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International Law Commission

Seventieth session (first part)

Provisional summary record of the 3399th meeting
Held at Headquarters, New York, on Thursday, 10 May 2018, at 10 a.m.

Contents

18-07588 (E)

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	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 on identification of customary international law (A/CN.4/717).

Mr. Jalloh, recalling that the topic had been placed on the agenda only in 2012, noted the speed with which the Commission had arrived at the near-completion of its work. The current project, which was aimed at offering practical and authoritative guidance to States on how to identify rules of customary international law, appropriately complemented the Commission's prior work on the sources of international law. The Special Rapporteur's latest report furnished an excellent basis to complete the second reading of the draft conclusions in 2018, on the historic occasion of the Commission's seventieth session.

In his report, the Special Rapporteur examined, critically but fairly, the constructive comments received from States on the draft conclusions adopted on first reading. All such comments were welcome, and it was regrettable that more had not been forthcoming. Only 16 of the 193 States members of the United Nations had submitted written observations, and of those, there was not a single one from the 55 African States, only one from the 33 Latin American and Caribbean countries and only 2 from the 54 Asian States. While it was commendable that the Special Rapporteur had gone to great lengths to take into account and respond to the views of more States by also reflecting on statements made during the Sixth Committee debate on the topic in 2016, the context of the limited written observations received should be kept in mind as the Commission approached substantive revisions to the draft conclusions: a tendency to rely too heavily on comments received from States from just one or two regions of the world should be avoided. The concerns that might be held by a majority of States that, for well-known structural and other reasons, had been unable to contribute their comments should not be ignored. He looked forward to further discussions, perhaps in the Working Group on Methods of work, on how the Commission might better address the general challenge of increasing the participation of all States in its current and future work.

The overall reaction to the draft conclusions, as indicated by the comments received from States, underscored the significance of the Commission's decision to help bring greater clarity to one of the most important but also most elusive sources of international law. Comments by the United States of America had referred to the text as "an impressive draft that is already contributing to a better understanding of the formation and identification of customary international law." The representative of Finland, speaking in the Sixth Committee, had observed that it would "undoubtedly become a useful tool for practitioners," while the representative of Greece had said it provided "much needed normative guidance". Comments submitted by Egypt and Singapore had emphasized its usefulness to practitioners, courts, scholars and States.

Nevertheless, he agreed with the comments of States such as New Zealand that, while it was helpful that the draft conclusions were generally concise and not overly prescriptive, in some places a better balance could be struck between the text and the commentary in order to avoid general statements that did not always provide clear guidance. For instance, additional clarification could be given where the language was somewhat vague in the text of the draft conclusions, since not all users ended up reading the commentary. More examples from different regions of the world could also be provided in the commentary in order to enhance the practical utility of the work for States. He was glad that the Special Rapporteur seemed agreeable to that possibility.

Having noted the concerns expressed in comments of the United States, China, Israel and New Zealand, as set out in paragraphs 16 and 17 of the report, he tended to agree with the Special Rapporteur that the draft conclusions should not be too rigid, for the three compelling reasons he had given in paragraph 20 of the report, the most important of which was that they needed to be broad and flexible enough to apply to a wide range of situations that might arise in practice. He endorsed the Special Rapporteur's suggestion that the Commission should emphasize that the conclusions and commentaries were to be read together, and that the issue should be addressed in the general commentary at the very beginning. One possibility, as suggested by the Special Rapporteur in his oral introduction, might be to incorporate in the general commentary itself the language currently contained in a footnote to that commentary (see A/71/10, para. 63), providing that: "As is always the case with the Commission's output, the draft conclusions are to be read together with the commentaries". That might not suffice, however, since there were some instances in which the commentary contained significant qualifications to the general language of the draft conclusions, as New Zealand had aptly pointed out and the Special Rapporteur had seemed to concede in his introductory statement. He

therefore encouraged the Special Rapporteur to review, ideally before the draft conclusions were referred to the Drafting Committee, each of the elements that were qualified in the commentary to determine whether those qualifications should be included in the text of the draft conclusions themselves.

Turning to comments on specific draft conclusions, he said that he generally agreed with the Special Rapporteur's assessment that States had raised no serious concerns regarding draft conclusion 1 (Scope), although, in his own view, a number of States had offered interesting comments that might be worth revisiting. For example, whereas Japan and Australia had seemed to endorse fully the draft conclusion, comments by Poland, the Russian Federation and Spain had revealed some doubts about aspects relating to the burden of proof and the delimitation of the scope of the topic. He himself would have preferred to include some language on the relationship between customary international law and other sources of international law. Although the title of the topic seemed to make it clear that the draft conclusions only concerned the identification of customary international law, further clarification might be helpful, since the role of treaties, judicial decisions and the teachings of publicists was also addressed in the text. Some clarification was provided in paragraph (5) of the commentary, however.

Draft conclusion 2 (Two constituent elements) set out the approach whereby rules of customary international law could be ascertained based on legal reasoning rather than empirical evidence and its acceptance as law. Although the provision seemed to have been well received by the majority of States — at least those that had reacted to the text as adopted on first reading – two significant issues had been raised. The first was the proposal by the United States to insert the words "of States" between "general practice" and "that is accepted by law". That amendment, with which he agreed, made it abundantly clear that it was primarily the practice of States that contributed to the formation of rules of customary international law. If accepted, it might require some corresponding changes to the commentary.

The second issue, in respect of which the Special Rapporteur had said he had an open mind, was the proposal by China that a new paragraph 3 should be added in order to make it clearer that the assessment of evidence must be rigorous. He himself agreed with the inclusion of an unequivocal statement to that effect, which could also have the salutary effect of addressing the concern expressed in the comments submitted by Israel, thereby obviating the need to insert in the commentary additional and cumbersome phrases such as "exhaustive, empirical and objective."

He agreed with the Special Rapporteur that no changes should be made to the text of draft conclusion 3 (Assessment of evidence for the two constituent elements), but it might be helpful to include in the commentary some of the language concerning *opinio juris* suggested by Denmark on behalf of the Nordic countries, in order to distinguish that element from other, extralegal, motives for action, since practice solely motivated by such considerations would not amount to a rule of customary international law. He also endorsed the proposal by Norway to replace the phrase "positive State practice" in paragraph (4) of the commentary with "affirmative State practice", since such practice could include the condemnation by a State of conduct by another State that was deemed to be in breach of an existing rule of customary international law.

