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Summary record of the 3400th meeting
Held at Headquarters, New York, on Friday, 11 May 2018, at 10 a.m.

Contents

18-07663 (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 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. Šturma said that the Commission was close to successfully completing its work on the topic, thanks to the Special Rapporteur's excellent analytical work, thoroughness and pragmatism. He also expressed his appreciation to the Secretariat for its memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710).

Overall, he was supportive of the draft conclusions as presented by the Special Rapporteur and provisionally adopted by the Commission on first reading. Unlike Mr. Park, he was not convinced that the entire set reflected a voluntarist rather than objectivist approach to customary international law. The Special Rapporteur's approach could not easily be classified in either of those categories; he attached great importance to State practice and his approach could better be described as rather pragmatic. That said, he agreed with Mr. Park and others that draft conclusion 15 (Persistent objector) and draft conclusion 16 (Particular customary international law) went beyond identification and dealt with the formation of customary rules of international law under rather particular conditions. If there were any albeit unintentional traces of the voluntarist approach, they would perhaps be found in those two draft conclusions.

While generally supporting draft conclusion 4 (Requirement of practice), he did not consider the changes proposed in paragraph 1 to be improvements. He preferred the original wording that the practice of States "contributes to the formation, or expression, of rules of customary international law". The proposed deletion of the word "primarily" might unnecessarily diminish the possible contribution made by the practice of international organizations. In paragraph 2, the insertion of the word "may" could limit the role played by international organizations in contemporary international law. Nevertheless, customary rules were primarily formed or created by State practice. He therefore agreed with the wording "in certain cases", mainly because it reflected the special legal personality of international organizations. Perhaps it could be made clear in the commentary that the recognition of a possible contribution by international organizations should be understood not as absolute, but rather as differentiated, according to the principle of speciality. Depending on the rules in question, some or all organizations might be involved, in which case they would be bound by such rules and would contribute to their formation. As the International Court of Justice had recognized in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, international organizations were not States or super-States, and thus they contributed to customary international law in a different way. Nevertheless, like Mr. Reinisch, he agreed that the "own practice" of international organizations had been acknowledged in certain areas of international law, such as in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and the articles on responsibility of international organizations.

He agreed in principle with the text of draft conclusion 8 (The practice must be general), including the proposed amendment. Although he had listened carefully to the arguments of Mr. Tladi, he did not regard the concept of specially affected States as particularly problematic. It was not a question of giving special weight to the practice of "great powers", since specially affected States could also be small States that were specially affected or concerned by certain rules, such as landlocked States on access to the sea. Although it was true that few authorities had been cited in the report concerning the generality of practice, apart from the *North Sea Continental Shelf* cases of the International Court of Justice, other than the *Fisheries case (United Kingdom v. Norway)*, it was also true that there were also few cases of the Court on the persistent objector rule, yet it had its own draft conclusion.

As he only had some doubts about the voluntarist approach to customary international law, he had been rightly omitted by Mr. Park from the group of objectors to the persistent objector rule. In particular, he found the rule problematic with respect to peremptory norms of general international law. If taken seriously, it would make *jus cogens* virtually impossible. However, in relation to regular (dispositive) customary rules, the persistent objector appeared to have garnered sufficient support among States and members of the Commission. Therefore, and in view of the newly proposed "without prejudice" clause in paragraph 3, which was a minimal but necessary provision, he would be able to join the consensus on draft conclusion 15, if such consensus emerged.

Lastly, he had doubts and objections about certain aspects of the concept of particular customary international law, the subject of draft conclusion 16. He did not have any problem with regional or even local

customary international law. Local or regional rules might be practical, although the case law showed that they did not arise very frequently. It was also possible to ascertain a general practice and *opinio juris* among the States concerned with reasonable certainty. Indeed, other particular customs might be possible in principle, if there was a common interest among the States concerned. In that case, however, there must be strong evidence of such general practice and of its acceptance as law, in particular the subjective element. Indeed, the States concerned could always adopt particular rules by way of an agreement, perhaps concluded in a simplified form, where the issue of the relative effects and non-opposability to third States would not give rise to such difficult questions. There was a risk that the construction of particular custom could blur the lines between treaty law and customary international law. Unless some useful examples were provided in the commentary, he did not see the utility of "other" particular customary law.

As to the final form of the Commission's output, he concurred that the term "conclusions" was appropriate and agreed with the Special Rapporteur's proposal to recommend to the General Assembly to take note of the draft conclusions in a resolution, annex them to the resolution, and commend them, together with the commentaries thereto, to the attention of States. Commending the Special Rapporteur on his excellent work, he said that he hoped the Commission would be able to adopt the draft conclusions. He recommended referring them to the Drafting Committee.

Mr. Huang said that the Commission had handled the topic extremely efficiently, since it had completed its first reading of the draft conclusions only five years after the topic had been formally added to the programme of work. Its work on the topic was nothing short of a tour de force. The careful and balanced approach taken by the Special Rapporteur had also garnered glowing praise. The draft conclusions, commentaries and bibliographies had received broad, unequivocal recognition from States and were considered vitally important and invaluable to the work of practitioners and scholars alike. Some suggestions for further improvement and refinement had inevitably been made, but there were no major differences of opinion, which was unusual.

A number of important conclusions could be drawn from the current experience, which should inform, inspire and benefit the Commission's future work. First, topics must be carefully chosen, since positive outcomes only resulted from well-chosen topics. They should meet the needs of States and the international community, and highly controversial topics should be avoided, as they were likely to result in a difficult deliberation process and even political impasse, as evidenced by one of the topics on the Commission's current programme of work.

Secondly, the State was and would remain the main driver of the progressive development and codification of international law, as should be evident at every stage of the Commission's work, including the establishment of precedents, the development of State practice and theory, the provision of political guidance and means of research for the Commission and the acceptance and assimilation of the Commission's outcomes. It should be rooted in the existing practice of States, as indicated in article 15 of the Commission's statute, not in individual Commission members' academic interests, ideologies or subjective goals of a utilitarian nature. Opinions should be solicited from all parties to ensure that the outcomes reflected the universal practice of States and contributed positively to the stability of international relations and to win-win cooperation between and among States. Therefore, States' statements in the Sixth Committee, as well as their written feedback and proposals on the outcomes of the Commission's work at every stage, should be fully respected. The Commission's second reading of draft articles or draft conclusions on any given topic should focus on the concerns and comments of States.

Consensus was part of the Commission's heritage and must be upheld. The Commission and the Member States must do their utmost to strive for consensus so that the final outcomes reflected the world's varied legal cultures and met with the broadest possible acceptance. The Commission should promote the democratic spirit in academic research and support constructive criticism. Special rapporteurs in particular should adopt a spirit of mutual learning, be open-minded, accommodate different opinions, and refrain from clinging to their entrenched ideas, claiming the superiority of their own propositions or throwing their weight around in academic circles. The Special Rapporteur had set an excellent example in that regard.

With the exception of administrative, electoral and procedural matters, the Commission must not invoke the simple majority rule when deliberating on a draft outcome, and much less try to force a vote. Dissenting voices warranted special attention because, as Plato had said, truth often rested with the minority. In his report, the Special Rapporteur presented the comments submitted by States in a systematic manner, with context-specific recommendations and clear and well-articulated conclusions. The report provided a sound basis for the second reading of the draft conclusions. It would be inadvisable to introduce new paragraphs or

elements or to relaunch the consultation process at the current point. A prudent, rigorous and systematic approach should be adopted for the identification of the rules of customary international law, which must at the same time be tempered by an appropriate degree of flexibility to allow States some discretion.

