso

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Mr. El-Murtadi
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. 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.4/691 and A/CN.4/695)

The Chairman invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the identification of customary international law (A/CN.4/695).

Mr. Šturma said that he wished to commend the Special Rapporteur on his report, which was well structured, clear and well documented, and to thank the secretariat for its extremely useful 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).

Like Mr. Forteau, he was not convinced that the Special Rapporteur’s proposal to modify, in the light of comments made by States, some of the 16 draft conclusions provisionally adopted by the Drafting Committee was wise at the current juncture. That said, some of the proposed modifications, namely those relating to draft conclusions 3, 4 and 9, were purely a matter of drafting and were mostly acceptable. He would therefore confine his comments to the proposed amendments to draft conclusions 6 and 12, which were more substantive in nature.

The reasons given by the Special Rapporteur in paragraph 34 of the report for the proposed deletion, in draft conclusion 6 (2), of the phrase “conduct in connection with resolutions adopted by an international organization or an intergovernmental conference” was unconvincing. First, while such conduct might often be useful evidence of *opinio juris*, it could also be relevant as State practice, depending on the kind of conduct in question. Put simply, it was important to distinguish between words and deeds. Secondly, the same paragraph of draft conclusion 6 included as a form of practice “conduct in connection with treaties”. He agreed with the Special Rapporteur’s analysis regarding the role of treaties contained in paragraph 24 of the report, in particular the assertion that ascertaining whether a conventional formulation corresponded to an alleged rule of customary international law could not be done simply by looking at the text of a treaty, but that in each case the existence of that rule would have to be confirmed by practice. If that was so, then a particular importance would be attached to the practice of third States. He therefore saw no major difference between the conduct of such a State in connection with a treaty — which was not binding on it as treaty law — and the conduct of a State in connection with recommendatory resolutions of international organizations or conferences. In both cases, it was the conduct of the State which was able to form a custom-creating practice.

Concerning draft conclusion 12, he supported the view that a resolution adopted by an international organization or an intergovernmental conference did not, of itself, create a rule of customary international law. However, like other colleagues, he was against the deletion of the phrase “or contribute to its development” in the second paragraph, since he saw no reason to deny that such a resolution might also contribute to the development of customary international law.

With regard to other aspects of the report, he mostly supported the analyses presented by the Special Rapporteur, including his analysis of particular customary international law contained in paragraph 29. He agreed that some rules which originated in one region might ultimately be embraced as part of general international law.

A further review by the Commission of ways and means for making the evidence of customary international law more readily available would be most welcome. Databases covering State practice in the field of public international law, such as those developed by
the Committee of Legal Advisers on Public International Law (CAHDI), might be a good model for such an endeavour.

In conclusion, he recommended that all the draft conclusions should be referred to the Drafting Committee.

Mr. Laraba congratulated the Special Rapporteur on the masterly way in which he had made a particularly complex subject eminently accessible. He said that he also wished to thank the secretariat for its excellent memorandum, which would help judges, government officials and practitioners to appreciate the importance of the interaction between domestic law and international customary law.

He endorsed the view that the proposed minor modifications to the draft conclusions should be examined in the Drafting Committee. The Special Rapporteur’s detailed analysis of the debates in the Sixth Committee showed that States generally accepted the draft conclusions, but that some questions still remained as to the nature of customary international law, its formation and the crucial point in time at which a customary rule emerged. It would undoubtedly be wise to provide answers to some of those questions in the commentaries and to defer a response to others, such as the use of the term “conclusions”, until the second reading.

Turning to section IV of the Special Rapporteur’s report, he said that improving the accessibility of evidence of customary international law was indeed of paramount importance. While advances in information technology had completely transformed the way in which access to such evidence could be made available — and members had made some valuable suggestions in that connection — it had to be remembered that those developments did not concern a very large number of States, contrary to what was said in the passage cited in footnote 46 of the report. Similarly, he was sceptical whether those advances had eliminated the gap between States and by that he did not mean States’ reluctance to place manifestations of their practice on record, but rather an issue discussed by the Special Rapporteur in paragraphs 16 and 38 of his report.

