

Provisional

**For participants only**

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## **International Law Commission**

### **Seventieth session (first part)**

#### **Summary record of the 3402nd meeting**

Held at Headquarters, New York, on Monday, 14 May 2018, at 10 a.m.

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*Interim report of the Drafting Committee*

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***Present:***

*Chair:* Mr. Valencia-Ospina

*Members:* Mr. Argüello Gómez  
Mr. Aurescu  
Mr. Cissé  
Ms. Escobar Hernández  
Ms. Galvão Teles  
Mr. Gómez-Robledo  
Mr. Grossman Guilloff  
Mr. Hassouna  
Mr. Hmoud  
Mr. Huang  
Mr. Jalloh  
Ms. Lehto  
Mr. Murase  
Mr. Murphy  
Mr. Nguyen  
Mr. Nolte  
Ms. Oral  
Mr. Ouazzani Chahdi  
Mr. Park  
Mr. Peter  
Mr. Petrič  
Mr. Rajput  
Mr. Reinisch  
Mr. Ruda Santolaria  
Mr. Saboia  
Mr. Šturma  
Mr. Tladi  
Mr. Vázquez-Bermúdez  
Mr. Wako  
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 Special Rapporteur for the topic “Identification of customary international law” to summarize the debate on his fifth report (A/CN.4/717).

**Sir Michael Wood** (Special Rapporteur) said that he wished to thank all the members of the Commission who had spoken during the debate for their constructive and thoughtful statements on his report. He had particularly appreciated hearing from those who had not had the opportunity to take part in the consideration of the draft conclusions on first reading.

His overall impression was that Commission members were in broad agreement with the draft conclusions as adopted on first reading and did not consider that the written and oral comments received from States meant that radical changes were needed to either the conclusions or the commentaries. The suggestions he had made in his report were relatively modest; even so, in some cases, members seemed on balance inclined to retain the texts as adopted on first reading. He was open to that idea and looked forward to discussing it further in the Drafting Committee.

The many other helpful suggestions put forward in the debate concerning the draft conclusions and the commentaries thereto would be considered in detail in the Drafting Committee and in the working group on the commentaries to be set up. There were many common themes among the comments and observations made during the debate; consequently, he would not attempt to address everything that was said or refer by name to everyone who had spoken. That did not mean, however, that he had not taken carefully into account each and every contribution made. In his introduction, he would concentrate instead on some of the more substantive points that had been raised, beginning with a number of general issues and proceeding from there through each of the draft conclusions in turn.

The debate had focused mainly on suggestions arising from the comments and observations received from Governments, for which he was very grateful. A number of Commission members had expressed regret that relatively few written comments had been received, especially from States in certain regions. That was true, and the Commission should consider how to remedy that situation in the future. That said, it had to be remembered that many States from all geographical regions had made detailed and very helpful comments during the debate in the Sixth Committee of the General

Assembly, not only at its seventy-first session, but also at previous sessions, and full account had been taken of those comments during the consideration of the draft conclusions on first reading. Those comments had been described fully in the report and had been considered during the debate in the Commission just concluded.

Furthermore, as Mr. Hassouna had mentioned, extensive and very thoughtful comments had also been received from the Asian-African Legal Consultative Organization (AALCO), which *inter alia* had held a two-day meeting on the topic for legal experts in 2015 and whose Secretary-General had addressed the Commission at its sixty-seventh session that same year, sharing some of the comments made by States members of AALCO on the topic. He agreed with Mr. Huang and Ms. Escobar Hernández that the number of States that had commented on the Commission’s work on the topic was, in fact, far from small.

Another general point was that, throughout the Commission’s work on the topic, the divergence of views had been highly valuable in encouraging the Commission to consider the relevant issues both carefully and constructively. At the current stage, too, some thoughtful concerns had been raised with respect to certain issues. He believed that addressing them would further improve the Commission’s output, and he fully shared Mr. Nolte’s view that such concerns could well be dealt with in the commentaries.

Mr. Murase, with his usual insight, had raised, or rather re-raised, a number of profound questions. He had asked for a definition of customary international law, for an acknowledgment of its universally binding nature and for an explanation as to the meaning of the word “identification”. To his own understanding, the draft conclusions addressed each of those questions in a manner that befitted their intended practical purpose. On the first question, the Commission had used the wording “a general practice accepted as law”, which had been taken from the Statute of the Permanent Court of International Justice and that of the International Court of Justice, and whose meaning and scope it had carefully explained. As to the second question, the generally universally binding nature of customary international law was well known and was apparent from the draft conclusions and the commentaries, including the commentaries to draft conclusions 15 and 16. Concerning the third question, he believed that the meaning of the word “identification” and its cognates was well understood by those who would have recourse to the Commission’s output. That said, as Mr. Murase had suggested, he had carefully looked at the commentary to draft conclusion 9 of the draft conclusions on the topic of protection of the atmosphere

from the previous year. The identification of the law was indeed distinct from its application, and that point could be mentioned in the commentaries if that was considered helpful.

Striking a balance between the draft conclusions and the commentaries was important. He strongly believed that they had to be read together, and that, although the draft conclusions obviously had a certain status, the commentaries were also very important, the two forming an indissoluble whole. As Ms. Galvão Teles and other members had noted, the Commission should bear in mind the need to maintain a text that offered clear guidance without being too rigid.

Turning to the individual draft conclusions, he noted that draft conclusion 1 (Scope) had received general approval, and he believed that no changes to its text were needed. It could be indicated in the commentary that no attempt was made in the draft conclusions to address the relationship between customary international law and other sources of international law, and that they touched on that relationship only insofar as was necessary to explain the way in which rules of customary international law were to be identified, with the relevance of treaties for that purpose serving as one example. It could also be indicated in the commentary that the draft conclusions were without prejudice to questions of hierarchy among rules of international law — including those concerning peremptory norms of general international law (*jus cogens*) — or questions concerning the *erga omnes* nature of certain obligations.

The issue of burden of proof had been raised by one or two members, including Mr. Cissé. He himself agreed with the explanation provided by Mr. Reinisch, who had pointed to the distinction between proof of fact, where the burden generally lay with the party asserting the fact, and the determination of an applicable rule of law, where the parties would put forward arguments but it was ultimately for a court to decide on the matter. His own reference to domestic legal systems was perhaps not clear enough. What he had wished to convey was simply that it was for each domestic legal system to determine how a rule of customary international law should be established — whether it should be treated as a question of law, as in an international court, or as a question of proof, as was often the case with foreign law. In any event, it should be specified in the commentary that the draft conclusions did not address the position of customary international law within national legal systems.

Draft conclusion 2 (Basic approach) and draft conclusion 3 (Assessment of evidence for the two

constituent elements), which set out the basic approach to identifying rules of customary international law and how the evidence should be assessed when undertaking such a task, had also received general approval from members of the Commission and from States. Indeed, every year since the beginning of the Commission's consideration of the topic, States in the Sixth Committee had reiterated their strong support for the two-element approach. In his view, the current texts of both draft conclusions should be maintained, and he would caution against any departure from the widely accepted expression "a general practice accepted as law".