Differences of opinion remained concerning the possible relevance of the practice of international organizations, the subject of paragraph 2 of draft conclusion 4. Although the primary role of State practice in the creation and expression of the rules of customary international law was clear, the importance of the practice of international organizations in specific circumstances must not be neglected. With the proliferation of international organizations, State practice within international organizations was becoming a major contributor to the formation of customary international law, especially in the case of international organizations with broad representation, such as the United Nations. He therefore shared the Special Rapporteur's conclusion that when States directed an international organization to execute in their place actions falling within their own competences, such practice might well be of relevance in the creation, or expression, of customary international law. The practice of international organizations among themselves and in their relations with States could also give rise to or attest to rules of customary international law binding in such relations. However, beyond those special circumstances, the practice of international organizations generally could not be deemed to constitute evidence of customary international law. Moreover, the authority of practice varied from one organization to another. A clear distinction must therefore be drawn in the commentary between the practice of States and the practice of international organizations, in contrast to what was proposed in paragraph 48 of the report, namely that "references to the practice … of States should be read as including … the practice … of international organizations". In addition, consistency with draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences) should be sought.

Concerning the expression "conduct of other actors" in paragraph 3, the conduct of non-State actors did not meet the requirement of practice and did not contribute to the formation or expression of customary international law. The phrase "but may be relevant when assessing the practice referred to in paragraph 1 and 2", contained in the second half of the paragraph, should therefore be deleted. He also agreed that the commentary to paragraph 3 should be amended, since a specific reference to "non-State armed groups and transnational corporations" was not justified.

Regarding draft conclusion 6 (Forms of practice), he agreed with the modifications proposed by some States. Discrepancies between the forms of evidence of acceptance as law (*opinio juris*) listed in draft conclusion 6 and those of draft conclusion 10 should be clarified. Terminology should be consistent and any inconsistencies should be explained.

Turning to draft conclusion 8, he said that some members of the Commission had a strong interest in the term "specially affected States" and its exact meaning was still unclear. In his own view, if a State, irrespective of its size, wealth and strength, had specific interests in the formation of rules in a given domain and was subject to the effects of such rules, that State might be qualified as a specially affected State and its practice must be accorded due attention. The necessity of according special attention to specially affected States was inherent in Article 31 of the Charter of the United Nations, and the unique role of specially affected States had been highlighted by the International Court of Justice in the *North Sea Continental Shelf* cases. The concept had not been introduced to serve the interests of big or powerful States; on the contrary, it was an objective concept that simply referred to any and all States that were particularly concerned about a subject. Failure to recognize the unique role of some States in the formation of customary international law could lead to an over-reliance on the opinions of States that were not specially affected. In reality, more State practice was likely to be formed in the case of States with special interests and such practice would naturally receive more attention. He suggested expanding the commentary, to underline the need to give more consideration to the practice and *opinio juris* of specially affected States. That, however, should not encourage the Commission to focus solely on specially affected States to the exclusion of others.

With regard to draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), most States had underscored that the evidentiary value of inaction should be treated with caution. In his own view, inaction by itself did not equate to implied consent or tacit agreement. When determining whether a State's inaction was intentional and thus could be used as evidence of *opinio juris*, the State's knowledge of the applicable rules and its ability to respond must be taken into account. However, whether the specific wording used in paragraph 3 should be "over time", "within a specific period" or some other formulation could be left to the Drafting Committee.

Draft conclusion 13 (Decisions of courts and tribunals) involved a value judgment of judicial decisions. He supported the reference to the limitations

of the decisions of national courts in the report. In normal circumstances, such decisions were by and large a function of national legal systems and judicial practice, and therefore had a relatively limited impact on the development of international law. However, the question of whether greater weight should be given to the decisions of international courts merited discussion. The decision of an international court should not automatically be presumed to be more authoritative by virtue of its international character. In addition, not all international courts had the same weight and value. The Commission could also consider introducing in the commentary a discussion of a scenario in which the decision of a national court conflicted with that of an international court.

He agreed with the Special Rapporteur's proposal to retain the words "a subsidiary means" in draft conclusion 14 (Teachings) and concurred that a distinction should be made between the Commission's output and the writings of other scholars. Given the Commission's nature and approach, its output was clearly of greater value for identifying customary international law than general scholarly writings.

In the commentary to draft conclusion 15, the Special Rapporteur had noted that, when determining whether an objection had been persistently maintained, "States cannot, however, be expected to react on every occasion, especially where their position is already well known." That was generally consistent with international practice. However, it was necessary to look at the specific circumstances and consider a variety of factors when determining persistent objector status, including whether the State in question was in a position to object and whether it had previously raised an unequivocal objection at an appropriate time, in which case it needed not repeat its objection. He suggested that those considerations should be articulated more clearly in the commentary.

Regarding draft conclusion 16, the Commission's discussions had not yet touched on the possibility that one rule of particular customary international law might conflict with another. Further clarification was needed on the relative status of particular versus general customary international law. It should also be indicated in the commentary that, when examining a relevant State practice, it would be necessary to clarify whether the practice came from the State's acceptance of a rule of particular customary international law or its acceptance as law of a rule of general customary international law. He suggested adding the following paragraph to the draft conclusion: "Certain materials referred to in Part Five of the draft conclusions may reflect particular customary international law or the means or subsidiary means for determining the rules of particular customary international law."

Lastly, he concurred with the Special Rapporteur's proposal regarding the final form of the Commission's output on the present topic and supported referring the draft conclusions to the Drafting Committee. He also thanked the Secretariat for its memorandum on ways and means of making the evidence if customary law more readily available and said that he would submit three additional resources to be included in the section on China concerning access to information on customary international law.

The Chair thanked Mr. Huang for his spirit of cooperation in not reading out part of his statement, which had saved time. His comments, both oral and written, would be duly taken into consideration, especially in the Working Group on the Long-Term Programme of Work and the Working Group on Methods of work.

Ms. Lehto, commending the Special Rapporteur for his report and for his steering of the topic over the past few years, said that, although she had not participated in the earlier stage of discussions, she had no difficulty in subscribing to the appreciative comments that had been made concerning his collegiality, cooperation, thoughtfulness and leadership. She also commended the Secretariat for its memorandum on elements in the previous work of the Commission that could be particularly relevant to the topic (A/CN.4/659) as well as its more recent memorandum on ways and means of making the evidence of customary law more readily available (A/CN.4/710), both of which were important contributions to the Commission's work. She also endorsed the suggestions made by the Special Rapporteur in paragraph 129 (d) of his report concerning the follow-up to be given to the more recent memorandum.

The Special Rapporteur's report was clear, concise and well drafted, making it accessible even to readers not familiar with the topic. That approach was also in line with one of the purposes of the draft conclusions and the commentaries thereto, as she understood it: to provide a tool for practitioners of international law or, as the Special Rapporteur himself had indicated in a lecture delivered at Vanderbilt University Law School on 4 November 2014, some reasonably authoritative guidance on how to identify rules of customary international law in concrete cases, especially at a time when questions of customary international law increasingly fell to be dealt with by those who might not be international law specialists. The debates in the Sixth Committee had proved that such a tool was greatly

appreciated by States, which seemed to be broadly in agreement with the Commission's work on the topic. She also thanked the Special Rapporteur for the extensive bibliography, which further added to the quality of his work. Since she was entering the debate at a late stage, she would restrict her remarks to some of the drafting proposals made by the Special Rapporteur and other members of the Commission.

With regard to draft conclusions 1 to 3, she supported the Special Rapporteur's assessment that the comments received from States did not give reason for any amendments. In particular, she agreed with the arguments presented in paragraph 34 of the report concerning the relevance of the views of States that had no practice of their own with regard to a certain rule. She would also be reluctant to add further qualifications, such as "rigorous" or "careful", to the text of draft conclusion 3, paragraph 2.

Draft conclusion 4 had attracted considerable comment from members of the Commission concerning the role of international organizations in the identification of customary international law. She fully endorsed the thorough analyses provided in particular by Ms. Galvão Teles and Mr. Reinisch. It was appropriate that the Commission, in its work on the topic, was taking into account and recognizing the increasingly important contribution that international organizations, as subjects of international law, made to the formation of customary international law. Paragraph 2 of the draft conclusion, importantly, dealt with the practice of international organizations as such or, as referred to in the commentary, "practice attributed to international organizations themselves, not that of their member States acting within them". At the same time, she accepted that the provision must be qualified in view of the different opinions held by members of the Commission, as had already been done in the current text through the inclusion of the words "in certain cases". She was nonetheless concerned that some of the proposed changes to the draft conclusion, particularly the deletion of the word "primarily" in paragraph 1 and the addition of the word "may" in paragraph 2, would make the recognition of the role of international organizations more ambivalent and unclear. She therefore did not support those changes.