In paragraph 16, it was noted that several delegations had suggested that the formation of customary international law should not be overlooked in the draft conclusions and commentaries. As the Special Rapporteur stated therein, the identification of the existence and content of a rule of customary international law might well involve consideration of the processes by which it had developed. That viewpoint had also been expressed in the course of debates in the Sixth Committee; for instance, one State had requested that the draft conclusions should be more detailed, while others had asked for the inclusion of examples of practice in the commentaries or had referred to the difficulty in determining the precise moment when a rule of customary international law was formed. All those comments indicated that the knowledge and grasp of a subject, the essence of which still remained somewhat of a mystery, varied from one group of States to another. That reality should not be ignored or underestimated.

In paragraph 38, the Special Rapporteur drew attention to the fact that the practical challenges of access to evidence in order to ascertain the practice of States and their opinio juris were closely linked to the nature of customary international law as lex non scripta. Read together, paragraphs 16 and 38 were a reminder of the topic’s primary purpose, namely to produce a set of practical conclusions with commentaries, aimed at assisting practitioners and others in the identification of rules of customary international law. That aim should not be forgotten, since, ultimately, the success of the draft conclusions would depend on whether all those for whom they were intended could understand and accept them. That was not a foregone conclusion in some States where practitioners had been raised not in a culture of lex non scripta, but one in which written law was considered sacred. The principle of giving primacy to international law, which was enshrined in certain
constitutions, concerned only treaty law. If the situation were to evolve towards a greater acceptance of customary international law, it might prove necessary, in some countries, to raise awareness among judges and prosecutors of the existence of international customary law, to give them access to evidence of it and to train them in its application in national courts. The progress made in applying human rights conventions in the Maghreb and the Middle East thanks to the academic activities of the Amman Office of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law showed what a valuable role training institutions could play in that respect.

Mr. Kamto said that he wished to congratulate the Special Rapporteur on his remarkable fourth report. The formation and identification of customary international law was an area of international law where learned writers vied with one another to introduce new theories peppered with brilliant turns of phrase which often delighted students, but rarely offered States and practitioners the rigour and precision required to tackle such a delicate and often controversial matter. According to one such theory, customary international law was “spontaneous law”. Mr. Roberto Ago, who had introduced that concept, was such an eminent lawyer that the pertinence of his assertion had probably never been explored sufficiently. Customary international law was not spontaneous law. The customary process was a tortuous mode of forming a rule of law. The very idea that customary international law was a general practice accompanied by *opinio juris*, which was understood to mean “acceptance” or a “sense of legal obligation”, gave the lie to any idea of spontaneity. It clearly reflected the fact that *opinio juris* was a conscious act entailing some deliberation — which was not necessarily synonymous with consent — whereas a spontaneous act involved no forethought and might often be regretted later by the person who had engaged in it on the spur of the moment. For that reason, he endorsed the Special Rapporteur’s statement in paragraph 17 of his report that “the creation of customary international law is not an event that occurs at a particular moment”.

He fully supported the Special Rapporteur’s caution in dealing with the contribution made by the resolutions and practice of international organizations to the formation of customary international law. In an effort to show that non-binding resolutions of international organizations, especially those of the United Nations General Assembly, could produce legal effects, writers had also posited that *opinio juris* could precede practice. That was an aporia. If *opinio* preceded practice it could not be *opinio juris*, because what was needed for *opinio* to be *opinio juris* was not yet in place at that moment. The sense of law which, together with a general practice, formed customary law did not exist as such; it produced the desired legal effect only because the practice which gave rise to such a feeling was in place. In the absence of that practice, any *opinio* could exist only in regard to the resolution that existed at that time and not to a string of resolutions or States’ subsequent conduct *vis-à-vis* the series of resolutions which would contribute to the formation of a customary rule as general practice.

Like Mr. Tladi, he was of the view that it would be difficult to delete all reference to the term “formation” in the draft conclusions contained in the Special Rapporteur’s fourth report. Not only was the term employed throughout the report but, as Mr. Laraba had noted, the Special Rapporteur, in paragraph 16 of the fourth report, agreed that the identification of the existence and content of a rule of customary international law might well involve consideration of the processes by which it had developed. Furthermore, the Special Rapporteur acknowledged that the draft conclusions indeed referred in places, explicitly or otherwise, to the formation of rules of customary international law. The matter should be resolved by the Drafting Committee, to which all the draft articles contained in the report should be referred.

