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Held at Headquarters, New York, on Tuesday, 8 May 2018, at 10 a.m.

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Identification of customary international law (*continued*)

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Present:

Chair: Mr. Valencia-Ospina

Members: Mr. Argüello Gómez
Mr. Aurescu
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guilloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Identification of customary international law
(agenda item 6) (*continued*) (A/CN.4/710, A/CN.4/716
and A/CN.4/717)

The Chair invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on identification of customary international law (A/CN.4/717).

Mr. Murase congratulated the Special Rapporteur on his report and on his handling of the topic. Although he had often been critical of the previous reports on the topic, he hoped that the Special Rapporteur understood that that stemmed from his passion for and attachment to the topic. As some of his views had, regrettably, not been accepted, he felt compelled to repeat them in part with respect to the current report. The first point of contention was that the set of draft conclusions lacked a definition or explanation of the essential characteristics of customary international law, something that should have been done at the very outset. The first of its essential characteristics was that customary international law was unwritten law. While that might entail flexibility, it could also create application difficulties. For example, the conviction by the State of a person for a violation of customary international law might conflict with the rule of *nullum crimen sine lege* or *nulla poena sine lege*, which had underpinnings in statutory law in many countries.

A second essential characteristic not mentioned in the draft conclusions was the universally binding nature of customary international law. Compared with the situation under treaties, to which States could refrain from becoming parties if they did not wish to comply with the attendant obligations, States had no choice but to comply with customary international law. Moreover, customary international law could be created spontaneously and there was no way of knowing systematically when, where and how that happened — there was no early warning system. That was one reason why the memorandum by the Secretariat entitled “Ways and means for making the evidence of customary international law more readily available” (A/CN.4/710) was so important. The possibility of spontaneous creation of customary international law should be clearly flagged as a caution for States, whose legal advisers had every reason to be cautious, since any official comment on customary international law made by a State or State officials could subsequently be used unexpectedly against the State in future litigation. That in fact was what had happened in the case concerning *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening)*.

A third essential characteristic not covered in the draft conclusions was the definition of the term “identification”, which was included in the title of the topic. The only explanation, given in the commentary, was that the word “identify” was used interchangeably with “determine”. Other words used in the draft conclusions and the commentaries were “ascertain”, “assess”, “recognize” and “establish”. In that light, it was difficult to see what was meant by “identification”. It was not clear whether it included or excluded the process of interpretation and application of customary international law. By contrast, in paragraph (3) of the commentary to draft guideline 9, paragraph 1, of the text adopted in 2017 on protection of the atmosphere, identification was described as an exercise preliminary to, but separate from, the exercise of interpretation and application of law. That distinction might be helpful for the current project.

He agreed in general with the proposed draft conclusions, but nevertheless had some concerns regarding some of them. On draft conclusion 3 (Assessment of evidence for the two constituent elements), he said that in the course of “identification”, however it might ultimately be defined, assessment of evidence was crucial. The rules of evidence related mainly to facts, but the draft conclusion dealt with the evidence of law. Although the court was primarily responsible for fact-finding in court proceedings, as encapsulated in the maxim *jura novit curia*, the parties to the case also had a responsibility to prove the existence of the law underpinning their case without the court ruling *proprio motu*. Therefore, he believed that certain procedural law issues, including the question of the burden of proof, as suggested by Spain, should be addressed more directly in the draft conclusion and in the commentary.

In response to comments from many States, the Special Rapporteur had made amendments to draft conclusion 4 (Requirement of practice) whereby more weight had been placed on the practice of States in paragraph 1, while less weight had been placed on the practice of international organizations. He had done by adding the word “may”, but that addition might not be sufficient. Paragraph 2 began with the phrase “in certain cases”, but in order to respond to the queries of some States, clarification in the commentary of the content of the expression “certain cases” was needed.

The insertion of the word “deliberate” before “inaction” in draft conclusion 6 (Forms of practice) was understandable in view of the comments made by some States. However, whether certain inaction was “deliberate” or not was quite a subjective decision, and he was not sure if it was proper to add such a subjective

element to the notion of “practice”, which was supposed to be determined by objective criteria.

In draft conclusion 8 (The practice must be general), the Special Rapporteur proposed to change the term “consistent” to “virtually uniform”. As he understood it, that amendment did not substantially alter the threshold of generality or lower the standard required, even though “virtually uniform” was slightly weaker than “uniform”. The term “consistent” came from the judgment of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, while the words “virtually uniform” were derived from the *North Sea Continental Shelf* judgment. He had opposed the insertion of a reference to “specially affected States” as had most members of the Commission, and he thought that the solution of explaining the issue in the commentary was a good one.

In connection with draft conclusion 15 (Persistent objector), he wished to be included in the list of persistent objectors to the persistent objector rule. Persistent objection was related, not to the identification of customary international law, but rather to its application. He was in favour of inserting a new paragraph 3 stating that the draft conclusion was without prejudice to any question concerning *jus cogens*.

He was not in favour of the inclusion of draft conclusion 16 (Particular customary international law). The topic should be limited to issues of general custom, not particular custom. Some States considered that the expression “or other” after the words “regional, local” should be deleted, in order not to lead to a proliferation of particular custom, and he agreed. Certain States such as Greece and the Russian Federation had expressed concern about the effect of particular custom on third States. He believed that a new paragraph, comparable to article 34 of the 1969 Vienna Convention on the Law of Treaties, should be included to cover the *pacta tertiis* rule, with a commentary referring to the exceptions to the rule, if any. The central question in that context was the opposability of particular custom to third States.

As to the final form of the product, he seemed to be the only member of the Commission who considered “conclusions” to be rather odd. Members of the Commission and the Sixth Committee were quite used to the word by now, but other people had entirely different reactions. Law students of his acquaintance reacted as if a text by such a name was of little importance, and he was afraid that the reaction of the judges of national courts would be the same. The Commission’s function was more than just one of

clarification. It was a normative organ, and “conclusions” did not convey that function to the outside world. The name gave the misleading impression that the Commission had been simply indulging itself by engaging in studies. There was still time to adopt the name “guidelines” for the topics of subsequent agreements and subsequent practice in relation to the interpretation of treaties and peremptory norms of general international law (*jus cogens*), as well as for the current topic. He would not press for such a change, if he was the only one who felt it necessary, but he did think that the proliferation of “conclusions” was a serious cause for concern.

Another cause for concern was the lack of citations of academic literature in the commentary to the draft conclusions and in the Special Rapporteur’s reports. Such a lack of citations could not be justified for a theory-dependent topic such as customary international law, even by the very welcome and exhaustive bibliography annexed to the fourth report of the Special Rapporteur (A/CN.4/695). For example, the commentary referred to the theory of “instant custom”, but the writings of authors who had discussed the question in detail had not been referenced. Another example was the lack of citations of learned articles regarding the concept of opposability underlying draft conclusion 16. The Special Rapporteur himself explicitly referred to “scholarly writings” in several parts of the commentary, but with no citations thereof. It was not just a matter of courtesy or respect for academic contributions: the practice of non-citation was a serious problem and should not be allowed to proliferate. The problem must be remedied before the commentary to the draft conclusions was adopted.