As to draft conclusion 6, she understood that the proposal to add the word "deliberate" was intended to respond to a widely held concern among States that too much could be read into inaction from a legal standpoint. At the same time, she wondered whether it really improved the existing wording, in which the expression "under certain circumstances" already indicated that inaction would be a special case. She looked forward to discussing the issue in the Drafting Committee.

Concerning draft conclusion 8, she preferred to retain the existing formulation of paragraph 1. She saw no reason to replace the expression "sufficiently widespread" with the word "extensive", as proposed by Mr. Murphy, or to replace the word "consistent" with the expression "virtually uniform". While it could be argued, as Mr. Murase had, that there was little, if any, qualitative difference between the different wordings used by the International Court of Justice for the purpose of indicating the standard that must be met for a practice to be considered general, the change from "consistent" to "virtually uniform" could be interpreted as raising the threshold.

With regard to draft conclusion 12, the acknowledgement in paragraph 2 of the role of resolutions of international organizations and intergovernmental conferences in providing evidence of the existence and content of a rule of customary international law or in contributing to its development was balanced with caution, expressed by the word "may". The proposed addition of the expression "in certain circumstances" would further qualify the contribution of such resolutions. Her concern was similar to that which she had expressed with regard to the proposed changes to paragraph 2 of draft conclusion 4: the combination of the word "may" and the expression "in certain circumstances" underlined the Commission's hesitation, ambivalence and indecision regarding the role of international organizations in the formation of customary law. She wondered whether that was the message that the Commission wished to convey.

Noting that the draft conclusions were intended to be read together with the commentaries, she welcomed the Special Rapporteur's suggestion that the commentaries could be discussed in an open-ended working group. Further useful clarifications could be made in the commentaries about the role of international organizations. For example, as mentioned by other members, it was not clear that the commentaries fully captured the significance of a series of consistent Security Council resolutions relating to the maintenance of international peace and security, an area for which the Council had been given primary responsibility by Member States. Since most of the draft conclusions referred only to the practice and *opinio juris* of States, or did not specify whether they applied both to States and to international organizations, she saw merit in the proposal to incorporate in the main text of the draft conclusions a clarification along the lines of the one currently provided in the commentary to draft conclusion 4, paragraph 2, indicating that references in

the draft conclusions and commentaries to the practice of States should be read as including, in those cases where it was relevant, the practice of international organizations.

On draft conclusion 15, she welcomed the proposed new paragraph 3 and would be open to discussing in the Drafting Committee whether its wording could be clarified or strengthened.

She did not take a strong view as to the final form of the Commission's output on the topic and whether the term "conclusions" or "guidelines" should be used. She noted, however, the obvious need for consistency in that regard.

She was in favour of referring all the draft conclusions to the Drafting Committee and looked forward to concluding the work on the topic at the current session.

Mr. Nolte said that the Special Rapporteur had guided the deliberations skilfully, drawing on his outstanding experience and inimitable persuasive style. The work on the topic was in its final stages and, once completed, it would be one of the Commission's most significant outcomes for a long time.

He was confident that the final outcome would be a singular achievement, which would be recognized as providing a reliable framework for the identification of one of the two most important sources of international law. The framework should provide sufficient, but not too much, room for identifying and developing rules of customary international law. Much depended, however, on how the Commission handled the Special Rapporteur's latest proposals — not all minor or merely technical — which were principally intended to accommodate the comments of some States. For the reasons set out below, he considered that, in most cases, the Commission should retain the wording of the draft conclusions as adopted on first reading.

Until the late 1980s, the main problem for the identification of customary international law had been a lack of information, with only a few academic journals from developed countries publishing accounts of the practice of certain States. That had been the main reason for the Commission's efforts to make the ways and means of customary international law more readily available. Since the early 1990s, however, the opposite problem of information overload had emerged, as illustrated by the impressive memorandum prepared by the Secretariat. In principle, even the least developed States could easily register their position on any question on a government website and, even if a State did not publish a digest of its practice, it left a digital footprint of such practice which might, in principle, be identified. It had also become possible to identify customary international law in more areas than before. More international and national courts, among other actors, were being called upon to decide whether there was a rule of customary international law that they must apply.

Those developments posed a fundamental challenge for customary international law as a source of international law. At first sight, they appeared very positive; the means to identify customary rules were more readily available, and there were more areas and actors for which such rules were relevant. However, the explosion of information and the number of relevant actors made it more likely that the standards for the formation and identification of customary international law would become confusing and diluted. There was a risk that not only States, but also courts, tribunals and other actors would apply different standards and use the available information selectively, perhaps swayed by the prevailing preferences in certain fields. The Commission must therefore ensure that a common standard was maintained and that the identification of customary rules was not taken lightly. Otherwise, the authority and value of that source of international law would be diminished, particularly in the eyes of national legal authorities. For those reasons, he strongly supported the Special Rapporteur's overall approach, which was to require some rigour in the identification of customary international law and to emphasize the primary role of States in the formation of customary rules, as well as to maintain continuity regarding the standards for the identification of such rules by emphasizing the long-standing case law of the International Court of Justice.

However, the baby should not be thrown out with the bathwater; the rules on the identification of customary international law could not and should not be so strict that they made it difficult or impossible to identify even rules that had been generally assumed to exist for a long time. They should also not discourage international cooperation. Yet, some of the changes proposed by the Special Rapporteur, at the initiative of a few particularly active States, could have a suffocating effect on customary international law.

The proposal that clearly went too far was the insertion of the word "deliberate" in paragraph 1 of draft conclusion 6. It would mean that a general practice, which must indeed be widespread and representative, could only be formed if almost all States not actively engaging in the practice deliberately refrained from doing so, in a demonstrable manner. Given such a requirement, it would be realistically impossible in

many deserving cases to demonstrate that an omission was deliberate, despite the vastly expanded sources of information available. That would be particularly true if some States, or groups of States, developed no views on the rule in question. He was still impressed by the comments made by Mr. Tladi on the inactivity of many States regarding many rules. He was very much in favour of helping those States develop and express their views on all topics at the international level, and it was his understanding that a side-event would soon be organized where such possibilities could be discussed. However, it could not be right that the lack of a demonstrable deliberate omission by a substantial number of States could prevent the formation and identification of rules of customary international law in the case of an otherwise widespread practice. That was not to say that the position of passive States was not important. It was, and such States could now make their views known much more easily than before, including through regional organizations. Nevertheless, States should not be able to inadvertently prevent the further development of customary international law simply by the absence of deliberate omission regarding the practice of other States, which they could easily take note of, but which was presumably of less interest to them.

Regarding the related issue of specially affected States, he supported the position of the Special Rapporteur. Mr Tladi had made an impassioned plea, in the name of the sovereign equality of States, for the concept and role of specially affected States not to be recognized. However, the concept did not and should not privilege the great powers, or stronger States in general. On the contrary, a great power that claimed to be affected by everything could not claim to be specially affected and could then only claim to be generally affected. A smaller State with recognizable specific interests, on the other hand, could more plausibly invoke the concept. Smaller States needed the concept of specially affected States more than larger States in order to protect their voice and their interests in the formation of customary international law.

The proposal to replace the word “consistent” with “virtually uniform” in paragraph 1 of draft conclusion 8 could also limit the development of customary international law. While the expression had occasionally been used in court decisions, it would create an unrealistic expectation that virtually all States needed to engage in a specific conduct.

His second major concern was that some of the proposed amendments, including the changes relating to the relationship between States and international organizations in the formation of customary international law, would excessively discourage international cooperation. The Special Rapporteur was proposing to substantially reduce the role of international organizations and those proposals should not be adopted.

As he himself had hinted in a question he had posed to Mr. Hmoud in an earlier meeting, he had observed that States that were more fully integrated in international organizations, particularly regional organizations, tended to support the text as adopted on first reading, whereas States that were less integrated were inclined to downplay the role of such organizations in the formation of customary international law. He suspected that States that were less integrated were concerned that those that were more integrated could increase their relative influence on the formation of customary international law simply by establishing more international organizations. Conversely, States that were more integrated were concerned that they would lose influence if the role played by international organizations was not recognized. Both concerns should be addressed in the draft conclusions.