Like a number of other colleagues, he still thought that the role of the Commission’s work in the identification of international customary law must be dealt with separately; first,
on account of its special status compared with classic theoretical sources and, secondly, on account of the Commission’s unique working method which, albeit long and slow, allowed a collective deliberation that guaranteed the quality and authoritative nature of the final product. In that regard, he commended the outstanding support provided by the secretariat, in particular its excellent memorandum, and endorsed the Special Rapporteur’s proposal to request the Secretariat to provide an account of the evidence of customary international law currently available and on ways and means of making it more accessible.

Mr. Vázquez-Bermúdez said that he wished to thank the Special Rapporteur for his report, which contained important elements for consideration by the Commission, particularly with regard to making the evidence of customary international law more readily available. He also wished to thank the secretariat for its memorandum; the observations contained therein were in line with the Commission’s conclusions in considering the decisions of national courts both as forms of evidence of the two constituent elements of customary international law and as subsidiary means for the determination of a rule of customary international law.

As to the use of the term “conclusions” to describe the outcome of the Commission’s work, he agreed with the Special Rapporteur that the matter should be considered on second reading. In any event, it should be noted that, although the draft conclusions were intended to provide guidance to legal practitioners, they were drafted more in the form of conclusions than actual guidelines. Regarding the degree of detail of the draft conclusions, while some conclusions might at first sight seem rather general, they were in fact broad — even complex — in content and scope; hence the importance of their being read in conjunction with the commentaries.

He had no problem with the expressions “identification of customary international law” and “determination of customary international law” being used interchangeably. The matter could, however, be revisited on second reading. As to the relevance of inaction as evidence of opinio juris, the legal significance of inaction by a State in response to the practice of another State should be sought not in an alleged acquiescence, which in practice would amount to a tacit consent, but rather in the possibility of attributing to such inaction the belief that the practice in question was mandated or permitted under customary international law. In short, silence or inaction must reflect opinio juris. The Special Rapporteur seemed to share that understanding in paragraph 22 of the report.

Turning to the proposed amendments, he said that he had no objection to clarifying the text of draft conclusion 3 (2) by indicating that “each of the two elements” was to be separately ascertained. With regard to draft conclusion 4, the current wording adequately reflected the primary role of State practice and the role played in some cases by international organizations in the formation and expression of customary international law. It was not advisable to further downplay the importance of the practice of international organizations, which were important subjects of customary international law. The proposal to replace, in paragraph 1, the phrase “that contributes to the formation, or expression,” with “as expressive, or creative,” should be discussed in the Drafting Committee.

Regarding the Special Rapporteur’s proposal to delete, in draft conclusion 6 (2), the reference to “conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference”, the fact that such conduct might also be useful as evidence of acceptance as law (opinio juris) did not mean that its usefulness as evidence of State practice should not be recognized. He did not, therefore, consider that the deletion was warranted.

The current formulation of draft conclusion 9 (1) was correct if viewed from the perspective of the State or States that developed a practice based on a belief in the existence of a legal obligation or right. However, if the intention was to refer to the opinio juris of
both States that developed the practice and third States, then the proposed amendment was appropriate.

With regard to draft conclusion 12, he supported the proposal to replace, in paragraph 1, the word “cannot” with “does not”. As to paragraph 2, while he could understand the Special Rapporteur’s wish to replace the word “establishing” with “determining” to ensure greater terminological consistency, he pointed out that, in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice had used the word “establish”. He did not support the proposal to delete the words “or contribute to its development” in that paragraph, since the contribution of resolutions to the development of customary international law was sufficiently important to deserve a mention in the draft conclusion itself and not merely in the commentary. He recalled that, in the aforementioned advisory opinion, the Court had stated that “General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris.”