Lastly, he said he was in favour of sending the draft conclusions to the Drafting Committee and supported the recommendation to the General Assembly proposed by the Special Rapporteur in paragraph 129 of his report.

Mr. Tladi said that the memorandum by the Secretariat (A/CN.4/710) addressed a significant challenge for the Commission: how to combat overreliance on European and North American materials. Materials from Latin America were on the upswing, but Asian and African materials remained significantly underrepresented. True, materials from Europe and North America were more readily available, but the suspicion that international law was made by the well-resourced, to the detriment of the underresourced, had to be addressed. The Secretariat’s memorandum made a good start, but much more needed to be done to find ways to uncover evidence of customary international law from all regions. He fully endorsed the

suggestions for improving the availability of the evidence of customary international law, especially those contained in paragraphs 120 to 122 of the memorandum. He therefore supported the Special Rapporteur's recommendation that the Commission should endorse the Secretariat's suggestions.

Paragraph 80 contained the startling information that out of 194 bibliographic resources relating specifically to international law, 102 were from Western European and related countries, and only 8 from Africa — and those 8 had come from only 5 countries, meaning that nothing had been forthcoming from the other 49 countries of the African continent. One of the resources cited was the *South African Yearbook of International Law*, of which he was the editor, but even that resource was not comprehensive. He had found a private resource in South Africa, called the Parliamentary Monitoring Group, which was dedicated to watching parliamentary activities. He suggested that the Secretariat should add the Group's website — pmg.gov.za — to its list of bibliographic resources.

Turning to the report of the Special Rapporteur, he said that overall, the work done by the Commission was excellent and well balanced, thanks in large part to the very collegial leadership of the Special Rapporteur. Any tinkering that might affect the fine balance achieved in the first reading of the draft conclusions should be avoided. Above all, it was necessary to protect the notion of the equality of States in law-making and to avoid entrenching the reality that the practice of some States mattered more.

With respect to draft conclusion 3, and in particular the comments by the Netherlands ([A/CN.4/716](#), p. 6), he said that while it seemed self-evident that the process for identifying the existence of a rule was the same as the process for determining the content of that rule, he would have no objection to clarification in the commentary, if there was a risk that an opposite explanation might be possible, something which he very much doubted. He therefore agreed with the Special Rapporteur on the draft conclusion. He disagreed, however, with the statement by Israel that the *opinio juris* of States that did not engage in practice was irrelevant. There was no basis for that statement in international law and no authority for it had been offered. In contrast, the Special Rapporteur had taken great care to advance authority for the contrary view in the form of decisions of the International Court of Justice.

Except for minor editorial corrections, he would not recommend any changes to draft conclusion 4, and

in particular he would caution against the deletion of the word “primarily” in paragraph 1.

Turning to draft conclusion 6, he accepted the changes to the text proposed by the Special Rapporteur and expressed satisfaction that States from across the political and economic spectrum had sounded a cautionary note about reliance on silence as a form of practice. However, he did not share some of the views expressed by some States. Israel, for example, had contended that verbal acts should be qualified by the words “at times”. Although that comment was said to be a reflection of customary international law, no evidence had been offered to support it. On the other hand, the questions raised by Israel, New Zealand and a number of other States as to whether only decisions of higher courts or those of all courts must be considered had some merit. For the most part, nevertheless, he agreed with the Special Rapporteur's comments in paragraph 56 of his report. The Special Rapporteur was right that certain decisions of lower courts might, for whatever reason, never have been appealed, and surely, those decisions constituted State practice. However, it had to be made clear that when a decision was overturned, its value as State practice was not only diminished but ceased to exist. He would also add the important caveat that the mere fact that a higher court came to a different finding in the *dispositif* of a judgment did not mean that the lower court decision was overturned for the purpose of State practice. Similarly, the mere fact that a decision of a higher court affirmed the finding of the lower court in its *dispositif* did not mean that the decision was confirmed.

On draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)), he was sympathetic to the argument by Austria concerning *opinio necessitatis*, but like the Special Rapporteur, he did not think that it was relevant to the identification or even the formation of customary international law

On draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), he had difficulty with the attempts to downplay resolutions. He agreed with those who suggested that the resolutions of universal entities, such as the General Assembly, were likely to be especially important, but disagreed with the suggestion, nevertheless accepted by the Special Rapporteur, that qualifiers such as “in certain circumstances” should be added. The current wording of the draft conclusion already captured the caution that concerned States had expressed. The use of the word “may” in draft conclusion 12 sufficed to suggest that under certain circumstances, the resolutions in question would not serve as evidence. The wording of the draft conclusion

did not suggest that the resolutions established customary international law, only that they served as evidence of its existence and content, and the commentary also contained cautionary elements. He therefore did not support any amendment to the wording of draft conclusion 12.

He had doubts about the persistent objector doctrine incorporated in draft conclusion 15 and looked forward to hearing the comments of members who had not yet been exposed to the text when adopted on first reading.

Turning to draft conclusion 8 (The practice must be general), he expressed gratitude to the Special Rapporteur for not recommending a change to the text, although he was probably tempted to. While he disagreed strongly with the Special Rapporteur, he appreciated his collegial approach, exemplified in his statement introducing the report, where he had recommended that the Drafting Committee should consider amending a text that had been clearly unpopular on first reading. In paragraph 65 of his report, the Special Rapporteur indicated that the United States stressed the importance of contrary practice. The Special Rapporteur's response, which was undoubtedly correct, was that of course contrary practice, particularly of States whose practice was said to be establishing custom, must be taken into account. While he agreed with the Special Rapporteur, he thought the concerns of the United States went further, and he shared them. Obviously, when 20 States had a consistent practice but another 10 had a contrary practice, then the latter should have the effect, if not of preventing, at least of complicating, the establishment of a rule of custom on the basis of the practice of the former.

He now came to the subject of specially affected States, about which he felt very strongly. As a preliminary matter, he wished to point out that some States, some members of the Commission and some academics had sought to suggest that those like himself who questioned the doctrine of specially affected States did so because they assumed it referred to powerful States or members of the Security Council. That was a gross simplification of what were much more nuanced arguments, some of which had been made by Mr. Forteau, Mr. Murase, Mr. Vázquez-Bermúdez and himself in the previous quinquennium. While they recognized that power was an integral part of the concern about that doctrine, it was not their understanding that the expression "specially affected States" meant "powerful States". They simply recognized that for some that was what it might mean, as indicated in two authorities found in the footnotes of the footnotes of the second report of the Special

Rapporteur (A/CN.4/672), namely the London Statement of Principles Applicable to the Formation of General Customary International Law and the dissenting opinion of Judge Schwebel in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*.

