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Provisional summary record of the 3338th meeting
Held at the Palais des Nations, Geneva, on Friday, 5 August 2016, at 3 p.m.

Contents

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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. Kittichaisaree
	Mr. Laraba
	Mr. McRae
	Mr. Murase
	Mr. Murphy
	Mr. Niehaus
	Mr. Nolte
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Saboia
	Mr. Singh
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Mr. Wisnumurti
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Draft report of the International Law Commission on the work of its sixty-eighth session (*continued*)

Chapter VI. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/L.884/Add.2)

The Chairman recalled that, at the previous meeting, during the consideration and adoption of chapter VI of the Commission's draft report, some members had been unable, because of time constraints, to contribute to the mini-debate that had taken place on the commentary to paragraph 4 of draft conclusion 13 [12]. He invited those members to take the floor.

Mr. Park said that, when the Special Rapporteur came to draft an abridged version of the commentary to paragraph 4 of draft conclusion 13 [12], he should preserve the content of paragraphs (23), (26) and (28) of document A/CN.4/L.884/Add.2, on regional human rights courts, domestic courts and doctrine, respectively.

Chapter V. Identification of customary international law (A/CN.4/L.883 and Add.1)

The Chairman invited the members of the Commission to consider and adopt documents A/CN.4/L.883 and A/CN.4/L.883/Add.1 paragraph by paragraph.

Document A/CN.4/L.883

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

B. Consideration of the topic at the present session

Paragraphs 5 to 9

Paragraphs 5 to 9 were adopted.

Paragraphs 10 to 12

The Chairman said that paragraphs 10 to 12 had to be completed and would thus be adopted at a later stage.

C. Text of the draft conclusions on identification of customary international law adopted by the Commission on first reading

1. Text of the draft conclusions

Paragraph 13

Paragraph 13 was adopted.

Document A/CN.4/L.883 as a whole was adopted, subject to the amendments to be made to paragraphs 10 to 12.

Document A/CN.4/L.883/Add.1

C. Text of the draft conclusions on identification of customary international law adopted by the Commission on first reading

2. Text of the draft conclusions and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Identification of customary international law

The Chairman invited the Special Rapporteur to introduce the draft commentaries.

Sir Michael Wood (Special Rapporteur on the identification of customary international law) said that the draft commentaries were relatively short, in part because it would be desirable for their intended audience, which included persons who were not experts in international law, judges who were often very busy and private lawyers, to be able to read them in their entirety. On a related note, that very morning, the High Court of England had issued a judgment in which it had cited several of the draft conclusions adopted by the Drafting Committee. He was grateful to Mr. Vázquez-Bermúdez for chairing the Working Group on the topic; its work had been very useful to him and its observations had helped him to revise the draft commentaries.

General commentary

Paragraph (1)

Mr. Nolte said that the words "Read together with the commentaries" at the beginning of the second sentence of paragraph (1) were unusual and might give the impression that the Commission wished to attach particular importance to the commentaries to the draft conclusions on the topic, giving them a status that was different from that accorded to the commentaries to the draft conclusions or articles on other topics. He therefore proposed that they should be deleted.

Sir Michael Wood (Special Rapporteur) said that he was reluctant to accept the deletion of those words. He recalled that the Commission had held a long discussion about how to ensure that readers of the conclusions also looked at the commentaries, because the two formed a whole. Given that the target audience of the draft conclusions included persons who were not experts in international law, it should be stated as clearly as possible that the draft conclusions needed to be read alongside the commentaries. That did not mean that the commentaries had a status different from that of the commentaries to the draft articles or conclusions on other topics.

Mr. Nolte said that what Sir Michael Wood had just said to justify that particular reference in the paragraph under consideration was also true of the commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, which the Commission had indicated were addressed not only to States but also to domestic courts and to anyone who was called upon to interpret treaties. If that was the criterion, it should be possible to insert the words in question in the commentary to those draft conclusions.

Mr. Murase said that he was not sure what was meant by the words "identify" and "identification". Did they imply the interpretation and application of the relevant rules, or an intellectual exercise aimed at determining the existence and content of such rules? The Commission should at least explain what it meant by "identification" and "identify" in a footnote.