It would be clarified in appropriate places in the commentary that a systematic and rigorous analysis was required for the identification of customary international law; the draft conclusions, as a whole, indeed required just that. It would also be clarified that the two-element approach applied to the identification of the existence and content of a rule of customary international law in all fields of international law, even if, in the process of ascertaining the two elements, regard must be had to the particular circumstances and context in which an alleged rule had arisen and operated. It should further be clarified, as Mr. Park had pointed out, that a measure of deduction, as an occasional aid in the application of the two-element approach, might only be resorted to with great caution, and not as an alternative to the standard approach.

Draft conclusion 4 (Requirement of practice) had, once again, attracted much interest as well as divergent opinions as to the appropriate way in which the relevance of the practice of international organizations should be captured. Some of the modest changes suggested in the report had met with considerable opposition. He looked forward to a constructive discussion in the Drafting Committee, where the concerns of all sides should be addressed. At the same time, all speakers had made it clear that it was generally the practice of States that was principally to be analysed in determining the existence and content of a rule of customary international law. The Commission should not lose sight of that fundamental point and should not let its output suggest otherwise.

It was also clear from the debate that the Commission would have to explain better in the commentary its reference to the practice of international organizations, including when such practice was relevant, what kind of practice could be relevant and what considerations should guide an assessment of the weight to be given to such practice. It could begin by explaining that, while international organizations often served as arenas or catalysts for the practice of States, paragraph 2 dealt with practice that was attributed to

international organizations themselves, not the practice of member States acting within or in relation to them. It could then explain that, bearing in mind the differences between States and international organizations, the practice of international organizations in international relations (when accompanied by *opinio juris*) might count as practice that gave rise or attested to rules of customary international law when it concerned those rules whose subject-matter fell within the mandate of the organizations and/or were addressed specifically to them. Examples of such rules were those regarding their international responsibility or those relating to treaties to which they were a party. Within that framework, relevant practice arose most clearly where member States had transferred exclusive competences to an international organization. But practice could also arise where member States had conferred powers on the international organization which were functionally equivalent to those exercised by States. Examples would be provided, taking into consideration the very helpful suggestions made by members during the debate. Such terms as “established practice of the organization” should be highlighted, as had been suggested by Mr. Reinisch.

In the commentary to the draft conclusion, the Commission should also explain that caution was required in assessing the weight of the practice of international organizations as part of a general practice. As certain members, including Mr. Murphy, had emphasized, international organizations varied greatly, not just in their powers, but also in their membership and functions. As a general rule, the more directly a practice of an international organization was carried out on behalf of its member States or endorsed by them, and the larger the number of such member States, the greater the weight that might be given to such practice in the formation or expression of a rule of customary international law. Among other factors to be considered in weighing the practice of an international organization were the nature of the organization, the nature of the organ whose conduct was under consideration, whether the conduct was *ultra vires* the organization or the organ, and whether the conduct was consonant with that of the organization’s member States. Additional clarifications might be needed in the commentary, including in relation to paragraph 3. Those points could be discussed in a working group on the commentaries.

Turning to draft conclusion 5 (Conduct of the State as State practice), he noted that no change to the text of the draft conclusion appeared necessary. It should be explained better in the commentary that the relevant practice must at least be known to other States for it to contribute to the formation and identification of a rule

of customary international law. It was difficult to see how confidential conduct by a State could serve such a purpose — as far as rules of general customary international law were concerned — unless and until such conduct was revealed.

On draft conclusion 6 (Forms of practice), the main question that had arisen was how best to refer to inaction. A significant number of States had addressed that issue in the Sixth Committee, suggesting that it was one case in which the clarification provided in the commentary could usefully be relocated to the text of the draft conclusion itself. He continued to believe that the Commission should pay due regard to those strongly expressed views of States. The reference to inaction in the draft conclusion was to instances where the abstention was a chosen course of action, an identifiable factual occurrence, and it was in that sense that it must qualify as deliberate. Appreciating the essence of the motivation behind such practice was left to other draft conclusions, namely draft conclusions 9 and 10, which mandated that only inaction undertaken out of a sense of its acceptance as law could contribute to the formation or expression of customary international law. That and other proposed changes could be further discussed in the Drafting Committee.

Taking into account several suggestions that had been made in the debate, the Commission would explain in the commentary that the decisions of national courts at all levels could count as State practice, especially when those decisions were final; that greater weight should attach generally to the higher courts; and that decisions that had been overruled on the particular point at issue were unlikely to be considered relevant. It would be clarified that the role of the decisions of national courts as a form of State practice was quite separate from the potential role of domestic courts as a subsidiary means for the determination of rules of customary international law.

The minor amendment that had been proposed to draft conclusion 7 (Assessing a State’s practice) had met with general approval. It would be made clear in the commentary, as Commission members had suggested, that not all cases in which different organs within a particular State adopted different courses of conduct on the same matter resulted in a reduction in the weight to be given to that State’s practice in ascertaining a general practice. The analysis of such conduct should be nuanced and contextual. Paragraph 2 served to highlight that point, in an effort to provide clearer guidance.

With regard to draft conclusion 8 (The practice must be general), there had been some support for replacing the word “consistent” with the words

“virtually uniform”. At the same time, several members had preferred to maintain the word “consistent”, some being concerned that the expression “virtually uniform” might imply not only a stricter threshold of consistency but also one of greater participation by States in the creation and expression of a given rule of customary international law. But “virtually uniform” did not refer to the number of States (and/or international organizations) engaging in the relevant practice — that was covered by the words “widespread and representative”. The purpose of the consistency requirement expressed by the words “virtually uniform” was to qualify the widespread and representative practice. It essentially required that no divergent pattern of behaviour should be discernible in such practice. In his opinion, “virtually uniform” provided clearer guidance in that respect and was not any different from “consistent”. But he recognized, as he had indicated in his report, that several terms had been used in that regard in international case law, which could serve as inspiration for explaining in the commentary a matter which, in substance, had in fact been widely agreed upon by members of the Commission.

The term “specially affected States” had been the subject of thoughtful remarks that had highlighted not only its logic and usefulness but also the potential for its abuse. When considering the draft conclusions on first reading, the Commission had already accepted, in a spirit of compromise and consensus, not to refer to the term in the text of the draft conclusion itself. He believed that, in light of the comments received from States, including the unequivocal support for the concept that had been expressed by States members of AALCO, and those made by Commission members in the plenary debate, the Commission could and should mention the term in the commentary, while at the same time specifying what it did and did not mean. Similar assurances had been included in the commentary adopted on first reading with helpful input from Mr. Tladi and others; they could serve as a basis for the Commission’s work in that respect.

Mr. Argüello Gómez had questioned the reference to “no particular duration” in paragraph 2. It would be made clear in the commentary to the draft conclusion that some duration of a general practice was inevitably required and that some time must elapse for a general practice to emerge. In his own view, that was what was implied by the reference to “no particular duration”.

Concerning draft conclusion 9 (Requirement of acceptance as law (*opinio juris*)), during the debate, Commission members had expressed general approval of its text and had made some useful suggestions for the text of the commentary to the draft conclusion. He

suggested that the wording of the draft conclusion as adopted on first reading should therefore be retained. The broad support conveyed by States for the Commission’s draft conclusions on the second constituent element of customary international law, namely acceptance as law, suggested that, in that respect, too, the Commission had been able to provide guidance and clarity on a matter that had long been considered elusive and intangible.