On the substance, he noted that only 4 of the 15 States that had commented on draft conclusion 8 had criticized the Commission's treatment of specially affected States. All four that had sought to emphasize the importance of specially affected States had referred to the *North Sea Continental Shelf* cases of the International Court of Justice. It should be noted, however, that the reference to specially affected States in those cases had been in the form of *obiter dictum*; that the Court had not once referred back to it; and that it had also made other pronouncements about customary international law in those cases. There was no evidence that any member of the Commission or any State was demanding that a norm-creating requirement should be reflected in the draft conclusions. The proponents of the doctrine of specially affected States had offered very little else in terms of authoritative support. However, for such a far-reaching principle, it would be good to have more than just some textbook entries and a 50-year-old *obiter dictum* which had never been repeated by the International Court. The only other justification given for the proposition that the doctrine of specially affected States was part of customary international law was that it was logical. He now proposed to test the logic of the arguments advanced by various countries in favour of the proposition.

China stated that "the practice of any country, whether it be big or small, rich or poor, or strong or weak, should receive full consideration, provided that that country has a concrete interest in and actual influence over the rules in that area". However, that was precisely the problem with the doctrine of specially affected States: it sought to establish, as a legal norm, the idea that some practice should not receive "full consideration". The statement of China also raised the question of what was meant by "actual influence". In his view, it was unlikely that Lesotho, as a landlocked State, could have actual influence over the development of legal rules relating to landlocked States, because it was small, poor and powerless.

Unlike the statement by China, those of Israel and the Netherlands did not seek to advance practical realities, but only to advance law as a basis. They contended that it was well accepted that specially affected States were crucial to the formation and identification of customary international law. Israel went on to say that where the practice or *opinio juris* of affected States could not be shown, that constituted

evidence that there was no rule of customary international law. But the only evidence for that was the *North Sea Continental Shelf* cases which, as he had already argued, did not constitute much of an authority for so bold a statement.

The comments by the United States suggested that it would be impractical not to apply the specially affected States doctrine but did not indicate why it would be impractical. He himself wished to explain why, apart from the fact that there was no authority for it, the specially affected States doctrine was inappropriate.

First, all States were specially affected by the rules of international law. It was often argued that States with continental shelves were specially affected by rules relating to the continental shelf. But a landlocked State was also specially affected, because the relevant rules had the potential to limit the size of the Area in which it was entitled to operate under international law. To quote the comments of Judge Shahabuddeen in his dissenting opinion on *Nuclear Weapons*: “Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all States are equally affected, for, like the people who inhabit them, they all have an equal right to exist.”

Secondly, it was not clear why some States’ practice and *opinio juris* should be particularly important in the formation and identification of rules of customary international law, whereas their binding effect would apply equally to all States without distinction. Such would be the case, for example if only those States that had the capacity to go to outer space was specially affected by rules relating to space, even though the rules they established would bind all States equally. That was unfair and even though fairness was not a legal standard, it had a role to play in the current normative arena in which there was no legal authority for specially affected States

Thirdly, under the specially affected States doctrine, there could be no customary international law rule prohibiting apartheid, because South Africa, which at the time was the State most synonymous with apartheid, was really the specially affected State.

Although he could go further on the subject of specially affected States, he wished to close by thanking the Special Rapporteur for his excellent work on the topic and looked forward to the adoption of the draft conclusions on second reading before the end of the current session. Having listened to Mr. Murase’s

comments, he was now reconsidering his views on the use of the word “conclusions” compared to “guidelines”.

Mr. Murphy said that the Secretariat memorandum entitled “Ways and means for making the evidence of customary international law more readily available” (A/CN.4/710) was an impressive compilation. All the recommendations in chapter II were sound and should be transmitted to the General Assembly. He also supported adding the Commission’s draft conclusions, once finalized, to a new version of the memorandum. States seemed to be generally supportive of the Commission’s draft conclusions, although they had expressed some concerns that merited changes in the text and in the commentary. Thankfully, virtually all the changes to the draft conclusions proposed by the Special Rapporteur were responsive to the concerns expressed.

With respect to draft conclusion 3, States such as China had indicated the need to make it clear that the assessment of evidence for the two constituent elements of customary international law — general practice and *opinio juris* — must be rigorous in nature. While the proposal by China was to add a third paragraph to the draft conclusion, he thought it might be possible to accommodate that concern by simply adding an adjective such as “rigorous” or “careful” before the word “assessment” in paragraph 2.

Draft conclusion 4, especially paragraph 2, continued to be the most problematic and had elicited a variety of reactions from States. As the Netherlands gently put it, “we cannot but note that the role of international organizations in relation to the formation and identification of international law has been a controversial issue in the drafting of the conclusions on this topic”. He thought that was because the Commission had been too facile, and perhaps too zealous, in insisting that the practice of international organizations, as such, created international law, without doing the harder work of explaining exactly how and why that was the case. As New Zealand noted, “the conceptual basis for that proposition has not been clearly articulated in the draft conclusion or its commentary”. The issue was not whether the practice of States before international organizations counted as State practice for the purpose of a customary international law analysis. Likewise, the issue was not whether an act by an international organization might elicit reactions by States that also counted as State practice. Rather, the claim in draft conclusion 4, paragraph 2, was that practice by an international organization “as such”, even when far removed from any State involvement, could form or create customary

international law. The issue was purportedly qualified in paragraph 2 with the words “in certain circumstances”, but neither the draft conclusion nor the commentary provided clear guidance as to what those circumstances were, as noted by several States. Singapore pleaded that at least a phrase like “limited cases” should be used to try to cabin the implications of paragraph 2.

He himself saw three conceptual problems with the paragraph, the first being exactly what constituted the practice of an international organization. Draft conclusions 5 and 6 described State practice and forms of State practice, respectively, but said nothing about the practice and forms of practice of international organizations. It was asserted in paragraph (3) of the commentary that those draft conclusions and others could apply, *mutatis mutandis*, to international organizations. The question was whether that meant, in line with the wording of draft conclusion 5, that the practice of an international organization, like State practice, consisted of the exercise of the organization’s executive, legislative, judicial or other functions. If so, then the practice of the International Court of Justice, in exercising its judicial functions, was relevant practice for forming or creating rules of customary international law. However, that did not fit well with draft conclusion 13, which referred to the Court’s decisions as subsidiary means for determining such rules, not as directly creating them. Furthermore, the question could also be asked whether the practice of an international organization included the conduct of the Secretary of the International Law Commission, or the conduct of the Chair of the Drafting Committee.

Such grey areas were why States some States were troubled, including Belarus, which said that the acts of international organizations “should be considered only to the extent that they relate to the practice of States acting within those organizations, mainly within their representative organs, not their secretariats, treaty bodies and the like”. The concern was to prevent the potential creation of customary international law by any conduct whatsoever by anyone associated in any way with an international organization. In the commentary to draft conclusion 4 the Commission tried to signal that the practice of an international organization closely associated with States was the most relevant practice, but merely confused things further. It emphasized in paragraph (4) of its commentary that international organizations were independent actors that had their own rights and obligations, yet in paragraph (8) it indicated that greater weight should be given to the practice of an international organization when directly carried out on behalf of its member States. Such

schizophrenia had been noted even by supporters of paragraph 2.

