Chapter X

IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

A. Introduction

133. At its sixty-fourth session (2012), the Commission decided to include the topic "Formation and evidence of customary international law" in its programme of work and appointed Sir Michael Wood as Special Rapporteur.[818] At the same session, the Commission had before it a note by the Special Rapporteur.[819] Also at the same session, the Commission requested the Secretariat to prepare a memorandum identifying elements in the previous work of the Commission that could be particularly relevant to this topic.[820]

134. At its sixty-fifth session (2013), the Commission considered the first report of the Special Rapporteur, as well as a memorandum of the Secretariat on the topic.[821] At the same session, the Commission decided to change the title of the topic to "Identification of customary international law".

B. Consideration of the topic at the present session

135. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/672). The Commission considered the report at its 3222nd to 3227th meetings, from 11 to 18 July 2014.

136. At its 3227th meeting, on 18 July 2014, the Commission referred draft conclusions 1 to 11, as contained in the second report of the Special Rapporteur, to the Drafting Committee. At the 3242nd meeting of the Commission, on 7 August 2014, the Chairperson of the Drafting Committee presented the interim report of the Drafting Committee on "Identification of customary international law", containing the eight draft conclusions provisionally adopted by the Drafting Committee at the sixty-sixth session. The report, together with the draft conclusions, was presented for information only at this stage, and is available on the Commission's website.[822]

1. Introduction by the Special Rapporteur of the second report

137. The second report focused on the two constituent elements of rules of customary international law: "a general practice" and "accepted as law". The report proposed 11 draft conclusions, divided into 4 parts ("introduction"; "two constituent elements"; "a general practice"; "accepted as law").

138. After recalling the history of the topic, the first part of the report presented the scope and planned outcome of the work. The extent and limits of the scope of the draft conclusions were the subject of draft conclusion 1,[823] and some of the terms that it might be useful to define for purposes of the work were reflected in draft conclusion 2.[824] The report then proceeded to the heart of the topic in its second part, namely the basic approach to the identification of customary international law. Draft conclusion 3 presented a clear statement of the two-element approach,[825] and draft conclusion 4 constituted a general provision on the assessment of evidence for such purpose.[826] The two elements were dealt with in more detail in the next two parts, respectively. The third part included five draft conclusions relating to the nature and evidence of "a general practice", namely the role of practice (draft conclusion 5), the attribution of conduct (draft conclusion 6), the forms of practice (draft conclusion 7), the weighing of evidence of practice (draft conclusion 8) and

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[818] At its 3132nd meeting, on 22 May 2012 (see *Yearbook … 2012*, vol. II (Part Two), p. 69, para. 157). The General Assembly, in paragraph 7 of its resolution 67/92 of 14 December 2012, noted with appreciation the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex I to the report of the Commission (*Yearbook … 2011*, vol. II (Part Two), p. 175, paras. 365–367, and annex I, pp. 183–185).

[819] *Yearbook … 2012*, vol. II (Part One), document A/CN.4/653. See also *ibid.*, vol. II (Part Two), pp. 137–142, paras. 157–202.

[820] *Ibid.*, p. 138, para. 159.

[821] *Yearbook … 2013*, vol. II (Part One), document A/CN.4/663 (first report); *ibid*., document A/CN.4/659 (memorandum of the Secretariat); see also *ibid*., vol. II (Part Two), para. 64.

[822] Available from http://legal.un.org/ilc/.

[823] Draft conclusion 1 read as follows:

"*Scope*

"1. The present draft conclusions concern the methodology for determining the existence and content of rules of customary international law.

"2. The present draft conclusions are without prejudice to the methodology concerning other sources of international law and questions relating to peremptory norms of international law (*jus cogens*). "

[824] Draft conclusion 2 read as follows:

"*Use of terms*

"For the purposes of the present draft conclusions:

"(*a*) 'Customary international law' means those rules of international law that derive from and reflect a general practice accepted as law;

"(*b*) 'International organization' means an intergovernmental organization;

"(*c*) …"

[825] Draft conclusion 3 read as follows:

"*Basic approach*

"To determine the existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law."