On draft conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)), in light of the debate, he recommended that no changes should be made to its text. It was important to understand that the reference to inaction in draft conclusion 10 served a quite different purpose than the one in draft conclusion 6, and he believed that the text of paragraph 3 of draft conclusion 10 adequately captured the relevant elements. Those elements should be explained in the commentary, with the clarification that States might well provide other explanations for their perceived silence. As several members had suggested, reference should also be made in the commentary to the differences between the forms of evidence of acceptance as law that were listed in draft conclusion 10 and the forms of State practice that were listed in draft conclusion 6. It should also be explained that the lists were intended to refer to the principal examples associated with each of the constituent elements. It would also be helpful if it could be clarified in the commentary, as Mr. Vazquez-Bermudez and Mr. Aurescu had suggested, that the forms of evidence listed could also apply, *mutatis mutandis*, to international organizations.

With regard to draft conclusion 11 (Treaties), he agreed with Mr. Grossman Guiloff that it should be made clear in the commentary to the draft conclusion, at the outset, that treaties were binding only on the parties thereto. It should also be made clear in the commentary, in response to the thoughtful concern raised by Mr. Argüello Gómez, that the note of caution provided for in paragraph 2 concerned the existence of similar provisions in many bilateral or multilateral treaties. In the commentary adopted on first reading, reference had already been made to the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* in that regard.

Concerning draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences), a considerable number of Commission members had commented on the proposal to insert the words “in certain circumstances” in paragraph 2. Given the divergence of views, he tended to agree that the word “may” in that paragraph sufficed to suggest that caution was needed in drawing upon resolutions as evidence. All

of that would be clarified in the commentary, with explicit reference to the specific circumstances in which a resolution might have such value. The editorial amendment of replacing the word “establishing” with the word “determining” in paragraph 2 should, in his view, nevertheless be made to ensure greater consistency within the set of draft conclusions as a whole. He agreed that, in the commentary, special attention should be paid to resolutions of the General Assembly, a plenary organ of the United Nations with virtually universal participation, as they could offer important evidence of the collective opinions of Member States.

Draft conclusion 13 (Decisions of courts and tribunals) had given rise to several interesting comments. While a number of Commission members had expressed approval of the current text, one or two had challenged the distinction made between the decisions of national courts and those of international courts as subsidiary means for determining rules of customary international law. He recalled that, originally, in his third report, no such distinction had been suggested; rather, a more general conclusion, referring to both judicial decisions and teachings, had been proposed. However, after a thoughtful and lengthy debate, both in the plenary and in the Drafting Committee, and after having had the benefit of the memorandum by the Secretariat on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691), the Commission had adopted the current text of the draft conclusion as affording better and clearer guidance on that matter. He continued to think that it met that objective. Bearing in mind the positions expressed by a number of States in the Sixth Committee, he strongly favoured retaining the text of the draft conclusion as it currently stood. It could then be highlighted in the commentary that, in each case, the reasoning offered in a decision, as well as its reception by States and in future case law, was of utmost importance. Additional and more specific guidance could be provided as well, as had been done in the text of the draft conclusion adopted on first reading. In keeping with what several Commission members had suggested, the distinction between decisions of national courts as State practice and/or evidence of acceptance as law and their possible role as subsidiary means should be clarified in the commentary.

With regard to draft conclusion 14 (Teachings), there had been general agreement on the role of teachings as subsidiary means, and some valuable suggestions had been made with respect to the

commentary. It would be highlighted in the commentary that, in the final analysis, it was the quality and the reasoning of the particular writing that mattered. Among the factors to be considered in that regard were the author’s approach to the identification of customary international law and the extent to which his or her text remained loyal to it. It would be further explained in the commentary that the reference to publicists “of the various nations” highlighted the importance of having regard, so far as possible, to writings that were representative of the principal legal systems and regions of the world and in various languages.

In respect of draft conclusion 15 (Persistent objector), the question had been raised as to whether the draft conclusion should be included in a set of draft conclusions dealing with the identification — as opposed to the application — of customary international law. The Commission had had occasion to discuss that question in the past, and it had been acknowledged that the persistent objector issue arose not infrequently together with an inquiry into the existence and content of a rule of customary international law, many examples of which had been provided in his third report (A/CN.4/682). One of the merits of the current wording was that it reflected the exceptional nature of the persistent objector provision and the stringent requirements that applied to it, thus reducing the risk of its abusive invocation. Year after year, States had overwhelmingly endorsed the inclusion of the draft conclusion and its content, and the same had been true for its inclusion in the draft conclusions adopted on first reading, which had been particularly welcomed by States in the Sixth Committee at the seventy-first session of the General Assembly. Given those circumstances, he strongly believed that the draft conclusion should be retained.

The addition of a third paragraph in the draft conclusion setting out a “without prejudice” clause relating to norms of *jus cogens* had been supported by a considerable number of Commission members. It would be for the Drafting Committee to consider its precise wording, bearing in mind the more general commentary on the scope of the draft conclusions, the decision adopted by the Commission not to deal with *jus cogens* under the present topic, and the work now being carried out by the Commission under a separate topic. An explanation of the reasons for the inclusion of the paragraph and what it was meant to convey would be provided in the commentary to the draft conclusion.

Turning to draft conclusion 16 (Particular customary international law), he noted that it had received general endorsement, as had the minor clarification in paragraph 2 that he had suggested in his

report, namely the insertion of the words “among themselves”. The applicable and helpful expression “a general practice accepted as law” would be maintained and the way in which the two-element approach applied to rules of particular customary international law should be specified in the text of the conclusion and the commentary, as Commission members had suggested. It should also be made clear in the commentary that particular customary international law was mostly regional, subregional or local, and referred only to the possibility, in principle at least, that a rule of particular customary international law could develop among States linked by a common cause, interest or activity other than their geographical location.

On the question whether the Commission’s product should be called “guidelines” instead of “conclusions”, while Mr. Murase, in particular, had indicated quite strongly that “guidelines” was the more appropriate designation, a number of other Commission members had indicated their preference to continue referring to the output as “conclusions”. As he himself had indicated during the debate, the answer to that question was very much a matter of taste. Having reflected on the question and having listened carefully to the debate, he remained of the view that calling the product “conclusions” was appropriate in the current context. The term “conclusions” captured well the Commission’s objective, which was to offer some reasonably authoritative guidance to those called upon to identify the existence of a rule of customary international law and its content. It also described a methodology and conveyed an appropriate degree of firmness without claiming a normative force that might not be warranted in such a context. That was the view that the Commission had adopted following its careful study of a wide range of materials, and, in his own opinion, the term “conclusion” was entirely consistent with the provision of guidance. In addition, States were used to the term in relation to the topic and had not indicated that they found it inappropriate. Furthermore, the Drafting Committee had considered the question at the current session in connection with the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties and had decided to maintain it. He saw no reason for a different decision in relation to the current topic and therefore recommended that the Commission should retain the term “conclusions”.