A second conceptual problem was how to construe the practice of international organizations in relation to a general practice that was “sufficiently widespread and representative”, as stipulated in draft conclusion 8. In talking about States, what that meant was relatively clear — 130 out of 193 States needed to have engaged in consistent practice, for example. However, if the thousands of existing international organizations were included in the calculation, it was impossible to know what “general practice” was required in order for a rule to be constituted. It might be claimed that not all international organizations were needed — only those that really counted. Perhaps the Security Council, which had a unique role to play with respect to international peace and security, was the sole organization to be taken into account with respect to that particular function. The draft conclusions were completely silent as to who or what must be engaged in a general practice required for the formation of a rule, and as to the pool of actors whose conduct must be widespread and representative.

A third conceptual problem was that the actors engaged in the practice did not need to be actors bound by the rule that emerged from the practice. Customary international law had traditionally been predicated upon the idea that the community of States, through their practice and *opinio juris*, could create rules binding upon those States. Yet the draft conclusions contained no requirement that the practice of an international organization should contribute to a rule that would then be binding on the organization. That led to a dilemma of determining how an international organization could be convinced that its practice was compelled by law, absent such compulsion by the law.

If not dealt with, those conceptual problems would persist, causing confusion and uncertainty, but hopefully not leading to the pernicious use of the Commission’s work. Some of the concerns with paragraph 2 might be ameliorated by clearer wording in the draft conclusion and in the commentary. He personally believed that the fixes proposed by the Special Rapporteur were a step in the right direction — they just did not go far enough. It would help to signal in the commentary that the very limited practice and lack of case law in support of paragraph 2 “moves the border between codification and progressive development in the direction of the latter” — in other words, paragraph 2 did not necessarily yet have the same authority as the other draft conclusions.

Turning to draft conclusion 8, he said that he supported the Special Rapporteur’s proposed change as

a means to address the concerns raised by a number of States. He would like to see a further change, whereby the words “sufficiently widespread” were replaced with “extensive”. The word “sufficiently” raised the question of what was “sufficient”, whereas the word “extensive” provided greater content and was consistent with the terminology used by the International Court of Justice in the *North Sea Continental Shelf* cases. At the very least, the word “sufficiently” should be deleted, as it did more harm than good.

He regretted that some way of including a reference to “specially affected States” in draft conclusion 8 had not been found. It would provide greater protection to smaller States that might otherwise be overlooked in a customary international law analysis. For example, when identifying a customary rule for archipelagic sea-lane passage, it was essential to consider the practice of archipelagic States, not just the practice of maritime Powers that transited through the archipelago. The point was not to give greater weight to the practice of specially affected States, but rather to ensure that such practice was taken into account. That was where he disagreed with Mr. Tladi. He continued to hope that thoughtful treatment of the matter would be provided in the commentary, if not in the draft conclusion itself.

In its comments on draft conclusion 9, the United States had expressed the view that paragraph 1 could be improved by deleting the words “right or”, most likely because the element of *opinio juris* was typically described with reference to a “sense of legal obligation”, whereas the Commission had used the phrase “legal right or obligation”. He supported the recommendation by the Special Rapporteur that that concern should be addressed in the commentary by indicating, in some fashion, that the broader formulation was not intended to alter the traditional understanding of *opinio juris*.

He supported the retention of the rule in draft conclusion 15, which was well known and well accepted, and it would be viewed as odd for the Commission to abandon it. However, he was not persuaded that a new paragraph 3 needed to be inserted, and he found it curious that that particular draft conclusion should be singled out as requiring a “without prejudice” clause; arguably, other parts of the draft conclusions, and texts on other topics, also needed such a clause. Perhaps the matter could be dealt with in the commentary.

He supported characterizing the outcome of the topic as draft conclusions and endorsed the triptych approach indicated by the Special Rapporteur, whereby the draft conclusions and commentary might run in

tandem with the Secretariat’s memorandum and a bibliography. In conclusion, he supported sending all the draft conclusions to the Drafting Committee for further revision, and again thanked the Special Rapporteur for his hard work on the project, which would result in an enduring legacy for the Commission.

Ms. Galvão Teles said that she wished to congratulate the Special Rapporteur for his report and for his efforts throughout the consideration of the topic. The Commission’s work was of the utmost practical importance for States and stakeholders called on to deal with what sometimes seemed to be the mysterious ways of identifying customary international law. Despite the increased importance of treaty law, customary international law remained a relevant source for determining the rules applicable in a wide variety of aspects of international dealings. As proof of that relevance, the draft conclusions adopted on first reading had already received attention from practitioners and scholars, had been cited by courts and had been discussed at several academic events and in scholarly writings. Indeed, the topic formed the very basis of the codification work carried out by the Commission.

The Secretariat was to be commended for its excellent and useful memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710). Together with the draft conclusions and commentaries thereto, the memorandum would serve as a valuable tool for all those working in the field of international law and its application. Since only a reduced number of Member States had submitted written comments on the draft conclusions and commentaries thereto adopted on first reading, perhaps a broader picture of States’ positions could be had by a review of their oral interventions in the debate in the Sixth Committee and throughout the process of the consideration of the topic. She endorsed the suggestion that comments and observations by States could be structured better for a more meaningful and comprehensive second reading by the Commission and echoed the view that the general challenge of increasing States’ active participation in the Commission’s work was an important one.

Given the advanced stage of the project, she would limit her comments to those draft conclusions to which the Special Rapporteur had proposed amendments. The main concern that had guided her overall analysis, and one shared by the Special Rapporteur in paragraph 20 of his report, was that the conclusions should not be too rigid, for the three reasons he had cited in that paragraph. Another overarching concern, referred to by the Special Rapporteur in paragraph 21 of his report, was the relevance of the practice of international

organizations and ensuring its adequate reflection in the draft conclusions.

Draft conclusion 4 was one of the conclusions that merited greater attention in the report, in particular as it related to the practice of international organizations, to which reference was made in paragraph 2, and the place of the corresponding provision within the overall structure of the draft conclusion, which concerned mainly the practice of States, as mentioned in paragraph 1, and referred to the conduct of other actors in paragraph 3. Her comments would primarily concern paragraphs 1 and 2.

The revised draft conclusion attempted to convey the primary role of States and the relative position of international organizations and other actors in the formation of customary international law. However, paragraphs 1 and 2 seemed to express a rather limited, if not reductionist, view of the role and place of international organizations in that context. That aspect had been highlighted and discussed in a number of interesting scholarly writings in reaction to the draft conclusions prior to their adoption on first reading, with differing positions being expressed. Traditionally, the theory of sources of international law had been framed almost exclusively in terms of State action or consent, with States being the only actors in the process of the formation of rules of customary international law. The classic two-element approach required the presence of general practice (traditionally, State practice) and acceptance as law (*opinio juris*) for the identification of a rule of customary international law. Since States continued to be the primary subjects of international law, and since the new emerging rules would apply primarily to them, it was their practice and *opinio juris* that had been considered determining factors.