Draft conclusion 4 (Requirement of practice) had been one of the most controversial. He agreed with most States that had commented on the text that customary international law was in principle created and evidenced by the practice of States. However, that should not prevent the Commission from acknowledging the growing importance of the practice of international organizations in the development of customary international law. In that regard, he joined Ms. Galvão Teles and Mr. Saboia in emphasizing that it was important not to downgrade the status of State practice within international and regional organizations. When States established such organizations and endowed them with certain competences, they created a role for them that seemed relevant to the process of identifying customary international law. For example, the practice of States acting under article 4 (h) of the Constitutive Act of the African Union, which provided for the right of the Union to intervene in the territory of a member State in respect of war crimes, genocide and crimes against humanity, was relevant to the emergence or crystallization of a rule concerning the responsibility to protect, at least as far as the 55 States members of the African Union were concerned. To the extent that decisions to use force in such circumstances were taken by States in the Assembly of Heads of State and Government of the Union, it would be problematic to exclude such practice of the member States themselves from contributing to the emergence of a rule concerning an exception to the prohibition on the use of force. Such practice might in turn feed into the evaluation of the emergence of a wider norm; the responsibility to protect had also been affirmed by the General Assembly in paragraphs 138 and 139 of the 2005 World Summit

Outcome document, which were based on an underlying body of international legal obligations for States, contained in international instruments or developing through State practice and the case law of international courts and tribunals. The fact that those paragraphs had been adopted by consensus at such a high political level lent greater impetus to the development of obligations to prevent and punish genocide, war crimes, ethnic cleansing and crimes against humanity. The Commission should make sure that its work would complement, not encumber, the development of such new regional or global customary international norms.

As the majority of States commenting on draft conclusion 4 apparently supported the proposition that "in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law", he was unable to support the deletion of the words "primarily" and "contributes to" in paragraph 1. He also did not consider it appropriate to insert the word "may" and replace the phrase "formation, or expression" with "expression, or creation", in paragraph 2. The latter phrase had the potential to cause more confusion than clarity, even though similar terms had been used by the International Court of Justice in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case. On the other hand, he supported the addition of some of the Special Rapporteur's explanations in the commentary, in acknowledgement of the valid concerns raised by many States.

He agreed with Chile, as mentioned in paragraph 50 of the report, that it was helpful that the commentary to draft conclusion 5 (Conduct of the State as State practice) had clarified that the conduct of a State must be publicly available or at least known to other States in order to qualify as State practice. That in turn enabled other States, as Spain had correctly observed, to have the opportunity to object. Although he agreed with the Special Rapporteur's suggestion that no changes should be made to draft conclusion 5, he welcomed the proposed revision of the commentary to reflect more accurately the significance of the availability of practice for the identification of customary international law.

On draft conclusion 6 (Forms of practice), many States had expressed concern about reliance on silence and inaction as a form of practice. The starting point, as the United States had indicated, must be that each State act should be assessed to determine whether it was relevant practice. He agreed with Mr. Tladi that a diverse array of States across the political and economic spectrum had sounded essentially the same cautionary note on that issue. Moreover, as Mr. Murase and Mr. Hassouna had noted, an assessment of whether inaction was "deliberate" or not was quite subjective, and it was uncertain whether adding such a subjective component to the analysis of practice was helpful. That said, he agreed with the Special Rapporteur's proposal to include the word "deliberate" and delete "in current circumstances" in paragraph 1. The overall concern of many States that there should be greater clarity about the circumstances in which inaction amounted to practice could be addressed in the commentary with citations of relevant supporting authorities, including authoritative academic works. He agreed with several other members of the Commission that paragraph 3 should remain unchanged.

With regard to draft conclusion 7 (Assessing a State's practice), a few States had expressed the valid concern that paragraph 2 could be read to suggest that States with varying practice were afforded less weight relative to the practice of other States under customary international law. He agreed with the proposed insertion of the phrase "depending on the circumstances" in order to alleviate that concern. Such an amendment would align the text more closely with the jurisprudence of the International Court of Justice, including in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*) and the *Fisheries* case, which essentially affirmed that too much importance need not be attached to the few uncertainties or contradictions that might appear in such circumstances.

In response to some of the comments made by States on draft conclusion 8 (The practice must be general), the Special Rapporteur had proposed that consideration should be given to whether the word "consistent" in paragraph 1 should be replaced with the expression "virtually uniform", which might capture more accurately the aspect of generality required by the use of the term "general practice" within the meaning of Article 38 (1) (b) of the Statute of the International Court of Justice. Although that could have the effect of raising the threshold of agreement required, bearing in mind that a variety of other phrases, including "uniform and widespread" and "constant and uniform", had also been used by the Court in its jurisprudence, he supported the change, since it was important to put beyond doubt that a certain practice must be general enough to give rise to a rule of customary international law. For similar reasons, he did not support the deletion of the word "sufficiently" as suggested by the Special Rapporteur, but he did support Mr. Aurescu's proposal to insert "especially when the frequency of the practice is high" at the end of paragraph 2.

Concerning draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)), he had listened

carefully to Mr. Tladi's impassioned comments on the matter of specially affected States. At the present late stage, however, he feared that it was too late to reverse course. Moreover, since no State had suggested substantive changes, he concurred with the Special Rapporteur's position that the text should remain unchanged. However, he looked forward to seeing the changes to the commentary suggested by the Special Rapporteur to clarify that representative — and not merely broad — acceptance as law was required, along with general practice, to identify a rule of customary international law.

On draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), he said that although no textual changes had been proposed, he concurred with the comments by Thailand and Australia that States, especially those with limited resources, could not be expected to react to everything that happened in today's complex world of international relations. Assessment of the legal significance of inaction must therefore turn on the circumstances of each case, including, as the representative of the Czech Republic had observed in the Sixth Committee, the extent to which the rights and obligations of the concerned State were affected. Much State practice was confidential and thus outside the public domain. Accordingly, he welcomed the Special Rapporteur's offer to further flesh out those issues in the commentary to draft conclusion 10.

He agreed with the Special Rapporteur that no change was required in draft conclusion 11 (Treaties), especially given the widespread support it had received from States.

On the other hand, he had some difficulties with the apparent efforts to downplay resolutions in draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences). He agreed with the comments of Algeria and Egypt that the resolutions of universal entities like the General Assembly were likely to have special importance, which should be elaborated upon in the commentary. He did not agree with the suggestion by Singapore, apparently accepted by the Special Rapporteur, that the phrase "in certain circumstances" should be inserted. The source of that language was the advisory opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*, which he himself read as merely making the common sense argument that not all resolutions could provide evidence of or contribute to the development of customary international law. He concurred with Mr. Tladi that draft conclusion 12 captured the concern expressed by States by indicating that resolutions "may", meaning that in certain circumstances they would not, serve as evidence for the existence of a rule of customary international law. Furthermore, the language did not suggest that resolutions created customary international law, only that they served as evidence for its existence and content. However, he did support the Special Rapporteur's proposal to replace the word "establishing" with "determining" in paragraph 2, for the reasons set out in paragraph 95 of the report.

