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Provisional summary record of the 3339th meeting
Held at the Palais des Nations, Geneva, on Monday, 8 August 2016, at 10 a.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. 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 10 a.m.

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

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

The Chairman invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.883/Add.1.

Commentary to draft conclusion 3 (Assessment of evidence for the two constituent elements) (continued)

Paragraph (9) (continued)

Mr. Murphy recalled the proposals he had made at the Commission's previous meeting: the words "the occurrences of practice are" should be changed to "the existence of a general practice is"; the words "when seeking to establish whether a general practice exists" should be deleted; and the paragraph should be split into two sentences, with the first sentence ending at "is not mandatory".

Sir Michael Wood welcomed those suggestions. In reply to a question from **Mr. Saboia**, he said that the rest of the paragraph would remain unchanged.

Paragraph (9), as amended, was adopted.

The commentary to draft conclusion 3 as a whole, as amended, was adopted.

Introductory text to Part Three (A general practice)

Mr. Vázquez-Bermúdez suggested that, in the second set of parentheses, the words "acceptance as law" should be changed to "*opinio juris*".

Sir Michael Wood (Special Rapporteur) said that he was not in favour of that suggestion. It was his understanding that it had been agreed to limit the use of the Latin term "*opinio juris*", which already occurred once in the introductory text.

The introductory text to Part Three was adopted.

Commentary to draft conclusion 4 (Requirement of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Šturma suggested that a reference to the Commission's work on subsequent agreements and subsequent practice in relation to the interpretation of treaties should be added to footnote 26.

With that amendment to footnote 26, paragraph (2) was adopted.

Paragraph (3)

Mr. Nolte said that, at the end of the penultimate sentence, an additional footnote should be inserted, referring to the definition of "international organization" that was contained in the draft articles on the responsibility of international organizations.

Sir Michael Wood (Special Rapporteur) said that he would prefer not to add such a footnote. It had been deliberately decided not to include a definition of "international organization" in the text; moreover, the way in which the term was used in the sentence in question did not correspond exactly to the definition given in the draft articles on the responsibility of international organizations. He hoped that the fact that those draft articles were brought to the reader's attention in footnote 29, albeit for a different purpose, would be sufficient.

Paragraph (3) was adopted.

Paragraph (4)

Mr. Tladi suggested that the opening phrase of the second sentence would be clearer if it read: "They are entities established and empowered by States and/or international organizations".

Mr. Murphy suggested that, in the third sentence, the word "participation" should be altered to "practice" and the words "when accompanied by acceptance as law" should be changed to "when accepted by the international organization as law".

Mr. Park suggested an editorial amendment to further reduce the number of parentheses used in the paragraph, which he considered excessive.

Sir Michael Wood (Special Rapporteur) said that Mr. Tladi's suggested change would confuse the issue rather than clarifying it. Although possible, it was rare for an international organization to be party to a treaty establishing a different international organization; the sentence as drafted captured the current reality.

Mr. Tladi said that his suggested wording had been intended to include instances in which international organizations were established by States alone. He was not convinced by the sentence as drafted.

Sir Michael Wood (Special Rapporteur) reiterated his preference for leaving the sentence as it stood.

Mr. Murphy suggested that changing the phrase in question to read: "They are entities established and empowered by States (or international organizations)" might be acceptable as a compromise.

Mr. Forteau said that, in the second sentence, it was not necessary to specify who established and empowered international organizations. The words "by States (or by States and/or international organizations)" could therefore be deleted. Mr. Murphy's proposed amendment to the third sentence would make it too restrictive. The practice of international organizations did not only contribute to custom when accepted by the international organizations themselves, but also when accepted as law by States.

Mr. Nolte questioned the logic of the third sentence: it implied that the practice of international organizations must be accompanied by acceptance as law in order to count as practice, which was at odds with the very essence of the two-element approach applied to the identification of customary international law in the case of State practice. He suggested that the phrase "when accompanied by acceptance as law (*opinio juris*)" should be deleted altogether.