Nonetheless, there was increasing acceptance of the notion that other international actors, namely international organizations, could also play an important role as lawmakers and could contribute to the development of customary international law. That notion was now relatively uncontroversial, and it was common for lists of the material sources of customary international law to include references to the practice of international organs and resolutions relating to legal questions adopted by United Nations organs, notably the General Assembly. That development had emerged alongside a growing acknowledgement that international organizations were bound by customary international law and were responsible for internationally wrongful acts. Consequently, it could be argued that they should take part in the formation of rules of customary international law.

As shown by the Special Rapporteur's detailed analysis of the positions of States in paragraphs 35 to 39 of his report, although there was general agreement that international organizations could contribute to the formation and identification of customary rules, the exact scope of that contribution was still open to debate. States were divided between those maintaining that international organizations could, through their own practice, contribute directly and independently to the formation of customary international law, and those that argued that the relevance of the practice of international organizations was limited to the extent to which the practice of their organs reflected and revealed the practice and *opinio juris* of their member States.

If it was admitted that the practice of international organizations could independently contribute to the formation of customary international law, then a second distinction should be made between the two sets of rules which that practice could help to identify: the rules that mostly affected international organizations, such as those governing relations between international organizations and between international organizations and States; and the rules that affected States and organizations equally, such as the rules of international responsibility, the rules of humanitarian law relating to peacekeeping operations and the rules embodied in the law of treaties.

In any case, the overall conclusion seemed to be that an appraisal of the relevance of the practice of international organizations still needed to be made on a case-by-case basis, considering the specific features of the organization in question, the extension of the powers conferred on it by States and the field of international law in question. International organizations were created by States, but once established, they acquired their own legal personality and methods of operation. Thus, lumping all such organizations together as "mere agents of States, was not particularly helpful. It diminished the role of certain entities in contributing to the formation of rules of customary international law, thereby diminishing too their legal personality and their ability to shape the rules governing their conduct in the future.

Despite the variety of State and doctrinal views referred to in the report, it was undeniable that acts by international organizations could be very relevant in identifying a rule of customary international law. In its case law, the International Court of Justice had repeatedly made reference to resolutions from international organizations, such as the Security Council and the General Assembly, in determining a rule of customary international law. In the case concerning *Armed Activities on the Territory of the Congo*

(*Democratic Republic of the Congo v. Uganda*), the Court had relied on a long series of Security Council and General Assembly resolutions as evidence of State practice and military activities. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court had accepted that a series of General Assembly resolutions played a role in developing the rule prohibiting intervention and aggression. Likewise, the practice of the Secretary-General had often been mentioned with regard to his function as depositary of multilateral treaties.

The Court's case law also supported the argument that the capacity for international organizations to contribute to the creation of rules of customary international law could be derived from an implied power. In its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the Court affirmed that the United Nations had not only the powers expressly mentioned in its Charter, but also those conferred upon it by necessary implication as being essential to the performance of its duties. In some cases, a strong argument could be made that an international organization had an implied power to contribute to a particular set of rules of customary international law because doing so was required to advance the purposes for which it had been established. Furthermore, in its advisory opinion on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court considered that the termination provisions set out in a range of host agreements in force between international organizations and Member States, and the respective interactions between States and international organizations, could provide evidence of the existence of a general rule governing the relations between those actors.

Most of the States that had commented on the draft conclusions had agreed that, in certain cases, the practice of international organizations contributed to the formation or expression of customary rules. Several States furthermore agreed that paragraph 2 of draft conclusion 4 and its accompanying commentary needed more refinement, but they disagreed on the direction that the reformulation of the draft conclusion should take. To illustrate the diversity of views, she highlighted some of the written comments on that question that had been submitted by Argentina, Australia, Austria, Israel, Netherlands, the Russian Federation, Singapore, Turkey and the United States, as outlined in paragraphs 37–39 of the report. Some States considered the current wording of paragraph 2 to be too limited or restrictive, others considered both the paragraph and its accompanying commentary to be too broad, while

another rejected any direct role for international organizations in the formation of customary international law.

On the basis of the comments of States and academic authors, the Special Rapporteur re-examined in paragraphs 41–46 of his report the relevance of practice of international organizations and agreed that draft conclusion 4 and its commentary could be improved. Although the suggestions he set out in paragraphs 42–44 of the report seemed to support the view that the powers of international organizations to contribute to the formation of customary rules should be better acknowledged in the draft conclusions, his proposed changes to the draft conclusion and the commentary fell short of realizing that goal. Adding the word “may” to paragraph 2 and deleting the word “primarily” from paragraph 1 actually emphasized the view that the practice of international organizations was not particularly relevant when identifying rules of customary international law and should be considered as a secondary element for such identification. It also failed to convey the idea that the practice of international organizations should always be analysed when identifying rules of customary international law, most importantly when those rules concerned relations between States and international organizations. In fact, the outcome of the Commission's work would benefit if the wording of draft conclusion 4 was more direct and unambiguous in affirming the role played by international organizations, instead of providing clarifications in the commentary.

The original wording of draft conclusion 4 adopted on first reading was more satisfying in that regard, as the Special Rapporteur had seemed to imply in his introduction to the report. Paragraph 1 indicated that the requirement of general practice of States referred “primarily” to the practice of States, and paragraph 2 affirmed that the practice of international organizations “also contributes” to the formation of a rule of customary international law. In addition, some of the wording that had been proposed for the commentary could be brought into the main text of the draft conclusions, namely the introduction of an explanation stating that “[r]eferences in the conclusions to the practice (and *opinio juris*) of States should be read as including, in those cases where it is relevant, the practice (and *opinio juris*) of international organizations”.

Another suggestion for clarifying that provision would be for the commentary to include explicit reference to the relevant dichotomy between the rules that specifically governed interactions between States and international organizations and among international

organizations, and those that governed the conduct of States and international organizations when they acted in the same fields. It could be useful to distinguish between the former set of rules, with an indication that all international organizations could potentially contribute to their formation, and the latter, to which only a limited number of international organizations had the ability to contribute, namely those to which States transferred exclusive powers and others, like the United Nations, that engaged in extensive activity on the ground.

Turning to draft conclusion 6 (Forms of practice), she noted that, although she recognized that the Special Rapporteur's concern for maintaining a certain degree of flexibility in the draft conclusions was what had led him to modify paragraph 1 so that it referred to "deliberate inaction", she preferred the previous wording, because the explanation in the commentary to the draft conclusion adopted on first reading was already sufficient to address the circumstances in which inaction could constitute practice.