Mr. Park said that he agreed with Mr. Murase's comment and asked whether the words "identification" and "determination" could be used interchangeably. Moreover, the phrase "as well as that of customary international law in general" at the end of paragraph (1) had been hotly debated within the Working Group, with some members arguing that its meaning was not very clear, and he doubted whether it ought to be retained.

Mr. Murphy, in reference to the point made by Mr. Murase and Mr. Park, said that he wished to draw the Commission's attention to paragraph (2) of the commentary to draft conclusion 1, the third sentence of which read "The terms 'identify' and 'determine' are used interchangeably in the draft conclusions and commentaries". The words "Read together with the commentaries" were useful, particularly in the context of draft conclusions rather than articles. He would have no objection to including those words in the commentary to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. In addition, for formal reasons, he proposed

replacing the words “This is a matter that” with “This matter” at the start of the third sentence of the paragraph under consideration.

Mr. Petrič said that the words “Read together with the commentaries” were perhaps superfluous, since all the texts adopted by the Commission had to be read together with the commentaries thereto, but he was not opposed to retaining them. The words could indeed be included in the commentaries to the texts adopted by the Commission on all its topics. It might be possible to find a better formulation so as not to give the impression that the Commission was attaching particular importance to the commentaries in question. As to the meaning of the words “determine” and “identify”, the second sentence of paragraph (1) clearly stated that it was a question of determining “the existence (or non-existence) of rules of customary international law, and their content”; a footnote was therefore unnecessary.

Mr. McRae, supported by **Mr. Vázquez-Bermúdez**, said that the words “Read together with the commentaries” could appear in the commentaries to all the texts that the Commission adopted, as the members unanimously agreed that those texts must always be read alongside the commentaries thereto. For that reason, he supported Mr. Nolte’s proposal to insert those words in the commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

Ms. Escobar Hernández said that she endorsed the arguments in favour of keeping the words “Read together with the commentaries” in the second sentence of paragraph (1). On the other hand, and unless it was a translation issue, the words “as well as that of customary international law in general”, which appeared at the end of the paragraph and suggested that the Commission’s aim was to promote the credibility of customary international law in general, should be deleted.

Mr. Nolte said that his understanding was that the members of the Commission agreed that the expression “Read together with the commentaries” could be inserted in the commentaries to the texts adopted by the Commission on other topics, and he would like that to be noted.

Mr. Kamto said that it was a matter of principle concerning the Commission’s practice. While it was obvious that draft texts must always be read together with commentaries, the Commission did not usually say so, and when it did, as in the current case, it might give the impression that the commentaries in question were of particular importance or had a status different from that of the commentaries adopted on other topics.

Mr. Murase said that the sentence quoted by Mr. Murphy on the subject of the terms “identify” and “determine” had not escaped his attention, but saying that terms were interchangeable was not the same as defining them, and he believed that the lack of a definition could be problematic with regard to, for example, draft conclusion 15, on the persistent objector rule. He therefore wished to reiterate his proposal for the terms in question to be defined in a footnote.

Sir Michael Wood (Special Rapporteur) said that the words “Read together with the commentaries” were useful, and he therefore proposed to retain them if the majority of members did not object, on the understanding that the same wording could be inserted in the commentaries to other draft texts.

As to the point made by Mr. Murase and Mr. Park, he considered that, if the draft conclusions and the commentaries were read as a whole, it was clear enough what was meant by identification. There had been a debate over the term when the title of the topic had been changed; the word “determination” was used in Article 38 of the Statute of the International Court of Justice and, in paragraph (2) of the commentary to draft conclusion 1, it was clearly stated that the terms “identification” and “determination” were interchangeable. Regarding interpretation, if it was possible to speak of interpreting customary international law, determining the existence or non-existence of a rule and its detailed content could amount to interpretation. If the lack of a definition posed a problem with regard to the commentary to draft conclusion 15, the Commission would solve that problem when it came to examine that commentary and could revert to the paragraph currently under consideration, if necessary.