Sir Michael Wood (Special Rapporteur) acknowledged Mr. Nolte's point but considered that it might be accommodated by changing the first part of the third sentence, taking into account Mr. Murphy's suggestion to alter "participation" to "practice", to read: "Their practice in international relations may also count as practice that, when accompanied by acceptance as international law (*opinio juris*), gives rise …".

Mr. Saboia expressed support for Mr. Forteau's comments. The Commission should avoid taking too narrow an approach to the contribution of international organizations to international law, which was becoming ever more important.

Mr. Tladi said that he too endorsed Mr. Forteau's suggestion, which seemed to offer the most straightforward basis for reaching agreement on the paragraph.

Sir Michael Wood (Special Rapporteur) said that, unless there was any substantive objection, he would prefer to retain the words which Mr. Forteau had suggested deleting. Although a partial definition of international organizations was included in paragraph (3), it was concerned with how international organizations were established, not who they were established by. It was important to consider the relationship between States and international organizations in discussing the practice of the latter.

Mr. Murphy observed that his suggested change to the third sentence did not seem to have been taken up. He considered it an important alteration that should be made. The matter at hand was not the practice of States operating through an international organization but the practice of the international organization itself, as was made clear in paragraph (3). It must be clear that the Commission was referring to the *opinio juris* of international organizations, as one of the two elements needed to form customary international law.

Sir Michael Wood (Special Rapporteur) said that Mr. Forteau had raised an interesting issue that required considerable thought and had not yet been dealt with satisfactorily. The wording "accompanied by acceptance as law" would favour Mr. Murphy's view while allowing for others; he suggested that it should be adopted but given careful examination on second reading.

Mr. Hmoud said that, as the Commission had yet to discuss the question of the nature of acceptance and who could give it, it might be preferable to adopt the paragraph as it currently stood.

The Chairman said that he took it that the Commission agreed to leave the paragraph unchanged apart from the editorial amendment suggested by Mr. Park, the alteration of "participation" to "practice" and the alternative wording for the third sentence suggested by Sir Michael Wood.

Paragraph (4), as thus amended, was adopted.

Paragraph (5)

Mr. Forteau said that, in the final sentence, the word "sometimes" diminished the role of exclusive competences within the European Union and suggested that it should be changed to "in certain areas of competence [*dans certains domaines de compétence*]". He further observed that, in the same sentence, the word "possibly" left open the question of whether the practice discussed existed for other international organizations.

Mr. Nolte, expressing support for Mr. Forteau's remarks, suggested that the phrase "This sometimes happens in the case of the European Union" should be altered to read: "This is the case for certain competences of the European Union". The word "possibly" should be deleted.

Sir Michael Wood (Special Rapporteur) agreed with the thrust of the amendments proposed. He suggested adopting Mr. Nolte's proposed wording and deleting the rest of the sentence.

Mr. McRae said that, unless the Commission had specific examples of other international organizations in which the same situation pertained, it would be better to follow Sir Michael Wood's suggestion of deleting the rest of the sentence.

The Chairman said that he took it that the Commission agreed to alter the sentence in question to read: "This is the case for certain competences of the European Union."

Paragraph (5), as thus amended, was adopted.

Paragraph (6)

Mr. Nolte said that he was not sure that the final sentence was accurate. States often set up organs that were composed of individuals serving in their personal capacity and that nevertheless exercised similar powers to those of States. For example, the Iraq Inquiry conducted by the United Kingdom, which had involved a number of independent experts, had been considered to be a State activity. Moreover, courts themselves were composed of individuals who were not under instruction from the State. Therefore, he proposed deleting the final sentence, as it seemed difficult to find any acts of international organizations that in one way or another were not also acts of States.

Mr. Murphy proposed replacing, in the final sentence, the words "powers exercised by" with the words "acts of". As for the clause within brackets, the Iraq Inquiry was not likely to be referred to as part of the practice of the United Kingdom that contributed to customary international law. Such individual expert groups were generally viewed as separate from the State so as to give them greater credibility in scrutinizing State acts. The clause within brackets seemed acceptable, as it indicated that there could be exceptions to that rule. With regard to the second sentence, the Commission had discussed the secretariats of international organizations as possible examples but had not identified any specific precedents in case law or in statements made by Governments or international organizations themselves. Therefore, he proposed replacing the words "For example" with the phrase "While there are no specific precedents in this regard".