It was interesting to note that in the ninth and latest edition of the invaluable publication entitled “*The work of the International Law Commission*”, which was not yet available in all languages, the Secretariat had provided definitions for the terms “guidelines”,

“principles” and “conclusions” used in connection with the Commission’s output, on the basis of what the Commission itself had said. On page 51 of volume I, the Secretariat indicated that “[c]onclusions have been used for topics intended to shed light on existing practice relating to a specific process.” That statement also appeared in the “About the Commission” tab of the Commission’s website.

He would welcome suggestions for additions to the draft bibliography, which had been distributed to all Commission members in October 2017 and had been distributed once again at the current session. He planned to submit the updated bibliography to the Secretariat by the end of the first part of the session so that it could be issued as annex II to his report. It was his hope that the bibliography would include a wide range of writings from all regions and in as many languages as possible, which was something to which he had paid close attention throughout the Commission’s work on the topic. To achieve that goal, he needed the continuous assistance of the other members of the Commission.

All speakers had welcomed the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available ([A/CN.4/710](#)) and had stressed the importance of taking that matter forward. The proposals he had made along those lines in paragraph 129 of his report had been widely supported, and some members, including Mr. Jalloh and Mr. Grossman Guiloff, had indicated that they might have further suggestions. He proposed to consult colleagues on the precise terms of the Commission’s recommendations to the General Assembly in that regard. The right time to do it would be during the second part of the session, in Geneva, and if necessary, in the context of a short-term working group, before the adoption of the Commission’s annual report on the work of its seventieth session.

In conclusion, he thanked members of the Commission once again for a very constructive debate. The progress that had been achieved thus far had been the result of the collective efforts of the Commission and the Secretariat. He recommended that the 16 draft conclusions, together with the amendments suggested in his report, should be sent to the Drafting Committee to be considered in the light of the debate of the previous week. He also recommended that a working group should be established to assist him with the revision of the commentaries once the Drafting Committee had completed its work on the draft conclusions, and that the working group might be chaired by Mr. Vásquez-Bermúdez.



**Mr. Murase**, reiterating a question to which he had not received a reply, asked what the Special Rapporteur's position was concerning the citation of academic literature in the commentaries.

**Sir Michael Wood** (Special Rapporteur) said he believed that that question ought to be taken up by a working group on the commentaries because it affected the commentaries rather than the draft conclusions. He was still very clearly of the view that the way forward was not to include references to literature, given the difficulty of selecting the authoritative works, especially in the field of customary international law, and considered the bibliography to be a good alternative in that regard. If any members thought that there should be references to academic literature in the commentaries, he would be very interested to hear the specific works they wished to see referred to in the commentaries.

**The Chair**, thanking the Special Rapporteur for his comprehensive summing up of the debate on his report, said he took it that the Commission wished to refer draft conclusions 1 to 16 to the Drafting Committee, taking into account the comments and observations made during the debate and the recommendations and amendments proposed by the Special Rapporteur.

*It was so decided.*

**The Chair** said that the Special Rapporteur had suggested that a working group should be set up to assist him in preparing the commentaries to the draft conclusions and that the working group should be chaired by Mr. Vásquez-Bermúdez. If he heard no objection, he would take it that the Commission wished to adopt those two suggestions.

*It was so decided.*

#### **Provisional application of treaties** (agenda item 5) ([A/CN.4/707](#) and [A/CN.4/718](#))

**Mr. Gómez-Robledo** (Special Rapporteur), introducing his fifth report on provisional application of treaties ([A/CN.4/718](#)), said that he had started serving as Special Rapporteur for the topic at the Commission's sixty-fourth session and had submitted a report on the topic at each session thereafter, with the exception of the sixty-ninth session. For the benefit of new Commission members, he would provide a brief review of the work on the topic completed thus far, followed by a description of the aspects addressed in the report and his proposal for a future workplan. He drew attention to the memorandum by the Secretariat, contained in document [A/CN.4/707](#), which, in accordance with the Commission's new practice, would be introduced by a

member of the Secretariat following the introduction of his report.

The starting point for the topic under consideration had been a document prepared by former Commission member Mr. Gaja — now Judge Gaja of the International Court of Justice — in which he had outlined the two most salient features of the topic, namely, the great variety of existing clauses on provisional application in bilateral and multilateral treaties, from which it seemed difficult to extract a homogenous and uniform State practice; and the lack of clarity with regard to many aspects of the rules pertaining to provisional application, despite the fact that the terms and conditions of provisional application and its termination were set out in article 25 of the Vienna Convention on the Law of Treaties of 1969.

At its sixty-fifth session, the Commission had had before it a very useful memorandum by the Secretariat which traced the legislative development of article 25 of the 1969 Vienna Convention ([A/CN.4/658](#)), and at its sixty-seventh session it had had before it a memorandum on article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 ([A/CN.4/676](#)). Both had been prepared by the Secretariat at the Commission's request as contributions to its consideration of the topic.

One of the most interesting findings of those studies, especially in relation to the 1969 Vienna Convention, was that, in both the *travaux préparatoires* and the diplomatic conference, consideration had been given to the possibility of defining the concept of provisional application as the temporary entry into force of a treaty — something which had ultimately been rejected. In his view, much of the confusion that had arisen with regard to the legal framework of article 25 was attributable to ambivalence in the mind of users, both States and secretariats of international organizations, when performing their functions as treaty depositaries or registries, as did the United Nations Secretariat, in accordance with Article 102 of the Charter of the United Nations.

He had had four objectives in his first report on the topic ([A/CN.4/664](#)): to introduce the study of provisional application; to identify, on the basis of their practice, why States engaged in provisional application; to address questions of terminology; and to propose a future workplan. The objective of his second report ([A/CN.4/675](#)) had been to provide an in-depth analysis of the legal effects of provisional application, which was undoubtedly the most important aspect of the topic.

Those first two reports, which had been developed from a theoretical perspective and which were more inductive than deductive in nature, had laid the foundation for his third report (A/CN.4/687), in which he had presented an analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention, including articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), 24 (Entry into force), 26 (“*Pacta sunt servanda*”) and 27 (Internal law and observance of treaties).

The third report also addressed the question of provisional application with regard to treaties between States and international organizations and between international organizations and introduced the second memorandum by the Secretariat on the 1986 Vienna Convention, even though the Convention had not entered into force, and without delving too deeply into the question of whether the Convention could be considered as constituting customary international law. The analysis in the report of certain aspects of the memorandum was organized into three parts: provisional application of treaties establishing international organizations and international regimes; provisional application of treaties negotiated within international organizations or at diplomatic conferences convened under the auspices of international organizations; and provisional application of treaties to which international organizations were a party.

Taking into account all the previous reports on the topic, as well as the written comments and observations of States, the comments made by States in the Sixth Committee and the debates held in the Commission, he had submitted an initial set of six draft guidelines to the Commission for its consideration. Those had subsequently been referred to the Drafting Committee, which had provisionally adopted draft guideline 1 (Scope), draft guideline 2 (Purpose) and draft guideline 3 (General rule) at its meetings held on 29 and 30 July 2015. Likewise, on 28 July 2015, the Drafting Committee had had before it draft guidelines 4 to 9, which had been set out in a revised version of the texts originally proposed in his third report, taking into account the comments and observations received from Commission members.