Regarding the comment made by Ms. Escobar Hernández, the intention in the final sentence of paragraph (1) was precisely to say that a sound approach to the identification of rules of customary international law gave credibility not only to the particular decision but also to customary international law in general, the point being that the latter was often attacked, by certain authors in particular, as being uncertain, vague or unclear. He nonetheless agreed that, by expressing itself in that way, the Commission might appear presumptuous, and therefore proposed that those words should be deleted.

It was so decided.

Mr. Murphy said that the word "decision", which now came at the end of the last sentence of paragraph (1), was confusing, and proposed that it should be replaced with "determination".

It was so decided.

Mr. Kamto proposed that, to address the various concerns expressed with regard to the beginning of the second sentence of paragraph (1), that part of the French text should read "*Lus conjointement avec les commentaires, comme il se doit pour les travaux de la Commission, ils visent à ...*" ("Read together with the commentaries, as should be the case with the work of the Commission, they seek to …").

Sir Michael Wood (Special Rapporteur) said that the addition was not very elegant in English.

Mr. Nolte proposed that the words "*comme il se doit pour les travaux de la Commission*" should be translated as "as it is usually the case with the work of the Commission".

Mr. McRae said that it would be better to use the expression "as is always the case", since the word "usually" created doubt.

Sir Michael Wood (Special Rapporteur) proposed that the second sentence of paragraph (1) should be split into two sentences, which would read "They seek to offer practical guidance on how the existence (or non-existence) of rules of customary international law, and their content, are to be determined. They are to be read together with the commentaries, as is always the case with the work of the Commission."

It was so decided.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murase said that it was important to underline the binding nature of international law and, to that end, proposed that the words "precisely because it is binding on all States" should be added at the end of the first sentence.

Mr. Park said that the word "decentralized", which was used in the second sentence to describe the international legal system, should be deleted because it gave the negative impression that the system was fragmented. In the same sentence, it would also be desirable to replace the adjective "dynamic" with "efficient".

Mr. Murphy said that it could not be asserted that customary international law was binding on all States because regional customary law, to cite just one example, was not. He therefore proposed that the addition put forward by Mr. Murase should be reformulated to read "which is binding upon States". Moreover, the words "and intercourse" were not particularly felicitous and should be deleted.

Mr. Vázquez-Bermúdez said that, since customary international law was "an important source of public international law", it was obviously binding and there was no need to emphasize the point. While Mr. Murphy had rightly noted that customary international law could not be said to be binding on all States because of the existence of regional or particular rules of customary international law, the solution that he proposed was not appropriate, either, as States were not the only subjects of international law to be bound by customary international law.

Mr. Kittichaisaree said that it would be unwise to mention the binding character of customary international law in paragraph (2), given that the matter was clearly explained further on in the commentary.

Sir Michael Wood (Special Rapporteur) said that, in the light of the comments made, a number of changes should be introduced: the words "a decentralized international legal system" should be replaced with "the international legal system"; the word "effective" should be used instead of "dynamic"; and the words "and intercourse" should be deleted. As to Mr. Murase's proposal concerning the binding character of customary international law, the matter was duly addressed in the commentary to the article on the persistent objector rule, and it was thus not necessary or appropriate to mention it in the general commentary.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Tladi proposed that, in the last sentence, the words "customary process" should be replaced with "process for the identification of customary international law".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Part One

Introduction

The introductory paragraph of part one was adopted.

Conclusion 1 (Scope)

Commentary

Paragraph (1)

Mr. Vázquez-Bermúdez said that, in the second sentence, the adjective "legal" should be deleted because, although it was evident that the identification of rules of customary international law required a legal analysis, it would be wrong to speak of a legal methodology.

Mr. Forteau, noting that the two-element approach to determining the existence of a customary rule was very much a legal rule, proposed a compromise solution that would read "[draft conclusion 1] sets out the methodology and rules to be followed when undertaking that exercise".

Mr. Hmoud said that he supported Mr. Forteau's proposal.

Sir Michael Wood (Special Rapporteur) said that the adjective "legal" was superfluous and should be deleted. While he found Mr. Forteau's proposal interesting, he would prefer to avoid the term "rules", as it could prove controversial in the context of the draft conclusions, which, as had been recalled from the outset of the Commission's work on the topic, should not be overly prescriptive.