Mr. Park, recalling the Commission's discussion, during the first part of its session, of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", said that he wondered whether paragraph 3 of draft conclusion 13 (Pronouncements of expert treaty bodies) under that topic was contradictory to the final sentence of paragraph (6) currently under discussion. Indeed, the former stated that the pronouncements of expert treaty bodies could give rise to subsequent practice, whereas the latter seemed to indicate that the acts of such bodies were unlikely to be relevant practice. Although the draft conclusions related to different topics, confusion might still ensue as to the relevance for State practice of the acts of organs composed of individuals serving in their personal capacity.

Mr. Saboia said that he supported the proposal to delete the final sentence. In addition to treaty bodies, an important example of international organizations whose acts were likely to be considered relevant practice was the Committee of Experts on the Application of Conventions and Recommendations, which, although an organ of the International Labour Organization, was clearly independent, and whose practice must be considered relevant as it influenced States' implementation of conventions of that Organization.

Mr. Forteau said that he was in favour of deleting, in the final sentence, the clause in brackets. There were many States in which independent organizations established by the administrative authorities had a public role. As to the second sentence of the paragraph, it was too early in the Commission's work on the topic for it to state whether or not there were precedents in case law or otherwise; he would therefore prefer to maintain the sentence as drafted.

Mr. Nolte said that he supported Mr. Forteau's statement with regard to the second sentence. The word "might" was sufficiently cautious language. He also could agree to deleting, in the last sentence, only the phrase in brackets. The Iraq Inquiry was perhaps not

the most fitting example in the current context; however, if the report of that Inquiry had included a statement that clearly violated the rights of a particular State, it would necessarily have been attributable to the United Kingdom, which had set up the Inquiry.

Ms. Jacobsson asked whether, in introducing the Iraq Inquiry, Mr. Nolte had meant to refer to it as a practice of States.

Mr. Nolte said that, rather than focusing on a single example, he would prefer to speak more generally: if a State set up an independent body of experts and asked them to issue a report and that report stated false information about another State that would give rise to damage, that act would be attributable to the State that had set up the body. Therefore, the State could not exonerate itself of such acts, even if it was not a State organ — in the narrow definition of the word — that had performed them.

Ms. Jacobsson said that in her country, and likely in the other Nordic countries also, such bodies were often set up by the State. Their acts were not, however, considered attributable to the State, at least not until the State officially endorsed them.

Mr. Tladi said that the paragraph under discussion was about international organizations, not about bodies set up by States. He supported maintaining the last sentence as currently drafted.

Mr. Hmoud said that he also supported maintaining the final sentence as drafted and as discussed within the Working Group.

Sir Michael Wood (Special Rapporteur) suggested deleting, in the second sentence, the words "For example", and replacing, in the final sentence, the words "is usually" with the words "may be".

Mr. Saboia said that, as the Special Rapporteur's proposal did not change the substance of the final sentence, he remained in favour of its deletion. He agreed, however, with the deletion of the words "For example" in the second sentence.

Mr. Forteau, supported by **Mr. Nolte** and **Mr. Park**, said that he opposed the Special Rapporteur's proposed amendments to the last sentence, as they did not seem in line with paragraph (2) of the commentary to draft conclusion 5. The definition therein of what constituted State practice was quite broad and should extend to the acts of independent administrative authorities that were composed of experts but that had a governmental role. He therefore proposed that either the phrase in brackets in the last sentence or the entire last sentence should be deleted.

The Chairman said that he took it that the Commission wished to adopt the paragraph with the proposed deletion of the entire last sentence and, in the second sentence, of the words "For example".