Draft conclusions 13 (Decisions of courts and tribunals) and 14 (Teachings) were related, both being "subsidiary means" for determining rules of customary international law, as outlined in Article 38 (1) (d) of the Statute of the International Court of Justice. He agreed with the Special Rapporteur that the draft conclusions represented a satisfactory balance that must be maintained. Austria had sought to suggest that a distinction should not be drawn between the decisions of national and international courts, but like the Special Rapporteur, he was not convinced that the two types of decisions should be placed on the same plane. The use of the phrase "subsidiary means" did not downgrade the practical importance of court decisions; it simply offered a sharper contrast with "primary" sources within the meaning of Article 38 (1) (a) to (c) of the Court's Statute.

As to the use made of the teachings of publicists, a field historically dominated by scholars from Europe and the Americas, the question of their value in establishing the existence of a rule of customary international law had been raised as far back as in the case of the S.S. "*Lotus*", adjudicated by the Permanent Court of International Justice in 1927. The influence of scholars had perhaps declined of late; nevertheless, it was important to indicate more explicitly that the quality of the works, their publication in the leading peer-reviewed journals and the extent that they were representative of the principal legal traditions, different geographical regions and different languages, were all relevant factors in assessing their possible value in discerning a rule of general customary law. Those elements, and other factors such as the scholar's reputation in the relevant field, should be more thoroughly discussed in the commentaries to draft conclusions 12 and 13.

Turning to draft conclusions 15 (Persistent objector) and 16 (Particular customary international law), he said that he tended to agree with Mr. Murase that the persistent objector rule was more a question of application than of identification of customary international law. However, in the current context, it was hard to separate identification from application. The persistent objector rule, which was a reaction in the process of formation, must be taken into account when

determining whether a rule of customary international law existed. That said, he supported the Special Rapporteur's proposal to include a new paragraph 3 to make it clearer that the draft conclusion was without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

With regard to draft conclusion 16, the Commission could further strengthen the text through the inclusion of the words "among themselves" at the end of paragraph 2, as proposed by the Special Rapporteur. It would also be helpful to indicate that the rules of particular customary international law included those that were regional and local. The already good commentary to the draft conclusion should then be used to clarify any remaining issues.

On the final form of the Commission's output, Mr. Murase had made a compelling argument about the use of the term "guidelines" instead of "conclusions." In that regard, his own law students, like Mr. Murase's, found the whole nomenclature of conclusions and guidelines utterly confusing. However, he did not want to take a final position on the matter yet, so as to give the Special Rapporteur a fair opportunity to make his case for "conclusions" during his statement summing up the discussion during the plenary debate. He certainly hoped that the Commission, as a normative body, would do some serious soul-searching about the nomenclature for the final form of its outputs. It should develop and use a consistent set of criteria which could be shared with States for their reactions. He therefore endorsed the calls for discussion of the issue in the Working Group on Methods of work during the second half of the current session. The Commission might also consider requesting the Secretariat to prepare a study on that matter.

He thanked the Secretariat for its excellent work in preparing the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which was an important and substantial study. While he could agree to the Special Rapporteur's proposal in paragraphs 127 to 129 of the report, it would be preferable for the Commission to thoroughly discuss the substance of the memorandum before formulating more precise recommendations to the General Assembly.

He supported the referral of the draft conclusions to the Drafting Committee and thanked the Special Rapporteur for giving such strong impetus to the work of the Commission on the topic.

Mr. Reinisch said that, in his excellent report, the Special Rapporteur had provided a most useful background for the Commission's work by summarizing the observations and comments made by States in the Sixth Committee and offering his own views on how they could be accommodated in the final drafting.

With regard to draft conclusion l, and the suggestion by Spain that there should be a specific burden of proof for the existence of customary international law, he shared the view of the Special Rapporteur that it was for courts and other law-applying bodies to determine the applicable law and that there was no specific burden of proof to establish customary law. The burden of proof usually came into play only with respect to establishing the facts, not the law. Establishing the existence of a rule of law was the task of the adjudicator — *jura novit curia*. Clearly, the International Court of Justice, whose function, according to Article 38 of its Statute, was "to decide in accordance with international law such disputes as are submitted to it," knew the law. In that regard, he concurred with the Special Rapporteur and Mr. Murase in their assessment of the relevance of pertinent case law of the Court, such as its 1974 judgment in the case concerning *Fisheries Jurisdiction (United Kingdom v. Iceland)*, in which the Court had clearly reaffirmed the principle of *jura novit curia*.

Turning to draft conclusion 4, he said that he considered the role of international organizations in the identification of customary international law to be one of the most important issues before the Commission. He shared the Special Rapporteur's view that acts of international organizations sometimes contributed to the determination as well as to the creation of customary international law. However, the statement of that view, in paragraph 2, was weakened by the proposed addition of the word "may," resulting in over-cautious language. It would be sufficient to retain either the phrase "in certain cases" or the word "may" to express the thought that international organizations did not contribute regularly, but only exceptionally, to the determination and creation of customary international law. More importantly, though, in order to correctly acknowledge the practice of international organizations, it should be made clear in the text of the draft conclusions, rather than just in the commentary, that it was not only State practice that was relevant. As the Special Rapporteur had stated in paragraphs 41 *et seq*. of his report, international organizations did contribute in various ways to the creation of customary international law and, as had been further recognized in paragraph 46 of the report, several improvements could be made to draft conclusion 4 in order to better reflect that position and address the concerns raised. However, the other amendments suggested by the Special Rapporteur in paragraph 46, namely to omit the words "primarily" and

"contributes to" and to change the reference to "rules of customary international law" to the singular, "rule of customary international law", in fact diminished rather than strengthened the reference to the role of international organizations. In order to correctly acknowledge their role, it would be useful, as suggested by the Special Rapporteur, to provide examples of the wide array of acts carried out by international organizations that might be relevant. In addition to their roles in treaty-making and as treaty depositories, their involvement in peacekeeping and in administering territory were examples of such relevant practice.