In his fourth report (A/CN.4/699 and A/CN.4/699/Add.1), he had continued the analysis of the relationship of provisional application to the other provisions of the 1969 Vienna Convention, in particular in the areas of reservations; invalidity of treaties; termination or suspension of the operation of a treaty as a consequence of its breach; and cases of State

succession, State responsibility and outbreak of hostilities. He had also addressed the practice of international organizations in relation to provisional application of treaties, in particular the practice of the United Nations, in respect of its registration functions, its depositary functions and its publications designed to guide States on treaties; the Organization of American States; the European Union; the Council of Europe; the North Atlantic Treaty Organization; and the Economic Community of West African States.

He had also submitted for the Commission’s consideration draft guideline 10 (Internal law and the observation of provisional application of all or part of a treaty), which had been added to the six draft guidelines pending consideration. At the Commission’s sixty-eighth session, the Drafting Committee had provisionally adopted draft guidelines 4, 6, 7, 8 and 9, while draft guideline 5 had been left in abeyance by the Drafting Committee to be returned to at a later stage.

During the first part of the Commission’s sixty-ninth session, the Drafting Committee had provisionally adopted draft guidelines 10, 11 and 12, leaving draft guideline 5 pending once more owing to time constraints. Draft guideline 5 had nevertheless been studied and provisionally adopted by the Drafting Committee during the second part of the sixty-ninth session, thereby enabling the Commission to provisionally adopt a first consolidated set of 11 draft guidelines, with commentaries thereto at that session. It was worth noting that, prior to their adoption, those draft guidelines had also passed through the filter of an *ad hoc* working group.

In 2017, the Secretariat had circulated its third memorandum on the topic (A/CN.4/707), in which it had reviewed State practice in respect of bilateral and multilateral treaties deposited or registered in the last 20 years with the Secretary-General that provided for provisional application. The memorandum had been requested on the basis of analysis in the fourth report that recognized the enormous difficulties inherent in identifying and systematizing State practice, owing to the fact that the classifications by the United Nations Secretariat on the basis of instructions from States in respect of treaties that it was responsible for registering or for which it acted as depositary and the actions related to those two tasks revealed an overall lack of clarity on the meaning of provisional application. Those considerations explained why, at the sixty-ninth session, he had not submitted a report on the topic and instead had concentrated on the adoption of the draft guidelines that had been held in abeyance, which had been accomplished.

Turning to the fifth report (A/CN.4/718), he said that, at the seventy-second session of the General Assembly, the number of delegations in the Sixth Committee that had commented on the topic of provisional application of treaties had risen to 44 from 30, the level at which it had remained constant from the sixty-eighth to the seventy-first sessions of the General Assembly. That increase occurred because the draft guidelines and commentaries provisionally adopted by the Commission offered States more material on which to formulate observations on the topic more generally.

It should also be noted that, between the Commission's sixty-sixth and sixty-ninth sessions, it had received written comments concerning the national practice of 24 States — which had been a constant figure for several years — but which illustrated a very imbalanced representation of States by regional group. Of those 24 responses, 13 were from Western European and other States; 4 were from Latin American and Caribbean States; 3 were from Eastern European States; 3 were from Asia-Pacific States; and only one was from an African State. Yet, as shown by the review of treaties in the latest memorandum by the Secretariat on the topic, treaties with clauses providing for provisional application were found in all regions and legal systems of the world. Using Africa as an example, 48 of the treaties concluded under the auspices of the Economic Community of West African States during the period 1975-2010 provided for provisional application.

The fifth report continued the analysis of views expressed by Member States, whether in the Sixth Committee or transmitted in writing to the Commission, and offered additional information on the practice of international organizations, adding three more organizations to the study: the International Organization of la Francophonie; the International Labour Organization and the European Free Trade Association.

One recent example that confirmed the growing use of provisional application by international organizations was the agreement signed between the United Nations and the Government of Haiti in October 2017, providing for the establishment of the United Nations Mission for Justice Support in Haiti (MINUJUSTH). Article 60 of the agreement contained a clause for the provisional application of the agreement from the time of its signature until the completion of the internal procedures in Haiti for its entry into force.

Two new draft guidelines were being submitted in the fifth report: draft guideline 8 *bis*, on termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach; and

draft guideline 5 *bis*, on formulation of reservations. A new chapter had also been included, comprising eight draft model clauses concerning the time frame for the provisional application of a treaty and the scope of provisional application.

In their comments during the most recent debates in the Sixth Committee, States had placed emphasis on the need to clarify three aspects: first, the reference to a possible “declaration by a State or an international organization that is accepted by the other States or international organizations” in draft guideline 4; — in other words, a unilateral declaration that required the express acceptance of the States or international organizations in question, something that could be clarified in the commentary; second, the question of the extent of the binding effect of provisional application, in connection with the wording of draft guideline 6 - in other words, whether the expression “as if it was in effect” did not go too far; and third, the modalities for the termination and suspension of provisional application, in relation to draft guideline 8, bearing in mind the need to maintain a degree of flexibility in that matter. He was well aware of the importance and legal sensitivity of all those issues and did not wish in any way to avoid examining them thoroughly. The fact that the Commission was currently considering only two new draft guidelines along with the eight model clauses did not in any way mean that the Commission would not be considering the outstanding issues once it had completed the first reading of the draft guidelines. In fact, the two new draft guidelines bore a direct relationship to the concerns outlined by States.

He saw no need to propose a draft guideline on amendments, both because there had as yet been little practice in that regard and the existing practice related primarily to cases when an organ of an international organization resorted to provisional application as a means of accelerating the implementation of amendments to a treaty; and because an amendment to a treaty concerned the scope of a treaty that had entered into force. To include a draft guideline on amendments would create the impression that, in the final analysis, provisional application had the same effects as the entry into force of a treaty.

Both of the new draft guidelines being proposed were intended to supplement the existing draft guidelines and the related commentaries; as always, the starting point was the 1969 Vienna Convention.

In connection with draft guideline 8 *bis*, he referred to paragraphs 69 to 87 of his fourth report (A/CN.4/699), in which he had discussed the relationship between provisional application and article

60 of the Vienna Convention. One of the aspects of article 60 that had been elucidated in that report in response to the interest expressed by States in the Sixth Committee was negative reciprocity, whereby a material breach had to have occurred and there had to have been an obligation in force between the parties that were applying the treaty provisionally. When he had undertaken that analysis, the question of the legal effects and termination of provisional application had not yet been discussed. He had therefore preferred at that time not to propose a provision on suspension or termination of provisional application as a consequence of a breach.

Subsequently, however, a number of delegations had shown interest in the matter in the light of draft guideline 8, entitled "Termination upon notification of intention not to become a party." Delegations had generally agreed with the content of the draft guideline; they had found that given the broad formulation of article 25 (2) of the Vienna Convention, there was room for contemplating the forms of termination and suspension contained in article 60; and had called for a certain margin of flexibility in approaching the matter. That was why he had decided, *ad cautelam*, to propose draft guideline 8 *bis* for the Commission's consideration.