He welcomed the fact that the Commission would consider once more ways and means for making the evidence of customary international law more readily available, after more than 65 years. There had obviously been major changes in the intervening period, particularly as a result of the availability of digital tools. He supported the proposal to request the secretariat to prepare a new study on the matter. It would, of course, also be important to receive input from States; in that connection, it would be particularly helpful if the General Assembly could recommend States to submit written comments, in addition to any statements they might make in the Sixth Committee. Such contributions, together with the memorandum, would provide the Commission with a firm basis to debate the topic with the thoroughness it deserved. He supported the future programme of work and the final outcome of the topic proposed by the Special Rapporteur.

Mr. Hmoud, referring to the role of inaction and silence, said that, in the Fisheries (United Kingdom v. Norway) case, the International Court of Justice had actually recognized acquiescence in that regard; the Commission would do likewise in the future commentaries to draft conclusion 10 (3) and (7).

The Chairman, speaking as a member of the Commission, said that he wished to congratulate the Special Rapporteur on his excellent fourth report and to thank the secretariat for its very rich memorandum. As to whether to use the term “conclusions” or “guidelines” to describe the Commission’s output on the topic, either term would be acceptable, but his preference would be to stick to the word “conclusions”, which seemed less rigid and less dogmatic.

While he agreed that draft conclusion 1 was not strictly a conclusion, it should be retained, since it provided readers with a useful introduction to the topic. In that connection, he tended to agree with Mr. Murase that it might be helpful to provide a definition of the concept of customary international law. He therefore suggested that the title of the draft conclusion should be changed from “Scope” to “Introduction” and that the text should be improved and expanded.

Regarding draft conclusion 4, he would rather maintain the phrase “that contributes to the formation, or expression” in paragraph 1, and include in the commentary the terms “expressive or creative”, as used by the International Court of Justice in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya). He supported the Special Rapporteur’s decision to retain the reference, in paragraph 2, to the contribution of the practice of international organizations to the expression or creation of rules of customary international law; the commentaries clearly underlined the caution required in appraising such practice.
He welcomed the Special Rapporteur’s wise decision to maintain draft conclusion 15 on the persistent objector rule and to emphasize in the commentary the stringent requirements associated therewith. In certain parts of the world, that legal mechanism could help right some wrongs of history; rejecting it out of hand could only contribute to the further fragmentation of international law.

He endorsed the proposed future programme of work and final outcome of the topic. His only reservation concerned the idea of the bibliography, which, at a time of strong academic dynamism, might be quickly superseded and possibly outdated in some respects; it might also be geographically unbalanced. His suggestion would be for the Commission or the Special Rapporteur to prepare the bibliography and for it to be published by the secretariat. An important initiative would be to prepare a table of cases before the Permanent Court of International Justice and the International Court of Justice or other international courts or tribunals that dealt authoritatively with issues of customary international law. He would support any course the Commission might wish to take on that matter.

Sir Michael Wood (Special Rapporteur), summing up the debate on his fourth report, said that he was grateful to all those who had taken part; he had taken careful note of their comments.

It had been suggested that the Commission’s output on the topic should begin with a brief introduction explaining the object, purpose and content of the draft. Perhaps the sort of general commentary that had been included in the draft articles on the responsibility of States for internationally wrongful acts or the draft articles on the responsibility of international organizations would suffice in substance, but, if it was thought appropriate, it could certainly be presented as an introduction, as had been done in the Guide to Practice on Reservations to Treaties. Such an introduction could explain in a little more detail than the draft commentaries on the individual conclusions the nature and role of customary international law, thus setting the conclusions in context. It could perhaps address Mr. Murase’s and the Chairman’s wish for a definition of customary international law, something which the Commission had decided to drop from the Special Rapporteur’s original proposals in an earlier report. It could also take up Ms. Escobar Hernández’s suggestion for an explanation of the significance of certain writings in the field; it might even include the text of the current draft conclusion 1 on scope, as suggested in paragraph 13 of his fourth report. In any event, it seemed best to consider the suggestion for an introduction at second reading, when the final shape of the conclusions and commentaries would be clearer.

The practice of international organizations continued to be the subject of controversy. It was becoming almost an ideological debate, with the repetition of rather entrenched positions. He suspected, however, that the practical differences between members were not so great. It was his belief that the present draft conclusions were reasonably balanced in their approach to the role of organizations and that they reflected reality. He did not think that draft conclusion 4 (2), which was cautiously drafted, could reasonably be described as *lex ferenda*, as it had been by one colleague. No doubt, improvements could be made in due course, but now was not the time to change the texts of the draft conclusions on that matter. He would try to meet the various concerns in the commentaries, although they were at times conflicting. In any event, that was clearly a matter to which the Commission would return on second reading.