The terms "practice of international organizations" and "established practice of the organization" had not been invented but had been repeatedly used by the International Court of Justice: examples were to be found in its advisory opinions on *Reparation for Injuries Suffered in the Service of the United Nations; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter);* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. They were also to be found in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character; in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; and in the 2011 articles on the responsibility of States for internationally wrongful acts.

As the Special Rapporteur had acknowledged in footnote 112 to his report, it had been "thoughtfully argued that while the practice of international organizations may not be as important as that of States, the draft conclusions, both in substance and form, do not take international organizations 'sufficiently seriously.'" It had also been pointed out that draft conclusions 4 to 8 did not fully reflect the fact that the practice of international organizations might contribute to the formation, or expression, of rules of customary international law, and that parts of those draft conclusions covered only State practice. To insert companion clauses for international organizations every time their practice might need to be mentioned alongside State practice and *opinio juris* would be difficult, and the Special Rapporteur was quite right to state that the existing draft conclusions might also apply to international organizations *mutatis mutandis*. Nevertheless, appropriate wording should be found to clarify, not only in the commentary but in the text itself, that the explanations contained in the draft conclusions applied *mutatis mutandis* to other subjects of international law.

He had doubts as to whether draft conclusion 4, paragraph 3, was correct from the conceptual point of view. While non-State actors other than international organizations might currently have only a marginal role in the formation of custom, the potential role of an entity enjoying international legal personality in the creation of customary international law should not be excluded by an overly strict formulation like the one contained therein.

Turning to draft conclusion 6, he said that in response to the comments of States, the Special Rapporteur had suggested amending paragraph 1 to refer to "deliberate" inaction. It was unclear, however, how the quasi-mental element that the term entailed belonged in a draft conclusion on the objective element of State practice, and also how it differed from what was referred to in draft conclusion 10, paragraph 3, as a State's "failure to react." The reference to "deliberate" inaction should be further discussed in the Drafting Committee.

With regard to draft conclusion 13, he was not convinced about the distinction drawn between international and national court decisions. The wording of draft conclusion 13 clearly ranked decisions of international courts higher than those of national ones, indicating that the former "are" a subsidiary means for the determination of such rules, while "regard may" only be had, "as appropriate," to the latter. That seemed to reflect the Special Rapporteur's scepticism towards the ability of national courts "to get international law right." It was certainly true that national court decisions might reflect a certain national perspective and might not always have international law expertise available to them, as pointed out in paragraph 99 of the report. However, as had been clarified in the commentary, the usefulness of any judicial decision ultimately depended on the persuasive force of its reasoning, both for international and for national court decisions. That was the point that should take centre stage in the draft conclusion, rather than any perceived hierarchy between international and national courts.

Equal treatment of international and national court decisions seemed also to be required in view of the fact that the Statute of the International Court of Justice did not differentiate between those types of subsidiary sources for the determination of international law. In Article 38 (l) (d), express reference was made to "[...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law," without making any distinction between international and national court decisions. Additionally, in article 24 of the Statute of the International Law Commission,

reference was made to the use of decisions of national and international courts, without distinction, as evidence of customary international law.

While the first two paragraphs of draft conclusion 15 captured the existing law very well, he was less certain about the usefulness of the "without prejudice" clause proposed in paragraph 3. If it was intended to say that the persistent objector rule did not apply in the case of rules having a *jus cogens* character, then it should say so. He shared Mr. Murphy's concern that inserting a "without prejudice" clause in draft conclusion 15 raised the question of why one was not also to be found in other parts of the draft conclusions and, more importantly, how there could be a persistent objector to a norm of *jus cogens*.

He supported the way in which draft conclusion 16 was formulated. The existence of particular customary international law had been acknowledged by many authorities and should thus be reflected in the draft conclusions. He especially appreciated the wording "whether regional, local or other," which aptly indicated that particular custom was not only regional in nature.

In conclusion, he expressed appreciation to the Secretariat for its preparation of the excellent memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), commended the Special Rapporteur for his outstanding work and supported the referral of the draft conclusions to the Drafting Committee.

Mr. Gómez-Robledo said that he wished to thank the Special Rapporteur for his report, which contained a comprehensive review of the comments and observations on the draft conclusions adopted on first reading, and would provide a solid foundation for the Commission's completion of the second reading of the draft conclusions at the current session. Indeed, the entire body of work developed by the Special Rapporteur was supported by detailed and exhaustive research, including the solid doctrinal foundation that underlay all of the Commission's work. The Commission should therefore situate its reading of the current draft conclusions and commentary in the broader context of all that had come before them and all that currently surrounded them. As the doctrinal research supporting the topic had become an intrinsic feature of the draft conclusions, they did not necessarily need to be supported by vast quantities of cited works, and thanks to the Special Rapporteur's talent for synthesis, the same applied to the commentaries, whose wording he considered to be impeccable.

He also wished to thank the Secretariat for its excellent memorandum on ways and means for making the evidence of customary international law more readily available, which would serve not only as a valuable study aid for Commission members as they completed the second reading of the draft conclusions but would also make countless sources of information for identifying the practice and *opinio juris* of States available to Governments and other users of international law.

With regard to draft conclusion 4, he fully agreed with the comments made by Ms. Galvão Teles and Mr. Jalloh concerning the Special Rapporteur's proposed amendments to paragraph 2. There were two main reasons why those two amendments were not suitable. The first was that the addition of the word "may" was unnecessary, since paragraph 2 began with the phrase "in certain cases", which sufficed to safeguard the margin of flexibility required for the analysis of the circumstances under which the practice of an international organization could contribute to the expression or creation of a rule of customary international law. The inclusion of the words "in certain cases" and "may" in the same sentence subjected the possibility of that contribution to an unrealistic evidentiary threshold. Even though it was States that established international organizations, the latter acquired a life of their own through a phenomenon known as functional splitting. It was therefore a fact that international organizations were something more than the sum of the States that composed them, and, as mentioned by many Commission members, the case law of the International Court of Justice did not seem to permit further hesitation by the Commission in that regard. The current wording of paragraph 2 did not do justice to the role played by international organizations in the identification and creation of customary international law. He endorsed Mr. Reinisch's arguments along those lines. The second reason was that the Commission had an obligation to ensure consistency between the decisions it adopted in relation to the current topic and those concerning the closely related topics of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Peremptory norms of general international law (*jus cogens*)".