The question of reservations had also been previously considered, in paragraphs 22 to 39 of his fourth report. Unless the Commission was to be unduly prescriptive, since sufficient practice to justify the introduction of a guideline had not been identified, and since neither States nor the Commission itself had expressed strong views on the matter, it seemed to him that the flexibility inherent in provisional application obviated the need for a State to formulate a reservation before a treaty entered into force. If it had any difficulties with a given provision, it could simply not include it in the provisional application of the treaty, a point already made in paragraph 34 of his fourth report.

He was grateful to a former member of the Commission, Mr. Forteau, for proposing materials from the University of Paris-X Nanterre as examples of reservations to provisionally applied treaties. After scrutinizing the examples, however, he had concluded that they did not constitute reservations within the meaning of article 2 (1) (d) of the Vienna Convention, but that they were either interpretative declarations or limitations deriving from the internal law of States or rules of international organizations. In the best of cases, a provision on reservations could only be proposed as a "without prejudice" clause, which for methodological reasons the Commission should generally avoid, although such clauses did serve the purpose of ensuring that nothing was left out.

In conformity with the conclusions in his fourth report, he was proposing eight model clauses, an idea widely supported by States. The model clauses contained elements that reflected the most clearly established practice of States and international organizations, while avoiding other elements that were not reflected in practice or were unclear or legally imprecise. While none of the proposed wordings of the model clauses was taken verbatim from any existing treaty, the purpose was to fill gaps that had been found in studying the topic.

He hoped that the Commission would refer the two new draft guidelines and the eight model clauses to the Drafting Committee. If that was done, he was of the view that the full set of draft guidelines, together with their commentaries, could be adopted on first reading during the current session. The final form of the Commission's output could be entitled "Guide to provisional application of treaties", although that remained a subject for discussion.

**Mr. Murase** thanked the Special Rapporteur for his report and welcomed the fact that the Commission was proceeding successfully towards completing the consideration of the draft guidelines on first reading.

The proposed draft guideline 8 *bis* referred to a situation when a material breach of a treaty being provisionally applied entitled the States or international organizations concerned to invoke the breach as a ground for terminating or suspending such provisional application, in accordance with article 60 of the 1969 and 1986 Vienna Conventions. Yet the Commission had already provisionally adopted draft guideline 8, under which a State could terminate the provisional application of a treaty by simply notifying other States or international organizations of its intention not to become a party to the treaty. He wondered if there were in fact any occasions when States particularly needed to invoke material breach in order to terminate the provisional application of a treaty.

There might be cases, as a matter of theoretical possibility, when a State felt bound to terminate a provisional application due to a material breach by another State, instead of simply notifying other States of its intention to terminate. That would be no problem, as long as draft guideline 8 *bis* was applied in a situation when the treaty had not yet entered into force and all the States were applying it provisionally, on an equal footing. The Special Rapporteur's drafting seemed to reflect a situation when the treaty in question had not yet come into effect and all the States had the same status of non-parties applying the treaty provisionally. However, the situation was different when the treaty had

already entered into force, with some States being parties to the treaty, while others were not yet parties and were merely applying the treaty provisionally.

That had been the situation, at the time of the decision of the Permanent Court of Arbitration in *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, with respect to the Energy Charter Treaty, when many States had already become parties to the Treaty, whereas States such as the Russian Federation had only been in a position to apply it provisionally. He wondered whether the proper balance was secured under draft guideline 8 *bis* between States parties to a multilateral treaty and States that applied the treaty only provisionally. In the *Yukos* case, the Russian Federation could simply terminate its provisional application by notifying other States in accordance with article 25 (2) of the Vienna Convention, whereas the States that were already parties to the treaty could terminate the treaty only by invoking material breach under article 60 of the Vienna Convention. He had doubts as to whether the Commission should assign such a privileged status to States that were merely applying a treaty provisionally without becoming parties thereto. If the new draft guideline was to be retained, there should be a clause safeguarding the rights of the parties to the treaty.

Regarding draft guideline 5 *bis*, he believed that the subject of reservations was very important in the context of provisional application of treaties. Referring again to the *Yukos* case, he said that the Russian Federation had apparently been unaware of the existence of a clause pertaining to provisional application when it had signed the Energy Charter Treaty. At the time of signature, the Russian Federation had not made a declaration of non-application in accordance with article 45 (2) of that Treaty. If it had made such a declaration or issued a reservation, it could have avoided extensive litigation at the Permanent Court of Arbitration and elsewhere. He therefore proposed that more explicit reference should be made to a declaration of non-application or a reservation, replacing the “without prejudice” clause proposed by the Special Rapporteur in draft guideline 5 *bis*.

With regard to the model clauses put forward by the Special Rapporteur, he wished to know how they related to the draft guidelines and what was their purpose and utility, since they did not seem to perform any function comparable to that of draft guidelines 8 *bis* and 5 *bis*.

As to the final form of the project, he hoped that the Special Rapporteur would not downgrade his draft guidelines to draft conclusions for the sake of consistency with the topic of subsequent agreements and

subsequent practice in relation to the interpretation of treaties: rather, the texts on the latter topic should be upgraded. Lastly, he said that he was in favour of sending the two new draft guidelines to the Drafting Committee.

**Ms. Ahlborn** (Secretariat), introducing the memorandum by the Secretariat on the topic of provisional application of treaties (A/CN.4/707), said that at its sixty-eighth session, the Commission had requested from the Secretariat a memorandum analysing State practice in respect of provisionally applied bilateral and multilateral treaties deposited or registered in the last 20 years with the Secretary-General, including treaty actions. In line with that request, the analysis in the memorandum covered only treaties available in the United Nations Treaty Collection; she thanked the Treaty Section of the Office of Legal Affairs for its valuable assistance.

Describing the methodology employed in drawing up the memorandum, she said that a number of search terms, such as “provisional application”, “provisional entry into force”, “interim application” or “temporary application”, had been used to identify the treaties that were relevant. The terminology used to describe the provisional application of a treaty varied greatly, in particular in bilateral treaties. In some special cases, including commodity agreements, a terminological distinction was drawn between provisional application by individual States or international organizations and the provisional entry into force of the agreement as a whole. Nevertheless, an effort had been made to differentiate the provisional application of a treaty from other concepts such as “provisional treaties” and “temporary treaties”.

The analysis was based on over 400 bilateral treaties and 40 multilateral treaties. Both bilateral and multilateral treaties subject to provisional application were generally registered only after their entry into force. Therefore, the number of treaties provisionally applied in the past 20 years was, in reality, higher than what was available in the United Nations Treaty Collection. The memorandum took account of the special characteristics of certain treaties, such as multilateral treaties with “limited membership;” “mixed agreements” concluded between the European Union and its member States and third parties; and treaties establishing institutional arrangements. The category of provisionally applied treaties which established institutional arrangements included commodity agreements. In that context, the Secretariat had considered it important to distinguish the resulting provisionally operational institutional arrangements from preparatory commissions for the establishment of

an international organization. The Secretariat had not approached its task with a preconceived structure in mind, but had developed the structure only after reading the pertinent provisions in the 440 treaties covered. Bilateral and multilateral treaties were discussed separately, in view of the differences observed between them.