Mr. Forteau said that, on the contrary, the term "rules" was perfectly consistent with the content of the draft conclusions, some of which were undeniably prescriptive in character. In addition, practice and *opinio juris* were legal rules. If the term "rules" was not retained, the adjective "legal" would have to be kept to reflect the fact that the draft conclusions were not simply a practical guide to the identification of customary international law but also contained a set of legal requirements. An amendment should be made to the French text, in which the word "methodology" had been incorrectly translated as "*moyens*" rather than "*méthode*".

Mr. Nolte said that he was also in favour of retaining the adjective "legal", since the sole purpose of the work on the topic under consideration was to define the methodology and legal rules to be followed when identifying customary international law.

Mr. Kamto said that legal methodology, which could be, *inter alia*, analytical or exegetical, should not be confused with methodology in general. The matter in hand was one of methodology, namely how to determine the existence and content of a customary rule. That methodology could, of course, involve the implementation of legal rules — in the case in question, that of the existence of a practice accepted as law — but was not in itself of a legal nature. The simplest solution would thus be to delete the adjective "legal", as proposed by the Special Rapporteur.

Mr. Petrič said that, while the draft conclusions had to be read together with the commentaries, the opposite was also true. Insofar as draft conclusion 1 did not provide any details of the methodology by which the existence and content of rules of customary international law were to be determined, it was important to indicate somehow in the commentary that the methodology involved the application of legal rules, in order to avoid leaving the door open to pure speculation.

Mr. McRae said that the original formulation was entirely correct and that there was no need to get into a debate over whether the draft conclusions laid down rules or not. He therefore proposed that the current wording should be retained, with a slight change at the end of the sentence, which would read "… that is, the legal methodology for undertaking that exercise".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murphy said that the third sentence bore no relation to the rest of the paragraph, which dealt with the different terms used to denote customary international law, and should be moved to the beginning of paragraph (3). He also proposed that, in the last sentence, the words "of law" should be inserted after "principles" in order to express more clearly the idea that, as demonstrated by the examples provided in footnote 5, the concepts of rules of customary international law and principles of law were sometimes confused.

Mr. Murase said that he supported Mr. Murphy's proposal to move the third sentence to the following paragraph of the commentary and that, in addition to the words "determine" and "identify", the sentence should contain a reference to the verb "ascertain", which also appeared in other draft conclusions.

Ms. Escobar Hernández said that the last sentence should be deleted, as the comparison that it drew between rules of customary international law and principles did not correspond to the definition of the categories of norms of international law.

Mr. Šturma said that, although he also had reservations about the last sentence, he did not feel that there was a need to delete it as the word "sometimes" showed that it was not a categorical assertion. He proposed that the words "of international law" should be added after "principles", rather than "of law", as proposed by Mr. Murphy, to avoid any risk of confusion with general principles of law.

Sir Michael Wood (Special Rapporteur) said that he agreed with the proposal to move the third sentence to the beginning of paragraph (3). Subject to the necessary verifications in the text as a whole, he would prefer not to mention the verb "ascertain" in the sentence, as proposed by Mr. Murase, because, unlike "identify" and "determine", it was used not in the sense of identifying rules of customary international law but of verifying the existence of a general practice or *opinio juris*. He recalled that the last sentence had been included in order to take into account the concern expressed by Mr. Petrič, who had wanted it to be clearly stated that, when the Commission spoke of "rules", it could also be referring to principles. For that reason, it would be better to keep the sentence, with the words "of customary international law" added after "principles" to avoid any ambiguity about the type of principle in question.

Mr. Forteau said that the addition should not be made unless it had been ascertained that the jurisprudence cited in footnote 5 did indeed refer to principles of customary international law, which he doubted.

Mr. Nolte said that the sentence in question did not contain a substantive provision; rather, it provided a simple terminological clarification, which was that, for the purposes of the topic, the term "rules" could also cover principles. There was thus no need to modify it.

Mr. Murphy said that it would be useful to add the words "of law" after "principles" to reflect the fact that, sometimes, reference was made to principles of law or of international law when talking about rules of customary international law, as was clear from the jurisprudence cited in footnote 5.