On draft conclusion 7 (Assessing a State's practice), she welcomed the proposed insertion in paragraph 2 of the words "depending on the circumstances" after the word "may", for the reasons outlined by the Special Rapporteur in paragraphs 60 to 62 of his report. Those reasons should be reflected and developed in the commentary. Recognizing that the reduction or not of the weight of the varying practice of a particular State was to be evaluated depending on the circumstances provided for an important element of flexibility in the project.

With regard to draft conclusion 8, the proposed replacement in paragraph 1 of the word "consistent" with the words "virtually uniform" for characterizing a general practice set a threshold that was too high and one that was inconsistent with the degree of flexibility for which provision should be made in the conclusions. The Special Rapporteur recalled in paragraph 67 of his report that the International Court of Justice had also used other expressions, such as "settled", "very widespread and representative", "established and substantial", "uniform and widespread" or "constant and uniform". Her preference would therefore be to retain the word "consistent" in that paragraph.

Concerning draft conclusion 12, the proposed new wording for paragraph 2 was unduly restrictive with regard to the role of international organizations in the creation of rules of customary international law, for the same reasons she had mentioned in connection with draft conclusion 4, paragraph 2. Inserting the words "in

certain circumstances" after the word "may" seemed unnecessary and excessively restrictive.

On draft conclusion 15, she welcomed the addition of the proposed new paragraph 3 containing a "without prejudice" clause regarding *jus cogens*. It was entirely consistent with the relationship that needed to be established between customary international law and preemptory norms of general international law and reflected the previous work of the Commission in that regard.

Lastly, in respect of draft conclusion 16, she welcomed the proposed insertion in paragraph 2 of the words "among themselves", which helped to clarify the meaning of the provision. In conclusion, she supported the referral of all the proposed draft conclusions to the Drafting Committee for consideration in the light of the plenary debate. She agreed with the Special Rapporteur's recommendations, as set out in paragraphs 127 to 129 of his report, regarding the final form of the Commission's output.

Mr. Aurescu said that he wished to commend the Special Rapporteur both for his report and for his comprehensive oral introduction to it, and for having paid attention to virtually all the comments submitted in writing by States concerning the draft conclusions and commentaries adopted on first reading. With reference to the suggestion by several States to include a provision regarding the relationship between customary international law and other sources of international law, he agreed with the Special Rapporteur's conclusion in paragraph 27 of his report that there was no need for such a provision. In his own view, the first three draft conclusions should remain unchanged.

With regard to draft conclusion 4 and the relevance of the role of international organizations in the identification of customary international law, although he acknowledged the growing importance of the practice of such organizations, he shared the view that it was States, when establishing international organizations and transferring powers to them, that created a role for them in that context. As asserted by the International Court of Justice in its advisory opinion on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, "they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them". It was thus important to recognize a larger role for international organizations in the identification of customary international law. At the same time, even if States no longer had exclusivity in that area, they nevertheless maintained the primary or central role in the creation of such law. Consequently,

he could not support the Special Rapporteur's proposal to delete the word "primarily" in paragraph 1. As to paragraph 2, the proposed amendment was acceptable.

On draft conclusion 6, he endorsed the amendments proposed by the Special Rapporteur in the second sentence of paragraph 1 to reflect the fact that each act by a State must be assessed to determine whether it was relevant practice. It was therefore appropriate to insert the word "may" in that sentence. With regard to the role of inaction as a form of practice, he strongly endorsed the Special Rapporteur's proposal to delete the words "[i]t may, under certain circumstances, include" and insert the word "deliberate" before "inaction" in that sentence, as well as to explain the matter more clearly in the commentary with accompanying examples of State practice and case law. While it was true that explicit conduct was not the only kind of conduct that could constitute practice relevant to the formation of customary international law, that fact did not imply that any type of inaction could constitute such practice. Inaction could be deemed a constituent element of customary international law only when it resulted from a State's consciousness of having a duty not to act, as illustrated by the Permanent Court of International Justice in its judgment in the case of the *S.S. "Lotus"*. Accordingly, inaction must be more than a simple omission; it must be based on the State's conviction that it must not act. As to paragraph 3, its current wording should be maintained.

On draft conclusion 7, which concerned matters related to assessing a State's practice in situations in which its practice could vary or be inconsistent, although he agreed with the proposed amendment to paragraph 2, the Commission should explain more clearly in the commentary the extent to which a certain degree of inconsistency became relevant in the analysis of State practice, taking into account the view of the International Court of Justice in the *Fisheries* case (*United Kingdom v. Norway*), where it noted that "too much importance need not be attached to the few uncertainties or contradiction" in the practice of the State in question in that case.

On draft conclusion 8, he agreed with the Special Rapporteur's proposal to replace the word "consistent" with the words "virtually uniform" in paragraph 1, even if, in his own view, the expression "practically uniform" or "quasi-uniform" was a better option. As to paragraph 2, taking into account the fact that contemporary international relations were highly dynamic, which meant that the rhythm of practice had increased, it might be worthwhile to include a reference not only to the duration of the practice in question but also to its frequency. He suggested that the Special

Rapporteur should consider adding the clause "especially when the frequency of the practice is high" at the end of the sentence and explaining the matter in the commentary.

On draft conclusion 9, he agreed with the Special Rapporteur's observations in paragraph 75 of his report regarding the significance of the Latin phrase *opinio juris sive necessitatis*, and in particular his reiteration that "[p]ractice motivated solely by considerations of political, economic or moral necessity can hardly contribute to customary international law, certainly so far as its identification (as opposed, possibly, to its early development) is concerned". In his own view, the text of the draft conclusion should not be amended.

Turning to draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), concerning the significance of the inaction referred to in paragraph 3, he said that if practice as such could serve as evidence of acceptance as law or *opinio juris*, a distinction should be drawn between the situation in which a State's failure to react could serve as acceptance as law, when its decision not to react was made out of a sense of "legal obligation", and the situation in which a State simply considered that there was no need to react in a particular situation. Not every inaction could constitute State practice, and inaction could also have legal consequences other than the formation of customary international law, such as estoppel. The words "provided that ... the circumstances called for some reaction" needed further clarification along those lines. In his view, States must have knowledge of the practice in question, and the inaction had to be maintained for a sufficient period of time. The text of paragraph 3 might be clearer if the word "deliberate" or "intentional" were inserted at the start of the sentence. At the same time, he supported the Special Rapporteur's intention, reflected in paragraph 83 of his report, to include in the commentary a clarification that draft conclusion 10 applied *mutatis mutandis* to international organizations, as they could produce the forms of evidence listed therein.

On draft conclusion 11 (Treaties), he agreed with the Special Rapporteur that no change was needed. On draft conclusion 12, he supported the Special Rapporteur's proposed amendment, since he shared the view that not all resolutions could provide evidence of, or contribute to, the development of customary international law.