Regarding section II, entitled “Legal basis for provisional application”, she said that both of the legal bases contained in common article 25 of the two Vienna Conventions were reflected in the practice analysed in the memorandum. However, the majority of bilateral treaties were applied on the basis of a clause included in the treaty being provisionally applied, whereas provisional application by separate agreement was more prevalent in multilateral treaties. Separate agreements on the provisional application of multilateral treaties were either concluded at the time of adoption of the original treaty or at a later point in time. Such separate agreements often explicitly stated the reasons for provisional application.

As a special case, the memorandum discussed the legal basis for the provisional application of amendments to the constituent instruments of an international organization. For example, the Statutes of the World Tourism Organization (UNWTO) did not allow for the provisional application of amendments, but its General Assembly had repeatedly adopted resolutions allowing for such provisional application. In contrast, the Rome Statute of the International Criminal Court explicitly provided for the provisional application of amendments to the Rules of Procedure and Evidence of the Court.

Another question that arose with regard to multilateral treaties, but which it had been impossible to answer based on the available practice, was whether States or international organizations other than the “negotiating States” or “negotiating organizations”, as provided for in article 25 (1) (b), of the 1986 Vienna Convention, could enter into an agreement on provisional application. The question was particularly pertinent when a treaty that had been applied provisionally was extended, as was the case with commodity agreements, and then, the decision to extend provisional application also applied to States or organizations that had acceded to the treaty.

Turning to section III of the memorandum, on commencement of provisional application, she noted that such commencement might depend on certain procedures stipulated in the treaty or, less frequently, on the occurrence of an external event such as the adoption of a law or the entry into force of another treaty. Treaties

might also combine procedural conditions with the requirement of an external event.

The memorandum identified a number of conditions for the commencement of provisional application: commencement upon signature of the treaty or separate agreement on provisional application; commencement on a certain date; or commencement upon notification. The adoption of a decision by an international organization was a fourth option for the commencement of provisional application that was specific to multilateral treaties.

As for commencement upon notification, multilateral treaties could specify the time of the declaration of provisional application in at least two ways: notification at the time of signature or at any other time, or notification at the time of ratification, approval, acceptance or accession. In the latter case, provisional application was precluded after the entry into force of the treaty, an example being the Convention on Cluster Munitions.

Treaties, in particular multilateral treaties, could include several conditions for the commencement of provisional application, to be applied in combination or in the alternative, as was illustrated by article 7 of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea.

Regarding section IV of the memorandum, on the scope of provisional application, she said that a significant number of both bilateral and multilateral treaties or separate agreements on provisional application limited the scope of provisional application in two ways: by stipulating the provisional application of part of the agreement; or with reference to the internal law or rules of the organization.

The study showed that few treaties provided expressly for the provisional application of part of a treaty, and that it was more common in multilateral treaties than in bilateral treaties. Clauses on provisional application of part of a treaty might either identify the provisions in the treaty that were not provisionally applied or specify which provisions were to be provisionally applied. Some treaties, such as commodity agreements, allowed for the provisional entry into force of part of the treaty by a decision of States and/or international organizations that had declared their consent to be bound by the treaty or their provisional application of the treaty.

As for the second way of limiting the scope of provisional application, references to internal law, she said that such limitations were less specific than clauses on provisional application of part of a treaty, which



typically singled out particular provisions. In the treaties covered by the study, reference was more often made to internal law generally, rather than to constitutional law specifically.

In section V, on termination of provisional application, the memorandum showed that a very limited number of treaties referred to termination of provisional application. Of the bilateral treaties and multilateral treaties that contained references to termination, few explicitly allowed for termination by notification of the intention not to become a party to the treaty, as provided for in common article 25 (2) of the 1969 and 1986 Vienna Conventions. Those treaties instead referred to termination or discontinuation of provisional application as such. For multilateral treaties, provisional application could also be terminated by withdrawal from the treaty by a State or international organization for which the treaty was not yet in force.

The memorandum confirmed that the entry into force of an agreement was the most common way to terminate provisional application by other agreement of the parties. Accordingly, the termination of provisional application frequently depended on the different conditions for entry into force of the treaty. However, provisional application could also be terminated by other forms of agreements between the parties unrelated to entry into force, such as the entry into force of a treaty other than the provisionally applied treaty; a set end date for provisional application; the conclusion by the parties to the provisionally applied treaty of a new treaty that superseded the previous treaty; a decision by the parties to terminate the provisionally applied treaty; and agreement by the parties to a multilateral institutional arrangement to expel a particular State or international organization while the constituent instrument was being provisionally applied.

In conclusion, she said that the Secretariat's memorandum showed that provisional application of treaties was a very flexible instrument in terms of the terminology used, the types of agreements involved and the conditions of application.

**Mr. Rajput** said he was grateful to the Secretariat for the helpful memorandum on the topic but sought clarification on the methodology. He wished to know whether the material presented in the memorandum had been drawn from searches for those terms “provisional application”, “provisional entry into force” and “temporary application” collectively or based on separate searches.

**Ms. Ahlborn** (Secretariat) said that the term “provisional application” referred to the provisional application of a treaty that would eventually come into

force as such. A related concept was “temporary” treaties, which were those that were only in force or applied temporarily and would eventually be replaced by another treaty. Very often, preparatory commissions for the establishment of an international organization were based on temporary treaties. Such had been the case with the Preparatory Commission for the Establishment of the International Criminal Court. The problem was that very often, States that were parties to treaties that were supposed to be applied provisionally described them using terms other than “provisional application”, such as “temporary application” and “interim application”. In paragraph 28 of the memorandum, reference was made to an exchange of notes constituting an agreement between Belgium and the Netherlands extending another agreement “which prior to its entry into force is being implemented on a temporary basis and shall be extended indefinitely as from 1 March 1996.” There, the term “temporary basis” referred to provisional application, not to a temporary treaty. The Secretariat had looked very carefully at the different provisions and had tried to identify those that referred to the provisional application of a given treaty as opposed to a temporary treaty that would be replaced by another treaty at a later point in time.

**Peremptory norms of general international law (*jus cogens*)** (agenda item 9) ([A/CN.4/714](#) and [A/CN.4/714/Corr.1](#))

*Interim report of the Drafting Committee*

**Mr. Jalloh** (Chair of the Drafting Committee), introducing the interim report of the Drafting Committee on the topic “Peremptory norms of general international law (*jus cogens*)”, said that in line with the Special Rapporteur's recommendation made in 2016, the draft conclusions would remain in the Drafting Committee until the full set had been adopted. The Commission would then have before it a full set of draft conclusions before taking action. He recalled that the Commission had adopted draft conclusions 1 and 3 at its sixty-eighth session, and draft conclusions 2 and 4 to 7 at its sixty-ninth session.

At the current session, the Drafting Committee had held three meetings, on 2, 4 and 8 May 2018. It had taken up work remaining from the previous session, namely the Special Rapporteur's proposal for draft conclusion 9, and had decided to split the text into two parts, which it had provisionally adopted as draft conclusions 8 [9 (1), (2)] and 9 [9 (3), (4)]. In drafting both of those texts, the Committee had taken into account the formulation of the draft conclusions on identification of customary international law.