Mr. Nolte said that Mr. Murphy's proposal was acceptable to him inasmuch as it did not reduce the scope of the term "principles" to any particular category.

Sir Michael Wood (Special Rapporteur) said that he would be happy to retain the current wording, but did not object to the addition proposed by Mr. Murphy.

Mr. Vázquez-Bermúdez said that, since the aim was precisely not to distinguish among different categories of principles, the current formulation, in which only the word "principles" was in inverted commas, was the most suitable.

Mr. Nolte proposed that, to reconcile the Special Rapporteur's decision with the point made by Mr. Vázquez-Bermúdez, the words "of law" should be placed in parentheses, outside the inverted commas.

Mr. Murphy said that he saw no need for parentheses, but, if Mr. Vázquez-Bermúdez insisted, he would not object.

Sir Michael Wood (Special Rapporteur), summarizing the accepted amendments to paragraph (2), said that the third sentence would be moved to the beginning of paragraph (3) and the words "of law" would be inserted in parentheses after "principles".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted with the above-mentioned amendment, namely the insertion of the third sentence of paragraph (2).

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Tladi said that, in the fourth sentence, the final clause, after the words "*jus cogens*", should be deleted, as its content raised numerous issues other than that of the *erga omnes* nature of certain rules.

Mr. Forteau said that, if the clause was retained, the word "rules" should be replaced with "obligations".

Mr. Nolte said that he supported Mr. Tladi's proposal, but would prefer to end the sentence after the words "distinct issues or questions".

Mr. Vázquez-Bermúdez said that, in the last sentence, the words "a matter governed by domestic law" should be deleted, as they might create confusion.

Sir Michael Wood (Special Rapporteur) said that he supported the proposals made by Mr. Forteau and Mr. Vázquez-Bermúdez. As to the proposals put forward by Mr. Tladi and Mr. Nolte, it would be preferable to delete the phrase "the identification of which raises distinct issues", so that the third sentence would read "Third, the draft conclusions are without prejudice to questions of hierarchy among rules of international law, including those concerning peremptory norms of general international law (*jus cogens*), or questions concerning the *erga omnes* nature of certain obligations."

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 1 as a whole, as amended, was adopted.

Part Two

Basic approach

The introductory paragraph of part two was adopted.

Conclusion 2 (Two constituent elements)

Commentary

Paragraph (1)

Mr. Murphy said that the words "and, in certain cases, international organizations", which appeared in parentheses in the second sentence, could be deleted because, in paragraph (3) of the commentary to conclusion 4, the Special Rapporteur clarified that "references in the draft conclusions and commentaries to the practice of States should … be read as including, in those cases where it is relevant, the practice of international organizations". The same applied to the first set of parentheses — "and/or international organizations, where applicable" — in the penultimate sentence of paragraph (2). The end of the first sentence of footnote 7, in which it was indicated that "the Latin term [*opinio juris*] has been retained … because it may be thought to capture the nature of this subjective element of customary international law as a matter of legal opinion rather than consent", could also be deleted, since it might be a source of confusion for the reader.

Mr. Nolte said that footnote 7 dealt with a very important issue, namely the reason for the Commission's decision to place the term "*opinio juris*" alongside the phrase "accepted as law". It was important to dispel any misunderstanding about the notion of acceptance and to point out clearly that it referred to a legal conviction that a general practice constituted a rule of customary international law. It was regrettable that such an important issue had been relegated to a footnote, and the phrase "as a matter of legal opinion rather than consent", which Mr. Murphy wished to delete, was in fact essential. In order to emphasize that point further, the two elements of the explanation should be inverted, as the second (the primacy of legal opinion over consent) was more important than the first (the prevalence in legal discourse). Lastly, he did not agree that the expression "*opinio juris sive necessitatis*" was not regarded as significantly different from "*opinio juris*", as stated in the second sentence of the footnote, which it would be best to delete in order to avoid sparking an overly broad debate.

Mr. Vázquez-Bermúdez said that he supported Mr. Nolte's comments and proposals.