Taking into account the role currently played by international organizations in identifying, strengthening, applying and, at times, verifying the rules of international law, the Commission should ensure that it did not downplay their contribution to the identification and creation of customary norms. In fact, it might be helpful for the Commission to look at its own

work, including on the current topic, and to recall that, even though it was not an intergovernmental organization, its contribution to the identification of customary international law was undeniable. The dilution of paragraph 2 therefore ran the risk of diminishing the value accorded to the Commission's own future work. The Commission had included lengthy explanations in the commentary in an effort to clear up any doubt about the scope of paragraph 2. For those reasons, the text of paragraph 2 and the commentaries thereto should remain the same as when adopted on first reading.

Turning to draft conclusion 8, and the increasingly heated debate on how much consideration was to be given to the concept of "specially affected States", he said that he supported the views of Mr. Tladi and Mr. Jalloh on the subject, with a few nuances. In his report, the Special Rapporteur had referred to the suggestions made by some delegations that more weight should be given, either in the draft conclusion or in the commentary, to the practice and *opinio juris* of "specially affected States". The Special Rapporteur had also recalled that the criticism of his proposal to give due weight to the practice of specially affected States by some Commission members during the consideration of the second report (A/CN.4/672) seemed to have been based on a fear that only the practice of specially affected States was to be taken into account. In his own view, that interpretation of the word "affected" departed from its usual connotation and the meaning that could be inferred from the excellent examples provided by Mr. Murphy. There were many issues in the vast framework of international cooperation in respect of which the international community of States as a whole had an objective interest and served as the custodian of that interest with regard to the rules of international law applicable to the issues in question. That objective interest, in areas such as the protection of human rights, in turn called for the establishment of systems that expressed collective enforcement by the international community of States as a whole, sometimes referred to in French as "*l'ordre public international*". In his view, it was absolutely clear that anything that concerned human dignity was of concern to everyone. It was therefore worrying that the adjective "affected" in the term "specially affected States" could be interpreted as meaning the States "concerned". Among the valid examples mentioned by Commission members were the interests of landlocked States, which had the same interests as States with a coastline in relation to the resources of exclusive economic zones or the protection of the marine environment and whose interests needed to be protected equally. However, he did not believe that was what was at issue.

To better understand the issue at stake, it might be useful to consider another type of situation — for example, the war on terrorism. The use of force against non-State actors in the context of counter-terrorism efforts represented a huge challenge for the application of international law, ranging from general rules of *jus ad bellum* to rules of international humanitarian or human rights law. Assuming for a moment that the counter-terrorism practice of a State could give rise to the development of a rule of customary international law in that field and that the practice and *opinio juris* of "specially affected States" were to be taken into account, the question would arise as to whether that designation applied to the States that sheltered the terrorist groups against whom military operations were conducted or to those that carried out the military operations. Assuming that it was the latter, it would have to be asked whether the practice of a State which had joined an international coalition but which did not carry out operations on the ground should be given the same weight as that of States which carried out ground operations. It was also unclear what approach should be taken with regard to States that had suffered a terrorist attack but had not participated in a coalition or in military operations. Another question would be whether only the practice of States that participated in such operations should be considered as relevant for creating a rule of customary international law in that context, even if the number of such States was very small. In that regard, he recalled that draft conclusion 16 allowed for the creation of a rule of particular custom which was applicable among a limited number of States that did not necessarily have a regional relationship. He also wondered whether it could be argued that less weight should be given to the practice of the rest of the international community — in particular States that had not been subjected to terrorist threats in their territory and that had not carried out counter-terrorism operations in third States — than to the practice of States that had conducted counter-terrorism operations. It was an important question because what was at stake were rules of international law in areas of concern to everyone, namely rules relating to the use of force and rules of international humanitarian and human rights law, which, by nature, were expressions of the objective interest of the international community of States as a whole. Similar questions arose in the area of nuclear non-proliferation and disarmament with regard to whether nuclear weapon States could be considered "specially affected States".

For all those reasons, the concept of "specially affected States" was, at best, a doctrinal proposition, and an extremely dangerous one indeed. The Commission did not have time to discuss it properly, given the

advanced stage of its work on the current topic. In his view, it was as dangerous as the concept of self-contained regimes and should not be included within the scope of the current topic. Accordingly, he considered the commentary adopted on first reading was sufficient to address and settle that issue.

Concerning draft conclusion 10, he noted that, following the attacks of 11 September 2001 in the United States, discussion in the international arena had intensified with regard to the potential "crystallization of a rule of customary international law" concerning the claim of self-defence against non-State actors. In his bibliography, the Special Rapporteur had listed a book on that subject by Tom Ruys entitled *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*. Following the emergence of the so-called Islamic State in Iraq and the Levant, that discussion was reaching another level, in which it had even been suggested that an emerging rule of customary international law might exist concerning the use of force in exercise of the right to self-defence against non-State actors operating in a State considered to be unwilling and unable to confront a terrorist threat (known as the "unwilling and unable" standard), and the literature on that subject continued to grow. While it was not the appropriate forum to consider the merits of that issue, he wished to comment on the possibility that the failure of States to react over time to a practice might serve as evidence of *opinio juris*, as set out in paragraph 3 of draft conclusion 10. The argument used to justify the existence of such an emerging rule of customary international law was essentially based on the fact that, from 2014 to the present, 12 States Members of the United Nations had sent official communications to the Security Council invoking Article 51 of the Charter of the United Nations, in particular the right of collective self-defence, for the purpose of carrying out military operations in the Syrian Arab Republic in order to confront the threat posed by Islamic State in Iraq and the Levant. Although various different arguments of international law were advanced in those communications, the first letter received by the Security Council on the matter, contained in document S/2014/695, invoked the "unwilling and unable" standard against the Syrian Arab Republic, claiming that the Syrian Government was unwilling or unable to prevent the use of its territory for terrorist attacks. Only two Member States had informed the Security Council in writing that they opposed the claim to the right of collective self-defence set out in the 12 letters, while silence had prevailed among the remaining Member States.