[826] Draft conclusion 4 read as follows:

"*Assessment of evidence*

"In assessing evidence for a general practice accepted as law, regard must be had to the context, including the surrounding circumstances."

the generality and consistency of practice (draft conclusion 9).[827] Thereafter, in the fourth part, the second of the two elements, "accepted as law", was addressed in two draft conclusions on the role and evidence of acceptance of law (draft conclusions 10 and 11 respectively).[828]

139. In his introduction, the Special Rapporteur recalled aspects of the discussions on the scope and outcome of the topic at the 2013 session of the Commission. He noted, in particular, that the outcome of the topic was presently intended to be "conclusions" with commentaries, an outcome which was widely supported in the Commission and in the Sixth Committee. Nevertheless, the final form could be kept under review as the work on the topic progresses. The Special Rapporteur also noted that he did not intend to deal with general principles of law or *jus cogens* as part of this topic.

140. The Special Rapporteur recalled that the objective of the topic, as was noted in the first part of the report, was not to determine the substance of the rules of customary international law, but rather to address the methodological question of the identification of the existence and content of rules of customary international law.

141. The core of the second report was the two-element approach to the identification of rules of customary international law. The Special Rapporteur noted that this approach was widely followed in the practice of States and in the decisions of international courts and tribunals, including the International Court of Justice, and had been welcomed in the Sixth Committee. It was also generally endorsed in the literature. He also recalled the view with regard to certain fields of international law, such as international human rights law and international humanitarian law, that one element, namely *opinio juris*, might suffice to establish a rule of customary international law, stressing that this view was not supported by State practice or the case law of the International Court of Justice. The Special Rapporteur noted, however, that there may be differences in the application of the two-element approach in different fields or with respect to different types of rules.

142. After addressing the basic aspects of the two-element approach, the report proceeded to a more detailed consideration of each of the two elements. Starting with the first element, "a general practice", the Special Rapporteur indicated that this term was preferable to "State practice" as it reflected the language of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice and allowed for the fact that the practice of international organizations may also be relevant. It was also noted that the draft conclusion on the role of practice, which proposed that it was "primarily" the practice of States that contributes to the creation or expression of rules of customary international law, borrowed, in part, from the language of the jurisprudence of the International Court of Justice. The draft conclusion on the question of attribution proposed in the report was based, to a large extent, upon the articles on the responsibility of States for internationally wrongful acts.[829]

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[827] Part Three (draft conclusions 5 through 9) read as follows:

"A general practice

"Draft conclusion 5

"*Role of practice*

"The requirement, as an element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the creation, or expression, of rules of customary international law.

"Draft conclusion 6

"*Attribution of conduct*

"State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial or any other function.

"Draft conclusion 7

"*Forms of practice*

"1. Practice may take a wide range of forms. It includes both physical and verbal actions.

"2. Manifestations of practice include, among others, the conduct of States 'on the ground', diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties and acts in connection with resolutions of organs of international organizations and conferences.

"3. Inaction may also serve as practice.

"4. The acts (including inaction) of international organizations may also serve as practice.

"Draft conclusion 8

"*Weighing evidence of practice*

"1. There is no predetermined hierarchy among the various forms of practice.

"2. Account is to be taken of all available practice of a particular State. Where the organs of the State do not speak with one voice, less weight is to be given to their practice.

"Draft conclusion 9

"*Practice must be general and consistent*

"1. To establish a rule of customary international law, the relevant practice must be general, meaning that it must be sufficiently widespread and representative. The practice need not be universal.

"2. The practice must be generally consistent.

"3. Provided that the practice is sufficiently general and consistent, no particular duration is required.

"4. In assessing practice, due regard is to be given to the practice of States whose interests are specially affected. "

[828] Part Four (draft conclusions 10 and 11) read as follows:

"Accepted as law

"Draft conclusion 10

"*Role of acceptance as law*

"1. The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.