Mr. McRae said that he also supported those comments and that it should be made clear that it was a question of acceptance, not consent. He would, however, prefer not to alter the order in which the elements of the explanation appeared and, in order to highlight the second element, he proposed that the sentence should be modified with the addition of the words "not just" and "but also" before the first and second "because", respectively.

Mr. Murphy said that he was in favour of Mr. Nolte's proposal to invert the two elements of the explanation. He doubted, however, that consent could be entirely disassociated from acceptance. In his view, when a State accepted that a given practice was legally binding, it consented to the recognition of the practice as such.

Mr. Forteau, referring to the French text, proposed that, to clarify that point, the end of the first sentence of footnote 7, after the words "*d'autre part*" ("and"), should be redrafted to read "*parce qu'elle caractérise mieux la nature particulière de cet élément subjectif qui constitue une conviction juridique et non un consentement formel*" ("because it may capture better the particular nature of this subjective element as referring to legal conviction and not to formal consent").

Mr. Hmoud said that he agreed with that proposal and noted that, in the Arabic version, the term "*opinio juris*" had been translated strangely; the Arabic, Chinese and Russian versions of the draft should be reviewed to ensure that the translations into those languages were satisfactory.

Mr. Vázquez-Bermúdez said that he supported Mr. Forteau's proposal. The word "formal" should, however, be deleted, to avoid giving the impression that there were informal kinds of consent.

Mr. Kamto said that he recognized the importance of clarifying the concept of *opinio juris*, but account should be taken of the fact that it appeared in parentheses and was intended simply to specify the meaning of the expression "accepted as law". In his opinion, it was, above all, the notion of acceptance that should be explained in the commentary.

The meeting was suspended at 4.50 p.m. and resumed at 5.10 p.m.

Sir Michael Wood (Special Rapporteur) read out the first sentence of footnote 7, which he had amended to reflect members' proposals: "The Latin term has been retained alongside 'acceptance as law' not only because of its prevalence in legal discourse, including the synonymous use of the terms in the jurisprudence of the International Court of Justice, but also because it may capture better the particular nature of this subjective element of customary international law as referring to legal conviction rather than formal consent."

Mr. Nolte said that he was in favour of the new wording.

Mr. Vázquez-Bermúdez said that he also supported the new version of footnote 7, but remained convinced that the word "formal" should be deleted, because the reader might think that the description of consent as formal meant that it had to be expressed through the deposit of an instrument of ratification.

Mr. Hmoud said that the word "formal" should be included in the sentence as an element of the comparison being made.

Mr. Forteau said that he agreed with that remark and, in reference to the French text, proposed that, to address the concern expressed by Mr. Vázquez-Bermúdez, the words "*plutôt qu'*" ("rather than") at the end of the new version of the footnote should be replaced with "*et non*" ("and not to"), which placed the emphasis on legal conviction.

Sir Michael Wood (Special Rapporteur) said that he was in favour of that proposal and that, in the English version, the words "rather than" would be replaced with "and not to".

Mr. Saboia asked whether the proposal to delete the second sentence of footnote 7, which he supported, had been accepted.

Sir Michael Wood (Special Rapporteur) said that, although he attached importance to that sentence, he was willing to comply with the wish expressed by Mr. Nolte and Mr. Saboia. He also accepted Mr. Murphy's proposal to delete the references to international organizations that appeared in parentheses in paragraphs (1) and (2).

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Vázquez-Bermúdez proposed that, at the end of the last sentence, the words "accompanied by *opinio juris*" should be added in parentheses after "accepted as law".

Sir Michael Wood (Special Rapporteur) said that he agreed with that proposal and that he had not mentioned *opinio juris* systematically after each occurrence of the expression "accepted as law" in order to avoid making the text unwieldy. As requested by Mr. Murphy, the reference to international organizations would be deleted.

Paragraph (2), as amended, was adopted.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were adopted.

Paragraph (5)

Mr. Murphy said that, in the first sentence, the word "sometimes" should be replaced with "often". Indeed, it seemed to him that the two-element approach was often referred to as inductive and only sometimes as deductive. He would also prefer to delete the last part of the last sentence ("or when considering possible rules of customary international law forming part of an 'indivisible regime'") and to move the text of footnote 15 to footnote 14, to which it clearly related. That language did not reflect all the stages of the reasoning adopted by the International Court of Justice in its judgment in *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*). In that judgment, the Court had noted that, when two general rules of a customary nature were linked by a third rule, the connection created between them by the third rule rendered that rule customary, too, with the result that the three rules formed an indivisible regime.