With regard to draft conclusion 13 (Decisions of courts and tribunals), he believed that no distinction should be made between the decisions of national courts and those of international courts, as far as their

importance was concerned. If Article 38 (d) of the Statute of the International Court of Justice did not distinguish between them — it used the words “judicial decisions” — then neither should the Commission. No modifications to the text were necessary. On draft conclusion 14 (Teachings), he agreed with the Special Rapporteur’s suggestion to include in the commentary to the draft conclusion a cross reference to what was said in the general commentary concerning the Commission’s role in the identification of customary international law.

On draft conclusion 15, in order to avoid abusive reliance on the persistent objector rule, it should be clearly stressed in paragraph 2 that it was not sufficient for the objection to be clearly expressed once, but rather that it should be maintained or reiterated “for sufficient time”. The new paragraph 3 proposed by the Special Rapporteur represented a step in the right direction; however, its wording was rather vague. It should be reformulated to clearly reflect the idea that the conclusion was not applicable to rules that had a preemptory character (*jus cogens*) or to obligations *erga omnes*. Moreover, the difference between the case where a rule of customary international law existed but was not binding for one or more States that objected to it in a persistent manner and the case in which a certain number of “persistent objections” had led, in fact, to non-uniform practice should be clarified in the commentary to the draft conclusion. The current wording of paragraphs (2) and (3) of the commentary to the draft conclusion showed certain degree of inconsistency in that regard. It should be recalled that, in both the *Colombian-Peruvian Asylum* case and the *Fisheries* case, the persistent objector argument was subsequent to the one on the non-existence of the rule of customary international law in question.

On draft conclusion 16, he supported the Special Rapporteur’s proposal to insert the words “among themselves” before the term “(*opinio juris*)” in paragraph 2, thus clarifying that rules of particular customary international law created no obligations for third States. At the same time, the word “general” that appeared in that paragraph, in the context of particular customary international law, might be misleading — at least for some readers. He was aware of and agreed with the meaning of “general practice” in the context of customary international law, including as explained by the Special Rapporteur in paragraphs 66 and 67 of his report. However, in paragraph 1 of draft conclusion 8, the Commission itself said that as “[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as virtually uniform”. The words “sufficiently widespread

and representative” might be seen as implying a practice of a relatively large number of States and differed from those used in paragraph 1 of draft conclusion 16, namely “a limited number of States”. A rule of particular customary international law was not at all based on widespread practice. It was therefore better to use another term in connection with particular customary international law, such as “consistent” or “established and substantial” — terms also embodied in the case law of the International Court of Justice.

In conclusion, he commended the Secretariat for its work in preparing its very useful memorandum on ways and means for making the evidence of customary international law more readily available. He supported the Special Rapporteur’s proposals regarding the choice of conclusions as the final form of the Commission’s output and his recommendations to the General Assembly, which were set out at the end of his report.

Mr. Nguyen said that he wished to express his deep appreciation to the Special Rapporteur for his extensive efforts in preparing the report, and for his expertise, guidance and cooperation, which had greatly facilitated the Commission’s work on the topic. The report reflected the attention the topic had attracted from States, international organizations and practitioners around the world, as well as their comments and cautions and the Special Rapporteur’s views in response thereto. The wide participation of States in the debate in the Sixth Committee was a further testament to the success of the topic.

The Special Rapporteur had skilfully combined the draft conclusions, which were concise, uniform and easy to understand, with their accompanying commentaries, containing comprehensive, detailed analyses of the practice of States and international organizations. The result was an outstanding practical and authoritative guide that balanced rigorous and flexible considerations regarding the current state of customary international law and would help government officials and practitioners to manage one of the grey zones of international law. The Commission’s output on the topic contributed to elucidating Article 38 (1) (b) of the Statute of the International Court of Justice on international custom, which was a universally recognized source of international law.

Draft conclusions 1–3 accurately established the content and objective of the two-element approach to the identification of a rule of customary international law. They did not require any amendment; however, in his view, greater emphasis should be placed in the commentaries thereto on the caution that States needed to exercise in identifying such rules.

With regard to draft conclusion 4, and in particular paragraph 2, he recalled the following analysis that appeared in paragraph 77 of the Special Rapporteur's third report (A/CN.4/682):

The contribution of international organizations as such to the formation and identification of rules of customary international law is most clear-cut in instances where States have assigned State competences to them: "When, as in the case of the [European Union], the international organization replaces, in whole or in part, its Member States in international relations, its practice may be relevant in broader areas [than of just the legal subjects that are directly relevant to its participation in international relations]." In essence, such practice may be equated with the practice of States.

However, like the practice of States, the practice of international organizations must also be general — which meant, in conformity with draft conclusion 8, widespread, universal, representative and uniform — in order to be recognized as a constituent element of customary international law. The practice of the European Union related only to some States in the European region, thus making it difficult for such practice to be accepted as law by States outside that region. Moreover, the practice of different international organizations had to be assessed differently. The contribution of a universal organization, such as the United Nations, had more weight in expressing or creating a rule of customary international law than did the contribution of a non-universal organization. The United Nations discharged its functions under the control of its Member States by means of their votes, and its practice generally reflected or expressed existing rules of customary international law. In certain circumstances, some, but not all, practice by international organizations could contribute to the formation of customary international law, but that had to be assessed in conjunction with other factors.

Paragraph 2 must therefore reflect the concerns of some States regarding the role of the practice of international organizations in the expression and formation of rules of customary international law, which was too broad and not limited. Although international organizations had a right to contribute to the expression, or creation of a rule of customary international law, Israel, Singapore, the United States and others believed that that right should be limited to special cases and be subject to special requirements. The phrase "[i]n certain cases" used at the beginning of the paragraph was still too broad and did not address that concern. In his opinion, the suggestion by Singapore to replace the

word "certain" with the word "limited" was a suitable option.

Although the purpose of the Special Rapporteur's proposal, set out in paragraph 46 of his report, to insert the word "may" before "also" in paragraph 2 was to emphasize the need for caution, the resulting wording could be interpreted as meaning that an equal role was to be assigned to the practice of all international organizations in the expression and creation of rules of customary international law, whereas the role of their respective practices in that context differed. The expression of a rule of customary international law was regular and permanent, but its creation was a rare, even long-lasting process. That wording could also be understood as implying that the contribution of international organizations to the expression or creation of a rule of customary international law was inconsistent or to be assessed on a case-by-case basis. If the words "in limited cases" were accepted as a replacement for the words "in certain cases", it would be appropriate to omit the word "may", because the word "limited" sounded the necessary note of caution.

With regard to draft conclusion 6, the forms of State practice enumerated in paragraph 2 should be aligned with the provisions of draft conclusion 5 (Conduct of the State as State practice) and paragraph 2 of draft conclusion 10. There was no predetermined hierarchy between those forms of practice, which included legislative, administrative and judicial acts as well as conduct of States in international organizations. However, a hierarchy existed within each form of practice as dictated by national law. A decision by a high court in a particular State, for example, carried more weight than one of a lower court and should consequently be taken into account first.