"2. Acceptance as law is what distinguishes a rule of customary international law from mere habit or usage.

"Draft conclusion 11

"*Evidence of acceptance as law*

"1. Evidence of acceptance of a general practice as law may take a wide range of forms. These may vary according to the nature of the rule and the circumstances in which the rule falls to be applied.

"2. The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice and action in connection with resolutions of organs of international organizations and of international conferences.

"3. Inaction may also serve as evidence of acceptance as law.

"4. The fact that an act (including inaction) by a State establishes practice for the purpose of identifying a rule of customary international law does not preclude the same act from being evidence that the practice in question is accepted as law. "

[829] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. The articles on reponsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

143. The report also dealt at some length with what may be termed "manifestations of practice", namely the acts or omissions that may be relevant to the ascertainment of "a general practice". The Special Rapporteur drew attention to six points relating to this part of the report. First, practice may consist of verbal acts as well as physical acts. Second, an indicative list of the forms of practice was useful, in particular given the overall aim of the topic, though any such list was bound to be non-exhaustive. Third, many of the types of practice listed may also serve as evidence of acceptance as law. Fourth, practice embodied in treaties and resolutions of organs of international organizations constitute two important forms of practice and would be covered in more depth in the next report. Fifth, the practical importance of inaction, or silence, should not be overlooked. Finally, the practice of certain international organizations may be of increasing importance, although it ought to be assessed with caution.

144. The Special Rapporteur stated that there was no predetermined hierarchy among the various forms of practice and that account should be taken of all available practice of a particular State. Moreover, practice must be general and consistent. To be general, the practice must be sufficiently widespread and representative, though it need not be universal. Where these conditions are met, no particular minimum duration would be required. In addition, due regard is to be given to the practice of States whose interests are specially affected.

145. Turning to the second of the two elements, "accepted as law", the Special Rapporteur stressed that many of the difficulties typically associated with this element have been theoretical rather than practical. For a general practice to be accepted as law means that the practice in question must be accompanied by a sense of legal obligation. It is that which distinguishes a rule of customary international law from mere habit or usage. It was also suggested that using the term "accepted as law", borrowed from the language of the Statute of the International Court of Justice, would be preferable to the term *opinio juris* or to other terms used in the jurisprudence, since it better describes what happens in practice than other expressions in common use. Using "accepted as law" would also avoid the need to interpret the Latin expression "*opinio juris sive necessitatis*", which remains debatable.

146. The report then proceeded to address the critical question of how acceptance of law (or the lack thereof) may be evidenced. It concluded that such acceptance may be indicated by or inferred from practice, though it was stressed that the subjective element was, nevertheless, a requirement distinct from "general practice", which must be separately identified in each case. The Special Rapporteur indicated that another draft conclusion may be needed to further clarify this point. As with "practice", it was also noted that evidence of "acceptance as law" may take a variety of forms, and the report provided an indicative, non-exhaustive, list of such forms.

147. The Special Rapporteur expressed his deep appreciation for the input and support he had received in preparing the second report, as well as for the written submissions received on the topic from several Governments. The Special Rapporteur noted that certain additional aspects of the topic would be considered in more detail in his third report next year and, in this regard, indicated that he would continue to welcome views and input as the work on the topic progresses. In addition to the question of the interplay of the two elements, the Special Rapporteur requested views on the role of the practice of non-State actors, the role of resolutions of international organizations and conferences, the role of (and relationship with) treaties, the task of evaluating evidence of practice and acceptance of law, and ways of addressing the challenges of assessing the practice of States and evidence thereof.

148. The Special Rapporteur also indicated that the issues of "special" or "regional" customary international law, including "bilateral custom", which had been raised in the Sixth Committee in 2013, would be covered in his third report in 2015.

2. Summary of the debate

(a) *General comments*

149. There was broad support for the overall direction and approach of the Special Rapporteur. The two-element approach was universally welcomed. It was widely agreed that the outcome of the work should be a practical tool, of particular value to practitioners who are not specialists in international law. In this regard, it was recommended that the draft conclusions should be clear and should reflect the necessary nuance and qualification. There was also general agreement that the draft conclusions should not be unduly prescriptive and should reflect the inherent flexibility of customary international law.