He considered that the text as adopted on first reading had succeeded in striking a good balance by emphasizing the primary role of States in paragraph 1 of draft conclusion 4. The word “primarily” in that context should not be given up. The insertion of the word “may” in paragraph 2 would unnecessarily raise the threshold for the practice of international organizations to be relevant. If an international organization took action in an area where its members would otherwise have acted, that practice needed to count, because otherwise its members would have given up their role in the formation of customary international law by establishing an international organization and allowing it to act on their behalf. Apart from that substantive consideration, he saw some discrepancy between the Special Rapporteur’s reasoning in paragraphs 41 to 45 of his report, with which he largely agreed, and his proposed changes to draft conclusion 4, which were perhaps the result of efforts to accommodate a few States; those concerns could perhaps be addressed in the commentary. He therefore recommended that the debate on such an important draft conclusion should not be fully reopened.

The same considerations applied to the Special Rapporteur’s proposal to add the words “in certain circumstances” to paragraph 2 of draft conclusion 12. The formulation “may, in certain circumstances” was problematic, since “in certain circumstances” was already covered by the word “may”. It was therefore redundant and risked creating additional uncertainty.

Regarding draft conclusion 15, he shared the Special Rapporteur's position. He was not convinced by the argument put forward by Mr. Murase that the concept of persistent objector was a matter of application, not identification, of customary international law. In his own view, even if the persistent objector rule was considered a form of application, such application would involve and imply the need to identify the rule in question.

He regretted that three important points had not been covered in the proposed draft conclusions and commentaries. First, the relationship between customary international law and general principles of law should have been addressed; there should at least be a "without prejudice" clause and the matter should be given some attention in the commentaries. Fortunately, the Commission would have an opportunity to address that relationship if and when it decided to work on the topic "General principles of law".

Secondly, the Special Rapporteur seemed to be seeking to put the important dimension of the formation of customary international law to rest by proposing to drop the word "formation" from the draft altogether. However, replacing that word with "creative" would remove the dimension of process — formation — almost entirely, which was so important for customary international law. It would facilitate shortcut arguments for recognizing existing law, and he had thought the Special Rapporteur wished to guard against such an impression. Less informed readers might easily understand the word "creative" as simply a synonym of "expressive". Even though the International Court of Justice had occasionally used the expression "expressive or creative", the Commission should retain "formation" as the established term, since it better captured the often-complicated and slow-moving process of customary law.

The third point concerned the references in the commentaries to the teachings of the most highly qualified publicists of the various nations. The lack of references to authoritative literature in the commentaries was difficult to understand, since the Special Rapporteur himself played a leading role in academic debates, in addition to his role as a foremost practitioner. Even if he did not wish to be described as an academic, he was undeniably one of the most highly qualified publicists. The question that should be asked is why he had chosen to omit references to academic publications in the commentaries, because it was unlikely that he had decided to do so simply to keep the commentaries succinct. He wondered whether that had anything to do with the Special Rapporteur's assessment that the increase in the number of publications and the diversity of views expressed therein made that category of material less useful than before for reaffirming the unity and rigour with which customary international law should be identified. In his own view, however, while that goal might be easier to achieve by focusing on the case law of the International Court of Justice, the Commission should not risk placing the responsibility for explaining and justifying the existence of rules of customary international law almost exclusively on one or a few courts. The Commission should continue to base its work on all the means of interpretation, determination and identification mentioned in Article 38 of the Statute of the International Court of Justice. Selecting among the various authors might require some courage, but it was necessary and justified.

Lastly, he agreed that "conclusions" was the right term for the Commission's output on the topic, since it reflected the rich basis of the Commission's work. It was particularly appropriate when it came to the rules of interpretation and identification of international law. The term "guidelines", on the other hand, was only apparently more normative; it was suggestive of decision makers who were interested in practical guidance, but also in flexibility. It should be possible to explain that difference to law students.

He thanked the Special Rapporteur once again for his outstanding work and recommended referring all the draft conclusions to the Drafting Committee.

Mr. Hmoud, referring to the comment he had made at the earlier meeting referred to by Mr. Nolte, said that his comment had not been about States wishing to control the evolution of practice. Apart from draft conclusions 4 and 12, the Commission's discussions had revolved around States and what they believed to be customary international law. Broad acceptance of a practice as law was subjective. There were no precedents for the involvement of international organizations in ascertaining broad acceptance of a rule of customary international law. That question had not been discussed at all during the first reading and there was insufficient relevant practice at the international level or from international courts. The Commission had decided on a two-element approach, but the two elements were also inter-related. He considered acceptance as law to be a matter for States.

Mr. Vázquez-Bermúdez said that he wished to commend the Special Rapporteur for his well-structured report, which was the product of a wide-ranging investigation of the topic and in which he paid particular attention to the comments and suggestions made by States on the draft conclusions and commentaries adopted on first reading. Although only a small number

of States had submitted comments, their contribution was appreciated and must be taken into account by the Commission in its deliberations. The report would allow the Commission to successfully complete the second and final reading of the draft conclusions and commentaries, which would be of clear practical use for States, international organizations, international tribunals and all legal actors when they were called upon to identify and apply rules of customary international law.

As a guide to practice in the identification of customary international law, the draft conclusions revealed their full significance and scope when they were read in conjunction with the commentaries. He therefore agreed that it should be emphasized in the general commentary introducing the draft conclusions that the conclusions and commentaries were to be read together.

As conceived in the past by authors such as Roberto Ago, custom was a spontaneous means of generating international law. Unlike treaties, which were based on an expression of consent to be bound, rules of customary international law were based on the general practice of States accompanied by *opinio juris* — a practice undertaken out of a sense of legal right or obligation under international law. The *opinio juris* must also exist in most of the States that did not undertake the practice. Therefore, the draft conclusions and the commentaries thereto should not be excessively prescriptive and should not affect the flexibility inherent in the process of generating customary international rules.

No changes were needed to draft conclusion 1, in which the scope of the topic was well circumscribed. He agreed that it was not necessary to make any reference to a possible burden of proof when identifying a rule of customary international law. At the international level, the general principle *jura novit curia* — meaning that a court was not solely dependent on the argument of the parties before it with respect to the applicable law — applied to any kind of rule or principle of international law. He concurred with Mr. Reinisch's eloquently expressed comments on that point; it could usefully be included in the commentary, along with the citations of the case law of the International Court of Justice reproduced in footnote 53 of the report.

Draft conclusion 2 (Two constituent elements) had attracted broad support from States. *Opinio juris* must exist both in States that undertook a practice and in States that were in a position to react to that practice. On the other hand, the Commission was correct to state in the commentary to the draft conclusion that the two-element approach did not preclude a measure of deduction. It had been acknowledged by Judge Tomka of the International Court of Justice, among others, that the Court had taken a pragmatic approach to determining the existence and content of international custom, considering whether a rule had been convincingly identified before moving on to consider the primary evidence of State practice and *opinio juris* through a detailed inductive analysis, which was necessary if the evidence derived from codification or subsidiary means was not conclusive. Further, as stated by Judge Gaja and quoted in the third report of the Special Rapporteur (A/CN.4/682): "Rather than on a thorough analysis of the attitude of States, the [International] Court often relies on a text which carries some authority.… In many instances the text in question is a codification convention, even if it is not applicable as a treaty to the dispute in hand.… There are several decisions by the Court which take as authoritative, for ascertaining a rule of customary law, a declaration made by the General Assembly or a conference of States." That was, of course, consistent with the approach taken by the Commission in its recognition of the two elements of international custom.

On draft conclusion 3, he agreed with the Special Rapporteur's view that the *opinio juris* of States other than those engaged in a practice was relevant to the identification of a customary rule. Indeed, as the International Court of Justice had stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*: "Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'" In the context of draft conclusions 2 and 3, it was important to emphasize that the requirement to ascertain the two constituent elements applied in all areas of international law.