In those circumstances, it might seem logical for some States — perhaps those "specially affected" — to argue that the practice in question was a repeated practice, with *opinio juris* confirmed either by the official communications received by the Security Council or by the silence of Member States, which implied their acquiescence, and with only two "persistent objectors" having expressed their opposition. It was at that point that the assessment whether States were in a position to react and whether the circumstances called for some reaction became critical, given that the opacity of the Security Council's procedures and working methods made it practically impossible for Member States that were not members of the Council to formulate a reaction. The only source in which the compilation of the 12 letters was to be found was the *Repertoire of the Practice of the Security Council*, which had been referred to in the memorandum by the Secretariat (A/CN.4/710). The problem was that the *Repertoire* was issued only every three years and the latest volume currently available was from 2015, which could be interpreted by some States as meaning that there had already been a "reasonable time" to respond. It was, furthermore, interesting to note that the *Repertoire* had been established pursuant to General Assembly resolution 686 (VII) of 5 December 1952, entitled "Ways and means for making the evidence of customary international law more readily available". Thus, despite the fact that the *Repertoire* contained only the official communications received by the Security Council, in respect of which States not members of the Council had not been able to react, those communications were offered as "evidence of customary international law". In his view, that situation was extremely dangerous. Moreover, it illustrated the enormous difficulties that States faced in terms of ensuring that they were in a position to react to a practice when the circumstances called for some reaction, as set forth in paragraph 3 of draft conclusion 10. For those reasons, he believed that, despite the quality of the drafting of the commentary to draft conclusion 10, it was advisable to proceed with great caution in terms of interpreting the failure to react over time to a practice as evidence of acceptance as law.

In respect of draft conclusion 12, he concurred with the Special Rapporteur's proposal to insert the qualifying words "in certain circumstances" after the word "may" in paragraph 2. He suggested that a series of examples of those circumstances should be provided in the commentary, and that the list of ways in which resolutions of international organizations could be adopted should be expanded. The importance of that exercise had been underscored the previous day in the Drafting Committee on Subsequent agreements and

subsequent practice in relation to the interpretation of treaties, with regard to the adoption of resolutions by means of consensus, and it would be important to ensure consistency with what had been decided in that regard.

Turning to draft conclusion 15, he welcomed the Special Rapporteur's proposal to add a new paragraph 3 containing a "without prejudice" clause in respect of *jus cogens* norms, while pointing out that the note of caution sounded by Mr. Reinisch merited consideration. Since the obligations imposed on States under rules of customary international law could refer to *jus cogens* norms that also expressed obligations *erga omnes*, it might be desirable to expand the "without prejudice" clause to include a reference to the latter. Indeed, it would be impossible to justify the validity of objections expressed by a persistent objector with regard to obligations owed by States to the international community as a whole, as illustrated by the established case law of the International Court of Justice, in particular its judgment in *Barcelona Traction, Light and Power Company, Limited* and its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*.

With regard to the form of the Commission's final output on the topic, he was surprised by the Special Rapporteur's preference for conclusions over guidelines based on the argument that guidelines were too dogmatic. In his own view, the opposite was true. However, notwithstanding the interest of Commission members in how the form of the Commission's final output was to be determined, the possibility that the question could be discussed in the Working Group on Methods of work and the fact that the General Assembly could decide to overrule the Commission's decision in that regard, it was, in his view, the prerogative of the Special Rapporteur to choose the form of the Commission's final output on a particular topic.

Mr. Nolte said that the similarity between the three topics referred to by Mr. Gómez-Robledo concerned the way in which sources were identified. In his view, it was the Commission as a whole that should decide on the form of the Commission's final output on a given topic. Any difference in the form of the final output of the three topics would imply a difference in the Commission's evaluation of their relative meaning or importance.

The Chair said that, in his opinion, it was up to the Drafting Committee to consider each of the three topics in its own context and to agree on what to recommend to the plenary Commission. Based on those recommendations, the Commission could decide what form the final output of its work on a particular topic would take, with a view to maintaining consistency between the three topics being considered at the current session and those to be considered at future sessions.

Mr. Petrič said that he wished to congratulate the Special Rapporteur for his excellent, dedicated and efficient work. Under his guidance, the Commission was about to successfully complete its consideration of the topic in six years, which was a relatively short period of time. The innovative methodology employed — including the three memorandums by the Secretariat, the bibliography and the use of an open-ended working group — had had a significant impact on the success of the Commission's work on the topic.

He approved of the Special Rapporteur's presentation of the Commission's development of the topic, which was theoretically exciting and of great practical relevance. In some ways, it was surprising that the topic had not been included in the Commission's programme of work until ¬2012, since customary law, with all of its uncertainties, had, at least until the late 1960s, comprised the vast majority of the international law in existence. It remained an important part of international law and several essential aspects of international relations were still regulated by it.

The identification of the rules of customary international law had been and remained the main challenge for its practical application and use, particularly in relation to *lex certa* or the principle of legal certainty — namely, whether a rule existed and what its content was. *Lex certa* was one of the basic principles of law and adherence to it was crucial to the application of customary international law. The draft conclusions would make a major contribution to the understanding and application of customary international law, including the problem of *lex certa*, and would be of great practical use to States, international organizations and all those involved in international relations and international law.

The Commission had made efforts to clarify most of the areas of uncertainty that had remained following the adoption of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Those areas of uncertainty concerned reservations to treaties, subsequent agreements and subsequent practice in relation to the interpretation of treaties, the provisional application of treaties and the impact of armed conflict on treaties. As it concluded its work on the current topic, the Commission should consider, as one of its priorities for future topics, the general principles of law, which were the third main source of international law and which also required clarification.

With reference to the meagre number of written replies from States in response to the Commission's request for comments, he noted that the situation was better in the Sixth Committee, where a larger number of States, from more than one regional group, typically made comments. The Working Group on Methods of work should consider how the Commission could receive more written comments and observations from States in response to its requests. He reminded the many legal advisors from permanent missions to the United Nations who were in attendance at the current session how important it was to the Commission's work for it to receive such information from States.

He had no major problems with the draft conclusions in general or with specific draft conclusions, and he agreed with most of what the Special Rapporteur had proposed in his report. He would touch only briefly on the draft conclusions, strictly respecting the bounds of the original scope and purpose of the topic, which was limited to stating the existing methodology for identifying rules of customary international law.

Draft conclusion 1 properly defined the scope of the topic. It had been discussed extensively at the early stages of the topic, and he had nothing to add, either to the text of the draft conclusion or to the commentary as proposed by the Special Rapporteur.

With regard to draft conclusion 2, he agreed with the Special Rapporteur that no modification of the draft conclusion was necessary. Concerning the commentary, perhaps some clarifications could be made when the commentaries were discussed in the Drafting Committee.

Concerning draft conclusion 3, the Special Rapporteur's original proposal adopted on first reading did not require any amendment, and none had been suggested by States. However, since some States, namely the Netherlands and Israel, had called for certain clarifications, some changes and additional clarifications in the commentaries might be welcome.