150. Questions were raised, however, regarding the scope of the topic. Some members of the Commission called for more direct reference to the process of formation of rules of customary international law, in addition to consideration of the evidence of customary international law. A number of members also raised concerns about omitting a detailed examination of the relationship between customary international law and other sources of international law, in particular general principles of law. It was also proposed that consideration of the relationship with usages and comity would be useful.

151. The efforts of the Special Rapporteur to draw upon practice from different parts of the world were praised, though several members highlighted the difficulty of ascertaining the practice of States in this field. In the light of the fundamental importance of making practice more accessible and available, it was deemed useful to again ask States to submit information on their practice relating to the identification of international law, as well as information on digests and other publications containing relevant State practice. Despite the difficulty of ascertaining State practice, some members cautioned against exclusive reliance on the jurisprudence of the International Court of Justice, as compared to other, more specialized, international courts and tribunals.

152. There was also an exchange of views on the related issue of who has the burden to prove the existence of a rule of customary international law. Some members of the Commission discussed the question whether, in

a dispute on the existence of a certain rule, the burden of providing evidence is on the party claiming or denying the rule, and whether a judge should take affirmative steps to ascertain evidence.

153. The future programme of work proposed by the Special Rapporteur was generally supported. Several members welcomed the proposal to examine the interplay between the two elements of customary international law, with several members calling for particular consideration of the temporal aspects of the interaction. Further consideration of the role of international organizations, as well as regional and bilateral custom and the notion of a "persistent objector", was also welcomed. Some members expressed reservations, however, about the ambitious pace of work proposed by the Special Rapporteur, noting that the topic contained numerous difficult questions that would require cautious and careful consideration.

(b) *Use of terms*

154. Views were exchanged on the desirability of including definitions of "customary international law" and "international organizations" as proposed in the draft conclusion on use of terms. Several members doubted whether the definitions were necessary or appropriate, while several other members considered the definitions to be useful and proposed that other terms, including the two elements of customary international law, could also be defined.

155. Regarding the definition of customary international law proposed by the Special Rapporteur in draft conclusion 2, there was extensive debate on two points. There were different opinions on whether to base the definition on the wording of Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice, and on whether to use the expression "*opinio juris*". Several members supported grounding the definition in the language of the Statute, though some members noted that this definition had been widely criticized in writings. Noting that "*opinio juris*" was the most common expression used in the jurisprudence and in writings, several members called for replacing the term "accepted as law" with "*opinio juris*", and several other members suggested including references to both terms. Various members of the Commission were of the view that the subjective element of custom ("*opinio juris*") is not synonymous with "consent" or the desire of States, but rather means the belief that a given practice is followed because a right is being exercised or an obligation is being complied with in accordance with international law.

(c) *Basic approach*

156. There was widespread agreement on the basic, two-element approach to the identification of rules of customary international law. In particular, the view that the basic approach does not vary across fields of international law was supported by most members of the Commission. Some members indicated, however, that there appeared to be different approaches to identification in different fields, but acknowledged that the variation may be a difference in the application of the two-element approach, rather than a distinct approach.

157. In anticipation of the Special Rapporteur's consideration of the interplay between the two elements in his next report, several members commented on the temporal aspects of the two-element approach. There was concern that the approach as articulated in draft conclusion 3 seemed to imply that "a general practice" must always precede "acceptance as law". Several members indicated that it was the existence of both elements that was critical, rather than any temporal order.

158. With respect to assessing evidence of a general practice accepted as law, there were different views regarding the proposed language, "regard must be had to the context, including the surrounding circumstances", in draft conclusion 4. Some members welcomed the mention of context, as it indicated that the process was inherently flexible, whereas other members called for more clear and discrete criteria. A question was also raised about whether the proposed approach to identification reflected the realities of international practice. It was pointed out that an exhaustive review of State practice and *opinio juris* was exceptional, as more often than not evidence of a rule is first sought in the decisions of the International Court of Justice, the work of the International Law Commission, or in resolutions of the General Assembly and treaties.