Mr. Nolte said that there was no reference in the paragraph to an important type of deductive approach that he had mentioned during the consideration of the fourth report and that consisted in taking into account general principles of law or principles of international law when identifying customary international law. In his view, that gap should be filled.

Mr. Murase said that he was not sure that it was necessary to introduce the notion of "general principles of law" or "principles of international law" in the context of deductive approaches. For example, in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, which could be cited in a footnote, the Court had taken a deductive, not inductive, approach.

Sir Michael Wood (Special Rapporteur) said that he did not think it appropriate to replace the word "sometimes" with "often" in the first line of paragraph (5), since, overall, only a handful of authors had qualified the two-element approach as "inductive" or "deductive". Nevertheless, he had no objection to that modification if the Commission shared Mr. Murphy's view.

With regard to deleting the last part of the last sentence ("or when considering possible rules of customary international law forming part of an 'indivisible regime'"), he had inserted those words at the suggestion of one of the members. The idea had been to refer to a case such as the one addressed in article 121 of the United Nations Convention on the Law of the Sea, which was a good example of a deductive approach. Indeed, it had been deduced that paragraph 3 of article 121, on rocks, was a rule of customary law because paragraphs 1 and 2 of that article, which was entitled "Regime of islands", had already been part of customary law. He would therefore prefer to retain those words, but was not opposed to deleting them, if the members as a whole so wished, or to moving the reference to *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) to footnote 14.

The relationship between customary international law and "general principles of law", which were mentioned in article 38 (1) (c) of the Statute of the International Court of Justice, should be the subject of a separate topic. The aim of Mr. Nolte's proposal was to introduce the concept of "principles of international law", not "general principles of law", but it seemed somewhat risky to say that rules of customary international law could be established on the basis of principles of international law by means of deductive reasoning. The following sentence dealt with a relatively similar deductive approach — illustrated by *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*) — that consisted in establishing specific rules of customary international law on the basis of more general rules of customary international law, but Mr. Nolte's proposal went even further. He himself was very reluctant, at that stage, to introduce a concept that was linked to a thorny theoretical issue. He would prefer to keep the text of paragraph (5) as it was, only with the word "often" in place of "sometimes". He did not think that it would be appropriate to cite the *Gulf of Maine* case, either, as proposed by Mr. Murase.

Mr. Nolte said that the question of the extent to which general principles of law or principles of international law must or should be taken into account for the purposes of

identifying customary international law lay at the heart of the topic and was a crucial element not addressed in the commentaries.

Mr. Murphy said that, in any event, the expression "in particular" left the door open to other types of deductive approach. The words that he wished to delete in the last sentence of paragraph (5) suggested that, once it had been established that rule A and rule B were part of customary international law, it could be concluded that they formed an indivisible regime and that rule C, which was also part of that indivisible regime, must, by extension, also be part of customary international law. However, that had not been the approach taken by the International Court of Justice in the case cited. The Court had, in fact, considered that rules A and B were both part of customary international law; that rule C, by its very nature, established a link between the two; and that, consequently, rule C must also be part of customary international law. The Court had concluded, based on that reasoning, that the three provisions formed an indivisible regime. The question was at what stage such provisions could be deemed to form an indivisible regime. In the case at hand, the Courts reasoning was better illustrated by the deductive approach referred to just before the call-out for footnote 14. While it was true that the last part of the sentence referred to article 121 of the United Nations Convention on the Law of the Sea, he believed that, from a methodological point of view, it was slightly misleading.

Mr. Forteau said that he would prefer to retain the end of paragraph (5), but to delete the term "customary", in line with Mr. Murphy's analysis of the reasoning of the International Court of Justice.