In that regard, he wished to place on record that the changes that he had suggested to draft conclusions 6 and 12 had not been intended to reduce the potential role of international organizations or, more precisely, of resolutions adopted by them. His intention had simply been to improve the coherence and logic of the draft. In any event, he had heard
what had been said in the debate and would not be asking the Drafting Committee to consider those changes at the first reading stage.

Another issue that had come up again was how best to reflect, in the conclusions and/or commentaries, the role of the Commission itself. He would do his best to describe that role at an appropriate point and in an appropriate way in the commentaries; the discussion in the Working Group that had reviewed the draft commentaries had been very helpful in that context, as in others. He did not think that there was any real difference among members on substance; the sole question was where best to deal with the matter. It was something that deserved a period of reflection; it could be taken up again on second reading.

A number of useful suggestions had been made concerning the content of the draft commentaries. He had noted them all and would endeavour to take account of them in the draft commentaries that he would submit to the secretariat shortly.

Mr. Forteau’s suggestion that more examples should be provided in the commentaries in order to give practical guidance to the users was undoubtedly a good one, but a balance needed to be struck with another important practical requirement, that of conciseness. The discussion in the Working Group had shown that some examples might be problematic, inasmuch as their citation — for the purpose of illustrating methodology — might be viewed as approval of their substance. He would try to address that concern in the commentaries.

Ms. Escobar Hernández and others had suggested that the commentaries should refer to some literature, including with cross references to the bibliography. It had been recalled in that context that the teachings of the most highly qualified publicists were a subsidiary means for the determination of rules of law under article 38 (1) (d) of the Statute of the International Court of Justice. That was, of course, uncontested and was already reflected in draft conclusion 14. However, another question was how far the literature could be used to determine the methodology for identifying rules of international law. Furthermore, it was, of course, difficult to be selective. Accordingly, at least for first reading, he would not be proposing references to the literature in the commentaries. The bibliography would be available and was to some degree arranged thematically so as to correspond to particular draft conclusions; he would propose that reference should be made to it in the commentaries so that anyone reading the conclusions and commentaries would be made aware of the literature.

As for the future programme of work, there seemed to be widespread agreement with the timetable restated in section V of the fourth report. However, that would, of course, be a matter to be decided in the next quinquennium.

The changes that he had suggested in section III of the report could be considered either at the current session, as part of the first reading, or on second reading. In the light of the comments made during the debate, he was of the opinion that, at the first reading stage, the Commission should ask the Drafting Committee to exercise caution and confine itself to changes that were uncontroversial and which could be adopted without lengthy discussion. He hoped that, on that understanding, the Commission would agree to refer the suggestions in annex I of the report to the Drafting Committee. It was not his intention to invite the Committee to consider more than a couple of those suggestions at the current stage.

Lastly, he wished to invite the Commission to request the secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement. He hoped that it would be possible to adopt the proposal, for which there was widespread support within the
Commission, following the current debate so that the secretariat could immediately begin the preparatory work for what would be quite a large exercise, involving wide consultation.

There seemed to be considerable interest among members in the “ways and means” part of the topic. During the current debate, a range of important suggestions and views had been heard, which he hoped the secretariat would be able to take into account, if requested to produce a memorandum. A number of speakers had made the point that the challenges might well be very different now from 70 years ago; no doubt that too would be reflected in the new memorandum.

It would, of course, be for the next Commission to decide whether and, if so, how to take up that part of the topic; the secretariat memorandum would be without prejudice to future action by the Commission, but it should be invaluable in helping members reach a decision in due course.

The Chairman said that he took it that the Commission wished to refer the proposed amendments to draft conclusions 3, 4, 6, 9 and 12 to the Drafting Committee.

It was so decided.

The Chairman said that, if he heard no objection, he would take it that the Commission wished to request the secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, as proposed by the Special Rapporteur.