(d) **"***A general practice***"**

159. There were a range of views on the language in draft conclusion 5, which, in its pertinent part, proposed that "… a general practice means that it is primarily the practice of States that contributes to the creation … of rules of customary international law." It has been suggested that the language could be clarified to indicate precisely whose practice is relevant to determining the existence of "a general practice", though the proposed clarification varied. Some members of the Commission were of the view that the use of the word "primarily" was misguided, as it suggested that the practice of entities other than the State could be relevant. Those members were of the view that the practice of international organizations was not to be taken into account in the process of identification of rules of customary international law. Other members considered that the practice of international organizations was only pertinent to the extent it reflected the practice of States. Some other members, however, agreed with the Special Rapporteur that the practice of international organizations as such could be relevant to the establishment of customary rules, particularly in regards to certain fields of activity within the mandates of those organizations. Those members drew attention to areas such as privileges and immunities, the responsibility of international organizations and the depositary function for treaties, in which the practice of international organizations is of particular relevance.

160. Members supported the proposal of the Special Rapporteur to address further in the third report the role of international organizations in relation to the identification of rules of customary international law. Insofar as international organization practice could be relevant, some members called for consideration of precisely what forms such practice could take. Some members also considered that the study of the role, if any, of the practice of non-State actors would be worthwhile.

161. On the issue of attribution of conduct, several members suggested to revise the proposed language of draft conclusion 6, which relied heavily upon the articles on responsibility of States for internationally wrongful acts. According to those members, attribution should be conceived of differently in this context as, for purposes of customary international law, pertinent practice must be authorized by the State. Where an organ acted *ultra vires*, it was questioned whether such conduct should be considered State practice. The question of whether conduct of non-State actors acting on behalf of the State constituted relevant practice was also raised in this regard.

162. There was broad support for the proposed forms of State conduct that may constitute "a general practice". In particular, several members welcomed that verbal acts were included along with physical acts, though some members called for clarification as to which verbal acts were relevant. There was uncertainty as to whether verbal acts, by themselves, could give rise to "a general practice", as well as to whether verbal acts must be transcribed or repeated. It was recommended that the draft conclusions should specifically address other forms of verbal acts, such as the diplomatic acts of recognition and protest. It was also suggested that administrative acts be explicitly mentioned. Lastly, discussion took place as to the relevance of pleadings before international courts and tribunals as State practice.

163. As to the inclusion of "inaction" as a form of practice, there was a general view that the issue needed to be further explored and clarified. Several members considered that the precise conditions by which inaction becomes of interest should be examined, indicating that silence or inaction may only be relevant when the circumstances call for some reaction. The view was also expressed that inaction or silence may be of varying significance depending on whether the inaction relates to a restrictive rule or a practice of others in which the State does not itself engage.

164. With regard to weighing evidence of practice, questions were raised as to the precise meaning of the phrase in draft conclusion 8 "[t]here is no predetermined hierarchy among the various forms of practice". Several members indicated that the practice of certain organs of a State was more important than others, with some members noting that different organs were more or less empowered to reflect the international position of the State. It was suggested that, in evaluating the practice of an organ, it should be considered whether its mandate related directly to the content of the rule in question, as well as whether it acted on behalf of the State at the international level. The view was also expressed that the practice of national courts should be treated cautiously in this regard.

165. On the related matter of whether inconsistency in practice within a State should lessen the weight accorded to that State's practice, some members considered that such inconsistency was material, while several other members were of the view that conflicting practice amongst or by low-level organs should not affect the evidentiary value of a State's practice as a whole. Concern was also raised that the proposed language on such internal inconsistency in draft conclusion 8 was too prescriptive and would hinder the flexibility of the identification process.

166. It was also suggested that other criteria should be considered in determining whether manifestations of practice are valid for purposes of identifying rules of customary international law. For example, the view was expressed that valid practice should be public, comply with national law and have a certain linkage with the content of the rule in question.