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraphs (9) and (10)

Sir Michael Wood (Special Rapporteur) introduced a revised version of paragraphs (9) and (10), in which he proposed that the word "Similarly" in the penultimate sentence of paragraph (10) should be replaced with the words "For example" and that that sentence, together with the last sentence of paragraph (10) and the corresponding footnote, should be moved to the end of paragraph (9). In the first sentence of paragraph (10), the words "For example" should be deleted, so that the paragraph would begin with the words "Official

statements", and the words "may likewise" should be inserted before the words "play an important role". In the second sentence, the word "thus" should be inserted between the words "may" and "contribute".

Mr. Murphy said that he supported the Special Rapporteur's revisions. In addition, he proposed replacing, in the second sentence of paragraph (9), the phrase "As such, such conduct" with the phrase "As such, their conduct".

Paragraphs (9) and (10), as amended, were adopted.

The commentary to draft conclusion 4 as a whole, as amended, was adopted.

Commentary to draft conclusion 5 (Conduct of the State as State practice)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Murphy proposed replacing, in the second sentence, the phrase "other subjects of international law established by States (namely, international organizations)" with the words "international organizations". More generally, the rationale for drawing a distinction between the joint action of several States and that of other subjects of international law established by States was not clear. If both were considered relevant practice, then perhaps the distinction was not necessary and the last sentence could simply be deleted.

Mr. Saboia said that he was opposed to deleting the last sentence, which made a useful point in emphasizing the importance of international organizations when acting in support of or jointly with States.

Sir Michael Wood (Special Rapporteur) said that he, too, would prefer to maintain the second sentence, with the amendments proposed by Mr. Murphy to the phrase beginning with the words "other subjects".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

The commentary to draft conclusion 5 as a whole, as amended, was adopted.

Commentary to draft conclusion 6 (Forms of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy proposed that, in the second sentence, the word "sometimes" should be inserted immediately before the words "may count as practice".

Mr. Tladi said that it was not clear on what legal authority verbal conduct could be said to only sometimes count as practice. Noting also that the word "sometimes" did not appear in draft conclusion 6, he said that he would prefer the last sentence to remain as drafted.

Mr. McRae said that he also did not support the insertion of the word "sometimes", since it did not seem to add anything to the sentence.

Mr. Murphy said that adding the word "sometimes" would reduce the ambiguity of the word "may". However, he would not insist on the amendment.

Ms. Jacobsson said that she would like clarification of the phrase "verbal conduct (both written and oral)".

Sir Michael Wood (Special Rapporteur) said that he was not in favour of inserting the word "sometimes" in the second sentence. The point of the phrase for which clarification had been requested was to indicate that verbal, not just physical, conduct could constitute practice. He proposed, for the sake of greater clarity, replacing the words "both written and oral" with the words "whether written or oral".

Ms. Jacobsson said that she supported the proposed amendment to the phrase contained in brackets.

Mr. Forteau proposed replacing the words "verbal conduct" with the words "conduct consisting of declarations".

Mr. Tladi said that, while he did not object to any of the proposed amendments to the wording "verbal conduct", there was nothing incorrect about the phrase as originally drafted.

Sir Michael Wood (Special Rapporteur) said that the word "verbal" was defined as consisting or composed of words and that its use in paragraph (2) reflected the language of draft conclusion 6 (1), in which reference was made to "physical and verbal acts". Therefore, he would prefer to maintain the reference to "verbal conduct", with the amended phrase "(whether written or oral)" following it.

Paragraph (2), as amended, was adopted.

Paragraphs (3) to (7)

Paragraphs (3) to (7) were adopted.

The commentary to draft conclusion 6 as a whole, as amended, was adopted.

Commentary to draft conclusion 7 (Assessing a State's practice)

Paragraph (1)

Mr. Tladi said that, in the first sentence, the phrase "the position of the State", whose meaning was not clear in that context, should be replaced with the words "its practice".

Sir Michael Wood (Special Rapporteur) said that, in his view, the current formulation accurately conveyed the idea that the Commission wished to express; repeating the word "practice" might make the sentence somewhat circular. However, he had no strong objection to the proposal.