With regard to draft conclusion 4, as the Special Rapporteur had noted, the relevance of the practice of international organizations to the identification of customary international law continued to be the subject of strongly held views among States. The majority of States commenting on the draft conclusion had expressed their support for the proposition in the existing text that, in certain cases, the practice of international organizations also contributed to the formation, or expression, of rules of customary international law. The text of the draft conclusion adopted on first reading already provided for different treatment of the practice of States and the practice of international organizations, as such, as a constituent element of customary international law. The

Commission was thus recognizing that it was mainly the practice of States that contributed to the formation or expression of rules of customary international law and that such a contribution was made by international organizations only in certain cases.

It was clear that international organizations were increasingly involved in many aspects of international affairs as subjects of international law, with an international legal personality distinct from that of its member States: among other things, they concluded treaties, conducted operations on the ground and bore responsibility for internationally wrongful acts. There was no reason, therefore, not to accept that, in certain cases, their practice contributed to the expression or formation of rules of customary international law, when accompanied by *opinio juris*. The expression "in certain cases" at the beginning of paragraph 2 was sufficient to confer the appropriate weight on the practice of international organizations compared with the practice of States; there was therefore no need to change the word "contributes" to "may contribute", which would diminish the contribution of international organizations even further. In addition, the expression "in certain cases" had a particular meaning in relation to the "principle of speciality" on which international organizations were based: in contrast with States, they did not possess a general competence and were established in order to exercise specific functions.

The current text of the draft conclusion should therefore be retained. He had initially thought that the proposal to replace the word "formation" with the word "creation" was acceptable; however, having heard the arguments put forward by Mr. Nolte, he believed that the word "formation" captured more accurately the process of creation or emergence of rules of customary international law. He agreed with the Special Rapporteur that the question of how to establish the *opinio juris* of international organizations did not seem to raise special difficulties and that the forms of evidence referred to in draft conclusion 10 might well apply, mutatis mutandis, to international organizations.

Concerning draft conclusion 6, he supported the proposed simplification of the wording of paragraph 1 but did not support the proposal to add the word "deliberate" to qualify the word "inaction". Inaction could be a form of practice constituting the material element of customary international law in cases where it was required under a customary rule and if it was general and accompanied by *opinio juris*. Indeed, there were many customary rules that prohibited States from carrying out certain acts, such as the prohibition of the threat or use of force and many of the rules of international humanitarian law. The reference to inaction was therefore sufficient without qualifying it as "deliberate"; that term could create confusion with respect to *opinio juris*, the subjective element of custom.

The order in which possible forms of practice were listed in paragraph 2 was appropriate, as it reflected common forms of practice at the international level and then forms of practice at the domestic level. The provision set out in paragraph 3, namely that there was no predetermined hierarchy among the various forms of practice, was important and should therefore be retained in the draft conclusion itself rather than being relegated to the commentary.

On draft conclusion 7 (Assessing a State's practice), the amendment to paragraph 2 proposed by the Special Rapporteur would give the provision greater flexibility by allowing for the circumstances of a specific case to be taken into account in order to determine whether or not to reduce the weight to be given to a State's practice where that practice varied.

No change was needed to the wording of draft conclusion 8 (The practice must be general) adopted on first reading. The Special Rapporteur's proposal to replace the word "consistent" in paragraph 1 with the words "virtually uniform" might have the effect of unnecessarily raising the threshold for a practice to be considered general; it would remove flexibility by requiring that the practice should be undertaken in practically the same way by the same State or a group of States and might reduce the value of a practice that varied, an issue already covered in draft conclusion 7. For the purposes of assessing whether a practice was general, the finding of the International Court of Justice in the *Fisheries case (United Kingdom v. Norway)*, namely that too much importance needed not be attached to the few uncertainties or contradictions, real or apparent, in a practice, should be borne in mind. The word "consistent" in the existing text reflected better the repetition of such practice over time. In addition, as stated by the Special Rapporteur, the word "sufficiently" in the phrase "sufficiently widespread and representative" might play an important role in providing further guidance as to how generality of practice should be assessed in a particular case. For those reasons, the current wording of the draft conclusion should be retained.

With regard to the concept of specially affected States, he pointed out that the Commission had already decided not to include it in the draft conclusion initially put forward by the Special Rapporteur. He concurred with the comments made by Mr. Tladi, Mr. Gómez-Robledo and others in that regard. He reiterated that, first, in accordance with the basic principle of the

sovereign equality of States, all States had an interest in the content and scope, and the generation and evolution, of general international law in all areas; therefore, the practice of all States, whether in the form of action or inaction, should have the same value. Secondly, the concept of specially affected States was ambiguous and confusing and raised more questions than answers, as demonstrated by the Commission's debate on the issue. To mention only one example, in the case of a potential rule prohibiting transboundary pollution, it would be necessary to determine whether the specially affected States were the border States affected by the pollution, the States in whose territory the pollution had originated, or the States that prohibited polluting activities in their territory. The concept should not, therefore, be included either in the draft conclusion itself or in the commentary.

On draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)), the current wording of paragraph 1 was appropriate from the point of view of a State or States that undertook a practice; however, it was not clear that it also included the *opinio juris* of those States that did not undertake the practice but were in a position to react to it. One solution could be to change the expression "undertaken with" to the expression "accompanied by", as the Special Rapporteur had once proposed. If the current wording was retained, a clearer explanation would be needed in the commentary; it would be useful, as suggested by the Special Rapporteur, to indicate that representative and not merely broad *opinio juris* was required. However, for the reasons already expressed in relation to draft conclusion 8, reference should be made in the commentary not to the *opinio juris* of States whose interests were specially affected but to that of States that were in a position to react to the practice.

As to draft conclusion 10, he agreed with the Special Rapporteur that no changes were necessary, apart from adjustments to the commentary to indicate, among other things, that the draft conclusion applied, mutatis mutandis, to international organizations.

Concerning draft conclusion 12, the Special Rapporteur had proposed that, for reasons of terminological consistency, the word "establishing" in paragraph 2 should be replaced with the word "determining". Even though the International Court of Justice had used the term "establish" with regard to the existence of a rule, for example in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, he could accept the proposed change.

It was unnecessary to add the words "in certain circumstances", as proposed by the Special Rapporteur, to qualify the fact that a resolution could provide evidence of the existence and content of a rule of customary international law, since the words "may provide" already established the necessary flexibility. It was important to note that the International Court of Justice had made extensive use of resolutions of the General Assembly, such as resolutions 1514 (XV) and 2625 (XXV), to identify rules of customary international law and *opinio juris*. In the *Nuclear Weapons* advisory opinion, the Court had stated that General Assembly resolutions could "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*".

A number of countries, including Argentina, Chile and Spain, had made the pertinent observation that the parallels between draft conclusions 11 and 12 should be made clearer in order to reflect more broadly the role that resolutions of international organizations could play in codifying customary rules, contributing to their crystallization or generating new rules. However, if there was no consensus on that point, clarifications could be provided in the commentary.

With regard to draft conclusion 15 (Persistent objector), it had been pointed out in the context of the topic "Peremptory norms of general international law (*jus cogens*)" that, by the very nature of those norms, there could be no persistent objection to them: no derogation from them was permitted; they were universally applicable and binding on all subjects of international law, including all States; and they protected fundamental values of the international community. It was not possible to conceive of a persistent objector, for example, to the prohibition of genocide, aggression or crimes against humanity; should such a possibility be recognized, States would have free rein to undermine the fundamental values and essential interests of the international community as a whole without any legal consequences. In addition, the articles on responsibility of States for internationally wrongful acts and the corresponding articles relating to international organizations provided for particular consequences of breaches of *jus cogens* norms, such as the obligation not to recognize as lawful a situation created by such a breach and the obligation to cooperate to bring to an end such a breach.