167. The view that practice must be general and consistent to establish a rule of customary international law was generally supported, though several members raised concerns regarding particular terms used in proposed draft conclusion 9. The words "representative" and "sufficiently widespread", according to some members, required further elaboration and clarification. A number of members were also of the view that the term "uniform" or "virtually uniform" should be introduced into the conclusion, as well as the frequency or repetition of practice. Lastly, it was suggested that further elaboration may be required on when deviant practice is to be set aside as an irrelevant violation of an existing rule, or as an exception in the process of formation.

168. The concept of "specially affected States", as reflected in draft conclusion 9, paragraph 4, was the subject of considerable debate. Several members were of the view that the concept was irreconcilable with the sovereign equality of States and should not be included in the draft conclusions. They stated that all States are interested in the content and scope, in the formation and development, of general international law in all fields, and as such the practice of all States, either by action or inaction, is equally relevant. Attention was drawn to the limited jurisprudence of the International Court of Justice on the subject, with some members noting that the Court had not made the concept one of general application and had only found that the practice of specially affected States should be examined in the specific context of a particular case. Other members not opposed to including the concept in the draft conclusions stressed that it was not a means to accord greater weight to powerful States or to determine whether practice was sufficiently widespread. Ultimately, it was suggested that the role, if any, of specially affected States should be clarified, including any role the concept may have in the context of regional or bilateral rules.

(e) "*Accepted as law*" *("opinio juris")*

169. There was general agreement among the members of the Commission regarding the role of "acceptance as law" in determining the existence of a rule of customary international law. Some members were, however, concerned that the reference to a "sense of legal obligation" did not sufficiently clarify the operation of the subjective element. It was suggested that the role of deviant practice where a State seeks to alter an existing rule should be addressed in this regard.

170. With respect to evidence of acceptance of law, the notion that an act (including inaction) may establish both practice and acceptance as law was discussed. Certain members were of the view that, as a general matter, acceptance of a practice as compelled by law could not be proven by mere reference to the evidence of the practice itself. On the other hand, several members saw no problem

with so-called "double-counting", noting that evidence of the two elements can be identified on the basis of an examination of the same conduct. It was proposed that this issue could be explored further in the examination of the interplay between the two elements.

171. Several additional comments were made on the evidence of acceptance as law. According to some members, but not other members, such acceptance needed to be nearly universal to establish a rule. Other members proposed that the role of resolutions of international organizations as potential evidence of *opinio juris* should be explored. There were also calls for clarification on certain points. For example, it was considered that elaboration was needed on the methods used to identify *opinio juris*, in addition to the forms of evidence provided in draft conclusion 11. Given the practical purpose of the work, further clarification on how to distinguish between practice that revealed acceptance as law and other conduct would be useful. Finally, it was proposed that the role of assessments of the subjective element by the ICRC, as well as professional organizations and jurists, required some attention.

3. Concluding remarks of the Special Rapporteur

172. The Special Rapporteur observed that there continued to be widespread support among members of the Commission for the "two-element approach", noting that the temporal aspects of the two elements, as well as the relationship between them, merited further consideration. He also noted the general agreement within the Commission that decisions of international courts and tribunals were among the primary materials for seeking guidance on the topic. As to the outcome of the topic, the members of the Commission continued to share the view that the work on the topic should result in the adoption of a practical guide to assist practitioners in the task of identifying customary international law, which would strike a balance between guidance and flexibility. There was still uncertainty, in the mind of the Special Rapporteur, as to the need to cover expressly the aspect of formation of rules of customary international law.

173. The Special Rapporteur indicated that this practical guide should take the form of a concise set of robust and comprehensive draft conclusions that should be read together with the commentaries thereto. The commentaries, which would form an indispensable supplement to the draft conclusions, should be relatively short, referring only to the key practice, cases and literature, like the articles on responsibility of States for internationally wrongful acts or on the responsibility of international organizations.