It was so decided.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (A/CN.4/694)

The Chairman invited the Special Rapporteur to introduce his fourth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as contained in document A/CN.4/694.

Mr. Nolte (Special Rapporteur) said that the main part of the report concerned pronouncements of expert bodies. The best-known such bodies were those established under human rights treaties to monitor and contribute to the application of those treaties; their pronouncements were addressed to States parties, who were encouraged to take them into account in their application of the treaty in question. Thus, both the pronouncements of expert bodies and the reaction of States thereto constituted a body of practice whose purpose under the treaty was to contribute to its proper application.

Regarding terminology, the term “pronouncement” had been chosen to describe the various forms of action of expert bodies because it was sufficiently neutral and was able to cover all relevant factual and normative assessments by such bodies, as indicated in paragraph 14 of the report. The term “expert body” had been chosen in preference to “treaty body” in order to make clear that only bodies that were composed of independent experts were dealt with in the report. However, as indicated in the second sentence of draft conclusion 12 (1), for the purposes of the draft conclusions, the term “expert body” did not include expert bodies that were organs of an international organization, since the project was limited to the scope of application of the 1969 Vienna Convention on the Law of Treaties and did not therefore address the practice of international organizations and their organs, with the exception of practice relating to their constituent instruments, in keeping with article 5 of the Convention.

The aim of the report was modest: it made no general claim as to the strength or otherwise of the legal effect, for the purpose of treaty interpretation, of pronouncements of expert bodies; rather, it emphasized that any such effect depended, first and foremost, on
the treaty itself, as properly interpreted. The report and the proposed draft conclusions simply aimed to articulate how the practice of expert bodies and the related conduct of States parties contributed to the proper interpretation of the treaty in question under articles 31 and 32 of the Vienna Convention.

It emerged from an assessment of relevant sources that there appeared to be general agreement that pronouncements of expert bodies did not, as such, constitute subsequent practice under article 31 (3) (b) because they did not, by themselves, establish agreement between the parties regarding the interpretation of the treaty concerned. On the other hand, it seemed to be equally generally agreed that subsequent agreements and subsequent practice under articles 31 (3) and 32 “may arise from, or be reflected in” such pronouncements, although it was often not easy to establish that States parties had reached agreement on the basis of such pronouncements.

The more difficult question was what interpretative weight, if any, pronouncements of expert bodies established under human rights treaties might have as such. According to the International Court of Justice, great weight should be ascribed to the interpretation adopted by such bodies. For its part, the Commission, in the commentary to its Guide to Practice on Reservations to Treaties, had stated that States parties were obliged to take account of the conclusions of the expert bodies of human rights treaties in good faith, even though those conclusions were not legally binding. The report suggested that the distinction between the formulation of the Court and that of the Commission corresponded to the distinction in the 1969 Vienna Convention, between the formulation of an obligation, in article 31, to take certain means of interpretation into account, and the formulation of a permission, in article 32, to take certain other means of interpretation into account. Based on a number of considerations, the report then suggested that the Commission should adopt the approach of the International Court of Justice and recognize that the formulation that appeared in the commentary to the Guide to Practice was limited to the special case of pronouncements regarding reservations. Such an approach, if applied to the rules of the Vienna Convention on interpretation, would mean that pronouncements of expert bodies should be recognized as a form of other subsequent practice that might be taken into account under article 32 of the Convention. The other possibility would be to recognize that the duty of cooperation in good faith under a treaty usually implied a duty of States parties to consider, and thus to take into account, the pronouncements of those bodies which they had established pursuant to the treaty. In that case, such pronouncements would constitute a form of practice that States parties were obliged to take into account, just as they needed to take into account the means of interpretation that were referred to in article 31 of the Vienna Convention.