Mr. Murphy said that, although he was happy with the current language, one solution might be to recast the first sentence to read: "Draft conclusion 7 concerns the assessment of the practice of a particular State when assessing the existence of a general practice (which is the subject of draft conclusion 8)."

Sir Michael Wood (Special Rapporteur) said that the wording proposed by Mr. Murphy would not adequately convey the notion of assessing the practice of the particular

State as part of assessing whether there was a general practice. He would therefore prefer to retain the original formulation of the sentence.

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy suggested that, in the second sentence, the words "that is, include" should be replaced with "including".

Paragraph (2) was adopted with that amendment.

Paragraph (3)

Mr. Murphy said that, in the interests of readability, the first sentence should be divided into two and reformulated. The first sentence should end after the words "during an armed conflict"; the new second sentence should read: "Yet a different position was adopted before the Special Supreme Court by the Greek Government when refusing to enforce the Hellenic Supreme Court's judgment and in defending this position before the European Court of Human Rights, and was adopted by the Hellenic Supreme Court itself in a later decision."

Sir Michael Wood (Special Rapporteur) said that he could agree to split the first sentence into two by placing a full stop after the phrase "during an armed conflict". As to the new second sentence, he was not in favour of all the changes proposed by Mr. Murphy because, among other things, it was the Special Supreme Court that had adopted a different position, not the Greek Government. He proposed that the new sentence should read: "Yet a different position was adopted by the Special Supreme Court; by the Greek Government when refusing to enforce the Hellenic Supreme Court's judgment, and in defending this position before the European Court of Human Rights; and by the Hellenic Supreme Court itself in a later decision."

Paragraph (3), as amended by Mr. Murphy and subamended by the Special Rapporteur, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

Sir Michael Wood (Special Rapporteur) said that the final sentence should be split into two by placing a full stop after the words "the practice of the higher organ". The new penultimate sentence should read: "In this vein, for example, a difference in the practice of lower and higher organs of the same State is unlikely to result in less weight being given to the practice of the higher organ." The second new sentence would retain the original wording.

Paragraph (5), as amended by the Special Rapporteur, was adopted.

The commentary to draft conclusion 7 as a whole, as amended, was adopted.

Commentary to draft conclusion 8 (The practice must be general)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy suggested that, for ease of understanding, the final sentence should be reworded to read: "In each case, however, the practice should be of such a character as to make it possible to discern a constant and uniform usage."

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy said that the quotations from the two cases referred to in footnote 49 — *Kaunda and Others v. The President of the Republic of South Africa and Others* and the German Federal Constitutional Court case concerning *2 BvR 1506/03* — did not seem to be directly supporting the proposition contained in the text, namely that universal participation in a particular practice was not required. If those cases were cited in other contexts, consideration might be given to deleting the footnote.

Mr. Nolte said that he was not in favour of deleting the footnote in its entirety because the German Federal Constitutional Court case provided clear support for the view that practice was not required to be uniform in order for it to be considered general practice.

Sir Michael Wood (Special Rapporteur) said that he tended to agree with Mr. Murphy that the quotation from the *Kaunda* case did not support the proposition in the paragraph, although it was an interesting quotation that could be used elsewhere in the commentary. Like Mr. Nolte, he preferred to retain the quotation from the German case, since it did substantiate the content of the commentary. He therefore proposed that the reference to the *Kaunda* case should be deleted from footnote 49.

Paragraph (3) was adopted with that amendment to footnote 49.

Paragraph (4)

Mr. Nolte said that, for the sake of accuracy, the words "some rules" in the final sentence should be amended to read "many rules".

Mr. Park said that the current wording was surprising inasmuch as, during the discussions in the Working Group on the Identification of customary international law, the Special Rapporteur had in fact proposed the wording "many rules". In any event, in his view, the final sentence bore no logical relationship to the substance of the paragraph, which dealt with specially affected States. He therefore proposed its deletion.