Turning to draft conclusion 8, he noted that rules of customary international law required universal application by States in a virtually uniform manner. The universal recognition of a rule of customary international law was the result of extensive, widespread and representative practice. The Commission should consider using the powerful word "universal" in paragraph 1, since it would obviate the question of what quantum of State practice must be taken into account to identify or create a rule of customary international law and since the word "universal" did not give rise to the requirement for any particular duration in relation to such practice.

In paragraph 68 of his report, the Special Rapporteur had used the word "generality" by way of explaining the use of the word "sufficiently" in paragraph 1, pointing out that "[t]he qualification

afforded by the word ‘sufficiently’ may thus play an important role in providing further guidance as to how generality of practice should be assessed in a particular case”. Yet there was no prescribed meaning for a standard as vague as generality, whose scope or exact range was indeterminate. Consequently, “universal” should be used in place of “sufficiently” in paragraph 1. At the end of the paragraph, he welcomed the Special Rapporteur’s proposal to replace the word “consistent”, which meant marked by harmony, regularity, or steady continuity, with the words “virtually uniform”, which meant almost entirely uniform.

With regard to the commentary to draft conclusion 8, the practice of “specially affected States” to which reference was made in paragraph 64 of the report, should be taken into account in the formation of a rule of customary international law, in both positive and negative ways. The practice of specially affected States could advance or hinder the process of the formation or identification of such a rule, as had been confirmed in the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, with regard to the creation of the regime relating to exclusive economic zones. The creation of a rule of customary international law must be based on general, universal practice accepted as law, including the practice of “specially affected States” and the acceptance of such practice by other States not specially affected. In that regard, he endorsed the Special Rapporteur’s suggestion that the question should be clarified in the commentary.

On draft conclusion 10, the phrase “failure to react over time to a practice” in paragraph 3 should be explained in detail in the commentary. Failure to react to the practice publicly could include a State’s confidential reaction, motivated by political, economic and other considerations over time, and deliberate inaction. To align it with paragraph 1 of draft conclusion 6, the text of paragraph 3 should focus only on deliberate inaction. Such inaction should be consistent and should be sufficiently uniform over time to reflect *opinio juris*. The reaction times of States differed depending on the circumstances; the interests of States seriously affected and those of States not seriously affected; a new emerging rule; or the breach of an existing rule of customary international law. He cited as examples the *Fisheries* case and the establishment of the regime of the exclusive economic zone, where the reaction time varied from 60 years in the first case to 10 years in the latter. That observation was confirmed by paragraph 2 of draft conclusion 8, which stated that, provided that: “[...] the practice was general, no particular duration was required”.

The Commission needed to provide, in the commentary to draft conclusion 10, further guidance concerning the phrase “the circumstances called for some reaction”, contained in paragraph 3. The Commission’s desire for brevity had led to wording that lacked prescriptiveness, making it unclear how severe a circumstance had to be for a State to be considered as not having been in a position to act, and what minimum bar should be set for such severity. In his view, the circumstances must expressly require, not call for, some reaction. The Commission should consequently consider replacing the current wording of paragraph 3 with the following paragraph: “Deliberate inaction over time, depending on the circumstances, to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances expressly required some reaction.”

On draft conclusion 12, in its commentary to the draft conclusion, the Commission should consider General Assembly resolutions to be a distinct category and should emphasize those that contained primarily legal considerations, as opposed to political, procedural or other kinds of considerations. In paragraph 2, it would be preferable to replace the words “determining” or “establishing” with the word “expressing”, for the sake of consistency with the other draft conclusions, such as draft conclusion 4. In certain circumstances, a resolution adopted by an international organization or at an intergovernmental conference could provide evidence for expressing the existence and content of a rule of customary international law or contribute to its development.

On draft conclusion 13, he proposed the insertion of the word “important” before the words “subsidiary means for the determination of such rules”, in paragraph 1, given that a distinction should be drawn between the decisions of courts and tribunals at the international level and those of national courts and tribunals in terms of their relative value in identifying rules of customary international law. Decisions of international courts and tribunals, in particular, those of the International Court of Justice, concerning the existence and content of rules of customary international law were important subsidiary means for the determination of such rules. They possessed a higher value than the decisions of national courts, which could also serve as subsidiary means but which could not be considered important and did not merit being used for that purpose.

That small amendment to the wording in paragraph 1 would rank decisions of international courts and tribunals higher than those of national courts and the teachings of the most highly qualified publicists of the

various nations, to which reference was made in draft conclusion 14. Even though the latter were also recognized as subsidiary means for the determination of rules of international law in general and of international customary law in particular, judicial practice showed that the decisions of international institutions were often invoked prior to the above-mentioned subsidiary means. Such judicial practice apparently reflected the order for subsidiary means set out in Article 38 (1) (d) of the Statute of International Court of Justice. Furthermore, those subsidiary means must be assessed together with the practice of States and international organizations; they could not be considered alone as settled evidence of the expression of a rule of customary international law.

In paragraph 2, the phrase “regard may be had” implied the need to proceed with caution. It was worth pointing out that each national court portrayed its own point of view in its practice; therefore, the assessment of the contribution of a decision by a national court to the identification of a rule of customary international law was not the same for each; careful evaluation on a case-by-case basis was hence recommended. For those reasons, the phrase “as appropriate” should be replaced by “on a case-by-case basis”.

Draft conclusion 14 accurately reflected the wording of Article 38 (1) (d) of the Statute of the International Court of Justice. However, the work of individuals reflected their own will and determination, making it advisable to exercise caution when having regard to that source. Since the value of the teachings of the most highly qualified publicists of the various nations and the decisions of national courts were both subsidiary means for the determination of the rules of customary international law, the wording of paragraph 2 of draft conclusion 13 could be applied to draft conclusion 14 so that it would read: “Regard may be had, as appropriate, to the teachings, the work of most highly qualified publicists of the various nations with the one of national courts as a subsidiary means for the determination of rules of customary international law.”

With regard to draft conclusion 15, the relationship between the persistent objector rule and the concept of the “failure to react over time to a practice” referred to in paragraph 3 of draft conclusion 10 should be clarified in the commentary, along with cases in which the persistent objector terminated its reaction, since the end of a persistent objection must be expressed clearly and definitively.

With regard to draft conclusion 16, when discussing particular customary international law, the words “general practice” that appeared in

Article 38 (1) (b) of the Statute of the International Court of Justice should be understood to mean the particular general practice of a limited number of States linked by a common cause and by interests that were not bound by their geographical location and accepted by them as law. He therefore proposed that, in paragraph 2, the Commission should consider inserting the word “particular” before the words “general practice”, to emphasize the distinction between a rule of general customary international law and a rule of particular customary international law. In conclusion, he was in favour of referring the draft conclusions to the Drafting Committee for its reconsideration of the issues raised.

The meeting rose at 12.20 p.m. to enable the Drafting Committee on Preemptory norms of general international law (jus cogens) to meet.