Case law relating to the persistent objector rule was not at all clear, nor were teachings uniform on the issue. If the rule were to be included in the draft conclusions, it would have to be on the basis that a rule of customary international law existed on the subject; however, it was not at all clear that that was the case. It would also have to be made clear that the concept of persistent objection could not be applied to fundamental

rules of international law, such as peremptory norms and rules establishing obligations *erga omnes*, which were owed by States to the international community as a whole. He was pleased to note that other members of the Commission, including Mr. Aurescu and Mr. Gómez-Robledo, had raised the same point. The same limitation would also have to be included in relation to regional or local custom. A separate draft conclusion on *jus cogens* norms and obligations *erga omnes* in relation to draft conclusion 15 and draft conclusion 16 should thus be formulated. If there was no consensus on that suggestion, then the "without prejudice" clause in draft conclusion 15, which currently referred only to *jus cogens*, should not be included, since it could be interpreted as meaning that persistent objection was permitted in relation to obligations *erga omnes*.

As to draft conclusion 16, he did not believe that the change suggested by the Special Rapporteur was essential; however, the wording of the draft conclusion could be discussed in the Drafting Committee.

Concerning the final form of the Commission's work on the topic, a set of conclusions could be appropriate, but he would be paying attention to any additional explanations offered by the Special Rapporteur during the summing-up of the debate.

Lastly, he thanked the Secretariat for preparing the important memorandum on ways and means for making the evidence of customary international law more readily available, which would be very useful for legal actors and should be disseminated widely. The final product would constitute an excellent contribution to the international community by the Commission in its seventieth anniversary year.

Mr. Argüello Gómez said that he wished to congratulate the Special Rapporteur on his excellent report, which was a testament to his wealth of experience as a lawyer. He also thanked the Secretariat for its invaluable support to the Commission and in particular for compiling the comments and observations received from Governments on identification of customary international law, a topic that was fundamental to the very purpose for which the Commission had been established.

With regard to draft conclusion 4, the original wording should be retained. In the proposed new version of paragraph 1, practice was limited to States; international organizations, in particular the United Nations, were excluded. Such organizations were actors in the international arena and their actions had consequences, including the creation and definitely the identification of customary international law. He concurred with other members who had amply addressed that point in a clear and balanced fashion.

In the proposed new wording of paragraph 2, a double limitation was placed on the contribution of international organizations with the inclusion of the expressions "in certain cases" and "may … contribute". If the role of the United Nations was so insignificant, he wondered what the point of the Commission's work was; after all, under the Commission's statute, the General Assembly was the addressee of the Commission's work.

Concerning draft conclusion 6, the proposed addition of the word "deliberate" to qualify the word "inaction" would result in a vague requirement that lacked legal or logical precedents and would be inconsistent with the presumption that States acted in a manner in which they considered themselves entitled to act. It was also unclear how inaction would be proved to be deliberate before a court; the concept of acquiescence was similar to that of inaction and he could not recall any such cases in which a State or a court had considered whether or not acts were deliberate.

Turning to draft conclusion 7 (Assessing a State's practice), he said that, since paragraph 1 provided that account was to be taken of all available practice of a particular State and that such practice was to be assessed as a whole, there was no need to include paragraph 2, which provided that the weight to be given to a practice depended on the circumstances.

On draft conclusion 8 (The practice must be general), it had been proposed that, in paragraph 1, practice should be qualified as "virtually uniform" rather than merely "consistent", on the basis of the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases. However, in that judgment the Court had used the more restrictive expression "virtually uniform" to refer to a specific case in which the practice in question was of short duration. Therefore, the original version of the paragraph, with the word "consistent", was more appropriate and should be retained.

The current wording of paragraph 2 — "provided that the practice is general, no particular duration is required" — left open the possibility that practice could create rules of customary international law immediately. That would diminish the value of practice, just as the proposed change from "formation" to "creation" in draft conclusion 4 would diminish the value of the process by which customary international law was formed, as pointed out by Mr. Nolte. It appeared that the *North Sea Continental Shelf* judgment was cited again in support of the wording of paragraph 2. However, the Court had not referred in that judgment to the immediate creation

of a custom; it had stated merely that the passage of only a short period of time was not necessarily, or of itself, a bar to the formation of a new rule of customary international law. In other words, it had stated not that the passage of time was irrelevant to the creation of a custom but rather that the period of time that had passed did not need to be very long. In the instant case, at the time of the judgment, the 1958 Convention on the Continental Shelf, which had been under consideration, had been signed a little over ten years prior; at the time the proceedings had been brought, the Convention had been in force for only three years. However, the Court had taken the view that its provisions formed part of customary international law; indeed, the Convention had not arisen *ex nihilo* but reflected practice and *opinio juris* that was already extensive at the time of its adoption. Another question that should be considered was whether a distinction needed to be made between consistent practice in the form of "positive" physical and verbal acts and consistent practice in the form of "negative" acts such as inaction or silence. All acts, whether they consisted in action or inaction, were considered forms of practice under draft conclusion 6; however, they were likely to be subject to different requirements concerning time. That point should be reflected in the text in some way. As to the concept of specially affected States, he concurred with previous speakers who had opposed its inclusion in the draft conclusion.

With regard to draft conclusion 10, it might be useful to specify that the temporal requirements applicable to inaction or silence were different from those applicable to other forms of evidence of acceptance as law, along the lines of his observations concerning the duration of practice under draft conclusion 8. Paragraph 3 of the draft conclusion provided that failure to react over time to a practice might serve as evidence of acceptance as law; in other words, some time was required in order for silence — a failure to react — to be regarded as a practice that established customary international law.

Paragraph 2 of draft conclusion 11 provided that the fact that a rule was set forth in a number of treaties might indicate that the treaty rule reflected a rule of customary international law. It should be made clear how many treaties and parties would be needed for that to be the case and whether particular consequences should flow from the fact that a few States or a small group of States had concluded a number of treaties.

Draft conclusion 12 had given rise to some interesting comments. He largely shared the view that international organizations should be accorded a greater role in the determination of customary international law. However, not all international organizations had the same international importance. Just as the decisions of the International Court of Justice, one of the principal organs of the United Nations, were accorded particular importance under draft conclusion 13 for the determination of customary rules, the General Assembly of the United Nations should be mentioned in paragraph 2 of draft conclusion 12 in order to emphasize the importance of its resolutions. Furthermore, since the decisions of international courts constituted a "means for the determination of such rules", there was no reason to diminish the importance of the resolutions of international organizations by stating that they "may, in certain circumstances, provide evidence" of such rules. Under that wording, resolutions, including those of the General Assembly, were accorded a value that was no greater than that of the teachings of unidentified publicists under draft conclusion 14.

Concerning draft conclusion 15, he noted that the persistent objector rule, which probably had its roots in the nineteenth-century consensualist view of international law, had not been included in the initial set of draft conclusions prepared by the Special Rapporteur. That was a prima facie indication that it did not form part of the topic at hand; indeed, a number of Commission members had questioned its relevance to the identification of customary international law. In paragraph 106 of his report, the Special Rapporteur indicated that even some States that did not directly oppose the inclusion of the rule maintained that it remained controversial. It was true that the *obiter dicta* or individual opinions of some judges in international courts referred to the persistent objector rule, but no court had found that a State's claim to be a persistent objector prevented the application of a rule of customary international law to that State. Moreover, there was little State practice to support the existence of the persistent objector rule; few States invoked it. Lastly, the alleged existence of the rule, and recourse to it, undermined the very institution of customary international law. The Commission should not, therefore, present it as definitive and generally accepted. Furthermore, as Mr. Murase had correctly stated, persistent objection was related not to the identification of customary international law but rather to its application.

Lastly, in paragraph 19 of the report, the Special Rapporteur recalled that the draft conclusions were to be read together with the commentaries. However, like Mr. Tladi, he too believed that it was the conclusions rather than the commentaries that were the main subject of the Commission's deliberations.

Ms. Escobar Hernández said that she was very grateful to the Secretariat for its memorandum, which

synthesized a vast quantity of information and included valuable suggestions for States, the Secretariat and the Commission. In particular, the establishment of a periodically updated database would be a valuable reference for academics and practitioners alike. The suggestions set forth in the memorandum deserved the Commission's support, and she trusted that the Commission would address them in greater detail at another stage.