Mr. Tladi said that he was not comfortable with the paragraph in its current formulation and wished to propose a number of amendments, which had been discussed with the Special Rapporteur. In particular, he proposed that the first sentence should be recast to read: "In assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule, have participated in the relevant activity." As to the final sentence, he was not in favour of its deletion, as proposed by Mr. Park. However, he was strongly opposed to the use of the words "some rules" in the opening phrase of that sentence; his preference would be to reword that phrase to read "In relation to most rules".

Mr. Vázquez-Bermúdez said that he could go along with Mr. Tladi's proposed amendment to the first sentence. With respect to the final sentence, he agreed with other colleagues regarding the need to amend the phrase "some rules". He was in favour of using the words "many rules", in line with the proposal made by the Special Rapporteur in the Working Group.

Sir Michael Wood (Special Rapporteur) said that, in general, he agreed with Mr. Tladi's proposed amendment to the first sentence; however, he suggested that the final word of his proposal, "activity", should be replaced with "practice". As to the final sentence, he proposed recasting it to read: "In many cases, all or virtually all States will be equally concerned."

Mr. Hmoud said that, in the final sentence, he would prefer to retain the words "directly concerned", since a comparison was being drawn with specially affected States. It was not clear what was meant by "equally" in that context.

Sir Michael Wood (Special Rapporteur) said that the point of the word "equally" was to suggest that, in many cases, there would not be any specially affected States.

Mr. Tladi said that, while he understood the issue raised by Mr. Hmoud, he saw no problem with the word "equally".

Mr. McRae said that he was not sure that there was any need to indicate the extent to which States were concerned by the rules in question. He therefore suggested that the last phrase of the final sentence could read: "all or virtually all States will be concerned".

Mr. Nolte said that a qualifier of some kind, whether "directly concerned" or "equally concerned", was needed in order to stand in opposition to the idea of "specially affected" States. He personally favoured the phrase "equally concerned".

Mr. Murphy said that, in view of the number of suggested amendments, it would be helpful if the proposed new version of the paragraph could be circulated to the Commission in written form.

The Chairman proposed that the meeting should be suspended in order to allow the Special Rapporteur time to draft a new version of the paragraph.

The meeting was suspended from 11.50 a.m. to 12.10 p.m.

The Chairman invited the Commission to adopt the Special Rapporteur's proposed new version of paragraph (4), which had been circulated to members and reads:

> "In assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule, have participated in the practice. It would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of coastal States and major shipping States, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as well as that of the States in which investment is made. In many cases, all or virtually all States will be equally concerned."

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Vázquez-Bermúdez said that, in the first sentence, the phrase "virtually uniform" should be replaced with "consistent" in order to bring the wording into line with the language of paragraphs (5) and (7).

Paragraph (6), as amended, was adopted.

Paragraph (7)

Mr. Murphy said that footnote 54, which contained a number of examples of possible divergence from an alleged customary rule, might not be helpful in the light of the overall objective of the commentary to draft conclusion 8. He therefore proposed the deletion of that footnote.

Sir Michael Wood (Special Rapporteur) said that he would have no problem with deleting footnote 54.

Paragraph (7) was adopted, with the deletion of footnote 54.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

The commentary to draft conclusion 8 as a whole, as amended, was adopted.

*Introductory text to Part Four (Accepted as law (*opinio juris*))*

The introductory text to Part Four was adopted.

*Commentary to draft conclusion 9 (Requirement of acceptance as law (*opinio juris*))*

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Nolte said that the brackets around the second sentence should be deleted and that the sentence should begin with the word "However".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Vázquez-Bermúdez said that in the first sentence the expression "*opinio juris*" in brackets should be added after the phrase "acceptance as law".

Sir Michael Wood (Special Rapporteur) suggested that, in footnote 63, the phrase "expressive of" should be replaced with "accompanied by" in order to ensure consistency with the terminology used elsewhere.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to draft conclusion 9 as a whole, as amended, was adopted.

*Commentary to draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*))*

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

The commentary to draft conclusion 10 as a whole was adopted.

Introductory text to Part Five (Significance of certain materials for the identification of customary international law)

Mr. Murphy proposed that, in the third sentence of the second paragraph, the order of the expressions "codification" and "progressive development" should be reversed for the sake of consistency with the Commission's statute. In the final sentence, he suggested that the phrase "and sources cited" should be inserted after the word "reached".