The report was not limited to pronouncements of expert bodies established under universal human rights treaties. It only highlighted those expert bodies because their activities had given rise to the most profound debate regarding the interpretative weight of their pronouncements. Those bodies were part of a larger group of expert bodies, all of which had been mandated by different kinds of treaties to give non-binding recommendations regarding the application and, explicitly or implicitly, the interpretation of those treaties. In paragraphs 66 to 92, the report described some other, particularly important, expert bodies, for example the Commission on the Limits of the Continental Shelf and the Compliance Committee established under the Kyoto Protocol to the United Nations Framework Convention on Climate, and examined the weight of their pronouncements for the interpretation of the treaties concerned. The report sought thereby to show that the issues that had been discussed regarding expert bodies established under human rights treaties also arose, mutatis mutandis, with regard to expert bodies more generally.
By proposing a general draft conclusion, draft conclusion 12, on pronouncements of expert bodies which applied to all such bodies, as defined in paragraph 1 thereof, the report did not aim to level the differences that existed between different expert bodies and the interpretative weight of their pronouncements. On the contrary, draft conclusion 12 was formulated carefully so as to leave room for possible specificities; paragraph 3 thus attempted to express the relevance of pronouncements of expert bodies without being unduly prescriptive. As explained in paragraphs 49 to 65 of the report, the weight of such pronouncements as a means for the interpretation of a treaty depended on a multitude of factors that might or might not be present in a specific case.

Draft conclusion 12 (4) addressed the question of the relevance of silence in the context of determining the interpretative weight of a pronouncement of an expert body. Such weight depended to a significant extent on the degree to which a particular pronouncement had been accepted by States parties. Since most treaties that provided for the establishment of expert bodies had many parties, the question as to whether silence signified acceptance would often arise in that context. According to the general rule set out in draft conclusion 9 (2), which the Commission had provisionally adopted in 2014, the answer depended on whether the circumstances called for some reaction. That in turn gave rise to the question of whether the adoption of a pronouncement of an expert body could generally be regarded as a circumstance calling for some reaction by States parties. Paragraph 4 proposed, on the basis of the reasoning contained in paragraphs 47 and 48 of the report, that a pronouncement of an expert body was usually not such a circumstance, although that presumption might be refuted.

The terminology chosen for draft conclusion 12 followed, as far as possible, that of draft conclusion 11, which the Commission had provisionally adopted in 2015. Draft conclusion 11 was similar insofar as it also dealt with treaties that provided for the establishment of a body mandated to contribute to the application of the treaty concerned.

The fourth report also addressed decisions of domestic courts, which merited separate attention for two reasons. First, such decisions themselves might be a form of subsequent practice in the application of a treaty and the way in which they dealt with subsequent agreements and subsequent practice as a means of treaty interpretation was particularly significant for the uniform interpretation of a given treaty. Decisions of domestic courts, being official acts by State organs, did not raise specific problems as far as their recognition as possible forms of subsequent practice under article 31 (3) (b) and 32 of the Vienna Convention were concerned. Accordingly, the possibility of their constituting such practice was simply confirmed in paragraph 1 of the proposed draft conclusion 13. Since decisions of domestic courts were not formally coordinated at the international level, it could not be lightly assumed that such decisions reflected the agreement of the parties under article 31 (3) (b) of the Convention. Even if those decisions had been informally coordinated, such informal coordination in itself would not be sufficient to establish an agreement of the parties in substance.

The second reason why decisions of domestic courts merited separate attention was that one of the purposes of the work on the topic was to provide guidance to domestic courts on the proper interpretation and application of treaties. Such guidance could also be provided by reviewing the way in which domestic courts had approached subsequent agreements and subsequent practice as means of treaty interpretation and by assessing whether such practice reflected the draft conclusions that the Commission had provisionally adopted thus far. Such an assessment must necessarily be incomplete, as it was impossible to comprehensively review the practice of domestic courts in that regard; nevertheless, even a limited assessment could be helpful and provide important indications, as long as the review of the available decisions of domestic courts merely served to provide an illustration...
for questions that had arisen in practice. It was to that end that the report described a number of issues that had arisen in leading cases from jurisdictions around the world.

As suggested by the decisions referred to in the report, the case law of domestic courts relating to the interpretation of treaties had regularly dealt with a number of issues concerning the use of subsequent agreements and subsequent practice. Those issues included the influence of constraints under domestic law, the classification of subsequent agreements and subsequent practice, the use of subsequent practice that did not establish the agreement of the parties and the identification of subsequent agreements and subsequent practice.