She commended the Special Rapporteur on his report, in which he displayed the same rigour and attention to detail as in the previous reports and for the effort made to incorporate the various comments and observations of States on the draft conclusions adopted on first reading. Although the number of States that had provided written comments was once again small, the Special Rapporteur had also taken into account other comments and observations made by representatives in the Sixth Committee, thus increasing the number of States participating in the exchange of information with the Commission. Nonetheless, as some other members had noted, it would be worth reflecting further on the limited range of those comments in terms of geographic representation and legal systems.

Governments had broadly supported the draft conclusions and some of their accompanying commentaries. They had also highlighted the practical value of the Commission's work, something that was a testament to the Special Rapporteur's pragmatic and straightforward approach.

As she had already commented extensively on the various reports of the Special Rapporteur, she would limit her comments to the draft conclusions for which the Special Rapporteur had suggested some changes. With regard to draft conclusion 4, she had no objection to the Special Rapporteur's proposal to replace the phrase "formation or expression" with "expression or creation". However, like several other members of the Commission, including Ms. Galvão Teles and Mr. Reinisch, she had serious doubts about removing the word "primarily" from paragraph 1, in reference to the practice of States. Along with the introduction of the word "may" in paragraph 2, that change represented a worrying departure from a text that had been adopted in 2016 and which represented a delicate balance of the positions expressed by Commission members in respect of the role of the practice of international organizations in the expression and creation of custom. She could not see anything in the comments of States that would justify altering that balance.

Other members of the Commission, including Ms. Galvão Teles, had already analysed the issue in detail. In any event, she could not support a proposal that could be read as placing an almost exclusive emphasis on State practice as the only valid form of practice for the creation or expression of a rule of customary law. As Mr. Saboia had argued, any conclusion designed to exclude or significantly downplay the value of the practice of international organizations to that end would merely deny the obvious. In her own view, international organizations unquestionably contributed to the formation of customary international law, either directly or through the will of their member States expressed through resolutions and their subsequent conduct. That contribution was neither extraordinary nor exceptional; it occurred regularly and ordinarily in practice; she could therefore not share the view that said practice was exceptional or atypical, except perhaps in the European Union and other regional integration organizations. A considerable number of States had taken the same view, and any concerns to the contrary would be best addressed in the commentary.

For similar reasons, she did not support the Special Rapporteur's proposal to add the words "in certain circumstances" in paragraph 2 of draft conclusion 12. The words "may provide" already adequately conveyed the relative and non-absolute nature of the resolutions of international organizations and intergovernmental conferences for the purposes at hand. The proposed addition introduced an element of uncertainty and could lead to a reductionist understanding of the role of international organizations. Again, any qualifications needed to address the concerns of some States would be best placed in the commentaries.

She supported the Special Rapporteur's proposal to add the phrase "deliberate inaction" to paragraph 1 of draft conclusion 6. However, like Mr. Tladi, she could not support without qualification the statement, in paragraph 56 of the report, that the decisions of higher courts should in general be accorded greater weight, and that where a lower court decision had been overruled by a higher court on the relevant point, the evidentiary value of the former was likely to be nullified. That assumption could not be made automatically: rather, each case should be examined individually, taking into consideration the distribution of judicial competences in the State in question.

She supported the Special Rapporteur's proposal to add the words "depending on the circumstances" in draft conclusion 7. With regard to draft conclusion 8, she agreed with the Special Rapporteur that the issue of specially affected States and that of contradictory or inconsistent practice should be addressed only in the commentary. However, she was not convinced that the

phrase "virtually uniform" captured the issue described in paragraphs 66 to 69 of the report. She would therefore prefer to retain the word "consistent", which appeared in the text adopted on first reading.

The new paragraph 3 of draft conclusion 15 proposed by the Special Rapporteur was needed in order to maintain the distinction between the current topic and that of peremptory norms of general international law (*jus cogens*), and to preserve the special nature and effect of *jus cogens* norms. She would, however, prefer a more direct formulation stating that the persistent objector rule did not apply in the case of peremptory norms of general international law. On the other hand, she was open to considering adding a reference to *erga omnes* obligations in paragraph 3, although she was not convinced that such a reference was necessary. She agreed with the Special Rapporteur that the words "among themselves" should be added to paragraph 2 of draft conclusion 16 for the sake of clarity.

As to the final form of the Commission's output, the question of whether it should be referred to as "conclusions", or "guidelines" would be best referred to the Working Group on Methods of work. She agreed with the Special Rapporteur that the recommendations should be submitted to the General Assembly, although in terms of procedure, she wondered if it was appropriate to do so at the current time. She also supported referring the draft conclusions to the Drafting Committee.

Mr. Cissé said that the report displayed an admirable combination of scholarship and readability. The Special Rapporteur had clearly defined the scope of the topic by deciding not to examine the potential relationship between international custom, *jus cogens* and other sources of international law. That approach was appropriate: the sources of international law were distinct and could not be created or identified by the same means or based on the same rules.

For a rule to be considered a rule of international customary law, it was imperative not only to identify it as such but also to prove its existence. On that basis, the question of a burden of proof, the relevance of which the Special Rapporteur seemed to minimize by limiting it to national law in his commentary, should be considered under the current topic. On that point, he disagreed not only with the Special Rapporteur but also with Mr. Reinisch, Mr. Murase and Mr. Vásquez-Bermúdez, but agreed with Spain that the question should be referenced in the draft conclusions. Indeed, any legal operation to establish the existence of a fact or a legal act gave rise to the thorny issue of adduction of evidence. Accordingly, a party to a dispute that invoked a rule of international customary law or its opposability had the burden of proving its existence. It would be up to a national or international judge to interpret the evidence and to decide whether the State practice in question had given rise to a rule of customary international law. Since it would be up to the judge to hear and determine the case not *in abstracto* but based on the evidence, the issue could not be considered the exclusive preserve of States, as the Special Rapporteur seemed to indicate by repeating the message from the commentary that the draft conclusions "do not address the position of customary international law within national legal systems". He himself found that proposition unconvincing. Indeed, even if that was true, any national judge faced with a case involving the relationship between national law and international law would have to decide based on the rules of international law on the identification of customary law and their opposability to one or more of the parties. The reason of his dissent was quite simple: national legal systems, to the best of his knowledge, did not have their own criteria distinct from those defined by international law on the identification of customary law.

A related point was the whole issue of the reception or transposition of rules of international law in national legal systems, which depended on whether the State in question was monist or dualist. In the case of international custom which, unlike a treaty was directly transposed into domestic law in both monist and dualist States, national judges simply had to take note of the custom and draw the necessary legal conclusions based on the rules of international law and the constitutional provisions governing the relationship between domestic law and international law. He therefore failed to see how the question of the burden of proof in respect of the identification of international customary law could be left to the discretion of national legal systems, nor could he agree with the Special Rapporteur's contention that a conclusion on burden of proof was unnecessary and could be misleading.

The Commission should make comments and guide States and judges towards a harmonized basic approach to the issue of burden of proof — while taking into consideration the various rules on adduction of evidence at the national and international levels — in determining whether a rule was a rule of customary international law. At the very least, the question should be examined in greater detail in the commentary.

Turning to draft conclusion 2, he said that it appeared to him that States had found issue, not so much with the two constituent elements of rules of international law themselves, but with the deductive approach used to identify them. Despite the reservations expressed by certain States, including Israel and the

United States, he believed that the deductive approach was appropriate, as it was based on an objective or material element, followed by a deduction as to whether there was *opinio juris* to show that the practice in question had become an *erga omnes* rule. Mr. Jalloh had asked whether practice or *opinio juris* came first. In his own view, there was no doubt that State practice preceded *opinio juris*, as the latter could not exist in the abstract. Indeed, while it was acknowledged that general practice and *opinio juris* were the two constituent elements of international custom, proof of said practice could only be provided using the deductive method, whereby the practice was first assessed before a conclusion could be reached as to the existence or non-existence of *opinio juris*. Conversely, a practice that had been shown to be general, uniform and constant could not continue existing without *opinio juris*. The two elements were thus cumulative and consubstantial, one living in the other, like Siamese twins.

It was worth noting that the two elements did not pose the same problems of identification. While practice was relatively easy to identify because it was based on a material element, including acts, facts and circumstantial evidence, *opinio juris* was more difficult to identify because it was abstract and even mystical, and based on a conviction that could only be deduced from the material element. Nevertheless, it could be acknowledged that, in general, *opinio juris* could be established by the joint declarations made by States independently of general practice, which at that stage might exist or might appear as the material element to be identified, particularly in the case of a customary rule, which might develop rapidly.