Mr. Nolte said that, while he was not opposed to analysing the value of the output of the Commission for the purpose of identifying customary international law, he was concerned that giving particular prominence to that output by referring to it in the introductory text to Part Five was likely to attract criticism. The paragraph in question might perhaps be moved.

Sir Michael Wood (Special Rapporteur) said that he agreed with Mr. Murphy that, in the third sentence of the second paragraph, the phrase "the codification and progressive development of international law" should be recast to read: "the progressive development of international law and its codification". He did not, however, consider it appropriate to insert a reference to sources in the last sentence, not least because, in the third sentence, mention was made of the Commission's consideration of extensive surveys of State practice, which seemed to cover the point.

In response to Mr. Nolte, he recalled that there had been a long debate within both the Working Group on the Identification of customary international law and the Commission on how to refer to the Commission's output. Several members had called for the matter to be addressed in a draft conclusion, whereas others had argued that such an approach would give the Commission too much prominence. He had proposed that the matter should be dealt with in draft conclusion 14 on teachings, but had encountered strong opposition on the basis that the Commission's work differed from teachings. After careful consideration, it had been decided that the introductory text to Part Five would be the most suitable location. Although it was true that the Commission's output was mentioned near the start of Part Five, it did not form part of a draft conclusion and was addressed only briefly in the commentaries, despite the fact that, in his view, it carried greater weight than teachings. If the placement of the paragraph drew an adverse reaction from States, the Commission could review it on second reading.

Mr. Tladi said that the Special Rapporteur had sought to take into account the two opposing views expressed during the debate on how to refer to the Commission's output and that, consequently, he was not sure what more could be done.

As to the last sentence of the second paragraph, he agreed with Mr. Murphy that reference should be made to sources. The third sentence did not sufficiently cover the issue in that it highlighted why the Commission's output was of particular importance, rather than the fact that relevant State practice should be borne in mind when attaching weight to the Commission's determinations.

Mr. Saboia said that he agreed with the proposed redrafting of the third sentence of the second paragraph. The paragraph as a whole was important, carefully worded and not self-laudatory. He was open to the modification of the last sentence proposed by Mr. Murphy and Mr. Tladi.

Mr. Forteau proposed that, to reflect the comments that had been made with regard to the second paragraph, it should be stated in the first sentence that the Commission had not considered it appropriate to devote a separate draft conclusion to its output.

Mr. Nolte proposed that the second paragraph of the introductory text should be moved to paragraph (6) of the commentary to draft conclusion 14. The first sentence of paragraph (6) would be amended to read: "The output of the International Law Commission,

while sometimes included among 'teachings', is of a different character. It carries particular weight." The remainder of paragraph (6) would be constituted by the second paragraph of the introductory text, minus the latter's first sentence, which would be deleted.

Ms. Escobar Hernández said that she was happy with the current wording of the second paragraph, which reflected the debate that had taken place within the Working Group on how to refer to the Commission's output. The addition proposed by Mr. Forteau, while unnecessary, was acceptable if it helped resolve the issue raised by Mr. Nolte. She could not, however, accept Mr. Nolte's proposal to move the second paragraph to paragraph (6) of the commentary to draft conclusion 14.

Mr. Hmoud said that, as he understood it, the Working Group had agreed to refer to the Commission's output in the introduction to Part Five. The Commission should stick to that agreement, particularly as its output could not be assimilated to teachings.

Mr. Murphy said that he agreed with Mr. Nolte that the Commission's output was given too much prominence. Decisions of the International Court of Justice, for instance, were not mentioned until draft conclusion 13. His preference would be to move the paragraph in question to the commentary to draft conclusion 14, as proposed by Mr. Nolte, with the addition of a phrase explaining that the Commission's output differed from teachings. He did not support Mr. Forteau's proposed rewording of the first sentence, which would shift the focus towards the Commission's internal deliberations.