Draft conclusion 4 reflected the reality that, without State practice, there could be no rule of customary international law and no *opinio juris*. Practice alone, however, was not sufficient to establish a rule of customary international law; it had to be accompanied by *opinio juris*. Yet in identifying a rule of customary international law, the identification of relevant practice was the first step. He therefore agreed with the suggestion of the Russian Federation and with the Special Rapporteur that the word "primarily" in paragraph 1 should be deleted. Also in paragraph 1, he endorsed the Special Rapporteur's proposal to replace the words "formation, or expression" with the words "expressive, or creative". With regard to paragraph 2, there was a broad divergence of views, both among States and among Commission members, concerning the relevance of the practice of international organizations, which was one of the most important issues raised by the topic. He was eager to hear the Special Rapporteur's reaction to those divergent views, and in the interests of compromise, would refrain from extensively elaborating his own views on the topic. His basic position was that, since international organizations played an ever-growing role in contemporary international relations and international law, the Commission would be ignoring reality if it denied international organizations any role in the expression and creation of customary international law. Given the increasing role of such organizations, States no longer had a monopoly in international relations. The dilemma was therefore not whether to include the role of the practice of international organizations in the draft conclusions, but rather how to adequately reflect that role. As had frequently been the case in the past, a compromise solution on that question could be sought in the Drafting Committee or else in the context of an open-ended working group. He shared the view of Mr. Reinisch that it was sufficient in paragraph 2 to retain either the words "in certain cases" or the word "may", but not both. However, for the sake of compromise, he could also live with the wording proposed by the Special Rapporteur.

With regard to draft conclusion 5, he had no comments to make on the Special Rapporteur's views and proposal.

In respect of draft conclusion 6, he endorsed the Special Rapporteur's reasoning with regard to silence and thus found the insertion of the word "deliberate" before "inaction" in paragraph 1 to be acceptable. On the contrary, in the second sentence, the word "may" was unnecessary and cast doubt as to whether or not physical and verbal acts, and deliberate action, were to be considered forms of practice. The question of hierarchy referred to in paragraph 3 could be explained in the commentary. That said, the hierarchy assigned to the practice of the courts of a particular State was not very relevant in terms of its contribution to State practice. What was relevant was whether a judicial decision was final or not; so long as it was not final, it should not be considered State practice.

On draft conclusion 8, he agreed with the suggestion by the United States, described in paragraph 63 of the report, that the draft conclusion should incorporate the "extensive and virtually uniform" standard. He could accept the Special Rapporteur's

proposed amendments to the draft conclusion; however, some additional explanations were needed in the commentary. With regard to the question of "specially affected States", which had arisen in the context of draft conclusion 8, he shared the Special Rapporteur's view, as expressed in his second report on the topic, that due regard should be given to the practice of States whose interests were specially affected. A proposal to that effect would be beneficial in particular for smaller and weaker States, given that powerful States usually had sufficient means to secure their special interests. Any State might have a vital specific interest; it was therefore wrong to believe that the concept of the specially affected State favoured powerful States. Because the situation of a specially affected State was different from that of other States, having due regard to the situation of the former did not contravene the principle of the sovereign equality of States. He therefore concurred with the Special Rapporteur's reasoning in paragraph 70 of the report, although, in his view, it would be preferable for a paragraph on that issue to be included in the text of the draft conclusion itself. If that was too much to ask, he could agree to the question being addressed only in the commentary.

With regard to draft conclusion 12, he agreed that resolutions of international organizations, including the United Nations, could not, of themselves, create a rule of customary international law, but that they could provide evidence for determining the existence and content of such a rule. However, the qualifying expressions "in certain circumstances" and "may" were not both necessary. Keeping both went too far and diminished the importance of resolutions as part of the practice of international organizations and intergovernmental organizations.

Draft conclusion 15 dealt with a rather controversial topic. Since the notion of the persistent objector seemed to be accepted by many States and was used in international relations, it would be wrong to ignore it in the draft conclusions. He supported the Special Rapporteur's proposal to add a new paragraph 3 containing a "without prejudice" clause in respect of *jus cogens*. However, given the importance of *jus cogens*, it might not be sufficient to refer to it only in the form of such a clause, and the point could perhaps be made elsewhere as well. He suggested that the matter could be taken up in the Drafting Committee.

He endorsed draft conclusion 16 in principle, since particular customary international law among States with a regional or local relationship was a reality in contemporary international relations. That said, he did not support the idea of the other kinds of particular customary international law referred to by the word "other" in paragraph 1, since like-minded States that did not have a geographical relationship could best safeguard their particular interests by concluding treaties. He would therefore prefer to limit particular customary international law to regional and local rules of customary international law.

He supported the Special Rapporteur's reasoning and proposals in respect of draft conclusions 7, 9, 10, 11, 13 and 14.

With regard to the final form of the Commission's output on the topic, he was still convinced, in spite of the excellent statement by Mr. Murase, that the most appropriate form was a set of draft conclusions. He agreed with Mr. Nolte on the need to maintain consistency in terms of the form of the final output of the related topics of identification of customary international law, peremptory norms of general international law (*jus cogens*) and subsequent agreements and subsequent practice in relation to interpretation of treaties. In his view, conclusions were determined on the basis of research, which was an expression of "wisdom", while guidelines were somewhat more normative, and lacked that quality of "wisdom". He endorsed the Special Rapporteur's proposals regarding what the Commission should recommend to the General Assembly, as set out in paragraph 129 of his report. He was in favour of referring all the draft conclusions to the Drafting Committee.

Ms. Oral said that she wished to join other Commission members in congratulating the Special Rapporteur, not only on his report but also on his work over the years on a complex and challenging topic that was of great significance to international law. She also commended the Secretariat for its excellent work in preparing the very valuable memorandum on ways and means for making the evidence of customary international law more readily available and for the clear oral introduction to that memorandum.

Given that the Commission was at the second-reading stage, and many other members had already spoken on the topic, she would be as brief as possible and comment only on certain draft conclusions. Her general comments, echoing States and other members of the Commission, such as Mr. Hassouna, related to the general nature of the draft conclusions. That concern could be largely addressed in the commentary, though some additional details might need to be covered in the draft conclusions themselves. She agreed that the draft conclusions must be read together with the commentaries. The draft conclusions provided an excellent starting point for practitioners, scholars and

courts to use as a guide when dealing with the challenge of identifying customary international law.