Proposed draft conclusion 13 (2) was somewhat unusual in the context of the draft conclusions on the present topic in that it contained recommendations, or guidelines, that were addressed specifically to domestic courts. The basis for those recommendations were decisions of domestic courts that were described in the report and assessed in the light of the previously adopted draft conclusions. Thus, while draft conclusion 13 (2) was a conclusion in the sense that it was based on a collection of materials, it differed from the other draft conclusions in that it was not aimed at elucidating and clarifying the pertinent rules of interpretation as such. Draft conclusion 13 (2) was not intended to inappropriately constrain domestic courts; rather, it served to identify certain issues that had given rise to questions in practice and offered approaches in the light of the international rules and practices that had been identified in previous draft conclusions. It should therefore be a particularly useful part of the set of draft conclusions; its specific character could perhaps be set out more clearly by the Drafting Committee.

The report also included a few smaller proposals with a view to enabling the Commission to adopt a full set of draft conclusions on first reading. The first proposal concerned the formulation of an introductory draft conclusion 1a, which read “the present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties.” The Commission had adopted a similar draft conclusion for the topic “Protection of persons in the event of disasters” on first reading, and the Drafting Committee had the previous week adopted the same formulation on second reading.

The second proposal, which was contained in paragraph 113 of the report, related to the structure of the set of draft conclusions and was made in order to facilitate the latter’s comprehension and readability. The order of the draft conclusions that the Commission had provisionally adopted had been maintained within the proposed structure, except for draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time). It was proposed to place draft conclusion 3 in part III, which related to the process of interpretation, rather than in part II, which concerned basic rules and definitions. The proposal in paragraph 113 of the report to add a final clause with a new final draft conclusion 14 had been included by mistake.

The third proposal, which concerned draft conclusion 4 (3), was the only one in the report to revise a draft conclusion that the Commission had provisionally adopted. The reason for the proposal was that, as currently formulated, draft conclusion 4 (3) was limited to conduct by States parties to a treaty. However, the Commission had, in the meantime, provisionally adopted draft conclusion 11 (3), which recognized that the practice of an international organization itself might contribute to the interpretation of a treaty under article 32 of the Vienna Convention. In addition, the Commission would hopefully adopt draft conclusion 12 (3), according to which pronouncements of expert bodies might contribute to such interpretation when applying articles 31 (1) and 32 of the Vienna Convention. That suggested that there were certain forms of subsequent practice in the application of treaties that might emanate from a limited group of actors — in addition to States parties — that were mandated by the treaty concerned to contribute to its application.
The proposed revised draft conclusion 4 (3) attempted to circumscribe the conduct of those who were called upon to apply a treaty by using the term “official conduct”, instead of “conduct by one or more parties”. The use of the term “official conduct” was supported by the conclusion of the International Court of Justice in its advisory opinion of 15 December 1989 on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, according to which the term “officials of the Organization”, as contained in Article 105 of the Charter of the United Nations, permitted the application of the Convention on the Privileges and Immunities of the United Nations to experts on missions. Although those experts were not officials in the sense of occupying an administrative position within the Organization, the Court had considered the nature of their mission to be such that they could be covered by the Convention.

Of course, the term “official conduct” was not the only possible term that draft conclusion 4 (3) could use in order to make clear that the practice of international organizations, as well as pronouncements by expert bodies within their sphere of competence, constituted other forms of subsequent practice under article 32 of the Vienna Convention. An alternative possibility to reach that goal might, for example, be to add the words “or other authorized actors” after the words “conduct by one or more parties”.

Other aspects of the topic could be added to the set of draft conclusions, for example the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations and between international organizations or in relation to the practice of international organizations more generally. However, on previous occasions, the Commission had dealt with such treaties and practice separately. Given the character of the present topic as an elucidation of particular means of interpretation under the rules of interpretation set forth in the Vienna Convention, it seemed neither necessary nor reasonable to aim for completeness. As was the case for certain other topics, it should be sufficient to cover the most important aspects. It would, of course, be possible to add a saving clause, should the Commission consider that to be necessary.

In conclusion, he expressed the hope that, after considering the report, the Commission would be in a position to refer the proposed draft conclusions to the Drafting Committee.

The meeting rose at 11.55 a.m. to enable the Drafting Committee on Protection of persons in the event of disasters to meet.