He admitted that the deductive method, while being very useful and generally applicable, was not the only method. Moreover, it had its own limitations and weaknesses; for a State practice to be deemed established, it should reflect practices around the world in a balanced manner, but the practices mentioned in the report did not fit that description.

He agreed with Mr. Murase that international custom and its main characteristics should be defined in the report. Like Mr. Murase and Mr. Nguyen, he felt that it would also have been useful to consider the question of spontaneous custom, particularly given that new information technologies could accelerate the formation of rules at the national and international levels. Time was no longer a determining factor in the formation of rules of customary international law; customs could be formed in a short time-frame, as the International Court of Justice had recognized in its judgment in the *North Sea Continental Shelf* cases. Another example of spontaneous custom was that of the establishment of the 200-nautical mile exclusive economic zone, which had become a State practice while the United Nations Convention on the Law of the Sea was being negotiated, in the period from 1973 to 1982.

The title of draft conclusion 3 (Assessment of evidence for the two constituent elements) was problematic and appeared to confirm his position as to the need to consider the question of a burden of proof when identifying customary international law. If the aim of the draft conclusion was to assess the means of identifying the two constituent elements of custom, then the title did nothing but express the need to seek evidence of their existence. If his explanation was incorrect, then it should be admitted that there was a difference between the terms “proof” and “evidence”, and that difference should be explained in the commentary, along with the reasons why the question of evidence or burden of proof could not be considered in the context of the draft conclusions and the commentaries. As a close reading of States’ comments and the Special Rapporteur’s suggestions showed, assessing evidence of the two constituent elements simply meant finding evidence of the existence or non-existence of a rule of customary international law.

Draft conclusion 5 added little value and would be better merged with draft conclusion 6, which included a fuller analysis of State practice.

Draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)) covered the same ground and raised the same issues as draft conclusion 6, as the forms of State practice and the forms of *opinio juris* were not mutually exclusive. If the Special Rapporteur had a different view, it would be useful to include in the commentary a distinction between forms of practice and forms of evidence. For the sake of consistency with draft conclusion 6, the list of forms of evidence of *opinio juris* set out in paragraph 2 of draft conclusion 10 should include the legislative and administrative acts of States. There was no reason to omit such acts: a domestic law could indicate acceptance of a rule of customary international law, because it unambiguously created a legal obligation for the State in question. Administrative acts could also demonstrate *opinio juris* when they were undertaken in order to apply a rule of customary international law. For instance, although the United States was not a party to the United Nations Convention on the Law of the Sea, it considered most of its provisions to constitute customary international law. When the Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly

Migratory Fish Stocks had been concluded, in 1995, the United States had amended its Magnuson-Stevens Fishery Conservation and Management Act (1976) partly to reflect the provisions of the Agreement. That amendment could potentially constitute proof that the United States considered certain provisions of the Agreement to be the applicable law. Another example was that of the Territorial Sea and Fishing Zones Act of Canada, which had since been repealed and replaced by the Oceans Act (1991), and the Territorial Sea Geographical Coordinates Order, which remained in force. Both instruments showed that Canada accepted the rules on contiguous maritime zones and baselines as defined in the Convention, and that those rules had been considered the applicable law even before the Convention had come into force.

The title of draft conclusion 15 (Persistent objector) was inaccurate: even a single objection was necessary and sufficient for customary law not to apply, provided that it had been expressed firmly, decisively, unequivocally, publicly and officially. The word "persistent" could, perhaps, be understood as meaning that the objection should be maintained consistently after it had been expressed. As stated in the commentary, the objection must be reiterated when the circumstances were such that a restatement was called for, namely in circumstances where silence or inaction might reasonably lead to the conclusion that the State had given up its objection. The subject of the draft conclusion was therefore not so much the persistent objector as the firm objector, or the objector who did not reverse his initial objection. Moreover, the question of a burden of proof arose both in the context of international customary law and in the context of particular (regional, local or bilateral) customary law, because in all those situations the case of the persistent objector would apply in relation to the custom in question and would need to be elucidated so long as the burden of proof had not been defined in a draft conclusion or in the commentaries.

Lastly, he wished to commend the Special Rapporteur for the depth and quality of his report. He supported endorsing the Secretariat's suggestions and forwarding them to the General Assembly, and believed that the draft conclusions should be referred to the Drafting Committee.

Mr. Ouazzani Chahdi said that the Special Rapporteur should be commended for his well-documented report, which contained a wealth of examples from international case law, and numerous States had recognized its value, especially as it was based on the comments and observations of States. However, as Mr. Tladi had noted, it was unfortunate that no comments had been received from African States. Some States had suggested that care should be taken to strike a proper balance between the draft conclusions and the commentaries. The Special Rapporteur had approached that difficult task with considerable flexibility and his suggestion that the draft conclusions should be read together with the commentary constituted a sound approach.

He agreed with the Special Rapporteur that draft conclusion 1 should refer only to customary international law and not to other sources of international law.

With regard to draft conclusion 4, he found it difficult to agree with the view expressed by certain States, and reflected in paragraph 39 of the report, that it was the practice of States within international organizations that might be relevant, not the practice of the organization as such. The Special Rapporteur had recognized the disagreements that had emerged regarding the role of the practice of international organizations in the creation or expression of rules of customary international law. He had also admitted that improvements could be made to the text of the draft conclusion to address the concerns expressed, which was highly appreciated. Paragraph 2 of the draft conclusion could be taken as minimizing the role of international organizations in the creation or expression of rules of customary international law. However, the legal personality of those organizations granted them the capacity to act autonomously in the context of international relations. The International Court of Justice had found as much on 11 April 1949 in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. As was mentioned in paragraph 36 of the report, the European Union had also claimed the potential to contribute to customary international law, including in such areas as fisheries and trade. It would be useful for that point to be made clear in the commentary.

He agreed with the Special Rapporteur that draft conclusion 6 should refer to deliberate inaction. As Chile had argued, in order for the inaction of a State to constitute a practice, which was an element of custom, it must be a deliberate act of the State, conducted in full awareness and intentionally for that sole purpose. However, like the Special Rapporteur, he could not agree with the position of New Zealand that only decisions of higher courts would be sufficient to be considered State practice for the purposes of the formation or identification of rules of customary international law. As Mr. Petrič had stated, the decisions of lower courts could also be taken into consideration when they became definitive, meaning that there had been no appeal or that the deadline for an appeal had

passed. The decisions of higher courts were taken into consideration precisely because they were not subject to appeal.

He supported the Special Rapporteur's explanation of the wording of draft conclusion 8, where reference was made to the case law of the International Court of Justice, notably its judgment in the *North Sea Continental Shelf* cases. Along with a number of States, he wondered whether it would be worth referring to specially affected States, if only in the commentary. China, for instance, had considered it appropriate that the commentaries to draft conclusions 8 and 9 should be expanded to emphasize that the practice and *opinio juris* of specially affected States should be given fuller consideration.

He supported the suggested change to paragraph 2 of draft conclusion 12 to state that the resolutions of international organizations could, in certain circumstances, provide evidence for determining the existence of a rule of customary international law. However, a distinction should be made in the commentary between the resolutions of the General Assembly, the Security Council and large international conferences.

While the formulation of draft conclusion 15 was sufficiently precise, he believed that it might be worth following Mr. Gómez-Robledo's suggestion of including in paragraph 3 a reference to *erga omnes* obligations. With regard to draft conclusion 16, he agreed with certain States that rules of particular customary law might operate among States linked by a common cause, interest or activity other than their geographical position.

He thanked the Secretariat for the rich documentation set forth in its memorandum on ways and means for making the evidence of customary international law more readily available. He supported the Special Rapporteur's suggestion that the Commission should endorse the Secretariat's suggestions, and forward them to the General Assembly for its consideration. Lastly, he agreed that the draft conclusions should be referred to the Drafting Committee.

The meeting rose at 1.05 p.m.