Although she had no overall objection to draft conclusion 1, she pointed out that the title of the topic referred to the "identification" of customary international law, while the text of draft conclusion 1 indicated that the draft conclusions concerned the way in which the existence and content of rules of customary international law were "to be determined". Furthermore, the words "to determine" and "determining" were used in draft conclusions 2 and 12, respectively, while the word "identification" was not. In paragraph 76 of the Commission's report on its sixty-fifth session (A/68/10), in reference to the debate concerning the scope of the undertaking, one of the suggested titles for the topic had been "The determination of customary international law". She wondered whether the Special Rapporteur and the Drafting Committee would consider it necessary to make the title of the topic consistent with the content of those draft conclusions.

Draft conclusion 4 had clearly attracted many comments, not only from States and Commission members but also from scholars. The title of one article by a scholarly writer enquired whether the Commission was taking international organizations seriously in the context of its work on customary international law, thus revealing a perception that the Commission had taken a somewhat narrow approach to the role of such organizations. Of course, the challenge that the Special Rapporteur and the Commission faced was to strike a balance between the competing views of those States that recognized international organizations as actors capable of independently contributing to the formation of customary international law, which was held by the majority of States that had commented on the question, and those that saw the role of international organizations as restricted to that of "agents of the State".

The European Union was the obvious example advanced by States that held the former view, and, as the Special Rapporteur had observed in a lecture on the subject, that example could not be ignored. Given that international organizations were entities with separate legal personalities — as had been recognized decades previously by the International Court of Justice — and that they had the concomitant rights and obligations, the Commission must recognize their independent, albeit limited, role. For the sound reasons provided by a number of Commission members, including Ms. Galvão Teles, Mr. Jalloh, Mr. Reinisch and others, she was of the view that the version of draft conclusion 4 adopted on first reading, which recognized the primary role of States in formulating customary international law, should be retained. It struck a good balance, recognizing States as the principal actors under international law in the formation of customary international law, while also recognizing the important and growing role of international organizations. Furthermore, the revised version of paragraph 1 was unclear, and she agreed with Mr. Park that the words "expressive" and "creative", whose insertion the Special Rapporteur had proposed, were somewhat foreign to the jargon of international law.

With regard to draft conclusion 5, she concurred with the Special Rapporteur that no change was necessary, but she also agreed with Chile that practice must be publicly available or at least known to other States to qualify as State practice, and she endorsed the suggestion by Spain that the commentary should "make it clear that practice must be publicly available or at least known to other States in order to give them the opportunity to object".

Concerning draft conclusion 6, she concurred with the view expressed by States such as Chile that the qualifier "deliberate" should be inserted before the word "inaction" in paragraph 1. Although that introduced a subjective element, as pointed out by various Commission members, it was nevertheless important to have some indication of the State's awareness of its inaction.

With regard to draft conclusion 7, the Special Rapporteur's suggested revision in response to concerns expressed by States was acceptable.

In respect of draft conclusion 8, she endorsed the overall formulation of the text but agreed with the suggested deletion, in paragraph 1, of the word "sufficiently" before "widespread", which already meant extensive. Concerning the question of "specially affected States", she endorsed the views expressed by Mr. Tladi, Mr. Gómez-Robledo and others. As Mr. Tladi had pointed out, the reliance on "specially affected States" in the identification of customary international law was based exclusively on the *North Sea Continental Shelf* judgment, which had originated the concept. The only other reference to it by the Court had been in the separate opinions of Judges de Castro and Petrén in the case concerning *Fisheries Jurisdiction (United Kingdom v. Iceland)*, which was cited in the Special Rapporteur's second report.

In the *North Sea Continental Shelf* cases, the Court was examining whether the equidistant rule of article 6 of the 1958 Convention on the Continental Shelf had attained the status of customary international law. In examining it, the Court had basically looked at whether the participation in the Convention itself was "widespread and representative" and included States

whose interests were specially affected. However, one judgment and two separate opinions that referred to the concept did not provide a sufficient foundation for extrapolating a general rule for giving priority to the practice of certain States over others in the identification of customary international law. The concept was too vague, as demonstrated by the Commission's own discussions and varying interpretations. She therefore shared the view that the Commission should exercise caution with regard to the concept of "specially affected States" and should not refer to it in the text of the draft conclusions.

With regard to draft conclusion 12, she concurred with those Commission members who had expressed concern that the Commission might be perceived to be diminishing the importance of resolutions by international organizations, especially the General Assembly. She therefore supported the retention of the original formulation and was not in favour of inserting the phrase "in certain circumstances" in paragraph 2.

She supported the inclusion of draft conclusion 15, as it was a well-accepted rule and practice of international law and the logical corollary of the principle of State consent in international law. If there was no legal obligation for a State to become a party to a treaty, and if reservations to treaties were permissible, then it followed that there could be no obligation for a State to agree to the formation of a rule of customary international law, and States must be able to express their objection to such rules. However, she also agreed that certain limitations were called for, in particular with regard to rules of a peremptory nature. She agreed with the points made by Mr. Reinisch and Mr. Gómez-Robledo concerning the inclusion in paragraph 3 of a reference to obligations *erga omnes*.

On draft conclusion 16, she agreed with the Special Rapporteur's proposal to insert the words "among themselves" in paragraph 2 in response to comments made by States, as it clarified the limited nature of the rule of customary international law in that context.

With regard to the form of the Commission's output on the topic, after reflecting on Mr. Murase's passionate plea regarding his preference for guidelines as opposed to conclusions, she agreed that the Commission should consider the matter, while, of course, taking into consideration Mr. Nolte's observation with respect to the need to maintain consistency between the form of the output of the Commission's work on the three related topics.

In conclusion, she was in favour of referring the draft conclusions to the Drafting Committee, and she endorsed the Special Rapporteur's proposals regarding the recommendations that the Commission should make to the General Assembly, as set out in paragraph 129 of his report.

Mr. Tladi said that he wished to address a point that had been raised repeatedly in a number of statements by Commission members, namely that the commentary was just as important as the draft conclusions. Although he agreed that the draft conclusions were to be read together with their commentaries, the commentaries went beyond the draft conclusions, and, consequently, the Commission should not take the approach that the two were equal in status. In his view, the purpose of the commentary was to explain the text of the draft conclusions.

The Chair said that, when adopting the commentaries to the draft conclusions, the Commission would ensure, first, that the commentaries did not contradict the text being adopted, and secondly, that they did not go beyond it, but merely explained and complemented it.

Programme, procedures, working methods of the Commission and its documentation (agenda item 12) (*continued*)

Mr. Hmoud (Chair of the Working Group) said that the Working Group on the Long-term programme of work was composed of Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Saboia, Mr. Ruda Santolaria, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez, Sir Michael Wood and Ms. Galvão Teles (Rapporteur), *ex officio*.

The meeting rose at 1 p.m.