174. The importance of submissions by States on their practice in relation to customary international law, as well as information on national digests and related publications, was again emphasized, and the Special Rapporteur indicated the usefulness for the Commission of addressing a request to States in this regard.

175. With respect to the general issue of whose practice counted, the Special Rapporteur acknowledged that it could be more clearly stated that the draft conclusions refer first and foremost to State practice. On the other hand, he stressed that practice of at least certain international organizations in certain fields, such as in relation to treaties, privileges and immunities, or the internal law of international organizations, could not be dismissed.

176. As regards the terminology used in draft conclusion 1, the Special Rapporteur acknowledged that the word "methodology" had raised difficulties, but he pointed out that those difficulties were not necessarily overcome by the other proposals that were made during the debate. He stressed that the language of this conclusion should indicate that its purpose was to make clear that the draft conclusions were not seeking to identify the substantive rules of customary international law, but rather the approach to the identification of such rules. The Special Rapporteur also reiterated his doubts about the necessity to keep the proposed definitions in a draft conclusion 2, rather than in the commentary.

177. The Special Rapporteur underlined the fundamental importance of the basic approach set out in draft conclusion 3, and his preference for maintaining the wording of the Statute of the International Court of Justice. He indicated that this language was probably more relevant than other common expressions, since it left room for practice other than State practice and a wide notion of the subjective element. Nevertheless, in the light of the controversies over the expression "accepted as law", the Special Rapporteur suggested to supplement it by the common term "*opinio juris*". He also pointed out that the general view was that there were not different approaches to identification in different fields of international law, though acknowledging that the basic approach may still be applied differently in relation to different types of rules.

178. As regards the use of the word "primarily" in draft conclusion 5, the Special Rapporteur clarified that this term was used in order to highlight the prominent role of the practice of States, while leaving room for the consideration of the practice of international organizations.

179. The Special Rapporteur recognized the need to study further whether rules on attribution adopted for the purpose of States responsibility were applicable in the present context. He also indicated a need to reflect further on the questions relating to the lawfulness of a practice.

180. The wide support enjoyed by draft conclusion 7, paragraphs 1 and 2, was welcomed, in particular concerning the inclusion of both verbal and physical acts. The Special Rapporteur acknowledged, however, that the questions on inaction raised by paragraphs 3 and 4 needed to be addressed in his next report.

181. Regarding the question of a possible hierarchy between forms of practice and conflicting practice within a single State, the Special Rapporteur made it clear that the emphasis was on the absence of a "predetermined" hierarchy and that he was certainly not suggesting that the actions of low-level organs would have the same weight as the practice of higher organs.

182. The Special Rapporteur welcomed the broad support for draft conclusion 9, though he acknowledged the debate that had arisen in regards to the reference to

"specially affected States". He explained that the language of the paragraph was careful and that his intention was not to suggest that the practice of certain powerful States should be regarded as essential for the formation of rules of customary international law. The States in question may vary from rule to rule, and the expression does not refer to any particular States.

183. Regarding the two draft conclusions on "accepted as law", the Special Rapporteur recognized that their drafting should be better aligned with the language of the draft conclusions on "a general practice". He also indicated that the issue of the so-called "double-counting" of the same act as evidence of practice and *opinio juris* was to be addressed further, since different views had been expressed among the members of the Commission.

184. As to the future work programme for the topic, the Special Rapporteur indicated that the third report would address, in particular, the various aspects pertaining to international organizations, the relationship between customary international law and treaties, as well as resolutions of international organizations. The third report would also cover the questions of the "persistent objector", and regional, local and bilateral custom. The need to further consider the question of evidence, and the related matter of the burden of proof, was also stressed by the Special Rapporteur.

185. The Special Rapporteur acknowledged that his plan to submit a final report in 2016, with revised draft conclusions and commentaries, might be ambitious, but reassured the members of the Commission that he would not push things forward at the expense of quality. He also suggested that, to the extent draft conclusions were provisionally adopted by the Drafting Committee at the present session, they would be presented for information to the Plenary at this stage, and formally considered by the Plenary in 2015.