Draft conclusion 8 [9 (1), (2)] (Evidence of acceptance and recognition) was based on paragraphs 1 and 2 of the original proposal for draft conclusion 9. It concerned the different forms of evidence of acceptance and recognition that a norm of general international law was a peremptory norm (*jus cogens*). The text of paragraph 1 essentially followed the wording of draft conclusion 10, paragraph 1, of the draft conclusions on identification of customary international law. It thus used the simplified phrase “may take a wide range of forms” instead of the Special Rapporteur’s proposal “can be reflected in a variety of materials and can take various forms”. The term “peremptory norm” had been added before “*jus cogens*” to reflect the full title of the topic, as in other draft conclusions.

To take into account the relationship between draft conclusion 9, as initially envisaged by the Special Rapporteur, and the preceding draft conclusions, several proposals had been made. One had been to include the relevant text of draft conclusions 4, 6 and 7 into draft conclusion 8, paragraph 1. Alternatively, it had been suggested to incorporate the whole text of the new draft conclusions 8 and 9 into draft conclusion 6, as a new paragraph 3. Finally, it had been proposed to include explicit cross references to the relevant draft conclusions in paragraph 1 of draft conclusion 8. A majority had been of the view that draft conclusions 4, 6 and 7 worked as a sequence leading up to draft conclusion 8. Accordingly, the reference to previous draft conclusions was understood to be implicit in draft conclusion 8.

Paragraph 2 of draft conclusion 8 provided a non-exhaustive list of the possible forms of evidence of acceptance and recognition by States that a norm of general international law was a peremptory norm (*jus cogens*). The Drafting Committee had focused on the relationship between that paragraph and the following paragraphs in the Special Rapporteur’s proposal for draft conclusion 9. To ensure coherence, it had decided to follow the wording of draft conclusion 10, paragraph 2, of the draft conclusions on identification of customary international law and to add the word “such” in front of “forms of evidence” at the beginning of the paragraph. Moreover, the order of the forms of evidence of acceptance and recognition initially proposed by the Special Rapporteur had been changed to conform to the list in draft conclusion 10, paragraph 2. Any deviations from draft conclusion 10, paragraph 2, would be explained in the commentary. The reference to “resolutions” was intended to include “conduct in connection with resolutions”, which was the wording used in draft conclusion 10, paragraph 2. Some members of the Drafting Committee had noted that national

legislation and constitutions constituted important evidence for the recognition and acceptance of a norm as one having a peremptory character. Based on the formulation in draft conclusion 6, paragraph 2, of the draft conclusions on identification of customary international law, the Drafting Committee had decided to include “legislative and administrative acts” in the list of forms of evidence in draft conclusion 8, paragraph 2.

Draft conclusion 8, paragraph 2, when read in the light of draft conclusion 7, concerned evidence of acceptance and recognition by States, including when acting through national courts as their organs. The question had arisen whether “decisions of international courts and tribunals” should also be included in the text. After some discussion, the Drafting Committee had decided to incorporate paragraphs 3 and 4 of the Special Rapporteur’s original proposal into a new draft conclusion, to reflect the distinct roles that the decisions of national courts, on the one hand, and those of international courts and tribunals, on the other hand, played in serving as evidence of acceptance and recognition that a norm of general international law was a peremptory norm (*jus cogens*). In contrast to the decisions of national courts and tribunals, the decisions of international courts and tribunals served as subsidiary means for the determination of rules of international law on the basis of assessments of the evidence. The approach of treating the decisions of national courts and tribunals, as forms of evidence, separately from those of international courts and tribunals, as subsidiary means, was also consistent with the draft conclusions on identification of customary international law.

The title of draft conclusion 8 [9 (1), (2)] remained “Evidence of acceptance and recognition,” as originally proposed by the Special Rapporteur.

Draft conclusion 9 [9 (3), (4)] (Subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*)) dealt with subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). The Drafting Committee had proceeded on the basis of a revised proposal by the Special Rapporteur, based on his original proposal for paragraphs 3 and 4 of draft conclusion 9 and taking into account suggestions made in the Drafting Committee.

The revised proposal followed the text of draft conclusion 13, paragraph 1, of the draft conclusions on identification of customary international law. The Drafting Committee did not accept a proposal to include the qualifier “judicial” in front of “decisions”, because decisions other than “judicial decisions” might be relevant for determining the peremptory character of



norms of general international law (*jus cogens*). A proposal was made to replace the term “determining” with “identifying”. However, the Drafting Committee had decided to keep the term “determining”, as it was consistent with the formulation used in Article 38 (1) (d) of the Statute of the International Court of Justice as well as with draft conclusion 13, paragraph 1, of the draft conclusions on identification of customary international law.

Draft conclusion 9, paragraph 2 dealt with the works of expert bodies and the teachings of the most highly qualified publicists as subsidiary means for determining the peremptory character of a norm of general international law (*jus cogens*). It had been suggested that the work of the International Law Commission should be explicitly mentioned in the text of the draft conclusion because of the significant contribution made by the Commission to the emergence and development of peremptory norms of general international law (*jus cogens*) and in light of its mandate and its interaction with States in the process of codification and progressive development. However, the Drafting Committee had agreed to delete any explicit reference to the Commission’s work because that was not in line with its usual practice. It would be explained in the commentary that the Commission, as an expert body, played a significant role in the emergence and development of peremptory norms of general international law (*jus cogens*).

The term “works” was intended to cover the process as well as the conclusive outcome of the consideration by expert bodies of peremptory norms of general international law (*jus cogens*). Alternative terms discussed were “pronouncements”, “determinations”, “views” and “assessments” by expert bodies. The Drafting Committee had also discussed whether the works of expert bodies should be placed in a separate paragraph from the teachings of the most highly qualified publicists of various nations, as the latter were explicitly mentioned in Article 38 (1) (d) of the Statute of the International Court of Justice, and the former were not. Concerns had been voiced that doing so could be interpreted as establishing a hierarchy among subsidiary means for determining the peremptory character of norms of general international law (*jus cogens*).

The phrase “expert bodies established by States or international organizations” was based on a revised proposal by the Special Rapporteur and several modifications made during the discussion. The phrase was understood to include organs established by international organizations and subsidiary bodies such as the International Law Commission as well as treaty

bodies. The term “expert bodies,” without any further qualification, as initially proposed by the Special Rapporteur, had been considered too broad, because it could be understood as including private organizations without an intergovernmental mandate. The phrase “recognized expert bodies established by States” had also been considered. The Drafting Committee had taken the view that the phrase “expert bodies established by States” would have the effect of excluding expert bodies established by international organizations.

The title of draft conclusion 9 [9 (3), (4)] was “Subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*)”.

Before concluding his report, he wished to pay tribute to the Special Rapporteur, whose deep expertise and knowledge of the subject, guidance and cooperation had greatly facilitated the work of the Drafting Committee. He also thanked the members of the Drafting Committee for their valuable contributions to the work on the topic and the Secretariat for its valuable assistance.

It was anticipated that the Drafting Committee would revert to the topic during the second part of the current session to consider any draft conclusions referred to it on the basis of the third report of the Special Rapporteur. The Commission was not being requested to act yet on the draft conclusions, as the interim report had been presented for information purposes only.

**The Chair** said he took it that the Commission wished to take note of the interim report by the Chair of the Drafting Committee.

*It was so decided.*

*The meeting rose at 12.50 p.m.*