Mr. Murphy said that it would indeed be helpful to remove the word "customary", but, to be truly accurate, it would be necessary to say "or when concluding that possible rules of international law form part of an 'indivisible regime'". Indeed, it was not the idea that the rules in question formed part of an indivisible regime that had enabled the Court to conclude that a rule of customary international law existed. If the Commission wished to retain that part of the sentence, the wording should be changed in the manner that he had indicated.

Mr. Murphy's last proposal was accepted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez proposed that the words "accompanied by *opinio juris*" should be added in parentheses after "accepted as law" in the last line of the paragraph.

Paragraph (6), as amended, was adopted.

The commentary to draft conclusion 2 as a whole, as amended, was adopted.

Conclusion 3 (Assessment of evidence for the two constituent elements)

Commentary

Paragraph (1)

Mr. Murphy asked whether it was useful to keep the word "dynamic" in the last sentence.

Mr. Nolte said that he would prefer to retain the word "dynamic", but the words "dynamic nature of custom" should be replaced with "dynamic nature of customary international law".

Mr. Saboia said that he shared Mr. Nolte's view with regard to the word "dynamic". Customary international law was fundamentally dynamic and flexible. The law of the sea, for instance, had evolved in the space of just a few decades.

Paragraph (1), as amended by Mr. Nolte, was adopted.

Paragraph (2)

Mr. Park said that the word "all" appeared four times. The expression "any and all", which made the wording of the sentence somewhat cumbersome, should be replaced with "any". Similarly, the word "all" should be removed from the phrase "in the light of all relevant circumstances".

Sir Michael Wood (Special Rapporteur) said that the word "all" emphasized the importance of the paragraph. Removing it from the expression "any and all" would weaken the sentence considerably. It could, however, be replaced with the word "the" in the phrase "in the light of all relevant circumstances".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Forteau said that, without context, the last quotation in footnote 20 could give the impression that only territorial sovereignty and the sovereign equality of States had to be taken into account for the purposes of identifying customary international law, and his preference would be to delete it. He would also like to see the words "*compte tenu du contexte*" ("taking into account the context") added at the end of the penultimate sentence of the paragraph, given that certain forms of evidence were of particular significance not in and of themselves, but taking into account the context.

Sir Michael Wood (Special Rapporteur) said that he was not opposed to deleting that quotation. He was not convinced that it would be useful to modify the end of the penultimate sentence, but did not object to that, either. He proposed that the additional phrase should read "depending on the context".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Mr. Forteau said that the logical sequence of the part of the paragraph that followed the quotation was unclear. It would be advisable to oppose, or at least contrast, the first and second sentences.

Mr. Murphy said that he shared Mr. Forteau's view, and proposed the deletion of the word "likewise", which came immediately after the quotation.

Sir Michael Wood (Special Rapporteur) said that, while he did not object to deleting the word "likewise", he was not in favour of Mr. Forteau's proposal, as the two sentences were not in opposition to each other; rather, they both illustrated how practice should be taken into account in general.

Paragraph (5), as amended, was adopted subject to a minor drafting change in the French text.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

Mr. Nolte, supported by **Mr. Vázquez-Bermúdez**, said that, in the second sentence of paragraph (8), the expression "in some cases" suggested that the scenario in question was very exceptional; it should be replaced with "sometimes".

Mr. Petrič said that the word "sometimes" did not in any way improve the wording of the sentence. He proposed the word "occasionally".

Mr. Forteau, in reference to the French version, proposed that the sentence should be redrafted to read "*il n'exclut pas la possibilité que le même matériau soit utilise ...*" ("the paragraph does not exclude the possibility that the same material may be used …").

Mr. McRae, supported by **Mr. Saboia**, said that there was no point in modifying the paragraph in that way, because if the phrase "in some cases" was simply deleted, the fact that it was a possibility was implicit.

Paragraph (8), as amended by Mr. McRae, was adopted.

Paragraph (9)

Mr. Murphy said that, in the first part of the sentence, it would be preferable to replace the words "the occurrences of practice are" with "the existence of a general practice is", to delete the phrase "when seeking to establish whether a general practice exists" and to keep what followed up to the semicolon, which should be replaced with a full stop. The first word of the second sentence would then begin with a capital letter.

The meeting rose at 6.05 p.m.