His problem with the last sentence of the second paragraph was that the weight given to the Commission's determinations should depend on more than just the stage reached in its work and States' reception of its output.

Mr. Vázquez-Bermúdez said that the second paragraph as it stood succinctly reflected the debate that had taken place within the Working Group. He did not consider, therefore, that any changes to the last sentence were necessary. To respond to the concern expressed by Mr. Murphy and Mr. Tladi, however, the words "*inter alia*", set off by commas, could be inserted after "depends".

Sir Michael Wood (Special Rapporteur) said that the first sentence could be redrafted to read: "The Commission decided not to include, at this stage, a separate conclusion on the output of the International Law Commission. Such output does, however, merit special consideration in the present context." As to the last sentence, he proposed the following wording: "The weight to be given to the Commission's determinations depends, however, on various factors, including the sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output."

The introductory text to Part Five, as amended, was adopted.

Commentary to draft conclusion 11 (Treaties)

Paragraph (1)

Mr. Nolte proposed that, in the second sentence, the words "under customary international law" should be added after "as a form of practice", since the current formulation could give rise to the misunderstanding that it related to subsequent practice in the application of treaties.

Sir Michael Wood (Special Rapporteur) said that no misunderstanding was possible. The draft conclusions related to the identification of customary international law and it was perfectly clear that the Commission was not referring to practice in other contexts. It would not be correct, in any case, to refer to "practice under customary international law".

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy said that, in the third sentence, the words "existence and" were rendered superfluous by the second half of the sentence and should be deleted. He also proposed that the last sentence of footnote 75, which was somewhat awkward, should be redrafted to read: "Article 38 of the 1969 Vienna Convention refers to the possibility of 'a rule set forth in a treaty … becoming binding upon a third State as a customary rule of international law, recognized as such'."

Sir Michael Wood (Special Rapporteur) said that he agreed with the amendment to footnote 75. The language of the third sentence, however, was consistent with that used in the rest of the document and should be left unchanged.

Mr. Nolte proposed that, in the second sentence, the word "implementation" should be replaced with "application", in line with the language of the Vienna Convention on the Law of Treaties.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy said that, in the first sentence, the word "sometimes" should be inserted between the words "near-universal acceptance" and "may be seen" in order to avoid any ambiguity. Referring to footnote 78, he asked whether it was in fact the case that, in *Prosecutor v. Sam Hinga Norman*, the Special Court for Sierra Leone had, in its judgment, referred to the "huge acceptance, the highest acceptance of all international conventions" as indicating that the provisions of the Convention on the Rights of the Child had come to reflect customary international law. He wondered whether that was not overstating what the Court had said and whether it would not be better, in any case, to replace "the provisions" with "certain provisions".

Mr. Saboia said that he could not accept the inclusion of the word "sometimes".

Sir Michael Wood (Special Rapporteur) said that he, too, was not in favour of inserting the word "sometimes". He would respond to Mr. Murphy's question concerning the citation in the *Prosecutor v. Sam Hinga Norman* case after checking the terms of the judgment in question.

Paragraph (3) was left in abeyance.

Paragraph (4)

Mr. Nolte proposed that, for the sake of clarity and to echo the language of the Vienna Convention, the last sentence should be redrafted to read: "It is important that States can be shown to engage in the practice not (solely) by virtue of the treaty obligation ('in the application of the treaty'), but out of a conviction that the rule embodied in the treaty is or has become customary international law."

Sir Michael Wood (Special Rapporteur) said that the addition proposed by Mr. Nolte introduced a complexity of thought that he would prefer to avoid. Moreover, he was not sure that "in the application of the treaty" meant the same as "by virtue of the treaty obligation".

Mr. Nolte said that "in the application of the treaty" was the standard terminology, whereas "by virtue of the treaty obligation" was not. Orthodoxy suggested that the sentence should be clarified in the manner that he had proposed.

Sir Michael Wood (Special Rapporteur) said that the issue could be resolved by replacing the words “by virtue” with “because”.

Paragraph (4), as amended, was adopted.

The meeting rose at 1 p.m.